CHAPTER ONE

INTRODUCTION

1.0: Background to Study

The ferocious performances of kidnapping and terrorism have not diminished. It seems rather to be on the increase. Law abiding citizens live in fear of the security of their lives and legitimate possessions day and night[1]

The above statement succinctly summarizes the situation we find ourselves in Nigeria in relation to terrorism. By 2001, when the twin tower bombings rocked the United States, we watched on our screens aloof, thinking after all United States is very far from where we are. We did not take any precautionary measures. We relaxed on our oars. By 1998, when the United States Embassy was bombed in a terrorist attack in Kenya, we were still complacent, well Kenya is far from us, so we thought. Before then, we had witnessed incidents of what we now know as state sponsored terrorist activities between 1995 and 1998 but no remedy was made available for its victims.

As far back as 2004, snippets of terrorism and terror related acts had started manifesting in Nigeria. This started with the bombings of oil installations and kidnapping of expatriates. It later metarmorphosed into a general booming business empire, known and addressed as kidnapping for ransom. Yet as usual, instead of seeking a legal solution to end the root cause of the incident, we opted for a political solution to check the immediacy of the crime. This political solution was in the guise of amnesty and while it worked temporary, it also emboldened many more to engage in such illicit endeavours with the hope of being granted amnesty and paid or even given government contracts as some of those who benefitted in the earlier amnesty package was settled.[2] It was in the face of the increasing spate of

[1] Per Tsamiya JCA in *Ogbuawa v FRN*[2011] 12 NWLR (Pt 1260)100 p127-128 paras H-A.

[2] Presently, some persons are claiming to be agitated because they were left out in the original amnesty package of the Federal Government. They therefore have threatened to renew hostilities until their requests are met.

kidnapping that many states in the South South and South East geopolitical zones of the country went into their various Houses of Assembly and started churning out laws aimed at providing a full and ultimate check mate for the crimes of kidnapping and related offences.[3] While it appeared as if the solution was working, yet other groups rose in other parts of the country especially the Northern Part of the country, clamouring for the abolition of all things western. At the inception of this violence, we underrated them, thinking it will soon fizzle out. Indeed some politicians used them for their political gains. While they were simmering before eruption, a Nigerian AbdulMuttallab Umar was caught 'pants down' in an aircraft seeking to inflict maximum damage to the property and souls aboard the aircraft using improvised explosive device in faraway United State on a Christmas morning. That singular act labeled Nigeria a terrorist community. The United States listed Nigeria on its terror watch list. Yet what we did at that time was to make noise in the National Assembly demanding that we be removed from the list. Yet we did nothing to keep our house in order. While our politicians were busy getting corrupt, our country and the terrorist groups simmered and eventually erupted. They put their acts together and eventually Yobe and gradually Borno and some other Northern States became a battle field. Soon states in the North were no longer sufficient and they took their acts to Abuja and Kano. Indeed their battle also got to the Police, and the United Nations. Their first outing at Eagle Square on Independence Day of 2010 was so successful that it emboldened them and they took the battle to the Louis Edet House home to Nigeria Police Force.[4] This recorded substantial casualties. Still we did nothing. We were like the proverbial man who was busy pursuing rat when his house was on fire. To show us and indeed the whole world that they meant

[3]Rivers State Kidnap (Prohibition) Law No 3 of 2009.
[4]Two Killed in Abuja Police Headquarters' Bomb Blast, *This Day Newspaper* June 11,2011

business, they took the battle to the United Nations Building in Abuja recording even more casualties[5]. As if that was not enough, they went to Kano and annihilated over 180 people[6]. Yet in the face of all these, we were busy tinkering with the Terrorist Prevention Bill haphazardly because we thought the group will soon fizzle out. It needs to be said that it was only in 2011 that we finally passed the Terrorism Prevention Act which said Act has yet to be tested in the Courts. Before then, the present Inspector General of Police had cause to posit that they are waiting for the Lawmakers in order to charge suspects accused of being involved in the Madalla bombings of December, 25, 2011. The few people who were even arrested for such related offences were charged under old and outdated laws where they are even charged. We have apparently forgotten that terrorism is a modern day crime and therefore requires a modern day warfare approach or via the instrumentality of the law. It is imperative that we embarked on this study in order to expose the nature of the crime of terrorism and how it could be tackled. It is also sufficient that such Laws should be supported with the necessary political will taking into cognizance also the competing rights of individuals in a democratic setting, if we are genuinely committed to checking this ugly menace and protect the lives and citizens of the country and assuage the grief of victims of such terrorist activities. One needs to add further that the state must demonstrate to its citizens that it can protect them and offer them opportunity. When soldiers destroy towns, kill civilians and detain innocent people with impunity, mistrust takes root and this will further fuel the root of terrorism.[7] The essence of this work therefore is to explore the crime of Terrorism, find out why it is thriving in Nigeria, and why the measures in existence have not been able to eradicate it. Further the work compares the fight against terrorism in other climes using Law, why it is succeeding there and not in Nigeria.

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[5]Msheliza Ibrahim, 'Islamic Sect, Boko Haram Claims Nigerian UN Bombing', *Reuters*, Monday August, 29, 2011

[6] This took place on 20th January, 2012.

[7]Robert Jackson inKunle Falayi, *Punch Newspapers* of Saturday May 17 2014

1.0.1: **Statement of Problem**

Given the palpable fear pervading the entire nation as a result of terrorist activities, there is the need to find a more lasting solution to the incidents of terrorism. While some persons believe that terrorism is a political problem deserving of political solutions, others believe that it is an act of war deserving of war time solutions. It is not in doubt that for any person involved the urgent need to find a lasting solution is uppermost in the mind. While looking at the incidents of terrorism, it becomes clear that it may occur at any time and to anyone and will affect the enjoyment of rights of individuals. The death of most perpetrators of terrorist activities in instances of suicide bombing leaves no suspect behind most times and the issue of who to arrest becomes a problem in the event of a terrorist attack. The problem therefore becomes under which law will the suspect where he/she is arrested be charged? Is it under the Criminal Code or the Penal Code? Will the person be charged under the Terrorism Prevention Act or the Firearms and or Explosives Act? It is clear that we have legislation that could be deployed in the fight against terrorism but there is a need to streamline operations in that regard with reference to enforcement and application.

Several bottlenecks therefore can be found on the way to fighting terrorism in Nigeria using the instrumentality of law. These include the jurisprudential problems of bridging multi-jurisdictional boundaries, locating the exact law to apply, providing reliefs for victims of terrorist activities, respect for the rule of law and compliance with the fundamental rights of the suspects and even non suspects in some circumstance. In addition, the roles expected of the lawmakers, the executives, the judiciary and other players in our criminal justice system need to be clear cut especially when adopting policies and incorporation of international instruments. The methods of investigations adopted by our security agencies are also issues that affect the efficient and effective functioning of the Law in the fight against terrorism as brutality and abuse of human rights cannot make for a robust counter terrorism efforts. It is

precisely these problems that this work proposes to examine with a view to recommending the necessity to wage a legal war against terrorism using the instrumentality of Law.

1.0.2: **Objective of Study**

The objective of this work is to examine the Laws in Nigeria and find out their adequacy in the fight against terrorism. In doing this, there is a comparison of the role Law plays in other crimes and find out why it appears that the laws in Nigeria cannot stem the tide of terrorism in Nigeria. In line with this purpose therefore, the specific objectives of this work are:

1. To study the nature and typology of terrorism in Nigeria and how they are committed worldwide and particularly in Nigeria
2. To refresh the memory about the Nigeria Legal System and at the same time appraise the adequacy or otherwise of the Nigeria Criminal Justice Administration System.
3. To review certain relevant statutory legal framework in order to ascertain whether or not and to what extent they are amenable to the fight against terrorism in Nigeria.
4. To compare the measures taken in relation to Law in selected jurisdictions with a view to finding out why ours have not made the necessary impact
5. To discover what roles the law can play in the fight against terrorism and especially at pertains to those charged with the responsibility of eradicating terrorism.
6. To explore the impact the fight against terrorism usually has on the rights of the individuals and the best way to ensure that those negative effects are wiped out.

7. To make useful recommendations about the need for one comprehensive legal regime and harmonization initiatives that will check the rising tide of terrorism in Nigeria

1.0.3: **Scope of Study**

This study is limited to critical study of the role of law in combating or stemming the tide of terrorism in Nigeria especially as concerns those at the forefront of the fight with particular emphasis on full and adequate enforcement. Yet it follows by parity of reasoning that a failure on the part of the law to check terrorism aids its growth. It does not also seek to exhaustively discuss terrorism as terrorism is too wide a topic to be discussed in a work of this nature. In the exploration of the nature of terrorism, this work seeks to show the types of terrorism without particularizing the types of terrorism in existence in Nigeria. The study is therefore restricted to the issues of understanding terrorism, reviewing extant legislation, comparing the role of law in other climes and why the laws in Nigeria have not yet recorded such achievements. The research further seeks to establish roles for those involved in the fight against terrorism in accordance with the law. Despite the fact that this work is on criminal jurisprudence, mention may be made of civil justice system if the need arises.

1.0.4: **Significance of Study**

Terrorism is a new crime at least for Nigeria. The pertinent fact is that it is not only the act that makes it a crime but also the objective intended to be achieved. Before it started creeping to the front burner, there were laws in existence in Nigeria prohibiting one aspect or the other of what is now known as terrorism. The consequence is that some may view terrorism as something the law cannot eradicate or fight. It is therefore envisaged that this study will have both theoretical and practical relevance in the fight against terrorism in Nigeria. The study will also be significant as it educates the policy makers, legislators and the judiciary on the roles the law expects them to play in relation to an effective legal

framework. It will also highlight the need to have a single front of approach in terms of law in the fight against terrorism. The work will also highlight the inadequacies in the existing legislations and the methods of addressing them. This dissertation will if brought to the attention of the law enforcement agencies enlighten them on the need to respect the rule of law and rights of the individuals in the fight against terrorism. Finally, if the suggestions and recommendations are accepted and implemented, this work shall have played a significant role in stemming the tide of terrorism and improvement of security in Nigeria.

1.1: **Definition and Analysis of Basic Terms**

Some basic terms here demand a definition in the context which they are used in this work. It is therefore the intention of the researcher to attempt to define those terms that will go a long way in helping us achieve the desired objective of this research.

1.1.1: **Terrorism**

The difficulty often encountered in defining the term "terrorism" is as a result of absence of consensus of the yardstick to be used in determining when the use of violence (directed at whom, by whom, for what ends) is legitimate; therefore, the modern definition of terrorism is inherently controversial. The use of violence for the achievement of political ends is common to state and non-state groups. The majority of definitions in use has been written by agencies directly associated with government, and is systematically biased to exclude governments from the definition.

The UN General Assembly[8], contains a provision describing terrorism as"Criminal acts intended or calculated toprovoke 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". The UN Member States still have no

[8]Resolution 49/60 (adopted on December 9, 1994), titled "Measures to Eliminate International Terrorism

agreeddefinition of terrorism, and this fact has been a major obstacle to meaningful international countermeasures. It is believed that terminology consensus would be necessary for a single comprehensive definition of terrorism as what is obtainable now is a piecemeal definition of Terrorism depending on which side of terrorism the international instrument is countering.

The Arab Convention for the Suppression of Terrorism was adopted by the Council of Arab Ministers of the Interior and the Council of Arab Ministers of Justice in Cairo, Egypt in 1998. It definedTerrorism as "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, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize a national resources".[9] It also defined Terrorist offence as "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, except where 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;

[9] Article 2.

(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."[10]

This definition describes rather than define the acts of terrorism. This it did by adopting an already made description. It is clear that the issue of defining terrorism is hard as a result of the peculiarity of the offence of terrorism.

UN Security Council Resolution 1566 (2004) gives a definition of terrorism as criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoking a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act. This is also another description of what terrorism entails and not a definition. A UN panel, on March 17, 2005[11], described terrorism in line with theVienna Declaration and Programme of Action adopted ten years ago at the World Conference on Human Rights namely as

> the acts, methods and practices of terrorism in all its forms and manifestations.. .are activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity and security of States and destabilizing legitimately constituted Governments.

The European Union defines terrorism for legal and official purposes in Article 1 of the Framework Decision on Combating Terrorism (2002), defines Terrorism as certain criminal offencesagainst persons and property which given their nature or context, may seriously damage a country or an international organization where committed with the aim of:

[10] Article 3.

[11] *Press Bulletin* No 3 (3351) Geneva, 17 March 2005

seriously intimidating a population; or unduly compelling a Government or international organization to perform or abstain from performing any act; or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization. This definition looks at the consequence. It appears that it is only when the objectives are achieved that the offence of terrorism will be said to have occurred.

The United Kingdom's Terrorism Act 2000[12], defines terrorism to include an act "designed seriously to interfere with or seriously to disrupt an electronic system". An act of violence is not even necessary under this definition as disruption of electronic system is enough.

US Patriot Act of 2001 Title VIII alters the definitions of terrorism, and re-defined rules with which to deal with it. The term "domestic terrorism" was redefined to broadly include mass destruction as well as assassination or kidnapping as a terrorist activity. The definition also encompasses activities that are "dangerous to human life that are a violation of the criminal laws of the United States or of any State" and are intended to "intimidate or coerce a civilian population," "influence the policy of a government by intimidation or coercion," or are undertaken "to affect the conduct of a government by mass destruction, assassination, or kidnapping" while in the jurisdiction of the United States Terrorism is also included in the definition of racketeering. Terms relating to cyber-terrorism are also redefined, including the term "protected computer," "damage," "conviction," "person," and "loss."[13] This definition excludes the armed forces. It appears that when the act is aimed at intimidating or coercing the military population it might not amount to terrorism.

Terrorism is defined in the Code of Federal Regulations as "the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian

[12] S 1(2)(e)

[13] USA PATRIOT Act (U.S. H.R. 3162, Public Law 107-56), Title VIII, Sec. 802, USA PATRIOT Act (U.S. H.R. 3162, Public Law 107-56), Title VIII, Sec. 813. Amended 18 U.S.C. § 1961(1), USA PATRIOT Act (U.S. H.R. 3162, Public Law 107-56), Title VIII, Sec. 814. Amended 18 U.S.C. § 1030(e)

population, or any segment thereof, in furtherance of political or social objectives"[14]. This definition still has the same problem as the previous ones especially when we know that terrorists may attack military installations. The Federal Bureau of Investigation while adopting this definition also expanded it to include 'Domestic terrorism' which is the unlawful use, or threatened use, of force or violence by a group or individual based and operating entirely within the United States or Puerto Rico without foreign direction committed against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof in furtherance of political or social objectives and International terrorism which involves violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or any state, or that would be a criminal violation if committed within the jurisdiction of the United States or any state. These acts appear to be intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of a government by assassination or kidnapping. International terrorist acts occur outside the United States or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.[15]Terrorism is often motivated by religious, political, or other ideological beliefs and committed in the pursuit of goals that are usually political.

Terrorism is defined by the Black's Law dictionary also as ''the use of threat or violence to intimidate or cause panic, especially by means of affecting political conduct[16]. In some cases, terrorist activities can be used to affect other conducts other than political conducts and this definition is therefore deficient.

In addition, it is pertinent for us to know that certain acts may disqualify terrorism depending on whether its sponsorship is traced to a ''legitimacy'' and ''lawfulness''.

[14] 28 C.F.R. Section 0.85

[15] Terrorism 2002-2005 US Department of Justice, Federal Bureau of Investigation publications.

[16]B Garner, (ed),*Black's Law Dictionary*,(8th edn,St. Paul Minnesota: West Publishing, 2004) p.1512

Theseare subjective depending on the perspective of one government or the other; and it diverges from the historically accepted meaning and origin of the term[17] . According to Hoffman[18], terrorism is a pejorative term. It is a word with intrinsically negative connotations that is generally applied to one's enemies and opponents, or to these when one disagree and would otherwise prefer to ignore. There is often this statement, ''One man's terrorist is another man's freedom fighter''. This is completely misleading especially in view of the fact that one man's rights started where another's stopped. However the statement stemmed from the fact that most definitions of terrorism are government introduced and also subjective. This simply means that for a freedom fighter, it is almost impossible for him to be referred to as such in view of the fact that most terrorists claim to be one. It assesses the validity of the cause when terrorism is an act. One can have a perfect cause and yet, if one commits terrorist acts, it is terrorism regardless of whatever umbrella it is carried out.

Under Section I (2) of the Terrorism Prevention Act as amended[19], a person becomes liable for acts of terrorism if, "(2). A person or body corporate who knowingly in or outside Nigeria directly or indirectly willingly - (a) does, attempts or threatens any act of terrorism,(b) commits an act preparatory to or in furtherance ofan act of terrorism,(c) omits to do anything that is reasonably necessaryto prevent an act of terrorism,(d) assists or facilitates the activities of personsengaged in an act of terrorism or is an accessory toany offence under this Act,(e) participates as an accomplice in or contributes tothe commission of any act of terrorism or offencesunder this Act,(f) assists, facilitates, organizes or directs theactivities of persons or organizations engaged inany act of terrorism,(g) is an accessory to any act of terrorism, or(h) incites, promises or induces any other person byany means whatsoever to commit any act ofterrorism or any of the offences referred to in

[17] T Nehisi Coastes, "Terrorism debates",*http://www.theatlanic.com/../36518/*accessed on 17/06/11
[18] B Hoffman,*Meaning of terrorism*, (New York: Columbia University Press, 1999)pp. 105-120
[19] Prevention of Terrorism Act, 2012 as Amended

thisAct,commits an offence under this Act and is liable on conviction to maximum of death sentence”

Subsection 3 of the same Act as amended states this; in this section, ‘’act of terrorism’’ means an act which is deliberately done with malice afore thought and which;

a. may seriously harm or damage a country or an international organization.

b. is intended or can reasonably be regarded as having been intended to-

(i) Unduly compel a government or international organization to perform or abstain from performing any act;

(ii) Seriously intimidate a population,

(iii) Seriously destabilized or destroy the fundamental political, constitutional, economic or social structures of a country or an international organization.

(iv) Otherwise influence such government or international organization by intimidation or coercion; and

(c) Involved or cause as the case may be

(i) An attack upon a person’s life which may cause serious bodily harm or death

(ii) Kidnapping of a person;

(iii) Destruction to a government or public facility, transport system, an infrastructural facility – including an information system, a fixed platform located on the continental shelf, public place or private property likely to endanger human life or result in major economic loss.

(v) The seizure of an aircraft, ship or other means of public or goods transport and diversion or the use of such means of transportation for any of the purposes in paragraph (b)(iv) of this sub section;

(vi) The manufacture, provision, acquisition, transportation, supply or use of weapons, explosive or nuclear, biological or chemical weapons, as well as research into, and development of biological and chemical weapons without lawful authority.

(vii) The release of dangerous substance or causing of fire, explosion or floods, the effect of which is endanger human life.

(viii) Interference with or disruption of the supply of water, power or any other fundamental natural resources, the effect of which is to endanger human life;

(ix) An act or omission in or outside Nigeria which constitutes an offence within the scope of counter terrorism protocol and Conventions duly ratified by Nigeria.

This definition adopted the often used definition of describing terrorism instead of definint it. We shall yet attempt an indepth definition of Terrorism in our Chapter Three anon and canvass our argument on terrorism.

1.1.2: **Al Qaeda**

Al-Qaeda is a global broad-based militant Islamist terrorist[20]organization founded by Osama bin Laden sometime between August 1988[21] and late 1989[22].It operates as a network comprising both a multinational, stateless army and a radical Sunni Muslim movement calling for global Jihad. It has been designated a "terrorist organization" by the United States, the United Nations Security Council, the European Union, NATO, and various other countries. Al-Qaeda has attacked civilian and military targets in various countries, such as the September 11 attacks, 1998 US embassy bombings and 2002 Bali bombings. The US government responded by launching the War on Terror. The characteristic techniques often employed by this group include suicide attacks and simultaneous bombings of different

[20]P Wilkinson,*Terrorism Versus Democracy: The Liberal State Response*,(New York: Routledge,2006)p. 136.

[21]P Bergen, *The Osama bin Laden I Know: An Oral History of al Qaeda's Leader* (2nd edn, New York: Free Press, 2006)p36

[22]*United States v. Usama bin Laden et al*., S (7) 98 Cr. 1023 (http:/ / cryptome. org/ usa-v-ubl-02. htm), Testimony of Jamal Ahmed Mohamed al-Fadl (S.D.N.Y. February 6, 2001) accessed on 27/11/12

targets[23]. It is a known fact that Al-Qaeda opposes man-made laws, and wants to replace it with a hardline form of sharia law[24].Al-Qaeda's management philosophy has been said to be more of centralization of decision and decentralization of execution. However there appears of recent to be decentralization of decision and as well a decentralization of execution yet with a clear strategic approach. For according to Hoffman people don't think there is a clear adversary out there, and that our adversary does not have a strategic approach.[25]

Al-Qaeda's network was built from scratch as a conspiratorial network that draws on leaders of all its regional nodes"as and when necessary to serve as an integral part of its high command.[26]"

The name comes from the Arabic noun "qā'idah", which means foundation or basis, and can also refer to a military base. The initial al- is the Arabic definite article the, hence the base.[27] Bin Laden explained the origin of the term in a videotaped interview with Al Jazeera journalist Tayseer Alouni in October 2001: "The name 'al-Qaeda' was established a long time ago by mere chance. The late Abu Ebeida El-Banashiri established the training camps for our mujahedeen against Russia's terrorism. We used to call the training camp al-Qaeda. The name stayed.[28]

The radical Islamist movement in general and al-Qaeda in particular developed during the Islamic revival and Islamist movement of the last three decades of the 20th century, along with less extreme movements.

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[23]L Wright,*The Looming Tower: Al-Qaeda and the Road to 9/11*, (New York: Knopf, 2006)p46

[24]*Ibid.* The Nigerian Terrorist Group Boko Haram has also adopted this principle.

[25]B Hoffman, 'The Emergence of the New Terrorism' in T Andrew and R Kumar,(eds)*The New Terrorism: Anatomy, Trends, and Counter-Strategies*, (Singapore: Eastern Universities Press, 2002) p. 30–49.

[26]R Gunaratna, *Inside Al Qaeda: Global Network of Terror*(New York: Columbia University Press, 2002)p52

[27]E Kay, *Arabic Computer Dictionary: English-Arabic, Arabic-English*, (Online Edition, Multi-lingual International Publishers,1986)

[28]'Transcript of Bin Laden's October interview' (http:/ / archives. cnn. com/ 2002). CNN. February 5, 2002 accessed on October 22, 2010.

Some have argued that "without the writings" of Islamic author and thinker Sayyid Qutb, "al-Qaeda would not have existed[29]. Qutb preached that because of the lack of sharia law, the Muslim world was no longer Muslim, having reverted to pre-Islamic ignorance known as *jahiliyyah*.To restore Islam, Qutb suggested that a vanguard movement of righteous Muslims was needed to establish "true Islamic states", implement sharia, and rid the Muslim world of any non-Muslim influences, such as concepts like socialism and nationalism[30].One of the most powerful of Qutb's ideas was that many who said they were Muslims were not but were rather apostates. This created a legal loophole around the prohibition of killing another Muslim for Jihadist and as well made it a religious obligation to execute these self-professed Muslims. These alleged apostates included leaders of Muslim countries, since they failed to enforce sharia law[31].

Toward the end of the Soviet military mission in Afghanistan, some *mujahideen* wanted to expand their operations to include Islamist struggles in other parts of the world, such as Israel and Kashmir. A number of overlapping and interrelated organizations were formed, to further those aspirations.One of these was the organization that would eventually be called al-Qaeda, formed by bin Laden with an initial meeting held on August 11, 1988[32].According to Wright, the group's real name wasn't used in public pronouncements because "its existence was still a closely held secret.[33]" His research suggests that al-Qaeda was formed at an August 11, 1988, meeting between "several senior leaders" of Egyptian Islamic Jihad, Abdullah Azzam, and bin Laden, where it was agreed to join bin Laden's money with the expertise of the Islamic Jihad organization and take up the jihadist cause elsewhere after the

[29]S Qutb, *Milestones*.(Chicago, Kazi Publications, 2003)p 38
[30]*ibid*
[31]D C Eikmeier, 'Qutbism: An Ideology of Islamic-Fascism' (2007) 37(1) *Parameters* Spring, 85-98

[32] 'The War on Terror and the Politics of Violence in Pakistan' (http:/ / web. archive. org/ web/ http:/ / www. jamestown.org/ news). The Jamestown Foundation. July 2, 2004 accessed on 27/11/12
[33]*Op cit*, p. 260.

Soviets withdrew from Afghanistan[34]. A key turning point for bin Laden, further pitting him against the Saudis, occurred in 1993 when Saudi Arabia gave support for the Oslo Accords, which set a path for peace between Israel and Palestinians[35]. Following the Soviet withdrawal, Afghanistan was effectively ungoverned for seven years and plagued by constant infighting between former allies and various *mujahideen* groups.

Flowing from the above and under the banner of the World Islamic Front for Combat Against the Jews and Crusaders, they declared:

> [T]he ruling to kill the Americans and their allies—civilians and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque [in Jerusalem] and the holy mosque [in Mecca] from their grip, and in order for their armies to move out of all the lands of Islam, defeated and unable to threaten any Muslim. This is in accordance with the words of Almighty Allah, 'and fight the pagans all together as they fight you all together,' and 'fight them until there is no more tumult or oppression, and there prevail justice and faith in Allah[36].

Unfortunately, neither Bin Laden nor al-Zawahiri possessed the traditional Islamic scholarly qualifications to issue a fatwa but they rejected the authority of the contemporary *ulama*and took it upon themselves[37].

Al-Qaeda has been designated a terrorist organization by several countries and international organizations[38]. Nigeria by necessary implications and as part of the comity of nations

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[34]L Wright, 'The Rebellion Within'*The New Yorker* June, 2006 p 36-53 <http:// www. newyorker. Com, accessed January 27, 2012.

[35]B Riedel, *The Search for al Qaeda: Its Leadership, Ideology, and Future*, (Washington DC: Brookings Institution's Press, 2008) p.52.

[36] 'Text of Fatwah Urging Jihad against Americans'online publication from http:/ / www. ict. org. il/ articles/fatwah. htm)accessed May 15, 2010

[37]D Benjamin and S Simon,*The Age of Sacred Terror* (1st edn, New York: Random House,2002)p61.

[38] United States Department of State, 'Foreign Terrorist Organizations (FTOs)' (http:/ / web. archive. org/ web/ /www. state. gov/ s/ ct/ rls/ fs/ 37191. htm accessed on July 3, 2011.

currently facing the scourge of terrorism is deemed to have adopted the list as part of proscribed organisations in Nigeria in accordance with Section 2 of the Terrorism Prevention Act 2011 as amended.

Al-Qaeda's involvement in Africa has included a number of bombing attacks in North Africa, as well as supporting parties in civil wars in Eritrea and Somalia. From 1991 to 1996, Bin Laden and other al-Qaeda leaders were based in Sudan. Islamist rebels in the Sahara calling themselves al-Qaeda in the Islamic Maghreb have stepped up their violence in recent years[39]. French officials say the rebels have no real links to the al-Qaeda leadership, but this is a matter of some dispute in the international press and amongst security analysts. It seems likely that Bin Laden approved the group's name in late 2006, and the rebels "took on the al Qaeda franchise label", almost a year before the violence began to escalate[40].

According to the United Nations High Commissioner for Refugees al-Qaeda was thought to have established bases in Pakistan-administered Kashmir (in Azad Kashmir, and to some extent in Gilgit-Baltistan) during the 1999 Kargil War and continued to operate there with tacit approval of Pakistan's Intelligence services[41].In 2007, around the sixth anniversary of the September 11 attacks and a couple of months before Rationalizing Jihadfirst appeared in the newspapers,[42] the Saudi sheikh Salman al-Ouda delivered a personal rebuke to bin Laden.Al-Ouda, a religious scholar and one of the fathers of the Sahwa, the fundamentalist awakening movement that swept through Saudi Arabia in the 1980s, is a widely respected critic of jihadism. Al-Ouda addressed al-Qaeda's leader on television asking him my brother Osama, how much blood has been spilt? How many innocent people, children, elderly, and women have been killed ... in the name of al-Qaeda? Will you be happy to meet God

[39]Y Trofimov, 'Islamic rebels gain in the Sahara' (2009) 33 *The Wall Street Journal Asia* (245):, p. 12.
[40] O*p cit*,p. 126
[41] United Nations High Commissioner for Refugees, 'Freedom in the World 2008 – Kashmir Pakistan, 2 July 2008"available www. unhcr. org/ accessed on May 8, 2011.
[42]L Wright, "The Rebellion Within" *The New Yorker* online publication at www. newyorker. com June, 2008,p. 36–53 accessed January 27, 2012.

Almighty carrying the burden of these hundreds of thousands or millions [of victims] on your back?[43]

On May 1, 2011 in Washington, D.C. (May 2, Pakistan Standard Time), U.S. President Barack Obama announced that Osama bin Laden was killed by "a small team of Americans" acting under Obama's direct orders, in a covert operation in Abbottabad, Pakistan,about 50 km (31 mi) north of Islamabad. According to U.S. officials a team of 20–25 US Navy SEALs under the command of the Joint Special Operations Command and working with the CIA stormed bin Laden's compound in two helicopters. Bin Laden and those with him were killed during a firefight in which U.S. forces experienced no injuries or casualties[44] .

1.1.3: **Boko Haram**

The group's official name is People Committed to the Propagation of the Prophet's Teachings and Jihad, which is the English translation of *Jama'atu Ahlis Sunna Lidda'awati wal-Jihad*better known by its Hausa name BokoHaram. This is a terrorist organisation based in the north east of Nigeria, in the areas predominated by the Kanuri ethnic group[45]. Founded by Mohammed Yusuf in 2002[46], the organisation is a Muslim sect that seeks to "abolish the secular system and establish an Islamic state" and "establish Sharia system of government in the country.The sect is referred to in Hausa as *Boko Haram* translated as "Western education is sacrilege" or "Western education is a sin"[47]and as at 2012, has been responsible for more than 1000killings in Nigeria[48].

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[43]P Bergen, and P Cruickshank, 'The Unraveling: The jihadist revolt against bin Laden' (2008) 238(10)*The New Republic* 16–21 accessed on May 4, 2011.

[44] A Richard, W Declan and M Ewen 'Osama Bin Laden is Dead, Obama announces'*The GuardianNewspaper* of May 1, 2011.

[45] Homeland Security Committee Report Details Emerging Homeland Threat Posed by Africa-Based Terrorist Organization, Boko Haram"(http:/ / homeland. house. gov/ press-release/ homeland-security-committee-report-details-emerging-homeland-threat-posed-africa-based) accessed on January 2, 2012

[46] France 24, "Boko Haram: Rocking the Nigerian boat" online News service of France24 of December, 27, 2011 available online at (http:/ / www. france24. com/ en accessed on May, 28, 2012.

[47]Obinna, Ogbonnaya, 'Boko Haram is battle for 2015, says Chukwumerije' *The Nation Newspaper* of September, 29, 2011

[48] "Terrorism in Nigeria: A dangerous new level"*The Economist* of September, 3, 2011 available online at (http:/ / www. economist. com/ node/ 21528307) last accessed on May, 28, 2011

Though the group first became known internationally following sectarian violence in Nigeria in 2009, it does not have a clear structure or evident chain of command.In the town of Maiduguri, where the group was formed in 2002, the residents dubbed it "Boko Haram".Literally the name translated from Hausa, means 'western education is forbidden'. The group earned this name due to its strong opposition to anything Western, which it sees as corrupting Muslims[49].It propagates a version of Islam that not only forbids any interaction with the Western World but it is also against the traditional Muslim establishment and the government of Nigeria[50].The group publicly extols its ideology despitethe fact that its founder and former leader Muhammad Yusuf was himself a highly educated man who lived a lavish life and most of its leaders currently in Nigeria live a high profile life making use of everything western including communicating by all modes of communication currently in existence in the world. The members of the group do not interact with the local Muslim population and have carried out assassinations in the past of any one who criticizes it, including Muslim clerics. They have also carried out assassinations of even their members who they alleged were giving security operatives information against them[51]. Recently, the group also carried their attacks to Newspaper houses alleging that they misinform the public of their mission.[52]

In a 2009 BBC interview, Muhammad Yusuf, then leader of the group, rejected scientific explanation for natural phenomena, such as evaporations being the cause for rain, the theory of evolution, and the Earth being a sphere solely on the ground that "[i]f it runs contrary to the teachings of Allah"[53]. Before his death, Yusuf reiterated the group's objective of

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[49] Chothia, Farouk, 'Who are Nigeria's Boko Haram Islamists?'online service of the BBC of August, 26, 2011 available at (http:/ / www. bbc. co. uk/ news/ world-africa-13809501) last accessed on May, 28, 2012

[50]C Bartolotta, 'Terrorism in Nigeria: the Rise of Boko Haram'*The Whitehead Journal of Diplomacy and International Relations online publication* **at** http:/ / blogs. shu. edu accessed on 2012-01-12

[51]Muryar Arewa, 'Boko Haram' available online at www.muryararewa.com accessed on 12/5/113

[52] African Globe, ' Religious Terrorist Attacks Nigerian Newspaper Killing 8' African Globe of 27/4/12 available online at www.africanglobe.net accessed on 30/6/12

[53] 'Nigeria's 'Taliban' enigma'BBC News of 28/7/2009 available at http:/ / news. bbc. co. uk/ accessed on 2011-07-28.

changing the current education system and rejecting democracy. Dr Mu'azu Babangida Aliyu, the Niger State governor, has criticized the group saying "Islam is known to be a religion of peace and does not condone violence and crime in any form" and *Boko Haram* doesn't represent Islam[54].The Sultan of Sokoto, His Eminence Alhaji Sa'adu Abubakar has called the sect "anti-Islamic" and "an embarrassment to Islam."[55]

Before colonization and subsequent annexation into the British Empire, the territory where *Boko Haram* is currently active, was a sovereign constitutional republic or sultanate with a majority Kanuri Muslim population. After their conquest of the Bornu Sultanate in 1903, the British, who were predominately Christians, introduced a new education system which found little appeal among the local population[56], increased dissatisfaction and gave rise to many fundamentalists among the Kanuri and other peoples of the north east of Nigeria.

The group had claimed responsibility for many acts of violence including the followings: 7 September, 2010 Bauchi prison break[57],October 2010 Abuja attack[58],22 April, 2011 Boko Haram frees 14 prisoners during a jailbreak in Yola, Adamawa State, 29 May, 2011 northern Nigeria bombings[59], 17 June, 2011 the group claimed responsibility for the 2011 Abuja police headquarters bombing[60],26 June, 2011 Bombing attack on a beer garden in Maiduguri,10 July, 2011 Bombing at the All Christian Fellowship Church in Suleja, Niger State,11 July, 2011 The University of Maiduguri temporary closes down its campus citing

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[54] J Abbas, "Boko Haram not representing Islam –Gov Aliyu" *Sunday Trust* of June, 12, 2011

[55] O Bayo and A George, 'Smoke Out Boko Haram Sponsors, Jonathan Orders Security Chiefs' *All Africa News Service* of December, 30, 2011 available at (http:/ / allafrica.com/ stories/ 201112300822. html) last accessed on May, 28, 2012

[56]*Op cit.*

[57] S Muh'd. 'Attack On Bauchi Prison - Boko Haram Frees 721 Inmates' *All Africa News Service* of September, 8, 2011 available at (http:/ / allafrica.com/ stories last accessed on 28/5/2012

[58]'Many dead in Nigeria market blast'- Africa - Al Jazeera English News Service of December, 12, 2011 available online at (http:/ / english. aljazeera. net/ news/ africa/ last accessed on 28/5/2012

[59]'More bombs follow Nigeria inauguration' available at http:/ / www. upi. com/ top_news accessed on May 30, 2011

[60] Brock, Joe, 'Nigerian Islamist sect claims bomb attack' online news service of AF Reuters of June, 17, 2011 available at (http:/ / af. reuters. com/ article last accessed on May, 28, 2012.

security concerns[61],12 August, 2011 Prominent Muslim Cleric Liman Bana was shot dead by Boko Haram[62],26 August, 2011 2011 Abuja bombing[63],5 November, 2011 2011 Damaturu attacks[64],25 December, 2011 December 2011 Nigeria bombings[65] and 20 January,2012 bombings of Police Stations and SSS Office in Kano[66]. During the fighting with the security forces *Boko Haram* "fighters reportedly "used fuel-laden motorcycles" and "bows with poison arrows" to attack a police station[67]. They have also recently claimed responsibility for the kidnapping of over 200 girls in Chibok, Borno State. Not done yet, *Boko Haram* also claimed responsibility for the twin bombings that claimed several lives at the Nyanya Bus Stop on 14th April 2014 and 1st May 2014 respectively. *Boko Haram* is considered to be a major potential terrorist threat affecting Nigeria and other countries, and US officials believe it is potentially allied with *Al Qaeda*. Former U.S. Africa Command (AFRICOM) Commander General Carter F. Ham stated in September 2011 that three African terrorist groups - *Shabab* of Somalia, *Al Qaeda* in the Islamic Maghreb across the Sahel region, and *Boko Haram* - "have very explicitly and publicly voiced an intent to target Westerners, and the U.S. specifically" and that he was concerned with "the voiced intent of the three organizations to more closely collaborate and synchronize their efforts."[68] As a result of these latest bombings and especially the kidnapping of the young girls, many countries including USA, Britain and France have agreed to lend a helping hand toward the fight against terrorism. Indeed the Principal Deputy Assistant Secretary of State for African

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[61] University of Maiduguri shut down as Boko Haram-linked killings increase, online News report of Sahara Reporters available online at (http:/ / saharareporters. com/ last accessed on May, 28, 2011.

[62] Washington Post of August 13, 2011 available online at www. washingtonpost. com/ world/ Africa accessed on 23/11/2011

[63]'Abuja attack: Car bomb hits Nigeria UN building' BBC News of 26th August, 2011 available at (http:/ / www. bbc. co. uk/ news/ world-africa-14677957) accessed on 28 August 2011.

[64] 'Nigeria Boko Haram attack 'kills 63' in Damaturu'BBC News of November 5 2011available online at (http:/ / www. bbc. co. uk/ news accessed on November, 5, 2011

[65] 'Nigeria churches hit by blasts during Christmas prayers', BBC News of December, 25, 2011 available online at www. bbc. co. uk/ news/ accessed on 26 December 2011.

[66] Vanguard Newspaper of 21st January, 2012

[67]Adam Nossiter, 'Scores Die as Fighters Battle Nigerian Police' New York Times of July 28, 2009

[68] Musikilu Mojeed and Eric Schmitt, 'Nigeria Arrests 2 in Blast that Killed 26 in Church', New York Times of December 26, 2011.

Matters, Robert Jackson made it emphatic that they have been urging Nigeria to reform its approach to *Boko Haram*. He further added that,

> From our own difficult experiences in Afghanistan and Iraq, we know that turning the tide of insurgency requires more than force. The state must demonstrate to its citizens that it can protect them and offer them opportunity. When soldiers destroy towns, kill civilians and detain innocent people with impunity, mistrust takes root[69]

Most recently, a retired Head of the US military's Africa Command Gen Ham asserted that US government will remain in a supporting role to Nigeria[70]. Not just the US but other world powers including China have joined Nigeria in this fight.

1.1.4: **Extra Judicial Killing**

An extrajudicial killing is the killing of a person by governmental authorities without the sanction of any judicial proceeding or legal process. Extrajudicial punishments are by their nature unlawful, since they bypass the due process of the legal jurisdiction in which they occur. Extrajudicial killings often target leading political, trade union, dissident, religious, and social figures and may be carried out by the state government or other state authorities like the armed forces and police. In most cases most of those that are killed this waay are those who have no access to justice occasioned by poverty and a host of other obstacles.

The concept of extra-judicial killing has come to be associated with all manner of unlawful killings in Nigeria especially by the security agencies and most particularly by the police. However, the term is used here to mean deliberate and premeditated execution by the police or other government agency of suspects. The security agencies in Nigeria have more than often been accused of carrying out extra judicial killings in multifarious dimensions. In the

[69]Kunle Falayi, *Punch Newspapers*, Saturday May 17 2014 available online at www.punchng.com accessed on 17/5/14

[70]Kunle Falayi, *Punch Newspapers* of Saturday May 17 2014 available online at www.punchng.com accessed on 17/5/14

Apo traders' saga, seven traders in Abuja in 2006 were killed by the police, the Federal government set up a panel of enquiry headed by a judge to investigate the circumstances of the killing of the 7 Apo traders by the police. The police officers were subsequently charged with murder of the traders[71]. Indeed, part of the reasons given by Boko Haram as forming the basis of their agitations was the extra judicial killing of their leader Mohammed Yousef by the Security agencies[72], an allegation that has now been substantiated following the arraignment in court for the killing by the Police authorities of an Assistant Commissioner of Police. Extrajudicial executions, other unlawful killings and enforced disappearances in Nigeria are not random. In a country where bribes guarantee safety, those who cannot afford to pay are at risk of being shot or tortured to death by the security agencies. The families of the victims often cannot afford to seek justice or redress because they cannot afford to pay for a lawyer or the court fees. In many cases they cannot even afford to retrieve the body[73]. Extrajudicial executions are unlawful and deliberate killings carried out by order of government or with its complicity or acquiescence. The term unlawful killings include extrajudicial executions aswell as other types of killing such as those resulting from excessive use of force by law enforcement agents. They violate the right to life as guaranteed by Nigeria's constitution[74], the International Covenant on Civil and Political Rights and the African Charter on Peoples and Humans Rights.

There are mainly several ways in which these issues take effect. Some of these ways include revenge killings. These killings are done when the security agencies loses a member. The men of the agency would return to the *locus* and annihilate any person seen there. Another one is Police Check Point killings. The ostensible purpose of roadblocks is to facilitate

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[71]Cleen Foundation*, Opportunity For Justice: A Report On The Justice Olasumbo Goodluck Judicial Commission Of Inquiry On The Apo Six Killings By The Police In Abuja*. (Lagos, Mbeyi Publications Ltd, 2006)

[72]www.liveleaks.com accessed on 1st August, 2012

[73] Extra Judicial Executions and other unlawful killings bythe Police in Nigeria, *Amnesty International Report* of December, 2009 AFR. 44/038/2009 Pg 2

[74] Section 33

security checks so as to assist police to arrest car thieves, armed robbers, drug carrier and other criminal suspect. It is also meant to assist in recovering arms and ammunitions. These policemen carry arms some times in a threatening posture. Unfortunately, a number of innocent citizen have met their untimely death at the checkpoints. Indeed, road blocks in Nigeria have turned into a slaughter house as many innocent users have met their untimely death there. It is therefore not surprising that when the present Inspector General of Police banned road blocks on Nigerian roads, the citizens heaved a sigh of relief. There has been many more incidents of such killings especially in the heat of argument ensuing in the course of the collection of the "roger" (bribes, illegal tips) at check points from commercial cyclist and buses[75].Again the way and manner our Policemen check crowd is also another issue in extra judicial killing.The crowd control situations which may attract police interventions include student protest, demonstrations or political agitations. Killing is the ultimate brutal act in dealing with students protest. It is reasonable to expect the Nigeria Police to adopt other measures of crowd control that will result in lesser number of casualties that is currently obtainable. The government should review the operational activities of the security agencies in crowd control to conform to international best practices. Indeed, the present IGP of Police, M.D Abubakar has muted the idea of equipping the police with rubber bullets in consonance with modern reality on the fight against criminals. This idea is yet to see any ray of light.

There is also the issue of extra judicial killings in the area of torture and police investigations. Many Nigerians have lost their lives at different police stations in the course of a normal arrest. In particular there is now slang for extra judicial killing. It is thus referred to as "the suspect has been taken to Abuja". Rrecently, the Chairperson of the NHRC, Chidi Odinkalu was summoned by the Police hierarchy to explain the source of the statement he

[75] Chiemelie Ezeobi, "Will Nigeria Police End Extra Judicial Killings?", This Day, May 18 2012 available online at www.thisdaylive.com accessed on 12/8 2013

made that Nigerian Police execute over 5000 persons illegally every year. According to Newspaper reports[76], the said Chairman reiterated his position before the Police authorities affirming that the estimate was gathered from reports of various government agencies that conducted research on the said issue.Though by section 34(3) of the Constitution of the Federal Republic of Nigeria, 1999 and other similar provision, a standard has been enacted for police investigation in consonance with world best practices. However, the Nigeria Security agencies are yet to embrace same. In some cases investigation, is often preceded by several unlawful acts. In extreme cases the methods of torture employed may be i.e. beating with horse whip, handcuffing, use of cigarette stumps, chaining hands and feet, inserting pins and broom sticks into several areas of the body, has once been reported against the police, but it was denied. There have been very many accusations against the security agencies in Nigeria on this yet they have continued to deny and extra judicial killing still exists. It is very unfortunate that our security agencies to date still employ crude methods in the execution of their duties.

1.1.5: **Violence**

Violence is the exertion of physical force so as to injure or abuse[77].Violence is also a noun meaning the use of physical force so as to damage or injure, intense natural force or energy, an abusive use of force, passion, fury, distortion of meaning[78]Worldwide, violence has been and is still used as a tool of manipulation and also is an area of concern for law and culture which make attempts to suppress and stop it. The word violence covers a broad spectrum. It can vary from a physical altercation between two beings to war and genocide where millions may die as a result. The causes of violent behavior in humans are often topics of research in psychology and sociology. Scientists do agree violence is inherent in humans. Among

[76] Vanguard Newspaper of 19th April, 2012.

[77]www. merriam-webster.com (http:/ / www. merriam-webster. com/ dictionary/ violence), Merriam-Webster Dictionary Retrieved January 8, 2009

[78]*The New Lexicon Webster's Encyclopedic Dictionary of the English Language*, (Deluxe Edition, Danbury CT, Lexicon Publication Inc, 1992)

prehistoric humans, there is archaeological evidence for both contentions of violence and peacefulness as primary characteristics[79].

Likewise understandings of violence are linked to a perceived aggressor-victim relationship: hence psychologists have shown that people may not recognise defensive use of force as violent, even in cases where the amount of force used is significantly greater than in the original aggression[80].James Gilligan is of the view that violence is often pursued as an antidote to shame or humiliation[81].

For Goetz most homicides seem to start from relatively trivial disputes between unrelated men which then escalate to violence and death. He argues that such conflicts occur when there is a status dispute between men of relatively similar status. If there is a great initial status difference, then the lower status individual usually offers no challenge and if challenged the higher status individual usually ignores the lower status individual. At the same an environment of great inequalities between people may cause those at the bottom to use more violence in attempts to gain status[82].Criminological studies have traditionally ignored half the population in their study of violence. Since the 1970s, important feminist works have noted the way in which criminal transgressions by women occur in different contexts from those by men and how women experiences with the criminal justice system are influenced by gendered assumptions about appropriate male and female roles. This have led Feminists to also highlight the prevalence of violence against women, both at home and in public."[83]Of all crimes reported in 2006, 76.2 percent of arrestees were men and also there was a huge imbalance in the ratio of men to women in prison. In 2004, women only made up 7.1 percent of the prison population.Men are overwhelmingly the aggressors in certain

[79] H Whipps, 'Peace or War? How early humans behaved' available online at (http:/ / www. livescience. com/ history accessed on 28th January, 2011

[80]J. Rowan,*The Structured Crowd*, (London: Davis-Poynter, 1978)p78

[81]J Gilligan, *Violence: Our Deadly Epidemic and Its Causes*,(New York: G.P Putnam,1996)p93

[82]A T Goetz, "The evolutionary psychology of violence".(2010)22(1)*Psicothema*, 15–21.

[83]*Introduction to Sociology.* (7th ed.),(New York: W.W. Norton & Company Inc, 2000),p. 187.

categories of crime such as domestic violence, sexual harassment, sexual assault, and rape. Women are mostly the victims in these categories. It is estimated that 25% of women are victims of violence at some point in their lifetimes.[84]

Several rare but painful episodes of assassination, attempted assassination and shootings in schools and universities in the United States led to a considerable body of research on ascertainable behaviors of persons who have planned or carried out such attacks. These studies (1995-2002) investigated what the authors called "targeted violence," described the "path to violence" of those who planned or carried out attacks, and laid out suggestions for law enforcement and educators. A major point from these research studies is that targeted violence does not just "come out of the blue."[85]One of the main functions of law is to regulate violence[86].Sociologist Max Weber stated that the State claims, for better or worse, a monopoly on violence practiced within the confines of a specific territory. Law enforcement is the main means of regulating non-military violence in the society. Governments regulate the use of violence through legal systems governing individuals and political authorities, including the Police and Military. Civil societies authorize some amount of violence, exercised through the police power, to maintain the status quo and enforce laws.However, German political theorist Hannah Arendt noted:

> Violence can be justifiable, but it never will be legitimate... Its justification loses in plausibility the farther its intended end recedes into the future. No one questions the use of violence in self-defence, because the danger is not only clear but also present, and the end justifying the means is immediate[87].

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[84]*ibid*.

[85]M Reddy et al 'Evaluating risk for targeted violence in schools: Comparing risk assessment, threat assessment, and other approaches' (2001) 38(2) *Psychology in the Schools*,p. 157-172

[86] E David, 'The One who is More Violent Prevails - Law and Violence from a Talmudic Legal Perspective', (2006) 19(2) *CanadianJournal of Law and Jurisprudence*.

[87]H Arendt**,** *Crises of the Republic; Lying in Politics, Civil disobedience on violence, thoughts on politics and revolution*,(New York: Harcourt, Brace Jovanovich, 1972) p. 134-155.

Violent acts that are not carried out by the Military or Police and that are not in self-defence are usually classified as crimes, although not all crimes are violent crimes. Damage to property is classified as violent crime in some jurisdictions but not in all.War is a state of prolonged violent large-scale conflict involving two or more groups of people, usually under the auspices of government. War is fought as a means of resolving territorial and other conflicts, as war of aggression to conquer territory or loot resources, in national self-defense, or to suppress attempts of part of the nation to secede from it. Since the Industrial Revolution, the lethality of modern warfare has steadily grown. World War I casualties were over 40 million and World War II casualties were over 70 million. Nevertheless, some hold the actual deaths from war have decreased compared to past centuries. Lawrence H. Keeley, a Professor at the University of Illinois, calculates that 87% of tribal societies were at war more than once per year, and some 65% of them were fighting continuously. The attrition rate of numerous close-quarter clashes, which characterize endemic warfare, produces casualty rates of up to 60%, compared to 1% of the combatants as is typical in modern warfare[88].

Religious and political ideologies have been the cause of interpersonal violence throughout history[89]. Both supporters and opponents of the 21st century War on Terrorism regard it largely as an ideological and religious war[90].Vittorio Bufacchi, describes two different modern concepts of violence, one the "minimalist conception" of violence as an intentional act of excessive or destructive force, the other the "comprehensive conception" which includes violations of rights, including a long list of human needs[91].Frantz Fanon, criticized

[88]K H. Lawrence, *War Before Civilization*, (New York: Oxford University Press, 1996).

[89]Kuklick Bruce, 'Doctrinal War: Religion and Ideology in International Conflict'(2006) 89(2) *TheMonist: The Foundations of International Order*,. 46.

[90]R Clarke,*Against All Enemies: Inside America's War on Terror*,(New York: Free Press, 2004); M Scheuer, *Imperial Hubris: Why the West is Losing the War on Terror*, (Washington D.C:Brasseys, 2004); F Robert, The*Great War for Civilisation - The Conquest of the Middle East*,(London**:** Fourth Estate, 2005);J Esposito, *Unholy War: Terror in the Name of Islam*,(London: Oxford University Press, 2003).

[91] Vittoriio Bufacchi,(2005) 'Two Concepts of Violence' (2005) 3(2)*Political Studies Review***,** 193-204.

the violence of colonialism and wrote about the counter violence of the "colonized victims."[92]Throughout history, most religions and individuals like Mahatma Gandhi have preached that humans are capable of eliminating individual violence and organizing societies through purely non-violent means. Gandhi himself once wrote: “A society organized and run on the basis of complete non-violence would be the purest anarchy.[93] The vital question here is what is the difference between violence and terrorism?. To answer this question, one has to state that violence is a means to achieving the objective of the terrorist. Violence is an everyday affair and leads to loss of lives no matter from what perspective it is viewed and Terrorists use violence more to achieve their aims and objective.For instance, if a murderer kills six men out of anger, the act of violence may not be termed terrorism but where another man kills one man for the purpose of getting a state government or company to change its views or decisions about something else, that act of violence becomes terrorism. The difference therefore becomes the objective sought to be achieved by that act of violence.

1.1.6: **Militancy**

The word militant, which is both an adjective and a noun, usually is used to mean vigorously active, combative and aggressive, especially in support of a cause, as in 'militant reformers'[94].It is also defined as using or willing to use force or strong pressure to achieve your aims especially to achieve social or political change[95] It comes from the 15th century Latin "militare" meaning "to serve as a soldier".

However, the current meaning of militant does not usually refer to a registered soldier: it can be anyone who subscribes to the idea of using vigorous, sometimes extreme, activity to achieve an objective, usually political. The Merriam-Webster Dictionary defines militant as

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[92] C E Butterworth and I Gendzier, ‘Frantz Fanon and the Justice of Violence’,(1974) 28(4) *Middle East Journal*, 451-458

[93]M K Gandhi, *For Pacifists***,** (Ahmedabad, India:Navajivan Publishing House,1949).p 131

[94]*Merriam-Webster online Dictionary* available online at http:/ / www. merriam-webster. com/ dictionary/ militant accessed on 13 November 2011.

[95]AS Hornby, *Oxford Advanced Learner’s Dictionary*, (7th ed) (Oxford; Oxford University Press, 2006) Pg 1528

"aggressively active (as in a cause)". It says that the word militant might be typically be used in phrases such as 'militant conservationists' or 'a militant attitude'.Militant can refer to individuals or groups displaying aggressive behavior or attitudes. Militant is sometimes used as a euphemism for terrorist or armed insurgent[96].Journalists sometimes apply the term militant to movements using terrorism as a tactic. The mass media also has used the term militant groups or radical militants for terrorist organizations[97].Those resisting a foreign military occupation can be seen as not meriting the label terrorists because their acts of political violence against military targets of a foreign occupier do not violate international law. Protocol 1 of the Geneva Conventions gives lawful combatant status to those engaging in armed conflicts against alien (or foreign) occupation, colonial domination and racist régimes. Non-uniformed guerrillas also gain combatant status if they carry arms openly during military operations. Protocol 1 does not legitimize attacks on civilians by militants who fall into these categories, however. Also the UN General Assembly Resolution on Terrorism (42/159, 7 December 1987) condemns international terrorism and outlines measures to combat the crime, with one proviso: "that nothing in the present resolution could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter of the United Nations, of peoples forcibly deprived of that right [...], particularly peoples under colonial and racist regimes and foreign occupation or other forms of colonial domination, nor...the right of these peoples to struggle to this end and to seek and receive support [in accordance with the Charter and other principles of international law]."

1.1.7: **Kidnapping**

[96] C Sanders,*Marginal Conventions: Popular Culture, Mass Media, and Social Deviance*,(Ohio: Bowling Green State University Popular Press, 1990),p. 98.

[97]P Wilkinson, *Homeland security in the UK: future preparedness for terrorist attack since 9/11*, (New York: Routledge, 2007) p. 55.

Kidnapping is the taking away or transportation of a person against that person's will, usually to hold the person in false imprisonment, a confinement without legal authority. Kidnapping is an offence under the Common Law of England and Wales.In R v D[98], Lord Brandon said: First, the nature of the offence is an attack on, and infringement of, the personal liberty of an individual. Secondly, the offence contains four ingredients as follows: (1) the taking or carrying away of one person by another; (2) by force or fraud; (3) without the consent of the person so taken or carried away; and (4) without lawful excuse[99]No prosecution may be instituted, except by or with the consent of the Director of Public Prosecutions, for an offence of kidnapping if it was committed against a child under the age of sixteen and by a person connected with the child, within the meaning of section 1 of the Child Abduction Act 1984[100].

To kidnap or abduct includes the unlawful removal or asportation of a person from any place where he or she is to another place from the vicinity where he or she is found, or the unlawful confinement of a person in any place without his or her consent with any of the following purposes:-

i. To hold for ransom or reward;or

ii. As a shield or hostage;

iii. To facilitate the commission of a felony; or

iv. To inflict bodily injury on or terrorize the victim or another; or

v. To interfere with the performance of any governmental or political function.

vi. To interfere with the person's business or the business of another.[101]

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[98] R v D [1984] AC 778, [1984] 3 WLR 186, [1984] 2 All ER 449, 79 Cr App R 313, [1984] Crim LR 558, HL, reversing [1984] 2 WLR 112,[1984] 1 All ER 574, 78 Cr App R 219, [1984] Crim LR 103, CA

[99] *R v Reid* [1973] QB 299, [1972] 3 WLR 395, [1972] 2 All ER 1350, 56 Cr App R 703, [1972] Crim LR 553, CA; *R v Wellard* [1978] 1 WLR 921, [1978] 3 All ER 161, 67 Cr App R 364, CA; *R v Cort* [2003] EWCA Crim 2149, [2003] 3 WLR 1300, [2004] 1 Cr App R 18, CA; *R v Hendy-Freegard*, [2007] EWCA Crim 1236, [2007] 3 WLR 488, The Times, 30 May 2007

[100] The Child Abduction Act 1984, section 5 (http:/ / www. legislation. gov. uk/ ukpga/ 1984/ 37/ section/ 5)

[101] Section 11 Rivers State Kidnap(Prohibition) Law, 2009

Kidnapping is a felonious offence and punishable without proof of previous conviction by death where life is lost and to life imprisonment where life was not lost[102]. Increased cases of kidnapping in Nigeria particularly in the South Eastern part of the country has led to an increase in the number of laws dealing with the said crime in almost all the states of the South East. Indeed kidnapping was more or less the forerunner of the present day terrorist bombings currently pervading the country.

1.1.8: **Human Rights**

Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible. Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.

The principle of universality of human rights is the cornerstone of international human rights law. This principle, as first emphasized in the Universal Declaration on Human Rights in 1948, has been reiterated in numerous international human rights conventions, declarations, and resolutions. The 1993 Vienna World Conference on Human Rights, for example, noted that it is the duty of States to promote and protect all human rights and fundamental freedoms, regardless of their political, economic and cultural systems.All States have ratified at least one, and 80% of States have ratified four or more, of the core human rights treaties, reflecting consent of States which creates legal obligations for them and giving concrete expression to universality. Some fundamental human rights norms enjoy universal

[102] Section 3 Criminal Code Act and Section 1(2) a and b Rivers State Laws supra

protection by customary international law across all boundaries and civilizations. Human rights are inalienable. They should not be taken away, except in specific situations and according to due process. For example, the right to liberty may be restricted if a person is found guilty of a crime by a court of law and the right to life could be deviated from in the course of carrying out a sentence of a court. All human rights are indivisible, whether they are civil and political rights, such as the right to life, equality before the law and freedom of expression; economic, social and cultural rights, such as the rights to work, social security and education, or collective rights, such as the rights to development and self-determination, are indivisible, interrelated and interdependent. The improvement of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affects the others. Non-discrimination is a cross-cutting principle in international human rights law. The principle is present in all the major human rights treaties and provides the central theme of some of international human rights conventions such as the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.

The principle applies to everyone in relation to all human rights and freedoms and it prohibits discrimination on the basis of a list of non-exhaustive categories such as sex, race, colour and so on. The principle of non-discrimination is complemented by the principle of equality, as stated in Article 1 of the Universal Declaration of Human Rights: “All human beings are born free and equal in dignity and rights.” Human rights entail both rights and obligations. States assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect 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 that States must take positive action to facilitate the enjoyment of basic

human rights. At the individual level, while we are entitled to our human rights, we should also respect the human rights of others. The issue of human rights is essential in the fight against terrorism. This is because respect and maintenance of the rights of individuals while fighting terrorism is one of the cardinal virtues of the role of law in the fight against terrorism. In Nigeria, the issue of Fundamental Human Rights is contained in Chapter 4 of the Constitution[103]. We shall deal with same in *extenso* in Chapter 7 anon.

1.1.9: **Conventions and Treaties**

Article 2 paragraph 1a of the Vienna Convention on the Law of Treaties 1969 done at Vienna on 23 May 1969 which entered into force on 27 January 1980 defined treaty to mean 'For the purposes of the present Convention:(a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;[104] . This definition is not however exhaustive for as Article 2 stated, "The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State".

A treaty is an official, express written agreement that States use to legally bind themselves. A treaty may also be known as an (international) agreement, protocol, covenant, convention or exchange of letters, among other terms. Regardless of terminology, all of these forms of agreements are, under international law, equally considered treaties and the rules are the same. A treaty could be bilateral or multilateral. Bilateral treaties are concluded between two states[105]or entities. It is possible however for a bilateral treaty to have more than two parties; what is vital is that there are only two parties to the treaty.The parties are divided into two groups, ("on the one part") and ("on the other part").

[103] 1999 Constitution as Amended
[104] United Nations, Treaty Series, vol. 1155, p. 331 Copyright © United Nations 2005
[105] H Nicolson, *Diplomacy*, (1st ed.London: Oxford University Press,1963)p331

It is common knowledge that every state possesses the capacity to conclude Treaties[106]. Apart from Heads of State, Heads of Government, Ministers of Foreign Affairs and Heads of Diplomatic missions, any other person authenticating a treaty for the purpose of expressing consent of the State to be bound must establish the following: (a) he produces appropriate full powers; or(b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.[107]

Where however such a person cannot be considered to represent a state for that purpose, such action is without legal effect unless confirmed by the State[108]. The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.[109]The text of a treaty is established as authentic and definitive:(a) by such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or(b) failing such procedure, by the signature, signature ad referendum or initialing by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text[110]. Article 11 provides the means of expressing consent to be bound by a Treaty[111]. Under Art 18, A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

[106] Article 6
[107] Art 7
[108] Art 8
[109] Art 9
[110] Art 10
[111] See also Articles 12-14

Under Article 19, a State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:(a) the reservation is prohibited by the treaty;(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or(c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

By, article 21, a reservation established with regard to another party in accordance with articles 19, 20 and 23:(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and(b) modifies those provisions to the same extent for that other party in its relations with the reserving State. In article 22, unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.Further, unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time. It is worthy of note also that the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation. Under Art 24(1) a treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree. In (2) failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.In sub 3, when the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.

By Article 25(1), a treaty or a part of a treaty is applied provisionally pending its entry into force if: (a) the treaty itself so provides; or (b) the negotiating States have in some other manner so agreed. The bindingness of a Treaty is emphasized in Art. 26 in the principle of "*pacta sunt servanda*" implying that every treaty in force is binding upon the parties to it

and must be performed by them in good faith. Note that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty[112]. This rule is without prejudice to article 46. Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party[113].Except where a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory[114]. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose[115].But a special meaning shall be given to a term if it is established that the parties so intended[116].

A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide[117]. Art.40 provides a means for amending a Treaty. Treaty could also be modified between certain parties as provided in Art 41. The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty[118]. By Article 44(1), a right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.In sub(2), a ground for invalidating,

[112] Art.27
[113] Art. 28
[114] Art.29
[115] Art. 31(1)
[116] Art 31(4)
[117] Art 39.
[118] Art 43

terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60,and in (3) if the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:(a) the said clauses are separable from the remainder of the treaty with regard to their application;(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and(c) continued performance of the remainder of the treaty would not be unjust. Error and fraud may also invalidate a Treaty[119]. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. This is called the principle of *jus cogens*.[120]Article 54, provided for termination of or withdrawal from a treaty under its provisions or by consent of the parties.The termination of a treaty or the withdrawal of a party may take place:(a) in conformity with the provisions of the treaty; or(b) at any time by consent of all the parties after consultation with the other contracting States.

Article 59, provides for the ways and manner a Treaty may be terminated. Supervening impossibility of performance and Fundamental change of circumstances can also be a ground for terminating a treaty.[121]The provisions of a void treaty have no legal force.[122] The consequences of the termination of a treaty is that it:(a) releases the parties from any

[119] Arts 48 and 49
[120] Article 53
[121] Arts 61 and 62
[122] Art 69

obligation further to perform the treaty;(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination[123]. Treaties are essential in the role of law against terrorism. This is because it is through treaties/conventions that some international instruments are created and eventually ratified. It offers state the possibility of having international legal frameworks in the fight against terrorism.

1.2.0: **Crime**

The word 'crime' is a noun. In a bid to fully to appreciate the depth of our work here, it is imperative that we should have a clear understanding of the word 'crime'. Surprisingly, our Criminal Code[124] did not define the word 'crime'; so also our Interpretation Act[125] . We are therefore left with no other choice but to go through the Dictionaries for a definition of crime. The word 'crime' has been defined variously "as a violation of law, an act punishable by law, something deplorable, to charge or to convict of an infraction of regulation'[126] , "an act that subjects the doer to legal punishment, the commission or omission of an act specifically forbidden or enjoined by public law, any grave offence against morality or social order'[127] ,'an offence punishable by law, illegal acts as a whole, an evil or shameful act'[128] , 'social harm that the law makes punishable, the breach of a legal duty treated as the subject matter of a criminal proceedings'[129] . Okonkwo submits that crime and offence would appear to be interchangeable hence his definition of an offence as essentially a definition in terms of procedure. Crime to him therefore is the breach of the law resulting in the special accusatorial procedure controlled by the state and which is liable to sanction over

[123] Art 70
[124] Cap C38 Laws of the Federation, 2004
[125] Cap I23 Laws of the Federation, 2004
[126] Chambers, *Chambers Dictionary*, (London; Chambers-Harrap Publishers Ltd, 2011)p358
[127] Webster's Dictionary available online at www.webster-dictionary.org accessed on 3/3/2011
[128] AS Hornby,(ed)(4th Ed), *Oxford English Dictionary* (Oxford; Oxford University Press, 1989)p 198
[129] B Garner, (ed), *Black's Law Dictionary*,(Minnesota, St Pauls'; West Publishing, 1999) p 37

and above compensation and costs.[130] To Oputa J[131] (as he then was) crime from the perspective of the lawyer is an act which is forbidden by law, an act which the law forbids under the pain of punishment. He went further to say that it is this legal prohibition that provides the *actus reus* of the crime and that if such legal prohibition is not attached to the act, then it does not matter how morally reprehensible the act may be, it does not constitute a criminal offence for the *actus* will be there but then it will not be an *actus reus*.Usually a natural person perpetrates a crime, but legal persons may also commit crimes. Conversely, at least under U.S. Law, nonpersons such as animals cannot commit crimes[132]. The sociologist Richard Quinney has written about the relationship between society and crime. When Quinney states"crime is a social phenomenon" he envisages both how individuals conceive crime and how populations perceive it, based on societal norms[133].

Originally the Latin word *crīmen* meant "charge" or "cry of distress."[134] The Ancient Greek word *krima*, from which the Latin cognate derives, typically referred to an intellectual mistake or an offense against the community, rather than a private or moral wrong.[135]The following definition of "crime" was provided by the Prevention of Crimes Act 1871, and applied[136] for the purposes of section 10 of the Prevention of Crime Act 1908:The

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[130] COkonkwo& Naish,*Criminal Law in Nigeria*, (Lagos, Spectrum Publishers,1981) p 18. The Learned Professor argued that the procedure distinguishes crime from a civil wrong. He posited that procedurally, it is the state that prosecutes criminal wrong; whereas it is the individuals that sue to remedy the civil wrong, and that the victim in a criminal action cannot *suo motu* withdraw the charges without the input of the state.

[131]Oputa, C., 'Crime and the Nigerian society', in Elias et al. (Eds.), *African Indigenous Laws*. (Enugu: Government Printer, 1975) p 37- 53

[132]*People v. Frazier*, 173 Cal. App. 4th 613 (2009). In this case, the California Court of Appeal explained: "Despite the physical ability to commit vicious and violent acts, dogs do not possess the legal ability to commitcrimes

[133]R Quinney, 'Structural Characteristics, Population Areas, and Crime Rates in the United States'(1957) 57(1)*The Journal of Criminal Law, Criminology and Police Science***,** 45-52

[134] Ernest Klein, *A Comprehensive Etymological Dictionary of the English Language* (Amsterdam: Elsevier, 1966)

[135] Bakaoukas, Michael. 'The conceptualisation of 'Crime' in Classical Greek Antiquity: From the ancient Greek 'crime' (krima) as an intellectual error to the christian 'crime' (crimen) as a moral sin' 2005(2)*ERCES (European and International research group on crime, Social Philosophy and Ethics)* p 23- 28

[136] The Prevention of Crime Act 1908, section 10(6) and Schedule

expression "crime" means, in England and Ireland, any felony or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or any misdemeanour under the fifty-eighth section of the Larceny Act, 1861 and for the purpose of section 243 of the Trade Union and Labour Relations (Consolidation) Act 1992, a crime means an offence punishable on indictment, or an offence punishable on summary conviction, and for the commission of which the offender is liable under the statute making the offence punishable to be imprisoned either absolutely or at the discretion of the court as an alternative for some other punishment.[137]

In Nigeria, crimes were classified as felony, misdemeanour or simple offences. This is also the classification adopted in our substantive criminal law and the criminal code[138] . A felony is an offence that is declared by law to be a felony and punishable without proof of previous conviction, with imprisonment for three years or more or even by death[139] . Misdemeanor on its own is so declared by law and is punishable by imprisonment of not less than six months but less than three years. Once an offence does not fall within felony or misdemeanor, such offence is a simple offence, they are therefore offences punishable with imprisonment for less than six months[140] . It is vital to note that the statute creating an offence may expressly designate the offence a felony or misdemeanor.

1.2.1: **Rule of Law**

The rule of law is a legal maxim that suggests that governmental decisions be made by applying known legal principles. The phrase can be traced back to 17th century and was popularized in the 19th century by British jurist A. V. Dicey. The concept was familiar to

[137] The Trade Union and Labour Relations (Consolidation) Act 1992, section 243(2) (http:/ / www. legislation. gov. uk/ ukpga/ 1992/ 52/ section/ 243)
[138] Sec 3 Criminal Code
[139] S. 3 Supra
[140] S.3 CC.

ancient philosophers such as Aristotle, who wrote "Law should govern"[141].Rule of law implies that every citizen is subject to the law. It stands in contrast to the idea that the ruler is above the law, for example, by divine right.Although credit for popularizing the expression "the rule of law" in modern times is usually given to A. V. Dicey,[142]development of the legal concept can be traced through history to many ancient civilizations, including ancient Greece, China, Mesopotamia, and Rome.[143]In Western philosophy, the Ancient Greeks initially regarded the best form of government as rule by the best men. Plato advocated a benevolent monarchy ruled by an idealized philosopher king, who was above the law.[144]Plato nevertheless hoped that the best men would be good at respecting established laws, explaining that "Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state."[145]

Aristotle flatly opposed letting the highest officials wield power beyond guarding and serving the laws. Aristotle advocated the rule of law thus:It is more proper that law should govern than any one of the citizens: upon the same principle, if it is advantageous to place the supreme power in some particular persons, they should be appointed to be only guardians, and the servants of the laws.[146]

In 1215, a similar development occurred in England: King John placed himself and England's future sovereigns and Magistrates at least partially within the rule of law, by signing Magna Carta[147]. The principle of Rule of Law was also discussed by Montesquieu in

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[141]B Jowett,*Aristotle's Politics*, (New York: Modern Library, 1943).p75

[142] F Wormuth, *The Origins of Modern Constitutionalism***,** (New York:Harper,1949) p. 28; Thomas Bingham,*The Rule of Law*, (New York: Allen Lane,2010).

[143]A Black, *A World History of Ancient Political Thought***,(**London:Oxford University Press,2009)p 64

[144] David Clarke, 'The many meanings of the rule of law' in Kanishka Jayasuriya(eds.), *Law, Capitalism and Power in Asia*, (New York: Routledge, 1998)p66

[145]J Cooper& D S Hutchinson*Complete Works By Plato*(Indianapolis: Hackett Publishing,1997)p231

[146]*Ibid*

[147] U.S. National Archives (http:/ / www. archives. gov/ exhibits/ featured_documents/ magna_carta/).

The Spirit of the Laws (1748)[148]. The phrase "rule of law" appears in Samuel Johnson's Dictionary (1755)[149].

In 1776, the notion that no one is above the law was popular during the founding of the United States, for example, Thomas Paine, wrote in his pamphlet ‘Common Sense’ that "in America, the law is king. For as in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other."[150] In 1780, John Adams enshrined this principle in the Massachusetts Constitution by seeking to establish "a government of laws and not of men."[151]

There exist divergent opinions in the course of the interpretation of Rule of Law. According to political theorist Judith N. Shklar, "the phrase 'the Rule of Law' has become meaningless thanks to ideological abuse and general over-use", but nevertheless this phrase has in the past had specific and important meanings[152].

However Dicey emphasized three aspects of the rule of law as follows:[153]

i. No one can be punished or made to suffer except for a breach of law proved in an ordinary court.

ii. No one is above the law and everyone is equal before the law regardless of social, economic, or political status.

iii. The rule of law includes the results of judicial decisions determining the rights of private persons.

In 1977, the influential political theorist Joseph Raz identified several principles that may be associated with the rule of law in some (but not all) societies.[154] Raz's principles encompass

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[148]B Tamanaha, *On the Rule of Law*, (Massacheusetts: Cambridge University Press, 2004)p 75

[149]A A Peacock**,** *Freedom and the rule of law*(Lanham:Lexington Books, 2012).p131

[150]J Lieberman, *A Practical Companion to the Constitution;How the Supreme Court has ruled on issues from abortion to zoning*,(Berkeley: University of California Press,2005).

[151] Massachusetts Constitution, Part The First, art. XXX (1780).

[152]J Shklar, & S Hoffman,*Political Thought and Political Thinkers*,(Chicago:University of Chicago Press,1998)p 62

[153] A V Dicey,*An Introduction to the Study of the Law of the Constitution*,(London: Macmillian,1959)p 121

[154]Joseph Raz,.(1977) "The Rule of Law and Its Virtue", (1977) *Law Quarterly Review* (93) 195-211.

the requirements of guiding the individual's behaviour and minimizing the danger that results from the exercise of discretionary power in an arbitrary fashion, and in this last respect he shares common ground with the constitutional theorists A. V. Dicey, Friedrich Hayek and E. P. Thompson. Some of Raz's principles are as follows:

i. That laws should be prospective rather than retroactive.

ii. Laws should be stable and not changed too frequently, as lack of awareness of the law prevents one from being guided by it,

iii. There should be clear rules and procedures for making laws.

iv. The independence of the judiciary has to be guaranteed.

v. The principles of natural justice should be observed, particularly those concerning the right to a fair hearing.

vi. The courts should have the power of judicial review over the way in which the other principles are implemented.

vii. The courts should be accessible; no man may be denied justice.

viii. The discretion of law enforcement and crime prevention agencies should not be allowed to pervert the law.

According to Raz, the validity of these principles depends upon the particular circumstances of different societies, whereas the rule of law generally "is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man". The position of rule of law in the fight against terrorism cannot be overemphasized. This is because in the absence of respect for the doctrine of rule of law then there will be no respect for the sanctity of Law and its enforcement.

CHAPTER TWO

AN OVERVIEW OF NIGERIAN LEGAL SYSTEM AND AN APPRAISAL OF THE NIGERIAN CRIMINAL JUSTICE SYSTEM

2.0 Background of Nigerian Legal System

To give a complete history of the legal system of Nigeria one must give and indeed include the account of the administration of justice in the various territories which ultimately constituted the entity known as Nigeria. This is because the legal systems of that era were actually the basis for the modern legal system[155]Before the nineteenth century, British and other foreign merchants had started to trade with the indigenous people on the coast of West Africa. It is necessary to state here that it was not until 1862, when the British administration made Lagos a British Colony that the British government introduced English Law in the colony[156] and subsequently established a Supreme Court.

By 1906[157], the Colony and Protectorate of Lagos and the Protectorate of Southern Nigeria were amalgamated to form the Protectorate of Southern Nigeria. Following this, a new native court's enactment was made for the new territory. As at January, 1 1900 when the Protectorate of Nigeria was established, another Protectorate that of Northern Nigeria was also established comprising territories of the Royal Niger Company North of Ida. A Supreme Court, Provincial and Cantonment Courts were also established in this new Protectorate. This court applied the statutes of general application in existence in England as at January 1, 1900. It also applied customary law. By January 1 of 1914, the Colony and Protectorate of Southern Nigeria and that of Northern Nigeria were amalgamated to form a political unit called Nigeria. Upon this amalgamation, three courts were established viz the Supreme Court, the Provincial Courts and the Native Courts. The Supreme Court applies

[155] T O Elias,*Nigeria Legal System,* (2nd ed, Ibadan: Spectrum Publishers,1963)p3
[156] This was with effect from March 4, 1863 by the Supreme Court Ordinance No. 11 of 1863
[157] Native Courts Proclamation, No 7 of 1906

common law, doctrines of Equity and statutes of general application in existence as at January 1, 1900. By 1933, the court systems were reformed by the establishment of High Court and Magistrate Court for the Protectorates. This High Court and Supreme Court share the same jurisdiction save in probate, divorce and matrimonial cases, admiralty and it is only in proceedings under specified ordinances, did the jurisdiction of the Supreme Court exceed the High Court[158]. The High Court and Magistrate Court had similar jurisdictions but not with regards to title or interest in land clearly reserved for the Native Courts. Appeals from Magistrate Courts lay to the High court while appeals from Supreme Court and High Court lay to the West African Court of Appeal.

By 1954, Nigeria had a Federal Constitution with effect from October 1, 1954. As a result of this, Nigeria became a federation comprising three Regions viz Northern, Western and Eastern Region in addition to a Federal territory – Lagos. The constitution then established a Federal Supreme Court for the whole country and then a High court for each region plus Lagos. Magistrate courts were also established in each jurisdiction. Appeals from Magistrate court lie to the High court of the region. The Western and Eastern regions have Customary Courts while the Northern region had Native courts. By 1956, the Northern region established a Customary Court of Appeal referred to as Moslem Court of Appeal followed by the establishment of a Shari a Court of Appeal in 1960. Consequent upon this, the Criminal Code and Penal Code came into existence.

Today, Nigeria therefore uses a tripartite system of criminal law and justice; the Criminal Code based on English common law and legal practice, the Penal Code based on Maliki law and Muslim system of law and justice and Customary Law based on the customs and traditions of the people. Thus since independence, both the Criminal Code and the Penal

[158]Elias *op cit*p. 60

Code have added some amendments to reflect the norms, values and standards of Nigerian people.

2.1. Background to Nigerian Civil Jurisprudence

The History of Nigeria legal system covers the background of both the criminal and civil aspect of Nigeria jurisprudence. This is because, it is the same law that creates the procedure as the major difference between civil and criminal law. The difference therefore is only procedural.

2.2. Sources of Nigerian Criminal Law.

The caption of this sub chapter is not designed to particularize the sources into sources of Criminal and Civil law but instead what is source of one can and will also be the source of the other.

2.2.1. The Received English Law

The Received English Law[159], as a source of Nigerian Law consists of the Common law, Doctrines of Equity, Statutes of General application and Subsidiary legislations. This reception dates back to 1863 when Ordinance No. 3 of 1863 introduced English Law into the colony of Lagos. Received English law applies subject to Nigerian Legislation. Accordingly to the extent that the subject matter of a rule of the received law is dealt with by a local enactment, the local enactment and not the received law is applicable and where there is a conflict between the two, then the local enactment prevails.

[159] The Received English law as a source of Nigerian Law excludes English Law received by enactment or that were re-enacted as Nigerian Legislation. This type of English Law in themselves form part of Nigerian Legislation

2.2.2. **Customary Law**

Customary law consists of customs and usages accepted by members of a community as binding among them[160] . Customary law in Nigeria may be divided in terms of nature into two classes viz- ethnic customary law and Muslim customary law. Ethnic customary law is indigenous to Nigeria and each system applies to members of a particular ethnic group whereas Muslim customary law is a religious law based on the Muslim faith and applicable to members of the Muslim faith. One of the essential features of ethnic customary law is that it is accepted as an obligation by the community and its members[161] . Another essential feature is that it is very flexible as the rules are amenable to changes to reflect the changing economic and social conditions[162] . However, on the other hand Muslim law, is not flexible instead it is rigid because of the written nature and thus it is not easily affected by social change.

For customary law to be valid, such law must have been subjected to validity tests prescribed by the statutes[163] . It is therefore a rule that unless such customs passes the test, it should not be applicable. Once a custom passes these tests, such custom becomes applicable and qualifies to be applied and once applied; it becomes part and parcel of our Legal system.

2.2.3. **Case Law**

This source of law also called judicial precedent consists of laws found in judicial decisions. Judicial precedent is the principle of law on which a judicial decision is based. It is the *ratio*

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[160] Elias, *op cit*p. 83

[161] Custom has been defined as a mirror of accepted usage. See*Owoniyi v Omotosho*(1961) 1 All N L R 304 at309

[162]*Lewis v Bankole(*1908) 1 NLR 81 at 100 - 101 per Osborne C.J

[163] The proviso in section 18(3) of the Evidence Act 2011 states, ‘in any judicial proceeding where any custom is relied upon, it shall not be enforced as law if it is contrary to public policy or is not in accordance with natural justice, equity and good conscience.

decidendi of the case[164] . Thus, pronouncements on material facts by the judge constitute judicial precedent and any other pronouncement outside the material fact becomes an *obiterdictum*[165] . It is right to state that judicial precedent binds courts but requires a well-organized hierarchy of courts for full applicability[166] . Consequently, previous decisions and judgment of high courts are generally binding on lower courts. But for such decisions and judgments to be applicable and binding, the facts and issues pronounced upon by the superior court must be on all four with the particular case under consideration by the lower court[167] . This bindingness is not exclusive and absolute. It has exceptions. It should be noted that for the principle of judicial precedent to be well grounded, there need to be put in place an efficient and well-funded law reporting system. These law reports expound the application of the laws made by the legislators and it is used to persuade the courts as to the law made by the legislators.

2.2.4. **Nigerian Legislation**

This consists of statutes and subsidiary legislations. Statutes are laws enacted by the legislature while subsidiary legislation is law enacted in the exercise of powers given by a statute[168] . It is to be noted that a statute under which subsidiary legislation is made is referred to as an enabling statute. Nigerian statutes consist of Acts, Ordinances Decrees, Edicts and Laws.Legislation is a very important instrument of legal development. It has a tremendous effect on all other sources of law. It can readily alter their content and as well a

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[164] This means the reason for the decision. By necessary implication therefore, it is clear that not all that was said by the Judge forms the reason for the decision.

[165] Obiter dictum means a statement made by the way and does not form part of the *ratio decidendi*. It is therefore not of binding effect but of persuasive effect

[166] For instance in Nigeria, the hierarchy of courts start from the Supreme Court and ends at the Magistrate Courts. Thus the decisions of the Supreme Court are binding on every other court and so down the hierarchy.

[167] *Odugbo v Abu* [2001] 14 NWLR (Pt 732) at 45

[168] For instance, the Supreme Court Act, Cap S15 Laws of the Federation, 2004, created the Supreme Court and the same Act gave the Chief Justice of the Federation the power to make Rules of Court. Thus, the Supreme Court Act is the statute law while the Rules of Court is the subsidiary legislation.

useful tool for the social, economic and technological development of the country. Nigerian legislation is therefore a very important source of Nigerian law especially under the present democratic dispensation.

2.2.5. **International Law**

Nigeria as a nation belongs to the international community. As it is, this international community once in a while proposes various regulations to guide the member communities on how to approach various legal issues. Nigeria by being a member of the international community will also be involved in the preparation and passage of law. These international organizations have rules and regulations and sometimes they make rules which the member nations are expected to become part of. It is relevant to say that mere adoption of this document is not sufficient to transform such into law in the adopting countries. The adopting country will then present the adopted document to its legislative house which in turn will enact it into law and it becomes law made in that adopting state[169]. This is sometimes referred to as "domestication" of the relevant adopted regulation. These International Laws are in turn adopted by Nigerian government and legislated upon in Nigeria and it therefore becomes a law made in Nigeria. By this way, one can then say that such international law constitutes a source of Nigerian law.

2.2.6: **Juristic Opinion as a Source of Domestic Law**

It is a fact that juristic opinion is a source of law under International Law but can same be said for our domestic laws? Under the Nigerian Legal system, opinions are together that Juristic opinion cannot constitute a source of law. This is because of the assumption in Nigeria of the Realist school of Law as regards the opinion of the court and nothing more. However it is relevant that we understand that as far back as 1957, the Court in Nigeria had

[169]JSF Inv. Ltd v Brawal Line Ltd {2010} 18 NWLR (Pt 1225) at 495

accepted an opinion as a source of law.[170]Nevertheless, this may be classified as opinion of experts which under the Evidence Act is admissible as such[171] but not strictly as sources of Law.

2.3: **Aspects**

As gleaned from our history and overview of Nigeria Legal System, one can easily understand that by aspects we mean the various criminal justice administration systems in existence in Nigeria. It has been said earlier that Nigeria has a tripartite criminal justice system. This tripartite criminal justice system applies to civil justice administration.

2.3.1: **Criminal Justice Administration in the North**

Thus, administration of Criminal Justice in the North includes both the Penal Code and the Sharia Customary Law. The Penal Code is applied through the Criminal Procedure Code in the Area Courts, Magistrate Courts and High courts, while the Sharia Customary Law is applied by the Sharia Courts. It does not apply to the Southern part of the country.

2.3.2. **Criminal Justice Administration in the South**

The main source of criminal proceedings in the south is the Criminal Code[172] . Just like the Criminal Procedure Code regulates the application of the Penal Code in the North, the Criminal Procedure Act[173] regulates the application of the Criminal Code in the South. The courts that apply this Criminal Code Act or Laws are the Magistrate Courts and the High Courts. It should be noted that the Federal High Court, whether situated in the North or South is regulated by the Criminal Procedure Act. Prosecution in these courts is undertaken by the Police, State Counsel and or other specialized agencies involved in the prosecution of

[170]Amao v Adigun 1957 WNLR 55at 56
[171] Sections 68-71 Evidence Act
[172] Cap C38 Laws of the Federation, 2004
[173] Cap C41 Laws of the Federation, 2004

offences[174] . Customary courts in the South do not convict people of criminal offences unless that offence is defined and the penalty thereof prescribed in a written law[175] . In summary, criminal justice administration in the South revolves round the Magistrate Courts, High Courts and Federal High Courts all of which apply the Criminal Code using the Criminal Procedure Act.

2.4. **Procedure**

There are procedures that regulate the arrest and arraignment of a suspect and or an accused person. These procedures will be taken seriatim in this segment of our work.

2.4.1 **Nature and Procedure of Criminal Justice.**

A first step in criminal proceedings is securing the appearance of an offender which may either be by way of a summons, arrest on warrant and or arrest without warrant. A Magistrate therefore can compel the appearance before him of any person accused of having committed in any place, whether within or without Nigeria any triable offence in the state[176] .

The Nigeria criminal justice system is accusatorial by nature. It consists of two parts, the prosecutor and the defence. The duty on the prosecution is that it must investigate the allegation of crime against the accused person. Upon finishing its investigation, the prosecution will then bring the matter to court and prove it beyond reasonable doubt[177]. Once the prosecution has proved its case beyond reasonable doubt, it is then left for the accused person to introduce his defence. Once the accused person successfully pleads his defence or even introduces reasonable doubt in the mind of the tribunal, then he shall be

[174] This includes the NDLEA, EFCC, NAFDAC etc
[175] *Aoko v Fagbemi*(1961) 1 All NLR 400, Section 36 CFRN as amended
[176] S.79 C.P.A
[177] S.135 Evidence Act 2011

acquitted. Where however he fails to provide a valid defence or a reasonable doubt, the court will find him guilty, convict him and then sentence him in accordance with the law on which he was charged. Once sentenced, the accused person is then sent to prison where he will be reformed while serving his sentence.

2.4.2. **Analysis of Crime**

In the first place, crimes are crimes because the legislature has so defined it. This is why an act is not a crime unless it is provided in a written law[178] . A crime therefore is an offence or a wrong duly contained in a written law in existence as at the time the offence was committed. It should also be noted that crimes mostly are wrongs punishable by the state in its bid to maintain judicial order within the society. It is the society that prosecutes a criminal wrong which is why all criminal charges are either headed the state against the party committing the infraction or with the heading of the Federal Republic of Nigeria[179] .

2.4.3. **Classification of Crime**[180]

Offences (oftentimes called crimes) may be classified in three different ways[181] . The first method is the threefold classification based on the extent of the punishment prescribed by law for an offence. Offences are thus divided into felonies, misdemeanors and simple offences. This is also the classification adopted in our substantive criminal law and the

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[178]*Aoko v Fagbemi&anor(*1960), All NLR 400, *Udokwu v Onugha&anor*(1963) 2 All NLR 107

[179] In the Magistrate Court, it is headed The C.O.P v. The accused person; in the High Court it is The State v The accused person; while in the Federal High Court it is The Federal Republic of Nigeria v The Accused person. Note that even the C.O.P stands for the State.

[180]T AkinolaAguda& Isabella Okagbue,*Principles of Criminal Liability in Nigerian Law* (Ibadan: Heinemman Educational Books Ltd, 1990) p5, Offence and Crime mean the same thing in the Nigerian context and may be used interchangeably

[181]F Nwadialo, *The Criminal Procedure of the Southern States of Nigeria*,(Benin: Ethiope Publishing Company, 1976), p 1

criminal code[182] . It is vital to note that the statute creating an offence may expressly designate the offence a felony or misdemeanor.

The second mode of classification is indictable and non-indictable offences. This classification revolves round the method by which the particular offence is tried in court. Indictable offence is one triable in the High court on information or in the Magistrate Court with the consent of the accused person. Non indictable offences on their own are tried summarily and mostly in the magistrate's court.

The third class is offences against Federal laws and offences against state laws. This classification resulted due to the Federal System of governance in Nigeria[183] . An importance of this is that it stipulates which of the Attorney General has precedence in the offence, Federal and or state. Also, most Federal offences are tried in the Federal High court[184] .

2.4.4. **Limitation Period**

Civil liability may be barred after a specific period of time but this is not so in criminal offences as they are not extinguished by effluxion of time. This notwithstanding, the prosecution of certain offences must be started within a certain limits[185] . Proceedings against custom offences must be instituted within seven years[186] . Apart from these time limits which may be prescribed in the cases of particular offences as noted, no other time limit exists. However, practical consideration may impose its own limits. This is because a case can only be proved by witnesses.

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[182] S.3 Criminal Code Cap C38 Laws of Federation, 2004
[183] Federal System of governance presupposes the existence of a federal and independent states and each can legislate for its own purpose.
[184] Such offences include those against the NDLEA, EFCC, NAFDAC Acts etc
[185] For example, the offence of sedition must be commenced within 6 months – S.52(1) Criminal Code
[186] Customs and Excise Act Cap C

There are various limitation period for different subject matter claims. Actions based on simple contracts, recovery of debts and arrears of interest, tortuous malfeasance which includes damages for negligence or breach of a duty of care, account stated, etc, must be commenced within a period of six (6) years of the occurrence of the injury, loss or damage. Actions based on any legal instrument under seal especially where such legal instrument relates to an interest or charge on land, or the arrears of an annuity charged on an immovable property, or the enforcement of an arbitration award where the Arbitration Agreement is under seal, or the judgment of a competent Court of Law, etc, must be commenced (or where a judgment or award is to be enforced) within a period of twelve (12) years from the period when the cause of action arose or the judgment or award was entered. It is to be noted that the main purpose of the limitation period is to protect o defendant from the injustice of having to face a state claim. Put in another way a claim which he never expected to have to deal with. For example if a claim is brought a longtime after the events in question, there is a strong likelihood that evidence which was available earlier may have been lost, and the memories of witnesses may have faded[187]

2.4.5: **Non Arbitrability of Crime**

It is trite law to say that crime is an offence against the state for which the state seeks redress. Arbitration on the other hand is reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner by a person(s) other than a court of competent jurisdiction[188]. Thus, notwithstanding that arbitration involves settling a dispute between two persons, it is also right to say that arbitration cannot be used to settle disputes involving crimes. It is therefore safe to say that

[187] *Sanni v. Okene L.G*(2005) 14 NWLR (Pt. 944) p. 60
[188] H Halsbury et al, *The Laws of England: being a Complete Statement of the Whole Law of England*, (3rd ed.Vol 2, London: Butterworth, 1952)p 2

criminal activity cannot be subject of arbitration[189] . Crimes therefore are not subject of arbitration because by its own very nature it is an offence against public nature.

2.5. **Trial, Punishment and Sentencing**

Where an accused person has been brought to court, three things happen. First, the accused is arraigned in court, then he faces his train and finally he is convicted or discharged and then sentenced if convicted. It is these procedures that we will take one after the other.

2.5.1. **Arraignment**

This is the bringing of the accused person before a court of competent jurisdiction for the hearing of his case. For there to be a valid arraignment, the accused must be brought to the court unfettered, and the charge read to him in the language he will understand and finally he takes his plea.[190]The accused is expected to take his plea of guilty, not guilty or keep mute.[191] This is a mandatory requirement and non-compliance with it *ab-initio* renders the trial a nullity[192].

2.5.2. **Trial**

Trial is the process that begins immediately after the arraignment. The process involves calling the entire witnesses one after the other, leading them in chief and afterwards allowing them to be cross-examined by the defence counsel. Once the prosecution is through with all his witness, he announces the close of his case and the defence will be called to open his defence. Once this process is completed then, the trial of the accused person is deemed to have come to an end. What commonly marks this end is the final address by the prosecution

[189]*Queen v Hardy*(1850) 14 QB 529
[190]*Kajubo v State*(1988) 1 NWLR (Pt 7) p.72, *Amala v State*(2004) 18 NSCQR 834
[191]*Gaji v State*(1975) 5SC 60, *Kayode v State*(2008) 1 NWLR (Pt 1068) @281
[192]*Sanmabo v State*(1967) NMLR 314

if he is a legal practitioner after that of the defence counsel. Once the case is concluded, it is left for the court to make a finding of fact and its pronouncement.

2.5.3. **Bail**

Bail is surety taken by a person dully authorized for the appearance of an accused person at a certain day and place to answer and be justified by law[193]. It has also been defined as the 'contract' whereby an accused person is delivered to his surety or also the contract of the surety himself[194] . It is to be noted that in granting this bail, the court or the police may require sureties in some cases but may also grant bail on self-recognizance. The power of the court to require sureties for bail is obtained from the Criminal Procedure Act[195]. There are several types of bail and these include police bail, and court bail. The essence of bail is to ensure that the accused will attend court and stand his trial. Thus refusing or granting of bail should not be seen as a punishment[196]. With regards to bail application in the High Court, the C.P.A provides for it[197] but it did not provide for the procedure. However some courts have held that it should be by summons supported by an affidavit[198].

2.5.4. **Conviction**

It is to be noted that trial includes the whole process of proceedings including sentencing[199] . The verdict in a criminal trial is a finding which the court does based on the evidence before it. This the court does through evaluation of the evidence before it reaches the verdict of

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[193]J Archibold et al, *Pleading, Evidence and Practice in Criminal Cases,* Volume 2 (43rd ed, London: Sweet and Maxwell,1988)p 201

[194]Courtney Kenny, *Kenny's Outlines of Criminal Law*,(16th ed, Oxford: Cambridge University Press,1952) p 585

[195] S.122

[196]*Eyu v State*[1988] 6 NWLR (pt 78) 602

[197] S. 123 of the Criminal Procedure Act.

[198]*Simidele v COP*(1966) NMLR 116. This decision follows section 363 of the CPA with resort to English law

[199]*R. v. Lawrence* (1935) 11 NLR 6.

whether the accused is guilty or not guilty. It is therefore imperative to say that without evaluation of evidence, there would not be a verdict and in the absence of a verdict no conviction can stand. An accused person may be handed down a verdict of not guilty in which case he is discharged and or acquitted or both.

2.5.5. **Sentencing and Punishment**

It is important to note that the punishments which can be inflicted under the Criminal Code are death, imprisonment, fine, whipping, caning and forfeiture[200] . Suffice it also to say that the punishment by amputation is also recognized under the Sharia Criminal Code. It is also possible that other written laws creating specific or a class of offence may make provision for any special type of punishment. Courts, no matter what grade have no power to create new punishments not provided for by the statute and that sentences for juvenile offenders are guided by the Children and Young Persons Law[201] . Sentencing therefore is the process of handing down punishment on the convicted accused person.

2.6: **The State of the Nigerian Judiciary**

The important nature of the Judiciary in Nigeria has been described in many formats. Some have described it as the last hope of the common man while yet others have referred to it as the most critical leg of the tripod on which democracy rest. According to Oyebode[202], it is almost axiomatic that the judiciary plays a pre-eminent role in any democratic dispensation.

The Nigerian judiciary has had a chequered history in its 52 years of Independence as the country has had to groan under various military dictatorships for 30 years. It is pertinent to say that during this period many judicial officers were bent on dancing to the music of the

[200] S. 17 CC, S. 366 CPA.
[201] Cap 22 Revised Laws of Anambra State 1991
[202] A. Oyebode, "Executive Lawlessness and the Subversion of Democracy and the Rule of Law" in Ajomoet. al., (eds).,*Nigeria: Democracy and the Rule of Law*,(Ibadan: Spectrum Books 1996), p.144.

dictators out of fear of sudden removal and subsequent banishment to penury and obscurity but yet for some others, they stood up to uphold their sacred oath to dispense justice without fear or favour.The judiciary has been defined as that branch of government responsible for interpreting the laws and administering justice; a system of courts, a body of judges[203]. Its primary duty is to exercise judicial power in the adjudication of disputes between persons inter se, between persons and government or authority, between the Federation and the state and between states inter se in all actions and proceedings for the determination of any question as to the rights and obligations of any person or government or authority[204].

The judiciary is a creation of the Constitution and derives its power from the enabling section(s) of the constitution. Section 6 of the 1999 Constitution as amended vests judicial powers in the courts established under Section 6(5) which includes the Supreme Court of Nigeria as the highest and final appellate body, the Court of Appeal which is subordinate to the Supreme Court, but hears appeals from lower courts, the Federal High Court and State High Court (including the High Court of the Federal Capital Territory, Abuja) which have coordinate jurisdiction in their different spheres of jurisdiction. There is also the Sharia Court of Appeal and the Customary Court of Appeal which exercises its own jurisdictions as allowed it by the Constitution and the National Industrial Court, also a superior court which is a creation of the Third alteration of the Constitution with exclusive jurisdiction over labour matters.

It is imperative to state at this point that though these various courts are in existence, yet they follow a laid down hierarchy as contained in the Constitution, hence the issue of the doctrine of *Stare decicis* which implies that a lower court is duty bound to follow the

[203]*Ibid*, p.864.
[204] Section 6(6)b of the 1999 Constitution of Nigeria as amended.

authority or decision of a higher court irrespective of whether it is right or wrong[205]. The question of whether this aids the administration of justice in the face of obvious conflicts that characterize judgments of most of our courts of present is a question for another day. This is so because there has been issue of conflicting decisions of the same court over the same issue[206]. However, since this is not the aim of this work, we shall leave this issue for another occasion. The other issue of importance is the issue of the system of our criminal justice administration. The system followed in Nigeria for dispensation of criminal justice is the adversarial system of common law inherited from the British Colonial Masters. The accused is presumed to be innocent and the burden is on the prosecution to prove his/her guilt beyond reasonable doubt. The accused also enjoys the right to silence and cannot be compelled to reply. This right to silence is oftentimes abused in the course of criminal justice administration. The aim of the Criminal Justice System is to punish the guilty and protect the innocent. In the adversarial system truth is supposed to emerge from the respective versions of the facts presented by the prosecution and the defence before an impartial judge. The judge acts like an umpire to see whether the prosecution has been able to prove the case beyond reasonable doubt and gives the benefit of doubt to the accused. The term proof beyond reasonable doubt according to Denning J "does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it permitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible but not probable', the case is proved beyond reasonable doubt but nothing short of that will suffice[207] .

[205]*Global Transport Oceanic V. Free Enterprises Nigeria Ltd*. (2001) 2 S.C. P.154.
[206]ObioraObeagu, *Emodi v Igbeke: A panel of biased judges?*,Vanguard Newspaper of May 13, 2010
[207]*Miller v Min. of Pensions*(1947) 2 AER, 32;*Bakare v State*,[1987] 1 NWLR (pt 52) 579; *Ogidi v State*[2003] 9 NWLR (pt 824) 1

Thus proof beyond reasonable doubt does not mean beyond all doubt as any reasonable doubt in the mind of the tribunal must be resolved in favour of the accused. Reasonable doubt according to Anyogu[208] , "must exclude unreasonable doubt, imaginary doubt and speculative doubt, a doubt not borne out of the facts and surrounding circumstances of the case". Once the prosecution has proved its case beyond reasonable doubt, it is then left for the accused person to introduce his defence. Once the accused person successfully pleads his defence or even introduces reasonable doubt in the mind of the tribunal, then he shall be acquitted. Where however he fails to provide a valid defence or a reasonable doubt, the court will find him guilty, convict him and then sentence him in accordance with the law on which he was charged.The State discharges the obligation to protect life, liberty and property of the citizens by taking suitable preventive and punitive measures which also serve the object of preventing private retribution that is so essential for maintenance of peace and law and order in the society.It is the parties that determine the scope of dispute and decide largely, independently and in a selective manner on the evidence that they decide to present to the court. The trial is oral, continuous and confrontational. The parties use cross examination of witnesses to undermine the opposing case and to discover information the other side has not brought out. The judge in his bid to maintain his position of neutrality never takes any initiative to discover truth. Where the Judge decides to intervene, he could be accused of descending into the arena, an accusation the superior courts do not take lightly. He does not correct the aberrations in the investigation or in the matter of production of evidence before court[209]. He only rules on facts raised by the parties. As the adversarial system does not impose a positive duty on the judge to discover truth he plays a passive role of ruling on

[208]Oyebode, o*p. cit*p 132

[209] It is pertinent at this juncture to state that the new Evidence Act has now given the Judge the responsibility to decide the admissibility of evidence obtained in an irregular manner. This is one of the innovations of the new Evidence Act and such evidence can only be admissible if it meets the need of justice from the perspective of the trial Judge. It is in doubt whether such ruling could form a ground of appeal and what the higher courts will likely do in such circumstance. See Section

objections by either of the parties and then delivers his judgment at the end of the proceedings. The system is heavily loaded in favour of the accused and appears insensitive to the victims' plight and rights. In the views of the Supreme Court[210] , it is contrary to the expected role of a judge as an impartial umpire and against the Spirit of fair hearing for him to descend into the arena of conflict or act for any of the parties. According to Nnaemeka-Agu, J.S.C., there are certain fundamental norms in the system of administration of justice we operate. That system is the adversary system, in contradistinction to the inquisitorial system…. Basically, it is the role of the judge to hold the balance between the contending parties and to decide the case on the evidence brought by both sides and in accordance with those rules. Under no circumstances must the judge under the system do anything which can give the impression that he has descended into the arena as obviously, his sense of justice will be obscured[211].

It is imperative also to say that, Section 6(4) of the Constitution empowers the National Assembly and orany House of Assembly to establish courts other than those aforementioned, with subordinate jurisdiction to that of a High Court. That would therefore bring the Magistrate courts, District Courts, Area Courts and customary courts in the various states where applicable under Courts also clothed with the Power granted to Courts in Section 6(6) of the Constitution. Under this, nevertheless one can say that the title judicial officers under the constitution did not apply to such courts that could be created by the National or State Assemblies except and unless such Court was inserted into the Constitution as was done by the National Assembly in the case of the National Industrial Court[212].

[210]*Ayubo, v. Aiyeleru* [1993] 3 N.W.L.R. 126.
[211]*Eholor V. Osayande* [1992]6 NWLR (pt. 249) 524 p 541-542
[212]Section 318. It is right to state here that the appellation Judicial officers apply only to heads of superior courts of record. However there is the need to cross check with the criminal code Cap C38 which classified

As we have noted, the Nigerian Judiciary has contended in a long period of time with the military incursion into politics. Indeed, the merger of the legislative and executive powers in the supreme military authorities curtailed the scope of judicial independence, giving rise to what generally came to be known as 'executive lawlessness,' ouster clauses, disobedience to court orders by the executive, acting with impunity and all the other manifestations of dictatorial or police state[213].

The effect of this therefore is that the Judiciary has most often been accused of being hands in gloves with the military in the rape of the Constitution. Indeed, Ademola, JCA had this in mind when he declared that "in matters of civil liberties in Nigeria, the courts must blow muted trumpets"[214]. Despite this, a few of the judges kept sacrosanct that oath of office they took to do justice to all manner of men without fear or favour. Consequently some courageous judges were ready, willing and able to stand up to the wiles of military usurpers and enemies of democracy have emerged at one point or the other[215]. Indeed in the famous case of *Governor of Lagos State V. Ojukwu*[216], Eso JSC in his lead judgment had observed that

> it is a very serious matter for anyone to flout a positive order of a court and proceed to taunt the court further by seeking a remedy in higher court while still in contempt of the lower court. It is more serious when the act of flouting the order of the court… is by the Executive… Executive lawlessness is tantamount to a deliberate violation of the constitution… the essence of the rule of law is that it should never operate under the rule of force or fear. To

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a magistrate as a Judicial officer. Nonetheless since the constitution is superior to the Code, the definition of the term judicial officers as contained in the constitution reigns supreme.

[213]Oyebode o*p. cit*, p.144.

[214]*WaChing Yao V. Chief of Staff* Suit No. CA/L/25/85 of 1 April, 1985 (Unreported).

[215]*Lakanmi& Another V. Attorney General of West & Others* ((1970) Vol. 6 NSCC 143 at 164 .

[216] [1986] I NWLR(pt 18) 621. See also *Obeya Memorial Hospital V. Attorney General of theFederation*(1987) 7 SC 152**;** *SaiduGarba .V. Federal Civil Service Commission and Anor* ((1988) NWLR (pt.71) 449.

> use force to effect an act and while under the marshal of that force, seek the court's equity is an attempt to infuse timidity into court and operate a sabotage of the cherished rule of law. It must never be.

In democratic dispensation, the judiciary becomes more relevant as without it no democracy can stand. According to Justice Oputa (Rtd),

> democracy and justice are twin bedfellows, man's capacity for justice makes democracy possible, but man's inclination to injustice makes democracy very necessary… Justice thus seems to be the most acceptable credential of democracy. There seems to be an umbilical cord linking democracy and justice. If that cord snaps the result will be injustice. It will all so be failure of democracy[217].

In any democratic government, there is the need for some semblance of separation among the three branches of government in order to efface arbitrariness which is likely to occur in the event of concentration of governmental powers in only one branch. This was why Montesquieu propounded the theory of separation of power which according to him functions to prevent this abuse and which is also necessary from the nature of things that one power should be a check on another"[218]. This system enables the Judiciary to look into the actions of the other arms of government most especially as it affects the constitution. According to Aka-Bashorun[219], the role of the judiciary is that of guardian of constitution. This role… put the judiciary in a taller and stronger position than the executive and, or legislature. For an organ which alone can pronounce the acts and deeds of the legislature and

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[217]Oputa , C. 'The Independence of the Judiciary: Myth or Reality', in Amucheazi, E. And Olatawura, O. (Ed) *The Judiciary and Democracy in Nigeria,* National Orientation Agency, 1998, p.168.

[218]National Open University of Nigeria Module for Constitutional Law, 2008

[219] Aka-Basorun, A., 'The Supreme Court and the Challenges of the '90's' in Akinseye, George (ed), *Law, Justice and Stability in Nigeria: Essays in Honour of Justice KayodeEso*, (Ibadan: JSMB,1993)p.11

executive unconstitutional, illegal, null and void and of no effect, must by implication be the supervisor of the other arms of state and must of necessity be the supervisor to the supervised.

In this present democratic dispensation, established in 1999, the Nigerian Judiciary has been at the forefront in the protection of the democratic ideals for which any democracy is known, this may not be without prejudice to few judicial officers that are yet living under the illusion of military mentality. This could be seen in several of the decisions particularly of the Supreme Court in the area of politics[220]. There is also their stand in the distribution of resources[221]. Despite all these accolades on the judiciary, corruption has remained the most devastating and reprehensible ailment of the judiciary. By virtue of their professional training and culture they are supposed to be men and women of integrity and probity. However, this is not the case as according to Oputa JSC (Rtd.),

> some of the samples of decay in the judiciary include: paying tips at the police charge office and court Registries before anything can be done, lawyers charging clients extra fees in the pretext that they are going to settle the judge, some dishonest judges employing agents to collect bribes for them while some courageous ones collect by themselves[222].

Recently, there was a fiasco between two powerful heads of the nation's judiciary. The incident further dampened the morale of the masses with respect to their confidence in the judiciary[223]. Aside this issue of corruption, there has been the issue of delay in our justice

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[220]*AtikuAbubakar and Action Congress v. INEC*,.(2008) 12 SC (Pt. II) 1; *Obi v. I.N.E.C.* (2007) 7 S.C. 268

[221]*Attorney-General of the Federation v. Attorney General of Abia State and 35ors* [2002] 6 NWLR (pt 764) 542.*Attorney-General of Lagos State v Attorney-General of the Federation and others* [2003] 12 NWLR (pt 833) 1,

[222]Akinseye, G, *op cit.*p.168.

[223]The 'war' between former CJN KastinaAlu and Salami PJCA. This issue still reverberates throughout the nation despite the fact that both contenders had left their various positions. It is still a black paint on the untainted white shirt of the Nigerian Judiciary

delivery system. Aguda[224] describes our slow judicial system as bankrupt while Prof. ItseSagay[225] is of the opinion that our judicial process is an elaborate charade, deliberately enacted to ensure permanent adjournment of justice and the rule of law. There are varied causes of this anomaly and they include under staffing, under funding, lack of necessary equipment and machinery, slow pace of investigation, taking evidence in long hand; cumbrous and outdated rules of procedure, laziness and inexperience on the part of some judges and lawyers; incessant power outages etc.[226]

We can therefore say that our Judiciary is doing its best within the limited space they found themselves and we hope that there will be more improvement as many men and women of integrity are appointed and equipped with the best equipment so they can deliver justice to the citizenry and thus preserve our democratic ideals.

2.6.1: **Definition of Criminal Justice**

What then is the 'Criminal Justice System?' The Criminal Justice System refers to the entire spectrum of institutions, rules and practices aimed at social control, by the prevention, detection, investigation, prosecution and punishment of crime[227]. The system thus refers to the police and policing arrangements, the Directorates of public prosecution, the courts, the prisons, the whole range of non-custodial sanctions, and the criminal laws and procedure codes.The major function of the state is undoubtedly social control, the protection of lives and livelihoods, and general security in the community. In many ways the success of other human engagements in the society largely depends on the extent of law and order, and or the

[224]A.Aguda,*The Crisis of Justice*, (Akure: Eresu Hills Publication, 1986) p.39.
[225]Quoted in the Guardian on Sunday, June 23, 1991 at p.8.
[226]In fairness to the Nigerian Judiciary, many efforts have been made to speed up justice dispensation and some of them are yielding fruits now. The delay recently is most often occasioned by the institution and not by the person.
[227]Y Osibanjo, 'The State of Criminal Justice in Nigeria'A paper delivered at the 10th Justice Idigbe Memorial Lecture on Friday, 11th December, 2009 at the University of Benin, Benin City.

assurance of personal and corporate safety. The failure of the criminal justice system is consequently a failure of the state itself. Indeed one of the most reliable indicators of a failed state is a criminal justice system that cannot deliver law and order[228].

A system according to Schoderbeck[229], is an organized or complex whole and assemblage or combination of things or parts forming a complex or unitary whole. Criminal Justice system according to IwaremieJaja[230] is a process when the different components coordinate their independent functions by processing the criminal suspect from one stage to the other. It could be defined both as an academic discipline and as a legal process. As an academic discipline, criminal justice provides a thorough understanding of the criminal justice system in relation to the society. It involves concentration on law enforcement, corrections or legal studies. As a Legal process, it involves the procedure of processing the person accused of committing a crime from arrest to the final disposition of the case.[231] Clarke and Kramer were of the opinion that it is possible to view criminal justice as a consequence of decision making stages. Through this system, offenders are either passed on to the next stage or diverted out of the system. This diversion may be due to any number of reasons such as lack of evidence or a desire to reduce the load on the system. Each subsequent stage of the process is dependent upon the previous stage for its elements; it is this dependence that best exemplifies the 'system' nature of the criminal justice[232].

To ground this issue one has to look at hard facts as opposed to guess work. The figure on the rates of conviction as at 2006 in Nigeria when compared with other nations of the world is poor. It was shown that out of a country of 167 Million only, 39,011 were convicted for

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[228]*Ibid*

[229]P PSchoderbeck*Management Systems*, (New York: Wiley, 1968).

[230]D IwaremieJaja, *Criminology: The Study of Crime*, (Owerri: Springfield Publications, 2003).p47

[231] S IOnimajesin, Criminal Justice System in Nigeria:An Appraisal, in ROLasisi and JOFayeye (eds*) Leading Issues in General Studies:Humanities and Social Sciences*,General Studies Division, Published by General Studies Division,University of Ilorin, Ilorin, Nigeria,2009) p 122

[232]P K Clarke and J H.Kramer,*Introduction to American Corrections*, (Boston: Holbrook Press Inc., 1977)p 131

crimes in Nigeria compared to the South Africa's 160,198 convictions in a country of 47.4 million.The figures show that relative to our population, the number of convicts per capita is extremely low. This may either mean that Nigerians are an incredibly law abiding people or that custodial sentences are not frequently used or that the criminal justice system has quite significant problems[233].

2.6.2: The Tripod in Nigeria Criminal Justice Administration System and their Problems

In Nigeria, the Criminal Justice System stands on a tripod made up of the Police, the Court and the Prison System. The Police as an institution is the most visible part of the tripod in the sense that they initiate the process. It is the police that receives complaints and carries out arrests. They also investigate and at the end of the day charge the suspect to court. At the court still, the Police may prosecute the case till its logical end or testify in the course of the quest for justice. The implication of this is that an efficient system of criminal justice requires an effective and efficient police system. The functions of the police in Nigeria are espoused in Section 4 of the Police Act[234].

The second leg of the tripod is the Courts. These Courts mainly the criminal courts are faced daily with criminal matters brought to them by either the Police or from the State Ministry of Justice. It is theses courts that the Police armed with the result of their investigations arraign the suspect. Once this arraignment takes place, the Police take a back sit in some circumstances. The further roles they can play could be to testify for the prosecution where they are not prosecuting. The Court will then process the admission or otherwise of the evidence garnered in the course of the investigation and at the end of the day sentence the accused person or acquit him.

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[233] *Ibid*
[234] Cap P19 L.F.N, 2004

Where the Court sentences, the Prisons automatically enters the field, for it is to the Prisons that the convict will be sent to for reformation and for punishment. There are many objectives of the prison system. It could be for reformation or for removal or even for punishment. An effective criminal justice system therefore requires this tripod to function effectively. In Nigeria, the reverse is the case as the Police is characterized by widespread corruption and inefficiency; the operational and management challenges of that arrangement are evident in the chaotic state of the Nigerian Police. From the point of view of effective coordination of the institutions of criminal justice, it is evident that there is a problem where the chief law officer of the state cannot determine how many police men he requires to keep law and order. This has led to the recent agitations by some governors for state police. Many of the delays in the criminal process are based on the conflicts in priorities between the federal command of the police and local needs, the transfer of investigating police officers out of state without consultation with the state directorate of public prosecution. There can be no excuse today, for the non-use of the broad range of criminalistics, i.e. the application of various sciences in the gathering of evidence which are the results of examination and comparison of biological evidence. These include Impression evidence, such as fingerprints, footwear impressions and tire impressions, ballistics, (scientific examination of firearms and ammunition). Forensic DNA Analysis is also quite common place in many jurisdictions. That the Nigeria Police does not have its own laboratories with the capacity of DNA Analysis is regrettable indeed. This is clear in the recent Dana air mishap where DNA tests were carried out in far-away UK. How about digital forensics? Which deals with the many scientific methods of recovery of data from electronic and digital equipment? A great deal of these forensic resources is quite affordable and the technology and training are easily accessible today. Fingerprint technology is clearly not rocket science. It is perhaps the oldest of the forensic technologies and had been available in the Nigeria Police force for decades. It

however fell into disuse and along with the fact that no database of fingerprints even of suspects or convicts exists. Without such data bases, gathering fingerprint evidence is of limited use since there is little to match what is gathered with. This could perhaps explain the reason for the recent introduction of the Police Biometric Motor Registry which sole aim is to capture the biometric data of car owners into a Police database.

The Courts lack the necessary manpower and training to be effective while the Prisons are ill equipped to undertake its own task. Judges in many jurisdictions still take verbatim notes of proceedings in longhand, and have to contend with power outages, uncomfortable court rooms, shortages of stationery and other office consumables. At the end, the criminal justice system in Nigeria is suffering and the worst hit are the inmates who have languished and are still languishing in prison awaiting trial and invariably denied justice. A study conducted in 2009 showed that Nigeria had a total of 40,447 prisoners across the various prisons in the Country. Out of this figure, 63% were awaiting trial inmates.[235]The figure of pretrial detainees and the inordinate length of pretrial detention has been a long running embarrassment. It is indicative of some of the grave problems of delays in processing suspected criminal activity through the criminal justice system. According to Osibanjo[236], the implications are profound. First there are issues of violations of the rights of detainees ranging from rights to fair and prompt trials to possibly torture and degrading treatment and other violations of the right to dignity of the human person created by the congestion in prisons and its associated problems. Second, is the non-effectiveness of the penal system's stated objective of rehabilitation and reform of the prisoner. Clearly, where the vast majority of inmates using prison facilities and subject to its regimen are not convicts and may never be, those for whom the system is meant can hardly benefit from its programs'.

[235]Y Osibanjo, 'The State of Criminal Justice in Nigeria'A paper delivered at the 10th Justice Idigbe Memorial Lecture on Friday, 11th December, 2009 at the University of Benin, Benin City.

[236]*Ibid*.

Slow criminal trials are a great disservice to the criminal justice system but must be understood as a function of the systemic problems of the entire criminal process. Poor investigations, absence of key witnesses including investigators at trials, delays in the prosecutorial advice, will slow down even the best resourced and prepared courts.

2.7: The Accusatorial System in Practice in Nigeria: An Overview

Accusatorial justice and adversarial justice are not identical terms. Accusatorial takes place in a prosecutor-victim level, whereas adversarial takes does it in a prosecutor-defendant level. Accusatorial system grounds its roots in history, where we can find it much earlier than the inquisitorial one[237].

The adversarial system is characterized by a way of solving conflicts in which the counsel for state and the defendant play a very active role, presenting the questioning to the witnesses in the presence of a neutral judge, whose task is to guarantee respect to the rules of evidence.. The system as adopted in Nigeria has several misgivings which have prompted questions as to how the system has fared and whether the system has failed or not. This is very vital at this point in Nigeria's history.[238] . An adversarial system is where the role of the court is primarily that of an impartial referee between the prosecution and the defence. Under the adversarial system, two or more opposing parties gather evidence and present the evidence, and their arguments, to a judge or jury. The Judges decide, only when called upon by counsel rather than of their own motion, on admissibility of evidence; costs; and procedural matters. The adversarial system as practiced in Nigeria is an offshoot of the Common Law and by implication the inquisitorial system is of the Civil law. Inherent in the adversarial system is the accusatorial procedure which is a system of criminal justice in

[237]S.C.Thaman, 'Is America a Systematic Violator of Human Rights in the Administration of Criminal Justice', (2000) 44.*St.Louis U.L.J.* p. 1013-1017.
[238]Communiqué on the Roundtable on the Adversary System: A Failed Process? Nigerian Institute of Advanced Legal Studies held on Tuesday, 22nd March 2011 at the Professor Ayo Ajomo Auditorium of the Institute at the University of Lagos Campus, Lagos.

which conclusions as to liability are reached by the process of prosecution and defence. The accusatorial system is the cornerstone of the Anglo-Saxon system of justice where the accused is presumed innocent until proven guilty. It is the duty of a party to litigation to prove a fact or facts in issue and generally, the burden of proof falls upon the party who substantially asserts the truth of a particular fact. The inquisitorial procedure on the other hand is a system of criminal justice in force in some European countries but not in England. The inquisitorial system applies to questions of (criminal) procedure as opposed to questions of substantive law; that is, it determines how criminal enquiries and trials are conducted. In the inquisitorial system, the judge is not a passive recipient of information. Rather, the judge is primarily responsible for supervising the gathering of the evidence necessary to resolve the case. He or she actively steers the search for evidence and questions the witnesses, including the respondent or defendant. The inquisitorial system flourished in England into the sixteenth century, when it became infamous, England gradually moved toward an adversarial system. In the inquisitorial system the court is actively involved in investigating the facts of the case. The distinction between an adversarial and inquisitorial system is theoretically unrelated to the distinction between civil and common law systems. Many jurisdictions adopt a blend of both. E.g Pre-Trial proceedings under Lagos State High Court Rules. In some jurisdictions, Nigeria inclusive, particularly in juvenile proceedings the trial judge may participate in the fact-finding inquiry by questioning witnesses even in adversarial proceedings.

As members of the judiciary, the investigating judges are independent and outside the province of the executive branch, and in many jurisdictions separate from the Office of Public Prosecutions which is supervised by the Minister of Justice. There are variations in existing inquisitorial systems. In France, prosecutors under Ministry of Justice working with police and examining judges are used only for severe crimes, e.g., murder and rape, as well

as for moderate crimes, such as embezzlement, misuse of public funds, and corruption, when the case has a certain complexity. They must file an indictment with the trial court if there is sufficient evidence and are not at liberty to discontinue an investigation[239]. The goal of both the adversarial system and the inquisitorial system is to find the truth. The adversarial system encourages competition and individual rights whereas the inquisitorial system places the rights of the accused secondary to the search for truth. The most striking differences between the two systems can be found in criminal trials. Privilege against self-incrimination, presumption of innocence and the burden of proof is reflected in most adversarial systems as a criminal defendant does not have to answer questions about the crime itself but may be required to answer all other questions at trial. These other questions concern the defendant's history and would be considered irrelevant and inadmissible in an adversarial system. In an adversarial system, the defendant is not required to testify. Since a case will not be instituted against a defendant unless there is evidence indicating guilt, the presumption of innocence – so fundamental in the adversarial system - is of little significance in the inquisitorial system. There are also variations in existing adversarial systems. In the United Kingdom, the court is permitted to make inferences on the accused failure to face cross-examination or to answer a particular question. In the United States, Fifth Amendment has been interpreted to prohibit a jury from drawing a negative inference based on the defendant's invocation of his right not to testify, and the jury must be so instructed if the defendant requests. In Nigeria also, the Judge is prohibited from making a negative inference when the accused opts for his right to silence. As an accused is not compelled to give evidence[240] in a criminal adversarial proceeding, he may not be questioned by prosecutor or judge unless he chooses to do so. However, should he decide to testify, he is subject to cross-examination and could be found

[239]Morris Ploscowe, 'Development of Inquisitorial and Accusatorial Elements in French Procedure', *23 Am. Inst. Crim. L. & Criminology*372 (1932-1933)

[240]See s.36(11) of the 1999 CFRN as amended; See*Balla&Anor .v. C.O.P*(1973)1 N.M.L.R.61

guilty of perjury. As the election to maintain an accused person's right to silence prevents any examination or cross-examination of that person's position, it follows that the decision of counsel as to what evidence will be called is a crucial tactic in any case in the adversarial system and hence it might be said that it is a lawyer's manipulation of the truth. Certainly, it requires the skills of counsel on both sides to be fairly equally pitted and subjected to an impartial judge. The inquisitorial system on the other hand, the power to investigate offences rests primarily with the judicial police officers. They investigate and draw the documents on the basis of their investigation. The Judicial police officer has to notify in writing of every offence which he has taken notice of and submit the dossier prepared after investigation, to the concerned prosecutor. If the prosecutor finds that no case is made out, he can close the case. If, however he feels that further investigation is called for, he can instruct the judicial police to undertake further investigation. The judicial police are required to gather evidence for and against the accused in a neutral and objective manner as it is their duty to assist investigation and the prosecution in discovering truth.[241]

If the prosecutor feels that the case involves serious offences or offences of complex nature or politically sensitive matters, he can move the judge of instructions to take over the responsibility of supervising the investigation of such cases. To enable the Judge of instructions to properly investigate the case, he is empowered to issue warrants, direct search, arrest the accused and examine witnesses. The accused has the right to be heard and to engage a counsel in the investigation proceedings before the judge of instructions and to make suggestions in regard to proper investigation of the case. It is the duty of the judge of instructions to collect evidence for and against the accused, prepare a dossier and then forward it to the trial judge. The accused is presumed to be innocent and it is the responsibility of the judge to discover the truth. The statements of witnesses recorded during

[241] www.justice.govt.nz accessed on 23/4/2011

investigation by the judge of instructions are admissible and form the basis for the prosecution case during final trial. Before the trial judge the accused and the victim are entitled to participate in the hearing. However the role of the parties is restricted to suggesting the questions that may be put to the witnesses. It is the Judge who puts the questions to the witnesses and there is no cross-examination as such. Evidence regarding character and antecedents of the accused such as previous conduct or convictions are relevant for proving the guilt or innocence of the accused. The standard of proof required is the inner satisfaction or conviction of the Judge and not proof beyond reasonable doubt as in the Adversarial System. Another important feature of the Inquisitorial System is that in respect of serious and complex offences investigation is done under the supervision of an independent judicial officer 'the Judge of Instructions' who for the purpose of discovering truth collects evidence for and against the accused.

Over the years taking advantage of the lacunae in the adversarial system,some defendant have thus escaped convictions. This has seriously eroded the confidence of the people in the efficacy of the System. Therefore it is necessary to examine how to plug the escape routes and to block the possible new ones.

2.7.1: **The Right to Silence**

The primary responsibility of the State is to maintain law and order so that citizens can enjoy peace and security. Life and personal liberty being very precious rights, their protection is guaranteed to the citizens as a fundamental right under Chapter 4 of our Constitution. These rights are internationally recognized as Human Rights. When there is an invasion of these rights of the citizens it becomes the duty of the State to apprehend the person guilty for such invasion, subject him to fair trial and if found guilty to punish him

The accused is presumed to be innocent and the burden is on the prosecution to prove beyond reasonable doubt that he is guilty[242]. The accused also enjoys the right to silence and cannot be compelled to reply. In the adversarial system truth is supposed to emerge from the respective versions of the facts presented by the prosecution and the defence before a neutral judge. This right of silence, like all other good things, may be loved unwisely, may be pursued too keenly and may cost too much[243]. The right of silence is not to be confused with the right to be presumed innocent, though both fall within the concept of a fair trial and are referred to in the same section of our constitution. The principle underlying the presumption of innocence is that a person must not be convicted where there is a reasonable doubt about his guilt. It seeks to eliminate the risk of conviction based on factual error. The right to silence, like the presumption of innocence, is firmly rooted in both our common law and statute. The common law principle is that no one can be compelled to give evidence incriminating himself, either before or during the trial. Our Constitution[244] is more explicit. It provides that any person who is arrested or detained shall have the right to remain silent or avoid answering any questions until after consultation with a Legal Practitioner or any other person of his own choice. It further provides that every accused person has the right to a fair trial, which includes the right to be presumed innocent[245]. Further, Section 183 of the Evidence Act[246] provided as follows: No one is bound to answer any question if the answer to it would, in the opinion of the court, have a tendency to expose the witness or the wife or husband of the witness to any criminal charge, or to any penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for:

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[242]See *Udo v. State* (2005)7 SC (pt11)83, *The State v. Akpabio* (1993)4 NWLR (pt 286)204. *TajudeenAlabi v. State* (1993)9 SCNJ 177-178

[243] Adapted from *Pearse v Pearse* 63 (1846) Eng Rep 950, 957
[244] S.35(2)
[245] S.36
[246] 2011

Provided that –

(a) a person charged with an offence, and being a witness in pursuance of section 180 of this Act may be asked and is bound to answer any question in cross examination notwithstanding that it would tend to incriminate him as to the offence charged;

(b) no one is excused from answering any question only because the answer may establish, or tend to establish that he owes a debt or is otherwise liable to any civil suit either at the instance of the Federal, State, or Local Government or any other person;

(c) nothing contained in this section shall excuse a witness at any inquiry by the direction of the Attorney-General of the Federation or of a State, under Part 49 of the Criminal Procedure Act from answering any question required to be answered under section 458 of that Act. Note also that a voluntary statement by the accused leading to discovery of any incriminating fact is admissible under S-28 of the Evidence Act. Following English Case law[247], the right to silence has many facets. It consists of a disparate group of immunities which differ in nature, origin, incidence and importance[248].

It is clear, however, that this right which had as its aim the protection of an accused against abuse has now become a device which shields the truth from the light of day and itself leads to abuse of the process of criminal justice.

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[247] *R v Director of Serious Fraud Office, 'Ex p' Smith* 1993 AC 1 (HL) 30

[248] They are:1 A general immunity, possessed by all, from being compelled on pain of punishment to answer questions posed by other persons or bodies.2 A general immunity, possessed by all, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.3 A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.4 A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.5 A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.6 A specific immunity (at least in certain unmentioned circumstances), possessed by accused persons undergoing trial, from having adverse comment made on any failure(a) to answer questions before the trial, or(b) to give evidence at the trial.

The right to silence and the right not to be questioned have even in England come in for scathing criticism. Bentham[249] called the rule "one of the most pernicious and most irrational notions that ever found its way into the human mind." Professor Glanville Williams calls it an irrational psychological reaction to past barbarism to refuse questioning of an accused. .."the rule cannot, if dispassionately regarded, be supported by an argument referring to torture. No one supposes that in to question an accused person, if accompanied, as it would be, by safeguards, would result in any ill treatment of him. The risk, if there is one, is just the opposite: that if dangerous criminals cannot be questioned before a magistrate or judge, the frustrated police may resort to illegal questioning and brutal 'third degree' methods in order to obtain convictions."[250] Professor Salmond[251] states: "The most curious and interesting of all these rules of exclusion is the maxim *Nemotenetur se ipsumaccusare*[252]....it seems impossible to resist Bentham's conclusion that the rule is destitute of any rational foundation, and that the compulsory examination of the accused is an essential feature of sound criminal procedure."

There is a lot of inferences deducible whenever the accused person decides to exercise his option of keeping quiet. An inference of guilt may be drawn from four facts: Withholding from the police during interrogation of a fact relied upon at the trial; failure to respond to police questions about suspicious things found in his possession or at the place of his arrest or about remarks he made at such time; failure to explain to the police his presence at the scene of the crime at the relevant time; failure to testify where it would have been appropriate for an innocent person to do so. In America, this principle has also come under criticisms. The American Supreme Court[253] held that the rule against self-incrimination was

[249]Glanville Williams *The Proof of Guilt* (3rd ed.,London: Steven & Sons, 1963) p53
[250]*Ibid*
[251]Glanville Williams, *Salmond, Jurisprudence*, (11th ed, London, Sweet and Maxwell, 1957), p. 178
[252]No man is bound to accuse himself
[253]*Twining v New Jersey* 211 US 78 113

not a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of citizens of a free country. “It has no place in the jurisprudence of civilized and free countries outside the domain of the common law, and it is nowhere observed among our own people in the search for truth outside the administration of the law.” A fundamental issue raised by Ingraham[254], is that a person who is morally or legally accountable for his conduct, owes a moral duty to answer questions relevant to that conduct to persons in authority -- i.e. to persons who have the official task of conducting investigations into suspected misconduct -- whenever a sufficient basis exists for conducting such inquiry. Every citizen has a duty to give frank answers to relevant questions concerning a crime to the police. An obdurate silence in the face of an accusation of involvement must be capable of leading to whatever reasonable inferences can be drawn therefrom. One of those could be concealment of guilt. Further, Ingraham posited that common sense expects one who is accused of a crime to reply, explain and attempt to exonerate himself. It does not threaten the privilege against self-incrimination because the facts called for are exculpatory, not inculpatory. This would include full disclosure of the defence a priori and avoid hide-and-seek litigation. Professor Wigmore, when dealing with police interrogation wrote that a thorough questioning of the suspect is necessary to uncover accomplices. “To forbid this is to tie the hands of the police. The attitude of some judges towards these necessary police methods is lamentable; one would think that the police, not the criminals, were the enemies of society. To disable the detective police from the very function they are set to fulfil is no less than absurd.” And as an alternative to police questioning he proposed: “In short, let an authorized, skilled magistrate take the confession. Let every accused person be required to be taken before a magistrate, or the district attorney, promptly upon arrest, for private examination; let the magistrate warn him of his right to keep silence; and then let his

[254] B L Ingraham ‘Right of Silence, the Presumption of Innocence, the Burden of Proof, and a Modest Proposal: A Reply to O'Reilly’ (1996) 86(2)*Journal of Criminal Law and Criminology* 556-594.

statement be taken in the presence of an official stenographer, if he is willing to make one..... Such, in general, is the method in other civilized countries[255]." The essential difference between the adversarial and the non-adversarial [so-called inquisitorial] systems is that the first is lawyer driven whereas the last is judge controlled. In the first the lawyers for the state and accused are single-mindedly committed to opposing sides of the case. In the inquisitorial system the judge is committed to neither side but actively and independently seeks the truth. Certain proposals are needed to actualize this. They include that upon arrest, should the prosecution request this, an accused must be questioned fully by an examining magistrate on his part [if any] in the alleged crime. He must be obliged to answer all legitimate questions fully. He must be entitled to the presence of a legal representative to ensure that the magistrate stays within the bounds of the permissible. This deposition must be audio-visually recorded and be admissible in court against him. An inference of guilt may in appropriate circumstances be drawn from the accused's failure to cooperate and his refusal to state his case at the commencement of the trial may be punished as contempt of court. In Canada right to silence is recognised by Section 11(c) of the Canadian Charter of Rights and Freedom. Section 4(6) of the Canadian Evidence Act 1985 provides that failure to testify shall not entitle the court to draw an adverse inference against him. In Italy, adverse inference is drawn against the accused for failure to testify. In Japan the accused has the right to silence and no adverse inference can be drawn on his refusal to testify. In South Africa, right to silence is enshrined in Section 35 of the Bill of Rights and no adverse inference can be drawn against the accused for failure to answer any question during investigation or trial.

So far as Australia is concerned, in New South Wales, the accused has the right to silence and Section 20 provides that adverse inference can be drawn against the accused for failure

[255]J H Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*(3rd Ed, Boston: Little, Brown and Company, 1940) p 851

to testify only when a comment is made by another accused in the case. The position is slightly different in the State of Queensland. In the case of *Weissensteiner vs. Queen*[256] the majority has held that adverse inference can be drawn on the failure of the accused to testify where the evidence establishes a prima-facie case.

The Law Commission of North South Wales has in its recent report No.95 recommended that legislation based on Sections 34, 36 and 37 of the United Kingdom Criminal Justice and Public Order Act 1994 should not be introduced in South Wales. However they have made recommendations No.5 (a), 5(b) and No.10 to require the accused to disclose his defence in several respects and upon failure to do so to draw adverse inference and also to draw adverse inference on the refusal of the accused to testify. United Kingdom has during last few years undertaken several measures to reform the Criminal Justice System. The reforms which have a bearing on the right to silence of the accused are contained in Sections 34, 35, 36 and 37 of the Criminal Justice and Public Order Act 1994. These provisions permit "proper inferences" being drawn from the silence of the accused to the questions put to him during investigation or trial.In Northern Ireland there are similar provisions in the CriminalEvidence (Northern Ireland) Order 1988. In that Country the cases are tried with the help of the Jury. A case arising from Northern Ireland where silence of the accused was taken into account came up for consideration in the House of Lords in the case of *Murray v DPP*[257], in that case Lord Mustill observed that no finding of guilt can be arrived at merely on the basis of the silence of the accused unless the prosecution makes out a prima-facie case. On appeal, the European Court of Human Rights in *Murray v United Kingdom*[258] upheld the validity of the Irish Law holding that they did not have the effect of denying the

[256] (1993) 178, Common Law Report 217
[257](1993) Cr.APP.REP.151.
[258] (1996) 22 EHRR-29

right of the accused to a fair trial or of rebutting the presumption of innocence flowing from Article 6 of the European Convention.

The Court however held that two conditions should be satisfied for drawing appropriate inferences from the silence of the accused, namely (i) that the prosecution must firstly establish prima-facie case and (ii) that the accused should be given an opportunity to call his Attorney when he is interrogated during investigation or questioned during the trial. In the light of this decision of the European Court of Human Rights, the Criminal Justice and Public Order Act 1994 applicable to England and Wales was amended to bring it in conformity with the view taken by the European Court of Human Rights and a provision requiring the accused to be informed of his rights to call an Attorney was added.

Shortly thereafter a case arose from the United Kingdom in which the provisions of the English Act permitting appropriate inferences being drawn from the silence of the accused were challenged. The matter ultimately reached the European Court on Human Rights which rendered its judgment in *Condronv United Kingdom* on the 2nd of May 2000. The European Court of Human Rights did not dissent from the view taken by it earlier in Murray's case. However the Court set aside the conviction of Condron on the ground that there was misdirection by the Court to the jury in the context of the stand taken by the accused that he remained silent on the advice of his Solicitor. The provisions of law which permit appropriate inferences being drawn against the accused on his silence were up-held following its earlier decision in Murray's case.

2.7.2: **The advantages/disadvantages of the system**

Proponents of the adversarial system claim it is fairer and less prone to abuse than the inquisitional approach, because it allows less room for the state to be biased against the defendant.The adversarial system ensures that the rights of the accused person are not so

trampled upon in the course of trial. On the downside, it is submitted that it is expensive for the state to prosecute accused persons. There is also the agitation that adversarial system creates enormous delays in our courts.

For the inquisitorial system, it is argued that the power of the judge is limited by the use of lay assessors and that a panel of judges may not necessarily be more biased than a jury.. The fact that despite important differences in the way criminal law is administered, authorities in inquisitorial and adversarial jurisdictions struggle with similar problems. Each system has its inherent structural shortcomings in terms of acceptable standards of prosecution of cases, in terms of rights and in terms of outcomes. Each type of jurisdiction also faces resource limitations in in a context of increasing criminalization of conduct and public concern about criminality and victimization.

2.8: **World Scenario**

As far back as 30 years ago, it had been acknowledged that the adversarial system has not served its purpose. Without doubt, it is quite manifest that the adversarial system of litigation can no longer sustain the justice delivery process as the only access to justice. Legal scholars agree that the litigation process is grossly inadequate to serve as the sole dispute resolution mechanism in a developing society. A lot of disaffection has been generated by the monopolistic hold of litigation in the administration of justice in common law jurisdictions. They range from the congestion of the court dockets, inordinate delays occasioned by the inflexible technical and cumbersome procedural system of litigation coupled with the unencumbered access by litigants from the court of first instance to the Supreme Court on the flimsiest and frivolous applications which may be totally unrelated to the substantive issues before the court. Judges are often helpless in such situations, watching helplessly in deference to the hallowed principle of fair hearing and the antiquated aphorism

that "a Judge must not descend into the arena,"[259] the resultant effect is that the life spans of cases are unduly elongated. By virtue of our Commonwealth heritage of the Common Law, received English Law and its accompanying adversarial system of litigation, the Nigerian judiciary and invariably other Common Law jurisdictions have been faced with or are facing similar problems arising from our dependence on these inherited systems. The cradle of the Common Law practice and adversarial system has not been insulated from the malaise inflicting the administration of justice system. The multi-door court system was conceptualized in the United States as a judicial panacea to overhaul the justice process and to ameliorate the problems in the traditional court system. Frontloading is a good faith effort to assist the adversarial system but has its own challenges. India has departed from the adversary system and appoints commissioners for the purpose of investigating facts with a view to gathering material data bearing upon the issues involved in a case. When the report of the commission is filed copies are made available to both sides of the dispute. Then on the basis of the report which is prima facie evidence and the affidavits the court decides the case and gives relief. There is no uniformity in the award of damages in human rights cases in Nigeria. Challenges to victim's rights in adversary system include poverty, ignorance, justiciability of social and economic rights, conservative judges and long hand recording of proceedings.[260]

2.8.1: **Need for Reform**

Consequently, following the path of the Roundtable we also agree that there is need to introduce the jury system as in most Common Law systems. This encourages natural justice as people of your own status/background sit over you in judgment. Advocacy should be cut off in trials because advocacy and brief writing cannot be reconciled. The concept of judicial

[259] *Oteju&ors v Ologunna&ors*[1992] 8 NWLR (Pt.262) at 752
[260] This passage is culled extensively from the recommendations of the Roundtable aforesaid.

precedent should be minimisedby way of distinguishing because it stalls the imaginativeness, initiative and thought of the judges. This is not the case in the inquisitorial system. A judge should 'descend into the arena' where it is necessary in order to clarify issues. The role of the judge as far as facts are concerned should be whittled down. Provisions Section 139 of the Evidence Act should be revisited. A review of the Constitution, Criminal Procedure Act and Civil Procedure Act should be undertaken. Oath-taking has served little purpose and should be discarded. Pre-trial processes such as discoveries and interrogatories should be introduced and then the length of time involved in it should be reduced to save time. The presumption of innocence should be retained only in capital offences such as cases of murder but modified in other cases. There must be a review of the burden of proof principle in such a way that inferences may be deduced from the accused person. The concept of justice that is amorphous should be discouraged and a definite and certain definition of Justice be adopted. Nigeria should employ the new method of investigating facts adopted in India. The Nigerian Courts should introduce the epistolary jurisdiction of the High Court as in the case of India. This is the process whereby by a letter addressed to the judge of the high court, an action alleging violation of human rights has lawfully commenced. Human rights litigation should be treated as an emergency and given priority in deserving cases. In deserving human rights cases, the court should award exemplary damages to reflect the extent of damage done to the applicant. The Human Rights Commission should assist financially other NGOs that have taken up violations of rights cases before the courts. The new rules[261] have watered down the harsh application of the *locus standi*rules and so more public spirited associations should prosecute violations of human rights on behalf of the poor. The inherited adversary system should be redefined to meet Nigerian needs and realities. The delays inherent in the system must be removed. Most

[261] Of Fundamental Rights Enforcement Rules 2009

importantly, there could be a fusion of both the adversarial and inquisitorial system where the need arises. Again the issue of right to silence should be given another look to know whether an inference could be drawn from the silence in order to aid the delivery of justice. There must be wholesale reform of the system not piecemeal reform. Whatever system is practiced, it is important that justice should not only be done, but it must be seen to have been done by all who are involved in the process of doing justice and for all who desire that justice be done.

CHAPTER THREE

REVIEW OF SOME RELATED STATUTORY LEGAL FRAMEWORK IN COMBATING TERRORISM IN NIGERIA

3.0: **Background to Study**

It is said that Nigeria has been doomed to witness endless cycles of inter-ethnic, inter religious violence because the Nigerian government has woefully failed to enforce laws protecting its citizens from wanton violence.[262] It is this inter-ethnic and inter religious violence that have today metamorphosed into terrorism and it is imperative to state that the Laws can help in checking the menace of terrorism in Nigeria. It is these existing legislative frameworks aimed at fighting terrorism in Nigeria that we will review in this chapter. The discourse will first focus on Nigerian statutes on terrorism after which we will take a look at the International Instruments that also could be used in the fight against terrorism. It is also pertinent to state that most of the domestic legislations against terrorism are in the area of Criminal Laws and that the existing ones if well and effectively implemented could go a long way in recording a substantial success in the fight against terrorism in Nigeria.

3.1: **Some Relevant Nigerian Legislation**

3.1.1: **The EFCC Act**

The Economic and Financial Crimes Commission was established by virtue of the Economic and Financial Crimes Establishment Act, 2004. The Act mandates the EFCC to combat financial and economic crimes. The Commission is empowered to prevent, investigate, prosecute and penalize economic and financial crimes and is charged with the responsibility

[262]C Achebe, *There was a Country* (London, Penguin Books, 2012)p251

of enforcing the provisions of other laws and regulations relating to economic and financial crimes.[263]

The functions of the EFCC was spelt out in Section 6 as follows and we quote

"6: The Commission shall be responsible for -

(a) the enforcement and the due administration of the provisions of this Act;

(b) the investigation of all financial crimes, including advance fee fraud, money laundering, counterfeiting, illegal charge transfers, futures market fraud, fraudulent encashment of negotiable instruments, computer credit card fraud, contract scam, etc.;

(c) the co-ordination and enforcement of all economic and financial crimes laws and enforcement functions conferred on any other person or authority;

(d) the adoption of measures to identify, trace, freeze, confiscate or seize proceeds derived from terrorist activities, economic and financial crimes related offences or the properties the value of which corresponds to such proceeds;

(e) the adoption of measures to eradicate the commission of economic and financial crimes;

(f) the adoption of measures which includes coordinated preventive and regulatory actions, introduction and maintenance of investigative and control techniques on the prevention of economic and financial related crimes;

[263]These includes: Economic and Financial Crimes Commission Establishment Act (2004) ;The Money Laundering Act 1995 ;The Money Laundering (Prohibition) Act 2004 ;The Advance Fee Fraud and Other Fraud Related Offences Act 1995 ;The Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act 1994; The Banks and other Financial Institutions Act 1991; and Miscellaneous Offences Act.[263] In addition, the EFCC will be the key agency of government responsible for fighting terrorism. The Act was originally referred to as the EFCC Act, 2002 but by virtue of S 44 of the Act, the 2002 version of the Act was repealed.

(g) the facilitation of rapid exchange of scientific and technical information and the conduct of joint operations geared towards the eradication of economic and financial crimes;

(h) the examination and investigation of all reported cases of economic and financial crimes with a view to identifying individuals, corporate bodies or groups involved;

(i) the determination of the extent of financial loss and such other losses by government, private individuals or organizations;

(j) collaborating with government bodies both within and outside Nigeria carrying on functions wholly or in part analogous with those of the Commission concerning -

(i) the identification, determination, of the whereabouts and activities of persons suspected of being involved in economic and financial crimes,

(ii) the movement of proceeds or properties derived from the commission of economic and financial and other related crimes;

(iii) the exchange of personnel or other experts,

(iv) the establishment and maintenance of a system for monitoring international economic and financial crimes in order to identify suspicious transactions and persons involved,

(v) maintaining data, statistics, records and reports on person, organizations, proceeds, properties, documents or other items or assets involved in economic and financial crimes;

(vi) undertaking research and similar works with a view to determining the manifestation, extent, magnitude, and effects of economic and financial crimes and advising government on appropriate intervention measures for combating same

(k) dealing with matters connected with the extradition, deportation and mutual legal or other assistance between Nigeria and any other country involving Economic and Financial Crimes;

(l) The collection of all reports relating suspicious financial transactions, analyse and disseminate to all relevant Government agencies;

(m) taking charge of, supervising, controlling, coordinating all the responsibilities, functions and activities relating to the current investigation and prosecution of all offenses connected with or relating to economic and financial crimes;

(n) the coordination of all existing economic and financial crimes, investigating units in Nigeria;

(o) maintaining a liaison with office of the Attorney-General of the Federation, the Nigerian Customs Service, the Immigration and Prison Service Board, the Central Bank of Nigeria, the Nigeria Deposit Insurance Corporation, the National Drug Law Enforcement Agency, all government security and law enforcement agencies and such other financial supervisory institutions in the eradication of economic and financial crimes;

(p) carrying out and sustaining rigorous public and enlightenment campaign against economic and financial crimes within and outside Nigeria and;

(q) carrying out such other activities as are necessary or expedient for the full discharge of all or any of the functions conferred on it under this Act."

It is pertinent to point out that subsection d of Section 6 made emphasis on the role of the commission in fighting terrorism. The subsection for emphasis provided for the adoption of measures to identify, trace, freeze, confiscate or seize proceeds derived from terrorist activities, economic and financial crimes related offences or the properties the value of which corresponds to such proceeds. By necessary implication, terrorism cannot succeed without strong finances and where such finances are hampered the success of the law in fighting terrorism is already achieved. The same act was also the first legislation in Nigeria to attempt a definition of Terrorism. Section 46 of the Act defined Terrorism thus, "Terrorism" means

(a) any act which is a violation of the Criminal Code or the Penal Code 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 property, natural resources, environmental or cultural heritage and is calculated or intended to:

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

(ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency, or

(iii) create general insurrection in a state;

(b) any promotion, sponsorship of, contribution to, command, aid incitement, encouragement, attempt threat, conspiracy, organization or procurement of any

> person, with the intent to commit any act referred to in paragraph (a) (i), (ii) and (iii)."

It is pertinent to state that this same Act went further to create offences of Terrorism when it said in its Section 15 as follows:

> 15: (1) A person who willfully provides or collects by any means, directly or indirectly, any money by any other person with intent that the money shall be used for any act of terrorism commits an offence under this Act and is liable on conviction to imprisonment for life.
>
> (2) Any person who commits or attempts to commit a terrorist act or participates in or facilitates the commission of a terrorist act, commits an offence under this Act and is liable on conviction to imprisonment for life.
>
> (3) Any person who makes funds, financial assets or economic resources or financial or other related services available for use of any other person to commit or attempt to commit, facilitate or participate in the commission of a terrorist act is liable on conviction to imprisonment for life."

Certain challenges exist in the implementation of this Act with regards to terrorism. The major one is that the EFCC Act does not provide a comprehensive framework for dealing with the tripartite offences of terrorism, namely, financing of terrorism, terrorists act and terrorist organizations. The Act merely defined terrorism and attempted to criminalize the funding and that in our view is insufficient for an effective implementation of the fight against terrorism. It is clear that since the establishment of the Act, the Commission has solely gone for political office holders on corruption related charges and not on terror related

matters. The problem remains the same. A beautiful piece of legislation made with no intent to effectively enforce same.

It is therefore clear that the fighting of terrorism by the commission was indeed incidental as the Act alone cannot wholly fight terrorism as it occurs in Nigeria. The act looks at the proceeds but not the crime itself. Be that as it may, the provisions of this Law as regards money laundering and other economic and financial crimes could be used to tighten the noose on all those who are involved in terrorist financing. This is so because if there is no source of funding for terrorists then there will be no act of terrorism. On this we therefore conclude that the Law as it exists here can still be used to fight financial crimes some of which relate to terrorist financing and funding.One needs to add that this Law is reactive in nature as it punishes commission of the offence. It would make more sense if the Law is proactive. To be proactive, we think that the Law requires effective implementation for when a man sees that the possibility of escaping punishment is not there, he will think twice before engaging in such a crime.

3.1.2: **The ICPC Act.**

The resolve to fight and win the war against corruption in Nigeria led to the promulgation of the Corrupt Practices and Other Related Offences Act 2000. The Act was the first bill presented by President Olusegun Obasanjo to the National Assembly for consideration at the inception of the present democratic administration in 1999. It was passed and signed into law on the 13th of June 2000. The Act in Section 3 (14) provides for the independence of the Commission and gives the Chairman authority to issue orders for the control and general administration of the Commission. The Commission has a chairman, 12 members and a secretary. At inception, they had the daunting task of venturing into an uncharted territory which involved putting in place a structure capable of meeting the challenges that lay ahead,

building up human resource capacity and pushing for infrastructural base to meet the demands of the new Commission. The mandate of the Commission is 'to prohibit and prescribe punishment for corrupt practices and other related offences'. Section 3 of the Act established the Commission while Section 6 of the Act confers three main responsibilities on the ICPC. They are: To receive and investigate reports of corruption and in appropriate cases prosecute the offender[s]; To examine, review and enforce the correction of corruption prone systems and procedures of public bodies, with a view to eliminating corruption in public life; Educating and enlightening the public on and against corruption and related offences with a view to enlisting and fostering public support for the fight against corruption. Sections 10 to 26 created various offences bordering on corruption and related acts. Between Sections 26 and 29, they created the powers to investigate, search and seizure of objects or properties used in the commission of such offences. There is no doubt that corruption is a cankerworm eating into the fabric of this nation, yet terrorism with its attendant evil stands the chance not just to eat deep into the fabric of the nation but then to completely wipe out the nation. The Act therefore made its own impact in injecting sanity into the country but it cannot as it exists today attempt to tackle terrorism for if it so does, then a requiem may be sung for it. Nevertheless, most of the finances used in sponsoring terrorism are finances obtained from corrupt acts and it is the belief of this researcher that if corruption is to be eliminated, then the funds for prosecuting the acts of terrorism may be stifled and hence curb terrorism. It is therefore a step in the right direction as corruption could be seen as the foundation upon which all other evils thrive in Nigeria.

The Act has some special features which raise some controversial issues. Such provisions are that Evidence of tradition or custom in the offering and/or acceptance of gratification is not admissible[264] and that the burden of proving innocence, in certain offences has been

[264] S.60

shifted to the accused person. This particular provision we submit conflicts with the provision of the Constitution as to the innocence of an accused person for shifting the burden of proving his innocence on him is tantamount to adjudging him guilty before the charge is read to him. The Commission has been granted the power to investigate petitions against persons hitherto granted constitutional immunity, i.e. the President, the Vice Presidents, Governors and their Deputies. Yet these set of persons are clothed with immunity under the Constitution[265]. Our question remains whether the provision of this Act can override the substantive provisions of the Constitution. In formulating an answer for this question, we take reference to Section 1(3) of the Constitution which provides that any provision in any other Law inconsistent with the provisions of the constitution is null and void to the extent of its inconsistency. If that is so, it simply means that such provisions of the Act would be rendered null and void since they are inconsistent with the Constitutional Provisions.

3.1.3: **Money Laundering Act**

Pervasive corruption in Nigeria constitutes a major threat and underlies most of the money laundering cases reported in recent time. Most of these funds are alleged to be hidden in western banks and offshore centers, while a significant amount have been laundered through the acquisition of properties, luxury cars and purchase of high net worth shares in blue chip companies. Funnily enough, most of these funds obtained by way of corruption end up enriching the western countries that will always list us as the most corrupt country while the nation wallows in capital flight. In 1995, the first Anti Money Laundering (AML) Act was enacted by the then Military regime of Gen Sani Abacha but covered only drug related laundering offences since the only predicate offence for Money Laundering at that point was drug trafficking. The Money Laundering (Prohibition) (MLP) Act of 2004 replaced the 1995

[265] S.308

Anti-Money Laundering Act and corrected this anomaly. A new Anti-Money Laundering Act was enacted and passed into law in 2011 which could be said to be more or less a revised version of the 2004 enactment with emphasis on harsher punishments for individuals and corporate offenders. Money laundering is now by virtue of the Anti-Money Laundering Act of 2011 a criminal offence, regardless of the source of funds. Nigeria commenced the implementation of a number of changes both in terms of legislative and institutional reforms. It should be noted that the Economic and Financial Crimes Commission (EFCC) remains the coordinating agency for all Anti-Money Laundering related cases. The Nigeria Financial Intelligence Unit (NFIU) was also established in 2005 under the EFCC to receive, analyze and disseminate financial intelligence to law enforcement agencies and other relevant institutions. It is our submission that the fight against illegal source of funds is a necessary one if we are to succeed in our fight against terrorism. It is therefore right to say that, the existence of this legislation is a commendable one. In the fight against money laundering, there is a lot of cooperation among countries and regions. This will make it possible to share information as it pertains to the source and end point of transferred funds. An effective implementation of the provisions of this Law will ensure the identity, origin and destination of certain funds especially where same raises suspicion. Further, it will make it easier for such funds to be confiscated to ensure same does not go into the wrong hands. It is not in doubt that proceeds from advance fee fraud, drug trafficking, illegal oil bunkering, bribery and embezzlement, contraband smuggling, theft, and financial crime constitute a major source of money laundered in Nigeria. Money laundering methods that exist in Nigeria include investment in real estate; wire transfers to offshore banks; political party financing; deposit in foreign bank accounts; use of professional services, such as lawyers, accountants, and investment advisers; and cash smuggling. It is also not wrong to state that most of these illegal funds are used in campaigns by political office seekers.

As earlier stated, money laundering has been criminalized under the Money Laundering (Prohibitions) Act, 2011, the National Drugs Law (Enforcement) Act, 1989, and the Economic and Financial Crimes, Act, 2004. Money laundering offences include the conversion, transfer, concealment, or disguise, possession and acquisition of property. There is a broad range of ancillary offences to the money laundering offences. Money laundering applies to both natural and legal persons, and proof of knowledge can be derived from objective factual circumstances. For artificial persons, a designated non-financial institutions are liable to a maximum of N250,000, and withdrawal of licenses,[266] while financial institutions are liable to a maximum of N1,000,000 fine or 3 to five years imprisonment or both fine and imprisonment and the possibility of suspension from professional activity for 5years.[267] Directors and officers of financial institutions are also liable for neglecting to carry out their obligations under the Money Laundering Prohibition Act. As is common in Nigeria, there is lack of comprehensive statistics on money laundering investigations, prosecutions and convictions due to lack of effective coordination mechanisms. It is therefore difficult to determine how many money laundering cases have been investigated and prosecuted. Simply put, one cans say without any fear of contradiction that, the AML legislation has not been effectively implemented.

It is pertinent here to state that Nigeria has ratified the UN Convention for the Suppression of the Financing of Terrorism 1999 on 28th April 2003. The country has also made an attempt to criminalize the financing of terrorism through Section 15 of the EFCC Act. Within the existing legal framework, there is evidence that the authorities have taken steps to confront terrorist activities whether the threat has an international nexus or it is purely domestic in nature such as the Niger Delta situation or it is one with religious dimension as the cases in Northern Nigeria suggest. It has been established by the authorities that there is

[266] S. 5(6)
[267] S6 (9)

a connection between the purchase of weapons and terrorist activities in the vulnerable parts of the country. The implementation of the existing framework has revealed some practical challenges. The first of such challenges is effective implementation. Most legislation in Nigeria is not effectively implemented and the Law under consideration is no exception. Again the law provides for the confiscation of laundered properties which represent proceeds from, instrumentalities used in and instrumentalities intended to be used for the commission of money laundering, and other illegal acts and property of corresponding value. Presently, the types of confiscation and recovery measures provided in the law are criminal conviction based confiscation, seizure and forfeiture of cash and assets either through plea bargain or through a court order. No rules have been made by the Attorney-General under section 31 (4) and 43 of the EFCC Act to guide the management and disposal of forfeited or confiscated properties. The current regime also does not set out modalities relating to freezing having regard to the rights of persons who have grievances. The Central Bank has issued a circular to the banks to forward suspicious transactions relating to Terrorist Financing to the NFIU but this circular is not being effectively implemented in the absence of a legal framework and a coordination mechanism. The legal provisions relating to the FIU are set out in Section 1 (2) of the Economic and Financial Crimes Commission (Establishment) Act (EFCC Act) and the EFCC Board Resolution of 2 June, 2004. The NFIU is an administrative type FIU that became fully operational in January 2005. Pursuant to Paragraph 1 of the EFCC Board Resolution, the main function of the NFIU is to receive, analyze and disseminate Suspicious Transaction Reports (STRs) related to AML/CFT activities in Nigeria. As such, NFIU is the central authority with the mandate to receive, analyze and disseminate information on STRs.

The NFIU is mandated under Paragraphs 7 and 8 of the EFCC Board Resolution to provide guidance on reporting procedures and templates to FIs and DNFBPs. The guidance is

provided either directly by the NFIU or in conjunction with the CBN and takes the form of guidance notes and instruction manuals. These guidance notes and circulars, while not a law or regulation are binding on all FIs and DNFBPs.

The Economic and Financial Crimes Commission (EFCC) is the central coordinating agency in the investigation of money laundering. However, the Nigerian Police Force, and the National Drug Law Enforcement Agency (NDLEA) have powers to investigate offences related to laundering to a lesser extent. The Department of State Security (DSS) is charged with the investigation and collection of intelligence related to terrorism and terrorist financing in collaboration with the NFIU and other related agencies. EFCC, ICPC, and NDLEA have powers to apply for seizure, forfeiture and confiscation orders from the court. The EFCC and the NDLEA can apply scientific method in the investigation of money laundering and terrorist financing, including controlled delivery, interception of communication records, and documents required for effective investigation and prosecution of cases. There exist also measures to detect the physical cross-border transportation of currency and bearer negotiable instruments that relate to money laundering and terrorist financing.

The legal framework for preventive measures is applicable to all the financial institutions, which include the banking, insurance and capital markets/securities sectors. Each supervisory authority has an applicable legislation and regulation which provides guidance to institutions in the finance, insurance and capital markets. The Central Bank of Nigeria (CBN) is responsible for supervising banks; the National Insurance Commission (NAICOM) is responsible for regulating insurance companies; and the Securities and Exchange Commission (SEC) is responsible for overseeing the capital market operations in Nigeria. Each of the regulatory agencies has developed basic regulation with respect to identification and verification of customers.

The CBN's Know Your Customer (KYC) Directive and Money Laundering Examination Procedure/Methodology Guidance Note both provide procedures for ensuring that FIs do not maintain anonymous accounts, particularly accounts with foreign transaction activity. The NAICOM reviewed and revised the Insurance Industry Policy Guidelines (IIPG) of 2004, so that the Customer Due Diligence (CDD) and Know Your Customer Guidelines (KYCG) for insurance companies would be in conformity with the provisions of the MLP Act. Sections 74, 75, and 100 of the Rules and Regulations of the Investment and Securities Act (ISA) require capital market operators to obtain proper customer identification information before entering into a business relationship. SEC is yet to develop a guideline for brokerage firms. Existing CDD measures are not quite comprehensive and not uniformly implemented across reporting agencies. Record keeping requirements have been implemented but Nigeria needs to determine beneficial ownership, identify politically exposed persons (PEPs), and define clear procedures in law or regulation for correspondent banking, implementation of new technologies, and non-face to face customers. Nigeria has not implemented effective measures concerning risks in technology or the establishment of non-face-to-face business transactions. Bureau de Change (BDC) and other money exchange remittances businesses need to maintain identification information of customers in a more effective manner. There is no explicit requirement in the laws for wire transfers generally and especially on terrorist financing.

The MLP Act, under Section 6, requires all financial institutions and designated non-financial institutions to draw up a written report containing all relevant information on transaction or suspicious transaction whether or not it relates to the laundering of the proceeds of a crime or an illegal act for submission to the NFIU within 7 days after the transaction. In addition, the CBN issued a circular (BSD/13/2006) in August 2006, requiring all FIs to forward suspicious transaction reports (STR) to the NFIU where the suspicious and

unusual transactions include potential financing of terrorism, and terrorist acts but the terrorist financing legal framework does not exist at the moment and thus this guidance may not be complied with by FIs and OFIs. Furthermore, the CBN has introduced maximum cash withdrawal and deposits across the nation. The MLP Act does not explicitly provide for the protection of persons who report in good faith. Tipping off is generally prohibited and there is a criminal sanction applicable to officials of financial institutions who tip off suspects.

The Central Bank of Nigeria (CBN) is responsible for the supervision of banks and other financial institutions; Securities and Exchange Commission (SEC) is responsible for the capital market while the National Insurance Commission (NAICOM) supervises the insurance sector. Supervisory agencies are all empowered by the various provisions of their enabling laws to carry out inspection (on-site and off-site) of the activities of financial institutions. Each institution has its budget and can hire their staff. The amount of resources devoted to supervision is not always adequate and staff is not very familiar with their AML/CFT supervisory roles. In this regard, CBN and the SEC have been conducting joint AML/CFT supervisory visits but this remains grossly in adequate.

The CBN's AML/CFT supervisory function is mostly incorporated within the timetable of prudential onsite examinations: commercial banks once per year once and community banks once every two years. In the case of 'other financial institutions' it was unclear as to the inspection cycle. The CBN is formally charged with the supervisory oversight of the 542 bureau de change operating in Nigeria.

There are a variety of criminal and civil sanctions available to the relevant designated authorities. Sanctions applicable also include suspension, cancellation, revocation to withdrawal of licenses of financial institutions, insurance companies and investment and capital market operators. Directors, managers, and other officers may be personally liable if

they fail to take all reasonable steps to secure the financial institution's compliance with relevant legislation and for non-compliance with the directives issued by supervisory entities. The breaches that have been recorded across all the sectors in recent times include failure to implement appropriate CDD requirements, non-reporting of transactions that exceed the threshold, poor preservation of records, failure to report international transactions, non-appointment of a compliance officer, and non-compliance with training programmes for staff AML controls. Most of the sanctions implemented have included the award of fines and referral to law enforcement agencies. However, sanctions applied so far are not considered to be effective, proportionate or dissuasive.

The obligations laid in the relevant AML laws apply to the non-financial professionals and business. They may also include such other businesses as the Federal Ministry of Commerce – the supervisory ministry - may from time to time designate.

The CAC maintains information on all legal entities, including ownership and control of companies, trustees, and charity organizations. There are no restrictions on competent authorities to access information available on CAC database. Furthermore, the CAC requires that every company maintain at its registered office, a register of members with information on the names, address of each shareholder, the number of shares that he holds and the date that each person becomes or ceases to be a member. The register is updated once there is a change in the information provided to CAC. The register is open for inspection by members of the company or the public. However, there is no requirement for beneficial ownership information to be collected by CAC or stored by the companies. The powers of the law enforcement agencies to access and request further information on beneficial ownership seem to be effective. The Corporate Affairs Commission has the responsibility to register Non-Profit Organizations (NPOs). However, where such NPO is registered as LTD/GTE,

the Ministry of Justice will also be involved in verifying the object of the company/NPO. As at 2007, it is estimated that 30,000 NPOs – religious based organizations and charity organizations have been registered by CAC. NPOs in Nigeria are owned in the first instance by those who append their names on the forms submitted at CAC. However, they maybe other beneficial owners, who may not want their names to appear on the registration document and who may have substantial interest in the NPO, including chairing the board meetings and determining how the NPO would be managed. Since most NPOs and charitable organizations rely on donations from internal or external sources, they remain vulnerable to money laundering and terrorist financing. There is no framework for monitoring the source of funding, accounting or management of funds or resources available to NPOs in Nigeria. There is no central authority for supervising NPOs, religious and charitable organizations. Once registered, they are not required to report back to CAC. They are only required to provide information regarding any change that may have occurred since its registration. Nigerian FIU indicated that it has commenced the monitoring of NPOs and other religious organizations for possible ML/TF activities. SCUML also has access to the CAC data base and is in the process of identifying NGOs and religious organizations that are involved in money laundering or terrorist financing. It plans to register the NGOs for the purpose of enhancing its onsite visits. It is expected that SCUML would develop a more strategic program to enhance interaction with NPOs for the purpose of fulfilling their AML/CFT obligations.

Policy Makers, LEAs, and Supervisors maintain working relationship through the EFCC Board. Members of the board are drawn from relevant law enforcement agencies and financial sector supervisory authorities such as the Central Bank of Nigeria, Securities and Exchange Commission, National Insurance Commission, Nigeria Intelligence Agency, Department of State Services, the Nigeria Police Force, National Drug Law Enforcement

Agency, and Nigeria Customs Service. Section 6 of the EFCC Act confers authority on the EFCC to act as the coordinating agency for anti-money laundering matters in the Nigeria. The EFCC, CBN, and the NFIU have been leading the process of developing anti-money laundering policies for the country. There is an inter-agency steering committee chaired by EFCC, which was set up to formulate policies related to anti-money laundering as the need arises. However, this committee is ad hoc in nature and does not meet as often as is required. The DSS has been appointed the focal agency for the coordination of anti-terrorism and terrorist finance matters. Other law enforcement agencies are part of the anti-terrorism initiative of the DSS. The EFCC and the NDLEA are empowered to confiscate proceeds of money laundering offence committed either in Nigeria or in a foreign country. Furthermore, Section 20(c) of the EFCC Act, 2004 and Section 18(c) of the NDLEA Act, empower the authorities to seize instrumentalities used in or intended for use in the commission of any money laundering or financing of terrorism or other predicate offences. Nigerian laws may permit the enforcement of foreign non-criminal confiscation orders even though civil based forfeiture is not yet recognized under existing laws. These powers are limited with regard to combating of terrorist financing.

Nigeria has extradition legislation. However, the legislation is subject to the Constitution requirement with regard to the application of dual criminality principles. This requirement may inhibit efficient execution of international cooperation requests. There is no time limit regarding the length of time required to respond to extradition requests and concerns have been expressed regarding the efficiency of the existing process. In the absence of a comprehensive terrorist financing legislation, extradition requests for FT offences may face legal challenges if presented to the court. Nigeria has implemented measures to facilitate administrative cooperation between domestic authorities such as the CBN, SEC, NAICOM, DSS, Customs and NFIU and other foreign counterparts outside the MLA process.

The structure of law enforcement agencies in Nigeria allows for operational independence in the investigation of ML/TF and other organized crime. However, the legal framework is often ambiguous with regards to supervisory line of authority. The AG's power over criminal prosecution is too broad. As a political appointee and also the Minister for Justice, there are concerns that this power may be used to hinder effective administration of justice in the country. With the exception of EFCC, the other agencies are not adequately funded. Human and material resources are limited across all the other enforcement agencies. Training opportunities are not evenly distributed despite the presence of specialized training units in EFCC and NDLEA.

Statistics on ML/TF prosecution and investigation, including assets forfeited or confiscated are not centrally coordinated. Statistics concerning the total number of money laundering and terrorism and terrorist financing cases under investigation or prosecution in Nigeria were either contradictory, not easily accessible and in some cases not available.

3.1.4: **The Constitution**

Nigeria gained independence from the United Kingdom on 1 October 1960. It is a federal republic, consisting of 36 states and one Federal Capital territory. The present Constitution was adopted on 29 May 1999. The Constitution is the basic and supreme law of the country and any other legislation inconsistent with its provisions is void to the extent of its inconsistency.[268] In Chapter IV, the Constitution guarantees fundamental rights, such as the right to life, respect for the dignity of the person, including the prohibition of torture, right to personal liberty, right to privacy, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, freedom of movement, right to non-

[268] Section 1(3) of the Constitution

discrimination as well as the right to property. It also provides for a right to a remedy in law for any infringements.[269]

The judicial system consists of lower courts and superior courts of record. The lower courts are the Magistrate and Customary Courts (as well as *Shari'a* courts in the north). The superior courts of record are the Customary Courts of Appeal, the *Shari'a* Courts of Appeal, federal and state High Courts, the Court of Appeal and the Supreme Court. The Magistrate Courts deal mostly with petty crimes and can order the remand in police custody of criminal suspects until they are formally charged in the High Court. The High Courts have no appellate jurisdiction over cases from the Customary Courts of Appeal and the *Shari'a* Courts of Appeal, but they have original jurisdiction over other matters. Dissatisfied parties can further appeal to the Court of Appeal and ultimately the Supreme Court, which is the highest court in the land.[270] By section 6 of the Constitution, all the judicial powers of the Federation was be vested in the courts to which this section relates, being courts established for the Federation. Sections 4 and 5 respectively created the Legislative and Executive powers of the Federation. It is from these general powers that all other arms of the government exercise their functions. For any law to be valid in Nigeria, such law must conform to Section 1 of the Constitution which provides as follows:

1. (1) This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.

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[269]Section 46 (1) of the Constitution: "Any person who alleges that any of the provisions of this Chapter has been, is
being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress."

[270] Chapter VII of the 1999 Constitution, Sections 230-296 provide for the establishment, jurisdiction and appointment of the judiciary. The judiciary is not however absolutely independent of the legislature under the Constitution. Section 231 provides for the appointments of the Chief Justice of the Federation and Justices of the Supreme Court, subject to the confirmation of such appointments by the Senate. Furthermore Section 232 (2) provides that the Supreme Court shall have original jurisdiction that may be conferred upon it by an Act of the National Assembly.

(2) The Federal Republic of Nigeria shall not be governed, nor shall any persons or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.

(3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void." Section 14 (1) and (2) provides the functions of the State thus 14. (1) The Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice.

(2) It is hereby, accordingly, declared that:

(a) sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority;

(b) the security and welfare of the people shall be the primary purpose of government: and

(c) the participation by the people in their government shall be ensured in accordance with the provisions of this Constitution.'

Chapter 4 of the Constitution makes far reaching provisions as pertains to the rights of the citizens. It is the same Chapter of the Constitution which states that, no person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed.[271] Thus it is this section of the Constitution that makes it imperative that before we take up the decision to punish for an offence, it must be in a written form and shall not have retroactive effect. The constitution also made provision for domestication of International Instruments when it provided in Section 12 as follows:

[271] S36(12)

12. (1) No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.

(2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the he Exclusive Legislative List for the purpose of implementing a treaty.

(3) A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the House of Assembly in the Federation.

It is therefore very clear that any law to be made in Nigeria must conform to the requirements of the constitution. Again in the area of Terrorism related provisions, care should be taken not to enact Laws that are repugnant to the provisions of Chapter IV of the Constitution as the provisions of that Chapter are non derogable.

3.1.5: **Evidence Act:**

Prior to the enactment of the 2011 Evidence Act in Nigeria, the country has been making use of the Evidence Act of 1990. Section 257(1) of the 2011 Act provided for the repeal of the Evidence Act[272] but further stated that nothing in the present Act shall affect any proceedings commenced before the coming into force of this Act. In its Section 256, the Act provided for its applicability thus, 256(1) This Act shall apply to all judicial proceedings in or before any court established in the Federal Republic of Nigeria but it shall not apply to –

(a) proceedings before an arbitrator; or

(b) a field general court martial;

[272] Cap E14, Laws of the Federation of Nigeria, 2004

(c) judicial proceedings in any civil cause or matter in or before any Sharia Court of Appeal, Customary Court of Appeal, Area Court or Customary Court unless any authority empowered to do so under the Constitution, by order published in the Gazette, confers upon any or all Sharia Courts of Appeal, Customary Courts of Appeal, Area Courts or Customary Courts in the Federal Capital Territory Abuja or a State, as the case may be, power to enforce any or all the provisions of this Act.

(2) In judicial proceedings in any criminal cause or matter in or before an Area Court, the court shall be guided by the provisions of this Act and in accordance with the provisions of the Criminal Procedure Code Law.

(3) Notwithstanding anything in this section, an Area Court shall, in judicial proceedings in any criminal cause or matter, be bound by the provisions of sections 134 to 140.

Thus it becomes patently clear that the provisions of this Act do not apply to arbitration proceedings, a field general court martial and judicial proceedings in any civil cause or matter before the Sharia Court of Appeal, Customary Court of Appeal, Area Court or Customary Court unless there is an order to that effect. Under Section 6 of the present Act, any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. The Evidence Act therefore guides the admissibility of evidence in the course of a trial. Evidence obtained therefore in the course of investigating Terrorist related activity cannot be used in a trial unless such evidence falls in line with the requirements of the Evidence Act. Outside the Evidence Act therefore, the admissibility of Evidence in the course of such a trial becomes a nightmare. It therefore becomes relevant and pertinent that those using the means of Law to fight terrorism should make effort to understand and appreciate the provisions of the Evidence Act in order to come properly within it and achieve the aim. One of the great changes made in the present Evidence Act is the definition

of document in the Act. Previously, the repealed Evidence Act's definition of document did not include electronically generated document. But the 2011 Act defined document to include, (a) books, maps, plans, graphs, drawings, photographs, and also includes any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of these means, intended to be used or which may be used for the purpose of recording that matter;

(b) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced from it,

(c) any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced from it; and

(d) any device by means of which information is recorded, stored or retrievable including computer output" It also defined "computer" to mean any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived from it by calculation, comparison or any other process. It also sees a copy of a document to include the following-

(a) in the case of a document falling within paragraph (b) but not (c) of the definition of "document" in this subsection, a transcript of the sounds or other data embodied in it;

(b) in the case of a document falling within paragraph (b) but not (c) of that definition, a reproduction or still reproduction of the image or images embodied in it whether enlarged or not;

(c) in the case of a document falling within both those paragraphs, such a transcript together with such a still reproduction; and

(d) in the case of a document not falling within the said paragraph (c) of which a visual image is embodied in a document falling within that paragraph, a reproduction of that image, whether enlarged on not,

(e) and any reference to a copy of the material part of a document shall be construed accordingly.

The import of these definitions in our fight against terrorism is that we will now be able to gather evidence in the form of an short messaging system or even electronic mail or other device in which information could be stored. Really, without this definition, any information contained in such devices and which could have helped in the fight against terrorism using the Law would become meaningless and of no effect as they could not be used in the prosecution of such matters. We can at least appreciate this more when we understand that the world of terrorism has gone high tech. It is not a war that could be prosecuted in the modern ages, without modern gadgets and technology hence the need to adapt as they move and even be faster and ahead of them if we hope to win this war using the Law.

Under Section 14 of the Evidence Act, where evidence is obtained in an improper way and manner, it is left for the Court to determine its admissibility. The said Section provides;

Evidence obtained –

(a) improperly or in contravention of a law; or

(b) in consequence of an impropriety or of a contravention of a law, shall be admissible unless the court is of the opinion that the desirability of admitting the evidence is out-weighed by the undesirability of admitting evidence that has been obtained in the manner in

which the evidence was obtained.[273] In deciding whether the Evidence would be admissible or not, the Court would put the following matters into consideration; (a) the probative value of the evidence; (b) the importance of the evidence in the proceeding; (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; (d) the gravity of the impropriety or contravention; (e) whether the impropriety or contravention was deliberate or reckless; (f) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; (g) the difficulty, if any, of obtaining the evidence without impropriety or contravention of law.[274] Another vital provision of the new Evidence Act is also the provision in Section 84. The said Section provides as follows:

84. Admissibility of statements in document produced by computers.

(1) In any proceedings, a statement contained in a document produced by a computer shall be admissible as evidence of any fact stated in it of which direct oral evidence would be

admissible, if it is shown that the conditions in subsection (2) of this section are satisfied in relation to the statement and the computer in question.

(2) The conditions referred to in subsection (1) of this section are –

(a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by anybody, whether corporate or not, or by any individual;

[273] Section 14
[274] Section 15.

(b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;

(c) that throughout the material part of that period the computer was operating properly or, if not, that in any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and

(d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

(3) Where over a period, the function of storing or processing information for the purposes of any activities regularly carried on over that period, as mentioned in subsection (2) (a) of this section was regularly performed by computers, whether -

(a) by a combination of computers operating over that period; or (b) by different computers operating in succession over that period; or (c) by different combinations of computers operating in succession over that period; or (d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate -

(a) identifying the document containing the statement and describing the manner in which it was produced; or

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer; or

(c) dealing with any of the matters to which the conditions mentioned in subsection (2) above relate, and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities, as the case may be, shall be evidence of the matter stated in the certificate, and for the purpose of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section –

(a) information shall be taken to be supplied to a computer if it is supplied to it in any appropriate form and whether it is supplied directly or (with or without human intervention) by means of any appropriate equipment; (b) where, in the course of activities carried on by any individual or body, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities; (c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Section 153 (2) is relevant when it provided for presumption in respect of electronic messages as follows (2) The court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission; but the court shall not make any presumption as to the person to whom such message was sent.

Under Section 181, in any criminal proceedings, where a defendant has not given evidence, the court, the prosecution or any other party to the proceedings may comment on the failure of the defendant to give evidence but the comment shall not suggest that the defendant failed to do so because he was, or that he is, guilty of the offence charged. This is in consonance with the right of the accused person to keep silence and fail not to give evidence. Under Section 183, a witness shall not be compellable to testify where his evidence is likely to incriminate him. This also goes to protect the right of the accused person from self-incrimination. But then there are three provisos following that section which departs from the general rule as follows; (a) a person charged with an offence, and being a witness in pursuance of section 180 of this Act may be asked and is bound to answer any question in cross-examination notwithstanding that it would tend to incriminate him as to the offence charged;

(b) no one is excused from answering any question only because the answer may establish, or tend to establish that he owes a debt or is otherwise liable to any civil suit either at the instance of the Federal, State, or Local Government or any other person;

(c) nothing contained in this section shall excuse a witness at any inquiry by the direction of the Attorney-General of the Federation or of a State, under Part 49 of the Criminal Procedure Act from answering any question required to be answered under section 458 of that Act.

Section 189 seeks to protect witnesses especially in crimes when it provides that no magistrate, police officer or any other public officer authorized to investigate or prosecute offences under any written law shall be compelled to disclose the source of any information as to the commission of an offence which he is so authorized to investigate or prosecute and no public officer employed in or about the business of any branch of the public revenue,

shall be compelled to disclose the source of any information as to the commission of any offence against the public revenue. Under Section 192, the Legal Practitioner enjoys a privileged communication with his client but not when (a) any such communication is made in furtherance of any illegal purpose; (b) any fact observed by any legal practitioner in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment. These provisions will certainly propel us on the right path in our fight against terrorism using the Law.

3.1.6: **Terrorism Act 2011 as Amended**

The first and currently existing specific legislation against terrorism in Nigeria is the Terrorism (Prevention) Act 2011. The said Act was signed into Law by President Goodluck Jonathan precisely on June 3, 2011, after it had been passed by Senate on February 17 and also by the House of Representatives on February 22, 2011. The Act provides measures for the prevention, prohibition and combating of terrorist acts as well as the financing of terrorism. This was in consonance with the effective implementation of the Convention on the Prevention and Combating of Terrorism as well as the Convention on the Suppression of the Financing of Terrorism, and prescribes penalties for the violation of its provision. The penalties provided for offenders in the Act include a 20-year jail term and the death sentence in some circumstances.

The executive bill for the Act was first read on the floor of the Senate on December 10, 2010. The second reading was made on the 28th of April, 2010 and on February 17, 2011, the bill was overwhelmingly passed by the senators before the House of Representatives did same thing on February 22, 2011, leading to it becoming law on June 3, 2011, following the President's assent. Not quite up to five months after its passage, the Executive found out that there are reasons to amend the Act to reflect the existing realities and same was sent back to

the National Assembly for a second missionary journey. That second missionary journey culminated in what we now have as the Terrorism Prevention Act 2011 as amended in 2013. It is imperative that the Act was not repealed but simply amended. It therefore contains most of its earlier contents while shedding some. Specifically, the Act amended Section 1 of the Principal Act by inserting a new subsection 1 before the existing subsection 1 to read, "(1). All acts of terrorism and financing of terrorism are hereby prohibited." For the remaining portions of Section 1, they were now renumbered to read subsections 2-4 accordingly. A new subsection was also substituted for subsection 2 to read, " A person or body corporate who knowingly in or outside Nigeria directly or indirectly willingly- (a) does, attempts or threatens any act of terrorism, (b) commits an act preparatory to or in furtherance of an act of terrorism,(c) omits to do anything that is reasonably necessary to prevent an act of terrorism, (d) assists or facilitates the activities of persons engaged in an act of terrorism or is an accessory to any offence under this Act, (e) participates as an accomplice in or contributes to the commission of any act of terrorism or offences under this Act, (f) assists, facilitates, organizes or directs the activities of persons or organizations engaged in any act of terrorism, (g) is an accessory to any act of terrorism, or (h) incites, promises or induces any other person by any means whatsoever to commit any act of terrorism or any of the offences referred to in this Act, commits an offence under this Act and is liable on conviction to maximum of death sentence." The two basic differences apparent in this new subsection is that it included body corporates in the commission of terrorism offences and at the same time created an offence punishable with a maximum sentence of death. Still in Section1, a new section 1A was inserted to create the office of the National Security Adviser. This is in a bid to give a statutory backing to that office which has been in existence as a creation of the executives. The said Office of the National Security Adviser becomes the coordinating office for terrorism related fights while by its Subsection 2 the

Attorney General becomes the authority for effective implementation and administration of this Act charged with strengthening and enhancing the existing legal framework to ensure conformity of Nigeria's counter- terrorism laws and policies with international standards and United Nations Conventions on Terrorism; (b) maintain international co-operation required for preventing and combating international acts of terrorism; and (c) the effective prosecution of terrorism matters[275]. By virtue of subsection 5 of the said section 1A, the Law enforcement agencies were given various powers that will definitely touch on the rights of the citizenry. The said subsection states, "(5) Subject to the provisions of this Act, the law enforcement agencies shall have powers to - (a) investigate whether any person or entity has directly or indirectly committed an act of terrorism, is about to commit an act of terrorism or has been involved in an act of terrorism under this Act or under any other law;(b) execute search warrants as granted by the courts authorizing its officers or any other law enforcement officer to enter into any premises, property or conveyance for the purpose of conducting searches in furtherance of its functions under this Act or under any other law; (c)investigate, arrest and provide evidence for the prosecution of offenders under this Act or any other law on terrorism in Nigeria; (d) seize, freeze or maintain custody over terrorist property or fund for the purpose of investigation, prosecution or recovery of any property or fund which the law enforcement and security agencies reasonably believed to have been involved in or used in the perpetration of terrorist activities in Nigeria or outside Nigeria; (e) seal up premises upon reasonable suspicion of such premises being involved with or being used in connection with acts of terrorism; (f) adopt measures to identify, trace, freeze, seize terrorist properties as required by the law and seek for the confiscation of proceeds derived from terrorist activities whether situated within or outside Nigeria; (g) under the authority of the Attorney - General of the Federation, enter into co-operation agreements or arrangements

[275] Section 1A(2)

with any national or international body, other intelligence, enforcement or security agencies or organizations which, in its opinion, will facilitate the discharge of its functions under this Act; (h) request or demand for, and obtain from any person, agency or organization, information, including any report or data that may be relevant to its functions; and (i) appoint experts or professionals, where necessary, to execute the powers required in furtherance of its functions under this Act". There are several things wrong with this provisions. Apart from subsections a-c, and then g, all other provisions will in one way or the other affect the rights of a citizen in a democratic dispensation. The 'reasonable' used in the enactment is a source of worry. The same reasonable used in Section 33 of the 1999 Constitution as amended that has become an excuse for law enforcement agencies to carry out extra judicial killings is here repeated. The right to size property without the order of a court or to even freeze assets or even invade data privacy without the court's permission is a dangerous trend. It beats the imagination why the Attorney General should be there at all when in such issues he has no say. It is suggested that more work should be done as regards those subsections knowing that militarization of the state is likely to occur in the guise of fighting terrorism. Terrorism is a crime that should be fought by Law and with Law as breach of human rights in the fight against terrorism most times lead to more incidents of terrorism. Section 2 of the principal Act was left as it were. Sections 3-8 were completely removed and in their stead new Sections 3- 25 were incorporated. The new Section 3 provided for offences against internationally protected persons. This we think was the fallout of the United Nations building bombing of August 26, 2010. Section 4 talked of terrorist meetings and makes it punishable by a term of imprisonment not less than twenty years. Under Section 5, soliciting and giving support to terrorist groups was criminalized. The problem of this criminalization therefore was its subsection (2) which defines support to include (a) incitement to commit a terrorist act through the internet, or any electronic means

or through the use of printed materials or through the dissemination of terrorist information. This particular provision is worrisome as it will affect the right to freedom of speech and conscience. Its noteworthy also that this Section attracts twenty years imprisonment. This is because incitement is not defined and a journalist doing his work may be charged for incitement and thus find himself in prison for twenty years simply for doing his job. This section requires a cautious approach. Section 6 provides for harbouring terrorists or hindering the arrest of terrorist. The good thing about this section is that knowledge is the mental element of the offence, that is, the accused must know that the particular person harboured is a terrorist. The offence carries also twenty years imprisonment. The same requirement applies in Section 7 which provides for the provision of training and instruction to terrorist groups or terrorists. Knowledge is also relevant as an ingredient of the offence. The offence also has a maximum punishment of twenty years. Section 8 criminalizes concealment of information about acts of terrorism, but for a person charged under this head, he may as a defence plead that he did not know and had no reasonable cause to suspect that the disclosure was likely to affect a terrorist investigation or that he has a defence for such non-disclosure one of such defences being that he is a legal practitioner and obtained the information in a priviledged circumstance.[276]

(b) receipt or provision of materials 3 – 8 of the Principal Act was removed and in their stead a new sections 3-8 were added. Section 9 provided for the offence of Provision of devices to a terrorist which is punishable on conviction to a term not less than twenty years. Section 10 talked about recruiting persons to be members of terrorist group or to participate in terrorist acts and makes same punishable with imprisonment of not less than twenty years. Section 11 talks about Incitement, promotion or solicitation of property for the commission of terrorist acts punishable with imprisonment for not less than twenty years. Section 12

[276] See Section 8(2-4). See also Section 192 of the Evidence Act 2011.

frowned at provision of facilities in support of terrorist acts and makes it punishable with life imprisonment while Section 13 talks about terrorist financing which is also punishable with life imprisonment. Section 14 included entities or persons who deal in terrorist property and punishes them with imprisonment of not less than twenty years while Section 15 discusses hostage taking. Of particular importance is subsections b and c of this section which states that (b) threatens to kill, injures or continues to detain another person in order to compel a third party to do or abstain from doing any act, or (c) gives an explicit or implicit condition for the release of the person held hostage. The implication is that all act of hostage taking is now under this Act because subsection 2 thereof defines a 'third party' to mean "a state, an international governmental organisation, a natural or legal person or a group of persons". Membership of a terrorist organization or proscribed organization was criminalized in Section 16. However, a person charged under subsection 1 thereof will have a defence if he can prove that the entity in respect of which the charge is brought was not a terrorist group at or on the date that (a) became a member of that entity; (b) professed to be a member of that entity; or (c) has not taken part in the activities of that entity, after it became a terrorist group. The question here is that a member may escape liability on the ground that he has not taken any part in the activities of such an organization since it became a proscribed organization or a terrorist organization. It therefore appears that we must wait for such a member to commit an overt act before he could be punished for being a member of a proscribed entity. Section 17 criminalizes conspiracy whether within or without Nigeria. In the event that the conspiracy results in terrorist act the punishment is life imprisonment but if only it stopped at conspiracy it is for a term not less than twenty years. Sections 18-19 talks about aiding and abetting the commission of an offence and escape and or aiding and abetting escape. The question here is whether these two sections will replace the provisions of the Criminal Code with regards to offences on terrorism or whether they should work side

by side. The reason for this question is that Sections 7 to 9 of the Criminal Code[277] is abundantly sufficient to identify parties in any criminal transaction. The only essence of these provisions here is the punishment they attract and it is our thinking that it is for that purpose that these were incorporated in this act otherwise the Criminal Code is ably sufficient and even wider to deal with parties, aiding and abetting and even aiding and abetting escape. Again under the Section on escape and aiding and abetting escape, there is no requirement that the aider must have knowledge that the person is suspected of having committed an offence. It is therefore going to amount to a strict liability offence and the application of Section 24 of the Criminal Code[278] may step in to relieve the person of liability and thus defeat the aim of this section[279]. Section 20 talks about attempt while 21 talks about preparation to commit terrorist offences. It is our thinking here that there is a duplicity of provisions for conspiracy and attempt are sufficient without including preparing to commit offence. With respect to Section 20, the provision of Subsection 3 is worrisome. The said subsection provides, 'Where a person is charged with an attempt to commit an offence under this Act, but the evidence establishes the commission of the full offence, the offender is not entitled to acquittal but is convicted for the commission of the offence and is liable on conviction to life imprisonment." The worry here is in view of the provision of Section 170 of the Criminal Procedure Act and as well the Constitutional provisions on a valid arraignment. Such a person was charged with an attempt and he pleaded to the attempt. If you now want to sentence him for the full offence which was not charged on which plea will you base your conviction or the arraignment in that matter?[280]There is therefore a need to revisit this section. Section 22 provides for impersonation. The question is why should impersonating a law enforcement agent be a concern of the Terrorism Act? This seems to us

[277] Cap C38 LFN,2004
[278] supra
[279] Section 19
[280]*Ezeja v State*(2008) 5-6SC Pt II at 74

as a misnomer. Section 23 provides for tampering with evidence and witness. It is the first ground on witness protection which is highly required in a successful fight against terrorism. It is a right step in a right direction. Section 24 discusses obstruction of a law officer. The problem with this section is that there is no procedure for the Law officer to demand for that information he wishes. It would have therefore been neater if a modality for demanding for that information were included. Section 25 deals with punishment for entities engaged in terrorist acts or related offences and provides apart from imprisonment to a winding down of the corporate entity involved. Section 9 of the Principal Act was left as it were while section 10 was substituted. The new Section 10 made emphasis on increased punishment for funds to support terrorism. For an individual the punishment is not less than 10 years while for artificial persons it is N100, 000,000.00. The problem with this section is that it criminalizes intention and its common knowledge that not even the Devil knoweth the intention of man. It is therefore likely to face serious hurdles before such offence could be proved in order to give room for conviction since it shall not be required to prove that such funds (a) were actually used to carry out terrorist acts; (b) were used to attempt a terrorist act; or (c) be linked to a specific terrorist act.[281] Section 11 was deleted and Section 12 amended as follows: "(a) substituting for the word 'cash' in subsections (5), (6) and (7), the words "funds or property" and (b) deleting subsection (8). Section 133 of the Principal Act was repealed and in its place another Section 13 was captioned funds or property used for terrorist acts. Section 14 of the Principal Act was also amended as follows:(a) in subsection (1), by substituting for the words "within a period of not more than 72 hours" in line 2, the words "immediately but not later than 72 hours"; (b) by substituting for subsection (4), a new subsection 4 which provides "(4) Any person who commits an offence under this Act is liable on conviction to a minimum fine of N10,000,000.00 or a term of imprisonment of not

[281] Section 10(3) as amended.

less than 5 years" and in subsection 6 of the Principal Act by substituting for the expression N5,000,000.00 or imprisonment for a maximum term of five years for the principal officers of the institution or the defaulting officer", a new expression, " liable to a minimum fine of 20,000,000.00 or imprisonment term of not less than ten years for the principal officers of the institution" Section 15 of the Principal Act was also amended. Of much importance therein is that it is no longer the Inspector General of Police and the National Security Adviser but the Attorney General who will apply to the Judge in Chambers for order of attachment of monies or properties belonging to a suspect. It is therefore a welcome development that such steps be taken by a law officer and a judge. This will limit the extent of infringement on the economic rights of the suspect. Sections 16 and 17 were deleted leaving Sections 18 to 23 extant. Sections 18 -22 fall within Part III which deals with Mutual Assistance and Extradition with Section 18 dealing on Requests from foreign States, Section 19 deals with Requests to foreign States. In section 20 we see Evidence pursuant to a request; Section 21, the Form of requests and Section 22 with the Extradition proper.Part IV makes provisions for Information sharing, extradition and mutual assistance on criminal matters and contains only one Section. The Part which contains only Section 23 provides for Exchange of information relating to terrorist groups and terrorist acts. This section remains as it were. Section 24 was amended to provide for warrants for terrorist investigations which could be obtained by an ex parte application made before the court. As a result of the existence of Section 24, there is little need for Section 25 which talks about investigation without a warrant. In the interest of the rights of the citizens and due process of law and since warrants are obtained vide ex parte application, there seems no need for any form on terrorist investigation to be done without warrant. Giving law enforcement officers this room will warrant to needless detention and violation of rights to privacy and liberty. If there is a valid suspicion, a warrant could be obtainable from any Judge within the area of operation of

those law enforcement agencies and at any time since such application is by way of an ex parte application. It should only be in rare occasions that investigations without warrants should be undertaken. Mention should still be made that the Act recognizes the right to defence of person and property. It is therefore our belief that such will constitute a valid defence for illegal investigations resulting in deprivation of liberty or privacy. Sections 26-29 of the Principal Act were removed and in their steads sections 26 -34 were substituted. Section 26 provided for finger prints and photographs of persons who are in detention and where there is a denial of being in detention, the court shall be the final arbiter on that.[282] Section 27 creates a series of undesirable provisions. In the first instance, subsection 1 provides for the detention of a person for a period not exceeding 90 days pending the conclusion of investigations. This to us is in clear breach of the constitutional provisions and stands the possibility of encouraging pretrial detention. Thus a person may be detained beyond the normal time and the authorities will rely on the ground of carrying out investigations. What is even more is that an order for this prolonged detention is obtainable by means of an ex parte application. The length of pretrial detention is very long and something should be done about it. Its subsection 2 it allows law enforcement officers powers to exercise reasonable force to actualize the provisions of Subsection 1. This to our mind will likely create rooms for extra judicial killings and related offences by the law enforcement officers. Again subsection 3 provides for a detention of anybody found at the scene of investigation pending completion of investigation. We believe that these provisions will give rise to the deprivation of rights of liberty of individuals. In Nigeria, where law enforcement agencies without any lawful backing arrest people at will, these provisions will give them further powers to become absolute lords over innocent and hapless citizens. Section 28 provides for access to a person arrested on a reasonable suspicion of having

[282] Subsection 2 of section 26

committed a terrorist offence. The danger in this is that such a person will be subjected to a visit by a medical officer of the relevant law enforcement agency. This is suspect especially when no mention of injuries was made. In the world of high tech advancement in the medical field, how are we sure that the medical officer may not induce the suspect into confession vide medical science? It is suggested that before such people will have access to such accused person, the accused counsel of choice must be present. This is what obtains in all situations of first arrest and we suggest this should also be obtainable in our jurisdiction. Subsection 4 of the said section appears to be geared towards double jeopardy. Why will a suspect after spending 90 days in detention be released and still kept under house arrest, monitored by officers, with no access to communication and speak only to his counsel? This is a psychological torture on the part of the suspect. It is unfair and highly prejudicial as these may render the suspect psychologically traumatized. Under Section 29 of the Act as amended, the Act provided for the gathering of intelligence by an interception of communication order obtained ex parte from a judge. The summary of this provision is that bugs and interception of devices may be installed on any premises for the purposes of preventing terrorist acts. This is purely a breach of the fundamental right to privacy. It simply implies that a man's house is no longer his castle and his communications no longer personal. These areas are clearly areas the Law should not encroach upon more so when there is no prelude or criteria for premises that should give rise to this encroachment. We submit that an amendment of this section is immanent. Section 30 talks about detention of conveyances while Section 31 provides for video recording of persons, conveyance or property detained under this Act and same shall constitute admissible Evidence subject to the provisions of the Evidence Act. Section 32 talks of evidence by certificate especially in relation to biological or hazardous substances. Sections 33- 34 dealt on witness protections. The Act sought to protect both informants and the information. To us, this is a salutary step

as we have said earlier. However the problem is in Section 34 which talks about trial in camera. To us this will offend the constitutional provision that trials must be in public. The whole of Section 34 therefore requires more efforts to make the content elegant and inoffensive to Section 36 of the Constitution as amended with regards to public trial and availability of a public record of the proceedings. Section 31 was deleted while a new Section 32 was introduced granting the Federal High Court exclusive jurisdiction to handle matters under this Act. The only issue we have with this is that such charges may be initiated in any division of the Federal High Court which may give rise to forum shopping. Again Subsection 4 thereof made provisions for plea bargaining without specifically creating procedures for it. It is suggested that plea bargaining should be expressly provided for in terrorist offences as it will go a long way in securing lives and properties while saving tax payers funds. The way and manner it was provided for here might give rise to abuse. Sections 36, 37 and 38 were amended by substituting for the words 'Minister of Internal Affairs" the words "Nigerian Immigration Service" wherever they appear. These sections form part of Part VIII and the last part of the Act which made provision for miscellaneous powers. Section 36 provides for Provision of information relating to passengers of vessels and aircraft and persons. Section 37 gives the Nigerian Immigration Services power to prevent entry and order the removal of persons. In Section 38, the same Immigration service has the power to refuse refugee application. Section 39 deals with regulations and is left as it were. Section 40 underwent a wholistic amendment as the substitutions were so many including the definition of proscribed organization, removing cash dealers and substitution with Bureau de Change, defining Law Enforcement and Security Agency to include the Nigerian Armed Forces and the Prisons; defining terrorist and terrorist act and as well terrorist investigations. It further specified that the prosecuting authority under this Act shall be the Attorney General of the Federation. The Act according to its explanatory note seeks

to provide for measures for the prevention, prohibition and combating of acts of terrorism; the financing of terrorism in Nigeria and for the effective implementation of the Convention on the Prevention and Combating of Terrorism and the Convention on the Suppression of the Financing of Terrorism. It also seeks to prescribe penalties for violating any of its provisions. Section 41, the final section deals with the Short Title of the Act.

According to section 1(2(c)(i-iii), terrorism includes attacks upon a person's life which may cause bodily harm or death, kidnappings, as well as the destruction of government facilities or private properties in a manner likely to endanger human life or result in a major economic loss. Some other acts of terrorism highlighted in the Act are propagation and dissemination of information in any form calculated to cause panic, evoke violence, or intimidate a government, person or group of persons.

At this juncture, it should be noted that, many may be of the view that the Act has not yet been implemented and therefore its inadequacies or adequacies will become clearer when it is applied. However, we make bold to say that despite the Act not having been applied, some clear cut inadequacies exist and such include the obvious non-inclusion of provisions that affect human rights in the fight against terrorism. It is a fact that Anti-terrorism Laws most times involve draconian provisions while refusing to accept that there are non derogable rights contained in our Constitution even for persons suspected or accused of acts of terrorism. It is a fundamental principle of law that a person is innocent until declared guilty by a competent court of law, but then there should have been a visible line of demarcation to define where the right of a suspect ends and the enforcement of the law commences, to the extent of enforcing compliance. Apart from these lacunae, there are inadequate provisions on the supervisory functions of the Judiciary over the activities of law enforcement agencies in relation to investigation and prosecution of terrorists. The Judiciary has always been the arbiter in respect of human rights violation and we all are witnesses to the activities of the

Anti-Terror squad under the Sani Abacha regime. Where powers are given to Law enforcement agents without adequate supervisory powers to the Judiciary, things may turn sour for the suspect or accused person.

The Act appears to be silent on the responsibility of government to protect Nigerians and other inhabitants of the country from terrorist attack as it did not reflect enough commitment from the government on how to reduce the vulnerability of Nigerians to terrorist attack through improved security of borders, transport and critical Infrastructure. The Act also did not make provision on how to manage and minimize the consequences of terrorist attacks, by improving capabilities to deal with it and how to promptly respond to the immediate and long term need of victims. It is the truth that we have the National Emergency Management Agency but then we are all witnesses to the August 26, 2011 bombing of the United Nations House in Abuja and how many precious minutes that were wasted waiting for rescue efforts. Such precious minutes could have saved one or more extra lives. Some of the Sections of the Act gave sweeping powers to law enforcement agencies to more or less do as they please in the course of enforcing the provisions of the Act. This is an invitation to chaos and anarchy. In Nigeria where extra judicial killings and forced disappearances are common, giving security agencies such powers is to empower them to carry on under the guise of state security. No matter how well drafted a law is, it will only amount to a mere provision if the appropriate mechanisms are not put in place to enhance its effective implementation. More needs to be done and mechanism put in place to curb the increasing waves of terrorism and insecurity in the country. To succeed in the fight against terrorism, a global collaboration is required among nations of the world and Nigeria should not be left out as it is a part of the global village. The fight against terrorism can therefore not be left in the hands of some superpowers alone. The summary is that now we have a specific legislation against terrorism, we must ensure that it does not negatively affect human rights and again that it is

effectively implemented. The truth is that with effective implementation of this Law and other laws that could be used in the fight against terrorism in Nigeria, we actually have no need for this present calls for another stringent law that will fight terrorism instead we shall make efforts to strengthen the fight against terrorism using the existing Laws while respecting the rights of the citizens and also preserving the sovereignty of Nigeria. It is also a cause for concern that some of the offences here do not carry the death penalty when the criminal code and some other laws in existence do have it. One can argue that in enacting this law, the National assembly was mindful of the clamour for the abolition of death penalty around the world and hence that may have resulted in the apparent removal of death penalty as a punishment for terrorism related offences.

3.1.7: **The Public Order Act**

This Act was a vestige of colonialism in that it was part of the remnants of our inheritance from the British Colonial Masters. The unfortunate aspect of the Law is that it seeks to make public gatherings without permit unlawful and liable for punishment. The Law which has 13 sections was enacted into Law and referred to as Public Order Act[283]. Its preamble stated that it is an Act to repeal all public order laws in the States of the Federation and to replace them with a Federal Act for the purpose of maintaining public order and to prohibit the formation of quasi-military organizations, regulate the use of uniforms and other matters ancillary thereto. One of its most powerful provisions is Section1 which provides as follows:

1. (1) For the purposes of the proper and peaceful conduct of public assemblies, meetings and processions and subject to section 11 of this Act, the Governor of each State is hereby empowered to direct the conduct of all assemblies, meetings and processions on the public

[283] Cap P42 Laws of the Federation of Nigeria 2004

roads or places of public resort in the State and prescribe the route by which and the times at which any procession may pass.

(2) Any person who is desirous of convening or collecting any assembly or meeting or of forming any procession in any public road or place of public resort shall, unless such assembly, meeting or procession is permitted by a general licence granted under subsection (3) of this section, first make application for a licence to the Governor not less than 48 hours thereto, and if such Governor is satisfied that the assembly, meeting or procession is not likely to cause a breach of the peace, he shall direct any superior police officer to issue a licence, not less than 24 hours thereto, specifying the name of the licensee and defining the conditions on which the assembly, meeting or procession is permitted to take place; and if he is not so satisfied, he shall convey his refusal in like manner to the applicant within the time hereinbefore stipulated.

(3) The Governor may authorise the issue of general licences by any superior police officer mentioned in subsection (4) below setting out the conditions under which and by whom and the place where any particular kind or description of assembly, meeting or procession may be convened, collected or formed.

(4) The Governor may delegate his powers under this section-

(a) in relation to the whole State or part thereof, to the Commissioner of Police of the State or any superior police officer of a rank not below that of a Chief Superintendent of Police; and

(b) in relation to any local government area or part thereof, but subject to any delegation made under paragraph (a) above, to any superior police officer or any police officer for the

time being acting as the District Police Officer, and references in this section to the Governor shall be construed accordingly.

(5) Any person-

(a) aggrieved by any decision of the Commissioner of Police or any superior police officer under paragraph (a) of subsection (4) of this section, may within 15 days of such decision appeal to the Governor;

(b) aggrieved by any decision of any police officer mentioned in paragraph (b) of subsection (4) of this section, may within 15 days of such decision appeal to the Commissioner of Police and shall have a right of further appeal from any decision of the Commissioner of Police under this paragraph to the Governor, and the Governor or, as the case may require, the Commissioner of Police shall give a decision on any appeal lodged pursuant to this section not later than 15 days after the date of its receipt by him.

(6) The decision of the Governor under subsection (5) of this section shall be final and no further appeal shall lie therefrom.

It went further to criminalize any assembly organized without any valid permit from the Governor in its Section 2. Section 6 of the Act also penalizes the organization or training or even equipping of persons for the use or display of physical forces as to arouse reasonable apprehension. Section 8 prohibits the possession of any form of offensive weapons at any public assembly or meeting or on the occasion of any public procession.

This particular Law has been used in Nigeria by politicians to suppress their opposition. It is no longer a secret that ruling members of a certain party may refuse to grant permission for another party to hold or organize rallies on the basis of this Law. Consequently, following the incident of 2004, which led to the death of Dr Chuba Okadigbo during an electioneering

campaign, some members of the opposition filed an action at the Federal High Court, Abuja presided by Hon Justice Anwuli Chikere challenging the validity of the Law in consonance with the Constitution of 1999. The Federal High Court Judge nullified the Public Order Act on the ground that it is inconsistent with Section 40 particularly of the 1999 Constitution. The authorities were uncomfortable with this action and they appealed to the Court of Appeal. In 2007 while delivering a Judgment in the appeal, the Court of Appeal upheld the views of the Lower Court and further struck down the Act as being inconsistent with the provisions of the Constitution.[284] The Court per Mohammed JCA held as follows;

> I hold the view that the Public Order Act does not only impose limitation on the right to assemble freely and associate with others, which right is guaranteed under section 40 of the 1999 constitution, it leaves unfettered the discretion on the whims of certain officials, including the Police. The Public Order Act so far as it affects the right of citizens to assemble freely and associate with others, the sum of which is the right to hold rallies or processions or demonstration is an aberration to a democratic society, it is inconsistence with the provisions of the 1999 Constitution. The result is that it is void to the extent of its inconsistency with the provisions of the 1999 Constitution. In particular section 1(2),(3)(4)(5) and (6), 2, 3 and 4 are inconsistent with the fundamental rights provisions in the 1999 Constitution and to the extent of their inconsistency they are void - I hereby so declare.

The last has yet not been heard on this as the authorities had gone on appeal to the Supreme Court but in the meantime, the Public Order Act is now moribund until another decision arises. But assuming the Public Order Act is still valid and extant, it is our view that it would also form part of the framework in the fight against terrorism. This is so because in

[284] *Inspector-General of Police v All Nigeria Peoples Party and Others* (2007) AHRLR 179

prohibiting firearms in public and banning certain associations, it would have aided in the fight against terrorism. The truth is that most of these terrorist organizations parade about in public and in such procession they arm themselves with many offensive weapons. We therefore submit that the Public Order Act should be revisited and some of the sections especially those not struck down by the Court should be incorporated in any exhaustive draft of any legislation to combat terrorism.

3.1.8: **NDLEA ACT**

The drug problem is as old as man. No society is insulated from the negative consequences of illicit drugs. Nigeria being no exception was bedeviled with this evil ostensibly from the Second World War when some of its citizens participated in the war on behalf of the Queen. They eventually caught onto the drug problems and by the time the war was over some had formed the habit of using hard drugs. Apart from these soldiers, there was also the issue of the geographical location of Nigeria, its thick population, bustling commerce, and vibrant air transportation which made it an ideal routing point for some drug barons. Bedeviled with this evil scourge, Nigeria started its journey towards curbing this menace.

Nigeria flagged off its narcotic control efforts in 1935, through the then Dangerous drugs Ordinance which was enacted to control drug trafficking and abuse. Subsequent efforts were made by successive governments. Under the Buhari/Idiagbon regime, Nigeria recorded another landmark effort when the Federal Military Government promulgated the Special Tribunal (Miscellaneous Offences) Decree No. 20 of 1984 to frontally confront drug trafficking within the Nigerian shores. Section 3 (2) (K) of this Decree provided that "any person who, without lawful authority deals in, sell, smoke or inhale the drug known as cocaine or other similar drugs shall be guilty under section 6 (3) (K) of an offence and liable on conviction to suffer death sentence by firing squad. The then administration meant every

section of the Decree as it soon caught up with three drug traffickers that were executed. Following the uproar that greeted this draconian legislation, there was a need to amend the 1984 decree. Consequently the military administration of Ibrahim Babangida in 1989 amended the Decree by expunging the death penalty clause, while substituting it with imprisonment terms ranging from two years to life.

This decree No. 48 of 1989[285], now an act of parliament established a new body, independent of other existing law enforcement agencies in the country called the National Drug law Enforcement Agency (NDLEA) to fight the scourge of drug trafficking and other related acts. This was in fulfillment of the country's international obligation, as a signatory to the 1988 UN Convention, which recommended separate bodies to lead the onslaught against the ravaging drug menace in many parts of the world. It is pertinent to state that before the advent of the NDLEA, the Board of customs and Excise (now Nigeria Customs Service) and the Nigeria police were the major drug interdiction organs of government, while the Federal Welfare Department was charged with the counselling, treatment and rehabilitation of drug dependent persons.

One may be wondering why the issue of drug enforcement should be raised in the discussion of terrorism. This is so because, the terrorists are not so much filled with the vigour of their beliefs but may also be motivated by the influence of the drugs or even by the financial entrapment obtainable in illicit drug trades. It is therefore worthy of note that in the fight against terrorism, there is every need to present a stronger legal framework in tightening the fight against drug and illicit trading in it. It is the fact that the function of the Agency is vital in any intended fight using the Law against terrorism[286]. Of particular interest to us is

[285] CAP N30 laws of the federation of Nigeria 2004,
[286] Section 3 provides as follows: 3. Functions of the Agency
(1) Subject to this Act and in addition to any other functions expressly conferred on it by other provisions of this Act, the Agency shall have responsibility for—

subsections(c) and (d)of the Act which provides for the adoption of measures to identify, trace, freeze, confiscate or seize proceeds derived from drug-related offences or property

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(a) the enforcement and the due administration of the provisions of this Act;
(b) the coordination of all drug laws and enforcement functions conferred on any person or authority, including Ministers in the Government of the Federation, by any such laws;
(c) adoption of measures to identify, trace, freeze, confiscate or seize proceeds derived from drug-related offences or property whose value corresponds to such proceeds;
(d) adoption of measures to eradicate illicit cultivation of narcotic plants and to eliminate illicit demand for narcotic drugs and psychotropic substances with a view to reducing human suffering and eliminating financial incentives for illicit traffic in narcotic drugs and psychotropic substances;
(e) taking such measures which might require the taking of reasonable precautions to prevent the use of ordinary means of transport for illicit traffic in narcotic drugs including making special arrangements with transport owners;
(f) adoption of measures which shall include coordinated preventive and repressive action, introduction and maintenance of investigative and control techniques;
(g) adoption of measures to increase the effectiveness of eradication efforts;
(h) the facilitation of rapid exchange of scientific and technical information and the conduct of research geared towards eradication of illicit use of narcotic drugs and psychotropic substances;
(i) taking measures for the early destruction or disposal of the narcotic drugs and psychotropic substances which have been seized, confiscated or forfeited;
(j) facilitation or encouragement of the presence or availability of persons, including persons in custody who consent to assist in investigations or participate in proceedings relating to narcotic drugs and psychotropic substances;
(k) enhancing the effectiveness of law enforcement to suppress illicit traffic in narcotic drugs and psychotropic substances;
(l) establishing, maintaining and securing communication to facilitate the rapid exchange of information concerning offences and improving international cooperation in the suppression of traffic in narcotic drugs and psychotropic substance by road, sea and air;
(m) reinforcing and supplementing the measures provided in the Convention on Narcotic Drugs 1961, as amended by the 1972 Protocol, the 1971 Convention on Psychotropic Substances and the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1989 as adopted by the Nigerian domestic law, in order to counter the magnitude and extent of illicit traffic in narcotic drugs and psychotropic substances and its grave consequences;
(n) taking such measures that may ensure the elimination and prevention of the root causes of the problems of narcotic drugs and psychotropic substances;
(o) strengthening and enhancing effective legal means for international cooperation in criminal matters for suppressing the international activities of illicit traffic in narcotic drugs and psychotropic substances;
(p) collaborating with government bodies both within and outside Nigeria carrying on functions wholly or in part analogous to those of the Agency concerning, amongst others—
(i) the identities, whereabouts and activities of persons suspected of being involved in offences mentioned in this Act;
(ii) the movement of proceeds or property derived from the commission of such offences;
(iii) the movement of narcotic drugs and psychotropic substances specified in the Second Schedule to this Act, and instrumentalities used or intended for use in the commission of such offences;[Second Schedule.]
(iv) the exchange of personnel and other experts;
(v) the establishment and maintenance of a system for monitoring international dealings in narcotic drugs and psychotropic substances in order to identify suspicious transactions and persons engaged in them;
(q) taking charge, supervising, controlling, coordinating all the responsibilities, functions and activities relating to arrest, investigation and prosecution of all offences connected with or relating to illicit traffic in narcotic drugs and psychotropic substances, notwithstanding any law to the contrary; and
(r) strengthening co-operation with the office of the Attorney-General of the Federation, the police force, customs agencies, immigration agencies, welfare officials, health officials and other law enforcement agencies in the eradication of illicit traffic in narcotic drugs and psychotropic substances.
(2) All drugs units under existing institutions dealing with offenders or offences connected with or relating to illicit traffic in narcotic drugs or psychotropic substances shall relate and be responsible to the Agency in the performance of their duties and functions.

whose value corresponds to such proceeds; and the adoption of measures to eradicate illicit cultivation of narcotic plants and to eliminate illicit demand for narcotic drugs and psychotropic substances with a view to reducing human suffering and eliminating financial incentives for illicit traffic in narcotic drugs and psychotropic substances. It is our submission that most of the funds used in prosecuting acts of terrorism are illicit funds. Again no human being worth one can execute acts of terrorism without being hardened by illicit drugs for no amount of brain washing can change an otherwise normal human being. This being so, the fight against terrorism therefore involves stringent measures against trade in illicit drugs and other drug related crimes which will move to the extent of seizing and confiscating proceeds from such businesses which in turn will prevent terrorist financing and thus cripple terrorism.

3.1.9: **The Police Act**

The Nigeria Police Act as the enabling law for policing in Nigeria should state as clear as possible the mission of the Nigeria Police Force. The Act is a legal authorization for the Police to act. It guides the operations of the police and defines its culture. Section 4 of the Police Act[287] summarizes this mission as general duties of the police as follows:

> The police shall be employed for the prevention and detection of crimes, the apprehension of offenders, the preservation of law and order, the protection of life and property and the due enforcement of all laws and regulations with which they are directly charged, and shall perform such military duties within and outside Nigeria as may be required of them by, or under the authority of this or any other Act.

[287] Cap.P19 Laws of the Federation 2004.

This section of the Act as it seems provide for what the Police can validly and legally do. It is the extent of the legality of the actions of the Nigeria Police. It encodes the organizational culture, work ethos and the personal compact between the leadership of the people and the rank and file of the force; and the police as an agency and its master- the Nigerian people. The issue now under review will be whether these functions are adequate in the present day world of crime and policing? It is the thinking of this researcher that the functions as couched are adequate but the modalities for exercising those functions we believe are not in the best interests of the Nigerian people. The researcher is of the opinion that the problem with the law is the implementation of the relevant sections of the Law. This is because the Police as an institution should be defined in a language that focuses on fairness, deference to human rights in the prevention and investigation of crimes and efficiency in combating crimes especially international and cross border crimes and as well lay emphasis for community policing in view of the fact that most crimes are now community related such as the crimes of terrorism. There is no express mention of community policing in the Police Act, even though it is now gaining upper hand in most states of the federation. It is now time to consider giving formal legal backing for community police especially in the context of the existence of many police-community initiatives and many vigilante groups doing informal policing work. It must be stressed however, that community or local policing is not about distributing police men to localities and still retain control over their operations. It is about allowing autonomous police units mostly made up of neighbourhood watches in the local areas and mandating the development of policing initiatives for these localities based on their local resources and contexts with a chain of command drawn for them.

This is a matter of efficiency. A police force that is more locally resourced and focused will attract more solidarity and support and be able to gather more human intelligence to fight crimes especially crimes that could be locally controlled as in the fight against *Boko*

Haram.[288] This is so because the locals know more of the characters of their indigenes than a foreigner. It should be noted that the Police Act was made for Nigeria in 1943 and since then, the Act has neither been repealed nor amended. It is therefore not surprising that its provisions may have lost touch with the realities of modern day crimes. It is clear that the Nigeria Police has been consistently rated low in the area of human and civil rights protection and enjoyment for they believe that human and civil rights are expendable to maintain public order. This is the general mentality of the average Nigerian Policeman. It is very difficult to see a polished and well-mannered policeman in Nigeria. Most of them are rude and will always reek of alcohol when talking to you. It is believed that one of the problems of policing is the abuse of discretion. The rule of law and the protection of human rights require that officials who exercise power on behalf of the state must not be allowed to act according to their prejudices, biases and in furtherance of personal or group interests. The essence of administrative guidelines and the Judges Rules is to curb discretion in a manner that results in valid exercise of police power. The Police Act should therefore aim at creating a police force that is able to police democracy and freedom in an efficient and effective way. The existing Police Act does not establish governance and administrative process that make for effective policing. The benchmark is that of efficient operations and even the efficient operations is not a reality. The Police Act provides insufficient democratic accountability of policing. One of the major failings of the Act is that it makes the Inspector General of Police dependent upon the president both in appointment and management of police resources. The police are subject to the direction of the president in its daily operations. This compromises both its policy independence and its technical efficiency. The act fails to distinguish between the needful political oversight of the police by the political

[288] On May 16 2014, there was an online report that local vigilante in Adamawa State killed over 200 members of Boko Haram as they came in pursuit of their objective following a tip off. This is when the Nigerian Security agencies are getting tired of the fight.

authority in "ensuring the efficiency" of the force and the managerial oversight of the "direction and control" of the force which should reside in a police authority.[289]

By putting the police force to the operational direction of the President, the act makes the police the servant of the government and not the protector of the rights of the citizen. The totality of the effects of section 9 of the Police Act is to invest the control of the police force on the president in his right as a president and as a chairman of the Nigerian Police Council. This control is not only on matter of general direction of policing but also on the operational control of the police. Given the manner of abuse of police power by president and governors in Nigeria which has necessitated the stringent refusal for state police, it will be a mistake to place the police in the operational control of the President[290]. This is against the spirit of professionalism and efficiency that underlines the political neutrality of the police force of a democratic country. Further, the Police Act, when critically reviewed did not create a police force that respects the rights of citizens as guaranteed under the constitution. While the nation lacks in basic police men, some multinational corporations, politicians, political god fathers and business interest enjoy the uninterrupted use and control of our police force through the Supernumerary Police[291]. These are Policemen and women seconded to corporate interests for the protection of their corporate businesses. It is not a fallacy to state that some of these policemen prefer such postings than the real reason for their joining the police force. Sections 18 to 20 of the Police Act therefore needsto be reviewed. This is so because one needs to bear in mind the potential dangers in handing over policemen and women to corporate interests and the loss of control of the police by the authority. This will more or less amount to privatization of police force against the poor in such a way that those

[289] P. Savage, 'Political Control or Community Liaison' (1984) 55(1) *Political Quarterly* 48 49-51)

[290] An example is the conflict between the Rivers State Governor Rotimi Amaechi and the then Commissioner of Police Rivers State Mathew Mbu

[291] It is not surprising to see Nigerian Soldiers or Policemen holding out an umbrella over the head of a half illiterate foreign road worker in Nigeria

who really need the services of the Policemen and women will not get them but those who don't will because they have the wherewithal.

The next issue is the issue of prosecution of offences. Most of the Prosecutors at the lower courts do not have the prosecutorial skills to match that of the defence lawyers as many are not lawyers. How then can the Police fare in the era of prosecution of Terrorism related offences when it is clear that people accused of such will ordinarily have more resources to engage a better qualified Defence Counsel. The law today in Nigeria is that police officers can prosecute offences before a court of law[292]. The constitution (section 174 and 211) denotes the power to prosecute to the AG and any other person he may delegate the power. It is taken for granted that the AG has delegated the power to officers in his office according to section 160 of the Constitution. Similarly, section 23 of the Police Act permits a Police Officer to conduct in person all prosecution before the court whether or not the case is filed in his name. By the wording of the section, this power is subject to the power of the AG to take over or stop further prosecution by the police.

The issue here is whether it is right that the police who investigate will also prosecute? Does it not really amount to persecution especially in this era where we are inundated with corruption? The view of this researcher therefore is that serious crimes as the ones under consideration in this work should be left for the Attorney General and the officers in his office.

Thinking of the nature and extent of corruption, will the Police still retain the power of arrests or will it be modified in view of the Kabiru Sokoto/Zakari Biu Saga? Under the Police Act, the power of the police to arrests and detain persons suspected of commission of

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[292]FRN V Osahon (2006) 4 M.J.S.C 1

crimes or intention to commit a crime or those caught in the commission of a crime is not articulated in a manner that respects the core essence of liberty and dignity of the person under the constitution. Chapter 4 of the Constitution guarantees citizens and residents in Nigeria with basic rights and freedom in the exact language of the international covenants on human rights. One of the most important of these rights is the right to the liberty of the person in section 35 of the Constitution. The section requires the arresting authority to arrest a person for a valid cause and in compliance with reasonable safeguards. Is this so in reality? The answer is no as the Police in Nigeria has been known for flagrant and unwarranted arrests of innocent citizens for the purposes of self-enrichment or settlement of differences. Indeed, unwarranted arrest is even a lesser sin as many have lost their lives to our Policemen for no reason other than failure to bribe them. The Police Act therefore in authorizing the police in that respect failed to establish sufficient safeguards against unwarranted and prejudicial arrest of persons.

Section 24 of the Police Act provides that:

> In addition to the powers of arrest without warrant conferred upon a police officer by section 10 of the Criminal Procedure Act, it shall be lawful for any Police Officer and any person whom he may call to his assistance, to arrest without warrant in the following cases-
>
> (a) any person whom he finds committing any felony, misdemeanour or simple offence, or whom he reasonably suspects of having committed or of being about to commit any felony, misdemeanour or breach of peace;
>
> (b) any person whom any other person charges with having committed a felony or misdemeanour;

(c) any person whom any other person-

(i) suspects of having committed a felony or misdemeanour; or

(ii) charges with having committed a simple offence, if such other person is willing to accompany the police officer to the police station and to enter into a recognizance to prosecute such charge.

It is therefore not surprising that most of the inmates in our various prisons are those often arrested on trumped up charges and dumped in the prison. Immediately such arrests take place, the next issue becomes detention and bail. Will the person arrested be released or detained? The question of what to do with the arrested person now depends on the whims and caprices of the same person who arrested him. It is not clear whether it is a right or a privilege which a police officer has a wide discretion to determine. The power to detain is left so open to abuse because of the absence of guiding criteria and reviewable standards. Section 35 of the constitution requires that the arresting authority charges the arrestee before a competent court of law within 24 hours or at most 48 hours if the distance between the police station and a competent court is a considerable distance. The context of section 35 therefore presupposes that as soon as a police officer arrests a person, he ought to offer such a person bail, once it is a bailable offence. But, where the Police officer refuses the person bail at the station, he must charge her before a competent court within 48 hours or release her.

The Police Act did not comply entirely to the high emphasis the constitution places on the right to personal liberty. The power of the arresting police officer to detain is made discretional and subject to subjective considerations of the seriousness of the offence and substantiality of sureties. Besides, the Police Act does not lay down elaborate and express steps to be taken by the arresting authority to ensure that the process of making the decision

to refuse bail to a suspect is made on good faith and based on objective grounds which are easily judicially reviewable. It is our thinking that the law should clearly provide for the right of hearing of a suspect when decisions extending his detention beyond 24 hours is made, and the fact of decision, the grounds and the representation of the suspect should be endorsed on custodial record for the purposes of judicial review of the reasonableness and due process of the bail decision. Another issue of controversy is that of power to search under the Police Act. This power is excessive and not limited according to constitutional principles. It is also, not safeguarded by detailed provisions on endorsement and objectivity and due process. Several other Statutes apart from the Police Act also grant public officials including the Custom and Excise Management Act, the National Drug Law Enforcement Agency Act, NAFDAC Act, etc the power to search and seize. An efficient police force must be proactive and preventive and therefore needs to be able to follow new leads on crimes. But, this need must be balanced with the need to protect the privacy of citizens. The Nigerian situation is deficient in many ways. Section 28 authorizes a superior police officer to instruct any police officer to enter into premises in search of stolen property and search and seize any property he may believe to be stolen. When he finds property he believes to be stolen, he may arrests the owner or occupier of such property or good. There are no provisions about how the superior police officer should come to the understanding that a probable cause exists to issues a search warrant.

One may therefore suggest that the Act should invest the power of arrest and issuing search warrant on authorities outside the police force in other to check the tendency towards institutional abuse of power. If it is the police officer who grants the application for issuance of search warrant of another police officer, the necessary oversight may be compromised.

Section 29 dealing with stop and search needs to be looked at. What should be paramount here is whether there is a reasonable cause for such action. In Nigeria, the Police require no

reasonable cause to stop and search either you or your vehicle. One therefore believes that such powers should be whittled down in order to further enhance the rights of the public. It is true that there may be situations where the police officer observes physical evidence that gives him/her reasonable belief that a person possesses anything that might be stolen. But then balance has to be struck between preemptive action and due process.

There is yet the issue of Internal Discipline and Oversight within the Nigeria Police Force. The disciplinary process determines the culture of policing. Internally, it is the work of police disciplinary mechanism that ensures that the police respect the high expectation of decorum, civility and objectivity. This discussion on police internal discipline relates to the question of the corruptibility of the police. There is no question that the issue of the corruption of police power is very important in every aspiring or flourishing democracy. In Nigeria, we are witnesses to how this power has been abused with regards to private citizens and democratic politics. The nefarious role of the police in aiding and abetting electoral fraud in Nigeria is almost a legend. Newspapers are full of stories of daily brutalization and murder of Nigerians in the guise of enforcing the law. The key task is how to create through internal procedures a culture that punishes abuse of police power.

Equally, Part xv of Police Regulation provides for disciplinary measures against police force with regards to complaint of grievances and wrongs. Unfortunately, this has nothing to do with grievance by the public against police officers. It is about grievance by a police officer against another police officer. Section 353 is on the issue of conflict of private and public interests. The point is that although the police have its own internal disciplinary procedure, this procedure does not address some aspect of corruption of police power and the internal procedure is not set up from the perspective of the citizens who are victims of police abusive conducts. Taking into consideration that many Nigerians are poor and cannot maintain a litigation to enforce their rights against erring officer, transparent and accountable internal

disciplinary procedures become in the long run the greatest control on police public misconduct. There are many ways to structure fully transparent and accountable disciplinary procedures such as reflecting our local context in the provisions of disciplinary procedures as long as it allows for transparency and engagement of the complainant.

In the light of the sophistication of crimes in Nigeria and the world, the Nigeria police force requires new persons with special skills and aptitudes. These skills and aptitudes can be developed through formal and informal training. But that still does not obviate the need for persons with the right aptitude in the police force. The police force requires that senior police officers (cadet ASP) should possess university education. Fresh police officers can be school certificate holders. In view of the general intelligence deficiency exhibited by some police officers, the researcher is of the opinion that recruitment to the police be open to persons who have recognized degree. The quality of training which police officers receive is the most important policy issue in the management of police conduct. Sections 55, 56 and 103 provides for training of various categories of police officers. One significant fact is that none of these sections is sufficient for the responsibilities that a modern society imposes on the police force. A closer look at section 55 shows that the required coursework for a cadet officer for 12 months deals more with drills and less with human rights, political philosophy and psychology, which are subject matters with a lot of insights for democratic policing. There is therefore the need to drastically review the curriculum of police training schools so that the focus should be on coursework that exposes the recruit to the moral and social complexities and inculcate in him the discipline of civility, tactics and respect for human rights. Training is key to the re-imagining of police force as an institution. The ideals which are implied in the new vision articulated by the IGP need to be communicated via official and unofficial training and education of officers and men and women of the Nigerian Police Force.

3.1.10: **The Firearms Act**

This Act prohibits the acquisition of prohibited firearms and establishes that no firearm may be imported or acquired without authorization from the competent authorities. Section 2 of the Act defines "ammunition" to mean ammunition for any firearm and any component part of any such ammunition, but does not include gun powder or trade powder not intended or used as such a component part; and firearm to mean any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged, and includes a prohibited firearm, a personal firearm and a muzzle-loading firearm of any of the categories referred to in Parts I, II and III respectively of the Schedule hereto, and any component part of any such firearm. It is pertinent to state here that these definitions are exhaustive in themselves. In section 3, it penalizes the offence of possessing firearms without license thus," No person shall have in his possession or under his control any firearm of one of the categories specified in Part I of the Schedule hereto (hereinafter referred to as a prohibited firearm) except in accordance with a licence granted by the President acting in his discretion. Licences remain effective up till 31st December of the year in which it was granted. Section 7 made it clear that issuance of licenses is not of right and went further to list the following classes of persons as those who will not be granted Firearms licence;

> (2) Notwithstanding the provisions of subsection (1) of this section, no licence or permit under the provisions of this Act shall be granted if there is reason to believe that the applicant or holder of the licence-
>
> (a) is under the age of seventeen;
>
> (b) is of unsound mind;
>
> (c) is not fit to have possession of the firearm in question on account of defective eyesight;
>
> (d) is a person of intemperate habits;

(e) has during the previous five years been convicted of an offence involving violence or the threat of violence.

Section 10 of the Act also criminalized the selling and or transfer of Firearms unless such a person is registered. Section 18 prohibited the importation of Firearms through certain areas. It provides, "No person shall import any firearms or ammunition into Nigeria by sea or by air or export the same therefrom by sea or by air except through a port which is a port for the purposes of the customs laws or an airport duly designated under the civil aviation laws nor import or export the same by land except through a prescribed town adjacent to the land frontier or by the shortest route from the nearest part of the frontier to such a prescribed town." Under Part VI of the Act, manufacture or repair of Firearms is also the exclusive preserve of those granted Licence by the President through the Inspector General of Police. Section 28 of the Act provided for punishments in three classes, a to c. While A creates punishment of a minimum of 10 years, b created those of a minimum of 5 years while c created those for less than 5 years and fine where the need arises. Trials of these offences also should be done summarily in any part of Nigeria. Trial could be in any Magistrate Court. It is our view in the course of this work that if the Firearms Act is working as it should, then where are all these guns coming into the country. Most of the guns in the country came in through unspecified borders and this go to show that though new legislations are needed old ones should be adequately enforced in order to achieve the full aim and objectives of such legislations.

3.1.11: **Explosives Act**

This is yet another legislation that seeks to aid the role of law in the fight against terrorism. The Act was also a relic of colonialism which seeks to control the use of explosives in the then mining business. As at the time it came into force, it was actually intended that same should regulate the explosives used in the mining industry. It therefore becomes relevant and

due for review to incorporate the new aspects and uses of explosives as obtainable in Nigeria now. The explanatory act stated that the object of the Act is to make provisions for the control of explosives for the purpose of maintaining and securing public safety; and for purposes connected therewith. Under Section 1 thereto, the Minister was given the power to make regulations with regards to explosives as he considers expedient for the purpose of maintaining and securing public safety. Subsection 2 of the said Section 1 provides,

> (2) Without prejudice to the generality of the powers conferred by subsection (1) of this section, regulations made by virtue of that subsection may in particular include provision with respect to all or any of the following matters, that is to say-
>
> (a) the importation of explosives into Nigeria;
>
> (b) the manufacture, storage, transport or use of explosives;
>
> (c) the ownership or possession of explosives (including changes of ownership or possession);
>
> (d) fees in respect of licences or other instruments issued in pursuance of the regulation;
>
> (e) penalties for offences against the regulations, not exceeding in the case of any particular offence, imprisonment for a term of two years or a fine of N1,000 or to both such imprisonment and fine;
>
> (f) the seizure of explosives in respect of which an offence is alleged to have been or has been committed and the forfeiture of explosives in respect of which such offence has been committed."

What is paramount here is the fact that notwithstanding when this Law was enacted, it is yet relevant in the face of the criminal reality we are facing. Common sense therefore encourages us to adopt and strengthen such Laws in our fight against terrorism.

3.1.12: **Criminal Code**

The Nigeria Criminal Code came into force on the 1st day of June, 1916. The provisions of Chapters 2, 4 and 5 of the Code was made applicable in relation to any offence against any Order, Act, Law or Statute and to all persons charged with any such offence.[293] Under its Section 4, it made provision that no person shall be tried for an offence except under the express provision of the Code or some Act or some Law which is in force as at the time of the commission of the offence. The Code was divided into 7 parts and contained a total of 55 Chapters. It is imperative at this juncture to state that the Criminal Code Law is the first codification of crimes in Nigeria. Subsequently, other crimes found their ways into several other laws. It is therefore the Criminal Code that made an exhaustive provision for parties and the relevant criminal responsibility.

Chapter 2 of the Code made far reaching provisions with regards to the parties. Chapter 3 of the Code is also relevant in that it made provisions for the venue of commission of offence and the most vital to our discussion here is Sections 12 to 13 of the Code made detailed provisions for venue of crime. This is important for purposes of jurisdiction. Chapter 5 of the Code makes provisions for criminal responsibility and provides for defences to crimes where one has been alleged. It covers through Sections 22 to 36. Section 42 provides for the offence of promoting communal war. Chapter 9 with sections 66 to 69 made provisions for unlawful societies while chapter 10 contained offences of unlawful assembly and breach of peace. Section 80 of the Code is vital in that it made provision for the offence of going armed in order to induce fear. Chapter 19 deals with offences relating to religion while Chapter 25 deals with violence against the person. Section 253 therein made provisions for when an assault will be unlawful. Chapter 27 deals with homicide and of particular importance to us is Sections 315, 316 and 317. Chapter 28 creates offences endangering

[293] Section 2(4) of the Act

human lives. Of particular importance there are Sections 330, 332, 334, 335, 336, 338, 346, 347 and 350. Chapter 31 deals with offences against liberty which includes kidnapping (S364), deprivation of liberty (365) compelling action by intimidation 366 and compelling action by assault 367. Chapter 42 deals with offences injurious to property. It includes the offences contained in Sections Arson and attempting to injure and or obstruct railways. Chapter 54 which dealt with conspiracy which is an aspect of preliminary offences Under Section 365, it is an offence to take hostages when the Code stated that;

365.

> Any person who unlawfully confines or detains another in any place against his will, or otherwise unlawfully deprives another of his personal liberty, is guilty of a misdemeanour, and is liable to imprisonment for two years.

A detailed look at all these provisions will point one in the right direction using the law in the fight against terrorism.

3.1.13: **Penal Code**

The position of the Penal Code in the Northern Part of Nigeria is somewhat unclear. The Penal Code Law[294] is the operative law in terms of criminal infractions in the now 19 Northern States of Nigeria. It is to that effect that we will discuss the Penal Code with a view to unraveling what punishment at least could be given to perpetrators of terrorist acts without really going through a new legislation. Before we do this however, it becomes pertinent to albeit partially on the Sharia Penal Code Law of some Northern State.

The Sharia Penal Code Law came into force on the 27th day of January, 2000 firstly in Zamfara State of Nigeria under the then Governor, Ahmed Yerima, other states in the north

[294]Cap 89 Laws of Northern Nigeria 1963

followed suit in quick succession.[295] Before the advent of this Sharia Penal Code Law, there was and still is the Penal Code Law of Northern Nigeria which commonly is known to regulate criminal offences in the entire Northern Region of the country. When the Sharia Penal Code Law came into force in Zamfara State, some other Northern States including the 12 core Northern States adopted the same Sharia Penal Code to the detriment of the existing Penal Code Law.

The question then becomes, what is the fate of the Penal Code Law? The answer is simple. The Sharia Penal Code Law did not abolish the Penal Code Law. It simply made the penal Code Law applicable to non muslims who do not submit themselves to the jurisdiction of the sharia courts.[296] The implication therefore is that the Penal Code Law and the Sharia Penal Code Law are both applicable in the Northern States that adopted the Sharia Penal Code Law in addition to the existing Penal Code Law applicable by force of the Constitution to all the Northern States in Nigeria. One will rightly wonder if there really is such a big difference between the Sharia Penal Code Law and the Penal Code Law of the Northern States. Oraegbunam amongst other scholars was of the view that the only difference between the two was in the area of the punishment as the punishment contained in the Sharia Penal Code Law included some of the punishments that were originally abolished in the Penal Code Law such as crucifixion and stoning to death.[297]

In view of this, it is right that a discussion on the criminal law in the northern states should be based on the penal code law and not on the sharia penal code law as the sharia penal code law is not applicable to all the northern states of Nigeria but is applicable to the northern states that chose to by adopting same. This is because the method of its adoption is

[295] Oraegbunam IK, A critical analysis of Nigeria's Islamic Sharia Praxis: Implications for the Nation's Constitutional Democracy (1999-2011)PhD Dissertation, University of Nigeria Nsukka, 2011 p205
[296] *Ibid*
[297] *Ibid p* 206

impugnable on constitutional grounds and more so it is unconstitutional because of its inconsistency with guarantees of rights and invariably amounts to adoption of Islam as state religion in the states concerned taking into cognizance that the Koran is a religious symbol and laws deriving directly from it grounds the assertion that such laws are religious laws.[298]

The Penal Code law has some very interesting provisions as regards the fight against terrorism. In its sections 43 to 58 the Penal Code Law made provisions for criminal responsibility. This is of very great importance as it will underscore the criminal responsibility of the defendant in any criminal matter within the entire Northern Part of Nigeria. It is imperative to state that criminal responsibility determines who is old enough to assume one or who is legally expected to assume one. Without a clear cut criminal responsibility the opportunity of a miscarriage of justice is likely.

In sections 68 to 78, the Penal Code made provisions for punishments. These sections distinguish the Penal Code Law from the Sharia Code Law. The Penal Code Law though made provisions for death penalty; the mode is not clearly stated whereas the Sharia Penal Code created modes such as crucifixion and stoning. It is a common knowledge of law that no act can be declared a criminal act unless there is first a punishment attached to it in accordance with our laws. It is therefore on the strength of these provisions of punishments that we acknowledge the impact of the Penal Code law on the fight against terrorism in Nigeria. The punishments included death, forfeiture, imprisonment, fine, caning etc.

Sections 79 to 82 of the Penal Code Law made provisions for joint acts. Under Section 79, when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. This provision is vital bearing in mind that most terrorist acts are committed by a group of

[298]*Ibid p* 209

person or persons. Section 80 imputes criminal intention to all who partook in the crime while Section 81 includes any person who cooperates in the commission of an offence as a party to that offence.

Section 83 provides for a person who abets the doing of a thing by instigating any person to do that thing or engages with one or more person in any conspiracy for doing that thing or intentionally aids or facilitates by any act or illegal omission the doing of that thing. Section 95 provides for attempt to commit offences. Must we wait until an offence is committed before we get on our oars? No. This is an area where the penal Code law seeks to prevent the commission of an offence by actually preventing or creating the offence of attempt and punishes it with imprisonment nt for a term which may extend to one half of the longest term provided for the main offence or with such fine as is provided for the offence or with both.

Section 96 provides for criminal conspiracy when two or more persons agree to do or cause to be done an illegal act or an act which is not illegal by illegal means. The said section was emphatic that notwithstanding the provision of subsection 96(1), no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some acts besides the agreement is done by one or more parties to such agreement in pursuance thereof. This is the beauty of well thought out laws. It is not enough to hold that conspiracy has taken place, there must be evidence that one or more of the parties to the conspiracy have acted towards the manifestation of such conspiracy. Our Courts are agreed that Conspiracy is an agreement by two or more persons to commit an unlawful act coupled with intent to achieve the agreement's objective. Conspiracy therefore is a separate offence from

the crime that is the object of the conspiracy[299]. Section 97 punishes conspiracy in two ways. Firstly if the conspiracy has to do with an offence punishable with death such a person will be punished as if he abetted the offence and secondly if the offence is not punishable with death the punishment will be for a term not exceeding six months.

Section 97A provided for unlawful society and defined it as any society dangerous to the good government of Northern Nigeria or any part thereof. Section 97B makes it a criminal offence for one to manage or become a member of an unlawful society and punishes it with seven years' imprisonment or fine or both.

Going further, the Penal Code law in Section 100 defined unlawful assembly to include an assembly whose objective is to overawe by criminal force or show of criminal force the government or the government of the federation or any government of Nigeria or any public servant in the exercise of his lawful powers. Section 101 defined who is a member of unlawful assembly and section 102 punishes it with imprisonment for one year or fine or both. Of course if in the course of the unlawful assembly the member has a deadly weapon, the punishment is increased to two years as provided by section 103.

Under section 183, the Penal Code Law, defined public nuisance as an act or omission which causes any common injury danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity or which must necessarily cause injury or obstruction danger or annoyance to persons who may have occasion to use any public right. Section 184 criminalizes adulteration of food or drink intended for sale with one year imprisonment while section 192 punishes for making the atmosphere noxious to health with six months' imprisonment and fine. In section 210, the penal code law punishes with two

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[299]*Garba v. C.O.P*. (2007) ALL FWLR (Pt. 384) 260 at 277, Paras. D - E (CA)

years or fine the act of insulting or inciting contempt on existing religions while in section 211, it punishes also the injuring or defiling of place of worship. Section 212 punishes for one year the disturbing of religious assembly voluntarily.

Section 220 defines culpable homicide and punishes it with death in section 221 and for those contained in section 222 it punishes not with death but with imprisonment. Under section 230, it punishes attempt to commit culpable homicide with imprisonment for a term which may extend to three years or with fine or with both and where hurt is caused with imprisonment for seven years or with fine or both. Section 240 defines ordinary hurt and Section 241 defines grievous hurt. Sections 242 to 253 contained several provisions on hurts and their punishments. Under Section 254, the code defined wrongful restraint and in section 257 it punishes the said wrongful confinement with imprisonment of one year or with fine which may extend to fifty pounds. The good thing here is the premium the law attached to this offence and this could be deduced from the fine of fifty pounds as at 1963. Sections 258 to 261 provided for other shades of restraint and their punishments.

In section 262 the penal Code law defined criminal force and assault. Sections 264 to 270 made wider provisions on criminal force and assault as well as their punishments. The Penal Cod elaw in Section 271 defined kidnapping as taking or enticing any person under fourteen years if a male or 16 years if a female or any person of unsound mind out of the keeping of the lawful guardian without the consent of such guardian or conveys any such person beyond the limits of the state without the consent of someone legally authorized to consent to such removal is said to kidnap such person.[300] Section 272 state that whoever by force compels or by any deceitful means induces any person to go from any place is said to abduct that person. By 273, the Penal Code law punishes either kidnapping or abduction with ten

[300]This clearly describes the kidnapping of the Chibok girls in Chibok Borno State of Nigeria.

years imprisonment and fine. Where such kidnapping or abduction is so that the person kidnapped or abducted be killed, the punishment is fourteen years and fine.

Section 326 defined mischief while section 327 punishes mischief generally with two years imprisonment or with fine or both. Section 331 punishes mischief in relation to water supply and punishes it with five years or fine or both. Section 332 punishes mischief by injury to public road, or bridge with life imprisonment or less with fine or both. Under 336 and 337, the Penal Code Law provided for mischief by fire or explosive with intent to cause damage punishable with seven years and fine while mischief by fire or explosive with intent to destroy house is punishable with imprisonment for life or less and with fine too respectively. Other forms of mischief are contained in sections 338, 339, 340 etc.

Section 396 of the Penal Code Law defines criminal intimidation and punishes it in section 397 with two years' imprisonment or seven years imprisonment together with fine depending on the nature of the criminal intimidation.

The bottom-line here is that even the penal Code Law has enough provisions to fight terrorism in Nigeria. One can therefore only suggest that the punishments may be reviewed to underscore the severity of the offence in question.

3.1.14: **Kidnapping Law of Rivers State**

We shall discuss only the kidnapping Laws of Rivers State since the issue of Niger Delta Militancy was most active in that state. Further, Rivers State was the first State to enact a specific anti-kidnapping Law before the other states took cue from them.

Rivers State was one of the states in the Niger Delta area of Nigeria. Indeed what we can call economic terrorism by way of kidnapping and bombing of oil installations first took a major dimension in Rivers State. Most oil companies closed shops in Port Harcourt the Rivers

State capital and yet a majority of other oil related business especially those manned by expatriates also took the next available flight out of the state. Worried by these increasing acts of terrorism and the attendant consequences to the economic growth of the State, the Government of the day sponsored a Kidnap Prohibition Bill No 12 of 2008. Indeed, Rivers State can be said to be the very first state to take the bull by the horns by running to the Law for the rescue. The said Bill was then passed into Law as the Kidnap (Prohibition) Law No 3 of 2009. The Law has a total of 12 sections. Section 1 provided for the offence of Kidnap and provides for its punishment. The said Section 1 provides thus

> 1(1) A person who kidnaps or abducts or by any other means of instilling fear, or tricks takes another person with intent to demand ransom or compel another to do anything against his or her will commits an offence.
>
> (2) Any person who contravenes section 1(1) of this Law

a. where the life of the person kidnapped abducted or seized is lost in the process is liable on conviction to death by hanging.

b. where the life of the person kidnapped abducted or seized is not lost in the process is liable on conviction to imprisonment for life without an option of fine.

Section 2 of the law provides for the offence of attempted kidnapping or abduction and makes it punishable with imprisonment for 20 years without an option of fine. Under Section 3, it provides for aiding or abetting and makes it punishable by life imprisonment without any option of fine. Under the same section, it provides for offence of kidnapping or abduction by a corporate organization and makes same punishable by a fine of not less than N50, 000,000.00. Section 4 provides for arranging for your own kidnap and makes it

punishable by imprisonment for life without option of fine and in section 5, it punishes the offence of harbouring a kidnapped person. The said offence is punishable without an option of fine to imprisonment for 14 years. But then, one of the mental element of this offence is that the person doing so must have been aware willingly or willfully the purpose to be made of his premises or building.

Section 6 criminalizes the offence of kidnapping to compel another to do or abstain from doing an act with imprisonment for life. Under Section 7, any false representation to release a kidnap or abducted person attracts punishment of 7 years without an option of fine. It should be noted that subsection 2 of this section provides that 'nothing in this section prohibits a person who in good faith believes that he or she can rescue or obtain the release of a person who has been kidnapped or abducted provided he or she has no part in or connection with the commission of the offence. The same law directs the Chief judge of the state a special court within the state for the trying of offences under this law[301]. Section 9 provides for the offence of procuring or counseling another to kidnap or abduct and punishes the offence with the same punishment for a person who kidnaps or abducts.

The Law defines kidnap or abduct in Section 11 and holds that doing of such act with any of the following intentions will leave a person liable for the offence of kidnapping or abduction that is to say

i. To hold for ransom or reward ;or
ii. As a shield or hostage;
iii. To facilitate the commission of a felony or;
iv. To inflict bodily injury on or terrorize the victim or another; or
v. To interfere with the performance of any governmental or political function;

[301] S8

vi. To interfere with the person's business or the business of another.

It shall be noted that when the Law was initially passed there were uproar in respect of the death penalty attached to the offence but then the Rivers State government was of the view that desperate situations demand desperate remedies. Hence with the passing into law of this law, there was a gradual abatement of the crime of kidnap and abduction in Rivers State. From there many other states in the South East borrowed from this Law to check the ugly trend of the crime of kidnap and abduction. This can be seen as an example of the role of law in the fight against terrorism this time terrorism in the guise of kidnap as it merely strengthened the existing legislations and if coupled with effective implementation stands a chance to effectively curb terrorism.

3.2: **Some Regional and International Instruments ratified by Nigeria**

The acts or incidents of terrorism can never be justified. Nigeria therefore unequivocally condemns all acts of terrorism and in doing so; Nigeria has taken bold steps in her efforts to combat the menace nationally, regionally and globally. In this wise, Nigeria has signed and ratified some of the major multilateral International Conventions and one regional instrument relating to the prevention and suppression of international terrorism. In this work however, we shall take a look at the regional instrument and then review some international instruments already ratified by Nigeria relevant in the fight against terrorism as it affects Nigeria.

3.2.1: **The OAU Convention on the Prevention and Combating of Terrorism**

Nigeria as a major player in the African continent was a signatory to the OAU Convention on the Prevention and combating of Terrorism which was adopted in Algiers on 14th day of July, 1999. The member states of OAU in part of the preamble to the Convention stated as follows: Concerned that the lives of innocent women and children are most adversely

affected by terrorism; Convinced that terrorism constitutes a serious violation of human rights and, in particular, the rights to physical integrity, life, freedom and security, and impedes socio-economic development through destabilization of States; 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. Aware of the growing links between terrorism and organized crime, including the illicit traffic of arms, drugs and money laundering; determined to eliminate terrorism in all its forms and manifestations."

The Convention defined Terrorist act to mean

> (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, environmental or cultural heritage and is calculated or intended to:(i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or (iii) create general insurrection in a State. (b) any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat,

> conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in paragraph (a) (i) to(iii).[302]

In order to strengthen the fight against terrorism, the Convention urged State parties to 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 make 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.[303]

Article 3 excluded 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 from the tag of terrorism and also removed Political, philosophical, ideological, racial, ethnic, religious or other

[302] Art 1
[303] Art 2

motives as a justifiable defence against a terrorist act.[304] It urged State parties to 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.[305] It further laid emphasis at the fight against terrorism using Law when it urged States Parties to adopt any legitimate measures aimed at preventing and combating terrorists 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 the planning, organization or execution of terrorists acts or for the participation or collaboration in these acts in any form whatsoever; (b) develop and strengthen methods of monitoring and detecting plans or activities aimed at the illegal cross-border transportation, importation, export, stockpiling and use of arms, ammunition and explosives and other materials and means of committing terrorist acts; (c) develop and strengthen methods or controlling and monitoring land, sea and air 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 on terrorist acts and establish data bases for the collection and analysis of information and

[304] Art 3(2)
[305] Art 4(1)

data on terrorist elements, groups, movements and organizations; (f) take all necessary measures to prevent the establishment of 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 relevant domestic security officials and services and the citizens of the States 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.[306]

Article 5 provided for cooperation among state parties in preventing and combating terrorist acts in conformity with national legislation and procedures of each State. Article 6 provided for jurisdiction as follows:

1. Each State Party has jurisdiction over terrorist acts as defined in Article 1 when: (a) 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 punishable by its national law; (b) the act is committed on board a vessel or a ship flying the flag of that State or an aircraft which is registered under the laws of that State

[306] Art 4(2)

at the time the offence is committed; or (c) the act is committed by a national or a group or nationals of that State.

2. A State Party may also establish its jurisdiction over any such 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.

3. 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.

4. 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 States Parties which have established their jurisdiction in accordance with paragraphs 1or 2.

Article 7 made provisions for the procedure to be followed in Terrorist related cases including the rights available to an accused person in such a situation. Article 8 made provisions for Extradition.

The said Art 8 provides as follows:

> 1. Subject to the provision of paragraphs 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 States Parties in conformity with the rules and conditions provided for in this Convention or under extradition agreements between the States Parties and within the limits of their national laws.
>
> 2. Any State Party may, at the time of the deposit of its instrument of ratification or accession, 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.
>
> 3. Extradition shall not be granted if final judgment has been passed by a component 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.
>
> 4. 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 component authorities for the purpose of prosecution if it does not extradite that person.

State Parties were also given the franchise to include as an extraditable offence any terrorist act as defined in Article 1, in any extradition treaty existing between any of the State Parties before or after the entry into force of this Convention[307]. Article 11 provides the format for extradition 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; (a) 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 (b) as comprehensive a description as possible of the wanted person together with any other information which may assist in establishing the person's identity and nationality.

Under Article 13 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. In extraditing, the 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.[308] Article 14 made provisions for mutual legal assistance to state party in a terrorist related investigation and judicial proceedings and in particular,

[307] Art 9
[308] Art 11(2)

(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.

It should be noted that the extra-territorial investigation (commission rogatoire) shall be executed in compliance with the provisions of national laws of the requested State. The request for an extra-territorial investigation (commission rogatoire) relating to a terrorist act shall not be rejected on the grounds of the principle of confidentiality of bank operations or financial institutions, where applicable.[309] The Convention also urged the States Parties to 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[310] and as well to 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.[311]

3.2.2: **International Convention for the Suppression of the Financing of Terrorism**

This treaty was entered into force on April 10, 2002.[312] Nigeria signed the Treaty on 1st June 2000 and ratified same on16th June, 2003.The objective of the Treaty is to enhance international cooperation among States in devising and adopting effective measures for the

[309] Art 16.
[310] Art 17
[311] Art 18
[312] In accordance with Art 26

prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators.

The Convention states that any person commits an offence within the meaning of the Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or with the knowledge that they are to be used, in full or in part, to carry out any of the offences described in the treaties listed in the annex to the Convention, or an act intended to cause death or serious bodily injury to any person not actively involved in armed conflict in order to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act. Any person also commits such an offence if that person attempts to commit an offence as set forth above or participates as an accomplice in an offence, organizes or directs others to commit an offence or contributes to the commission of such an offence by a group of persons acting with a common purpose. For an act to constitute an offence, it is not necessary that funds were actually used to carry out an offence as described above. The provision or collection of funds in this manner is an offence whether or not the funds are actually used to carry out the proscribed acts. The Convention does not apply where an act of this nature does not involve any international elements as defined by the Convention. The Convention requires each Party to take appropriate measures, in accordance with its domestic legal principles, for the detection and freezing, seizure or forfeiture of any funds used or allocated for the purposes of committing the offences described. The offences referred to in the Convention are deemed to be extraditable offences and Parties have obligations to establish their jurisdiction over the offences described, make the offences punishable by appropriate penalties, take alleged offenders into custody, prosecute or extradite alleged offenders, cooperate in preventive measures and countermeasures, and exchange information and evidence needed in related criminal proceedings. The offences

referred to in the Convention are deemed to be extraditable offences between Parties under existing extradition treaties and under the Convention itself.

3.2.3: **Convention On The Suppression Of Unlawful Acts Relating To International Civil Aviation**

This treaty was adopted in Beijing, China on 10 September 2010 and Nigeria is a signatory to same. Part of the preamble of the Convention states that unlawful acts against civil aviation jeopardize the safety and security of persons and property, seriously affect the operation of air services, airports and air navigation, and undermine the confidence of the peoples of the world in the safe and orderly conduct of civil aviation for all States.[313] Article 1 of the Treaty states that a person commits offence if he intentionally and unlawfully:

> (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
>
> (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
>
> (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or
>
> (d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or

[313] First Paragraph of the Preamble to the Treaty

(e) communicates information which that person knows to be false, thereby endangering the safety of an aircraft in flight; or

(f) uses an aircraft in service for the purpose of causing death, serious bodily injury, or serious damage to property or the environment; or

(g) releases or discharges from an aircraft in service any BCN weapon or explosive, radioactive, or similar substances in a manner that causes or is likely to cause death, serious bodily injury or serious damage to property or the environment; or

(h) uses against or on board an aircraft in service any BCN weapon or explosive, radioactive, or similar substances in a manner that causes or is likely to cause death, serious bodily injury or serious damage to property or the environment; or

(i) transports, causes to be transported, or facilitates the transport of, on board an aircraft:

(1) any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, with or without a condition, as is provided for under national law, death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act; or

(2) any BCN weapon, knowing it to be a BCN weapon as defined in Article 2; or

(3) any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of

> special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to a safeguards agreement with the International Atomic Energy Agency; or
>
> (4) any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon without lawful authorization and with the intention that it will be used for such purpose.

Under Article 1 paragraph 5, it is expected under this Treaty that each State Party shall establish as offences, when committed intentionally, whether or not any of the offences set forth in paragraph 1, 2 or 3 of this Article is actually committed or attempted. Such offences shall be punishable by severe penalties[314]. Article 2 stated

> when a plane is in flight as follows an aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation; in the case of a forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board. It is pertinent to note that this convention shall not apply to aircraft used in military, customs or police services.[315]

The issue of jurisdiction under this convention was treated in Article 8 as follows:

ARTICLE 8

[314] Art 3
[315] Art 4

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 1 in the following cases:

(a) when the offence is committed in the territory of that State;

(b) when the offence is committed against or on board an aircraft registered in that State;

(c) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;

(d) when the offence is committed against or on board an aircraft leased without crew to a lessee whose principal place of business or, if the lessee has no such place of business, whose permanent residence is in that State;

(e) when the offence is committed by a national of that State.

2. Each State Party may also establish its jurisdiction over any such offence in the following cases:

(a) when the offence is committed against a national of that State;

(b) when the offence is committed by a stateless person whose habitual residence is in the territory of that State.

3. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 1, in the case where the alleged offender is present in its territory and it does not extradite that person pursuant to Article 12 to any of the States Parties that have established their jurisdiction in accordance with the applicable paragraphs of this Article with regard to those offences.

4. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Article 11 guaranteed fair treatment including enjoyment of all the rights and guarantees in conformity with the law of the state in the territory of which that person is present for any person who is taken into custody, or regarding whom any other measures are taken or proceedings are being carried out pursuant to this Convention. Article 12 made these offences extraditable and made further provisions for the procedure in Articles 13 and 14. Article 17 provided for mutual assistance to state parties. Article 24 made this Convention to prevail over the following instruments (a) the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Signed at Montreal on 23 September 1971; and (b) the 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, Done at Montreal on 23 September 1971, Signed at Montreal on 24 February 1988.

3.2.4: **International Convention for the Suppression of Terrorist Bombings**

This Treaty came into force on the 12th of January, 1998. This Convention was a follow up to the General Assembly Resolution 49/60 of 9th December, 1994 on Measures to Eliminate International Terrorism and as well the General Resolution 51/210 of 17th December, 1996. Article 2 of the Convention defines the offence of Terrorism to mean "Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a state or government facility, a public transportation system or an infrastructure facility; (a) with an intent to cause death or serious bodily injury; or (b) with the intent to cause extensive destruction of such a place, facility or system, where such

destruction results in or is likely to result in major economic loss. It is pertinent to state that under paragraph 2 of Article 2, an attempt to commit any of the act in paragraph 1 of Article 2 is also declared an offence. Article 1 deal with definitions and interpretations. This Convention will not apply where the offence in question is committed within a single state or the offender and victim are nationals of the state or the alleged offender is found in that state.[316] Article 4 enjoined states to create domestic offences in relation to the offences created under this Convention. Article 6 deals with jurisdiction and when each state shall assume jurisdiction over a breach of this Convention. Article 9 provides that the offences under this convention shall be extraditable offences while Article 10 encourages State parties to extend assistance to states in terms of mutual legal assistance, investigations and or extradition proceedings. The Convention also made provisions for the protection of the right of the accused person in offences under this Convention.[317]

3.2.5: **International Convention for the Suppression of Acts of Nuclear Terrorism**

This Convention seeks to encourage the development and application of nuclear energy for peaceful purposes and their legitimate interests in the potential benefits to be derived from the peaceful application of nuclear energy. It came into force on 14th of September, 2005. It noted that acts of nuclear terrorism may result in the gravest consequences and may pose a threat to international peace and security and that existing multilateral legal provisions do not adequately address those attacks. Article 1, of the Convention deals with definition of terms while Article 2 creates the offence of possessing with intent or uses with intent…[318] Attempt to commit these acts is also an offence[319]. Application of the Convention is when an offence is committed within more than a single state.[320] Article 5 encourages each State

[316] Art 3
[317] Art 14
[318] Art 1(a) and (b)
[319] Art 1(3)
[320] Art 3

Party to criminalize offences contained in this Convention under her domestic Laws. Cooperation among State Parties is also encouraged in Article 7. Article 9 enjoins each State to take such measures as may be necessary to establish its jurisdiction over the offences contained in Article 2. The issue of fair hearing is also provided for in Art 12. Article 13 makes the offences under this Convention Extraditable one and further lays down procedures for same. State Party shall also afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in article 2, including assistance in obtaining evidence at their disposal necessary for the proceedings.[321] Article 18 seeks to ensure that seized radioactive materials should not be used for illegitimate purposes or vengeful missions by declaring that same shall be rendered harmless. The Convention encourages effective implementation of itself.[322]

3.2.6: **Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation**

This Convention was concluded at Montreal on the 23rd day of September, 1971 but came into force on 16th January, 1973. The Convention is made up of 16 Articles. The preamble to the Convention stated that unlawful acts against the safety of civil aviation jeopardize the safety of persons and property, seriously affect the operation of air services and undermine the confidence of the peoples of the world in the safety of civil aviation. The Convention creates the offence in its Article 1(1). It stated that any person commits an offence if he unlawfully and intentionally

a. Performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or

[321] Art 14
[322] Art 20

b. Destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or

c. Places or causes to be placed on aircraft in service, by any means whatsoever, a device or substance which is likely to destroy the aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its flight; or

d. Destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of the aircraft in flight; or

e. Communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

The Convention further criminalizes the attempt to commit any of the offences mentioned in paragraph 1 of this article[323] as well as an accomplice. It is pertinent to state also that the Convention defined an aircraft in flight as one whose doors have been closed upon embarkation and that even in the event of forced landing; such an aircraft is still deemed to be in flight until the competent authorities have retaken possession of same.[324] It stated that an aircraft is considered in service from the beginning of the preflight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty four hours after and landing; the period of service shall in any event extend for the entire period during which the aircraft is in flight[325]. It also excluded aircrafts used in military customs and police services.[326] It is immaterial for the applicability of this Convention whether the aircraft is on domestic or international flight provided that the place of takeoff or landing, actual or

[323] Article 1(2)
[324] Article 2(a)
[325] Article 2(b)
[326] Article 4

intended is situated outside the territory of the state of registration of the aircraft or that the offence is committed in the territory of a state other than the state of registration.[327] Article 5 of the Convention encouraged State parties to establish jurisdictions for such offences occurring solely within their territory and on aircrafts registered within enclave. Article 8 made the offence an extraditable one and enjoined contracting states to explore opportunities of extradition where the need arises.

3.2.7: **International Convention for the Unlawful Seizure of Aircraft**

This came into force on October 14, 1971 and Nigeria is a signatory and has as well ratified same. It has 14 Sections referred to as Articles. The preamble to this convention states that unlawful acts of seizure or exercise of control of aircraft in flight jeopardize the safety of the persons and property and seriously affect the operation of air services, and undermine the confidence of the peoples of the world in the safety of civil aviation. The Convention makes it an offence for any person who on board an aircraft in in flight to unlawfully, by force or threat thereof, or by any other form of intimidation seizes or exercises control of that aircraft or attempts to perform any such act or is an accomplice of a person who performs or attempts to perform any such act.[328] Article 3 (1) of the Convention identifies an aircraft to be in flight the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. It further stated that in the case of forced landing, such flight shall be deemed to have continued until the competent authorities have taken over same. It further removed aircraft used in military, customs or

[327] Article 4(2)
[328] Article 1.

police services from the application of this convention.[329] The application of this treaty is in the event of the takeoff and landing of the plane taking place within the same territory but where the offender is found in the same territory but the registration of the aircraft is not of the same territory, the convention will apply.[330] The Convention also made provisions for extradition[331]. The convention in its Article 10 made provisions for mutual assistance between contracting states. Finally the convention made provisions for withdrawal of any contracting state parties in the event that it so wishes[332] and as well the modality for such withdrawal.

3.2.8: **Convention on The Marking Of Plastic Explosives For The Purpose Of Detection (Montreal Convention)**

In December 1988, Pan American flight 103 exploded over Lockerbie, Scotland. To prevent future explosions onboard aircraft, the ICAO Council passed a resolution urging its Member States to expedite current research and development on detection of explosives and on security equipment during its regular session meeting in February 1989. The UN Security Council (SC) also met on 14 June 1989 to discuss the marking of plastic or sheet explosives for the purpose of detection. That same day, the Security Council unanimously adopted Resolution 635 condemning all acts of unlawful interference against the security of civil aviation and calling on Member States to co-operate in devising and implementing measures to prevent all acts of terrorism, including those involving explosives. The body urged the ICAO to intensify its work to prevent all acts of terrorism against international civil aviation, and in particular its work on devising an international regime for the marking of plastic or sheet explosives for the purpose of detection.

[329] Article 3(2)
[330] Articles 3, 4 and 5
[331] Article 8
[332] Article 14

From 9-19 January 1990, the ICAO Sub-Committee for the Preparation of a New Legal Instrument Regarding the Marking of Plastic Explosives for Detectability met in Montreal, Canada and drafted a new international agreement to ensure that plastic explosives were marked with an additive to enhance their detectability. The ICAO Legal Committee considered this draft during its 27th session, which met from 27 March-12 April. This meeting resulted in a final text of six articles for a draft convention. From 12 February-1 March 1991, the International Conference on Air Law met in Montreal to consider the draft articles prepared by the ICAO Legal Committee in 1990. The Conference adopted the Convention by consensus and without a vote. This Convention calls on States Parties to take the necessary and effective measures to prohibit and prevent the manufacture of unmarked ex-plosives in their territories, to prevent the movement of such explosives into or out of their territory, to exercise strict control over the possession and transfer of unmarked explosives made or imported prior to the entry into force of the Convention, to ensure that all stocks not held by the military or police are destroyed or consumed, marked, or rendered permanently ineffective within three years of the Convention's entry into force, with respect to a State, and to ensure the timely destruction of any unmarked explosives manufactured after the entry into force of the Convention for that State.[333]

The Convention establishes an International Explosives Technical Commission composed of members appointed by the Council of the International Civil Aviation Organization (based on nominations of States Parties to the Convention).[334] The parameters for membership allow between 15 and 19 experts with direct experience in matters relating to the manufacture, detection of, or research in explosives. Members will serve three-year renewable terms. Sessions of the Commission shall be convened at least once a year at the ICAO Head-quarters or as directed or approved by the ICAO Council. The Commission is

[333] Articles 2-4
[334] Article 5

tasked with evaluating technical developments relating to the manufacture, marking, and detection of explosives, reporting findings to the States Parties and international organizations involved, and making recommendations for amendments to the Technical Annex to the Convention[335]. Under Article 13, States are requested to declare whether they are producer States when depositing their instruments of ratification, acceptance, approval, or accession. Under Article 11 paragraph 1, disputes between two or more States concerning the interpretation or application of the Convention will be submitted to arbitration at the request of one of the States if the matter cannot be settled through negotiation. However, at the time of signing, ratification, or accession, a State may make a reservation that it does not consider itself bound by this paragraph, in which case other States Parties shall not be bound to it with respect to any State Party that has made such a declaration. In addition, States Parties may denounce this Convention by written notification to the Depository. In such a case, denunciation will take effect 180 days following the date on which notification is received.

3.2.9: **Protocol For The Suppression Of Unlawful Acts Of Violence At Airports Serving International Civil Aviation**

This Protocol was opened for Signature on 24th February 1988 and formally entered into Force on 6 August 1989. The preamble to this Protocol states that unlawful acts of violence which endanger or are likely to endanger the safety of per-sons at airports serving international civil aviation or which jeopardize the safe operation of such airports undermine the confidence of the peoples of the world in safety at such airports and disturb the safe and orderly conduct of civil aviation for all States. It further stated that the occurrence of such

[335] Articles 6 and 7

acts is a matter of grave concern to the international community and that, for the purpose of deterring such acts, there is an urgent need to provide appropriate measures for punishment of offenders.

Article I This Protocol supplements the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971 (hereinafter referred to as «the Convention), and, as between the Parties to this Protocol, the Convention and the Protocol shall be read and interpreted together as one single instrument. It further provided in Article 1 of the Convention, that the following shall be added as new paragraph 1, Any person commits an offence if he unlawfully and intentionally, using any device, substance or weapon: (a) performs an act of violence against a person at an airport serving international civil aviation which causes or is likely to cause serious injury or death; or (b) destroys or seriously damages the facilities of an airport serving international civil aviation or aircraft not in service located thereon or disrupts the services of the airport, if such an act endangers or is likely to endanger safety at that airport. It enjoined each Contracting State to take such measures as may be necessary to establish its jurisdiction over the offences mentioned in Article 1, paragraph 1 , and in Article 1, paragraph 2, in so far as that paragraph relates to those offences, in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to the State mentioned in paragraph 1(a) of this Article.

3.2.10: **Convention on Physical Protection of Nuclear Material**

The Convention on the Physical Protection of Nuclear Material was signed at Vienna and at New York on 3 March 1980. It was eventually adopted on 26th October, 1979 at Vienna Austria and entered into force on February 8, 1987. Nigeria is a signatory to this Convention. The Convention is the only international legally binding undertaking in the area

of physical protection of nuclear material. It establishes measures related to the prevention, detection and punishment of offenses relating to nuclear material. A Diplomatic Conference in July 2005 was convened to amend the Convention and strengthen its provisions. The amended Convention makes it legally binding for States Parties to protect nuclear facilities and material in peaceful domestic use, storage as well as transport. It also provides for expanded cooperation between and among States regarding rapid measures to locate and recover stolen or smuggled nuclear material, mitigate any radiological consequences of sabotage, and prevent and combat related offences. The amendments will take effect once they have been ratified by two-thirds of the States Parties of the Convention. Article 1 of the Convention defined terms relevant such as nuclear material, uranium enriched in the isotope 235 or 233 andinternational nuclear transport. In its Article 2, it provided for its applicability to nuclear material used for peaceful purposes while in international nuclear transport and as well nuclear material used for peaceful purposes while in domestic use, storage and transport. It enjoined each state party to criminalize the offences contained in its Article 7. Article 7 stated as follows:

The intentional commission of:

a. an act without lawful authority which constitutes the receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material and which causes or is likely to cause death or serious injury to any person or substantial damage to property;
b. a theft or robbery of nuclear material;
c. an embezzlement or fraudulent obtaining of nuclear material;
d. an act constituting a demand for nuclear material by threat or use of force or by any other form of intimidation;

e. a threat: to use nuclear material to cause death or serious injury to any person or substantial property damage, or to commit an offence described in sub-paragraph (b) in order to compel a natural or legal person, international organization or State to do or to refrain from doing any act;

f. an attempt to commit any offence described in paragraphs (a), (b) or (c); and

g. an act which constitutes participation in any offence described in paragraphs (a) to (f)

shall be made a punishable offence by each State Party under its national law. The state party shall also make the offences described in this article punishable by appropriate penalties which take into account their grave nature[336]. Article 8(1) provided for the jurisdiction of a state party as follows: "each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 7 in the following cases; when the offence is committed in the territory of that State or on board a ship or aircraft registered in that State; when the alleged offender is a national of that State." The offences in Article 7 were also made extraditable offences.[337] Article 13 encourages State parties to mutually assist each other in the prosecution of these offences while Article 15 made the annexures an integral part of the Convention.

[336] Article 7(2)
[337] Article 11.

CHAPTER FOUR

NATURE, BACKGROUND AND TYPOLOGY OF TERRORISM

4.0: Background and History of Terrorism in Nigeria

The genesis of terrorism, as a global problem, is attributed to development of political situation in the World in late 60s. However, it is not a modern phenomenon as it has been in existence since the days of ancient Greece, in medieval Italy and in the 20th Century. The origin of the present day terrorism can be traced to the Sinai War of June 1967 when in a few days Israel decimated the armed forces of some of the Middle East countries and occupied large tract of their land. The Arab world has since then been simmering with anger and rage leading to the beginning of "contemporary wave of terrorism" in the Middle East in 1968[338]. The first manifestation of moving away from the conventional war and confrontation between the Israeli and the Arab was the seizure of an American Airline by a Palestinian sympathizer. Terrorism is no longer a technique of protest but has become a global apparatus to challenge thenumber one superpower in the unipolar world.[339] What had not been reckoned earlier was the way in which religion was to become enmeshed with the political aspiration. In Nigeria on the other hand, terrorism was with us albeit on a very small scale. As far back as 1985, we had an incident of Letter bombing[340] which forms a part of the acts of terrorism. Between 1995 and 1998 we had several cases of terrorism which eventually were found out to be state sponsored[341].

With the entrenchment of democratic regime, the issue of terrorism slowly crept to the front burner. It started in the form of agitation for one democracy dividend or another. The most

[338] Indeed any group of terrorist arising anywhere will list as their demands the liberation of Palestine and Islamisation of the whole world among others

[339] Amy Zalman,*The History of Terrorism*, e book available online at www.terrorism.about.com accessed on 27/4/2011

[340] Dele Giwa, a journalist was killed by a bomb on Oct. 19, 1986. See www.wikipaedia.org/wiki/Dele_Giwa

[341] Under the reign of Sani Abacha, many people lost their lives in state sponsored terrorism.

visible acts of terrorism was the economic terrorism witnessed in the oil rich Niger Delta region which gave rise to bombing of oil installations and eventual kidnap of oil workers, mostly expatriates. The perpetrators argued that the government of the day had neglected them so much and therefore it was time for them to take the laws into their hands and assuage their thirst. When the cases became increasingly hot, the government of the day orchestrated another government magic called amnesty urging the people involved in the crimes to surrender their arms and then be accommodated in a camp where they were paid some allowance and eventually some of them were sent out of the country for some living skills that will make them effective members of the society[342]. Of course, the essence of this amnesty was not because the government wanted to do what is right. No, it was simply because oil was involved and any attempt to sabotage oil business in Nigeria is an attempt to cripple the economy of the nation. It is also imperative that we state here that terrorist acts can be committed by a state against its people. This has been evidenced in Nigeria during the Odi Massacre[343].

While the country was yet wallowing in the euphoria of having destroyed the evil of oil installations bombing, kidnapping rose to a crescendo in Aba, Abia State. The town was sacked and economic activities ground to a halt. It was so bad that kidnapping for ransom became the biggest business in the city. Finally it took the combined might of the federal and state government to quell the ugly event. By the time it was quelled in Aba, kidnapping has assumed a dangerous trend in the entire states of the South East calling for urgent effort to quell same. Most of the States hurriedly went into their Houses of Assembly and came up with various Laws aimed at eradicating the crime of kidnapping. These Laws prescribed

[342] As at today some of such former militants have acquired some life changing skills. See also Soni Daniel, 'Kuku seeks jobs for amnesty trained pilots' *Vanguard Newspaper* of March 17, 2014

[343] Abdul Oroh, "The CLO Speech at University of Pennsylvania" available online at www.africa.upenn.edu accessed on 23/4/15

varied punishments including death. What is not yet clear is whether there was a critical analysis of the consequences of the Laws especially in the area of human rights.

As if that was all, another group arose in the North East part of the country. Indeed it was their emergence that signaled to the country that we are in for serious trouble. This was so because; the group as research has shown has ties with the dreaded *Al qaeda* terrorist group that has put the fear of violence in the mind of almost all the countries of the world. One can simply say that the fear of *Al qaeda* is the beginning of wisdom security wise. Indeed the emergence of *Boko Haram* manifested the issue of the usage of improvised explosive devices, suicide bombers, shoot outs and vehicle bombs. Till date *Boko haram* has killed more than 1000 persons the highest being the Kano orchestrated bombings that claimed over 180 souls on the 20th of January, 2012[344]. .

4.1: **Definition of Terrorism**

It stands to reason that in order to combat an evil, the nature of such evil must be given an acceptable definition. It is extremely difficult to offer a precise and objective definition of terrorism which can be universally acceptable. There are several reasons for this, namely: (i) Terrorism is prompted by a wide range of motives, depending on the point in time and the prevailing political ideology. (ii) It takes different forms: although it is usually equated with political subversion; (iii) The criteria for defining the term 'terrorism' is generally subjective since it is mainly based on political considerations and is often employed by Governments; (iv) It is used as an instrument of syndicated crime. It is difficult to define "terrorism", as, during the last 40 years the forms of terrorism have undergone complicated changes. However, one of the earliest definitions in the 20th century which comes to mind is the one

[344] *Vanguard Newspaper* of March 26, 2014

given in Article 1 of the League of Nations Convention on Terrorism, 1937[345] which defined it as "criminal acts" directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public. This definition has also undergone a change as terrorism is seen to be about power – as a means to political power with full control of State authority. There has been a good deal of debate on the desirability of having a comprehensive definition as new trends and dangers have been revealed. This definition could be general or enumerative or mixed or whether it should be confined to individual and group terrorism or cover State terrorism as well and whether it should exempt the struggles for self-determination from its scope or embrace all situations alike. A.S. Anand J. (as he then was) delivering the judgment in *H.V. Thakur vs. State of Maharashtra* has perceptively dealt with the definition of terrorism. He observed that:

> Terrorism is one of the manifestations of increased lawlessness and cult of violence. Violence and crime constitute a threat to an established order and are a revolt against a civilized society. "Terrorism" has not been defined under TADA nor is it possible to give a precise definition of "terrorism" or lay down what constitutes "terrorism". It may be possible to describe it as use of violence when it's most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole. There may be death, injury, or destruction of property or even deprivation of individual liberty in the process but the extent and reach of the intended terrorist activity travel beyond the effect of an ordinary crime capable of being punished under the ordinary penal law of the land and its main objective is to overawe the Government or disturb harmony of the society or

[345]UN Secretariat Study on Terrorism, UN Doc A/C.6/418, Annexe I

> "terrorise" people and the society and not only those directly assaulted, with a view to disturb even tempo, peace and tranquility of the society and create a sense of fear and insecurity. A 'terrorist' activity does not merely arise by causing disturbance of law and order or of public order. The fall out of the intended activity must be such that it travels beyond the capacity of the ordinary law enforcement agencies to tackle it under the ordinary penal law. Experience has shown us that "terrorism" is generally an attempt to acquire or maintain power or control by intimidation and causing fear and helplessness in the minds of the people at large or any section thereof and is a totally abnormal phenomenon. What distinguishes 'terrorism' from other forms of violence, therefore, appears to be the deliberate and systematic use of coercive intimidation. More often than not, a hardened criminal today takes advantage of the situation and by wearing the cloak of "terrorism", aims to achieve for himself acceptability and respectability in the society because unfortunately in the States affected by military, a 'terrorist' is projected as a hero by his group and often even by the misguided youth[346].

The definition of terrorism has eluded and haunted countries for decades. The first attempt to arrive at an acceptable definition under the League of Nations was stillborn. If "terrorism" by nature is difficult to define, acts of terrorism conjure emotional responses in those affected by it or after its effects. The Federal Bureau of Investigation has been using several definitions of terrorism which have been quoted in Arijit Pasayat, J. in his judgment in *Devender Pal Singh vs. State of N.C.T. of Delhi & Anr.*[347] The definitions quoted therein are road-maps to understanding "terrorism" and terrorist activities. Terrorism is the use or

[346]VS Malimath et al, 'Report of the Committee on Reforms of Criminal Justice System',(Vol 1, Government of India, Ministry of Home Affairs, Bangalore, 28 March, 2003).
[347]*ibid*

threatened use of force designed to bring about political change. Terrorism has been defined as "the use or attempted use of terror as a means of coercion". It is often linked with violence, but that is because violence is a very effective means of intimidation. Goodin submits that terrorism is "a political tactic, involving the deliberate frightening of people for political advantage"[348]For Honderich, terrorism is best defined as "violence, short of war, political, illegal and prima facie wrong"[349]

Terrorism is the unlawful use of force or violence against persons or property to intimidate or coerce a Government, the civilian population, or any segment thereof, in furtherance of political or social objectives[350]. Notwithstanding the difficulties which operate against providing a universally acceptable definition of the term, terrorism encompasses use of violence of threat for acts directed against a country or its inhabitants or violation of law and calculated to create a state of terror in the minds of the Government officials, an individual or a group of persons, or the general public at large. This process could be an individual-oriented but more than often it is organized groups which embark on a journey of violence and quite occasionally mayhem. The International Law Commission[351] concluded that the following categories constitute terrorist acts:

(i) Any act causing death or grievous bodily harm or loss of liberty to a Head of State, persons exercising the prerogatives of the Head of State, their hereditary or designated successors, the spouse of such persons, or persons charged with public functions or holding public positions when the act is directed against them in their public capacity.

(ii) Acts calculated to destroy or damage public property or property devoted to a public purpose.

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[348]R E Goodin, *What's Wrong with Terrorism*? (Oxford: Polity, 2006)p.16
[349]Ted Honderich,*Humanity, Terrorism, Terrorist War*, (London and New York: Continuum, 2006)p.67
[350] Federal Bureau of Investigation working definition
[351]www.un.org/law/ilc/ accessed on 23/4/2011

(iii) Any act likely to imperil human lives through the creation of a public danger, in particular the seizure of aircraft, the taking of hostages and any form of violence directed against persons who enjoy international protection or diplomatic immunity.

(iv) The manufacture, obtaining, possession or supplying of arms, ammunition, explosives or harmful substances with a view to the commission of a terrorist act.

The acceptability of violence in a society is a pointer as to whether terrorism is perceived to be a valid form of protest and thus closely linked to the level of support a group can hope to receive from their society at large. This does not necessarily suggest that, if support is lacking, terrorists will renounce violence because it is counter-productive. Part of their problem is that terrorist organizations often have difficulties in moving away from violence. Terrorism, as an effective weapon, has since appeared as a serious challenge to the world order and cannot be overlooked or washed away. In the words of Venkatraman, R, the former President of India, the response to this "spectrum of challenges" has to be "multi-dimensional". In his inaugural address at the 21st Annual Conference of the Indian Society of International Law[352], he underlined the "need to mobilize the processes of ratiocination that have taken the shape of legal enquiry". He said that "lego-philosophic minds can arrest the world in so arranging or ordering human affairs as to make them consistent with the evolution of collective human thought. What is involved in the process is not just the maintenance of the powers of the States or "order" but "order" with "law". Within the boundaries of a State the balance is not so difficult to maintain. But in trans-national affairs, the task becomes difficult". The globalization of terrorism, or organized violence, in contrast to conventional war, is the one which concerns the world. The acts of terrorism, whatever the purpose, are aimed at creating an atmosphere of fear, apprehension and destabilize the security systems apart from disturbing the existing social order. The very fact that acts of

[352] *Op cit* p 7

terrorism are well orchestrated by motley group of persons because of their perceived grievances or their anger against "targets chosen for their power and importance aimed at paralyzing Government concerns". Terrorism has also been described as a proxy war, both stealthy and clandestine[353].

Realistically, neither scholars nor practitioners have managed to agree on a single accepted definition of terrorism. Counterterrorism efforts worldwide suffer because of definitional problems among nations, and even within nations, to agree on an all-encompassing definition of terrorism. More so Counter Terrorism efforts have themselves been alleged to include terrorist acts. This is so because the moment the counter terrorism force overwhelms the initial force of the terrorist attack, it becomes a terrorist act. In some cases preventive attacks have shown clearly that some counter terrorism measures are equivalent to terrorist attacks. All these therefore give rise to the difficulty encountered in the definition of terrorism. The difficulty is such that some scholars believe that the search for a definition is futile[354].We shall in this work take cue from the definitions provided by the U.S. Department of State with the characteristics stated by Schweitzer et al[355]. The U.S. Department of State[356] treats as terrorism "any violence perpetrated for political reasons by sub-national groups or secret state agents, often directed at noncombatant targets, and usually intended to influence an audience." To augment this definition of terrorism, characteristics that are associated with terrorism and terrorists are stated to include the following:

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[353]*Op cit* p 8

[354]J D Simon, *The Terrorist Trap: America's Experience With Terrorism*,(Indiana: Indiana University Press, 1994), p. 384 states that definitions of terrorism "lend themselves to contradictions, since they are usually influenced by ideological and political perceptions of the terrorist threat."

[355] Glenn Schweitzer & Carol Dorsch, *Super terrorism: Assassins, Mobsters, and Weapons of Mass Destruction*, (New York and London: Plenum Trade, 1998) p. 32

[356] Patterns of Global Terrorism: 1998, Department of State Publication 10610, Office of the Secretary of State, Office of the Coordinator for Counterterrorism, U.S. Department of State, Washington, D.C., April 1999, p. vi.

a. terrorism provokes a fear and insecurity deeper than any other form of violence, striking innocent victims randomly and without warning
b. terrorists attempt to discredit governments by demonstrating their inability to protect their citizens…
c. terrorists use violence in an increasingly scattered way to express protest and rage[357].

Certain issues can be distilled from the definition of terrorism provided above. The definition is still valid in the present society and in itself shows how the phenomenon of terrorism does not change in kind and is continuous. Again, terrorism is a struggle for the achievement of political goals. In addition to these, Simon[358] adds that "since the essence of terrorism is the effect that violent acts can have on various targets and audiences, it would make more sense to talk about terrorist-type tactics—which can be utilized by extremist groups, guerillas, criminals, or governments". In terrorism the means that are used to achieve the political goals are of such nature that they can be described as severe crimes. It is vital still to note that acts of terror are intended for an audience beyond the immediate victims of the act. Still one will not overlook the fact that terror tactics are usually performed against noncombatants. The truth as evidenced in Nigeria is that the victims of terrorist attacks have no issue to distill with the terrorists themselves.

Bruce Hoffman states that throughout history although national armies have caused much greater death and destruction than "terrorists might ever aspire to bring about, there nonetheless is a fundamental qualitative difference between the two types of violence…even in war there are rules and accepted norms of behavior that prohibit the use of certain types of weapons, proscribe various tactics and outlaw attacks on specific categories of targets.[359]" Some argue that acts of terror are legitimate because of the ultimate objectives that are

[357] *Ibid* p. 32.
[358] *Op. cit* p. 384
[359] Bruce Hoffman,*Inside Terrorism,* (New York: Columbia University Press, 1998), p. 34.

sought. Indeed Nielsen[360] has argued that the legitimacy or otherwise of terrorism depends on their utility as a method for attaining morally and politically worthwhile objectives such as "a truly socialist society" or liberation from colonial rule. "When and where [either] should be employed is a tactical question that must be decided … on a case-by-case basis … like the choice of weapon in a war" Others have yet not seen anything worth justifying in terrorism as the terrorists treat human beings as objects and nothing more.For the terrorist, the innocent victim is neither a human in this judgmental sense nor a human in the sense of simply having value as a human being. To Fotion, the terrorist needs to pick a human being as a victim … because [that] brings about more terror … But this does not involve treating them as humans. Rather, they are victimized and thereby treated as objects because they are humans[361]. Terrorist acts, as we know them tend to meet this caveat of actions that fall outside the bounds of civilized rule and commonly accepted international law.

Terrorism is commonly understood to refer to acts of violence that target civilians in the pursuit of political or ideological aims. In 1994, the General Assembly's Declaration on Measures to Eliminate International Terrorism, set out in its resolution 49/60[362], stated that terrorism includes "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" and that such acts "are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them."

[360]Nielsen, Kai, 1981, "Violence and Terrorism: Its Uses and Abuses", in Leiser, Burton M., ed., Values in Conflict, (New York: Macmillan,1981)p 435–449.
[361]Fotion, Nicholas, 'The Burdens of Terrorism', in Leiser, Burton M., (ed)., *Values in Conflict,*(New York: Macmillan,1981) p 463–470
[362] http:/ / www. un. org/ documents/

Ten years later, the Security Council, in its resolution 1566 (2004)[363], referred to "criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a Government or an international organization to do or to abstain from doing any act". Later that year, the Secretary-General's High-level Panel on Threats, Challenges and Change described terrorism as any action that is "intended to cause death or serious bodily harm to civilians or noncombatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act" and identified a number of key elements, with further reference to the definitions contained in the 1999 International Convention for the Suppression of the Financing of Terrorism and Security Council resolution 1566 (2004)[364]. The General Assembly is currently working towards the adoption of a comprehensive Convention against terrorism, which would complement the existing sectoral anti-terrorism Conventions. Its draft article 2 contains a definition of terrorism which includes "unlawfully and intentionally" causing, attempting or threatening to cause: "(a) death or serious bodily injury to any person; or (b) serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or (c) damage to property, places, facilities, or systems…, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act." The draft article further defines as an offence participating as an accomplice, organizing or directing others, or contributing to the commission of such offences by a group of persons acting with a

[363] *Ibid*
[364] *Ibid*

common purpose. While Member States have agreed on many provisions of the draft comprehensive convention, diverging views on whether or not national liberation movements should be excluded from its scope of application have impeded consensus on the adoption of the full text. Negotiations continue. Many States define terrorism in national law in ways that draw to differing degrees on these elements.

Terrorist acts can destabilize Governments, undermine civil society, jeopardize peace and security, threaten social and economic development, and may especially negatively affect certain groups.The destructive impact of terrorism on human rights and security has been recognized at the highest level of the United Nations, notably by the Security Council, the General Assembly, the former Commission on Human Rights and the new Human Rights Council. Specifically, Member States have set out that terrorism:

i. Threatens the dignity and security of human beings everywhere, endangers or takes innocent lives, creates an environment that destroys the freedom from fear of the people, jeopardizes fundamentalfreedoms, and aims at the destruction of human rights;

ii. Has an adverse effect on the establishment of the rule of law, undermines pluralistic civil society, aims at the destruction of the democratic bases of society, and destabilizes legitimately constituted Governments;

iii. Has links with transnational organized crime, drug trafficking, money-laundering and trafficking in arms, as well as illegal transfers of nuclear, chemical and biological materials, and is linked to the consequent commission of serious crimes such as murder, extortion, kidnapping, assault, hostage-taking and robbery;

iv. Has adverse consequences for the economic and social development of States, jeopardizes friendly relations among States, and has a pernicious impact on

relations of cooperation among States, including cooperation for development; and

v. Threatens the territorial integrity and security of States, constitutes a grave violation of the purpose and principles of the United Nations, is a threat to international peace and security, and must be suppressed as an essential element for the maintenance of international peace and security.

There is therefore neither an academic nor an international legal consensus regarding the definition of the term "terrorism"[365]. Various legal systems and government agencies use different definitions of "terrorism". Moreover, the international community has been slow to formulate a universally agreed upon, legally binding definition of this crime.

During the 1970s and 1980s, the United Nations attempts to define the term floundered mainly due to differences of opinion between various members about the use of violence in the context of conflicts over national liberation and self-determination."[366]These divergences have made it impossible to conclude a Comprehensive Convention on International Terrorism that incorporates a single, all-encompassing, legally binding, criminal law definition of terrorism[367].In the meantime, the international community adopted a series of sectoral Conventions that define and criminalize various types of terrorist activities. In addition, since 1994, the United Nations General Assembly has condemned terrorist acts using the following political description of terrorism: "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

[365] Myra Williamson,*Terrorism, war and international law: the legality of the use of force against Afghanistan in 2001,* (Vermont: Ashgate Publishing,2009), p.380 .

[366] Angus Martyn, *The Right of Self-Defence under International Law-the Response to the Terrorist Attacks of 11 September (*http:/ / www. aph.gov. au/ library/ Pubs/), Australian Law and Bills Digest Group, Parliament of Australia Web Site, 12 February 2002.

[367]Carlos Fernando Diaz-Paniagua,'Negotiating terrorism: The negotiation dynamics of four UN counter-terrorism treaties, 1997-2005',Ph.D. dissertation, City University of New York, New York, July 2008.

political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them."[368] Schmid and Jongman stated that there are about 109 definitions of terrorism that covered a total of 22 different definitional elements[369].Record[370] asserted that Walter Laqueur also has counted over 100 definitions and concludes that the 'only general characteristic generally agreed upon is that terrorism involves violence and the threat of violence.' Yet terrorism is hardly the only enterprise involving violence and the threat of violence. So does war, coercive diplomacy, and bar room brawls"[371].

For Bruce Hoffman, "terrorism" is a pejorative term. It is a word with intrinsically negative connotations that is generally applied to one's enemies and opponents, or to those with whom one disagrees and would otherwise prefer to ignore. Hence the decision to call someone or label some organization 'terrorist' becomes almost unavoidably subjective, depending largely on whether one sympathizes with or opposes the person/group/cause concerned. If one identifies with the victim of the violence, for example, then the act is terrorism. If, however, one identifies with the perpetrator, the violent act is regarded in a more sympathetic, if not positive (or, at the worst, an ambivalent) light; and it is not terrorism."[372]This has given rise to the common saying that one man's terrorist is another man's freedom fighter. But how true is this cliché? To Goldberg, it is simply absurd to contend that because people may argue over who is or is not a terrorist that it is therefore impossible to make meaningful distinctions between terrorists and freedom fighters.[373] It is imperative to understand that a terrorist is gven that label usually by governments. To that

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[368] 1994 United Nations Declaration on Measures to Eliminate International Terrorism annex to UN General Assembly resolution 49/60 ,"Measures to Eliminate International Terrorism", of December 9, 1994, UN Doc. A/Res/60/49 (http:/ / www. un. org/ documents/ ga/ res/ 49/ Definitions of terrorism 16 a49r060. htm)

[369] Alex P Schmid, et al.,*Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature,* **(**New Jersey:Transaction Books,1988)p. 5-6.

[370]Jeffrey, Record**,** *Bounding the Global War on Terrorism*, (Honolulu Hawaii:University Press of the Pacific, 2004)

[371]*Ibid p3*.

[372]*Op. cit*p.35

[373]Goldberg, Jonah, " The Tyranny of Cliches" (New York, Sentinel, 2012)p4

extent therefore, it becomes understandable that the people with whom the terrorist live will see him as a freedom fighter hence the cliché. For instance in Nigeria, when the Niger Delta Militants were active, they were seen as rebels by the government but in their immediate vicinity they were seen as heroes who were out to liberate their people from bondage. It therefore shows that to the government or the persons whom the terrorists are directing their anger against, they are terrorists but to the people on their side, they are martyrs. It is obviously this reason that gives rise to the growth of terrorism because the immediate environment from which the terrorist comes from will see him as a martyr if he is killed and there will be many more that might be willing to replace him. It is clear then that the cliché is nothing more than a deceptive label for encouraging more people into terrorism and every clear thinking person ought to avoid that label.

Etymologically, the term "terrorism" comes from French word “terrorisme”, from Latin: 'terror', "great fear", "dread", related to the Latin verb “terrere”, "to frighten". Historically however, the terror *cimbricus* was a panic and state of emergency in Rome in response to the approach of warriors of the Cimbri tribe in 105BC. The French National Convention declared in September 1793 that "terror is the order of the day". The period 1793–94 is referred to as *La Terreur* (Reign of Terror). Maximilien Robespierre, a leader in the French revolution proclaimed in 1794 that "Terror is nothing other than justice, prompt, severe, inflexible."[374]The Committee of Public Safety agents that enforced the policies of "The Terror" were referred to as "Terrorists". The word "terrorism" was first recorded in English-language dictionaries in 1798 as meaning "systematic use of terror as a policy".[375]

[374]Mark Burgess,” ABrief History of Terrorism” (http:/ / www. cdi. org/, Center for Defense Information (http:/ / cdi. org).

[375]Douglas Harper, . " Terrorism (http:/ / dictionary. reference. com/ browse/ terrorism)", Dictionary.com (http:/
Dictionary. com) Online Etymology Dictionary. (accessed, January 27, 2012).

According to Dr Myra Williamson, "The meaning of “terrorism” has undergone a transformation. During the reign of terror a regime or system of terrorism was used as an instrument of governance, wielded by a recently established revolutionary state against the enemies of the people. Now the term “terrorism" is commonly used to describe terrorist acts committed by non-state or subnational entities against a state[376].Ben Saul has noted that a "A combination of pragmatic and principled arguments supports the case for defining terrorism in international law"[377], including the need to condemn violations to Human rights, to protect the state and deliberative politics, to differentiate public and private Violence, and to ensure International Peace and Security.

Carlos Diaz-Paniagua,[378] who coordinated the negotiations of the proposed United Nations Comprehensive Convention on International Terrorism, noted, on his part, the need to provide a precise definition of terrorist activities in international law: "Criminal law has three purposes: to declare that a conduct is forbidden, to prevent it, and to express society's condemnation for the wrongful acts. The symbolic, normative role of criminalization is of particular importance in the case of terrorism. The criminalization of terrorist acts expresses society's repugnance at them,invokes social censure and shame, and stigmatizes those who commit them. Moreover, by creating and reaffirming values, criminalization may serve, in the long run, as a deterrent to terrorism, as those values are internalized."[379]

According to Saul, ‘Terrorism’ currently lacks the precision, objectivity and certainty demanded by legal discourse. Criminal law strives to avoid emotive terms to prevent prejudice to an accused, and shuns ambiguous or subjective terms as incompatible with the principle of non-retroactivity. If the law is to admit the term, advance definition is essential

[376]*Op. cit*. p. 43.
[377]B Saul, ‘Defining Terrorism to Protect Human Rights’, in D Staines (ed*), Interrogating the War on Terror*, (Cambridge: Cambridge Scholars Press: 2007) 190-210
[378]Carlos Fernando Diaz-Paniagua,‘Negotiating terrorism: The negotiation dynamics of four UN counter-terrorism treaties, 1997-2005’**,**Ph.D. dissertation, City University of New York, New York, July 2008. p. 41.
[379]*Ibid*.

on grounds of fairness, and it is not sufficient to leave definition to the unilateral interpretations of States. Legal definition could plausibly retrieve terrorism from the ideological quagmire, by severing an agreed legal meaning from the remainder of the elastic, political concept. Ultimately it must do so without criminalizing legitimate violent resistance to oppressive regimes – and becoming complicit in that oppression."[380]

Diaz-Paniagua has noted that, in order to "create an effective legal regime against terrorism, it would be necessary to formulate a comprehensive definition of that crime that, on the one hand, provides the strongest moral condemnation to terrorist activities while, on the other hand, has enough precision to permit the prosecution of criminal activities without condemning acts that should be deemed to be legitimate. Nonetheless, due to major divergences at the international level on the question of the legitimacy of the use of violence for political purposes, either by states or by self-determination and revolutionary groups, this has not yet been possible."[381] In this sense, Bassiouni notes: "to define "terrorism" in a way that is both all-inclusive and unambiguous is very difficult, if not impossible. One of the principal difficulties lies in the fundamental values at stake in the acceptance or rejection of terror-inspiring violence as means of accomplishing a given goal. The obvious and well known range of views on these issues are what makes an internationally accepted specific definition of what is loosely called "terrorism," a largely impossible undertaking. That is why the search for and internationally agreed upon definition may well be a futile and unnecessary effort."[382]

Sami Zeidan, a Lebanese diplomat and scholar, explained the political reasons underlying the current difficulties to define terrorism as follows: "There is no general consensus on the

[380] *Ibid*p. 11.
[381] *Ibid*p. 47.
[382] M Cherif Bassiouni, 'A Policy-oriented Inquiry of 'International Terrorism' in M Cherif Bassiouni, (ed.), *Legal Responses to International Terrorism: U.S. Procedural Aspects*,(Dordrecht, Boston and London: Martinus Nijhoff Publishers, 1988,)p. xv – xvi.

definition of terrorism. The difficulty of defining terrorism lies in the risk it entails of taking positions. The political value of the term currently prevails over its legal one. Left to its political meaning, terrorism easily falls prey to change that suits the interests of particular states at particular times. The Taliban and Osama bin Laden were once called freedom fighters (*mujahideen*) and backed by the CIA when they were resisting the Soviet occupation of Afghanistan. Now they are on top of the international terrorist lists. Today, the United Nations views Palestinians as freedom fighters, struggling against the unlawful occupation of their land by Israel, and engaged in a long-established legitimate resistance, yet Israel regards them as terrorists. Israel also brands the Hezbollah of Lebanon as a terrorist group, whereas most of the international community regards it as a legitimate resistance group, fighting Israel's occupation of Southern Lebanon. In fact, the successful ousting of Israeli forces from most of the South by the Hezbollah in 2000 made Lebanon the only Arab country to actually defeat the Israeli army. The repercussion of the current preponderance of the political over the legal value of terrorism is costly, leaving the war against terrorism selective, incomplete and ineffective."[383]

The political and emotional connotation of the term “terrorism” makes difficult its use in legal discourse. In this sense, Saul notes that:"Despite the shifting and contested meaning of "terrorism" over time, the peculiar semantic power of the term, beyond its literal signification, is its capacity to stigmatize, delegitimize, denigrate, and dehumanize those at whom it is directed, including political opponents. The term is ideologically and politically loaded; pejorative; implies moral, social, and value judgment; and is "slippery and much-abused." In the absence of a definition of terrorism, the struggle over the representation of a

[383] Sami Zeidan, ‘Desperately Seeking Definition: The International Community's Quest for Identifying the Specter of Terrorism’(2004) 36 *Cornell International Law Journal* 491-492

violent act is a struggle over its legitimacy. The more confused a concept, the more it lends itself to opportunistic appropriation."[384]

In order to elaborate an effective legal regime to prevent and punish international terrorism, rather than only working on a single, all-encompassing, comprehensive definition of terrorism, the international community has also adopted a "'sectoral' approach aimed at identifying offences seen as belonging to the activities of terrorists and working outtreaties in order to deal with specific categories thereof"[385]. The treaties that follow this approach focus on the wrongful nature of terrorist activities rather than on their intent: On the whole, therefore, the 'sectoral' conventions confirm the assumption that some offences can be considered in themselves as offences of international concern, irrespective of any 'terrorist' intent or purpose. Indeed, the principal merit of the 'sectoral approach' is that it avoids the need to define 'terrorism' of 'terrorist acts' (...) So long as the 'sectoral' approach is followed, there is no need to define terrorism; a definition would only be necessary if the punishment of the relevant offences were made conditional on the existence of a specific 'terrorist' intent; but this would be counter-productive, inasmuch as it would result in unduly restricting their suppression.[386]

Andrew Byrnes, observed that all the Conventions ratified by the United Nations as part of its panoply of anti-terrorist measures – share three principal characteristics:

a. they all adopted an "operational definition" of a specific type of terrorist act that was defined without reference to the underlying political or ideological purpose or motivation of the perpetrator of the act – this reflected a consensus that there were

[384] Saul Ben, *Defining Terrorism in International Law*, (Oxford: Oxford University Press, 2006) p. 3.
[385] Andrea Gioia, 'The UN Conventions on the Prevention and Suppression of International Terrorism' in Giuseppe Nesi, (ed.), *International Cooperation in Counter-terrorism: The United Nations And Regional Organizations in the Fight Against Terrorism*, (U.K.: Ashgate Publishing Limited, 2006) p. 4 .
[386] *Ibid*.

some acts that were such a serious threat to the interests of all that they could not be justified by reference to such motives;

b. they all focused on actions by non-State actors (individuals and organizations) and the State was seen as an active ally in the struggle against terrorism - the question of the State itself as terrorist actor was left largely to one side; and

c. they all adopted a criminal law enforcement model to address the problem, under which States would cooperate in the apprehension and prosecution of those alleged to have committed these crimes.[387]

Nonetheless, since 2000, the United Nations General Assembly has been working on a proposed Comprehensive Convention on International Terrorism. The international community has worked on two comprehensive counter-terrorism treaties, the League of Nations' 1937 Convention for the prevention and punishment of Terrorism that never entered into force, and the proposed Comprehensive Convention on International Terrorism, that has not been finalized yet.

Article 1.1 of the League of Nations' 1937 Convention for the Prevention and Punishment of Terrorism,[388] which never entered into force, defined "acts of terrorism" as "criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public". Article 2, included as terrorist acts, if they were directed against another state and if they constituted acts of terrorism within the meaning of the definition contained in article 1, the following:

[387] Andrew Byrnes, 'Apocalyptic Visions and the Law: The Legacy of September 11'A professorial address by Andrew Byrnes at the ANU Law School for the Faculty's 'Inaugural and Valedictory Lecture Series', May 30, 2002,p.4

[388] League of Nations, 1937 Convention for the prevention and punishment of Terrorism, art 2.

"1. Any willful act causing death or grievous bodily harm or loss of liberty to: a) Heads of State, persons exercising the prerogatives of the head of the State, their hereditary or designated successors;

b) The wives or husbands or the above-mentioned persons;

c) Persons charged with public functions or holding public positions when the act is directed against them in their public capacity.

2. Willful destruction of, or damage to, public property or property devoted to a public purpose belonging to or subject to the authority of another High Contracting Party.

3. Any willful act calculated to endanger the lives of members of the public.

4. Any attempt to commit an offence falling within the foregoing provisions of the present article.

5. The manufacture, obtaining, possession, or supplying of arms, ammunition, explosives or harmful substances with the view to the commission in any country whatsoever of an offence falling within the present article."

Since 2000, the United Nations General Assembly has been negotiating a Comprehensive Convention on International Terrorism. The definition of the crime of terrorism, which has been on the negotiating table since 2002 reads as follows:

"1. Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:

(a) Death or serious bodily injury to any person; or

(b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or

(c) Damage to property, places, facilities, or systems referred to in paragraph 1 (b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act."[389]

That definition is not controversial in itself; the deadlock in the negotiations arises instead from the opposing views on whether such a definition would be applicable to the armed forces of a state and to Self-determination movements.

The coordinator of the negotiations, supported by most western delegations, proposed the following exceptions to address those issues:

"1. Nothing in this Convention shall affect other rights, obligations and responsibilities of States, peoples and individuals under international law, in particular the purposes and principles of the Charter of the United Nations, and international humanitarian law.

2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.

3. The activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.

[389] United Nations General Assembly, Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, Sixth session (28 January-1 February 2002) Annex II, art. 2.1.

4. Nothing in this article condones or makes lawful otherwise unlawful acts, nor precludes prosecution under other laws."

The state members of the Organisation of the Islamic Conference proposed instead the following exceptions:

"2. The activities of the parties during an armed conflict, including in situations of foreign occupation, asthose terms are understood under international humanitarian law, which are governed by that law, are notgoverned by this Convention.

3. The activities undertaken by the military forces of a State in the exercise of their official duties, inasmuchas they are in conformity with international law, are not governed by this Convention."[390]

Article 2.1 of the 1997 International Convention for the Suppression of Terrorist Bombings defines the offence of terrorist bombing as follows:

"Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place or public use, a State or government facility, a public transportation system or an infrastructure facility:

a) With the intent to cause death or serious bodily injury; or

b)With the intent to cause extensive destruction of such a place, facility or system, where such a

destruction results in or is likely to result in major economic loss.[391]

[390] United Nations General Assembly, Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, Sixth session (28 January-1 February 2002) Annex IV, art. 18.
[391] Terrorist Bombings Convention art. 2.1

Article 19 expressly excluded from the scope of the convention certain activities of state armed forces and of self-determination movements as follows:

"1. Nothing in this Convention shall affect other rights, obligations and responsibilities of States, and individuals under international law, in particular the purposes and principles of the Charter of the United Nations, and international humanitarian law. 2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.[392]

Article 2.1 of the 1999 sectoral United Nations International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention) defines the crime of terrorist financing as the offence committed by "any person" who "by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out" an act "intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act."

The 2005 United Nations International Convention for the Suppression of Acts of Nuclear Terrorism defines the crime of nuclear terrorism as follows: Any person commits an offence

[392] Terrorist Bombings Convention art. 19

within the meaning of this Convention if that person unlawfully and intentionally: (a) Possesses radioactive material or makes or possesses a device:

(i) With the intent to cause death or serious bodily injury; or

(ii) With the intent to cause substantial damage to property or to the environment;

(b) Uses in any way radioactive material or a device, or uses or damages a nuclear facility in a manner which releases or risks the release of radioactive material:

(i) With the intent to cause death or serious bodily injury; or

(ii) With the intent to cause substantial damage to property or to the environment; or

(iii) With the intent to compel a natural or legal person, an international organization or a State to do or refrain from doing an act.[393]

Article 4 of the convention expressly excluded from the application of the convention the use of nuclear weapons during armed conflicts without, though, recognizing the legality of the use of those weapons:

1. Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law.

2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.

[393] Art 2(1) Nuclear Terrorism Convention

3. The provisions of paragraph 2 of the present article shall not be interpreted as condoning or making lawful otherwise unlawful acts, or precluding prosecution under other laws.

4. This Convention does not address, nor can it be interpreted as addressing, in any way, the issue of the legality of the use or threat of use of nuclear weapons by States.

In parallel with the criminal law codification efforts, some United Nations organs have put forward some broad political definitions of terrorism. On December 17, 1996, the non-binding United Nations Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, annexed to the UN General Assembly Resolution 51/210[394], condemned terrorist activities in the following terms:

"1. The States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomsoever committed, including those that jeopardize friendly relations among States and peoples and threaten the territorial integrity and security of States;

2. The States Members of the United Nations reaffirm that acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations; they declare that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations;"

3. 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[395]" Antonio Cassese

[394]www. un. org/ documents/

[395]See also: 1994 United Nations Declaration on Measures to Eliminate International Terrorism annex to UN General Assembly resolution 49/60 ,"Measures to Eliminate International Terrorism," of December 9, 1994 "Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or

has argued that the language contained in these declarations "sets out an acceptable definition ofterrorism."[396]

In 2004, United Nations Security Council Resolution 1566 condemned terrorist acts as: "criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature."

Also in 2004, a High-Level Panel on Threats, Challenges and Change composed of independent experts and convened by the Secretary-General of the United Nations called states to set aside their differences and to adopt, in the text of a proposed Comprehensive Convention on International Terrorism, the following political "description of terrorism":"any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act."[397]

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particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious orany other nature that may be invoked to justify them."

[396] Anthonio Cassese,*International Law*, (London: Oxford University Press,2002).

[397] 'A more secure world: Our shared responsibility', United Nations Report of the High Level Panel on Threats, Challenges and Change " 2004 para. 164.

The following year, the then Secretary-General of the United Nations Kofi Annan endorsed the High Level Panel's definition of terrorism and asked states to set aside their differences and to adopt that definition within the proposed comprehensive terrorism Convention before the end of that year. He said: "It is time to set aside debates on so-called "State terrorism". The use of force by states is already thoroughly regulated under international law. And the right to resist occupation must be understood in its true meaning. It cannot include the right to deliberately kill or maim civilians. I endorse fully the High-level Panel's call for a definition of terrorism, which would make it clear that, in addition to actions already proscribed by existing Conventions, any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a Government or an international organization to do or abstain from doing any act. I believe this proposal has clear moral force, and I strongly urge world leaders to unite behind it and to conclude a comprehensive Convention on terrorism before the end of the sixtieth session of the General Assembly."[398]

The suggestion of incorporating such a political definition of terrorism into the comprehensive convention was rejected. United Nations' member states noted that a political definition such as the one proposed by the High-Level Panel on Threats, Challenges and Change, and endorsed by the Secretary General, lacked the necessary requirements to be incorporated in a criminal law instrument. Carlos Diaz-Paniagua, who coordinated the negotiations of the proposed Comprehensive Convention on International Terrorism, stated that a comprehensive definition of terrorism to be included in a criminal law treaty must have "legal precision, certainty, and fair-labeling of the criminal conduct - all of which emanate from the basic human rights obligation to observe due process."

[398] United Nations General Assembly, Secretary General, Report of the Secretary-General In larger freedom: towards development, security and human rights for all, 2005, Chapter 3 para. 91.

The European Union defines terrorism for legal/official purposes in Article 1 of the Framework Decision on Combating Terrorism 2002. This provides that terrorist offences are certain criminal offences set out in a list consisting largely of serious offences against persons and property that;

> ...given their nature or context, may seriously damage a country or an international organisation where committed with the aim of: seriously intimidating a population; or unduly compelling a Government orinternational organisation to perform or abstain from performing any act; or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.

The Supreme Court of India, adopted Alex P. Schmidt's definition of terrorism in a 2003 ruling[399].The United Kingdom's Terrorism Act 2000 defined terrorism as follows:

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

[399]*Madan Singh vs. State of Bihar*,S.C India Appeal No 1285 of 2003 judgment delivered on 02/04/2004.
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(e) is designed seriously to interfere with or seriously to disrupt an electronic system.[400]

The United Kingdom Terrorism Act 2000 defines terrorism so as to include not only violent offences against persons and physical damage to property, but also acts "designed seriously to interfere with or to seriously disrupt an electronic system" if those acts are (a) designed to influence the government or to intimidate the public or a section of the public, and (b)be done for the purpose of advancing a political, religious or ideological cause.Section 34 of the Terrorism Act 2006 amended sections 1(1)(b) and 113(1)(c) of Terrorism Act 2000 to include "international governmental organizations" in addition to "government".

Title 22, Chapter 38 of the United States Code (regarding the Department of State) contains a definition of terrorism in its requirement that annual country reports on terrorism be submitted by the Secretary of State to Congress every year. It reads: "Definitions ... the term 'terrorism' means premeditated, politically motivated violence perpetrated againstnoncombatant targets by subnational groups or clandestine agents;"[401]

Title 18 of the United States Code (regarding criminal acts and criminal procedure) defines international terrorism to mean activities that . . . involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; [and] appear to be intended...to intimidate or coerce a civilian population; . . . to influence the policy of a government by intimidation or coercion; or . . . to affect the conduct of a government by mass destruction, assassination, or kidnapping; and [which] occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek

[400] "UK Terrorism Act 2000
[401] 22 U.S.C. section 2656f(d)

asylum."The US Code of Federal Regulations defines terrorism as "...the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives"[402]

In September 2002 the US National Security strategy defined terrorism as "premeditated, politically motivated violence against innocents".[403] This definition did not exclude actions by the United States government and it was qualified some months later with "premeditated, politically motivated violence against noncombatant targets by subnational groups or clandestine agents"[404].

The United States Department of Defense recently changed its definition of terrorism. It defined Terrorism as "the unlawful use of violence or threat of violence to instill fear and coerce governments or societies. Terrorism is often motivated by religious, political, or other ideological beliefs and committed in the pursuit of goals that are usually political."[405]The new definition distinguishes between motivations for terrorism (religion, ideology, etc.) and goals of terrorism ("usually political"). This is in contrast to the previous definition which stated that the goals could be religious in nature.

The USA PATRIOT Act defines domestic terrorism activities as "activities that (A) involve acts dangerous to human life that are a violation of the criminal laws of the U.S. or of any state, that (B) appear to be intended (i) to intimidate or coerce a civilian population, (ii) to influence the policy of a government by intimidation or coercion, or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping, and (C) occur

[402]28 C.F.R. Section 0.85.
[403]P Edward *et al*, *The corporate security professional's handbook on terrorism*, (illustrated ed.,Amsterdam: Elsevier, 2007) p. 5.
[404]T. Rockmore, et al (eds), 'The Philosophical Challenge of September 11'*Metaphilosophy Series in Philosophy*(Cornwall, UK: Blackwell Publishing, 2005)p. 15.
[405] Per Joint Pub 3-07.2, Antiterrorism, (24 November 2010) the Department of Defense

primarily within the territorial jurisdiction of the U.S."The US National Counterterrorism Center (NCTC) defines terrorism the same as United States Code 22 USC § 2656f (d)(2). The Center also defines a terrorist act as a: "...premeditated; perpetrated by a sub-national or clandestine agent; politically motivated, potentially including religious, philosophical, or culturally symbolic motivations; violent; and perpetrated against a non-combatant target."

The researcher sees terrorism as as those actions which are criminal in nature geared towards achieving a particular aim, mostly a political objective of forcing the government to yield to the demands of the group claiming responsibility for the particular act. Terrorism was not defined in our current Terrorism Prevention Act 2011 as amended. What the Act did define is Terrorist Act. The reason is not far-fetched at least going through the problems we have encountered in our bid to define it. The Act therefore to avoid duplicity of definition and the loopholes it may afford criminals decided to adopt definitions as contained in some International instruments on Terrorism[406].

4.2:**Nature of Terrorism**[407]

There are six basic components to all terrorism. Terrorism is (1) an intentional and (2) rational (3) act of violence to (4) cause fear (5) in the target audience or society (6) for the purpose of changing behavior in that audience or society. Terrorism is a political act, the goal of which is to make a change. The terrorist is not driven by personal desires or ambitions.

Terrorism is about impact on society. There are three types of terrorist attacks: (1) attacks that involve weapons of mass destruction, (2) weapons of mass casualty and (3) weapons of mass disruption. These distinctions are made to focus on the intent of the terrorist act rather

[406]Section 40 of the Terrorism Prevention Act 2011 as Amended in 2013.
[407] This section is sourced from www.gov.au with the researcher building on it.

than the means per se.A weapon of mass destruction is a weapon that causes damage to buildings, dams, bridges, computer systems or other structures of a society. A weapon of mass casualty is a weapon that causes massive sickness and/or death. Biological and chemical weapons are weapons of mass casualty. It is these types of weapons that are generally referred to as weapons of mass destruction. Weapons of mass disruption are weapons that cause social, political and/or economic damage to society. Magnetic pulse weapons (to disrupt computer operations), agro terrorism (disrupt food supply or manufacturing) or cyber terrorism (hacking into computers and destroying bank records or government records) are examples of weapons of mass disruption. The distinctions explain how terrorist goals can be achieved and that any act of violence is not terrorism. A terrorist act can involve a weapon that achieves all three goals, such as September 11th. The attack was one of mass destruction of infrastructure (the WTC and Pentagon), mass casualty (an estimated 3000 people killed) and mass disruption (airports shut down, new laws passed, heightened fear of future attack, loss of millions of dollars due to the loss of the WTC as an economic center).While terrorism is goal centered in creating fear in a society to achieve a political goal, a terrorist act can be placed in one of two general groupings. The act is either objective driven or terror driven.

An objective driven act of terrorism is committed in order for the terrorist group to get certain demands met by a government. Hostage taking is an example. The taking of the U.S. Embassy in Iran in 1980 was committed to get the United States to change its behavior in regard to Iran and the Middle East in general. An objective driven act of terrorism is committed to give the government a chance to negotiate or change policy. Terror driven acts are committed as retaliation for a perceived wrong or as a warning of future acts of terror if the government does not change its policies. The acts of terrorism in the Gaza Strip and West Bank are examples of terror driven attacks. Israel kills a leader of Hamas and Hamas

bombs the Hebrew University and kills settlers in the West Bank. Threats follow that for every one Hamas leader that is killed, one hundred Israelis will be killed. The acts of terrorism in Nigeria are therefore both objective driven and terror driven. The terrorists want to get something from the government and the same time to retaliate for perceived wrongs done and also to warn against certain activities of government.

The nature of terrorism is the indiscriminate and indirect targeting of individuals with a specific goal and purpose. Terrorism is indiscriminate and indirect in that the people killed are not targeted specifically and the people killed, per se, are of no account to the terrorist. Who gets killed is of no consequence but the fact that people are killed is of consequence. Terrorism is not an impromptu act. The targets are chosen because they will cause a desired impact (either the destruction of infrastructure, the causing of massive death, or disruption of a society like the UN Building in Abuja or the Louis Edet Police Headquarters bombings.). The nature of modern terrorism is that anyone can be a victim, but terrorism is not random. The apparently random target is not random, buts its appearance as random causes public anxiety and fear and change in behavior, which is exactly what the terrorist wants to accomplish. To underscore this, one needs to live in Maiduguri, Borno State or Yola, Adamawa State or even Kano. Terrorism is also a public act. The act must be such that the greater society will see it and react to the attack. The terrorist will choose targets that have symbolic value and/or economic value (UN Building for example) or targets that have public value (churches, restaurants, etc.) in order to get public attention and public behavior change.

Terrorism should not be confused with traditional warfare. In war, the target is selected for its military value. In war groups of people are selected for attack because the people themselves have some specific value and attacking the group will achieve a military objective. In terrorism, the group is of little account per se, but the fact that they are killed is

the point. Terrorism should not be confused with war crimes. An example of a war crime is an army going into a town with the objective of purging the town of enemy forces, and while doing so they kill unarmed civilians and non-combatants. Although such action is illegal and a crime, it is not considered terrorism; the dead were killed because the army lost control of itself, not because the destruction was designed to intimidate other towns or the society as a whole. In distinguishing the difference between war and terrorism, the focus is on the reason for the attack and the impact of the attack, not the target of the attack itself.

In summary, terrorism should be understood as a political act to achieve a desired goal through the use of violence. Terrorism is not an irrational act committed by the insane. The terrorist does not act for personal gain or gratification, thus the terrorist is not a criminal in the traditional sense. A terrorist believes in what he is doing. The objective is worth the life of the terrorist and the lives of the people he will take. The intent is not just to kill those who die in an attack, but to affect the larger society as a whole and possibly force the society to a desired change. An attack can be committed to destroy the buildings and operations of a society, to kill or injure people or to disrupt the peaceful existence of the society. The attack can seek to achieve all three or a combination of the three. The objective can be to force a government to negotiate or to seek revenge for a government action. Terrorism does not seek specific victims but it does seek out specific targets for a specific outcome.

4.3 **Types of Terrorism**

Types of terrorism include religious terrorism, anarchist terrorism, state-sponsored terrorism, right wing terrorism, left wing terrorism, nationalist terrorism, narco-terrorism and cyber terrorism. However, it is imperative to state that terrorism in Nigeria cannot be grouped under all the headings of terrorism herein described. The terrorism in Nigeria can be said to be limited to religious and anarchist terrorism. This is so because most incidents of terrorism

recorded in Nigeria are either attributed to the influence of religion or simply to the fact that the culprits are not law abiding. It is right to state that though there could be terrorism solely for economic purposes, that could not be labeled economic terrorism because almost all acts of terrorism has a motive. The economic implication of such terrorism is but one of the motives. We shall therefore discuss some of the known types of terrorism for purposes of enlightenment.

4.3.1: **ReligiousTerrorism**

Religious terrorism is terrorism by those whose motivations and aims have a predominant religious character or influence.In the modern age, after the decline of ideas such as the divine right of kings and with the rise of nationalism, terrorism more often involved anarchism, nihilism and revolutionary politics, but since 1980 there has been an increase in activity motivated by religion[408].

Former United States Secretary of State Warren Christopher said that terrorist acts in the name of religion and ethnic identity have become "one of the most important security challenges we face in the wake of the Cold War."[409] However, political scientists Robert Pape and Terry Nardin[410], social psychologists M. Brooke Rogers and colleagues[411], and Mark Juergensmeyer have all argued that religion should be considered only one incidental factor, and that so-called "religious" terrorism is primarily geopolitical.According to Juergensmeyer, religious terrorism consists of acts that terrify, the definition of which is

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[408] Bruce Hoffman; 'A Conversation with Bruce Hoffman and Jeffrey Goldberg' in MCromartie, *Religion, Culture, And International Conflict: A Conversation*, (Lanham Maryland: Rowman & Littlefield, 2005) p.29-35. See also: B Hoffman, 'The Confluence of International and Domestic Trends in Terrorism', *Terrorism and Political Violence*(1997) 9 (2)1–15. :B Hoffman, *Inside Terrorism*. (New York: Columbia University Press, 1999).

[409]Mark Juergensmeyer,*Terror in the Mind of God: The Global Rise of Religious Violence*,(California: University of California Press,2004).

[410]Terry Nardin, 'Review: Terror in the Mind of God'(2001) *The Journal of Politics* 64 (2) 683–684.

[411] M. Brooke Rogers et al, 'The role of religious fundamentalism in terrorist violence: A social psychological analysis' (2007)*International Review of Psychiatry*, 19(3) 253-262

provided by the witnesses - the ones terrified - and not by the party committing the act; accompanied by either a religious motivation, justification, organization, or world view.[412] Religion is sometimes used in combination with other factors, and sometimes as the primary motivation. Religious terrorism is intimately connected to current forces of geopolitics. Bruce Hoffman has characterized modern religious terrorism as having three traits:- the perpetrators must use religious scriptures to justify or explain their violent acts or to gain recruits, clerical figures must be involved in leadership roles[413] and apocalyptic images of destruction are seen by the perpetrators as a necessity.[414]

Suicide terrorism, self-sacrifice, or martyrdom has throughout history been organized and perpetrated by groups with both political and religious motivations. Suicide terrorism or martyrdom is efficient, inexpensive, easily organized, and extremely difficult to counter, delivering maximum damage for little cost. The shocking nature of a suicide attack also attracts public attention. Glorifying the culture of martyrdom benefits the terrorist organization and inspires more people to join the group. Robert Pape, a political scientist who specializes in suicide terrorism, has made a case for secular motivations and reasons as being foundations of most suicide attacks that are often times labelled as "religious".[415]

Terrorism activities worldwide are supported through not only the organized systems that teach holy war as the highest calling, but also through the legal, illegal, and often indirect methods financing these systems which sometimes utilize organizations as fronts to mobilize or channel sources and funds, including charities. Robert Pape compiled the first complete database of every documented suicide bombing from 1980-2003. He argues that the news reports about suicide attacks are profoundly misleading — "There is little connection

[412]*Op. cit*, p. 4–10.
[413]*Op. cit*, p. 90.
[414]J. Arquilla, et al ,(eds),*Countering the New Terrorism*,(Santa Monica California: Rand, 1999).
[415]Robert A.Pape,*Dying to Win: The Strategic Logic of Suicide Terrorism,* (New York: Random House,2005).

between suicide terrorism and Islamic fundamentalism, or any one of the world's religions". After studying 315 suicide attacks carried out over the last two decades, he concludes that suicide bombers' actions stem from political conflict, not religion[416].

Terry Nardin wrote, "A basic problem is whether religious terrorism really differs, in its character and causes, from political terrorism... defenders of religious terrorism typically reason by applying commonly acknowledged moral principles... But the use (or misuse) of moral arguments does not in fact distinguish religious from nonreligious terrorists, for the latter also rely upon such arguments to justify their acts... political terrorism can also be symbolic... alienation and dispossession... are important in other kinds of violence as well. In short, one wonders whether the expression 'religious terrorism' is more than a journalistic convenience"[417].

Professor Mark Juergensmeyer wrote,

> Religion is not innocent. But it does not ordinarily lead to violence. That happens only with the coalescence of a peculiar set of circumstances - political, social, and ideological - when religion becomes fused with violent expressions of social aspirations, personal pride, and movements for political change and "whether or not one uses 'terrorist' to describe violent acts depends on whether one thinks that the acts are warranted.[418]

To a large extent the use of the term depends on one's world view: if the world is perceived as peaceful, violent acts appear to be terrorism. If the world is thought to be at war, violent acts may be regarded as legitimate. They may be seen as preemptive strikes, as defensive tactics in ongoing battles, or as symbols indicating

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[416]*Ibid.*.
[417]T Nardin, 'Review: Terror in the Mind of God'(2001) *The Journal of Politics* 64 (2) 683–684.
[418]*Op. cit*, p. 9.

to the world that it is indeed in a state of grave and ultimate conflict".[419] David Kupelian wrote, "Genocidal madness can't be blamed on a particular philosophy or religion."[420] Riaz Hassan wrote, "It is politics more than religious fanaticism that has led terrorists to blow themselves up."[421] This form of terrorism seems to be more dangerous and it is the type currently ravaging Nigeria as a country.

4.3.2: **Anarchist Terrorism**

To understand Anarchist Terrorism one needs to first understand anarchism. Anarchism was a late 19th century idea among a number of Europeans, Russians and Americans, that all government should be abolished, and that voluntary cooperation, rather than force, should be society's organizing principle. The word "anarchism" itself comes from a Greek word, "*anarkos*" which means "without a chief." The movement had its origins in the search for a way to give industrial working classes a political voice in their societies without having anybody at the helm of affairs. With time, the proponents realized that it would be difficult to achieve their aim as they themselves are leaders over their own group. Consequently, by the turn of the 20th century, anarchism was already on the wane, to be replaced by other movements encouraging the rights of dispossessed classes and revolution[422]. This eventually gave way to those who believe that action speaks louder than voice and that violence could achieve more. These groups were referred to as anarchist as a result of the result of their actions. These groups of persons were described as anarchists. It was from the activities of these groups that we get the label anarchist terrorism due to the violent nature of their actions. However, people involved in such acts have consistently denied the appellation terrorists. This is because they claim that though they use violence but that their acts of

[419] *Op. cit* p.10
[420] David Kupelian, *How Evil Works: Understanding and Overcoming the Destructive Forces That Are Transforming America,* **(**New York:Simon & Schuster, 2010) p. 185.
[421] Riaz Hassan,*Life As a Weapon: The Global Rise of Suicide Bombings,*(Florence United States: Taylor & Francis, 2010).
[422] J. Simkin, 'Anarchist' available online on *www.spartacusschoolnet.uk* accessed on 14/3/13

violence were targeted at political figures and not civilians. This claim could be considered reasonable but yet does targeting a political figure not give rise to collateral damage and ultimately violence on the populace which is one of the major marks of a terrorist group? This form of terrorism can be seen from the initial attacks of *Boko haram*when they targeted public buildings and public figures. Nowadays they have gone through metamorphosis and their attacks spares no one.

4.3.3: **Right Wing Terrorism**

Right-wing terrorism holds its inspiration from a variety of ideologies and beliefs, including neo-fascism, neo-Nazism, racism and opposition to foreigners and immigration. Existence of this type of terrorism has been sporadic with little or no international cooperation[423] and their *modus operandi*are generally poorly coordinated because there are very few identifiable organizations. Modern right wing terrorism began to appear in Western Europe in the 1980s and in Eastern Europe following the collapse of the Eastern Bloc[424]. The objective of right-wing terrorism is the overthrow of existing governments and their replacement with nationalist or fascist-oriented governments. It should also be noted that Right-wing terrorists were generally inspired by 19th century and early 20th century nationalist writers such as Arthur de Gobineau, Houston Stewart Chamberlain and Heinrich von Treitschke.[425]The core of this movement includes neo-fascist skinheads, right-wing hooligans, youth sympathisers and intellectual guides who believe that the state must rid itself of foreign elements in order to protect rightful citizens. This type does not exist in Nigeria for now.

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[423]Aubrey Stefan,*The New Dimension of International Terrorism*. (Zurich: vdf Hochschulverlag AG, 2004)
[424]Moghadam Assaf. *The Roots of Terrorism***.**(New York: Infobase Publishing, 2006)p.54
[425]*Ibid* p. 57

4.3.4: **Left Wing Terrorism**

Modern left-wing terrorism developed in the context of the political unrest of 1968. Left-wing terrorists view the governments they oppose as authoritarian, exploitive and corrupt, and emphasize idealism, pacifisms and anti-imperialism. Their ideology is heavily influenced by Marxist and other communist and socialist thought.[426] Modern left-wing terrorist groups in the United States developed from remnants of the Weather Underground, the Black Panthers and extremist elements of the Students for a Democratic Society. While Left-wing terrorism is ideologically motivated, nationalist-separatist terrorism is ethnically motivated. The revolutionary goal of left-wing terrorism is non-negotiable, whereas nationalist terrorists are willing to make concessions. Left-wing terrorism has its roots in 19th and early 20th century anarchist terrorism and became pronounced during the Cold War period, while nationalist terrorism has its roots in anti-colonial and anti-imperialist struggles following the end of the First World War. The level of left-wing violence varies with the strength of local communist parties, while the strength of separatist parties tends to reduce nationalist terrorism. This may be explained by concessions to nationalist aspirations leading to reduced ethnic tension. Left-wing terrorists, lacking popular support, often turned to foreign sources for backing. Some of them may have received military and financial support from the Soviet Union. Nationalist terrorist groups were more likely to rely on local sources of support, obtaining foreign support mostly through fellow nationals living overseas.[427]Left wing terrorism limits the use of violence, but destroys the democracy and take over with socialist or communist regime. They also stay away from harming victims. We can emphatically state that we do not have this type in Nigeria at the moment.

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[426]Naeem Ahmed, State, Society and Terrorism' Ph.D Dissertation, Department of International Relations, University of Karachi Pakistan available online at www.trackingterrorism.ord accessed on 13/2/13

[427]Brockhoff Sarah, Krieger Tim and Meierrieks, Daniel, 'Looking Back on Anger: Explaining the Social Origins of Left-Wing and Nationalist Separatist Terrorism in Western Europe, 1970-2007' (2012). APSA 2012 Annual Meeting Paper, 2012 available at SSRN: http://ssrn.com/abstract and accessed on 28/12/2011

4.3.5: **Nationalist Terrorism**

Nationalist terrorism is a form of terrorism motivated by nationalism. Nationalist terrorists seek to form self-determination in some form, which may range from gaining greater autonomy to establishing a completely independent, sovereign state (separatism). Nationalist terrorists often oppose what they consider to be occupying, imperial, or otherwise illegitimate powers. Nationalist terrorism is linked to a national, ethnic, religious, or other identifying group, and the feeling among members of that group that they are oppressed or denied rights, especially rights accorded to others.As with the concept of terrorism itself, the term "nationalist terrorism" and its application are highly contentious issues. What constitutes an illegitimate regime and what types of violence and war are acceptable against such a state are subjects of debate. Groups described by some as "nationalist terrorists" tend to consider themselves "freedom fighters," engaged in valid but asymmetric warfare[428]. For the moment, no terrorist group has adopted this mantra. However, one can say that the *Boko Haram* terror group wants a nation of their own and they can assume the mantra of nationalist terrorism.

4.3.6: **Narco Terrorism**

Narco-terrorism is another type of terrorism that has to do with drugs. It is seen by many as a new development in the largely deadly world of terrorism..In the original context, narco-terrorism is understood tomean the attempts of narcotics traffickers to influence the policies of a government or a society through violence andintimidation, and to hinder the enforcement of the law and the administration of justice by the systematic threat oruse of such violence. Pablo Escobar's ruthless violence in his dealings with the Colombian and Peruvian governmentis probably one of the best known and best documented examples of

[428]*ibid*

narcoterrorism[429].The term has become a subject of controversy, largely due to its use in discussing violent opposition to the USGovernment's War on Drugs.The term is being increasingly used for known terrorist organizations that engage in drug trafficking activity to fundtheir operations and gain recruits and expertise. Although Al Qaeda is often said to finance its activities through drug trafficking, the 9/11 Commission Report notesthat "while the drug trade was a source of income for the Taliban, it did not serve the same purpose for al Qaeda, andthere is no reliable evidence that bin Laden was involved in or made his money through drug trafficking." Theorganization gains most of its finances through donations, particularly those by "wealthy Saudi individuals".[430] It is a possibility that the *Boko Haram*group in Nigeria is benefitting from this type of terrorism though it is not in existence in Nigeria at the moment.

4.3.7: **Cyberterrorism**

Cyber terrorism is the use of Internet based attacks in terrorist activities, including acts of deliberate, large-scale disruption of computer networks, especially of personal computers attached to the Internet, by the means of tools such as computer viruses.Cyber terrorism is a controversial term. Some authors choose a very narrow definition, relating to deployments, by known terrorist organizations, of disruption attacks against information systems for the primary purpose of creating alarm and panic. By this narrow definition, it is difficult to identify any instances of cyber terrorism.Cyber terrorism can be also defined as the intentional use of computer, networks, and public internet to cause destruction and harm for personal objectives[431]. Objectives may political or ideological since this is a form of terrorism.There is much concern from government and media sources about potential

[429]Christopher Minster, 'Biography of Pablo Escobar, Colombia's Drug Kingpin', available online at www.latinamericanhistory.about.com accessed on 12/3/12
[430]Evan Jean Lawrence, 'Narco Terrorism', available online at www.trackingterrorism.org accessed on 7/2/13
[431]Matusitz, Jonathan, 'Cyber terrorism'.(2005) 2 *American Foreign Policy Interests*137-147.

damages that could be caused by cyber terrorism, and this has prompted official responses from government agencies.

There is debate over the basic definition of the scope of cyber terrorism. There is variation in qualification by motivation, targets, methods, and centrality of computer use in the act. Depending on context, cyber terrorism may overlap considerably with cybercrime or ordinary terrorism.[432]If cyber terrorism is treated similarly to traditional terrorism, then it only includes attacks that threaten property or lives, and can be defined as the leveraging of a target's computers and information, particularly via the Internet, to cause physical, real-world harm or severe disruption of infrastructure. There are some who say that cyber terrorism does not exist and is really a matter of hacking or information warfare. They disagree with labeling it terrorism because of the unlikelihood of the creation of fear, significant physical harm, or death in a population using electronic means, considering current attack and protective technologies.

Cyber terrorism is defined by the Technolytics Institute as "The premeditated use of disruptive activities, or the threat thereof, against computers and/or networks, with the intention to cause harm or further social, ideological, religious, political or similar objectives or to intimidate any person in furtherance of such objectives." [433]The term was coined by Barry C. Collin. The National Conference of State Legislatures, an organization of legislators created to help policy-makers issues such as economy and homeland security defines cyber terrorism as:[T]he use of information technology by terrorist groups and individuals to further their agenda. This can include use of information technology to organize and execute attacks against networks, computer systems and telecommunications

[432]Victoria Baranetsky, ‘What is cyber terrorism? Even experts can't agree’. *Harvard Law Record*. November 5, 2009 available online at <http://cultureandcommunication.org/tdm/s10/04/24/cyberterrorism-additional-reading-summary>

[433]Afroz, Soobia "Cyber terrorism — fact or fiction?, June, 16, 2002 available online at <http://archives.dawn.com/weekly/dmag/archive/020616/dmag21.htm>

infrastructures, or for exchanging information or making threats electronically. Examples are hacking into computer systems, introducing viruses to vulnerable networks, web site defacing, Denial-of-service attacks, or terroristic threats made via electronic communication[434]. Cyber terrorism can also include attacks on Internet business, but when this is done for economic motivations rather than ideological, it is typically regarded as cybercrime.Cyber-terrorism is a type of terrorism that uses computers and network. Usually, small terrorist groups use cyber-terrorism. Cyber-terrorism can allow disruptions in military communications and even electrical power. It could also be used in destroying the actual machine that contains the electronic information. If it is of any consolation, we can state that terrorists in Nigeria are yet to adopt this strategy though they are susceptible to change at a short time without any notice.

4.3.8: **State terrorism**

State terrorism may refer to acts of terrorism conducted by a state against a foreign state or people. It can also refer to acts of violence by a state against its own people.[435]There is neither an academic nor an international legal consensus regarding the proper definition of the word"terrorism".[436] Many scholars believe that the actions of governments can be labeled "terrorism"; however others,including governments, international organizations, private institutions and scholars, believe that the term is onlyapplicable to the actions of non-state actors. Historian Henry Commager wrote that "Even when definitions of terrorismallow for state terrorism, state actions in this area tend to be seen through the prism

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[434] Cyber terrorism, National Conference of State Legislatures.

[435]Anthony Aust, *Handbook of International Law*(2nd ed.), (Cambridge:Cambridge University Press, 2010,)p. 265. Gus, Martin,*Understanding terrorism: Challenges, Perspectives, and Issues,*(New York:Sage, 2006). Mark Selden&Alvin So, (ed),*War and state terrorism: the United States, Japan, and the Asia-Pacific in the long twentieth century,*(Lanham Maryland: Rowman & Littlefield.2004).Timothy Shanahan,*The provisional Irish Republican Army and the morality of terrorism, (*Edinburgh: Edinburgh University Press, 2009) p. 195.

[436]A P. Schmid,"The Definition of Terrorism,"*The Routledge Handbook of Terrorism Research*. (London and New York: Routledge, 2011) p. 39.

of war or national self-defense,not terror."[437] While states may accuse other states of state-sponsored terrorism when they support insurgencies,individuals who accuse their governments of terrorism are seen as radicals, because actions by legitimategovernments are not generally seen as illegitimate. Most states use the term "terrorism" for non-state actors only.[438]The Encyclopædia Britannica Online defines state terrorism thus

> establishment terrorism, oftencalled state or state-sponsored terrorism, is employed by governments -- or more often by factions withingovernments -- against that government's citizens, against factions within the government, or against foreign governments or groups.[439]

While the most common modern usage of the word terrorism refers to political violence that mainly victimizes civilians byinsurgents or conspirators,[440] several scholars make a broader interpretation of the nature of terrorism thatencompasses the concepts of state terrorism and state-sponsored terrorism.[441] Michael Stohl and George A. Lopez have designated three categories of state terrorism, based on theopenness/secrecy with which the alleged terrorist acts are performed, and whether states directly perform the acts,support them, or acquiesce to them.[442]The original general meaning of terrorism was of terrorismby the state, as reflected in the 1798 supplement of the *Dictionnaire* of the *Académie française*, which describedterrorism as *systeme*, regime *de la terreur*.[443] Dr. Myra Williamson[444] wrote that "The meaning of "terrorism" hasundergone a transformation. During the reign of terror a

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[437]Michael Y Hor, *Global anti-terrorism law and policy*, (Cambridge University Press, Cambridge, 2005) p. 20.

[438]*Ibid*

[439] "Terrorism" (http:/ / www. wip. britannica. com/ eb/ article-217762/ terrorism). Encyclopædia Britannica. .

[440]Helen Purkitt, 'Dealing with Terrorism: Deterrence and the Search for an Alternative Model,' in *Conflict in World Society*, (ed.) Michael Banks (New York: St. Martin's Press, 1984). p. 162

[441]Michael Stohl, & George Lopez, *Terrible beyond Endurance: The Foreign Policy of State Terrorism,* **(**London:Greenwood Press, 1988).p.207

[442]*Ibid* ,p.208

[443]Walter Lacquer, *A History of Terrorism*, (New Jersey:Transaction Publishers, 2007) p. 6

[444]Williamson, Myra (2009). Terrorism, war and international law: the legality of the use of force against Afghanistan in 2001. (Vermont: Ashgate Publishing.2009) p. 43.

regime or system of terrorism was used as an instrument ofgovernance, wielded by a recently established revolutionary state against the enemies of the people. Now the term“terrorism" is commonly used to describe terrorist acts committed by non-state or subnational entities against a state.

Later exemplars of state terrorism in Nigeria were the Odi Massacre of 1999 were the then President Obasanjo deployed troops who invaded Odi town in order to inflict pain and instill fear in the people. [445]. In the Soviet Union, terrorism was eventually unleashed on victims chosen at random." [446]

The Chairman of the United Nations Counter-Terrorism Committee has stated that the twelve previous international Conventions on terrorism had never referred to state terrorism, which was not an international legal concept, and thatwhen states abuse their powers they should be judged against international Conventions dealing with war crimes,international human rights and international humanitarian law, rather than against international anti-terrorismstatutes.[447] In a similar vein, Kofi Annan, at the time United Nations Secretary-General, stated that it is "time to setaside debates on so-called 'state terrorism'. The use of force by states is already regulated under international law"[448]Annan added, "...regardless of the differences between governments on the question of definition of terrorism, whatis clear and what we can all agree on is any deliberate attack on innocent civilians, regardless of one's cause, isunacceptable and fits into the definition of terrorism." Dr. Bruce Hoffman has argued that failing to differentiate between state and non-state violence ignores the fact

[445]Before then was Ogoni Land and before it was Umuechem all in Rivers State of Nigeria. Odi is in present day Bayelsa State see. www.waado.org accessed on 23/4/15

[446]Terry Nardin, ‘Review: Terror in the Mind of God’(2001) *The Journal of Politics* 64 (2) 683–684

[447]Kofi Annan. ‘Addressing Security Council, Secretary-General Calls On Counter-Terrorism Committee To Develop Long-Term Strategy To Defeat Terror’ (Geneva: United Nations 2002 available online at www. un. org/ News/ Press/ docs accessed on 25/6/2010

[448]*Ibid*.

thatthere is a “fundamental qualitative difference between the two types of violence.” Hoffman argues that even in warthere are rules and accepted norms of behavior that prohibit certain types of weapons and tactics and outlaw attackson specific categories of targets. For instance, rules codified in the Geneva and Hague conventions on warfareprohibit taking civilians as hostages, outlaw reprisals against either civilians or POW’s, recognize neutral territory,etc. Hoffman states that “even the most cursory review of terrorist tactics and targets over the past quarter centuryreveals that terrorists have violated all these rules.” Hoffman also states that when states transgress these rules of war“the term “war crime” is used to describe such acts.[449]Walter Laqueur, has stated that those who argue that state terrorism should be included in studies of terrorism ignorethe fact that “The very existence of a state is based on its monopoly on violence. If it were different, states would not have the right, nor be in a position, to maintain that minimum of order on which all civilized life rests. “Callingthe concept a “red herring” he stated: “This argument has been used by the terrorists themselves, arguing that there isno difference between their activities and those by governments and states. It has also been employed by somesympathizers, and rests on the deliberate obfuscation between all kinds of violence...”[450]

First, because of the nature of the modern state and "the amount and variety of resources"available even for small states, the state mode of terrorism claims vastly more victims than does terrorism bynon-state actors. Secondly, because "state terrorism is bound to be compounded by secrecy, deception andhypocrisy", terrorist states typically act with clandestine brutality while publicly professing adherence to "values andprinciples which rule it out." Thirdly, because unlike non-state actors, states are signatories in international laws and Conventions prohibiting terrorism, so when a state commits acts of terrorism it is "in

[449]B Hoffman, *Inside Terrorism*. (New York: Columbia University Press, 1999)p. 34–35.
[450] Walter Laqueur,*No end to war: terrorism in the twenty-first century*, (London: Continuum, 2003)p. 237.

breach of its own solemninternational commitments." Finally, while there may be circumstances where non-state actors are in such anoppressed situation that there may be no alternative but terrorism, Primoratz argues that "it seems virtuallyimpossible that a state should find itself in such circumstances where it has no alternative to resorting to terrorism." This form of terrorism did exist in Nigeria between 1995 and 1998. Fortunately as at today, it is no longer in existence notwithstanding the perception of some persons that the present terrorist activities in Nigeria are state sponsored[451].

4.4: **Tactics of terrorism**

Terrorist groups use various tactics to maximize fear and publicity. Terrorist organizations usually methodically plan attacks in advance, and may train participants, plant "undercover" agents, and raise money from supporters or through organized crime. Communication may occur through modern telecommunications, or through old-fashioned methods such as couriers.

4.4.1: **Methods of attack**

While terrorists act according to different motivations and goals, all such groups have one tactic in common: intimidation or coercion of the public or the government in order to effect social or political change. Terrorism uses violence, or threat of violence, against one portion of a society to compel the greater body of that society or their leaders to make a change out of fear. Terrorism often exploits propaganda techniques to ensure the public receives the intended message. One type of improvised explosive device is the car bomb, placed in a car or other vehicle and then detonated. It is used by terrorists to kill people near the blast site. Car bombs act as their own delivery mechanisms and can carry a relatively large amount of

[451] Recently, the former Governor of Adamawa State, M. Nyako accused the Presidency of genocide as a result of Boko Haram attacks. This letter is contained in an online Saharareporters publication of 24th March 2014 titled, “Is the Massive killing by Boko Haram State Sponsored?”

explosives without attracting suspicion; in larger vehicles, weights of up to 1000 pounds (450 kg) have been seen.

4.4.2: **Suicide attacks**

When the issue of terrorism arose in Nigeria, it was simply a question of detonate bombs here or there. Few months into the era, we witnessed suicide bombings. This most times is combined with vehicle based attacks for purposes of inflicting maximum impact. It has been suggested that most of those used for purposes of this suicide based attacks are misguided youths threatened with the total annihilation of his entire family in the event he refuses to assume the mission. This method is in existence in Nigeria.

4.4.3: **Vehicle based attacks**

In the 2000s, there have been a number of vehicle based attacks in which terrorists used earthmovers or other motor vehicles to run over pedestrians or to attack vehicles. Some examples of such attacks include the 2006 Jerusalem bulldozer attack and the Omeed Aziz Popal SUV rampage. Compared to suicide-bomb attacks, using vehicles as weapons is easier to plan and carry out without detection. The tactic does not require acquiring explosives. The weapon, a standard street-legal vehicle, is readily available in the target country and can be used without raising suspicion. Using a vehicle as a terrorist tactic is nearly as effective, and at the same time as destructive as a suicide bombing. This we have severally witnessed in Nigeria. The vehicle based attacks were used at the United Nations Building bombing and as well the Police Headquarters bombing. It is very effective.

4.4.4: **Aircraft attacks and hijackings**

In the failed 2002 airliner attack, shoulder-launched surface-to-air missiles were fired at an airliner while taking off. Aircraft hijacking is also employed as a terrorist tactic. On

September 11, 2001, 19 al-Qaeda terrorists hijacked American Airlines Flight 11, United Airlines Flight 175, American Airlines Flight 77, and United Airlines Flight 93 and crashed them into the Twin Towers of the World Trade Center, the southwestern side of the Pentagon building, and Stonycreek Township near Shanksville, Pennsylvania in a terrorist attack. Chemical and biological weapons Aum Shinrikyo, a Japanese "new religious movement" in 1995 carried out the Sarin gas attack on the Tokyo subway. Ian Davison, a British white supremacist, and neo-Nazi who was arrested in 2009 for planning terrorist attacks involving ricin poison. In 2011 the United States government discovered information that terrorist groups were attempting to obtain large amounts of castor beans for weaponized ricin use. The terrorists groups in Nigeria are yet to carry out any terrorist attack using this method. It is the reason why effective implementation of existing legislation is required to tighten all loose ends to avoid the usual Nigerian strategy of realizing too late after the deed has been done.

4.4.5: **Nuclear weapons**

Concerns have also been raised regarding attacks involving nuclear weapons. It is considered plausible that terrorists could acquire a nuclear weapon. In 2011, the British news agency, the Telegraph, received leaked documents regarding the Guantanamo Bay interrogations of Khalid Sheikh Mohammed. The documents cited Khalid saying that, if Osama Bin Laden is captured or killed by the Coalition of the Willing, an Al-Qaeda sleeper cell will detonate a "weapon of mass destruction" in a "secret location" in Europe, and promised it would be "a nuclear hellstorm". This means of attack is yet to be deployed in Nigeria and we pray that it does not occur as this is the most deadly form of terrorist attack rendering maximum impact immediately upon attack.

4.4.6: **Conventional Firearms**

Despite the popular image of terrorism as bombings alone, and the large number of casualties and higher media impact associated with bombings, conventional firearms are as much if not more pervasive in their use. For example, in the second part of the 2011 Norway attacks 68 people were killed by a man with two guns. Also, the 2008 Mumbai terrorist attacks were partly by guns and partly by bombs. In 2004, the European Council recognized the "need to ensure terrorist organizations and groups are starved of the components of their trade," including “the need to ensure greater security of firearms, explosives, bomb-making equipment and technologies that contribute to the perpetration of terrorist outrages." This form of attack is very rampant in Nigeria. Indeed it has been the easiest form of attack by terrorists on innocent Nigerians. The existence of this mode of attack has prompted the banning of motorcycles in some prone areas in the North.

4.4.7: **Kidnappings**

While most terrorist activities revolve round violence and death, one should not lose sight of the fact that some terrorist groups may resort to kidnapping and abduction of vulnerable members of the community such as children and women. The kidnapped and or abducted persons are then kept hostage with the intention of using them to secure the release of their members already in the net of security agencies. This method of attack is almost always very effective as it pushes the authorities to either give in to their demands or risk losing the kidnapped souls. This method is currently in use in Nigeria[452] and it is very effective for while all other methods give rise to deaths and violence, this method leaves room for imaginations especially when the persons kidnapped are children and or women.

[452]This is evidenced in the current spates of abductions and kidnappings in the North Eastern Part of the Country

4.5: **Secondary attacks**

Terrorist groups may arrange for secondary devices to detonate at a slightly later time in order to kill emergency-response personnel attempting to attend to the dead and wounded. Repeated or suspected use of secondary devices can also delay emergency response out of concern that such devices may exist. The terrorists attacks in Nigeria has in some cases assumed this dimension that while the security agencies may be lured to another attack site, the main attack may occur more debilitating than the original attack.

4.6: **Training, Funding and Communication**

4.6.1: **Training**

There are and have been training camps for terrorists. The range of training depends greatly on the level of support the terrorist organization receives from various organizations and states. In nearly every case the training incorporates the philosophy and agenda of the group's leadership as justification for the training as well as the potential acts of terrorism which may be committed. State sanctioned training is by far the most extensive and thorough, often employing professional soldiers and covert operatives of the supporting state. Preparation of a major attack such as the September 11, 2001 attacks may take years, whereas a simpler attack, depending on the availability of arms, resources, and more it may be almost spontaneous. Where terrorism occurs in the context of open warfare or insurgency, its perpetrators may shelter behind a section of the local population. Examples include the intifada on Israeli-occupied territory, and insurgency in Iraq. This population, which may be ethnically distinct from the counter-terrorist forces, is either sympathetic to their cause, indifferent, or acts under duress. Terrorists preparing for the September 11, 2001 attacks changed their appearance to avoid looking radical.

4.6.2: **Communication**

Even though older communication methods like radio are still used, the revolution in communication technology over the past 10–15 years has dramatically changed how terrorist organizations communicate. E-mails, fax transmissions, websites, cell phones, and satellite telephones have made it possible for organizations to contemplate a global strategy. However, too great a reliance on this new technology leaves organizations vulnerable to sophisticated monitoring of communication and triangulation of its source. When Osama bin Laden found out that his satellite phone conversations were being intercepted, he ceased using this method

4.6.3: **Terrorism Funding/ Financing**

Funding can be raised in both legal and illegal ways. Some of the most common ways to raise funds are through front groups, charitable organizations, or NGOs with similar ideologies. In the absence of state funding, terrorists may rely on organized crime to fund their activities. This has included kidnapping, drug trafficking, or robbery. Additionally, terrorists have also found many more sources of revenue.Terrorism financing came into limelight after the events of terrorism on 9/11. The US passed the USA PATRIOTAct to, among other reasons, attempt thwarting the financing of terrorism and anti-money laundering making sure these were given some sort of adequate focus by US financial institutions.

Terrorism financing and money laundering are conceptual opposites.Money laundering is the process where cash raised from criminal activities is made to look legitimate forre-integration into the financial system, whereas terrorism financing cares little about the

source of the funds, but it iswhat the funds are to be used for that defines its scope[453].An in-depth study of the United States of America and other areas of the world referred to as crime-terror nexus points have beenpublished in the forensic literature.[454] Terrorists use low value but high volume fraud activity to fund their operations. Bulk cash smuggling and placementthrough cash-intensive businesses is one typology. Terrorists are now also moving monies through the new onlinepayment systems. They also use trade linked schemes to launder monies. Nonetheless, the older systems have notgiven way. Charities also continue to be used in countries where controls are not so stringent.Suspicious activityOperation Green Quest was the US multi-agency task force set up in October 2001 to combat terrorism financingand had developed a checklist of suspicious activities[455].

It would be difficult to determine by the activity alone whether the particular act was related to terrorism or toorganized crime. For this reason, these activities must be examined in context with other factors in order todetermine a terrorism financing connection. Simple transactions can be found to be suspect and money launderingderived from terrorism will typically involve instances in which simple operations had been performed revealing links

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[453]Bedi Rohan,*Money Laundering - Controls and Prevention,* (Hong Kong,ISI Publications, 2004) p 231

[454] Perri Frank S et al.,'Evil Twins: The Crime-Terror Nexus' ,(2009) 18(4) Forensic Examiner, 16-29. T. Makarenko, 'Crime, Terror, and the Central Asian Drug Trade' (2002) 6(3) *Harvard Asia Quarterly* 1－24.

[455]The following patterns of activity indicate collection and movement of funds that could be associated with terrorism financing:1. Account transactions that are inconsistent with past deposits or withdrawals such as cash, cheques, wire transfers, etc.2. Transactions involving a high volume of incoming or outgoing wire transfers, with no logical or apparent purpose that come from, go to, or transit through locations of concern that is sanctioned countries, non-cooperative nations and sympathizer nations.3. Unexplainable clearing or negotiation of third party cheques and their deposits in foreign bank accounts. 4. Structuring at multiple branches or the same branch with multiple activities.5. Corporate layering, transfers between bank accounts of related entities or charities for no apparent reasons.6. Wire transfers by charitable organizations to companies located in countries known to be bank or tax havens.7. Lack of apparent fund raising activity, for example a lack of small cheques or typical donations associated with charitable bank deposits.8. Using multiple accounts to collect funds that are then transferred to the same foreign beneficiaries9. Transactions with no logical economic purpose, that is, no link between the activity of the organization and other parties involved in the transaction.10. Overlapping corporate officers, bank signatories, or other identifiable similarities associated with addresses, references and financial activities.11. Cash debiting schemes in which deposits in the US correlate directly with ATM withdrawals in countries of concern. Reverse transactions of this nature are also suspicious 12. Issuing cheques, money orders or other financial instruments often numbered sequentially, to the same person or business, or to a person or business whose name is spelled similarly.

with other countries including FATF blacklistedcountries. Some of the customers may have police records, particularly for trafficking in narcotics and weapons andmay be linked with foreign terrorist groups. The funds may have moved through a state sponsor of terrorism or acountry where there is a terrorism problem. A link with a Politically Exposed Person (PEP) may ultimately link up toa terrorism financing transaction. A charity may be a link in the transaction. Accounts (especially student) that onlyreceive periodic deposits withdrawn via ATM over two months and are dormant at other periods could indicate thatthey are becoming active to prepare for an attack.

In addition to normal AML controls, banks must focus on the CFT angle with renewed vigor and knowledge derivedfrom the extensive databank of case studies now available. Banks must focus on not just name matching withsanctions databases but also with other know your customer (KYC) high-risk databases of good third party vendors.They must use technologies like link analysis to establish second and third level links that identify transactions aspotentially suspicious from a CFT perspective. Focus on preventing identity theft is an integral part of any CFTprogram. Detection rules designed to capture the suspicious activity list given above, should be evaluated. Controlsout of the transaction monitoring process, for example, account openings by groups of individuals, are also importantto watch for.

CHAPTER FIVE

A COMPARATIVE REVIEW OF THE ROLE OF LAW IN THE FIGHT AGAINST TERRORISM IN OTHER JURISDICTIONS

5.0: **Background to Study**

This chapter seeks to do a comparative analysis of some selected jurisdictions that are battling with issues of terrorism through the instrumentality of law. The countries under review have made some progress using the law as the major instrument in the fight against terrorism.

5.1: **The United States of America**[456]

The essence of this chapter is to compare the role of law in the fight against terrorism in the United States of America. Terrorism in the United States is not new. By the 1980s, terrorism had come to stay in the United States. There were close to eleven terrorist attacks in the United States within this period. By the 1990s, terrorism assumed a more dangerous dimension in the United States. The period witnessed more daring attacks. It was during this period that First World Trade Centre bombing was carried out by radical Islamist, Ramzi Yousef also a member of *al qaeda* killing six and injuring about 1000. In 1996 July 27 Eric Rudolph bombed the Centennial Olympic Park in Atlanta, Georgia, during the Atlanta Olympics killing one and injuring 111.[457]

By, the turn of the next century, the United States was given a rude shock, which changed all their perceptions and preparedness against terrorism. It not only affected the United States but also all other countries of the world in the way and manner they approached the issue of

[456]Charles Doyle, *The USA PATRIOT Act: A Legal Analysis*, American Law Division, 2002, Congressional Research Services, Report for Congress April 15, 2002. The researcher used this report extensively in analyzing the Law.

[457] *Ibid*

terrorism. On September, 11 2001, members of the *Al qaeda* Terrorist group carried out a well-coordinated Terrorist attacks on the United States on September 11, 2001 which attacks killed nearly 3,000 civilians, and were carried out by Islamic fundamentalists using hijacked commercial airplanes to damage the Twin Towers of the World Trade Center, ultimately destroying both 110-story skyscrapers. The Pentagon near Washington, D.C., was also severely damaged. It was after the 911 attacks that the whole world became sensitized on the evil effects of terrorism; that no one is excluded from their attacks and also no one is insulated from the ensuing catastrophe. In December of 2009, a Nigerian citizen and self-described Al Qaeda member Umar Farouk Abdulmutallab allegedly attempted to blow up Northwest Airlines Flight 253 in flight over Detroit by igniting his underpants which were filled with the C-4 explosive. He has been indicted in a U.S. Federal Court with various charges including the attempted murder of 289 people. It is relevant to say that on October 12, 2011 Abdulmutallab during his trial pled guilty to all counts against him and read a statement to the court saying

> I attempted to use an explosive device which in the U.S. law is a weapon of mass destruction, which I call a blessed weapon to save the lives of innocent Muslims, for U.S. use of weapons of mass destruction on Muslim populations in Afghanistan, Iraq, Yemen and beyond"[458].

Following the choice of the United States as the first port of call for all terrorist groups or organization, the United States has not remained passive in the fight against terrorism. One of such efforts includes the USA PATRIOT Act[459]. The USA PATRIOT Act[460] passed in the wake of the September 11 2001 terrorist attacks flows from a consultation draft circulated by

[458]Davey, Monica, "Would-Be Plane Bomber Pleads Guilty, Ending Trial" The New York Times, Wednesday, October 12, 2011 online publication available at www. nytimes. Com.

[459] The full name of the Act is Uniting and Strengthening America by Providing Appropriate Tools Requiredto Intercept and Obstruct Terrorism (USA PATRIOT ACT) ACT OF 2001

[460]Charles Doyle, *The USA PATRIOT Act: A Legal Analysis*, American Law Division, 2002, Congressional Research Services, Report for Congress April 15, 2002.p 137

the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect the country against any similar future attacks.

The Act grants federal officials greater powers to trace and intercept terrorists' communications both for law enforcement and foreign intelligence purposes. It re-enforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens also the immigration laws to close our borders to foreign terrorists. Finally, it creates a few new federal crimes, such as the one outlawing terrorists' attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

The Act also provides for the authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions. This ostensibly signifies a red flag as it affects the freedom of individuals in the fight against terrorism. The Act itself responds to some of these reservations. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well-being of our financial institutions. This is the Act's own ways of allaying the fears of those who are afraid that their rights may be violated in the course of this onerous fight.The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close the

borders to foreign terrorists and to detain and remove those within the US borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September[461]. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists' communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications[462].The tiers reflected the Supreme Court's interpretation of the Fourth Amendment's ban on unreasonable searches and seizures[463]. The Amendment protects private conversations[464]. It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual's home[465], or bank records of an individual's financial dealings[466]. Congress responded to Berger[467] and Katz, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations,

[461] The Department's proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (Draft) and analysis (DoJ) were printed as an appendix in Administration's Draft Anti-Terrorism Act of 2001, Hearing before the House Comm. On the Judiciary, 107th Cong., 1st Sess. 54 (2001).

[462] For a general discussion of federal law in the area prior to enactment of the Act, see, Stevens & Doyle, Privacy: An Overview of Federal Statutes Governing Wiretapping and Electronic Eavesdropping, CRS REP.NO. 98-327A (Aug. 8, 2001);

[463] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized," U.S. Const. Amend. IV.

[464] *Berger v. NewYork*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967)

[465] *Smith v. Maryland*, 442 U.S. 735 (1979)

[466] *United States v. Miller*, 425 U.S. 435 (1976).

[467] *Berger v. New York*, 388 U.S. 41 (1967) and *Katz v. United States*, 389 U.S. 347 (1967)

or computer and other forms of electronic communications[468]. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses)'.[469] Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations.[470]. The court notifies the parties to any conversations seized under the order after the order expires[471]. Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection – telephone records, e-mail held in third party storage, and the like[472]. Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception[473].

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government's use of trap and trace devices and pen registers, a kind of secret "caller id", which identify the source and destination of calls made to and from a particular telephone[474]. The orders are available based on the government's certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the

[468] 18 U.S.C. 2511 Although there are technical differences, the interception processes are popularly known as Wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeably here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
[469] 18 U.S.C. 2516.9
[470] 18 U.S.C. 2518
[471] 18 U.S.C. 2518(8).
[472] 18 U.S.C. 2701-2709 (Chapter 121).
[473] 18 U.S.C. 2703
[474] 18 U.S.C. 3121-3127 (Chapter 206).

investigation of a crime, any crime[475]. The Act modifies the procedures at each of the three levels. It permits pen register and trap and trace orders for electronic communications(e.g., e-mail); authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records; treats stored voice mail like stored e-mail; permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system's owner); adds terrorist and computer crimes to Title III's predicate offense list; re-enforces protection for those who help execute Title III orders; encourages cooperation between law enforcement and foreign intelligence investigators; establishes a claim against the U.S. for certain communications privacy violations by government personnel.In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations[476]. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court.[477]

Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States.[478]With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber.[479]A warrant will also suffice to seize records describing telephone and other communications

[475] 18 U.S.C. 3123
[476] 18 U.S.C. 3121, 3123
[477] 18 U.S.C. 3123(a)(3).
[478] 18 U.S.C. 3123(b)(1)(C), 3127(2).12
[479] 18 U.S.C. 2703(a),(b).

transactions without customer notice.[480]In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation; officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records.[481]They can obtain a limited amount of record information (subscribers' names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena.[482]There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial. [483] In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider's customer records.[484]

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offence under investigation occurred may issue orders applicable "without geographic limitation," [485] The Act, in section 209, treats voice mail like e-mail that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required.[486]

Finally, the Act resolves a conflict between Chapter 121 and the Federal Law governing cable companies. Government entities may have access to cable company customer records

[480] 18 U.S.C. 2703(c).
[481] 18 U.S.C. 2703(b),(c).
[482] 18 U.S.C. 2703(c)(1)(C).
[483] 18 U.S.C. 2705.
[484] 18 U.S.C. 2703(c)(1)(C).13
[485] 18 U.S.C. 2703.14
[486]*United States v. Smith*, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity.[487]When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers. The Act makes it clear that the cable rules apply when cable television viewing services are involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services. To Title III's predicate offence list, the Act adds cybercrime [488] and several terrorists' crimes[489]. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order.[490]Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur[491].

The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism[492].It amends

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[487] 47 U.S.C. 511(h).

[488] (18 U.S.C. 1030)

[489] Sections 201, 202; 18 U.S.C. 229 (chemical weapons), 2332(terrorist acts of violence committed against Americans overseas), 2332a(use of weapons of mass destruction), 2332b(acts of terrorism transcending national boundaries), 2332d(financial transactions with countries which support terrorists), 2339A(providing material support to terrorists), and 2339B(providing material support to terrorist organizations).

[490] 18 U.S.C. 2511(2)(i).

[491] Elsewhere the Act defines "electronic surveillance" for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

[492] Best, Intelligence and Law Enforcement: Countering Transnational Threats to the U.S., CRS REP.NO. RL30252 (Dec. 3, 2001).

the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that "the purpose for the surveillance is to obtain foreign intelligence information,"[493], although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Out of these challenges arose the notion that perhaps "the purpose" might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation[494]officials were required to either end surveillance or secure an order under Title III.The Justice Department sought FISA surveillance and physical search authority on the basis of "a" foreign intelligence purpose.Section 218 of the Act insists that foreign intelligence gathering be a "significant purpose" for the request for the FISA surveillance or physical search order[495], a more information under this title may consult with Federal law enforcement officers. Section 504 of the Act further encourages coordination between intelligence and law enforcement

[493] 50 U.S.C. 1804(a)(7)(B)(2000 ed.)

[494] In *United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, "as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted 'primarily' for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly,individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution." *United States v. Pelton*, 835 F.2d 1067, 1075-76 (4th Cir. 1987)("We also reject Pelton's claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later beused . . . as evidence in a criminal trial"); *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991) ("Appellants attack the government's surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance").

[495], 50 U.S.C. 1804(a)(7)(B), 1823(a)(7)(B

officials, and states that such coordination is no impediment to a "significant purpose" certification. [496]

The Act re-enforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act's safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005. The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter 121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices)[497]. Victims of offences under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees,[498] but could not recover against the United States.[499] Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions. [500]

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained. Under pre-existing law providers could disclose the content of stored communications but not customer

[496] 50 U.S.C. 1806(k), 1825k; "(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a) (7)(B) or the entry of an order under section 105." FISA defines "foreign power" and "agent of a foreign power" broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

[497] 18 U.S.C. 2511, 2701, and 3121 (2000 ed.), respectively.

[498] 18 U.S.C. 2520 and 2707 (2000 ed.).

[499] *Spock v. United States*, 464 F.Supp. 510, 514 n.2 (S.D.N.Y. 1978); *Asmar v. IRS*, 680 F.Supp. 248, 250 (E.D.Mich. 1987).

[500] 18 U.S.C. 2707.

records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others.[501] A third section, section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers' obligation to make modifications in their systems in order to accommodate law enforcement needs.Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough[502].Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police.

Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA)[503], after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections.[504]

FISA later grew to include procedures for physical searches in foreign intelligence cases[505], for pen register and trap and trace orders, [506]and for access to records from businesses engaged in car rentals, motel accommodations, and storage lockers[507]. Intelligence authorities gained narrow passages through other privacy barriers as well. In many instances, access was limited to information related to the activities of foreign governments or their

[501] "Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

[502] E.g., As amended by section 902 of the Act, "'foreign intelligence' means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities," 50 U.S.C. 401a(2)(language added by the Act in italics).

[503] 50 U.S.C. 1801 et seq.

[504]*United States v. United States District Court***,** 407 U.S. 297 (1972).

[505] 50 U.S.C. 1821-1829

[506] 50 U.S.C. 1841-1846,

[507] 50 U.S.C. 1861-1863 (2000 ed.)

agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs.[508] There were and still are extra safeguards if it appears that an intelligence investigation may generate information about Americans ("United States persons," i.e., citizens or permanent resident aliens).[509] The procedures tend to operate under judicial

[508] "As used in this subchapter: (a) 'Foreign power' means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, notsubstantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments. "(b) 'Agent of a foreign power' means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of suchactivities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States;(C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C) or knowingly conspires with any person to engage in activities described in subparagraph (A), (B), or (C). "(c) 'International terrorism' means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnaping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum. "(d) 'Sabotage' means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States. "(e) 'foreign intelligence information' means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or anagent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States\ person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States," 50 U.S.C. 1801.

[509] Strictly speaking for FISA purposes, a United States person "means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of thissection," 50 U.S.C. 1801(i).

supervision and tend to be confidential as a matter of law, prudence, and practice. The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse.

FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases.[510] It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, [511] The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year.[512]

Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications.[513] The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment.[514]The Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the

[510] For a general discussion of FISA prior to enactment of the Act, see, Bazan, The Foreign Intelligence Surveillance Act: An Overview of the Statutory Framework for Electronic Surveillance, CRS REP.NO. RL30465 (Sept. 18, 2001).
[511] 50 U.S.C. 1803(a).
[512] 50 U.S.C. 1805(e), 1824(d).
[513] 50 U.S.C. 1842(d).
[514] 50 U.S.C. 1842, 1843.

execution of the order.[515] The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes those who provide such assistance[516], section 225.

Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records.[517] The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians. [518]Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. The Act, [519]allows disclosure of matters occurring before the grand jury to "any federal law enforcement, intelligence, protective, immigration, national defense, or national security" officer to assist in the performance of his official duties.[520]

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[515] 50 U.S.C. 1805(c)(2)(B).
[516] 50 U.S.C. 1805(h), section 225.
[517] 50 U.S.C. 1861 to 1863 (2000 ed.).
[518] section 215.
[519] Section 203(a),
[520] F.R.Crim.P. 6(e)(3)(C)(i)(V). These officers may receive: (1) "foreign intelligence information" that is, information regardless whether it involves Americans or foreign nationals that "[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;" or [b] "with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States," F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] "information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities" or [b] "information gathered and activities conducted, to protect against espionage,other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities," 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics)

Critics may protest that the change could lead to the use of the grand jury for intelligence gathering purposes, or less euphemistically, to spy on Americans[521].The Act, in section 203(a), instead calls for confidential notification of the court that a disclosure has occurred and the entity to whom it was made.[522]It also insists that the Attorney General establish implementing procedures for instances when the disclosure "identifies" Americans (U.S. persons).[523]

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers which may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that emanates in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral.[524]To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties.

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[521] Beale SS & Felman JE, "The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act's Changes to Grand Jury Secrecy", *25 Harvard Journal ofLaw& Public Policy* 699, 719-20 (2002)("There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury's investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury's awesome powers should not be unwittingly extended to a much wider range of issues. . . Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury's investigation within proper bounds.Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes"); but see, Scheidegger et al., Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 (Nov. 2001)("The grand jury secrecy rule is a rule of policy which has always had exceptions,and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature").

[522] F.R.Crim.P. 6(e)(3)(C)(iii).

[523] Section 203(c)

[524] 50 U.S.C. 403-5b.

The Act liberalizes authority for the FBI to hire translators which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a computerized translation capability to be used in foreign intelligence gathering.Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture.[525]

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction.[526]Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so.[527]Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban.[528] It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial

[525] For a brief overview, see, Murphy, Money Laundering: Current Law and Proposals, CRS REP.NO. RS21032 (DEC. 21, 2001).
[526] 31 U.S.C. 5318(g)(2)(2000 ed.).
[527] 31 U.S.C. 5318(g)(3)(2000 ed.).
[528] 31 U.S.C. 5318(g)(2)(A).

institutions.[529] Finally, it makes clear that the immunity does not extend to immunity from governmental action. Section 355 expands the immunity to cover disclosures in employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.[530]

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements was administratively created in 1990 to provide other government agencies with an "intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,".[531]The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department.[532] Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures.

Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes.[533]They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must

[529] 31 U.S.C. 5318(g)(2)(B).
[530] 31 U.S.C. 1828(w).
[531] 55 Fed.Reg. 18433 (May 2, 1990).
[532] 31 U.S.C. 310
[533] 31 U.S.C. 5318(i).

at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.[534]The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business[535]) which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.[536]

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions' concentration account practices. The Secretary of the Treasury is instructed in section 326 to issue regulations for financial

[534]Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

[535] Or more exactly, a bank which has no physical presence in any country; a "physical presence" for a foreign bank is defined as "a place of business that – (i) is maintained by a foreign bank; (ii) is located at a fixed address (other than solely an electronic address) in a country in which the foreign bank is authorized to conduct banking activities, at which location the foreign bank – (I) employs 1 or more individuals on a full-time basis; and (II) maintains operating records relating to its banking activities; and (iii) is subject to inspection by the banking authority which licensed the foreign bank to conduct banking activities," 31 U.S.C. 5318(j)(4).

[536] 31 U.S.C. 5318(j);

institutions' minimum new customer identification standards and recordkeeping and to recommend a means to effectively verify the identification of foreign customers.[537]Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities. Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities' requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days).[538]

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.[539]

Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals. Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (i.e., the International Monetary Fund, the International Bank for Reconstruction

[537] 31 U.S.C. 5318(l); H.R.Rep.No. 107-250, at 62-3 (2001)("Section [326](a) amends 31 U.S.C. 5318 by adding a new subsection governing the identification of account holders.
[538] 31 U.S.C. 5318(k).
[539] 31 U.S.C. 5313

and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the Inter-American Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported their anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C.1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party. [540]

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities.[541] In this same vein, section 376 adds the crime of providing material support to a terrorist

[540] 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:
18 U.S.C. 541 (goods falsely classified);18 U.S.C. 922(1) (unlawful importation of firearms);18 U.S.C. 924(n) (firearms trafficking);18 U.S.C. 1030 (computer fraud and abuse);22 U.S.C 618 (felony violations of the Foreign Agents Registration Act).

[541] H.R.Rep.No. 107-250, at 55 (2000).

organization (18 U.S.C. 2339B) to the predicate offense list and section 318 expands 18 U.S.C. 1956 to cover financial transactions conducted in foreign financial institutions.

Section 329 makes it a federal crime to corruptly administer the moneylaundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe. Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.[542]

Aliens believed to have engaged in money laundering may not enter the United States.[543]The same section directs the Secretary of State to maintain a watch list to ensure that they are not admitted. The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense.[544] Section 1004 relies on dicta in *United States v. Cabrales,*[545] in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, "if the defendant participated in the transfer of the proceeds,"[546]

[542] "This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses," H.R.Rep.No. 107-250, at 75-6 (2001).
[543] section 1006 (8 U.S.C. 1182(a)(2)(I)).
[544] section 377
[545] 524 U.S. 1,8 (1998
[546] 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,[547] in the state and district in which the monetary transaction takes place. The Supreme Court in *Cabrales* held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in *dicta*, however, that "money laundering . . . arguably might rank as a continuing offence, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,"[548].Forfeiture is the government confiscation of property as a consequence of crime. The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.[549] Section 319(d) establishes a procedure under

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[547] "The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed," U.S.Const. Art.III, §2, cl.3.

"[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law," U.S.Const. Amend. VI.

[548] 524 U.S. at 8See also, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm "during and in relation to" a crime of violence.

[549] 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001)("The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss any presumption of remedial purposes.94 The same has been said of the applicabilityof the ex post facto

which a convicted defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offence committed overseas, if the offence was punishable as a felony under the laws of the nation where it occurred and if the offence would have been a felony if committed in the US. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of timely- notice defence.

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien

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clause.95 The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high. On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate thecommission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806 , the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO.96 If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce thesections are bound by the limitations of the double jeopardy and ex post facto clauses. Other Forfeiture Amendments. In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federalreceiver to take control of contested assets during the pendency of the proceedings. American Bank, 191 F.3d 30 (1st Cir. 1999). “The second provision, modeled on 18 U.S.C. 1345(b), gives the district court the powerto restrain property, issue seizure warrants, or take other action necessary to ensure that a defendant in an action covered by the statute does not dissipate the assets that would be needed to satisfy a judgment.“This section also authorizes a court, on the motion of the Government or a State or Federal regulator, to appoint a receiver to gather and protect assets needed to satisfy a judgment under sections 1956 and 957, and the forfeiture provisions in sections 981 and 982. This authority is intended to apply in three circumstances: (1) when there is a judgment in a criminal case, including an order of restitution, following a conviction for a violation of section 1956 or 1957; (2) when there is a judgment in a civil case under section 1956(b) assessing a penalty for a violation of either section 1956 or 1957; and (3) when there is a civil forfeiture judgment under section 981 or a criminal forfeiture judgment, including a personal money judgment, under section 982. “The amendment also makes section 1956(b) applicable to violations of section 1957.It applies to conduct occurring before the effective date of the Act”).

terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11[550].Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity.[551]Aliens may be inadmissible for any number of terrorism-related reasons. [552]Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported. Prior law recognized five terrorism-related categories of inadmissibility. Section 411 redefines two of these – engaging in terrorist activity and representing a terrorist organization[553] – and it adds three more – espousing terrorist activity, being the spouse or child of an inadmissible alien associated with a terrorist organization, and intending to engage in activities that could endanger the welfare, safety or security of the United States.[554] It defined engaging in terrorist activity, which is grounds for both inadmissibility and deportation, to encompass soliciting on behalf of a terrorist organization or providing material support to a terrorist organization.[555] Section 411 defines "terrorist organization" to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence.[556] It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support.[557] Section 411 makes representatives of political, social or similar

[550]Sec 401 - 410
[551] 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv).
[552] 8 U.S.C. 1182 (a)(3)(B).
[553] (8 U.S.C. 1182(a)(3)(B)(iv), (a)(3)(B)(i)(IV))
[554] (8 U.S.C. 1182(a)(3)(B)(i)(VI), (a)(3)(B)(i)(VII), 1182(a)(3)(F
[555] 8 U.S.C. 1182(a)(3)(B)(iii)(2000 ed.).
[556] 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv)
[557] 8 U.S.C. 1182(a)(3)(B)(iv).

groups, whose public endorsements of terrorist activities undermines U.S. efforts to reduce or eliminate terrorism, inadmissible as well.[558]

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct.[559]Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible.[560] Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in "premeditated, politically motivated violence perpetrated against noncombatant targets," or groups which retain the capacity and intent to engage in terrorism or terrorist activity.[561] Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days.[562] He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out

[558] , 8 U.S.C. 1882(a)(3) (B)(i)(IV).
[559] 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).
[560] 8 U.S.C. 1182(a)(3)(F).
[561] 8 U.S.C. 1189(a)(1)(B).
[562] 8 U.S.C. 1226a

of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11[563].

Pre-existing federal law criminalized, among other things, wrecking trains,[564] damaging commercial motor vehicles or their facilities,[565] or threatening to do so,[566] destroying vessels within the navigable waters of the United States,[567] destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives,[568] possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so,[569] use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so,[570] commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive,[571]conspiracy to commit a federal crime.[572] The Act makes an offence terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons.[573] The Act, in section 817, makes two substantial changes. It makes it a federal

[563]Sections 421-426
[564] 18 U.S.C. 1992
[565] 18 U.S.C. 33,
[566] 18 U.S.C. 35
[567] 18 U.S.C. 2273,
[568] 18 U.S.C. 844(i)
[569] 18 U.S.C. 175
[570] 18 U.S.C. 2332a
[571] 18 U.S.C. 924(c), 844(h),
[572] 18 U.S.C. 371
[573] 18 U.S.C. 175

offence, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes.[574]Second, consistent with federal prohibitions on the possession of firearms[575]and explosives,[576]it makes it a federal offence for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents.[577]

The Constitution, however, may insist that prosecution take place where the crime of harboring occurred. Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense. [578]

Finally, the section announces that a prosecution for violation of section 2339A (support of terrorists) may be brought where the support is provided or where the predicate act of terrorism occurs. There may be some question whether the Constitution permits prosecution where the predicate act occurs.[579] Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce.[580]Prior law, 18 U.S.C. 2325-2327, outlawed violation of Federal Trade Commission (FTC) telemarketing regulations promulgated under 15 U.S.C. 6101 et seq. Section 1011 of the Act brings

[574] 18 U.S.C. 175(b).
[575] 18 U.S.C. 922(g),
[576] 18 U.S.C. 842(i),
[577] 18 U.S.C. 175b.110
[578] 18 U.S.C. 1956(c)(7)(D)
[579] U.S.Const. Art.III, §2, cl.3; Amend. IV; *United States v. Cabrales*, 524 U.S. 1 (1998); *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999).
[580] 18 U.S.C. 1961.115

fraudulent charitable solicitations within the FTC's regulatory authority. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud. The Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offences.[581]

It is a separate federal offence punishable by imprisonment for not more than five years to conspire to commit any federal felony.[582] Co-conspirators are likewise subject to punishment for the underlying offence and for any other crimes committed in furtherance of the conspiracy.

A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center,[583] and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship.[584]

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories,[585] and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force.[586] The Act likewise

[581]Section 810
[582] 18 U.S.C. 371
[583] section 103
[584] section 205
[585] section 817
[586] section 105

clarifies the Secret Service's investigative jurisdiction with respect to computer crime[587]and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions.[588] Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism. The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials.[589].The Trade Sanctions Reform and Export Enhancement Act,[590] limits the President's authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction.[591] The Act expands the exception to include products that might be used for the design of chemical or biological weapons or of weapons of mass destruction as well.[592]

It should be noted that the USA PATRIOT Act was enacted just six weeks after the events of September 11 2001. This legislation broadly expands the powers of federal law enforcement agencies to gather intelligence and investigate anyone it suspects of terrorism. It contains more than 150 sections and amends over 15 federal statutes, including laws governing criminal procedure, computer fraud, foreign intelligence, wiretapping, and immigration. Since the Law was made under terrorist tension, there seems a likelihood to actually overstep the bounds in some areas. On the side of free speech, four sections are worrisome. They are Sections 206, which permits the use of "roving wiretaps" and secret court orders to monitor electronic communications to investigate terrorists; sections 214 and 216, which extend telephone monitoring authority to include routing and addressing

[587] (18 U.S.C. 1030)
[588] section 506
[589] section 1012
[590] 22 U.S.C. 7201 to 7209,
[591] 22 U.S.C. 7203(2)(c)
[592] Section 221(a)(1).

information for Internet traffic relevant to any criminal investigation; and, finally, section 215, which grants unprecedented authority to the Federal Bureau of Investigation (FBI) and other law enforcement agencies to obtain search warrants for business, medical, educational, library, and bookstore records merely by claiming that the desired records may be related to an ongoing terrorism investigation or intelligence activities. Several of the Act's hastily passed provisions not only violate the privacy and confidentiality rights of those using public libraries and bookstores, but sweep aside constitutional checks and balances by authorizing intelligence agencies to gather information in situations that may be completely unconnected to a potential criminal proceeding. The constitutional requirement of search warrants, to be issued by judges, is one such check on unbridled executive power. In addition to the dangers to democracy from such unbridled executive power, it is doubtful if these enhanced investigative capabilities will make the nation safer in the face of abuse of rights of individuals and democratic tenets. The USA PATRIOT ACT is therefore an effective instrument in the fight against terrorism despite its few draconian provisions. However, such draconian provisions are subject to the Court's final decision wherever the need arises as in *Doe v. Ashcroft*[593] where the Judge held that

> Democracy abhors undue secrecy, in recognition that public knowledge secures freedom. Hence, an unlimited government warrant to conceal, effectively a form of secrecy per se, has no place in our open society. … Under the mantle of secrecy, the self-preservation that ordinarily impels our government to censorship and secrecy may potentially be turned on ourselves as a weapon of self-destruction

The law is effectively fighting terrorism in the United States as seen above. The question to ask is why is it recording this huge success? The answer is from the

[593]334 F. Supp. 2d 471 (S.D.N.Y. 2004)

analysis obvious. Any law made to fight terrorism must show the citizenry not only that it is capable of fighting terrorism but that it is also more capable of protecting their rights. Hence the review provisions and the Court decisions in regards to areas of conflicts and or controversy in the Law.

5.2: **The United Kingdom**

Terrorism in the United Kingdom, according to the Home Office, poses a significant threat to the state.[594]Several incidents of terrorism had taken place in the United Kingdom since 2001. In August 2006 eleven individuals tried to detonate liquid explosives carried on board several airliners travelling from the United Kingdom to the United States.

The UK government has responded with a wealth of legislation (Terrorism Act 2000, the Anti-terrorism, Crime and Security Act 2001, the Prevention of Terrorism Act 2005 and the Terrorism Act 2006) that has significantly altered the criminal law as it relates to police investigations, police powers and prosecutions in terrorist offences. Many new offences have been created, police powers have been expanded, and the relationship between the state and the individual has been in many cases fundamentally altered. The new legislation particularly impacts on minority ethnic and religious groups, and raises many significant Human Rights issues relating to freedom of speech, freedom of association and the right to a fair trial.

The legislative developments since 2000 have reflected this, and the Government's much anticipated British Terrorism Bill 2005 (which came into force as the Terrorism Act 2006) contains several further proposed measures which significantly change the law in this area still further. The Bill underwent considerable amendment in Parliament and its passage through both Houses was accompanied by strongly contested divisions at several stages, and

[594] List of proscribed terrorist groups (http:/ / www. homeoffice. gov. uk/ security/ terrorism-and-the-law/terrorism-act/ proscribed-groups) Home Office of the British government.

attracted intense media coverage. In its final form the Act contains creates several new "Terrorist" offences, some of which are highly novel and have attracted considerable controversy. The measures contained within the Act give rise to fundamental civil liberties concerns, particularly as they affect minority ethnic and religious groups. The Terrorism Act also significantly extends police powers in terrorist investigations, and these provisions are described in the Police Powers section. Because of the controversy surrounding the Act, particularly over the Government's proposal to create an offence of "glorifying terrorism" and the original provision for police detention of suspects prior to charge for 90 days, the key sections in the Act are here listed and explained separately.Encouragement of terrorism carries a maximum sentence of 7 years imprisonment.

Dissemination of Terrorist Publications[595]

This offence is committed where a person distributes, circulates, gives, sells or lends a terrorist publication; offers a publication for sale or loan or provides a service enabling others to obtain or look at such a publication. The section provides a definition of a "terrorist publication" as a publication likely to be understood as an encouragement or inducement to commit terrorist acts, or to be useful in the commission of such acts. The person who distributes etc the publication must intend to encourage the commission of acts of terrorism, intend his act to provide assistance in doing so, or be reckless as to either. A matter likely to be understood as indirectly encouraging acts of terrorism will include anything which "glorifies the commission or reparation" of terrorist acts. The offence carries a maximum sentence of 7 years imprisonment.[596]It is an offence for a person who intends to commit or

[595]This is provided for in Section 2 subsections 1 – 13.

[596]*R-v-(1)Abdul Rahman(2)Bilal Mohammed* (2008) [2008]EWCA Crim 1465 The Court of Appeal gave sentencing guidance in relation to offences under s2 Terrorism Act 2006.The 1st appellant had pleaded guilty to disseminating a terrorist publication under s2, offences under s5 and s57 Terrorism Act 2000. Following a Goodyear direction he was sentenced to 6 years imprisonment. The 2nd appellant pleaded guilty to an offence under s2 and in mitigation argued that he had been unaware of the change in the law. He was sentenced to 3 years imprisonment.

assist an act of terrorism, to engage in any conduct in preparation in order to give effect to his intention. The maximum sentence for this offence is life imprisonment.[597]It is also an offence to provide instruction or training in certain specified skills – these include making or handling "noxious substances," and any "method or technique" for doing anything else capable of being done for terrorist purposes. It is also an offence to receive instruction or training in these skills. The maximum sentence is 10 years imprisonment and on conviction a court may order forfeiture of anything it considers to have been in a person's possession and connected with an offence under this section.[598]

Under the Act, it is an offence for a person to attend any place (in or outside the UK) where training is provided while he is there which is wholly or partly for purposes connected with terrorist acts. The person must know or believe that instruction or training is being provided there for such purposes, or a person attending could not reasonably have failed to understand that such training was being provided. It is irrelevant whether the person charged actually receives instruction or training himself. The offence carries a maximum sentence of 10 years imprisonment.[599] It is important to note that under s17 of the Act, certain offences created by the Act can now be prosecuted even if they are committed outside the UK.By virtue of the provisions in section 23, 26 and 28,a terrorist suspect may now be held in police custody prior to charge for a maximum of 28 days. Police powers of search and seizure have also been widened. These provisions are referred to fully under Police Powers. The powers available to the Police and other investigating agencies in cases where terrorist offences are suspected have, for several decades, been subject to close scrutiny and in many cases controversy. Broadly, since the legislation of the mid-1970 in the light of Irish paramilitary activity, the police have enjoyed much wider and more intrusive powers of investigation in

[597] (section 5)
[598] (section 6)
[599] (section 8)

terrorist cases, particularly in the area of detention of suspects for questioning. Since the Terrorism Act 2000 and especially since September 11th the legislative trend has been towards extending these powers still. As a result, police officers investigating terrorist offences can draw on a wider range of powers than previously. In many cases these powers hugely exceed those that apply in other criminal investigations. There has been widespread concern that the advance of police powers in this area has significantly altered the balance between the need to investigate serious crime, and the civil liberties of individuals. Some relate specifically to investigations proper, while some arise in the context of public order and pre-emption eg stop and search.Under Section 32 TA 2000, a "terrorist investigation" means an investigation of: a) the commission, preparation or instigation of acts of terrorism; b) an act which appears to have been done for the purposes of terrorism; c) the resources of a proscribed organization; d) the possibility of an order under s 3(3) (proscription of an organization); or e) the commission, preparation or instigation of an offence under Act.

Anybody who is arrested and detained by the police in relation to a terrorist investigation will be reminded of the right to legal advice by consulting a solicitor. It is invariably essential to obtain legal advice, preferably from a specialist in terrorist cases. The police are also empowered to seize terrorist cash. An authorized officer may seize cash if he has reasonable grounds for suspecting that it is "terrorist cash." Cash seized may be retained for 48 hours, and this period may be extended by a Magistrates' Court initially up to three months to a maximum of two years. The cash may only be detained in this way if the court finds that there are reasonable grounds for suspecting that the cash may be used for the purposes of terrorism and that its detention is justified either by an on-going investigation, or by on-going court proceedings. Alternatively, the cash may be detained if there are reasonable grounds for suspecting that it consists of resources of a proscribed organization,

or that it is "earmarked" as terrorist property and that its detention is justified by an on-going investigation or court proceedings. A Magistrates' Court may order forfeiture of the cash. There is a procedure for appealing forfeiture.

Part IV of the 2000 Act gives the police the power designate "cordoned"[600] areas for the purposes of terrorist investigations. The power to designate[601] lies with a police officer of at least the rank of Superintendent (although officers of lesser rank may designate if urgent). Any designated area must be demarked as soon as reasonably practicable, and any verbal designation must be confirmed in writing as soon as reasonable practicable. A designation may be for a maximum initial period of 14 days but may be extended to 28 days. A police officer in uniform may order a person to leave a cordoned area immediately, or order a person immediately to leave premises which are wholly or partly in or adjacent to a cordoned area (s 36 (1)). He may also order vehicles to be moved. It is an offence to fail to comply with an order or prohibition or restriction imposed under s 36 (1) without reasonable excuse, punishable with 3 months imprisonment and/or a fine.

Under Part V of the Act, a police officer may arrest any person he suspects of being a terrorist without a warrant.[602] In addition, s 110 Serious Organized Crime and Police Act 2005 now gives the police very wide powers to arrest without a warrant in cases where there are reasonable grounds to suspect that any offence is being, is about to be or has been committed, and an arrest is necessary to establish the suspect's name, address or to ensure the prompt investigation of the offence, or to ensure that an investigation is not hindered by the suspect's disappearance. A Justice of the Peace may, on the application of a police officer, issue a search warrant in respect of specified premises if he is satisfied that are reasonable grounds to suspect that a person whom the officer reasonably suspects to be a

[600] S. 32
[601] S.34 TA
[602] S. 41

terrorist is to be found there. The warrant authorizes any police officer to enter and search the premises for the purpose of arresting the terrorist[603] Under Schedule 5 Part I TA 2000 (amended by s 26 Terrorism Act 2006) a Justice may issue a search warrant to enter and search specified premises (or any premises controlled or occupied by a specified person) and to seize and retain material that the searching officer has reasonable grounds to believe may be of "substantial value" to a terrorist organization. The search must be part of a terrorist investigation, and the issuing Justice must have reasonable grounds for believing that there is material on the premises likely to be of substantial value to a terrorist investigation.

There is a further power for a senior police officer to authorize the search of specified premises within a "cordoned" area. In addition, a Justice may issue a search warrant to enter premises to search for and seize "terrorist publications"[604]Under s 43 TA 2000, a police officer may stop and search a person whom he reasonably suspects to be a terrorist to discover whether he has in his possession anything which may constitute evidence that he is a terrorist. Any person arrested under suspicion of being a terrorist may also be searched. Searches must be conducted by an officer of the same sex as the suspect, and items which the officer reasonably suspects may constitute evidence that the person is a terrorist may be seized.

Under s 44 TA 2000 a senior police officer may designate specified areas or places in which an officer in uniform may stop and search vehicles, drivers or pedestrians. An authorization may only be given if the senior officer "considers in expedient for the prevention of acts of terrorism." The power under s 44 may only be exercised for the purpose of searching for articles of a kind which could be used in connection with terrorism, but there is no need for the officer who conducts the search to have grounds to suspect the presence of such articles.

[603] Section 42
[604] (S 28 Terrorism Act 2006).

Articles the officer reasonably believes are intended to be used in connection with terrorism may be seized and retained. Where an officer carries out a search under s 44 he may only require the suspect to remove his outer coat, jacket, gloves, headgear or footwear. He may seize and retain any item he reasonably suspects is intended to be used in connection with terrorism. The suspect or vehicle may be detained for as long as reasonably required for the search to be carried out near to the place he has been stopped.

If a senior police officer grants an authorization under s 44, the Home Secretary must be notified. Any authorization may be for a maximum period of 28 days (or 48 hours, if the Home Secretary's confirmation is not granted). It is an offence to fail to stop (or to stop a vehicle) when required to by an officer under s 44. This offence carries a maximum penalty of 6 months' imprisonment.

A person arrested under s 41 TA 2000 (ie on suspicion of being a terrorist) may be held initially by the police without charge for 48 hours, and the provisions in Schedule 8 of the Act (as amended by the Criminal Justice Act 2003 and Terrorist Act 2006) will govern his treatment while in custody and the procedure for reviewing and extending his detention. In practice, most terrorist suspects are held at Paddington Green Police Station. The period of time that a terrorist suspect can be held in police custody prior to charge is now governed by the Terrorism Act 2006[605] which has amended the provisions of the 2000 Act. Suspects may be held initially for 48 hours, with reviews every 12 hours. After that, detention can be extended by a High Court Judge, at intervals of 7 days, to a maximum of 28 days. After 28 days, a suspect must be released either unconditionally or on police bail or charged. Schedule 8, together with associated provisions, sets out in detail the powers available to the police regarding the taking of photographs, fingerprints and samples.

[605] S. 23 TA 2006

Under s 132 it is an offence to organize, take part in or carry on a demonstration in a "public place" in a "designated area" unless, when that demonstration starts, authorization has been given under s 134 (2). It is a defence for the demonstrator to show that he reasonably believed that authorization had been given. An application for authorization must be in the form of a written notice to the Metropolitan Police Commissioner, and the Act sets out the way in which applications must be made and the timescale for doing so. If the notice is given in the correct way, authorization must be given for the demonstration, but the police may attach conditions. It is an offence to fail, when taking part or organizing, to fail to comply with a condition, or to do so knowing that the demonstration is being carried on otherwise than in accordance with the terms of the notice. Organizing a demonstration without notice carries a maximum sentence of 51 weeks imprisonment and/or a fine. Taking part or carrying on a demonstration carries a fine. Failing to comply with conditions in the capacity of an organizer also carries a 51 week prison sentence and/or a fine. Failing to comply with conditions as a participant is punishable by a fine.

Part II of the 2001 Act contains provisions for the making of freezing orders in suspected terrorist cases. Orders are made by the Treasury. One of two conditions must be satisfied. The Treasury must believe either that action to the detriment of the UK economy has been or is likely to be taken by individuals, or that action constituting a threat to the life or property of one or more UK nationals or residents has been or is likely be taken. The freezing order can only be made in respect of foreign governments or a person(s) who resides outside the UK. A freezing order prohibits funds being made available to the person (s) named in the order. Orders are made by the Treasury, and not by any court. They may remain in force for a maximum of two years.

Schedule 2 to Part II of the Act listed certain proscribed organizations. The list has been added to by the Home Secretary, and now includes *Al-Qa'ida* and Egyptian Islamic Jihad

among several others, and the Home secretary retains the power to remove or amend names on the schedule. Organizations that unlawfully "glorify" acts of terrorism can now be proscribed[606] (The procedure for appealing against proscription is set out in Sections 5 – 6. Membership (or professing membership) of a proscribed organization is an offence carrying a maximum penalty of 10 years imprisonment. It is a defence for a person to show that the organization was not proscribed when he last joined, and that he has not taken part in any of its activities while it has been proscribed. It is an offence for a person to invite support for a proscribed organization[607]; to arrange a meeting which he knows is to support a proscribed organization (or to further its activities or to be addressed by a member of a proscribed organization, [608]and to address a meeting with the purpose of encouraging support for a proscribed organization (s12 (3). There are statutory defences. The maximum penalty for these offences is also 10 years imprisonment.

It is also an offence for a person to wear, in a public place, an item of clothing (or wear or display an article) in such away as to arouse reasonable suspicion that he is a member or supporter of a proscribed organization (s13). The maximum sentence for this offence is 6 months imprisonment. It is an offence for a person to provide instruction or training in the making or use of firearms, explosives or chemical or biological weapons. Receiving instruction or training or inviting another to do so are also offences (in the latter case, even if the instruction or training is outside the UK). It is a defence, in relation to instruction or training, to prove that the action or involvement was wholly for a purpose other than assisting, preparing or participating in terrorism. The maximum penalty for these offences is 10 years imprisonment.

[606]Section 21, Terrorism Act 2006).
[607] Section 12(1
[608] Section 12(2)

Under Section 57, it is an offence for a person to possess an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of terrorist acts. It is a defence to prove that the possession was not for such a purpose. A court may assume possession if the article is found at premises at the same time as the person is present, or on premises that he controls (unless he proves he did not know of its presence or that he had no control over it). The maximum sentence for this offence is now 15 years imprisonment. Under Section 58, it is an offence to collect or make a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or to possess a document or record containing information of that kind.[609]

It is a serious offence to invite a person to provide money or other property, intending that it should be used (or having reasonable cause to suspect it may be used) for the purposes of terrorism. Receiving money or property intending it should be used (or having reasonable cause to suspect it may be used) for terrorist purposes is also an offence, as is providing money or property knowing (or having reasonable cause to suspect) that it will or may be used for the purposes of terrorism. "Providing" money or property means giving, lending or otherwise making available whether or not this is in return for something else (s 15). If a person uses money or property for the purposes of terrorism, this is also an offence, and it is also an offence to possess money or property intending that it should be used (or having reasonable cause to suspect it may be used) for the purposes of terrorism (s 16). There are further offences that relate to situations where a person becomes involved in an arrangement where money or property is made available for the purposes of terrorism (s 17); and where a person engages in money laundering connected with terrorism (s 18).

[609]*R-v-(1)Zafar(2)Butt(3)Iqbal(4)Raja(5)Malik* [2008]EWCA Crim 184; R-v-K [2008] EWCA Crim 185**;** *R-v-Samina Malik* [2008]EWCA Crim 1450

Where a person believes or suspects that another person has committed an offence under sections 15 to 18, and that belief is based on information that comes to him in the course of his trade, profession, business or employment, it can be an offence not to disclose this information to the police soon as reasonably practicable (s 19). All of the offences in sections 15 to 18 carry a maximum penalty of 10 years imprisonment. In addition, the Court has wide powers of forfeiture following any conviction.

Where a person has information which he knows or believes might be of "material assistance" in preventing the commission of an act of terrorism, or in securing the apprehension, prosecution or conviction of a person (in the UK) for an offence involving an act of terrorism, it is an offence not to disclose the information as soon as reasonably practicable. Disclosure should be made to a police officer. A person charged with this offence has a defence if he can show that he had a reasonable excuse for not disclosing the information. The offence is punishable by five years' imprisonment.[610]

Under the Terrorism Prevention Act of the United Kingdom, we have seen the extent the Law can go in fighting terrorism. There has been an increase in the powers of the police which on its own is a cause for alarm knowing that expansion of Police powers most times lead to abuse of those powers. However, what is pertinent is that there seems a commensurate power in the Courts to supervise such powers and strike some down where the necessity arises. There are also clear demarcations of roles between the agencies and institutions involved in such fights. Most importantly under this Act, we have seen the position of pre charge detention. It is noteworthy that the maximum length is 28 days whereas in Nigeria, the issue of illegal detention for up to a year without trial has arisen

[610]Sections 38- 39 Terrorism Act, 2000; Section 117 Anti-Terrorism Crime and Security Act 2001

severally[611]. All in all, the Act in existence seriously aims at fighting terrorism with the major role reserved for the courts to not just serve as an arbiter but also to oversee all cases where the likelihood of human right abuse will arise.

5.3: **Australia**

Australia has known acts of modern terrorism since the 1960s, while the federal parliament, since the 1970s, has enacted legislation seeking to specifically target terrorism. In a government publication, transnational terrorism in particular is identified as a threat to Australia, driven by a misguided interpretation of the tenets of the Islamic religion.[612] The 2002 Bali Bombing which occurred on 12 October 2002 in the tourist district of Kuta on the Indonesian island of Bali, was the deadliest act of terrorism in the history of Indonesia or Australia, killing 202 people, of whom the largest portion (88) were Australians. A further 240 people were injured. Following these various attacks, the Australian government was put in the mood for further legislations. Since then, successive governments have reviewed and altered the shape of both legislation and the agencies that enforce it to cope with the changing face, threat and scope of terrorism. It was not until after the attacks of 11 September 2001 however, that Australian policy began to change to reflect a growing threat against Australia and Australians specifically[613].

As of March 2008, the latest legislation to be brought into effect is the Anti-Terrorism Act (No. 2) 2005.[614]

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[611] Amnesty International, *Amnesty International Annual Report 2012, Nigeria*, May, 2012 available at www.refworld.org/docid accessed on 23/4/15

[612] Commonwealth of Australia, 'Transnational Terrorism: The Threat to Australia', Department of Foreign Affairs and Trade Publications(15th July, 2004) available online at www. dfat. gov. au/publications/ accessed on 29/5/2012.

[613] *Ibid*

[614] Commonwealth of Australia, 'Anti-Terrorism Act (no. 2) 2005, No. 144, 2005'available at www. comlaw. gov. au/ ComLaw/ Legislation/ Act1. nsf/ accessed on 29/5/2012.

The most important piece of legislation in Australia against Terrorism is the Australian Criminal Code of 1995. It is true that the Australian Government also passed an Anti-Terrorism Act in 2005, yet the Criminal Code Act of 1995 which was amended in 2011 contained the clearest format and vim in the fight against terrorism. For the purpose of this segment of our work therefore, we will rely on the Criminal Code of 1995 as amended. Part 5.3—Terrorism, Division 100 of the said Criminal Code dealt extensively with Terrorism and our role at this point is to take a look at some of the provisions of that Division in a bid to show the efforts the Australian Government has made through legislations to fight Terrorism.Division 100 of the said Part 5.3 dealt on Preliminaries and what should concern us more on that is the definition of Terrorism related glossaries. The Code[615] stated that AFP member means: (a) a member of the Australian Federal Police (within the meaning of the Australian Federal Police Act 1979); or (b) a special member of the Australian Federal Police (within the meaning of that Act). It further stated that continued preventative detention order means an order made under section 105.12. State preventative detention law means a law of a State or Territory that is, or particular provisions of a law of a State or Territory that are, declared by the regulations to correspond to Division 105 of this Act.[616]

It also defined listed terrorist organization as an organization that is specified by the regulations for the purposes of paragraph (b) of the definition of terrorist organization in section 102.1. Under Division 100:1, terrorist act means an action or threat of action where: (a) the action falls within subsection (2) and does not fall within subsection (3); and (b) the action is done or the threat is made with the intention of advancing a political, religious or

[615] Criminal Code Act 1995 Act No. 12 of 1995 as amended

[616]The same section defined funds to mean:

(a) property and assets of every kind, whether tangible or intangible, movable or immovable, however acquired; and (b) legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such property or assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, debt instruments, drafts and letters of credit. Organization under the Code means a body corporate or an unincorporated body, whether or not the body: (a) is based outside Australia; or (b) consists of persons who are not Australian citizens; or (c) is part of a larger organization.

ideological cause; and (c) the action is done or the threat is made with the intention of: (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or (ii) intimidating the public or a section of the public. It posits that Action falls within this subsection if it: (a) causes serious harm that is physical harm to a person; or (b) causes serious damage to property; or (c) causes a person's death; or (d) endangers a person's life, other than the life of the person taking the action; or (e) creates a serious risk to the health or safety of the public or a section of the public; or (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to: (i) an information system; or (ii) a telecommunications system; or (iii) a financial system; or (iv) a system used for the delivery of essential government services; or (v) a system used for, or by, an essential public utility; or (vi) a system used for, or by, a transport system. Under Sub(3) Action falls within this subsection if it: (a) is advocacy, protest, dissent or industrial action; and (b) is not intended: (i) to cause serious harm that is physical harm to a person; or (ii) to cause a person's death; or (iii) to endanger the life of a person, other than the person taking the action; or (iv) to create a serious risk to the health or safety of the public or a section of the public.

Under Section 100.4, the Code provides for its Operation in a non-referring State. It stated that this part generally applies to all terrorist acts and preliminary acts. The section provides that (1) Subject to subsection (4), this Part applies to the following conduct: (a) all action ns or threats of action that constitute terrorist acts (no matter where the action occurs, the threat is made or the action, if carried out, would occur); (b) all actions (preliminary acts) that relate to terrorist acts but do not themselves constitute terrorist acts (no matter where the preliminary acts occur and no matter where the terrorist acts to which they relate occur or

would occur)[617]. Under Section 100.4[618] (2) Subsections (4) and (5) apply to conduct if the conduct is itself a terrorist act and:(a) the terrorist act consists of an action and the action occurs in a State that is not a referring State; or (b) the terrorist act consists of a threat of action and the threat is made in a State that is not a referring State. Under 100.4 (3) Subsections (4) and (5) also apply to conduct if the conduct is a preliminary act that occurs in a State that is not a referring State and:(a) the terrorist act to which the preliminary act relates consists of an action and the action occurs, or would occur, in a State that is not a referring State; or(b) the terrorist act to which the preliminary act relates consists of a threat of action and the threat is made, or would be made, in a State that is not a referring State.

Under 100.4 (4) Notwithstanding any other provision in this Part, this Part appliesto the conduct only to the extent to which the Parliament has powerto legislate in relation to:(a) if the conduct is itself a terrorist act—the action or threat of action that constitutes the terrorist act; or (b) if the conduct is a preliminary act—the action or threat of action that constitutes the terrorist act to which the preliminary act relates. In 100.4(5) Without limiting the generality of subsection (4), this Part applies to the action or threat of action if: (a) the action affects, or if carried out would affect, the interests of:(i) the Commonwealth; or (ii) an authority of the Commonwealth; or(iii) a constitutional corporation; or (b) the threat is made to:(i) the Commonwealth; or (ii) an authority of the Commonwealth; or(iii) a constitutional corporation; or (c) the action is carried out by, or the threat is made by, a constitutional corporation; or(d) the action takes place, or if carried out would take place, in a Commonwealth place; or (e) the threat is made in a Commonwealth place; or (f) the action involves, or if carried out would involve, the use of a postal service or other like service; or(g) the threat is made using a postal or other like service; or(h) the action involves, or if

[617] Note: See the following provisions: (a) subsection 101.1(2); (b) subsection 101.2(4); (c) subsection 101.4(4);
(d) subsection 101.5(4); (e) subsection 101.6(3); (f) section 102.9.
[618] 100.4.

carried out would involve, the use of an electronic communication; or(i) the threat is made using an electronic communication; or(j) the action disrupts, or if carried out would disrupt, trade or commerce: (i) between Australia and places outside Australia; or(ii) among the States; or (iii) within a Territory, between a State and a Territory or between 2 Territories; or (k) the action disrupts, or if carried out would disrupt: (i) banking (other than State banking not extending beyond the limits of the State concerned); or (ii) insurance (other than State insurance not extending beyond the limits of the State concerned); or (l) the action is, or if carried out would be, an action in relation to which the Commonwealth is obliged to create an offence under international law; or(m) the threat is one in relation to which the Commonwealth is obliged to create an offence under international law.

In 100.4(6) to avoid doubt, subsections (2) and (3) apply to a State that is not a referring State at a particular time even if no State is a referring State at that time.[619] Section 100.6 provides that Concurrent operation is intended for the Law.[620]

Division 101 particularly dealt on Terrorism. For ease of reference, we shall take them seriatim. The said Division 101.1 provides as follows on Terrorist Acts with its punishment as follows: Terrorist acts (1) A person commits an offence if the person engages in a terrorist

[619] These provisions relate to the Operation in relation to terrorist acts and preliminary acts occurring in a State that is not a referring State. The State reference fully supplements the Commonwealth Parliament's other powers by referring the matters to the Commonwealth Parliament to the extent to which they are not otherwise included in the legislative powers of the Commonwealth Parliament. The operation of this Part in a State that is not a referring State is based on the legislative powers that the Commonwealth Parliament has under section 51 of the Constitution (other than paragraph 51(xxxvii)) See 103:2 of the Criminal Code Act. See also Section 100.4

[620] When it provided as follows: (1) This Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory. (2) Without limiting subsection (1), this Part is not intended to exclude or limit the concurrent operation of a law of a State or Territory that makes: (a) an act or omission that is an offence against a provision of this Part; or (b) a similar act or omission; an offence against the law of the State or Territory.
(3) Subsection (2) applies even if the law of the State or Territory does any one or more of the following:
(a) provides for a penalty for the offence that differs from the penalty provided for in this Part;
(b) provides for a fault element in relation to the offence that differs from the fault elements applicable to the offence under this Part;(c) provides for a defence in relation to the offence that differs from the defences applicable to the offence under this Part.(4) If: (a) an act or omission of a person is an offence under this Part and is also an offence under the law of a State or Territory; and(b) the person has been punished for the offence under the law of the State or Territory; the person is not liable to be punished for the offence under this Part.

act. Penalty: Imprisonment for life.[621] Division 101.2 Providing or receiving training connected with terrorist acts (1) A person commits an offence if: (a) the person provides or receives training; and (b) the training is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and (c) the person mentioned in paragraph (a) knows of the connection described in paragraph (b). Penalty: Imprisonment for 25 years.(2) A person commits an offence if: (a) the person provides or receives training; and (b) the training is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and (c) the person mentioned in paragraph (a) is reckless as to the existence of the connection described in paragraph (b). Penalty: Imprisonment for 15 years.

(3) A person commits an offence under this section even if: (a) a terrorist act does not occur; or (b) the training is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act; or (c) the training is connected with preparation for, the engagement of a person in, or assistance in more than one terrorist act.[622] (5) If, in a prosecution for an offence (the prosecuted offence) against a subsection of this section, the trier of fact is not satisfied that the defendant is guilty of the offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the alternative offence) against another subsection of this section, the trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

Under Division 101.4 Possessing things connected with terrorist acts (1) A person commits an offence if: (a) the person possesses a thing; and (b) the thing is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and (c) the

[621] (2) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against subsection (1).

[622] Note that the subsection stated that Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against this section.

person mentioned in paragraph (a) knows of the connection described in paragraph (b). Penalty: Imprisonment for 15 years.(2) A person commits an offence if: (a) the person possesses a thing; and(b) the thing is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and (c) the person mentioned in paragraph (a) is reckless as to the existence of the connection described in paragraph (b). Penalty: Imprisonment for 10 years.(3) A person commits an offence under subsection (1) or (2) even if: (a) a terrorist act does not occur; or (b) the thing is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act; or(c) the thing is connected with preparation for, the engagement of a person in, or assistance in more than one terrorist act.Subsections (1) and (2) do not apply if the possession of the thing was not intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act.[623] Under (6) If, in a prosecution for an offence (the prosecuted offence) against a subsection of this section, the trier of fact is not satisfied that the defendant is guilty of the offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the alternative offence) against another subsection of this section, the trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

In Division 101.5, it provided for collecting or making documents likely to facilitate terrorist acts. Subsection 1 thereof states that (1) A person commits an offence if: (a) the person collects or makes a document; and (b) the document is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and (c) the person mentioned in paragraph (a) knows of the connection described in paragraph (b). Penalty: Imprisonment for 15 years.(2) A person commits an offence if: (a) the person collects or makes a document;

[623] A defendant bears an evidential burden in relation to the matter in subsection (5) (see subsection 13.3(3)).

and (b) the document is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and (c) the person mentioned in paragraph (a) is reckless as to the existence of the connection described in paragraph (b). Penalty: Imprisonment for 10 years.(3) A person commits an offence under subsection (1) or (2) even if: (a) a terrorist act does not occur; or (b) the document is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act; or(c) the document is connected with preparation for, the engagement of a person in, or assistance in more than one terrorist act.Subsections (1) and (2) do not apply if the collection or making of the document was not intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act.(6) If, in a prosecution for an offence (the prosecuted offence) against a subsection of this section, the trier of fact is not satisfied that the defendant is guilty of the offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the alternative offence) against another subsection of this section, the trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt[624].

Division 102.3 provides for Membership of a terrorist organization as follows :(1) A person commits an offence if: (a) the person intentionally is a member of an organization; and (b) the organization is a terrorist organization; and (c) the person knows the organization is a

[624]In Division 101.6, it provides for Other acts done in preparation for, or planning, terrorist acts
(1) A person commits an offence if the person does any act in preparation for, or planning, a terrorist act. Penalty: Imprisonment for life.(2) A person commits an offence under subsection (1) even if: (a) a terrorist act does not occur; or (b) the person's act is not done in preparation for, or planning, a specific terrorist act; or (c) the person's act is done in preparation for, or planning, more than one terrorist act.(3) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against subsection (1).Division 102 of the Act Subdivision A deals with the definitions while subdivision B deals with offences. It is to these offences that we should turn our attention here. It provides for a variety of terrorism related offences as follows:102.2 Directing the activities of a terrorist organization(1) A person commits an offence if: (a) the person intentionally directs the activities of an organization; and (b) the organization is a terrorist organization; and (c) the person knows the organization is a terrorist organization. Penalty: Imprisonment for 25 years.(2) A person commits an offence if: (a) the person intentionally directs the activities of an organization; and (b) the organization is a terrorist organization; and (c) the person is reckless as to whether the organization is a terrorist organization. Penalty: Imprisonment for 15 years.

terrorist organization. (2) Subsection (1) does not apply if the person proves that he or she took all reasonable steps to cease to be a member of the organization as soon as practicable after the person knew that the organization was a terrorist organization.[625]

In Division 102.4, there is a provision for Recruiting for a terrorist organization.(1) A person commits an offence if: (a) the person intentionally recruits a person to join, or participate in the activities of, an organization; and (b) the organization is a terrorist organization; and (c) the first-mentioned person knows the organization is a terrorist organization. (2) A person commits an offence if: (a) the person intentionally recruits a person to join, or participate in the activities of, an organization; and(b) the organization is a terrorist organization; and (c) the first-mentioned person is reckless as to whether the organization is a terrorist organization. [626]

Under Division 102.6 there is a provision for Getting funds to, from or for a terrorist organization (1) A person commits an offence if: (a) the person intentionally: (i) receives funds from, or makes funds available to, an organization (whether directly or indirectly); or(ii) collects funds for, or on behalf of, an organization (whether directly or indirectly); and (b) the organization is a terrorist organization; and (c) the person knows the organization is a terrorist organization.(2) A person commits an offence if: (a) the person intentionally: (i) receives funds from, or makes funds available to, an organization (whether directly or indirectly); or (ii) collects funds for, or on behalf of, an organization (whether directly or

[625] A defendant bears a legal burden in relation to the matter in subsection (2) (see section 13.4).

[626] Division 102.5 provides for Training a terrorist organization or receiving training from a terrorist organization (1) A person commits an offence if: (a) the person intentionally provides training to, or intentionally receives training from, an organization; and (b) the organization is a terrorist organization; and (c) the person is reckless as to whether the organization is a terrorist organization. Penalty: Imprisonment for 25 years.(2) A person commits an offence if: (a) the person intentionally provides training to, or intentionally receives training from, an organization; and (b) the organization is a terrorist organization that is covered by paragraph (b) of the definition of terrorist organization in subsection 102.1(1). Penalty: Imprisonment for 25 years. (3) Subject to subsection (4), strict liability applies to paragraph (2) (b).(4) Subsection (2) does not apply unless the person is reckless as to the circumstance mentioned in paragraph (2) (b).

indirectly); and (b) the organization is a terrorist organization; and (c) the person is reckless as to whether the organization is a terrorist organization. Penalty: Imprisonment for 15 years.(3) Subsections (1) and (2) do not apply to the person's receipt of funds from the organization if the person proves that he or she received the funds solely for the purpose of the provision of: (a) legal representation for a person in proceedings relating to this Division; or (b) assistance to the organization for it to comply with a law of the Commonwealth or a State or Territory.

In Division 102.7 it provides for providing support to a terrorist organization. (1) A person commits an offence if: (a) the person intentionally provides to an organization support or resources that would help the organization engage in an activity described in paragraph (a) of the definition of terrorist organization in this Division; and (b) the organization is a terrorist organization; and (c) the person knows the organization is a terrorist organization.(2) A person commits an offence if: (a) the person intentionally provides to an organization support or resources that would help the organization engage in an activity described in paragraph (a) of the definition of terrorist organization in this Division; and (b) the organization is a terrorist organization; and (c) the person is reckless as to whether the organization is a terrorist organization. Under Division 102.8, there is a provision for associating with terrorist organizations. (1) A person commits an offence if: (a) on 2 or more occasions: (i) the person intentionally associates with another person who is a member of, or a person who promotes or directs the activities of, an organization; and (ii) the person knows that the organization is a terrorist organization; and (iii) the association provides support to the organization; and (iv) the person intends that the support assist the organization to expand or to continue to exist; and (v) the person knows that the other person is a member of, or a person who promotes or directs the activities of, the organization; and (b) the organization is a terrorist organization because of paragraph (b) of the definition of terrorist

organization in this Division (whether or not the organization is a terrorist organization because of paragraph (a) of that definition also) (2) A person commits an offence if: (a) the person has previously been convicted of an offence against subsection (1); and(b) the person intentionally associates with another person who is a member of, or a person who promotes or directs the activities of, an organization; and (c) the person knows that the organization is a terrorist organization; and (d) the association provides support to the organization; and (e) the person intends that the support assist the organization to expand or to continue to exist; and (f) the person knows that the other person is a member of, or a person who promotes or directs the activities of, the organization; and(g) the organization is a terrorist organization because of paragraph (b) of the definition of terrorist organization in this Division (whether or not the organization is a terrorist organization because of paragraph (a) of that definition also). (3) Strict liability applies to paragraphs (1)(b) and (2)(g). (4) This section does not apply if: (a) the association is with a close family member and relates only to a matter that could reasonably be regarded (taking into account the person's cultural background) as a matter of family or domestic concern; or (b) the association is in a place being used for public religious worship and takes place in the course of practicing a religion; or (c) the association is only for the purpose of providing aid of a humanitarian nature; or (d) the association is only for the purpose of providing legal advice or legal representation in connection with:(i) criminal proceedings or proceedings related to criminal proceedings (including possible criminal proceedings in the future); or (ii) proceedings relating to whether the organization in question is a terrorist organization; or(iii) a decision made or proposed to be made under Division 3 of Part III of the Australian Security Intelligence Organization Act 1979, or proceedings relating to such a decision or proposed decision; or (iv) a listing or proposed listing under section 15 of the Charter of the United Nations Act 1945 or an application or proposed application to revoke such a listing, or proceedings

relating to such a listing or application or proposed listing or application; or(v) proceedings conducted by a military commission of the United States of America established under a Military Order of 13 November 2001 made by the President of the United States of America and entitled "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism"; or(vi) proceedings for a review of a decision relating to a passport or other travel document or to a failure to issue such a passport or other travel document (including a passport or other travel document that was, or would have been, issued by or on behalf of the government of a foreign country).(5) This section does not apply unless the person is reckless as to the circumstance mentioned in paragraph (1)(b) and (2)(g) (as the case requires).(6) This section does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication.(7) A person who is convicted of an offence under subsection (1) in relation to the person's conduct on 2 or more occasions is not liable to be punished for an offence under subsection (1) for other conduct of the person that takes place:(a) at the same time as that conduct; or (b) within 7 days before or after any of those occasions. It is pertinent to say that Division 15 deals with Extended Geographic Jurisdiction in the event of offences of Terrorism occurring partially or wholly within the Australian territory or outside it.[627]Division 104 provides for Control orders which in its Subdivision A provide that the object of the Division is to allow obligations, prohibitions and restrictions to be imposed on a person by a control order for the

[627]Division 103 deals with the offences of Financing Terrorism. It provides as follows:

103.1 Financing terrorism(1) A person commits an offence if: (a) the person provides or collects funds; and (b) the person is reckless as to whether the funds will be used to facilitate or engage in a terrorist act. Penalty: Imprisonment for life.(2) A person commits an offence under subsection (1) even if: (a) a terrorist act does not occur; or (b) the funds will not be used to facilitate or engage in a specific terrorist act; or (c) the funds will be used to facilitate or engage in more than one terrorist act.103.2 Financing a terrorist (1) A person commits an offence if: (a) the person intentionally: (i) makes funds available to another person (whether directly or indirectly); or (ii) collects funds for, or on behalf of, another person (whether directly or indirectly); and (b) the first-mentioned person is reckless as to whether the other person will use the funds to facilitate or engage in a terrorist. Penalty: Imprisonment for life.(2) A person commits an offence under subsection (1) even if: (a) a terrorist act does not occur; or (b) the funds will not be used to facilitate or engage in a specific terrorist act; or (c) the funds will be used to facilitate or engage in more than one terrorist act.103.3 Extended geographical jurisdiction for offences Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against this Division.

purpose of protecting the public from a terrorist act.[628] Divisions 104.6 and 104.7 made provisions for the issuance of an urgent and interim control orders by electronic means if the need arises while Divisions 104.8 to 104.9 provided for the said urgent interim orders in person. Division 104.10 made it necessary that the consent of the Attorney General must be sought and obtained before such applications but where it was not sought and obtained before, the Police officer who sought and obtained the orders must get the consent of the Attorney General within four (4) hours after obtaining the order. In 104.11, the Court is to assume that the order was wrongly obtained if the necessary forms are not placed before it. Under 104.12, upon obtaining the control order, it must be served personally on the person and proper explanations must be given to the person against whom the order is made. This must be within 48 hours of getting the order. In 104.13, the Lawyer to the person against whom the interim order is made must be given a copy of the said interim order. Division 104.20 lays down the procedure for the revocation or variation of such interim control orders. Division 104.27 creates the offences for contravening a control order: A person commits an offence if: (a) a control order is in force in relation to the person; and (b) the person contravenes the order. Penalty: Imprisonment for 5 years. Division 104.28 made special rules for young people and insists that a control order cannot be requested, made or confirmed in relation to a person who is under 16 years of age. But where the person is above 16 but under 18, sub 2 of the said division provides thus:(2) If an issuing court is satisfied that a person in relation to whom an interim control order is being made or confirmed is at least 16 but under 18, the period during which the confirmed control order is to be in force must not end more than 3 months after the day on which the interim control order is made by the court.

[628] Division 104(1)Subdivision B from Divisions 104 2 to 104 5 laid down the procedure for this control order, to whom the application would be made and who makes the application etc.

Division 105 provides for Preventative detention orders and cites as its object the provision of Division 105.1 that the object of this Division is to allow a person to be taken into custody and detained for a short period of time in order to: (a) prevent an imminent terrorist act occurring; or (b) preserve evidence of, or relating to, a recent terrorist act. Division 105.2 makes provisions for those who can authorize such detentions. They include: (1) The Minister who may, by writing, appoint as an issuing authority for continued preventative detention orders:(a) a person who is a judge of a State or Territory Supreme Court; or (b) a person who is a Judge; or (c) a person who is a Federal Magistrate; or (d) a person who: (i) has served as a judge in one or more superior courts for a period of 5 years; and (ii) no longer holds a commission as a judge of a superior court; or (e) a person who: (i) holds an appointment to the Administrative Appeals Tribunal as President or Deputy President; and (ii) is enrolled as a legal practitioner of a federal court or of the Supreme Court of a State or Territory; and (iii) has been enrolled for at least 5 years.(2) The Minister must not appoint a person unless: (a) the person has, by writing, consented to being appointed; and (b) the consent is in force.

Division 105.4makes provisions for Basis for applying for, and making, preventative detention orders while Division 105.5 insists that a preventative detention order cannot be applied for, or made, in relation to a person who is under 16 years of age. Under 105.5A, there should be special assistance for person with inadequate knowledge of English language or disability. Division 105.9 provides for the duration of initial preventative detention order. It further provides that an initial preventative detention order in relation to a person starts to have effect when it is made.[629] Under Division 105.10 an initial preventative detention order could be extended (1) If: (a) an initial preventative detention order is made in relation to a

[629] The order comes into force when it is made and authorizes the person to be taken into custody (see paragraph 105.8(3) (a)). The period for which the person may then be detained under the order only starts to run when the person is first taken into custody under the order (see subparagraph 105.8(3) (b) (i)).

person; and (b) the order is in force in relation to the person; an AFP member may apply to an issuing authority for initial preventative detention orders for an extension, or a further extension, of the period for which the order is to be in force in relation to the person. Such an application must be in writing[630] and cogent reason given for the extension required. Under 105.12, a Judge, Federal Magistrate, AAT member or retired judge may make continued preventative detention order. Division 105.14A provides the basis for applying for, and making, prohibited contact order. Under Division 105.19, the Act provides for the power to detain person under preventative detention order.A Preventative Detention Order is an order issued by a Senior Australian Federal Police (AFP) Member or a nominated current or ex-judicial office[631]. Division 105.33 provides for humane treatment of person being detained. A person being taken into custody, or being detained, under a preventative detention order: (a) must be treated with humanity and with respect for human dignity; and (b) must not be subjected to cruel, inhuman or degrading treatment; by anyone exercising authority under the order or implementing or enforcing the order.[632] Though there is a restriction on contact with people by a person detained[633], yet such a person may contact his or her family members, his or her lawyer or even the ombudsman.[634] The Act yet creates further offences that could arise as a result of the contacts made by the detainee. Such offences are contained as follows in Division 105.41as Disclosure offences. Person being detained (1) A person (the subject) commits an offence if: (a) the subject is being detained under a preventative detention order; and (b) the subject discloses to another person: (i) the fact that a preventative detention order has been made in relation to the subject; or (ii) the fact that the subject is being detained; or (iii) the period for which the subject is being detained; and (c) the disclosure occurs while the subject is being detained under the order;

[630] Div 105.10(2)
[631]Criminal Code Act 1995 (Cth) §§ 100.1, 105.2.
[632] A contravention of this section may be an offence under section 105.45.
[633] 105.34
[634] Divisions 105.36, 105.37 and 105.38.

and (d) the disclosure is not one that the subject is entitled to make under section 105.36, 105.37 or 105.39.

The Law also made provisions for Lawyers to ensure they are protected from harassment in the course of their duty. The Law states that a person (the lawyer) commits an offence if: (a) a person being detained under a preventative detention order (the detainee) contacts the lawyer under section 105.37; and (b) the lawyer discloses to another person: (i) the fact that a preventative detention order has been made in relation to the detainee; or (ii) the fact that the detainee is being detained; or (iii) the period for which the detainee is being detained; or (iv) any information that the detainee gives the lawyer in the course of the contact; and (c) the disclosure occurs while the detainee is being detained under the order; and (d) the disclosure is not made for the purposes of: (i) proceedings in a federal court for a remedy relating to the preventative detention order or the treatment of the detainee in connection with the detainee's detention under the order; or (ii) a complaint to the Commonwealth Ombudsman under the Ombudsman Act 1976 in relation to the application for, or making of, the preventative detention order or the treatment of the detainee by an AFP member in connection with the detainee's detention under the order; or (iia) the giving of information under section 40SA of the Australian Federal Police Act 1979 in relation to the application for, or making of, the preventative detention order or the treatment of the detainee by an AFP member in connection with the detainee's detention under the order; or (iii) a complaint to an officer or authority of a State or Territory about the treatment of the detainee by a member of the police force of that State or Territory in connection with the detainee's detention under the order; or (iv) making representations to the senior AFP member nominated under subsection 105.19(5) in relation to the order, or another police officer involved in the detainee's detention, about the exercise of powers under the order, the

performance of obligations in relation to the order or the treatment of the detainee in connection with the detainee's detention under the order.

Person having special contact with detainee who is under 18 years of age or incapable of managing own affairs (3) A person (the parent/guardian) commits an offence if: (a) a person being detained under a preventative detention order (the detainee) has contact with the parent/guardian under section 105.39; and (b) the parent/guardian discloses to another person: (i) the fact that a preventative detention order has been made in relation to the detainee; or (ii) the fact that the detainee is being detained; or (iii) the period for which the detainee is being detained; or (iv) any information that the detainee gives the parent/guardian in the course of the contact; and (c) the other person is not a person the detainee is entitled to have contact with under section 105.39; and (d) the disclosure occurs while the detainee is being detained under the order; and (e) the disclosure is not made for the purposes of: (i) a complaint to the Commonwealth Ombudsman under the Ombudsman Act 1976 in relation to the application for, or the making of, the preventative detention order or the treatment of the detainee by an AFP member in connection with the detainee's detention under the order; or (ia) the giving of information under section 40SA of the Australian Federal Police Act 1979 in relation to the application for, or the making of, the preventative detention order or the treatment of the detainee by an AFP member in connection with the detainee's detention under the order; or (ii) a complaint to an officer or authority of a State or Territory about the treatment of the detainee by a member of the police force of that State or Territory in connection with the detainee's detention under the order; or (iii) making representations to the senior AFP member nominated under subsection 105.19(5) in relation to the order, or another police officer involved in the detainee's detention, about the exercise of powers under the order, the performance of obligations in relation to the order or the treatment of the detainee in connection with the detainee's detention under the order.

(4) To avoid doubt, a person does not contravene subsection (3) merely by letting another person know that the detainee is safe but is not able to be contacted for the time being. (4A) A person (the parent/guardian) commits an offence if: (a) the parent/guardian is a parent or guardian of a person who is being detained under a preventative detention order (thedetainee); and (b) the detainee has contact with the parent/guardian under section 105.39; and (c) while the detainee is being detained under the order, the parent/guardian discloses information of the kind referred to in paragraph (3)(b) to another parent or guardian of the detainee (the other parent/guardian); and (d) when the disclosure is made, the detainee has not had contact with the other parent/guardian under section 105.39 while being detained under the order; and (e) the parent/guardian does not, before making the disclosure, inform the senior AFP member nominated under subsection 105.19(5) in relation to the order that the parent/guardian is proposing to disclose information of that kind to the other parent/guardian. Penalty: Imprisonment for 5 years.(4B) If: (a) a person (the parent/guardian) is a parent or guardian of a person being detained under a preventative detention order (the detainee); and (b) the parent/guardian informs the senior AFP member nominated under subsection 105.19(5) in relation to the order that the parent/guardian proposes to disclose information of the kind referred to in paragraph (3)(b) to another parent or guardian of the detainee (the other parent/guardian); that senior AFP member may inform the parent/guardian that the detainee is not entitled to contact the other parent/guardian under section 105.39.[635]

The interpreter assisting in monitoring contact with detainee may also be guilty of an offence if he gets involved in any of the following. A person (the interpreter) commits an offence if: (a) the interpreter is an interpreter who assists in monitoring the contact that a

[635] The parent/guardian may commit an offence against subsection (2) if the other parent/guardian is a person the detainee is not entitled to have contact with under section 105.39 and the parent/guardian does disclose information of that kind to the other parent/guardian. This is because of the operation of paragraph (3) (c).

person being detained under a preventative detention order (the detainee) has with someone while the detainee is being detained under the order; and (b) the interpreter discloses to another person: (i) the fact that a preventative detention order has been made in relation to the detainee; or (ii) the fact that the detainee is being detained; or (iii) the period for which the detainee is being detained; or (iv) any information that interpreter obtains in the course of assisting in the monitoring of that contact; and (c) the disclosure occurs while the detainee is being detained under the order. Penalty: Imprisonment for 5 years. Under subsection (6) A person (the disclosure recipient) commits an offence if: (a) a person (the earlier discloser) discloses to the disclosure recipient: (i) the fact that a preventative detention order has been made in relation to a person; or(ii) the fact that a person is being detained under a preventative detention order; or (iii) the period for which a person is being detained under a preventative detention order; or (iv) any information that a person who is being detained under a preventative detention order communicates to a person while the person is being detained under the order; and (b) the disclosure by the earlier discloser to the disclosure recipient contravenes: (i) subsection (1), (2), (3) or (5); or (ii) this subsection; and (c) the disclosure recipient discloses that information to another person; and (d) the disclosure by the disclosure recipient occurs while the person referred to in subparagraph (a)(i), (ii), (iii) or (iv) is being detained under the order. Penalty: Imprisonment for 5 years. In subsection(7) A person (the monitor) commits an offence if: (a) the monitor is: (i) a police officer who monitors; or (ii) an interpreter who assists in monitoring; contact that a person being detained under a preventative detention order (the detainee) has with a lawyer under section 105.37 while the detainee is being detained under the order; and (b) information is communicated in the course of that contact; and (c) the information is communicated for one of the purposes referred to in subsection 105.37(1); and (d) the monitor discloses that

information to another person. Penalty: Imprisonment for 5 years.[636] Despite every other section of this provision, Division 105.47 requires an Annual report as follows: (1) The Attorney-General must, as soon as practicable after each 30 June, cause to be prepared a report about the operation of this Division during the year ended on that 30 June. And in Division 105.50, the Law relating to legal professional privilege was not affected. To avoid doubt, this Division does not affect the law relating to legal professional privilege.

A pertinent point here is that the Law made a detailed definition of the offence of terrorism. The issue of definition is a very important aspect of the fight against terrorism by Law. With regards to preventative detention, the Law was careful to exclude people aged 16 years and below from those that such an order may affect. It also made provisions making it criminal for Lawyers who disclose any information they may have obtained from their Client who are under such detention. This is of immense importance as such will enable the Lawyers access to such persons without any form of intimidation or harassment from the security agencies. Such right is non-existent in Nigeria as we rely on the privileged information between client and Lawyer but no Law has affected such impact as to create a breach of this privilege as a criminal act. Clearly, the Law here is proactive and mindful of the various roles of the individuals and or institutions involved in the fight against terrorism and as well makes adequate provisions to protect them in a bid to ensure that rights are not trampled upon. The fulcrum therefore is that Law meant for Terrorism must observe and conform to rules of human rights and avoid any provision that will likely limit the rights of the individual.

[636] See also subsection 105.38(5).

5.4: **Canada**

Terrorism in Canada primarily consists of fundraising for terrorist attacks outside of the country.[637]This notwithstanding, the Canadian government has banned nearly 40 terrorist organizations, including Al Qaeda.[638]Despite the fact that little or nothing has been heard on the activities of terrorists in Canada, Canada has not remained completely immune from casualties resulting from such attacks outside the domestic territory of Canada.

It is pertinent to say also that Canada already had a Criminal Code before the events of 9/11. That Criminal Code criminalized the offence of Terrorism and other subsequent legislations were an amendment of the Code or better still an innovation on the Code. The Criminal Code under Part II.1, particularly Section 83.01 offered a definition for terrorism and terrorist activity using definitions contained in various other laws.[639]In the same section, it

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[637] Canada and Terrorism (http:/ / www. adl. org/ terror/ tu/ tu_0401_canada. asp) Anti-Defamation League accessed on 26/12/2011

[638]Ynet News, 'Canada bans Kahane Chai' *Ynet news* of May, 26, 2005 available online at <http. www. ynetnews. Com>accessed on 28/5/2012

[639]The Code held the following as a definition of Terrorist activity: "terrorist activity" means (a) an act or omission that is committed in or outside Canada and that, if committed in Canada, is one of the following offences: (i) the offences referred to in subsection 7(2) that implement the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on December 16, 1970, (ii) the offences referred to in subsection 7(2) that implement the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on September 23, 1971, (iii) the offences referred to in subsection 7(3) that implement the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on December 14, 1973, (iv) the offences referred to in subsection 7(3.1) that implement the International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on December 17, 1979, (v) the offences referred to in subsection 7(3.4) or (3.6) that implement the Convention on the Physical Protection of Nuclear Material, done at Vienna and New York on March 3, 1980, (vi) the offences referred to in subsection 7(2) that implement the 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, signed at Montreal on February 24, 1988, (vii) the offences referred to in subsection 7(2.1) that implement the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on March 10, 1988, (viii) the offences referred to in subsection 7(2.1) or (2.2) that implement the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on March 10, 1988, (ix) the offences referred to in subsection 7(3.72) that implement the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on December 15, 1997, and (x) the offences referred to in subsection 7(3.73) that implement the International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on December 9, 1999, or (b) an act or omission, in or outside Canada, (i) that is committed (A) in whole or in part for a political, religious or ideological purpose, objective or cause, and (B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic

defined terrorists group to mean (a) an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity, or (b) a listed entity, and includes an association of such entities. Sub sections 1.1 and 1.2 offer something else in the definition of the offence of terrorism when it said that (1.1) For greater certainty, the expression of a political, religious or ideological thought, belief or opinion does not come within paragraph (b) of the definition "terrorist activity" in subsection (1) unless it constitutes an act or omission that satisfies the criteria of that paragraph and again (1.2) For greater certainty, a suicide bombing is an act that comes within paragraph (a) or (b) of the definition "terrorist activity" in subsection (1) if it satisfies the criteria of that paragraph.

The Act makes the Financing of Terrorism an offence under Section 83.02. The said section majorly states that 'Everyone who, directly or indirectly, willfully and without lawful justification or excuse, provides or collects property intending that it be used or knowing that it will be used, in whole or in part, in order to carry out (a) an act or omission that constitutes an offence referred to in subparagraphs (a)(i) to (ix) of the definition of "terrorist activity" in subsection 83.01(1), or (b) any other act or omission intended to cause death or serious bodily harm to a civilian or to any other person not taking an active part in the hostilities in a situation of armed conflict, if the purpose of that act or omission, by its nature or context, is to intimidate the public, or to compel a government or an international organization to do or refrain from doing any act, is guilty of an indictable offence and is

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or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and (ii) that intentionally (A) causes death or serious bodily harm to a person by the use of violence, (B) endangers a person's life, (C) causes a serious risk to the health or safety of the public or any segment of the public, (D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or (E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C), and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.

liable to imprisonment for a term of not more than 10 years. Under section 83.03, it makes it an offence for providing, making available, etc., property or services for terrorist purposes with a punishment of 10 years also. It is also an offence punishable by imprisonment of not more than 10 years if one uses or possesses property for terrorist purposes.[640]

Section 83.05 authorizes the Governor in Council to establish a list of entities that could be said to have knowingly carried out, attempted to carry out, participated in or facilitated terrorist activity. Section 83.06 makes admissible any foreign information obtained in confidence from a government, an institution or an agency of a foreign state, from an international organization of states or from an institution or an agency of an international organization of states. Under section 83.08, it becomes an offence for any person in Canada and a Canadian outside Canada to knowingly (a) deal directly or indirectly in any property that is owned or controlled by or on behalf of a terrorist group; (b) enter into or facilitate, directly or indirectly, any transaction in respect of property referred to in paragraph (a); or (c) provide any financial or other related services in respect of property referred to in paragraph (a) to, for the benefit of or at the direction of a terrorist group. Nevertheless in Section 83.09 (1) the Minister of Public Safety and Emergency Preparedness, or a person designated by him or her, may authorize any person in Canada or any Canadian outside Canada to carry out a specified activity or transaction that is prohibited by section 83.08, or a class of such activities or transactions. Section 83.11 is vital that we will take it en block. It provides as follows; 83.11 (1) The following entities must determine a continuing basis whether they are in possession or control of property owned or controlled by or on behalf of a listed entity: (a) authorized foreign banks within the meaning of section 2 of the Bank Act in respect of their business in Canada, or banks to which that Act applies; (b) cooperative credit societies, savings and credit unions regulated by a provincial Act and associations

[640] Section 83.04

regulated by the Cooperative Credit Associations Act; (c) foreign companies within the meaning of subsection 2(1) of the Insurance Companies Act in respect of their insurance business in Canada; (c.1) companies, provincial companies and societies within the meaning of subsection 2(1) of the Insurance Companies Act; (c.2) fraternal benefit societies regulated by a provincial Act in respect of their insurance activities, and insurance companies and other entities engaged in the business of insuring risks that are regulated by a provincial Act; (d) companies to which the Trust and Loan Companies Act applies; (e) trust companies regulated by a provincial Act; (f) loan companies regulated by a provincial Act; and (g) entities authorized under provincial legislation to engage in the business of dealing in securities, or to provide portfolio management or investment counselling services. Section 83.12 (1) provides punishment for everyone who contravenes any of sections 83.08, 83.1 and 83.11 and such a person is liable for the punishments contained in subsections a and b. Section 83.13 makes provisions for seizure and restraint of assets involved in terrorism related actions. Section 83.18(1) provides that everyone who knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years. Section 83.19 (1) provides that everyone who knowingly facilitates a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years while Section 83.2 provides that everyone who commits an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of or in association with a terrorist group is guilty of an indictable offence and liable to imprisonment for life. Section 83.21 criminalizes instructing anybody to carry out activity for terrorist group. So also 83.22 but under 83.23, 83.23 every one who knowingly harbours or conceals any person whom he or she knows to be a person who has carried out or is likely to carry out a terrorist

activity, for the purpose of enabling the person to facilitate or carry out any terrorist activity, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years. Funnily enough, an offence was also created in 83.231 (1) in that everyone commits an offence who, without lawful excuse and with intent to cause any person to fear death, bodily harm, substantial damage to property or serious interference with the lawful use or operation of property, (a) conveys or causes or procures to be conveyed information that, in all the circumstances, is likely to cause a reasonable apprehension that terrorist activity is occurring or will occur, without believing the information to be true; or (b) commits an act that, in all the circumstances, is likely to cause a reasonable apprehension that terrorist activity is occurring or will occur, without believing that such activity is occurring or will occur. Section 83.27 (1) provides a general punishment of imprisonment for life where the act or omission constituting the offence also constitutes a terrorist activity. Section 83.28 provides for investigative hearing in charges of terrorism and terrorism related offences. Section 83.31 (1) provides that the Attorney General of Canada shall prepare and cause to be laid before Parliament and the Attorney General of every province shall publish or otherwise make available to the public an annual report for the previous year on the operation of sections 83.28 and 83.29 dealing with investigative hearings and arrest warrants respectively. Section 83.32 (1) provide for Sunset provisions[641] with respect to Sections 83.28, 83.29 and 83.3 up till December, 31, 2006 unless renewed by the Parliament.

Canada's new Anti-Terrorism Act (ATA) then was quickly enacted in the months after September 11 and compared to Canada's previous response to terrorism; this new law has not so been used ostensibly because the Canadian authorities have focused on using immigration law as a means to detain suspected international terrorists. Although the ATA

[641] In public policy, a sunset provision or clause is a measure within a statute, regulation or other law that provides that the law shall cease to have effect after a specific date, unless further legislative action is taken to extend the law. In 2007, the Parliament debated a bill to renew the sunset clause in this law successfully.

departs from some traditional criminal law principles, it still has requirements such as proof beyond a reasonable doubt of a prohibited act with fault, a three-day limit on preventive arrest and the ability of trial judges to stay proceedings if secret evidence will result in an unfair trial. It is also pertinent to say that in late 2003-2004 Canada created a new Department for Public Safety and Emergency Preparedness and articulated a national security policy that has the potential to facilitate a more rational and effective approach not only to the risks of terrorism, but other harms relating to disease, nuclear and chemical accidents and the safety of food and water. In consequence of this therefore, Canada enacted also the Public Safety Act of 2004.

The Anti-Terrorism Act of 2001 introduced a massive antiterrorism bill that for the first time created and defined crimes of terrorism under Canada's Criminal Code. The bill's definition of terrorism seems to have been inspired by the United Kingdom's Terrorism Act 2000 in requiring proof of religious, ideological or political motive and the commission of a broad range of harms that went well beyond violence against civilians. As first introduced, it would have defined as acts of terrorism politically motivated acts that intentionally caused a serious disruption of any public or private essential service. Such acts had to be designed to intimidate a segment of the public with regard to its security. This broad definition of terrorism led to widespread concerns among many civil society groups that the Act would brand many illegal protests and strikes as terrorism. This concern led to amendments before the bill became law that dropped the requirement that exempted protests must be lawful and provided that the expression of religious, political or ideological thought or opinions would not normally be considered terrorism.[642]Two of its most controversial provisions relating to preventive arrest and investigative hearings were also subject to a renewable sunset after five

[642] Section 83.01 (1.1) of the Criminal Code provides: 'For greater certainty, the expression of a political, religious or ideological thought, belief or opinion does not come within paragraph (b) of the definition terrorist activity" in subsection 1 unless it constitutes an act or omission that satisfies the criteria of that paragraph.'

years. Nevertheless the permanent nature of the Act increases the risks that investigative and trial powers introduced to combat terrorism will eventually spread to other parts of the criminal law. The ATA was built on the premise that the ordinary criminal law was inadequate to deal with the threat of terrorism after 11 September 2001 as the ordinary criminal law functioned under the traditional principle that motive was not relevant and that a political or religious motive could not excuse the crime but in contrast, the ATA requires proof that terrorist crimes were committed for religious or political motives. The ATA criminalized a broad array of activities in advance of the actual commission of a terrorist act, including the provision of finances, property and other forms of assistance to terrorist groups, participation in the activities of a terrorist group and instructing the carrying out of activities for terrorist groups. The financing provisions of the ATA were required to implement Canada's obligations under the 1999 Convention for the Suppression of the Financing of Terrorism.

Another important feature of the ATA is that it applies to a broad range of acts committed inside or outside of Canada. This was done to make clear that Canada was implementing various international conventions concerning specific forms of terrorism. The extra-territorial application of the new terrorism laws also builds on precedents relating to war crimes and aircraft hijackings. People can be prosecuted in Canada for sending financial and other support to struggles fought in foreign lands. In noting the difficulty of defining terrorism, the Supreme Court of Canada has noted that 'Nelson Mandela's African National Congress was, during the apartheid era, routinely labeled as a terrorist organization, not only by the South African government but by much of the international community'.[643] The only exemptions from the scope of international terrorism targeted by the law are for armed conflict conducted according to customary or conventional international law or the official

[643]*Suresh v. Canada* [2002] 1 S.C.R. 3 at para 95.

activities ofa state military force 'to the extent that those activities are governed by other rules of international law'.[644] Difficult issues may emerge should people in Canada be charged with sending financial or other forms of support to liberation struggles in foreign lands. The first and so far only charges under the ATA were laid by the Royal Canadian Mounted Police (RCMP) on 31 March 2004; Charges of knowingly participating in the activities of a terrorist group and facilitating a terrorist activity were laid against Mohammad Momin Khawaja.[645]

A central feature of the ATA is the ability of the cabinet of elected ministers to designate groups and even persons as terrorists.[646] Executive designation of terrorist groups and individuals is a common feature of many international and national anti-terrorism schemes. Nevertheless, it can be criticized as a challenge to judicial powers to decide in a particular case who is a terrorist. A person or group listed as terrorist receives no prior notice of the listing decision and a limited right of judicial review after the decision has been made. In Canada, at least one person, Liban Hussein, was wrongfully listed as a terrorist, an error that was corrected by the government after more than six months.[647]The procedure for judicial review is also open to criticism. Hearings can be closed and the group challenging the listing can be denied access to evidence before the judge because of national security concerns. In cases of intelligence received from other governments or international organizations, the applicant can be denied access to even a summary of evidence.[648] In a case decided after September 11 in a non-terrorist context, the Supreme Court of Canada emphasized the

[644] ATA s. 83.01(1}(b).

[645] The participation offence provides: 'Everyone who knowingly facilitates in or contributes to, directly or indirectly, any activity of a terrorist group for the purpose ofenhancing the ability of any terrorist group to facilitate or carry out a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years' (Criminal Code, s. 83.18). The facilitation offence provides: 'Everyone who knowingly

[646] Criminal Code s. 83.05.

[647] E Alexandra Dosman, 'For the Record: Designating "'listed Entities" for the Purposes of Terrorist Financing Offences at Canadian Law' (2004) **62***University of Toronto Faculty Law Review*,1-19.

[648] ATA s. 83.05(6) {a), 83.06.

importance for Canada of assuring foreign governments that their intelligence will be kept secret because Canada relies heavily on such intelligence.[649]

Section 83.1 requires all Canadians to report information about a transaction with terrorist property and provides that no 'criminal or civil proceedings lie against a person for [such] disclosure[s] made in good faith'. All of these financing provisions depart from the traditional criminal law model by conscripting non-state third parties in the state's anti-terrorism efforts. Another important feature of the ATA was its expansion of police powers. One provision provides for preventive arrest when there are reasonable grounds to believe that a terrorist activity will be carried out and reasonable suspicion to believe that detention or the imposition of conditions is necessary to prevent the carrying out of the terrorist activity. The period of preventive arrest under the Canadian law is limited to seventy-two hours. At the same time, the effects of a preventive arrest can last much longer. The suspect can be required bya judge to enter into a recognizance or peace bond for up to a year with breach of the bond being punishable by up to two years' imprisonment and a refusal to agree to a peace bond punishable by a year's imprisonment.

A second new investigative power is a power to compel a person to answer questions relating to terrorist activities. The subject cannot refuse to answer on the grounds of self-incrimination, but the compelled statements and evidence derived from them cannot be used in subsequent proceedings against the person compelled. There is also judicial supervision of the questions and a right to counsel.

In Application under Section 83.28, to the Supreme Court, it upheld the constitutionality of this novel procedure when it held that the procedure did not violate Section 7 of the Charter given protections that compelled evidence or evidence derived from that evidence could not

[649]*Ruby v. Canada* [2002) 4 S.C.R. 3 at para 44.

be used against the person in subsequent criminal prosecutions with the exception of those for perjury. They added that the Charter would prevent the use of an investigative hearing if the predominant purpose was to determine penal liability and would prevent the use of compelled testimony and evidence in subsequent extradition and deportation proceedings even though this was not specifically provided for in the impugned statute.[650]The ATA included a new offence of hate motivated mischief against religious property and expanded powers to remove hate literature from the Internet. These provisions were defended on the basis of the connection between racial and religious hatred and terrorism. Although the government was prepared to proclaim its commitment to the anti-discrimination principle when it extended the criminal law, it was not prepared to introduce an anti-discrimination clause in the ATA that would bind state officials. An important exception under the ATA, however, is that the criminal trial judge has the right to make any order, including a stay of the entire criminal proceedings, that he or she 'considers appropriate in the circumstances to protect the right of the accused to a fair trial'. The ATA, as well as a new emphasis on intelligence based policing, puts pressure on the traditional distinction between policing and intelligence by criminalizing a wide variety of associations and support for terrorism.·

Canada has enacted broad new criminal laws against terrorism and given police enhanced powers, but so far has relied on the even broader powers available under immigration law as a means to deal with terrorist suspects.The enactment of the Public Safety Act, although not without controversy, may facilitate administrative measures to protect sites and substances that are vulnerable to terrorism. The Public Safety Act of 2002 was also in the mould of the Anti-Terrorism Act which merely amended a variety of pre-existing legislatures and consolidated them. This enactment amends certain Acts of Canada, and enacts the Biological and Toxin Weapons Convention Implementation Act, in order to enhance public safety. Part

[650]*Re Vancouver Sun* [2004} 2 S.C.R. 332,

1 amends the Aeronautics Act to enhance the scope and objectives of the existing aviation security regime. The amendments permit the Minister and delegated officers to make emergency directions of no more than 72 hours duration in order to provide an immediate response to situations involving aviation security, and they permit the Minister to delegate to his or her deputy, for the same purpose, the power to make security measures. They clarify and expand the regulation making power relating to screening. They require air carriers or operators of aviation reservation systems to provide information concerning specified flights or persons. They also require them to provide information for transportation security purposes and national security purposes. They create a new offence concerning passengers who are unruly or who jeopardize the safety or security of an aircraft in flight. They provide a legislative basis for security clearances. They also authorize the making of regulations that require the establishment of security management systems by the Canadian Air Transport Security Authority and by air carriers and operators of aerodromes and other aviation facilities. Part 2 amends the definitions of ‘‘screening’’ and ‘‘screening point’’ in the Canadian Air Transport Security Authority Act to include emergency directions made under the Aeronautics Act. It also permits the Authority to enter into agreements with operators of designated aerodromes respecting the sharing of policing costs.

Part 3 amends the Canadian Environmental Protection Act, 1999 to authorize the Minister to make an interim order under Part 8 of that Act if the appropriate Ministers believe that immediate action is required to deal with a significant danger to the environment or to human life or health. Part 4 adds a new offence to the Criminal Code for communicating information or committing any act that is likely to lead others to falsely believe that terrorist activity is occurring, with the intention of causing persons to fear death, bodily harm, substantial damage to property or serious interference with the lawful use or operation of property.Part 5 amends the Department of Citizenship and Immigration Act to permit the

Minister to enter into agreements or arrangements to share information with a province or group of provinces, foreign governments or international organizations. Part 6 amends the Department of Health Act to authorize the Minister to make an interim order if the Minister believes that there is a significant risk to health or safety and immediate action is required to deal with the risk.Part 7 amends the Explosives Act to implement the Organization of American States Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials as it relates to explosives and ammunition. It prohibits the illicit manufacturing of explosives, and illicit trafficking in explosives. It allows for increased control over the importation, exportation, transportation through Canada, acquisition, possession and sale of explosives and certain components of explosives, and provides increased penalties for certain offences.

Part 8 amends the Export and Import Permits Act by providing for control over the export and transfer of technology, as defined, in addition to control over the export of goods as provided for in the Export and Import Permits Act at present. It also authorizes the Minister of Foreign Affairs to address security concerns when considering applications for permits to export or transfer goods or technology.Part 9 amends the Food and Drugs Act to authorize the Minister to make an interim order if the Minister believes that there is a significant risk to health, safety or the environment and immediate action is required to deal with the risk.

Part 10 amends the Hazardous Products Act to authorize the Minister to make an interim order if the Minister believes that there is a significant risk to health or safety and immediate action is required to deal with the risk.Part 11 amends the Immigration and Refugee Protection Act to allow for the making of regulations relating to the collection, retention, disposal and disclosure of information for the purposes of that Act. The amendments also allow for the making of regulations providing for the disclosure of information for the purposes of national security, the defence of Canada or the conduct of international

affairs.Part 12 amends the Marine Transportation Security Act to permit the Minister to enter into agreements respecting security of marine transportation and to make contributions or grants in respect of actions that enhance security on vessels or at marine facilities.

Part 13 amends the National Defence Act to allow for the identification and prevention of the harmful unauthorized use of, or interference with, computer systems and networks of the Department of National Defence or the Canadian Forces, and to ensure the protection of those systems and networks. The amendments also clarify the provisions dealing with active service and the definition of ‘‘emergency’’. In cases of aid to the civil power, the amendments allow the Minister to provide direction to the Chief of the Defence Staff on how to respond to provincial requisitions. The amendments provide for a member of the reserve force who is called out on service during an emergency to be reinstated with their former employer at the conclusion of the period of call out. The amendments also establish the Reserve Military Judges Panel, thus making it possible to increase, according to the needs of the military justice system, the number of officers who can be selected to hear military cases.Part 14 amends the National Energy Board Act by extending the powers and duties of the National Energy Board to include matters relating to the security of pipelines and international power lines. It authorizes the Board, with the approval of the Governor in Council, to make regulations respecting the security of pipelines and international power lines. It provides the Board with authority to waive the requirement to publish notice of certain applications in the Canada Gazette if there is a critical shortage of electricity. It authorizes the Board to take measures in its proceedings and orders to ensure the confidentiality of information that could pose a risk to security, in particular the security of pipelines and international power lines.Part 15 amends the Navigable Waters Protection Act to authorize the Minister to make an interim order if the Minister believes that there is a significant risk to safety or security and immediate action is required to deal with the risk.

Part 16 amends the Office of the Superintendent of Financial Institutions Act by authorizing the Superintendent of Financial Institutions to disclose to the Financial Transactions and Reports Analysis Centre of Canada information related to compliance by financial institutions with Part 1 of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act.Part 17 amends the Personal Information Protection and Electronic Documents Act to permit the collection and use of personal information for reasons of national security, the defence of Canada or the conduct of international affairs, or when the disclosure of the information is required by law.

Part 18 amends the Pest Control Products Act to authorize the Minister to make an interim order if the Minister believes that there is a significant risk to health, safety or the environment and immediate action is required to deal with the risk.Part 19 amends the Proceeds of Crime (Money Laundering) and Terrorist Financing Act by extending the types of government databases from which the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) may collect information considered relevant to money laundering or terrorist financing to include national security databases. The amendments also authorize FINTRAC to exchange information related to compliance with Part 1 of that Act with regulators and supervisors of persons and entities subject to that Act, in order to facilitate FINTRAC's compliance responsibilities under that Act.Part 21 amends the Radiation Emitting Devices Act to authorize the Minister to make an interim order if the Minister believes that there is a significant risk to health or safety and immediate action is required to deal with the risk.

Part 22 amends the Canada Shipping Act and the Canada Shipping Act, 2001 to authorize the appropriate Minister or Ministers to make an interim order if the Minister or Ministers believe that there is a significant risk to safety, security or the environment and immediate action is required to deal with the risk.Part 23 enacts the Biological and Toxin Weapons

Convention Implementation Act. These two legislations more or less supersede all other legislations in respect of terrorist offences.

It is vital to say that in Canada, the Criminal Code had actually anticipated the act of terrorism before the increased wave following the September 11, 2001 attack. The Criminal Code is so detailed as to be adequate in the fight against terrorism in Canada. The other legislations enacted as a follow up to the 9/11 attack were mainly to strengthen the relationships with other nations in the fight against terrorism. Indeed, such other Laws border on Chemical, Border issues and as well the need to reflect international instruments on Terrorism. The Law as seen here is very effective hence Canada has not been one of the hot beds of terrorism. This could be attributed to the proactive nature of the Law and the country's stringent enforcement of Laws no matter who is involved. Further, apart from collating the Laws into one, there is a strengthening and review of other laws that will complement the Criminal Code hence the success recorded in the fight.

5.5: **South Africa**

September 11, 2001 was a clear reminder of how vulnerable even the most powerful and rich nations are, and how insecure nations can be when there are no clear institutional and normative principles guiding world peace. The attacks furthered the case for a global security framework in which nations adopt collective measures to deal with security threats. Governments the world over cannot afford to be complacent about the security of their citizens nor that of their resources. A common morality for establishing new means of stability has found expression in numerous legislative and policy trends adopted as affirmations of commitment to dealing with situations that provide fertile grounds for

terrorism. Nations immediately recommitted themselves to assembling both military and intelligence resources to collectively eliminate the threat of terrorism.

Post-apartheid South Africa's approach to terrorism has both mirrored the international stance and been designed to respond to the numerous instances of urban terrorism. We therefore wish to provide a cursory survey of some of the legislative measures adopted by South Africa to tackle the terrorism threat. The government in desperation responded with legislative measures aimed at strengthening the investigative and prosecution capacity of its agencies. At that time, with a view to clearing legal impediments that compromised the investigative capacity of law enforcement agencies some politicians called for the suspension of constitutional guarantees such as the right of the arrested person to remain silent and the right to be released after a 48-hour detention if not charged and even a further call to restrict legal representation during the period of detention. None of these public declarations were adopted by the Government, not only because of possible illegality of such action but also because of the opposition to amending the Constitution that would result in undermining the fundamental rights guaranteed by the Constitution. Instead, creative and constitutionally compliant legislative and policy approaches to terror-related crimes were conceived, and existing mechanisms strengthened. Section 37 of the Constitution permits a presidential declaration of a state of emergency, where 'the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency'. This power is exercised in terms of the State of Emergency Act, which permits the President by proclamation to declare a state of emergency. In post-apartheid South Africa, this power has not been used for purposes of combating terrorism. The power is regarded as a last resort after all other legal means have been exhausted and it is clear that it should only be utilised

where a threat to state security is of such proportion as to be disastrous to normal life.[651]The government committed itself to taking lawful measures to prevent terror acts, to bring to justice those involved in acts of terror, to protect foreign citizens from terror attacks, to co-operate with the international community in the investigation and deterrence of acts of terror and to protect its citizens both internally and externally from terrorism. Nevertheless, the policy stays within the bounds of the Constitution, guaranteeing the rule of law and the protection of human rights whilst tackling terrorism, unless under a state of emergency. This approach, propagates constitutionalism as a cardinal feature of state and security, and is valuable for its underlying view that civil liberty must remain on the agenda of anti-terrorism campaigns. In the same year the South African Law Commission undertook to align security legislations such as The Interception and Monitoring Act (IMA) and the Explosives Act (EA) with international obligations of South Africa to counter terrorism. Section 8 (1) of the said IMA provided for the establishment of a call monitoring center thus; (a) The Police Service, the Defence Force, the Agency, the Service and the Directorate must, at State expense, establish, equip, operate and maintain central monitoring centers for the authorized monitoring of communications in terms of this Act. It is pertinent further to say that Section 1 of IMA defined communications thus; ‘‘communication’’ includes a conversation or a message, and any part of a conversation or message, whether— (a) in the form of— (i) speech, music or other sounds; (ii) data; (iii) text; (iv) visual images, whether animated or not; or (v) signals; or (b) in any other form or in any combination of forms. A direction to intercept and monitor may be consented to under S 4(2) 2) a direction may only be issued if the judge concerned is satisfied, on the facts alleged in an application referred to in section 3, that there are reasonable grounds to believe that— (a) a serious offence has

[651]In 1998, the South African government approved a new official policy in which terrorism is defined as: “An incident of violence, or the threat thereof, against a person, a group of persons or property not necessarily related to the aim of the incident, to coerce a government or civil population to act or not to act according to certain principles.”

been or is being or will probably be committed and cannot be investigated in another appropriate manner; or (b) the security or other compelling national interests of the Republic are threatened or that the gathering of information concerning a threat to the security or other compelling national interests of the Republic is necessary. Such a direction may be may be issued for a period not exceeding three months at a time, and the period for which it has been issued must be mentioned in the direction.[652] Any judge may upon an application— (a) extend the period referred to in subsection (3) for a further period not exceeding three months at a time; or (b) amend an existing direction, if the extension or amendment, as the case may be, is necessary for a reason mentioned in subsection (2)[653]. Section 7 of the Act prohibited certain communications when it said that notwithstanding any other law, no service provider may provide any telecommunication service which does not have the capacity to be monitored: Provided that a service provider providing such a service is only responsible for decrypting any communication encrypted by a customer if the facility for encryption was provided by the service provider concerned. The IMA was reviewed with the aim to grant additional powers to the state to intercept and monitor communications relating to suspected terrorist activities and economic espionage considered a threat to state security. The amended IMA permits a judge to direct that postal articles, communications and conversations by, to or from a person or organization be intercepted or monitored wherever there is evidence of a crime being committed.[654] The amended EA does not allow anyone to manufacture, import, possess, sell, supply or export any plastic explosive, which is not marked with a detection agent.[655] Taken together, these legislations provide the South African government with the legal framework necessary to counter threats of terrorism. Despite these two regulations, the South African Government like all the other Governments

[652] S.4(3)
[653] S4(4)
[654] Sections 17, 18 and 19 of IMA.
[655] Section 2 – 17 of the Explosives Act 2002.

of the world came up with another regulation in the fight against terrorism known as the Anti-Terrorism Act, 2003. The Act in its definition section[656] defined ‘‘terrorist act’’ to mean an unlawful act, committed in or outside the Republic; while ‘‘terrorist organization’’ means an organization declared as such under section 14 which is— (a) a convention offence; or (b) likely to intimidate the public or a segment of the public. Under its section 2, it created a wide variety of offences and for ease of reference we cite verbatim;2. (1) Any person who— (a) commits or threatens to commit a terrorist act; (b) conspires with any person to commit or bring about a terrorist act; or (c) incites, commands, aids, advises, encourages or procures any other person to commit or bring about a terrorist act, is guilty of an offence and liable on conviction to imprisonment which may include imprisonment for life.(2) Any person who knowingly facilitates the commission of a terrorist act is guilty of an offence and liable on conviction to imprisonment which may include imprisonment for life.(3) Any person who becomes or remains a member of a terrorist organization after the date on which it is declared as such is guilty of an offence and liable on conviction to imprisonment for a period not exceeding 15 years.(4) Any person who knowingly does anything to support a terrorist organization economically or in any other way is guilty of an offence and liable on conviction to imprisonment for a period not exceeding 15 years.(5) (a) Any person is guilty of an offence if he or she knowingly— (i) harbours or fails to report to the authorities the presence of a member of a terrorist organization;(ii) furnishes weapons, food, drink, transport or clothing to a member of a terrorist organization;(iii) receives any benefit from a terrorist organization or any member of such an organization; or (iv) carries out any instruction or request by a terrorist organization or any member of such an organization on its behalf.(b) Any person convicted of an offence contemplated in paragraph (a) is liable to imprisonment for a period not exceeding 15 years.(6) Any person who fails to

[656] Section 1

comply with section 15 or 16 is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 10 years or to both a fine and such imprisonment.(7) (a) Any person is guilty of an offence if he or she— (i) fails to comply with an instruction of a police officer in the exercise of his or her powers under section 6; or (ii) willfully obstructs a police officer in the exercise of those powers.(b) Any person convicted of an offence contemplated in paragraph (a) is liable to a fine, or imprisonment for a period not exceeding six months.Under Section 4, it widens the scope of the jurisdiction of the Courts in South Africa when it provided thus;

4. (1) A court of the Republic has jurisdiction in respect of any offence referred to in this Act, if— (a) the accused was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered in the Republic; or (b) the offence was committed— (i) in the territory of the Republic; (ii) on board a vessel, a ship, an installation in the sea over the continental shelf or an aircraft registered in the Republic at the time the offence was committed; (iii) by a citizen of the Republic or a person ordinarily resident in the Republic; (iv) against the Republic, a citizen of the Republic or a person ordinarily resident in the Republic;(v) on board an aircraft in respect of which the operator is licensed in terms of the Air Services Licensing Act, 1990 (Act No. 115 of 1990), or the International Air Services Act, 1993 (Act No. 60 of 1993); or (vi) against a government facility of the Republic abroad, including an embassy or other diplomatic or consular premises, or any other property of the Republic; or (c) the evidence reveals any other basis recognized by law.

(2) Whenever the National Director receives information that a person who is alleged to have committed an offence under this Act, may be present in the Republic, the National Director must— (a) order an investigation to be carried out in respect of that allegation; (b) inform any other foreign States which might also have jurisdiction over the alleged offence

promptly of the findings of the investigation; and (c) indicate promptly to other foreign States, which might also have jurisdiction over the alleged offence, whether he or she intends to prosecute.

(3) If a person is taken into custody to ensure the person's presence for the purpose of prosecution or extradition to a foreign State the National Director must, immediately after the person has been taken into custody, notify any foreign State which might have jurisdiction over the offence in question either directly or through the Secretary-General of the United Nations, of the— (a) fact that the person is in custody; and (b) circumstances that justify the person's detention. (4) If the National Director declines to prosecute, he or she must notify any foreign State which might have jurisdiction over the offence in question accordingly.

Section 6(1) grants the Courts the power to order for stop and search of vehicles and persons by the Police which said order may not exceed 10 days unless renewed. Section 7 makes it mandatory that prosecution may not be initiated under this Act without the consent of the National Director of Public Prosecutions. Chapter 4 of the Act with Sections 14 to 19 made stringent provisions for measures to combat terrorism. In addition to this, institutional reforms have led to the creation of elite police units, superior intelligence gathering and investigative tactics and more efficient prosecutions of alleged criminals. It is under this legal framework that the South African Government hopes to curb terrorism using the instrument of the Law. The Legal framework in South Africa therefore shows an understanding that Terrorism is not a fight that could be won without the backing of the Law. Such Laws must also be clear and effectively enforced with regards to the rights of the individuals and in accordance with the principles of rule of Laws. Reality has shown that the implementation of the Law in South Africa is effective hence the rate of proliferation of terrorist group is on the decline as the reverse is the case in Nigeria.

CHAPTER SIX

THE ROLE OF LAW IN COMBATING TERRORISM IN NIGERIA

6.0: **Background to Study**

In order to provide an active and effective criminal justice in response to terrorism, there is the need to have an adequately functioning counter-terrorism legal regime and criminal justice systems, as well as the related capacity to deal with potentially complex criminal cases and engage effectively in international criminal justice cooperation. This requires a firm commitment by States to pursue common objectives at the national, sub-regional and regional levels. An essential part of a comprehensive criminal justice response is the widespread ratification and implementation of the universal legal instruments against terrorism of which Nigeria has been a part of. It is not in doubt that the existing legislations will go a long way in combating the evils of terrorism. However there is also the need to review some of them by way of upgrading the punishments contained therein and or collate the various legislation into one in order to give effect to the provisions. Even if there are to be new ones, regard must be had to the existing ones[657]in order to adequately comply with the Constitutional requirements of law making. There is the need to clearly and effectively demarcate and delineate the functions of each of the organs of government and as well the individual institutions involved in our criminal justice system. Further there is the need to show the political will to enforce these Laws no matter who is involved. The organs of government involved must live up to their callings.

[657]On Thursday September, 20, 2012, the Senate read a letter from the Presidency introducing two new bills, a bill to amend the Terrorism Act of 2011 and as well the Anti-Money Laundering Act 2011. Practically, the implication is that the Laws are insufficient to meet with the changing phase of terrorism in Nigeria. The Terrorism Act has now been amended by the Terrorism (Prevention) Amendment Act of 2013 while the AML is still pending as at the time of submission of this research.

The functions of the Executive under the 1999 Constitution of the Federal Republic of Nigeria is the execution and maintenance of this Constitution and all laws made by the National Assembly and to all matters with respect to which the National Assembly has for the time being, power to make laws[658]. In discussing this issue we shall treat the role of the Legislators simultaneously with the role of the Executive as most of their functions dovetail into each other in this regard. For instance, even though it is the executive that will endorse an International Instrument, such instrument cannot become Law until it is domesticated by the legislature. To that extent we shall take both of them under the heading of Role of Executives and Legislators. We shall also discuss the roles that will be played by other arms of the executive government and other agencies from government involved in the administration of criminal justice system.

6.1: **The Role of the Executives and Legislators**

The executive as the policy makers and the legislators as law makers must provide the policy and legal frameworks respectively within which the criminal justice system exercises its counter-terrorism function. International law provides guidance for policy development and articulates the many obligations of States with respect to international cooperation, upholding the rule of law and protecting fundamental rights and freedoms. It is pertinent to lend credence to the fact that there will be no effective role for the law in the fight against terrorism if it cannot uphold its own rule and effectively protect the rights of the people. Having said this, it is a truism that despite the existence of various international instruments on terrorism, they do not become Law unless incorporated into the Laws of the particular state in this case Nigeria.

[658] Section 5 of the Constitution as amended.

6.1.1: **Legislative Incorporation of International Obligations**

The rule of law requires that the laws of a State be comprehensive, clear, certain and accessible; they must be legitimate and must balance stability and flexibility. The State, following the ratification of the universal instruments, must proceed with the legislative incorporation based on a comprehensive review of the existing national law[659]. This is necessary for the effective implementation of counter-terrorism measures particularly and also for creating the legal basis to guide the work of criminal justice administrators.[660]The process of becoming party to an international treaty or Convention involves both an international and a domestic aspect. The international aspect consists of a formal procedure dictated by the terms of the agreement and governed by the principles of international law. An analysis of legislation is normally the first step to becoming a party to the global instruments against terrorism. This analysis enables the Government and the legislature to anticipate the changes that will result to their legal system as a result of such global instrument.

Nigeria, because of domestic law and as a matter of policy, will not adopt a treaty until legislation is in place that permits the fulfilment of all its international obligations. The treaty has no domestic application until implemented by a domestic law. This is often referred to as the "dualist tradition", in which international law and domestic law are considered two separate systems. Legislation is therefore required in Nigeria to introduce the international obligation into the domestic legal order.In some other countries once a treaty is ratified, it is automatically incorporated into domestic law. Such countries are referred to as

[659] It is pertinent here to state that Nigeria has ratified the UN Convention for the Suppression of the Financing of Terrorism 1999 on 28th April 2003. The country has also made an attempt to criminalize the financing of terrorism through Section 15 of the EFCC Act. All these are evidence of the fact that the country has taken a look at international instrument and has decided to strengthen their own existing national legislation.

[660] This is because apart from the fact that international instruments need to be domesticated, it is the responsibility of the nation in question to adapt definitions and prescribe punishments best suited to their clime

those that follow the monist tradition. However, even in those countries, legislation is often required to provide non-self-executing elements essential to the implementation of the treaty. The clearest example of this relates to the criminalization of various conducts as required by the global instruments against terrorism. None of those instruments specifies penalties for the offences in question. Domestic legislation is therefore required to effect specific penalties for the offences created. It is therefore imperative that each State (Nigeria inclusive) must opt for what it considers the most appropriate implementation mechanism. When the ratification of the pertinent universal instrument creates a binding obligation, the legal framework can be established by any of the following means:

(i) a comprehensive review of national criminal law and its relevant provisions, followed by amending legislation;

(ii) the inclusion in the criminal law of a special section of the Criminal Code; (sometimes, this a good option for a State that has the intention of undertaking broader reforms to its criminal law);

(iii) the adoption of an autonomous law containing all the elements required by international Conventions.

These activities therefore entail a holistic and detailed analysis by the country in question of the principles contained in the particular international treaty that they are adopting. Apart from this legislative incorporation, there is also the need for the Legislators to criminalize certain offences which the various international instruments called for its criminalization. This is also a part of the functions of the legislatures and the policymakers and in doing this the organs of government involved must comply with the principles of rule of law and human rights.

6.1.2:. **Criminalization**

For the Law to play an effective role in the fight against terrorism the Criminal Justice System must be invoked and this invocation can occur only when some of the acts are criminalized. The need therefore arises for effective criminalization of various acts associated with terrorist activities which we believe is a prerequisite to intervention by the criminal justice system. Criminalization is not only a legal obligation for parties to the various instruments against terrorism but also a precondition for effective international cooperation. They must also ensure that those offences are punishable by appropriate penalties that take into account the gravity of the offences. States must define the *actus reus* and the *mens rea*elements of the offences in accordance with their general criminal law. In doing so, the state must ensure that the new criminal law provisions comply with their other obligations under international law and their constitution; in particular international human rights, and the fundamental rights provisions entrenched in their constitution.The universal instruments against terrorism require the criminalization of a certain number of acts in the areas that they regulate. Some of these offences can be grouped into five categories: (1) offences related to civil aviation; (2) offences based on the victim's status; (3) offences related to dangerous materials; (4) offences related to vessels, fixed platforms and harbour installations; and (5) offences related to the financing of terrorism. Further to this, the universal instruments against terrorism and Security Council resolution 1373 (2001) require the criminalization of certain ancillary offences relating to the planning and preparation of terrorist acts, as well as participation in those acts.[661]The issue of the extent of participation that gives rise to criminal liability in relation to terrorism is essential. The universal instruments require punishment of both the perpetrators and accomplices of completed or

[661]These we have seen in the course of our comparative analysis of the role of law in the fight against terrorism in other jurisdiction. For instance, the United Kingdom Terrorism Act of 2006 criminalized ancillary acts relating to terrorism. So also the USA PATRIOT Act.

attempted offences and, for specific offences, persons who organize, direct or threaten to commit terrorist acts.[662]

In criminalizing offences and in the definition of terrorist acts or terrorism-related crimes, it is expected that the country, must observe the basic human rights principle of legality, which requires precision and clarity when drafting laws and prohibits the retroactive criminalization of a conduct as contained in Section 36 of the 1999 Constitution of Nigeria as amended.This principle of general international law is also enshrined and made expressly non-derogable in article 4 of the International Covenant on Civil and Political Rights and the provisions of regional human rights treaties and national constitutions. It requires that the criminalized conduct be described in precise and unambiguous language that narrowly defines the punishable offence and distinguishes it from conduct that is either not punishable or is punishable by other penalties. Accordingly, the principle of legality also entails the principle of certainty, which means that the law must be reasonably predictable in its application and consequences.[663]

It is very vital that terrorist acts be checked before they occur. It is therefore important to be able to counter a terrorist conspiracy before it achieves its goals. For terrorist violence to be reduced by the instrumentality of law there must be a re-focus of attention on proactive intervention at the planning and preparation stages. Thus, criminalizing various preparatory conducts may facilitate early intervention, as can the creation of conspiracy or criminal association offences.[664]The offences of conspiracy and criminal association are obvious models for preventive intervention against the planning and preparation of criminal acts.

[662]For us in Nigeria, this aspect of criminal Law is well entrenched under our criminal Code Sections 7, 8, 9 and 10 which deal in extensor with parties to an offence.

[663]That is why the Nigerian constitution makes it imperative that for an offence to be an offence it must be expressly written in a Statute book(s).See section 11 of the Code and also *Aoko v Fagbemi.(supra) , Okoro v State* [1988] 1 NWLR (pt 74)255, *Eyu v State [1988]* 2 NWLR (pt 78)602

[664]The Criminal Code created both what is called attempt in Section 4 and as well the offence of conspiracy. The implication is that while we make efforts to adopt new legislations, we should strengthen the existing ones as some aspects of the existing ones may well meet the demands of the present day evil of terrorism.

Criminal responsibility at a time preceding actual violence can be established in law through the common law concept of "conspiracy"[665], which prohibits agreements to commit crime. For these offences to be complete, the intended harmful act need not be attempted or accomplished,[666] although some laws require the commission of a preparatory step to carry out the group's purposes. It is possible to criminalize financial preparations of terrorist acts, as now required of States parties to the International Convention for the Suppression of the Financing of Terrorism.[667] This relatively new approach introduces a deliberate strategy to permit intervention before a terrorist atrocity has been committed or attempted. Instead of defining a violent offence that can be punished only if it succeeds or is attempted,[668] article 2 of the Convention requires the criminalization of the non-violent financial preparations that precede nearly every terrorist attack.

Preventing terrorists and terrorist organizations from funding their activities and planned attacks is an essential component of any successful counter-terrorism campaign. This is so because terrorism related activities are money intensive and with no access to funds then there will be little or no likelihood of terrorist attacks. International and national efforts to combat transnational financial crime and terrorist financing have evolved considerably in recent years. Global efforts to combat terrorist financing were enhanced in 1999 through the International Convention for the Suppression of the Financing of Terrorism. Article 2, paragraph 1, of the Convention provides that

[665]Which is also a provision of our criminal Code Section

[666]Note that attempt to commit an offence is a distinct offence from the offence of conspiracy. See Section 4 of the Criminal Code

[667]The issue of Terrorism Financing is contained in the Anti-Money Laundering Law 2011 and as well in the EFCC Act, 2004. Those two are examples of International instrument influencing legislations. See also Section 10 of the Terrorism Prevention Act, 2011 as amended in 2013.

[668] Reference should be had to the 2011 Terrorism Prevention Act which only defined terrorism if it succeeds or is attempted. It is therefore one of the reasons why we embarked on this work knowing that the best method is to review existing legislations before introducing new ones especially when the new law is introduced in a haste

> any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out [certain defined acts].[669]

From the Convention's definition, the *mens rea,* behind the financing of terrorism has two aspects: the act must be committed willfully and the offender must intend to use the funds to finance acts of terrorism or know that they will be used for that purpose[670].

The Convention also obliges States parties to hold legal persons liable under specific circumstances[671]. Article 5 obliges each State party to take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence as set forth in article 2. Such liability may be criminal, civil or administrative, although recent practice leans more towards establishing criminal corporate liability whenever possible.[672]

It is yet vital that we state that the Security Council, in paragraph 1 (b) of its resolution 1373 (1999), required States to criminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that

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[669] This is almost at par with the provision of Section 10 (1) of the Terrorist Prevention Act 2011

[670]Section 10(1) states 'a person or body who corporate who, in any manner, directly or indirectly, willingly provides, solicits or collects any fund or attempts to provide, solicit or collect any fund with the intention or knowledgethat they will be used in full or part in order to…" The *mens rea* and *actus reus* seem to match with that suggested by the international instrument.

[671]This was the major shift observed in the current amendment of the Terrorism Amendment Act of 2013. Section 1(2) of the amended version was categorical when it said, "a person or body corporate who knowingly in or outside Nigeria…." Throughout the Act, persons were interspersed with artificial persons and punishment prescribed also for such persons

[672]This segment can be found in Sections 13 and 14 of the Terrorist Prevention Act as amended in 2013. There is also a more serious surveillance on such legal entities in the Anti-Money Laundering Law, 2011

the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.[673]

6.1.3: **Inciting Terrorism**

This is another area that needs a careful study. The Security Council, in its resolution 1624 (2005), called upon all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to:(a) Prohibit by law incitement to commit a terrorist act or acts;(b) Prevent such conduct;(c) Deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct.[674]

In Nigeria, the offence of inciting terrorism was created in Section 11 of the Terrorism Prevention Act 2012 as amended. The problem with the section however is its inability to define conducts or omissions that will give rise to incitement. Inciting terrorism has been defined as "tostir, encourage, or urge on; stimulate or prompt to action"[675]. From this definition therefore, it appears clear that some Nigerians have through their comments incited terrorism and were not punished by the law. Indeed a former Governor of Zamfara State was arrested by the police in Kaduna for inciting comment but nothing came out of it.[676] It is therefore necessary that the Act as it were should make provisions for acts or omissions that would give rise to incitement but in doing that, the Law should be careful of drawing a line between the right to freedom of speech and incitement.

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[673]This Nigeria has done vide Section 13(a) of the Terrorist Prevention Act of 2011as Amended in 2013.

[674]This issue of inciting terrorism was contained in Section 5 of the Terrorism Prevention Act as amended. Section 5 (1) criminalizes giving support to terrorist organizations while Section 5(2) defines support under subsections (a-e) With particular reference to Subsection 2(a) there is this fear that it may attack the right to freedom of speech. The subsection stated, "Incitement to commit a terrorist act through the internet, or any electronic means or through the use of printed materials or through the dissemination of information. The question now is what terrorist information is as it was nowhere defined.

[675]Dictionary. Com at www.dictionary.reference.com accessed on 23/4/15

[676] David Attah, "Police Arrest Yerima over Alleged Inciting Statement" Punch Newspaper of March 10, 2013 available online at www.punchng.com accessed on 23/4/15

The Security Council further called upon all States to continue international efforts to enhance dialogue and broaden understanding among civilizations, in an effort to prevent the indiscriminate targeting of different religions , tribes and cultures, and to take all measures as may be necessary and appropriate and in accordance with their obligations under international law to counter incitement of terrorist acts motivated by extremism and intolerance and to prevent the subversion of educational, cultural and religious institutions by terrorists and their supporters. Since terrorist propaganda incites discrimination, hostility and violence by advocating hatred on national, racial or religious grounds, penalizing such a provision on incitement is a direct means of implementing the International Covenant on Civil and Political Rights, even when the harm being incited does not occur. Prohibiting such incitement based upon the additional grounds of cultural differences would seem to be an entirely consistent extension of the proactive, preventive approach reflected in article 20 of the Covenant. Nevertheless, prohibitions against incitement must be crafted with care to comply with other provisions of the Constitution that protect freedom of opinion and freedom of expression. Freedom of expression is an essential foundation of democracy, and its enjoyment is linked with other important rights such as the freedom of thought, conscience and religion. Great care must be taken to ensure that any restriction on the right to freedom of expression where applicable is both necessary and proportional.[677]The Council of Europe Convention on the Prevention of Terrorism provides one model for analyzing the above-mentioned issue. Its article 5, on public provocation to commit a terrorist offence, defines "provocation to commit a terrorist offence" as "the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist

[677]In *Ukegbu V N.B.C*, [2007] 4 NWLR (pt. 1055) 551, the court was of the view that although Section 39(1) guaranteed the right to freedom of expression of every person and the freedom to hold opinions and to receive and impart ideas and information without interference, yet such rights were not absolute and could be regulated especially as it affects wireless broadcasting, television or films. It therefore suffices to state that there should be a detailed analysis of when the right to freedom of expression is curtailed with a view to appreciating if it breaches the rights of the citizenry

offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed".[678] The purport of this definition raises four issues concerning the aspect of a provocation/ incitement offence with freedom of expression:

(a) that only public messages are criminalized, leaving non-public incitement to be dealt with under the general concepts of civil or criminal responsibility;

(b) Making a subjective intent (to incite the commission of a terrorist offence) an element of the offence eliminates many possible objections concerning freedom of expression and the value of intellectual discourse concerning unpopular ideas;

(c) No legislative or executive authority is given power to declare that any particular message, slogan, symbol or philosophy is dangerous or prohibited per se. The offence element, that the message being publicized will cause the danger of the commission of a terrorist offence, must be proved to the satisfaction of an independent judiciary in a specific, factual context;

(d) Proven conduct causing a danger of the commission of terrorist offences is punishable whether or not it involves direct advocacy of particular offences.

A very important fact to note here is that most of these international instruments provided for the exclusion of justification. It therefore becomes vital to accept that none of the criminalized terrorist acts can, under any circumstance, be justified by considerations of a political, philosophical, ideological, racial, ethnic, religious or other, similar nature. The corpus of international counter-terrorism instruments rests on an unequivocal condemnation of this type of crime, with no concession to any possibility of ideological justification. Thus,

[678]It is pertinent to state that this provision was not contained in the Terrorist Prevention Act of 2011 as amended yet this is a very relevant area in the fight against terrorism.

no terrorist offence can be justified by considerations of a political nature. There is therefore the need to include such exceptions in national legislations.[679]

6.1.4: **Procedural Law**

Criminal procedural law constitutes one of the main safeguards of the rule of law and offers concrete legal safeguards to the rights of all those who come in contact with the criminal justice system. It plays the dual role of social protection through the prosecution process and protection of the accused by permitting the accused to defend himself or herself. It ensures the reliability of the criminal justice process and, in particular, the criminal trial, thus ensuring a fair justice system. Under the extant system in Nigeria, each state can legislate on its own criminal justice administration Law as has been done by almost all the states in Nigeria[680]. Effective action against terrorism may sometimes require specific amendments to procedural law. Such changes are often called for by the universal or national instruments against terrorism or are required in order to comply with various other State obligations under international law. A workable criminal justice response to terrorism almost certainly requires a review of existing procedural law, including its evidential requirements, in order to empower the criminal justice system to fulfill its security and social protection duties while upholding its commitment to the rule of law and human rights.[681]

In all these efforts geared towards achieving substantial role for the Law in the fight against terrorism, there is the need to strengthen procedural safeguards to protect individual rights. States must continue to adhere to the rule of law, including the basic principles, standards

[679]This is also missing in our extant law on Terrorism

[680]The country has two major criminal procedure rules. The Criminal Procedure Act in force in the Federal High Courts and the Southern Parts of the country and also the Criminal Procedure Code applicable to the Northern part of the country. However states are at liberty to enact their own Criminal Procedure Laws as have been done by many states. See for instance the Administration of Criminal Justice Law of Anambra State 2010

[681]This could be said to be the reason why most states are reviewing their criminal justice administration process to make for speedy dispensation of justice in the area of criminal prosecution.

and obligations under criminal and constitutional law that define the boundaries of permissible and legitimate criminal justice activities against criminal offences including terrorism. Those boundaries tend to be articulated to a large extent in various aspects of criminal procedural law and laws regulating police powers. It is possible that some counter-terrorism measures have resulted in prolonged detention without charge[682], denial of the right to challenge the lawfulness of detention, denial of access to legal representation, illegal deportations, monitoring of conversation with lawyer[683], and incommunicado detention. It is therefore necessary to be cautious when modifying normally applicable procedures in order to adapt them to the unique characteristics of terrorist crimes. Any substantial modification of criminal procedure is likely to raise fundamental questions about the protection of individual rights, the safeguarding of the rule of law and the integrity and the fairness of the criminal justice process. When national laws adopt special procedures to fight terrorism, particularly procedures that may potentially infringe on fundamental rights and freedoms, it is important to design safeguards to prevent any potential abuses.[684]

6.1.5: **Some Considerations on Police powers**

There is no way we can discuss the role of Law in fighting terrorism without discussing one of the pillars of our criminal justice system, the Police. The Executive and the legislators should therefore seek to strengthen the functions and powers of the Police with a view to empowering them in the fight against terrorism through the Law. Police functions, powers and procedures are normally defined and limited by statute[685]. The Police Act typically encompasses organizational elements as well as the relevant powers of a police force[686], particularly in the public order realm. The police powers relating to investigation are likely

[682]Section 27(1), Terrorism Prevention Act as amended.
[683] Section 29(1), Terrorism Prevention Act as amended.
[684]See for instance Section 5 as amended and Sections25 – 30 also as amended of the Terrorism Prevention Act, 2011 as amended.
[685] Police Act Cap P19 L.F.N, 2004
[686] Section 4 of the Police Act

to be found in the domestic Criminal Procedure Code[687]. In many instances in recent years, some of these powers have been enhanced by special legislation, often legislation adopted as a result of a terrorist incident or threat[688].Some experts argue that many of the investigative powers available to Governments could be used to penetrate terrorist organizations and defeat their plans—surveillance, informants, searches, seizures, wiretaps, arrests, interrogations, and detentions—are tightly restricted by a web of laws, judicial precedents and administrative rules. They argue that new legislation is necessary to make police powers more flexible and useful while simultaneously setting boundaries to minimize overuse or abuse[689]. An example of this will be found in the freezing of assets of suspected terrorists. Perhaps, one can further state that actions to effectively prevent the financing of terrorist activities require not only the criminalization of certain conduct, but also implementation of procedures relating to the freezing, seizing and confiscation provisions as required by the treaty obligations of the International Convention for the Suppression of the Financing of Terrorism[690]. Article 8 of the Convention requires the following of States parties:

> (a) Each State party shall take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in article 2 as well as the proceeds derived from such offences, for purposes of possible forfeiture;

[687]The Criminal Procedure Act and the Criminal Procedure Code make detailed provisions on the powers of the police with respect to arrest, detention, prosecution, search warrant, its execution, summons, bail, charges etc.

[688]The banning of motorcycles and keke nape in Maiduguri, Borno State on the 26th day of July, 2014 is a recent example.

[689] S. Taylor, "Rights, Liberty and Security: Recalibrating the Balance after September 11", in G. Martin, (ed.), *The New Era of Terrorism: Selected Readings*, (London: Sage Publications, 2004) p. 220.

[690] For examples of model legislation, see *International Monetary Fund, Suppressing the Financing of Terrorism: a Handbook for Legislative Drafting,* International Monetary Fund, Washington, D.C., 2003.

(b) Each State party shall take appropriate measures, in accordance with its domestic legal principles, for the forfeiture of funds used or allocated for the purpose of committing the offences set forth in article 2 and the proceeds derived from such offences.[691]

Unlike the broader freezing obligations under the freezing regimes imposed by the Security Council, the freezing, seizing and confiscation provisions of the International Convention for the Suppression of the Financing of Terrorism adopt the more traditional approach to the confiscation of criminal assets, based on the instrumentality and proceeds of crime principles. The Convention focuses on reducing the incidence of terrorist acts by freezing, seizing and confiscating economic instrumentalities before they are used to support the commission of violent acts. This preventive purpose is emphasized in article 2, paragraph 3, of the Convention: "For an act to constitute an offence set forth in paragraph 1, it shall not be necessary that the funds were actually used to carry out an offence referred to in paragraph 1, subparagraphs (a) or (b)".[692]

In the absence of a definitive explanation in Security Council Resolution 1373 (2001) of what acts trigger its freezing obligation, countries apply their own interpretations[693]. Many countries have definitions of terrorism or terrorist acts in domestic criminal statutes[694]. Confiscation may then be possible as a criminal penalty under national law, but would be unlikely to reach all property required to be frozen pursuant to Resolution 1373 (2001). This is because the resolution requires freezing all property of those who commit or support acts of terrorism, including property not intended for criminal use. Such property would not be

[691]This provision is contained in Section 1A (5) and Section 12 of the Terrorism Prevention Act of 2011 as amended.

[692]Sections 10(3) and 13(3) which provides that "for an act to constitute an offence under this section, it is not necessary that the funds or property were actually used to commit any offence of terrorism.

[693]Section 1A(5d)

[694]Nigeria has none but simply relies on various definitions of terrorist acts in international instruments. See Sections 1(3) and 40(g) as amended

subject to confiscation under domestic provisions that typically provide for the restraint and confiscation of only actual or intended instrumentalities and proceeds of crime. Implementation of the obligation imposed by resolution 1373 (2001) therefore requires the creation of a freezing power in a court or other competent authority such as the Police that exists independently of the criminal process.[695] Since this is a sort of an emergency measure, it becomes relevant that this freezing protocol must be made in accordance with the provision of the law and not under any delegated power.

In this era of terrorism, it is most unlikely that citizens will be willing to supply information to the Police that will enable them apprehend or check terrorists for fear of attack in retaliation. It is not unheard of that witnesses or informants of the Police or other security agencies have been eliminated after passing on such information. It would therefore be an invitation to commit suicide for one to agree to testify in a case involving terrorism. This therefore brings us to the issue of witness protection in the event of a terrorist offences related trial and as well the ability of a witness to give testimony in a judicial setting or to cooperate with law enforcement investigations without fear of intimidation or reprisal which is essential to maintaining the rule of law[696]. It is imperative to state that this still lies under the turf of the Police who are saddled with the investigation and prosecution in some cases. But then can the police dabble into special witness protection programme without any law to that effect?.

[695] This is not the case with the Terrorist Prevention Act of 2011 as amended as it says that the National Security Adviser or the Inspector of Police may seize cash with the approval of the President where he has reasonable ground to so suspect. Now we have seen the position of the Police in Nigeria in terms or reasonable grounds of suspicion. Most of our prisons are congested today because of the police reasonable ground. It is therefore likely that in the event of an altercation with the Police or the President, assets of a citizen could be frozen on the ground that it was intended to be used for terrorist purposes. This will affect the citizen especially his right to seek redress in a court of Law.

[696] Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime, UNODC, p. 1.

Witnesses and informants play an essential role in the investigation and prosecution of terrorist activities. Their protection is therefore crucial to the success of the criminal justice process. A number of procedural measures should be considered for a more secured protection of witnesses and informants whose assistance is essential to the prevention, investigation and prosecution of terrorist crimes. These measures must ensure an appropriate balance between the need to protect the safety of witnesses and the obligation to safeguard the defendants' right to a fair trial. Section 33 and 34 of the Terrorist Prevention Act of 2011 as amended made provisions for the protection of witnesses and informants. But the said provisions are insufficient to checkmate potential reprisal attacks on the person or family members of the witness in a terrorism related trial in Nigeria. A review of the process of witness protection will be a welcome development in our *corpus juris*. It is sometimes necessary to consider procedural means of recognizing pretrial statements. In most European countries, pretrial statements given by witnesses and collaborators of justice are recognized as valid evidence in court, provided that the parties have the opportunity to participate in the examination of witnesses[697]. The issue of front loading has not been applied in our criminal justice system and an adoption of such a model might not be a bad move. A report by a Council of Europe group of experts suggests that one may assume that, in a system where pretrial statements of witnesses or testimonies of anonymous witnesses are generally regarded as valid evidence during proceedings, such procedures can provide effective protection of witnesses[698]. In concluding this segment, it becomes necessary to state that the

[697] N. Piancete, "Analytical Report", in *Council of Europe, Terrorism: Protection of Witnesses and Collaboratorsof Justice, (*Strasbourg, France, Council of Europe, 2006), p. 22. In Nigeria on the other hand, Statements are made at the Police Station and the official rule is that the suspect will make the statement alone without the aid of a lawyer. In most cases the Police investigator employ varied means of intimidation therefore rendering the statement invalid. In court such statement will be subjected to trial within trial to ascertain its voluntary nature. Where it is involuntary, it becomes inadmissible and of course most times this could have been the only means of convicting the accused and when it is thrown out, the case suffers a setback and the accused may be discharged for want of evidence.

[698] *Ibid*. But then, the Constitutional Safeguards in Nigeria makes provisions for the accused person to have the right to examine all the witnesses lined up against him and when such witness do not appear their statements

Executive and the Legislators have a very vital role to play in the fight against terrorism through the Law. This could be by way ofjudicial oversight which is case-specific and dependent on the resources of litigants to engage in the process or review by a parliamentary committee. Review by democratically elected politicians may further enhance public accountability[699]. The purpose of the review is to establish whether the objectives of the law are furthered in a manner consistent with the rule of law and respect for human rights.

6.2:**Role of the Police**

The Law enforcement agencies are part of the executive. These agencies have a very vital role to play if we intend to fight terrorism through the instrumentality of the Law. We shall therefore consider some of their roles especially the Police in the light of the offence of terrorism and within the ambit of law.

6.2.1: **The Role of the Police in Fighting Terrorism**

"In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons." [700] The Police and other law enforcement officials face particular challenges in responding to terrorism within a rule-of-law and human rights framework. Capacity limitations often emerge when the Police face a terrorist conspiracy, particularly one that is international in nature. Given the difficulties involved in detecting, investigating and controlling terrorist activities, let alone preventing terrorist violence, police agencies must consider ways of enhancing their technical, human and strategic capacity to respond to terrorism. Given the international dimension of many terrorist activities, police services must also develop their capacity for law enforcement

could not be admissible in Law except a valid foundation is laid. All in law, a need for an overhaul yet again of the evidence act in view of these protections stares us in the face

[699]However this is frowned at In Nigeria as it is often a means of enriching the Legislators to the detriment of the issue at hand.

[700] Code of Conduct for Law Enforcement Officials (General Assembly resolution 34/169, annex)

cooperation. Due to the complexity and the sensitivity of counter-terrorist operations, it is important for all law enforcement agencies to establish sound mechanisms for governance and leadership, accountability and the protection of integrity.In countering terrorism, the police are required to work closely with the military and intelligence services[701]. There is a risk that this may blur the distinction between the police and the army and contribute to the militarization of the police, and weakens civilian control and oversight of the police. But to do this, the integrity and independence of police need to be protected; the fight against terrorism may lead to the politicization of the police, which could undermine its legitimacy and credibility in the eyes of the population. The police need to carry out their function in a non-arbitrary and impartial manner, without political interference. While that requires a degree of operational independence, safeguards are important because too much autonomy may lead to abuses of authority. To maintain that delicate balance, the police need to operate in an environment of transparency and must be held accountable for their actions.

Some of these roles include the following:

6.2.2:**Methods of Investigation**

The clandestine nature of terrorist conspiracies and activities and the typical mode of operation of terrorist organizations require specialized investigation methods. Several international and regional human rights bodies have highlighted the risk of discrimination presented by some law enforcement methods used to counter terrorism. It is noteworthy to say that the investigative technique of the Nigerian Police is nothing to write home about. It is not as if the Nigerian Police do not have the skills or qualification but then the issue is the will of the person involved and the availability of the means of discharging their functions vis a viz the increasing technology driven nature of crimes and investigations. Generally

[701]Section 40(c) of the Terrorist Prevention Act as amended

speaking, the use of police investigation methods that may compromise the rights of individuals can be justified only on reasonable grounds based on the principles of necessity and proportionality. Yet there are some issues pertaining to the investigative methods of the Nigerian Police and other security agencies that cannot be justified.

The weakness or strength of the investigating techniques of the Police can be seen vividly through some of these measures:

i. Offender Profiling and Group Targeting

In conducting counter-terrorism investigations, it is often difficult to identify potential suspects and since certain communities can be associated with terrorist activities, the police may be tempted to focus on those particular communities in order to prevent terrorist incidents from taking place. However, racial/tribal profiling or profiling on the basis of religion is not a legitimate response to those challenges[702]. The Committee on the Elimination of Racial Discrimination has called on States to "ensure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent or national or ethnic origin and that non-citizen are not subjected to racial or ethnic profiling or stereotyping."[703]

It is not in doubt that profiles based on factors that are statistically proven to correlate with certain criminal conduct may be effective tools when law enforcement resources are limited, the use of broad profiles that reflect unexamined generalizations or stereotypes is extremely problematic. Profiling based on stereotypical assumptions that persons of a certain tribe,

[702] "No difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures."*Timishev v Russia*, European Court of Human Rights, 13 December 2005, para. 42.This is also evident in the way innocent Fulanis are being killed in the guise of Fulani herdsmen responsible for the killings in Nassarawa State

[703] General recommendation XXX on discrimination against non-citizens, adopted by the Committee on the Elimination of Racial Discrimination at its sixty-fifth session (Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 18 (A/59/18), chap. VIII, para. 10). See also Section 42 of the Constitution.

national or ethnic origin or religion are particularly likely to commit crime may lead to practices that are incompatible with the principle of non-discrimination[704]. The practice of terrorist profiling raises concerns with respect to a number of human rights. Profiling based on stereotypical assumptions may bolster sentiments of hostility and xenophobia in the general public towards persons of certain ethnic or religious backgrounds. Profiling and screening solely on the basis of religious or racial characteristics is deemed discriminatory and inappropriate. To prevent racial and other unjustifiable profiling practices, it may be necessary for a State to adopt legislation to specifically prohibit it. National legislation prohibiting racial discrimination should specifically cover the activity of the police. It may also be useful for a State to review its legislation to determine whether it sufficiently defines reasonable suspicion standards with respect to various police investigation and intervention practices[705].If the law does not already provide a "reasonable suspicion standard", it may be necessary to introduce one whereby powers relating to control, surveillance and investigation activities can be exercised only on the basis of a suspicion that is founded on objective criteria.[706]

It may be necessary, when there are credible reports of unacceptable profiling and targeting practices, to conduct an audit of police practices to review policies, training curricula, supervisory methods and operational protocols. When administrative mechanisms to carry out such an audit do not exist, it may be necessary to establish an independent authority to carry out such a review. Police practices can be improved by providing training on racial profiling and existing standards establishing a "reasonable suspicion". It is also essential to ensure effective investigations by an independent body or a civilian oversight mechanism of alleged cases of racial discrimination or racially motivated misconduct by the police, and to

[704] Example the suspicion that an average Hausa Moslem man is a Boko Haram member is wrong.
[705]This is nowhere contained in any of our Laws
[706]There is therefore need to introduce such into our Terrorist Prevention Act of 2011 as amended.

ensure that the perpetrators of those acts are adequately punished. Finally, measures must be taken to make it possible and safe for victims of racial and other forms of unacceptable profiling and discrimination to report those incidents to the authorities[707].

ii. **Gathering Intelligence**

The acquisition, analysis and use of information about terrorist groups are essential to prevent acts of terrorism. Information may be collected through open and covert sources and may be obtained from other police agencies at home or abroad[708]. Information-gathering can be improved through technology[709] but also by cultivating relationships with other stakeholders, such as the community, other law enforcement agencies, intelligence agencies and foreign Governments. Intelligence-gathering activities, in particular covert surveillance, must be regulated by law, monitored by independent agencies and subject to judicial review[710]. Any act that impacts on a person's privacy must be prescribed and regulated by law. The mode of gathering information by the Nigeria Police is outdated and obnoxious. Most of the information obtained are obtained by torture or through other inhuman treatment. The technological nature of information gathering is still a mirage for the Nigeria security agencies. It is noteworthy to state that any search, surveillance or data collection related to an individual must be authorized by law. Laws authorizing interference with personal privacy must specify in detail the precise circumstances in which the interference is

[707] Specific recommendations are offered by the European Commission against Racism and Intolerance in its ECRI General Policy Recommendation No. 11 on combating racism and racial discrimination in policing, adopted on 29 June 2007. The Present Inspector General of Police is determined to revitalize the Police force in Nigeria to make it effective and society friendly. Hence, there is an increased inquiry into the activities of some senior police officers especially with regards to unprofessional conducts.

[708] Section 1A(2) of the Terrorism Prevention Act as amended

[709] Section 29 as amended

[710] Section 26- 29 of the Terrorism Prevention Act as amended gave the right for information gathering. It also empowers the Attorney General to make applications to a Judge ex parte for interception order. The fear is that this may affect the privacy rights of an individual.

to be permitted and must not be implemented in a discriminatory manner.Article 17 of the International Covenant on Civil and Political Rights prohibits States parties from interfering with the privacy of those within the State's jurisdiction, and it requires States to protect those persons by law against arbitrary or unlawful interference with their privacy[711]. Recent counter-terrorism strategies have included efforts to collect, analyze and use information about large numbers of individuals.[712] Many States have significantly expanded the surveillance powers and capacity of their law enforcement agencies including wiretapping, use of tracking devices and monitoring of Internet communications.[713] Those authorized law enforcement practices have the potential to limit the privacy of the individuals concerned. Their use also raises questions about how the data collected are to be protected, stored and, when necessary, shared with other agencies.When personal information is collected, it must be protected against unlawful or arbitrary access, disclosure or use. There should be provisions for individuals to ascertain whether their personal data are stored for law enforcement purposes and to be able to rectify or remove incorrect data.

iii. Intelligence Systems and the Sharing of Information

The nature of terrorist threats necessitates the gathering and analysis of information that is not confined by territorial borders or organizational structure.[714] The sharing of information and intelligence between security and law enforcement agencies is an important means of preventing terrorist acts and other major criminal offences.[715] Efforts to increase such exchanges have produced some positive results but have also shown that, in many instances, the domestic and international legal frameworks governing such exchanges are

[711]Section 37 of the Constitution. See also *Ibrahim v C.O.P* 2008 1 W.R.N, 30

[712]There has been a rash of instituting many biometric systems for ease of identification and checks on the citizens in Nigeria recently

[713]See section 29 as amended supra

[714] Eveline R. Hertzberger, *Counter-Terrorism Intelligence Cooperation in the European Union*, (Turin: UNICRI, 2007), p. 27.

[715]See Part IV of the Terrorism Prevention Act, 2011 as amended

inadequate[716]. It is right to state that most of the existing international instruments make provisions for mutual assistance between countries. In that regards then there has been some progress being made at the bilateral, sub-regional and regional levels to ensure that current exchange mechanisms meet the needs of judicial and law enforcement cooperation, while providing the necessary safeguards for the protection of personal data and individual privacy rights. There is also the need to refer to the 2006 Council of the European Union framework decision on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union,[717] which lays out the basic principles for the effective and expeditious exchange of information and intelligence for the purpose of conducting criminal investigations or criminal intelligence operations. Each State has a responsibility to provide the legal and regulatory frameworks that will guide these exchanges across systems and to ensure that they do not compromise the integrity of the criminal justice process or the criminal justice agencies involved.

iv. **Use of Criminal Informants and Accomplices**

When attempting to break up criminal and terrorist conspiracies and prevent terrorist crimes, the police often need to rely on the testimonies of co-defendants and accomplices willing to cooperate and provide evidence against their former associates.[718] Although some may argue that there is insufficient evidence about the effectiveness of that particular approach,[719]

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[716]Reference here will be made to the recent arrest of Aminu Sadiq Ogwuche, the alleged mastermind of the Nyanya bombing and the initial hiccups it suffered as a result of ambiguities in the existing extradition treaties. Also there has been wide consultations with foreign countries on the abducted chibok girls but none of the countries involved was willing to share the information obtained with Nigeria.

[717] Council of the European Union framework decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the member States of theEuropean Union (Official Journal of the European Union, L 386, 29 December 2006).

[718]Section 198 of the Evidence Act; Council of Europe, Combating Organised Crime: Best Practice Surveys of the Council of Europe, p. 22; A J Schreiber, 'Dealing with the Devil: an examination of the FBI's troubled relationship with its confidential informants', (2001) 34(4) *Columbia Journal of Law and Social Problems*, 301-368.

[719] N R Fyfe & J Sheptycki, *Facilitating Witness Co-operation in Organised Crime Cases: An International Review, Home* Office Online Report 27/0 (London, Home Office, 2005); also N R Fyfe & J Sheptycki,

the use of criminal informants and accomplices is usually considered essential to the successful detection and prosecution of terrorism and organized crime. As a result, various international agreements and conventions actively promote these methods.[720] National laws are sometimes also necessary to authorize these practices and to determine how and when evidence obtained through such sources can be used against the accused. Due to the importance of "accomplice testimony" in cases involving terrorism, plea bargaining and offers of immunity or leniency often play a crucial role in the gathering of evidence and the successful prosecution of these cases[721]. Therefore the way and manner such information is obtained in Nigeria is unclear. It is expected that such information should be sought through the procedure of Law

v. **Use of Modern Investigation Techniques**

The effectiveness of techniques such as electronic surveillance, undercover operations, forensic sciences and controlled deliveries cannot be overemphasized. Those techniques are especially useful in dealing with sophisticated groups because of the inherent difficulties and dangers involved in gaining access to information and gathering intelligence on their operations and as well the analysis of the information gathered. Technological advances such as cross-border surveillance using satellites, unmanned drones and the interception of telephone conversations through satellite connections make cross-border investigation possible without the physical presence of a foreign investigating officer. It also makes terrorist investigation possible without so much risk on the lives of the personnel involved.

'International trends in the facilitation of witness co-operation in organized crime cases*',(*2006) 9(3)*European Journal ofCriminology*, 319-355.

[720]The Organized Crime Convention and Council of Europe recommendation Rec(2001)11 of the Committee of Ministers to member States concerning guiding principles on the fight against organized crime, adopted by the Committee of Ministers on 19 September 2001. One may also see Section 1A (3 and 4) of the Terrorism Prevention Act as amended for functions of security agencies charged with the power to investigate terrorist activities which may include the method of agent provocateur.

[721]Section 32(4) as amended provided for plea bargaining where the accused facilitated the identification of other accused persons and their sponsors

There is also the need to further the extent of the Nation's Forensic Science Laboratories. It is a failure to note that the country has only one of such Laboratories and depended on foreigners to achieve the aim of such laboratories. Domestic arrangements and legislation relating to these techniques must be reviewed to reflect technological developments, taking full account of any human rights implications and the need to facilitate international cooperation. Wherever special investigation techniques have the potential to interfere with guaranteed rights, they must be subject to effective control by bodies independent of the person or agency implementing them.New technological developments and modern methods of investigation have created new issues with respect to the legitimacy of these methods and the protection of the rights of the individuals involved in the course of an investigation. The police, prosecutors and the courts have a duty to ensure that these methods are used lawfully and in accordance with applicable human rights standards. Prosecutors must be very vigilant in their use of evidence obtained through such "modern" methods.[722] The legal basis for cooperation in criminal matters for officers acting under cover or under an assumed identity is not always strong. For prosecutors and courts, there are questions about the admissibility of evidence collected in other States through methods that are not necessarily acceptable in their own State and about the use of evidence obtained by officials in another State in violation of the law of that State. The verification of the legitimacy of evidence obtained as a result of international police cooperation is certainly not without procedural and practical difficulties and this also requires effective legislation to ensure its admissibility.

6.2.3: **Arrest and Detention**

Depriving individuals of their personal liberty is one of the most common means of controlling and preventing crime and terrorism. This is often times referred to as arrest or detention. The terms "arrest" and "detention" are often used interchangeably, but they refer

[722]Section 14 of the Evidence Act 2011

to different concepts. According to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,[723] an "arrest" refers to the act of apprehending a person for the alleged commission of an offence or by the action of an authority. The arrest, therefore, may take place on criminal grounds and be reviewed by a judge, or may be administratively ordered. Arrested persons are often, but not necessarily, detained. The lawful application of the powers to arrest and detain must be restricted by law to specific conditions that are described clearly in the law and for which subsequent accountability is required. The key human rights principles that must guide the lawful application of the powers to arrest and detain are the following:

> The arrest and the detention must be lawful and not arbitrary; The arrest and detention must be in accordance with procedures established by law; Individuals who have been arrested or are being detained must be treated in accordance with the principle of presumption of innocence and should be detained separately from convicted persons; Specific and precise time limits should be set by law for the prompt appearance of the arrested/detained person before a judicial authority; The arrested/detained person must have access to legal counsel and must be able to communicate with counsel in full confidentiality; The arrested/detained person must be informed of the reasons for the arrest/ detention, the charges against him/her, in a language that he or she can understand; The arrested/detained person must be informed of his/her rights, including the right to legal counsel; The date, time and reason for the arrest, the identity of the person arrested or detained, the identity of the person(s) who performed the arrest and the time and date of the person's first appearance before a judicial authority must all be duly recorded; the

[723] General Assembly resolution 43/173, annex.

arrested/detained person has the right to access to the outside world;The arrested/detained person has the right to take proceedings before a court, in order for the court to decide on the lawfulness of the arrest and/or the detention.[724]

Arrest on the basis of ethnic profiling contradicts the principle that an arrest should never be arbitrary. The rejection of arbitrariness implies that someone should not be arrested or stopped or searched, for discriminatory reasons.[725]

Article 9, paragraph 3, of the International Covenant on Civil and Political Rights requires that, in criminal cases, any person arrested or detained has to be brought promptly before a judge or other officer authorized by law to exercise judicial power[726]. The person who is being arrested is entitled to take proceedings before a court in order for that court to decide without delay on the lawfulness of the arrest/detention and to order the release of that person if the detention is unlawful.

A person who is arrested is entitled to be informed of his or her rights, to know what he/she is being accused of, and to consult with counsel immediately following arrest[727]. In the case of a foreign national, the universal anti-terrorism conventions and protocols and the Vienna

[724]Section 35 of the Constitution, *Onyirioha v IGP*[2009] 3 NWLR (pt 1128)342, *Dokubo Asari v FRN*[2007] 12 NWLR (pt 1048)320

[725] The "reasonableness" of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention "[H]aving a "reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed theoffence. What may be regarded as "reasonable" will, however, depend upon all the circumstances. In this respect, terrorist crime falls into a special category. Because of the attendant risk of loss of life and human suffering, the police are obliged to act with utmost urgency in following up all information, including information from secret sources. Further, the police may frequently have to arrest a suspected terrorist on the basis of information which isreliable but which cannot, without putting in jeopardy the source of the information, be revealed to the suspect or produced in court to support a charge." *Fox, Campbell and Hartley v. the United Kingdom*,European Court of Human Rights, 30 August 1990, paragraphs 32 and 34.

[726]Section 35(4)

[727]Section 36 CFRN as amended

Convention on Consular Relations[728] all require that the person has the right to communicate with and be visited by a representative of the State of which he or she is a national. In the case of a stateless person, the person has the right to communicate with the International Committee of the Red Cross and be visited by a representative of the State in whose territory that person habitually resides and to be informed of his or her rights.[729]

Following an arrest, individuals are frequently detained in police detention facilities. In such cases, the police have an obligation to ensure the safety and health of those individuals. The police must also ensure that the individual is not, while in its custody, subjected to torture or other cruel, inhuman or degrading treatment or punishment.[730]It is suggested that Nigeria will find it necessary to carefully review her policies, operational procedures, policy directives and training programmes related to police practices regarding arrest and temporary detention of suspects.

6.2.4: **Interrogation of Suspects**

The interrogation of a suspect is an investigative method to collect information that can further the investigation or be used as evidence at the trial. The use of the method must be guided by the principle of the presumption of innocence. The right to remain silent is inherent in the presumption of innocence.[731] Furthermore, article 14, paragraph 3 (g) of the

[728] United Nations, Treaty Series, vol. 596, No. 8638.

[729]Section 35(2) provides for the right to a legal practitioner to an accused person even if he cannot afford one.

[730] Article 1 of the Convention against Torture "For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." See also Section 34(1) of the Constitution

[731]Section 35(2) of the Constitution

International Covenant on Civil and Political Rights states that everyone is entitled "not to be compelled to testify against himself or to confess guilt".[732]

The Body of Principles, in its principle 23, also provide guidance concerning recording the conduct of the interrogation/interview: "The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law."There is an absolute prohibition of torture and other cruel, inhuman or degrading treatment.

Information obtained through torture or other forms of coercion should not be accepted as evidence in court.[733] Principle 27 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment stipulates that "non-compliance with these principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person".[734] In recent years, the question of torture and ill-treatment has come up in many contexts with respect to counter-terrorism measures. Measures creating discomfort may be unavoidable for custodial purposes and to ensure the safety of the guarding or interrogating personnel. However, if the discomfort is not justified by legitimate custodial and safety needs and its purpose is to overbear the will of the person being interrogated to secure information, it is impermissible under article 14, paragraph 3 (g) of the International Covenant.

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[732]This is also contained in our Evidence Act section 183.Principle 21 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment is also quite explicit:"1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any another person."2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgment."

[733]But ourSection 14 of the Evidence Act 2011seems to suggest otherwise.

[734]There is such controversy in our Evidence Act pertaining to such admissibility of wrongly obtained evidence. The Court is expected to determine whether to admit such evidence or not.

6.2.5: **Preventing Obstructions of Justice**

Various forms of obstruction of justice can hinder the efforts of the justice system to investigate and prosecute terrorist offences. Obstruction can include witness tampering and intimidation,[735]and intimidation of justice officials[736]. Measures must be put in place to prevent all forms of obstruction of justice and to deal severely with all attempts to obstruct the criminal justice process.[737] The particular situation of vulnerable groups and communities within a society requires attention. These groups can become subject to community-wide intimidation by terrorist and criminal groups. It is therefore important to address this kind of intimidation in order to prevent terrorism. Broader strategies are often required to protect whole communities against intimidation and retaliation by terrorist organizations and their sympathizers[738]. The issue of community intimidation,[739] which is often related to various forms of discrimination, must be approached from a broad perspective. The communities that are targeted, intimidated and exploited by terrorist groups must feel safe enough to cooperate with the authorities. Members of such communities must believe that they will not be left on their own should they muster the courage to inform the authorities. Above all, it is important to ensure that counter-terrorism practices do not render these communities even more vulnerable to intimidation and coercion by radical or terrorist groups.Community-wide intimidation involves "acts that are intended to create a general sense of fear and an attitude of non-cooperation with police and prosecutors within a

[735] S Roadcap, 'Obstruction of justice', (2004) 41(2)*American Criminal Law Review*, 911-945.
[736]Sections 23 and 24 of the Terrorism Prevention Act as amended
[737]Section 8 of the Terrorism Prevention Act of 2011 made specific provisions for obstruction of Terrorism Investigation and criminalized it with imprisonment for 10 years
[738]Reference here should be made to the Chibok community in Borno State who are now so scared to live within the community
[739] K M Healey, 'Victim and witness intimidation: new developments and emerging responses', NIJ Research in Action (Washington, D.C., National Institute of Justice, October 1995); N R Fyfe& H McKay, 'Desperately seeking safety**'**, (2000)40(4)*British Journal of Criminology*, 675-691; N R Fyfe, *Protecting Intimidated Witnesses*, (Hampshire: Ashgate, 2001) p. 18.

particular community"[740]. This can become particularly important for some communities when terrorist supporters attempt to compromise potential witnesses and expose them to potential prosecution for associating with terrorist elements.[741] Fear of reprisal and fear of ostracism play a role. Community-wide intimidation is especially frustrating for the police and prosecutors because, while no actionable threat is ever made in a given case, witnesses and victims are still effectively discouraged from testifying[742].

Intimidation of witnesses or justice officials can be overt or implicit. The risk of collaborating with the justice system is heightened by the power wielded by those involved in terrorist activities, their ability to intimidate or suppress the witnesses and informants and the relative inability of the justice system to offer full protection to those witnesses.

The various types of obstruction of justice must be clearly defined and criminalized in law and include provisions for severe punishment. The police have a duty to investigate and help prosecute all forms of obstructions of justice[743]. These offences must be taken seriously, as they jeopardize the integrity of criminal justice process as a whole.

6.2.6: **Gathering of Financial Information**

The gathering of financial information to detect financial networks linked to terrorist groups and their investments, including exchanges of information between law enforcement and regulatory bodies, is a part of all strategic approaches to combating terrorism[744]. Establishing national financial intelligence units is part of the capacity-building initiative that must be

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[740] K. Dedel, Witness Intimidation, Problem-Oriented Guides for Police, Problem-Specific Guides Series, No. 42 (Washington, D.C., United States Department of Justice, Office of Community Oriented Policing Services, 2006), p. 4.

[741] Y Dandurand and V Chin, 'Human security objectives and the fight against transnational organized crime: The Current Stage in Transnational Organized Crime: World and Japan', Kan Ueda, (ed), *Human Security and Transnational Organized Crime Series*,(Kyoto: Nihon Hyouronsya, 2007) vol. 2, pp. 149-171.

[742] P Finn and K M Healey, 'Preventing Gang- and Drug-related Witness Intimidation', *National Institute of Justice Issues and Practices* (Washington, D.C., United States Department of Justice, Office of Justice Programs, 1996), p. 4.

[743]This has now been incorporated under our law. Sections 23 and 24 as amended

[744]Section 14 of the Terrorism Prevention Act of 2011 as amended

encouraged. The successful investigation and prosecution of terrorism financing require the quick identification of relevant information from banks, other financial institutions and commercial or other businesses.[745] The tracing and confiscation of assets, both within a jurisdiction and internationally, are made difficult by the complexity of the banking and financial sector. Technological advances are complicating those efforts. Since many such transactions are transnational, changes to bilateral treaties or national legal frameworks are required to allow for the lawful and expeditious exchange of that information across borders between prosecution services or between other law enforcement authorities.[746] In that regard, the existence of unregulated offshore centres presents some practical problems from the point of view of international cooperation among prosecution services. Difficulties are frequently encountered in dealing with the differences in company law and other regulatory norms involved. There are also issues with cyber-payments, "virtual banks" operating in under-regulated offshore jurisdictions and shell companies operating outside of the territory of the offshore centres. The international community has acted on many fronts to respond to the growing complexity and the international nature of the rapidly evolving methods of money-laundering and financing of terrorism. The emphasis has been on promoting international cooperation and establishing a coordinated and effective international regime to combat money laundering and counter financing of terrorism of which Nigeria has legislated upon. The specific obligations of countries in relation to that regime vary depending on their adherence to various treaties. Those obligations are quite complex and can overwhelm countries with limited resources and relatively underdeveloped financial, legal and regulatory institutions. Within that global regime, because of the relative ease with which

[745] This is the purport of the new Anti-Money Laundering Act of 2011 (Sections 2 and 6). It should be noted also that the Nigeria Police has a NFIU unit and the EFCC Act also made provisions for this. Banks and other financial institutions are indeed mandated to report all shady transactions in their bank. It is also the reason why the recent KYC programme was introduced in all the banks.

[746] This comes in the way of mutual assistance and information sharing with various countries. Thus countries are expected to work our information sharing formula with other countries.

proceeds of crime and terrorist funds can be moved around the world, countries with weak mechanisms to counter money-laundering and counter the financing of terrorism are left especially vulnerable to criminal activities. Nigeria must now have an effective national regime in order to avoid having its financial institutions and businesses targeted by money-launderers, terrorist supporters and other criminals. It is therefore in this regards that Nigeria is now acclaimed to have one of the strongest Laws in the area of Money Laundering going by the Anti-Money Laundering Act of 2011 but then the same problem affects the law as its enforcement is halfhearted.

Participants at the Organization for Security and Cooperation in Europe Expert Workshop on Enhancing Legal Cooperation in Criminal Matters Related to Terrorism suggested the adoption of a non-conviction-based civil forfeiture regime as well as direct methods of execution of mutual legal assistance requests for restraining terrorist assets[747].

A number of emerging practices in this area are worth considering for strengthening the capacity of the police to intercept criminal assets and to prevent the financing of terrorism,[748] including the following: The use of investigative strategies that target the assets of organized crime and terrorist groups through interconnected financial investigations; The development of arrangements and a capacity to engage in active and ongoing exchanges of relevant financial intelligence information and analyses; Initiating confiscation or forfeiture of assets proceedings that are independent from other criminal proceedings; Establishing methods to mitigate the onus of proof regarding the illicit origin of assets; Entering into bilateral or other agreements for sharing assets among countries involved in the tracing, freezing and

[747] Organization for Security and Cooperation in Europe, Overview of the OSCE Expert Workshop on Enhancing Legal Cooperation in Criminal Matters Relating to Terrorism, Vienna, April 2005.
[748] Group of Eight, "G8 best practice principles on tracing, freezing and confiscation of assets", 2004, available at www.usdoj.gov/criminal/cybercrime/g82004/G8_Best_Practices_on_Tracing.pdf.

confiscation of assets originating from organized crime activities.[749] It is suggested that if the Police adopts these measures, a full effect will be given to the existing legislation.

6.2.7: **Community Engagement**

The role of the police in preventing terrorism can be greatly supported by the quality of the relationship it maintains with the local population and with the various ethnic and cultural communities involved. Good relationships can lead to cooperation.[750] A variety of methods can be used to help the police improve its relations with ethnic and other potentially vulnerable community groups. Those methods include recruiting members of underrepresented minority groups in the police and ensuring that they have equal opportunities for progression in their careers; training the police in cultural diversity and in policing a diverse society; establishing frameworks for dialogue and cooperation between the police and members of minority groups; and giving police access to interpreters and others who can facilitate communication between the police and members of minority groups. In some cases, the police can actively engage in a dialogue with various community groups or discuss with them their role in the prevention of terrorism. Many community groups will welcome the opportunity to share with the police some of their concerns about the perceived detrimental impact of various counter-terrorism measures on their lives. The media can also play an important role in helping the police communicate more honestly and

[749]One can say in this regard that the Nigeria nation has made spirited efforts towards this but the remaining issue is that there are other means of money laundering not provided for in the Laws. Off shore accounts are apparently an area Nigeria has not made any effort to trace illegal wealth. The relationship between money laundering and terrorism is that it is from this illegal wealth that is lying fallow that funds are then remitted to terrorist organization to achieve their evil purpose. It is therefore suggested that a law should be enacted to include funds outside the country working in tandem with other countries for effective checks on various funds lying fallow owned by individuals or organizations suspected of having terrorist links. See Section 6 of the Anti-Money Laundering Act of 2011

[750]This indeed was one of the major aims of the former IGP M.D Abubakar. The Police according to him require a cordial relationship for in doing so, they may be able to get information from the public. Unfortunately there is an avowed hatred and dislike from the populace against the police. Nevertheless, we ought to understand that the Police are humans as we are and cannot be expected to perform magic in the absence of useful information in the area of crime detection. The present IGP Suleiman Abba has harped once more on the importance of this.

more effectively with the public at large and with minority groups. The police must develop good relationships with the media and must communicate with the media in a manner that does not perpetuate hostility or prejudice towards members of certain groups. The establishment of community policing may also be introduced to effectively check crimes within the community. It has been suggested that Policemen from a particular terrain should be sent to such terrain to fight crime as against the present habit of sending foreigners to another terrain to fight crime. The Police should also seek the cooperation of the traditional rulers and presidents of town unions for effective policing and identification of terrorist's network before they do much harm. To benefit from all these, the Police must ensure they respect the rights of the individuals and avoid intimidation and harassment of citizens.

6.2.8: **International Law Enforcement Cooperation**

Due to the dynamic nature of terrorism and transnational crime, Nigeria must constantly attune her cooperation strategies in order to achieve integrated, cooperative and strategic approaches to the investigation and prosecution of crimes across borders. International cooperation in all relevant fields is indispensable in the fight against terrorism. The most important form of international cooperation is arguably that which takes place between law enforcement agencies.[751] Such international cooperation requires national efforts to comply with new international standards, encourage convergence and compatibility of national legislation, introduce complex procedural reforms, generally develop a much greater investigative capacity at the national level and strengthen the capacity to cooperate at the international level.The global instruments against terrorism provide a strong basis for international law enforcement cooperation and suggest some of the elements that must be

[751] Adel Maged, 'International legal cooperation: an essential tool in the war against terrorism', in W P.Heere (ed.)*Terrorism and the Military: International Legal Implications*,(The Hague: Asser Press, 2003)p. 157.

developed as part of a national capacity for effective investigation and prosecution of such crimes.

Nevertheless, there are some challenges apparent in such international cooperation. Such challenges include investigations. In cases involving transnational offences, States with jurisdiction need to coordinate their respective investigations in order to effectively target terrorist groups and their international activities. Coordination of cross-border investigations and prosecutions is still rare and tends to require considerable preparation through formal channels. The establishment of joint investigative teams represents a major new trend in the development of an effective capacity to investigate and prosecute transnational crimes, including terrorism. It offers one of the most promising new forms of international cooperation against organized crime, corruption and terrorism, even though legal issues, as well as issues of attitude and trust among law enforcement agencies, or even procedural questions still require close attention. For purposes of such joint investigative teams, States must put in place the required legal framework, both at the national and international levels. Once a relationship of confidence and trust has been established between law enforcement agencies, they can engage in ongoing exchanges of information and intelligence. Several agencies have entered into formal information- and intelligence-sharing agreements and this some did within the framework of international structures such as INTERPOL[752]. This notwithstanding, some practical problems in the organization of joint investigations such as the lack of common standards and accepted practices, the actual supervision of the investigation, the prevention of intelligence leaks and the absence of mechanisms for quickly solving these problems manifest.[753] Still, when a case requires international cooperation, national differences in the law regulating police powers, the use of special

[752]Nigeria is a member of INTERPOL

[753] See T. Schalken, 'On joint investigation teams, Europol and supervision of their joint actions', (2002) 10(1)*European Journal of Crime, Criminal Law and Criminal Justice,* 70-82.

investigation techniques, the use of collaborators and informants or the admissibility of certain types of evidence can seriously hinder law enforcement collaboration. It is therefore suggested that the efforts already made, through the implementation of the Organized Crime Convention and other international cooperation initiatives to identify such obstacles and remedy the situation are relevant to the prevention of terrorist acts, and their use by law enforcement and intelligence agencies within the framework of ongoing cooperation has drawn some close attention.[754]

Another challenge is in the extradition of suspects accused of terrorist offences. Under domestic laws when a suspect flees the country where the act of terrorism was perpetuated, it certainly becomes difficult to get him to face justice. This could be resolved by entering into mutual treaties bordering on extradition once the conditions have been met. Such conditions must be easy and capable of being fulfilled without much hassle[755]. This way fugitive will know that they cannot run from their crimes.

Yet another challenge is that of confiscation of assets. Confiscations within a jurisdiction and international confiscations are made difficult by the complexities of the banking and financial sector and by technological advances. There are some International Instruments that make for effective confiscation of terrorists funds These international legal instruments[756] are meant to ensure that each party adopts such legislative and other measures

[754] The European Court of Human Rights has endorsed the use of such techniques in the fi ght against terrorism (Klass and Others v. Germany) and, within the Council of Europe, a draft recommendation of the Committee of Ministers to member States that seeks to promote the use of special investigative techniques in relation to serious crime, including terrorism, is being drafted. See P De Koster, 'Part 1: analytical report', *Terrorism: Special Investigation Techniques* (Strasbourg, Council of Europe Publishing, 2005), pp. 7-43.

[755] Refer once more to the extradition of Aminu Sadiq Ogwuche.

[756] They include The Convention on Psychotropic Substances of 1971, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, the Organized Crime Convention, the Convention against Corruption and the International Convention for the Suppression of the Financing of Terrorism contain provisions on the tracing, freezing, seizure and confiscation of instrumentalities and proceeds of crime. Other international efforts to counter money-laundering and the financing of terrorism are based on the FATF Forty Recommendations on Money-Laundering and Nine Special Recommendations on Terrorist Financing and the Basel Committee on Banking Supervision.

as may be necessary to trace, identify, freeze, seize and confiscate criminal assets, manage those assets and extend the widest possible cooperation to other States parties in relation to tracing, freezing, seizing or confiscating proceeds of crime.[757] Cooperating States must also possess a similar capability with respect to assets of licit or illicit origin that are used or are to be used for the financing of terrorism.[758] The implementation of effective measures to counter the financing of terrorism remains a priority for the nation. The International Convention for the Suppression of the Financing of Terrorism requires States parties to engage in wide-ranging cooperation with other States parties and to provide them with legal assistance in the matters covered by the Convention and such international cooperation can also be substantially facilitated by the development of equitable arrangements for the sharing of forfeited assets and confiscated proceeds of crime. The Organized Crime Convention and the Convention against Corruption contain provisions in that regard[759].

Still under this issue of international cooperation, there is the issue of information and intelligence exchanging. It is correct to state that existing International Instruments make provision for that, yet it is a problematic area in view of the fact that there is obviously an absence of clear channels of communication and where the channels exist their inefficiency prevents the timely exchange of both operational information and general information on criminal networks, trafficking trends and patterns, the extent of known criminal activity in a particular sector and typical *modus operandi*.[760]Some progress has been made at the bilateral, sub-regional and regional levels to ensure that current exchange mechanisms fulfill

[757]This is the purport of Section 13 of the Anti-Money Laundering Law 2011

[758]This ostensibly is what Section 14 of the Terrorism Prevention Act as amended seeks to fight though not in a detailed manner.

[759] United Nations Convention against Transnational Organized Crime, article 14; United Nations Convention against Corruption, chapter V, articles 51-59. It is suggested that this provision should be brought home in our Terrorism Prevention Act of 2011

[760]Note that the existing Terrorism Prevention Act of 2011 provides for sharing of information but then the process involved may even affect the investigation of the crime knowing the bureaucratic bottleneck in existence within Nigeria public service. See Section 23as amended

the requirements for law enforcement cooperation while providing all the necessary safeguards for the protection of personal data and individual privacy rights.[761]

Again, there is also the need for International cooperation in the area of witness protection. This is because many terrorist groups operate across borders, the threat that they represent to witnesses and collaborators of justice is not confined to national borders. Physical and psychological intimidation of witnesses and their relatives can take place in different jurisdictions. Furthermore, at times, witnesses may need to move to another country or return to their own country during lengthy criminal proceedings. To ensure greater international cooperation in offering effective witness protection at home or across borders, law enforcement and prosecution agencies often need to develop arrangements with other jurisdictions for the safe examination of witnesses at risk of intimidation or retaliation. Developing a capacity to protect witnesses and even relocate them in another country must often be considered.[762] Article 24, paragraph 3, of the Organized Crime Convention requires States parties to consider entering into agreements or arrangements with other States for the relocation of witnesses. The objective is to develop such instruments while preserving an acceptable balance between the protection measures and the human rights and fundamental freedoms of all parties involved.

6.2.9: **Extraordinary Measures**

[761] Section 23(1b) Terrorism prevention Act as amended. See also Council of Europe, Recommendation CM/Rec(2007)1 of the Committee of Ministers to member Statesregarding cooperation against terrorism between the Council of Europe and its member States, and theInternational Criminal Police Organization (ICPO-Interpol), adopted by the Committee of Ministers on18 January 2007 which recommended that Member States use, in accordance with national law, INTERPOL's three main counter-terrorism tools: a global police communications system called the "I-24/7"; databases containing essential police information (including names, stolen vehicles, stolen travel documents and DNA and fingerprint data); and real-time operational support for police services via the command and coordination centre at the General Secretariat

[762]This is missing in our Terrorism Prevention Act as amended. See also Sections 23 and 24 of the said Act

There is a very vital need to ensure that all measures taken by law enforcement agencies to combat terrorism must be lawful. In that regard, some specific law enforcement activities against terrorism have raised serious concerns and human rights issues. These are called "exceptional measures". These so-called "exceptional measures" have highlighted the need to ensure that, in adopting measures aimed at preventing and controlling acts of terrorism, countries comply to the rule of law, including the basic principles, standards and obligations of criminal and Constitutional law that define the boundaries of permissible and legitimate actions against terrorism and the various forms of serious crime in which terrorists and other criminal groups are involved. It is imperative to state that the need to take protective measures against the phenomenon of suicide bombers has driven certain countries to tolerate exceptions to internationally recognized human rights.[763] The country shall therefore avoid all such illegal measures and where such wrongful acts have taken place, the country must undertake prompt and effective measures to investigate those occurrences, prosecute those responsible for the violation and ensure that the victims are adequately compensated.The Code of Conduct for Law Enforcement Officials, adopted by the General Assembly in its resolution 34/169 of 17 December 1979, and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,[764] adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, succinctly stress the limited role

[763]The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism expressed concern about legal strategies employed by many States to extend the powers of policemen to take action against potential suicide bombers. He reiterated that the use of lethal force by law enforcement officers must be regulated within the framework of human rights law and its strict standard of necessity. The "defence of necessity" that is invoked by law enforcement officials applies only when there is an imminent danger.In several of his communications with Governments, the Special Rapporteur on extrajudicial, summary or arbitrary executions has drawn attention to the increasing reluctance to respect the right to life as a non-derogable human right.In his view, the rhetoric of "shoot-to-kill" serves only to displace clear legal standards with a vaguely defined licence to kill, risking confusion among law enforcement officers, endangering innocent persons and rationalizing mistakes, while avoiding the genuinely difficult challenges that are posed by the relevant threat.

[764] Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat (United Nations publication, Sales No. E.91.IV.2),
chap. I, sect. B.2, annex.

of lethal force in all enforcement operations[765]. Principle 9 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials states that in any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life. These instruments when fully enforced are adequate with respect to the prevention of suicide attacks as a form of terrorism[766]. There is also the issue of targeted killings. It is imperative to state here that the right to life is non-derogable, and lethal force taken in the context of counter-terrorism must be necessary and proportional. The Human Rights Commission has expressed concerns with respect to the alleged use of the so-called "targeted killings" of suspected terrorists[767]. In some cases, the practice appears to have been used in part as a deterrent or punishment[768]. In a case where an extra-legal or arbitrary execution is suspected, there must be a thorough, prompt and impartial investigation[769]. The purpose of such an investigation is to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death. It must include an adequate autopsy, as well as the collection and analysis of all physical and documentary evidence and statements from witnesses. Furthermore, governments must ensure that persons identified by the investigation as having participated in extra-legal,

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[765]The Police Act Cap P 19 LFN also provided for the rules of engagement on when a policeman may use his weapon to cause death. However, most policemen are unaware of the rules as they believe a criminal should be eliminated upon arrest and some of them have gone ahead to do such.

[766] Principle 10 of the Basic Principles states the following: Law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.

[767] Edward J Flynn, 'Counter-terrorism and human rights: the view from the United Nations',(2005) 1 *European Human Rights Law Review*, 29-49.

[768] This raises issues related to article 6, paragraph 1, of the International Covenant on Civil and Political Rights, which states the following: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." Still Section 33 of the Constitution provides for the right to life. However, the second arm of the Section that is subsection 2, a, b and c could be used as a leeway for justifying such killings. This could be seen in the way and manners the security agencies have been eliminating people in the guise of terrorist. A clear case is the killing of a finance Director in the Ministry of Finance in Kaduna by the Police alleging that he drove in a violent manner giving rise to their suspicion that he was a suicide bomber. He was then shot and killed and nothing happened to those who committed that act of murder.

[769]This is rarely done in Nigeria. Police killings are always almost swept under the carpet

arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments must either bring such persons to justice or cooperate to extradite them to other countries wishing to exercise jurisdiction. This principle applies irrespective of who and where the perpetrators or the victims are, their nationalities, or where the offence was committed[770]. A local enactment is therefore required to effectively cage this monster of extra judicial and or arbitrary killings in the guise of fighting terrorism. The law will not and indeed did not authorize anybody to take the life of another. It is therefore imperative that Law enforcement agencies should be alive to their responsibilities while being exceptionally careful to avoid falling on the wrong side of the Law.

6.3: **Role of Prosecutors**

Another role for the law in the fight against terrorism is the effective prosecution of terrorist offences, wherever they are committed and wherever the perpetrator takes refuge. This is crucial in order to deny safe haven to the perpetrators of such crimes. It is right to state that the primary duty of a lawyer engaged in public prosecution is not to convict but to see that

[770] Prohibition of extra-legal, arbitrary and summary executions (from the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions) "1. Governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences. Exceptional circumstances including a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of such executions. Such executions shall not be carried out under any circumstances including, but not limited to, situations of internal armed conflict, excessive or illegal use of force by a public official or other person acting in an official capacity or by a person acting at the
instigation, or with the consent or acquiescence of such person, and situations in which deaths occur in custody. This prohibition shall prevail over decrees issued by governmental authority.
"2. In order to prevent extra-legal, arbitrary and summary executions, Governments shall ensure strict control, including a clear chain of command over all officials responsible for apprehension, arrest, detention, custody and imprisonment, as well as those officials authorized by law to use force and fi rearms.
"3. Governments shall prohibit orders from superior officers or public authorities authorizing or inciting other persons to carry out any such extra-legal, arbitrary or summary executions. All persons shall have the right and the duty to defy such orders. Training of law enforcement officials shall emphasize the above provisions.
"4. Effective protection through judicial or other means shall be guaranteed to individuals and groups who are in danger of extra-legal, arbitrary or summary executions, including those who receive death threats."
(Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and
Summary Executions (Economic and Social Council resolution 1989/65, annex) paras. 1-4.)

justice is done[771]. In the case of international or transnational crime and terrorism, this raises the issue of establishing and exercising jurisdictions, the questions of prosecutorial capacity and independence and the issue of the need to address various obstacles to international cooperation in the prosecution of terrorist offences. The role of prosecutors in prosecuting terrorist offences is more or less the same as their role in the prosecution of any criminal offence.[772]The prosecutors are expected to adapt to the new face of crime and then seek to rapidly keep pace with new criminal methods and criminal exploitation of new technologies. This dynamic nature of crimes especially as it affects terrorism reflects the new determination of countries to work more closely with each other to face the growing threats of organized crime, corruption and terrorism[773]. The Prosecutors therefore are expected to have some qualities that will make for effective prosecution. The truth is that where the prosecutors are not strong, the defence will easily overwhelm them knowing that crimes offer much funds for the defence of suspects. Such qualities include:

a.**Independence of the Prosecution**

The basic role of prosecutors varies considerably among legal systems, as does the extent of their power and authority. In particular, prosecutors may play a more or less active role in the actual investigation of crime, depending on national law, and as a result, their respective relationship with the police can vary from country to country. In some jurisdictions, a large proportion of the prosecutions are carried out by police officers.[774]In order to maintain the

[771]Rule 9D Rules of Professional Conduct, *Enahoro v State* 1965 1 ALL NLR 125

[772]Under the extant Criminal Procedure Act or the various Administration of Criminal Justice Laws in force in various states, the prosecutor is mainly either the Police or a Lawyer. Now their function is to effectively and diligently prosecute the cases they have to their logical conclusion by either getting a conviction or an acquittal.

[773] Y Dandurand, 'Strategies and practical measures to strengthen the capacity of prosecution services in dealing with transnational organized crime, terrorism and corruption',(2007) 47(4 &5), *Crime, Law and Social Change* 225-246; Y Dandurand, G Colombo & N Passas, 'Measures and mechanisms to strengthen international cooperation among prosecution services', (2007) 47(4-5) *Crime, Law and Social Change,* 261-289.

[774]As is the case in Nigeria

integrity of the prosecution function and uphold the rule of law[775], it is required that serious measures must be taken to ensure the integrity and independence of prosecution services. Political and other forms of interference with the impartial and fair execution of the prosecution function are in direct contradiction with the principle of the rule of law and will in turn affect the independence of the prosecutor. Prosecutors must remain vigilant and ensure that the actions of the police, prisons and other law enforcement authorities are lawful and respectful of human rights. They can do so by bringing to the attention of the courts any instance of unlawful or corrupt behaviour by agents of the State or other officials in positions of authority and by vigorously prosecuting such offenders to the full extent of the law. In cases involving the corruption of public officials, the role of prosecutors is vital and delicate. This is because the debilitating effects of corruption on the rule of law are all too obvious[776]. Corruption within the justice system itself is a concern, as are the implications of such corruption for upholding the rule of law and preserving the integrity of the criminal investigation and prosecution processes. Corruption not only affects the credibility and effectiveness of a justice system in a general sense; it also places witnesses, victims and justice officials at risk. Preventing corruption is one of the most important ways in which prosecutors protect the rule of law and the integrity of the justice system. The quality of the legal training offered to professional prosecutors varies greatly from place to place. It is clear that a non-lawyer prosecutor cannot have the same quality with a lawyer prosecutor.

[775]The essence of the role of prosecutors in upholding the rule of law is captured in part by the Guidelines on the Role of Prosecutors, which affirms the following:Prosecution services are a vital part of States' efforts to affirm the rule of law through the fair, consistent, impartial and effective enforcement of the law. Without the commitment of prosecutors to human rights and to upholding the rule of law, the criminal justice system and governing institutions risk falling into disrepute and losing credibility and moral authority. Prosecutors are also important guarantors of the rule of law inasmuch as they accept the role of combating impunity and ensuring the lawfulness of State actions. By tackling impunity for human rights abuses wherever they arise, prosecutors not only reinforce respect for the rule of law at the national level, but they also help consolidate the principle of rule of law at the international level.

[776]Article 15 of the Guidelines on the Role of Prosecutors specifies that prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.

Still the issue of corruption is eating deeper into the fabrics of the prosecutors in Nigeria. Some officers of the Ministry of Justice do not want to prosecute as they will collect monies to enable them look the other way in a matter they are prosecuting. This is not the exclusive of legal officers in the Ministry, but also of legal officers in the various security agencies saddled with the prosecution of crimes. It is noteworthy to state that the prosecution of terrorism related offences is restricted to the Attorney General and any person he may deem fit to delegate the said powers to.[777]The prosecution system in Nigeria therefore needs to be re oriented in view of the vital role they are expected to play in the fight against terrorism using the instrument of the Law. Consequently, it continues to be relevant that prosecutors possess the professional qualifications required for the accomplishment of their functions, through improved methods of recruitment and legal and professional training and re training and through the provision of all necessary means for the proper performance of their role in combating criminality[778].

6.4: **Role of Defence Counsel**

To secure justice as a basic human right, the Universal Declaration of Human Rights enshrines the key principles of equality before the law, the presumption of innocence, the right to a fair and public hearing by an independent and impartial tribunal, along with all the guarantees necessary for the defence of persons charged with a penal offence.[779] The Body of Principles for the Protection of All Persons under Any Form of Detention or

[777]Section 30(1) Terrorism Prevention Act 2011as amended

[778] Guidelines on the Role of Prosecutors (Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. C.26, annex); available at http://www2.ohchr.org/english/law/pdf/prosecutors.pdf.

[779]Article 14 of the International Covenant on Civil and Political Rights provides for the minimum fair trial guarantees: the right to be tried without undue delay; the right to a fair and public hearing by a competent, independent and impartial tribunal established by law and to defend oneself in person or through legal assistance of one's own choosing; the right to be informed, if one does not have legal assistance, of the right to such assistance; the right to have legal assistance assigned to one, in any case where the interests of justice so require, without payment; and the right to have adequate time and facilities for the preparation of one's defence and to communicate with counsel of one's own choosing.

Imprisonment provides that a detained person shall be entitled to have the assistance of counsel, while the Standard Minimum Rules for the Treatment of Prisoners recommend that legal assistance be assured for prisoners pending adjudication[780]. These instruments recognize that individuals have a right to legal assistance when their fundamental rights to liberty and life are at stake.[781] The Basic Principles on the Role of Lawyers,[782] adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, establishes as its first principle that all persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings. As mentioned above, Section 36(1)of the 1999 Constitution as amended establishes the right of all persons accused of having committed a crime to be tried in their presence and to defend themselves in person or through legal assistance of their own choosing.[783] They also have a right to be informed, if they do not have legal assistance, of the right to obtain legal assistance. Where the interests of justice so require, they have a right to receive free legal assistance. To effectively offer defence to persons accused of terrorism and terrorism related offences, there need to be certain elements. One of such element is that of principle of equality of arms. It encompasses the idea that both parties are treated in a manner ensuring that they have a procedurally equal position during the course of the trial and are in an equal position to make their case[784]. Thus, each party must be afforded a reasonable opportunity to present its case, under conditions that do not place it at a substantial disadvantage vis-à-vis the opposing party. In criminal trials, where the prosecution has the power of the State behind it, the principle of

[780] First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 22 August-3September 1955: report prepared by the Secretariat (United Nations publication, Sales No. 1956.IV.4), annex I.A;and Economic and Social Council resolution 2076 (LXII).

[781]See also Section 36 (1- 12) of the 1999 Constitution as amended.

[782] Basic Principles on the Role of Lawyers (Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. B.3, annex).

[783]Article 14 of the ICCPR

[784]Judgments in the cases of *Ofner v Austria*, Application No 524/59;*Hopfinger v Austria*, Applications No617/59 European Court of Human Rights. See also *Iwuoha v Okoroike* [1996] 2 NWLR(pt 429)234

equality of arms is an essential guarantee of the right to defend oneself. The principle ensures that the defence has a reasonable opportunity to prepare and present its case on a footing equal to that of the prosecution. It encompasses the right to adequate time and facilities to prepare the defence, including the disclosure by the prosecution of material which forms part of our criminal justice system provisions.Equality of arms also includes the right to legal counsel, the right to call and examine witnesses and the right to be present at the trial. The principle would be violated if, for example, the accused was not given access to information necessary for the preparation of the defence, was denied access to expert witnesses or was excluded from an appeal hearing where the prosecutor was present.[785] The defence counsel is therefore expected to exercise the rights of the accused person effectively while ensuring that there exist equality of arms in the course of defending and prosecuting the case. The defence counsel must be punctual to court[786], he must attend all sittings unless he has obtained the Court's leave to be absent,[787] he must conduct his case in logical sequence and as well be candid and fair[788]. Most importantly the paramount duty of counsel to court is not to mislead the court[789]. The lawyer is bound by all fair and honourable means to present every defence that the law of the land permits to the end that no person may be deprived of his life or liberty but by due process of law[790]. Rule 26 of the Rules of Professional conduct requires a legal practitioner to preserve the client's confidence and must not disclose any confidential communication made to him by his client without the

[785]See further Section 36 of the Constitution
[786]Rule 1 B of RPC
[787]*FRN v Abiola* 1997 2 NWLR Pt 488 at 467
[788] Rule 4 RPC
[789]*Linwodd v Andrew* 1988 58 LT 612
[790]Rule 9A

client's knowledge and consent[791]The Lawyers involved in this role are expected to effectively discharge these responsibilities to the best of their ability.[792]

The accused person in any criminal trial is entitled to a legal practitioner of his choice[793]. The right to counsel of persons charged with a criminal act is therefore integral to the right to a fair trial and is a fundamental right recognized by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights[794] and regional human rights treaties and conventions[795]. Under Principle 8 of the Basic Principles all persons in custody are required to be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. While such consultations may be observed, they may not be heard. Similarly, principle 22 requires Governments to recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential information.[796] The challenge therefore becomes

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[791] See also Section 192 Evidence Act, *R v Eguabor* 1962 1 ALL NLR 287

[792] Note the provisions of the Basic Principles of the Role of Lawyers which relate to the Constitutional Provisions in Section 36. Principle 1 of the Basic Principles on the Role of Lawyers states that all persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings. Principle 5 requires that all persons detained, arrested or charged be immediately informed of their right to be assisted by a lawyer of their choice. Principle 6 requires that "in all cases which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services. Principle 7 requires that all persons who have been detained or arrested be given prompt access to a lawyer and in any case not later than forty-eight hours from the time of arrest or detention. Principle 2 of the Basic Principles requires Governments to implement efficient procedures and mechanisms that allow effective and equal access to lawyers and requires that such access be provided to all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status. Principle 3 states that Governments shall ensure sufficient funding and other resources to provide legal services for the poor and other disadvantaged persons. Professional associations of lawyers are to cooperate in the organization and provision of services, facilities and other resources. The need for confidential communications between lawyer and client is critical to a meaningful exercise of the right to counsel and its attendant lawyer client relationship.

[793]Section 36(6) of the Constitution.

[794] Article 14

[795]These include including the European Convention for the Protection of Human Rights and Fundamental Freedoms (article 6), the American Convention on Human Rights (article 8) and the African Charter on Human and Peoples' Rights (article 7).

[796]This is also contained in our Evidence Act and as well Sections 7 and 8 of the Terrorism Prevention Act of 2011 as amended

how to balance the legitimate requirements for the confidentiality of certain informants and the safety of sources with the right of the accused to a fair trial. Practice and jurisprudence show that tribunals recognize the need for the State (prosecution) to protect witnesses and certain information. Nowhere is this more evident than in cases involving terrorists and terrorist organizations. One will also say that the accused facing a terrorist criminal trial must be notified of his or her right to be defended by counsel[797]. This right is applicable whether or not the accused has been arrested or detained before trial. In order for the notice to be effective, it must be given sufficiently in advance of the trial to allow adequate time to prepare a defence. The accused should generally be able to choose his or her own counsel, because of the special role of trust and confidence between the lawyer and the client[798]. It should however be noted that the accused does not have an unrestricted right to choose assigned counsel, especially if the State is paying the costs. Where accused individuals do not have a lawyer of their choice to represent them, they may have counsel assigned.[799] Under article 14, paragraph 3 (d), of the International Covenant on Civil and Political Rights, the right to have counsel assigned is conditional upon a conclusion by the court that the interests of justice require it. The determination of whether the interests of justice require appointment of counsel is based primarily on the seriousness of the offence, the issues at stake, including the potential sentence and the complexity of the issues. Effective access to a lawyer means access must be confidential. The right of detained or imprisoned persons to communicate with their legal counsel is a very important one; it is a fundamental right that

[797]See Section 36(6)(a) of the Constitution and also Basic Principles on the Role of Lawyers, principle 5; statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in theTerritory of the Former Yugoslavia since 1991, article 21, paragraph 4 (d); Rome Statute of the InternationalCriminal Court (United Nations, Treaty Series, vol. 2187, No. 38544), article 55, paragraph 2 (c). See also theInternational Covenant on Civil and Political Rights, article 14, paragraph 3 (d).

[798]Section 36(6)(c) and also the International Covenant on Civil and Political Rights, article 14, paragraph 3 (d); Basic Principleson the Role of Lawyers, principle 1.

[799]Sometimes it's doubtful if the Court can assign Lawyers to accused persons without Lawyers. The cause of this doubt is because not all the states in the country have office of the public defenders from where Lawyers can be appointed for accused who have no lawyers. Again the constitution said a legal practitioner of his choice. Will the assignment of this lawyer accord with this constitutional provision?

relates directly to the right of defence. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order[800]. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person on the grounds of privileged communication under both the Evidence Act[801] and the Terrorism Prevention Act 2011.

6.5: **Role of the Judiciary**

The courts play a pivotal role in promoting the rule of law[802]. Thus, it is necessary to protect the independence of the judiciary. The right to a competent, independent and impartial

[800]Principle 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states the following:A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.

[801]Section 192

[802]It is obvious that the impartial expectation of a court or tribunal cannot be over emphasized. The principle that a judge must be impartial is accepted in the jurisprudence of any civilized country and there was no ground for holding that in this respect the law of Nigeria differs from the law of England or for hesitating to follow English decisions. In other words, there is no alternative to an acceptable concept of justice. Justice is truth and both go along one path way since they both stem from the same compartmental units which are non-separable. Its concept speaks one universal language in carrying the same meaning. A court must therefore be impartial to uphold justice no matter where, what society and the law applicable. On further need for judges to be impartial in the dispensation of justice, the Supreme Court again in the case of David *Uso vs C.O.P* (1972) 11 SC 37 at 45/47 held and said:- "In our system of criminal trial, the judge as umpire is not expected to descend into the arena. This illustrates the difference between the accusatorial and the inquisitorial methods of trying an accused person - the difference between the Anglo-Saxon and the Civil Law systems. Our procedure is accusatorial in the sense that the innocence of the accused is presumed until he is proved guilty by the prosecution. Under the inquisitorial system of trial, which obtains in most continental legal systems, the judge plays a dynamic role in cross-examining litigants and witnesses and the accuser's guilt is presumed until he proves his innocence." Other and further related authorities against bias

tribunal is articulated in Section 36(1) of the Constitution.[803]. A court has a constitutional obligation to grant fair hearing to both parties. Where the court unduly interferes the judgment may be set aside. In all a judge is to be impartial but not to sit unconcerned where counsel's incompetence is likely to cause injustice. [804]An independent, impartial, honest and competent judiciary is integral to upholding the rule of law and engendering public confidence. In addition, the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, envisage judges with full authority to act, free from pressures and threats, adequately paid and equipped to carry out their duties[805]. The Basic Principles on the Independence of the Judiciary cover freedom of expression and association; the qualifications, selection and training of judges; conditions of service and tenure; and discipline, suspension and removal of judges.[806] Many countries have formally adopted the Basic Principles and report regularly to the United Nations on their progress and problems, sometimes seeking help with legal education or the monitoring of procedures[807]. For the

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are:- *Okoduwa vs State* (1988) 2 NWLR (Pt.9) 333; *Obiora vs Osele* (1989) 1 NWLR (Pt.97) 279; and *Abodunrin vs Arabe* (1995) 5 NWLR (Pt.393) 77 at 97

[803]It is also contained in article 10 of the Universal Declaration of Human Rights and article 14 of the International Covenant on Civil and Political Rights, as well as in regional treaties and conventions including the European Convention for the Protection of Human Rights and Fundamental Freedoms134 (article 6), the American Convention on Human Rights (article 8) and the African Charter on Human and Peoples' Rights135 (article 7). See also the provisions of The Universal Declaration of Human Rights contains the right to a fair and public hearing by an independent and impartial tribunal (article 10) and the right of the accused to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence (article 11).

[804]*Eleja v Bagudu* 1994 3NWLR Pt 334 at 534

[805] Basic Principles on the Independence of the Judiciary (Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985: report prepared by the Secretariat (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. D.2, annex).Although that set of standards does not carry the force of law, it provides a model for lawmakers everywhere, who are encouraged to write them into their national constitutions and to enact them into law.

[806]This is contained in Sections 286 to 293 of the Constitution. The power to discipline Judges is also with the National Judicial Council established under the Constitution.

[807] See the procedures for the effective implementation of the Basic Principles on the Independence of the Judiciary (Economic and Social Council resolution 1989/60, annex) and the Bangalore Principles of Judicial Conduct (E/CN.4/2003/65, annex, available at www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_ principles.pdf; United Nations Office on Drugs and Crime, Commentary on the Bangalore Principles of Judicial Conduct (2007), available at www.unodc.org/documents/corruption/publications_unodc_commentary-e.

judiciary to perform optimally, they need to be independent, impartial and of the highest integrity. The authority granted to the judiciary by the constitution and any other enabling statutes are critical in determining the role of the judiciary and the nature of its relationship with the various branches of Government. The source of authority for the administration of justice is found not only in statutes, including the criminal law and criminal procedures codes, but also in rules that are promulgated, often by the courts themselves, with input from representatives of other stakeholders in the criminal justice system. However the power of the judiciary in Nigeria is derived from Section 6 of the Constitution. Those are the primary sources of the legal basis for frameworks and organizations that regulate the behaviour and conduct of judges. A close analysis is therefore required to determine whether the existing legal framework supports the independence and integrity of the judiciary or inappropriately impinges on those key values by granting supervisory authority over the judiciary to another branch of Government. That debate often arises in relation to emergency courts and military tribunals[808]. As a basic condition, the independence of the judiciary must be guaranteed by the State and enshrined in the constitution[809].In order to secure the independence of the judiciary, judicial appointments should be made on the basis of clearly defined criteria and through a public process ensuring that appointments are made based on merit and that there is equality of opportunity for all those who are eligible for judicial office. Arrangements for appropriate security of tenure and protection of levels of remuneration must also be in place, and adequate resources must be available for the judicial system to operate effectively and without any undue restraints.[810] The judiciary must decide matters impartially, on the basis

[808]The Basic Principles on the Independence of the Judiciary set out the elements of the independence of the judiciary in its principles 1-7. Remember also the issue of ouster clauses during military regimes.

[809]This independence is nowhere specifically contained in our constitution. This independence is by way of implication from the school of thought on separation of powers within a federal system of government which Nigeria operates.

[810]This is the purport of Section 292 of the Constitution in respect to removal of Judges. Some other arrangements include the payment of their salary from the consolidated revenue. Yet there is still a flaw in the seeming independence of the judiciary when they have to go cup in hand for funds to equip their courts

of facts and the application of law, without any restrictions, improper influences, inducements, pressures, threats or interferences. The courts themselves have exclusive authority to decide whether they have jurisdiction over a matter. There must be no unwarranted interference with the judicial process, including the assignment of judges, by the legislative and executive branches of government.The Government may not displace the jurisdiction of the ordinary courts through the creation of a tribunal that does not follow established legal procedures. Accused persons have the right to be tried by ordinary courts or tribunals using established legal procedures. Alternative processes such as truth commissions and special tribunals may be established. However, such entities cannot be ad hoc. They must be duly established by law and must afford the minimum guarantees established by national and international law. The judiciary has the authority and the obligation to ensure that judicial proceedings are conducted fairly and that the rights of all parties are respected. Where tribunals are established to tackle some urgent matter, such tribunals are also expected to be independent and impartial.

Thus an accused person also has the right to be tried by a tribunal which is independent and impartial and this is central to the due process of law.[811] Of particular importance, those tribunals must satisfy the obligations of independence and impartiality. In this era of terrorism and other violent crimes, it has been argued that it is necessary to establish courts

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and other incidental matters in complete violation of Sections 81(3), 121(3) and 162(9) of the Constitution as amended.

[811]Section 36 (1). Also the Human Rights Committee has stated that it is an absolute right that may suffer no exception. Article 10 of the Universal Declaration of Human Rights affirms the right to a fair trial by an independent and impartial tribunal. Similarly, the International Covenant on Civil and Political Rights, in its article 14, paragraph 1, states the following:All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. Article 14, paragraph 2, of the International Covenant states that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

with special jurisdictions, especially to hear terrorist cases[812]. In many countries, regular courts have sometimes been given a special jurisdiction or mandate greatly shaped by the nature of the crimes to be prosecuted.[813] Prosecutions of certain types of cases involving terrorist groups can be centralized in a certain part of the country, allowing a group of judges (as well as prosecutors and defence counsels) to specialize in those cases. The centralization of cases and the specialization of certain Judges can also make it easier to prevent various attempts at obstructing justice and to protect those involved against possible intimidation or retaliation. A centralization or specialization of Courts may also make it easier for the courts to be adequately protected. While a court is disposed to do justice, it is imperative that the courts need to be adequately protected. The courts here imply both the presiding officer and the institution. In certain circumstances, there have been numerous cases in which terrorists have sought to obstruct justice by threatening prosecutors, judges and other officers of the court or by intimidating or attacking witnesses. Without proper protection for judges, court personnel and court buildings, courts are often unable to function effectively or fairly when they are the object of threats or potential threats by terrorist groups or their supporters. Similarly, the criminal justice process can be paralyzed by the system's inability to protect all participants against intimidation and retaliation. Part of the core capacity of the criminal justice system to deal with acts of terrorism is capacity to effectively ensure the security of judges, prosecutors and other court personnel, as well as the capacity of lawyers, witnesses and all others who participate in court proceedings.

[812]This argument has been made also in Nigeria.

[813]In Nigeria there have been calls for specialized tribunals and Courts but the present Chief Justice of Nigeria has maintained that the best will be to designate some courts to handle terrorism related matters.

6.6: Role of the Criminal Justice System in Protecting the Rights of Victims of Terrorist Crimes

In any society, the need for prosecution of offenders is to balance the equilibrium of order in the society. The victims of crimes are therefore expected to feel comforted by the actions of the society in arresting and prosecuting the offenders. In Nigeria, there is no provision for victims in our criminal Justice system as the State prosecutes for them. But to us, fathers and mothers, and the families of the victims, they are not just numbers. They are human beings – sons and daughters, uncles, nieces, nephews, brothers, sisters and indeed, fathers and mothers! They are Nigerians!! They are individuals with dreams and aspirations, noble Nigerians who love their country[814]. They are emphatically referred to as complainants whose presence is needed for the prosecution of offence and nothing more. In order to achieve the role of the Law in the fight against terrorism, States have a duty to provide protection and assistance to victims of crime, including acts of terrorism. This victim-centred approach has become an increasingly important and recognized part of contemporary criminal justice practice. There are a number of ways in which individuals can become victims of terrorist crimes. Terrorist attacks typically target the civilian population and in the process victimize large numbers of individuals. Victimization may take various forms: the death of a large number of civilians, material losses, physical injury and psychological trauma for surviving victims, and long-term damage to quality of life. The criminal justice system has to be able to deal with the various forms of victimization.Victims' rights have been articulated in a number of international instruments

[814]His Excellency, President Goodluck Ebele Jonathan, GCFR Remarks At theInauguration of the Victims Support Fund CommitteeState House – Abuja on July 16, 2014

and in many cases incorporated into the national legislation of States[815]. This is not the case in Nigeria as the Country has only a Victims Support Fund Committee that was established in 2014 with no backing of Law. In establishing the Committee, the President stated that:

> We have set up this committee to provide a framework through which all persons and institutions who wish to help mitigate the pains our country men and women are going through for no fault of theirs.
>
> The Victims Support Fund Committee will help to mobilise collective efforts and resources in support for the victims. I appeal to all well-meaning Nigerians and non-Nigerians, individuals and cooperate bodies, to give generously to this Fund. The victims need our sympathy and empathy. We have to show that we care and can never give way or give in to agents of evil.[816]

Since 1945, international law has made progress in the recognition of individual rights in this regard. More recent developments, such as the inclusion of victims' rights to reparations and participation in the Statute of the International Criminal Court, highlight the centrality of victims in the criminal justice system and, by extension, the response of that system to terrorism. It is important to emphasize that while victims of terrorist activities were perhaps not foreseen or at least not expressly mentioned in human rights instruments to the extent that terrorism, as an attack on civilians, is an affront to the human rights of the victims, those victims have the rights enumerated in the relevant treaties. The United Nations Global Counter-Terrorism Strategy directly addresses the issue of victims of terrorist acts. It lists

[815]Apart from the Administration of Criminal Justice Law of Lagos State, dealing on Plea Bargaining, no other legislation has made any reference to victims of criminal actions. It is now included under Section 32(4) as amended though with no modalities.

[816]His Excellency, President Goodluck Ebele Jonathan, GCFR Remarks At theInauguration of the Victims Support Fund CommitteeState House – Abuja on July 16, 2014

measures to address the conditions conducive to the spread of terrorism, including measures to counter the "dehumanization of victims of terrorism in all its forms and manifestations". The Strategy encourages the creation of national systems of assistance, which would "promote the needs of victims of terrorism and their families and facilitate the normalization of their lives".

It is therefore necessary to state that each State Party shall seek to ensure that any person whose rights or freedoms are violated shall have an effective remedy. They should also realize and ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the country, and to develop the possibilities of judicial remedy. Finally there is the need to ensure that the competent authorities shall enforce such remedies when granted. In order to explain further this issue of the need to take victims seriously in the fight against terrorism in Nigeria under the auspices of the Law, we shall hereinafter take a look at victims under international law.[817]

6.6.1: Victims in International Law*vis a viz* Nigeria

International human rights and humanitarian law establish several duties in relation to victims of human rights violations. Those duties include the duty to provide victims with equal and effective access to justice irrespective of who may be the ultimate bearer of responsibility for the violation; the duty to afford appropriate remedies to victims; the duty to provide for or facilitate reparation to victims. The existence of these duties is grounded in

[817]This is because no Nigerian Legislation has paid adequate emphasis on the rights of victims. The most we have done is to ensure that justice is done and thus balance the order and justice in existence in the society. Many has argued that a crime is committed against the society and therefore out is the society that has to be redressed, but the truth is that the society has been wronged but there are individuals who feel the pains of the crime more than the society and they are the victims.

several international and regional conventions.[818] A comprehensive articulation of this duty is found in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[819]. The Declaration is the most comprehensive instrument on justice for victims. It provides guidance on measures that should be taken at the national, regional and international levels to improve access to justice and fair treatment, restitution, compensation, protection and assistance for victims of crime and abuse of power. In adopting the Declaration, the General Assembly called upon Member States to take the necessary steps to give effect to the provisions of the Declaration[820].

Victims of terrorist crimes must be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.[821] Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious,

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[818]With respect to human rights norms, the International Covenant on Civil and Political Rights ensures, in its article 2, paragraph 3, that victims of human rights violations have the right to an effective remedy, including the right to have such a remedy determined by competent judicial, administrative or legislative authorities and to have that remedy enforced when granted.

[819] General Assembly resolution 40/34, annex.

[820]See its resolution 2005/20 of 2005, the Economic and Social Council adopted the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.In 2005, the Commission on Human Rights adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law(Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violationsof International Human Rights Law and Serious Violations of International Humanitarian Law (GeneralAssembly resolution 60/147, annex), available at http://www2.ohchr.org/english/law/remedy.htm.)In addition, in April 2005, the Commission on Human Rights took note of the revised Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity(E/CN.4/2005/102/Add.1)That set of principles includes the right to know, the right to justice, the right to reparation and guarantees of non-recurrence. The Organized Crime Convention and the Convention against Corruption also contain various provisions concerning victim protection and victim assistance, including international cooperation in protecting and assisting victims(United Nations Convention against Transnational Organized Crime, articles 24 and 25; United NationsConvention against Corruption, article 32.)

[821]So far victims of terrorism in Nigeria are at the mercy of the first government official that happens to be the first on the scene. When their means of livelihood are destroyed the government offers no remedy. Even when they are, injured the government at best, pledges to take care of the hospital bills and nothing more. When they die the government offers pittance as compensation which in some cases they fail to pay. A victim of terrorism in Nigeria is simply put on his own. Thus one can say that making of terrorism legislation cannot be complete without adequate legislation on the situation of the victims.

fair, inexpensive and accessible. To respond to the needs of victims of terrorist crimes, measures should be in place to inform victims of their role in the criminal justice process; the nature of the cooperation that is expected from them; and the scope, timing and progress of the criminal proceedings, as well as the outcome of the proceedings.[822]The government should also allow the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant procedures of the national criminal justice system and as well provide proper assistance to victims throughout the judicial proceedings. Above all, the government should minimize inconvenience to victims, protect their privacy when necessary, and ensure their safety and that of their families from potential intimidation and retaliation.[823]. The government should also avoid unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims, offer victims the necessary material, medical, psychological and social assistance through governmental, voluntary and community-based means, offer them access to restitution and compensation[824] Experience has shown that an effective way to address the many needs of crime victims is to establish programmes that provide social, psychological, emotional and financial support and effectively help victims within criminal justice and social institutions. In addition to provisions allowing victims to bring civil claims against perpetrators, some countries have enacted national legislation recognizing victims' rights to compensation and

[822]Victims in Nigeria have no value. They are treated in some cases as criminals. Most relocate to avoid harassment by security agencies. Some don't even know what they are expected to do to aid the investigation. There is no legislation requesting for their assistance which in turn will address their victimhood.

[823]This is very vital in Nigeria as a victim who suffered loss should not be expected to bear the expenses of the prosecution on himself. Indeed one of the problems of access to justice in Nigeria is the high cost of prosecuting crimes. In most scenarios, the prosecuting agencies insist on collecting appearance fees and other sundry amounts from the complainants who are also the victims in the case. If no legislation seeks to support the victims in this regard then there is no need for them to come and testify in order to ensure conviction etc.

[824]Where there is no provision for victims, the best they can do is to relocate from the particular scene to avoid intimidation from the culprits and also from the government. Thus the fight against terrorism through the instrumentality of the law is already on the loosing side.

to participation in criminal proceedings.[825] Those possibilities enhance recognition of the suffering of victims. Allowing victim participation in criminal proceedings and recognizing the right of victims to be informed of progress in the case serves to rebalance a criminal justice system that would otherwise heavily favour perpetrators and offenders. The right of victims to be informed of their rights and of the existence of procedures from which they can benefit is perhaps the most important concern. Those who come into contact with victims in the course of justice—police, social workers, defence counsel, prosecutors and judges—should be required to brief victims of their rights and direct them to where they can obtain help when they need it. Finally, Criminal justice officials and policymakers can help ensure that criminal justice systems are responsive to the needs of victims and respectful of their rights.

It is understandable that Nigeria has no such law. Indeed the terms of reference for the Victim Support Fund Committee is as follows: To identify sources and ways of raising sustainable funding to support victims of terror activities; To develop appropriate strategies for the fund raising; To ascertain the persons, communities, facilities and economic assets affected by terror activities; To assess and determine the appropriate support required in each case; To manage, disburse and/or administer support to the victims as appropriate; To address related challenges as may be appropriate; To advise Government on other matter(s) necessary or incidental to support victims of terror activities. An analysis of the foregoing ToR shows that the development of a viable legal framework on Victims was not part of the ToR. There is therefore a need not just to support the victims financially but also legally. Let there be a legal Framework for such supports.

6.7: Issues and Challenges Concerning Detention.

[825]None of these provisions can be found in the present legislations in existence in Nigeria. It therefore calls for a review of all the existing legislations and not a hasty legislation that will not take cognizance of the changing face of crimes in the society.

The issue of detention has been a controversial issue within the security agencies in Nigeria. The Constitution[826] gave a time frame within which a person arrested can be brought to court, yet this provision of the Constitution is rarely complied with. What however obtains is that individuals arrested are detained at the Police Station or any detention center of the arresting agencies. When it appears to the security agencies that nothing is forth coming, they will hurriedly prepare a charge which has no facts backing it and arraign the suspect. This will in turn be on charges a Magistrate Court has no jurisdiction which will prompt the presiding Magistrate to order for remand. Once a remand order has been made, the individual is at the mercy of the justice system with its attendant myriads of problems. In the fight against terrorism, where security of the nation and lives of individuals are at stake, the security agencies may as well arrest an innocent citizen, detain him and insist on his non release on the ground that terrorism is alleged.[827] The implication is that the effort of the Law in fighting terrorism will be thwarted as justice delayed occasions a denial of justice. Individuals who are accused of terrorist crimes are often held in prison, sometimes for a long period of time, awaiting the conclusion of an investigation or a trial. They are unlikely to be released on bail pending trial and likely to be segregated from the inmate population. There are often circumstances that dictate that their contacts with the outside world or with suspected accomplices be limited. Nevertheless, all persons deprived of their liberty in relation to terrorist activities must in all circumstances be treated with due respect for their human dignity and human rights.[828] Numerous international standards have been developed to ensure that the human rights of prisoners are protected and that their treatment has the

[826]Section 35(4) and (5) of the 1999 Constitution as amended.

[827]Reference here is made for instance to Subsection 2(b-e) of Section 25 of the Terrorism prevention Act of 2011 as amended. Now the issue is that this has provided excuses for the law enforcement agencies to detain a person on the ground that he was found at a crime scene relating to terrorism and such person cannot be released until the end of the search. The truth is that there has never been an end for our law enforcement agencies until some token are parted with. The option available for such detained person is the Court but then is there really an easy access to the courts to the average Nigerian?

[828]As guaranteed by Section 35 of the 1999 Constitution as amended

priority aim of ensuring their social reintegration[829]. Counter-terrorism strategies may require some adjustments to normal prison practices, as long as those modifications are lawful and their application is subject to judicial review[830].

i: **Detention Prior to Adjudication or During Investigation**

Those arrested as suspects in terrorism related offences are certainly not prisoners. This is because to be a prisoner, there must be in existence a validly concluded trial by a court of competent jurisdiction finding the suspect culpable. In Nigeria, majority of the inmates in our prisons are awaiting trial inmates. This is caused by a variety of problems. The first being the corrupt and inefficient police system; followed by the low skilled and insufficient staffed court system and finally by an almost comatose prison service. Despite this number of inmates who are illegally and improperly designated prisoners, there has never been any effort to at least make provisions for the way they might be treated within the prison system. Unlike them, the Prisoners so called have their rights but they are beggars. It is in the light of this that we believe that in fighting terrorism via the instrumentality of the law, there arises the need to reflect on those who may be unfortunate to fall into detention prior to adjudication and or during investigation.[831]The Standard Minimum Rules for the Treatment

[829]Those standards include the Standard Minimum Rules for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, and the Code of Conduct for Law Enforcement Officials, among many other international and regional documents.

[830]For example, guideline XI of the Council of Europe Guidelines on Human Rights and the Fight against Terrorism, states the following:"The imperatives of the fight against terrorism may nevertheless require that a person deprived of his/her liberty for terrorist activities be submitted to more severe restrictions than those applied to other prisoners, in particular with regard to:

"(i) The regulations concerning communications and surveillance of correspondence, including that between counsel and his/her client;

"(ii) Placing persons deprived of their liberty for terrorist activities in specially secured quarters;

"(iii) The separation of such persons within a prison or among different prisons, on condition that the measure taken is proportionate to the aim to be achieved."

[831]This becomes particularly relevant because of the provision of Section 25 (1) and (2) of the Terrorism Prevention Act which authorizes a Judge to grant an order of detention against a suspect pending investigation.

of Prisoners devote a section to prisoners under arrest or awaiting trial[832]. Those provisions serving as guidelines for prison authorities govern the conditions of detention of pretrial prisoners, the privileges to which they are entitled and access to legal advice and assistance. In all prisons, those on remand should be treated as a privileged category of prisoners and be able to dress in their own clothes, receive food from the outside, have access to their own doctors, procure reading and writing materials and receive regular visits from their legal advisers as well as assistance in preparing for their trials. Pretrial detention should be a measure of last resort implemented only to protect society or ensure that a serious offender attends trial at a future date. Time spent on remand should be kept to a minimum and should be applied against any sentence that may eventually be imposed.[833]As mentioned above, persons suspected of terrorist activities who are detained pending trial are entitled to regular reviews of the lawfulness of their detention by a court, and access to legal counsel can help them enforce that right.[834]A detained person must therefore be entitled to have the assistance of a legal counsel and even when he cannot afford one, a court appointed one must be made available for him from the moment he is arrested and taken into detention.[835]. All such persons detained are expected to be treated with humanity and with respect for the inherent dignity of the human person in accordance with the provisions of the Constitution.[836]In order for prison systems to be managed in a humane manner, national policies and legislation

[832]Rules 84-93 of the Standard Minimum Rules for the Treatment of Prisoners

[833]Article 10 of the International Covenant on Civil and Political Rights makes it clear that accused persons should be held separately from convicted offenders and be subject to separate treatment appropriate to their status as un-convicted persons. In contrast to the situation in Nigeria, a person on pretrial detention is dressed in the prison uniform and is taken and regarded as a prisoner. The inclusion of these rules into a comprehensive Terrorism Prevention Act becomes necessary for the present one made no provision as to the reasons why the Judge will be moved to grant a detention order. Where such a person is detained and eventually had to be released what remedy will he have?

[834]This the Legal Representative can achieve through the Constitution. The problem remains if the suspect has any access to the courts for a review of his situation? Many pretrial detainees have languished in prisons for as many as 15 years due to lack of access to courts originally created by illegal arrest and unconstitutional detentions.

[835] This is very necessary taking into cognizance the attitude of Law enforcement agents who refuse lawyers access to those under arrest on the ground that they have yet to finish with the suspect. Indeed most times now, Lawyers are refused access to their clients until such clients finish writing their statements.

[836]Section 35 of the 1999 Constitution as Amended. See also International Covenant on Civil and Political Rights, article 10, paragraph 1.

concerning prison conditions must be guided by the numerous international standards developed to ensure that the rights of prisoners are protected[837]. Unfortunately in Nigeria, prisoners have no rights. They are treated as criminals. No regard is had for them to the extent that prisoners provide the funds for them to be fed and taken to court. In some circumstances, visitor to inmates are expected to part with a token to gain access including the Lawyers. Yet their woes have not ended. Some of such detainees who are not so fortunate to be taken to the prisons are left at the detention center of the arresting agencies. Some of these centers are referred to as abattoirs as most of these persons are tortured to death. [838]Torture as a means of investigation has been abolished worldwide. However in Nigeria, our Law enforcement agents make use of even the crudest methods of torture to elicit truth. It is a welcome development that recently, the former Inspector General of Police, M.D Abubakar has sounded a note of warning to all those who engaged in torture as a means of investigation. But really, has it ended amongst our security agencies?[839] The term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from,

[837]Those standards include the Standard Minimum Rules for the Treatment of Prisoners and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

[838]The problem here remains that some persons who have not had any cause to be taken into detention may not know that one in some circumstances may have to admit to a crime and fight it in the courts. Thus in trying to prove their innocence, they get killed all in the name of investigation.

[839]Some of these people take sadistic pleasure in the torture of suspects often times claiming that such suspects are hardened criminal and that if they kill them in the course of torture nothing will happen

inherent in or incidental to lawful sanctions[840].The essential elements of what constitutes torture as defined in article 1 of the Convention against Torture are the infliction of severe mental or physical pain or suffering, by, or with the consent or acquiescence of, State authorities, for a specific purpose such as gaining information, punishment or intimidation. Cruel, inhuman or degrading treatment[841] or punishment are also legal terms, referring to ill-treatment that is not necessarily inflicted for a specific purpose but which is conducted with the intent of exposing individuals to conditions that amount to or result in ill treatment. Exposing a person to conditions reasonably believed to constitute ill-treatment entail responsibility for inflicting that ill-treatment. Degrading treatment may involve pain or suffering that is less severe than that inflicted in the course of torture or cruel or inhuman treatment and usually involves humiliation and debasement of the victim. The essential elements that constitute ill-treatment not amounting to torture are thus reduced to intentional exposure to significant mental or physical pain or suffering, by or with the consent or acquiescence of the State authorities. The case in Nigeria is that the authorities involved will look the other way while all these are going on. Under International Law, there are several provisions on what the state shall do to ensure eradication of torture or its reduction to the barest minimum.[842] However, the Constitution in existence in Nigeria provides for remedy to a person tortured in the course of his detention etc. However, as we keep lamenting, it is

[840]Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See also the definition of torture in *Uzoukwu and ors v Ezeonu II and ors* 1991 6 NLWR Pt 200 at 708

[841]Specifically mentioned in Section 34(1) of the Constitution of 1999 as amended.

[842]Article 11 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that each State party shall 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, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12 of the Convention requires a State party to ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction. Article 13 of the Convention requires a State party to ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

only very few detainees that can afford to seek this remedy upon torture. A majority of others will happily go home to their families thanking God and even attributing their release to God who fights for the innocent. For purposes of enforcing and protecting a person's legal rights and safeguarding him/her against ill-treatment and torture, there are a number of fundamental safeguards that should apply from the outset of a person's detention. These include, the right to inform a close relative or someone else of the detained person's choice of his/her situation immediately[843] ;the right to immediate access to a lawyer[844] ;the right to a medical examination and the right of access to a doctor, ideally of the detainee's own choice, at all times, in addition to any official medical examination[845] ; the right to be brought "promptly" before a judge for a determination of the legality of the detention and whether it may continue[846] ;the right to be informed immediately about the reasons for arrest and rights under the law, in a language they understand[847]. There are other International rules and standards relevant in the area of protection against torture[848]. It is suggested that

[843]Rule 92, Standard Minimum Rules for the Treatment of Prisoners, See also Principle 16 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

[844]Section 35(2) of the 1999 Constitution as amended. See also Principle 17, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

[845] Standard Minimum Rules for the Treatment of Prisoners, rule 91; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 24; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 2nd General Report on the CPT's activities, covering the period 1 January to 31 December 1991 (Strasbourg, Council of Europe, 1992), available at www.cpt.coe.int/en/annual/rep-02.htm; Council of Europe, Recommendation Rec(2001)10 of the Committee of Ministers to member States on the European Code of Police Ethics, article 57.

[846]Section 35(4) of the 1999 Constitution as amended. See also Principle 11 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. While there is no precise definition for "promptly", more than 72 hours is often consideredexcessive and is the maximum established by the model code of criminal procedure (draft, 30 May 2006), article 125

[847]Section 35(3) of the 1999 Constitution as amended. See also Principles 10, 13 and 14, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

[848]Those standards include the following: Standard Minimum Rules for the Treatment of Prisoners (1957, amended in 1977) Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975) Code of Conduct for Law Enforcement Officials (1979)Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment (1982) Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) Basic Principles on the Independence of the Judiciary (1985) United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) (1985) Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988) Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (1989) Basic Principles for the Treatment of Prisoners (1990) Basic Principles on the Role of

such standards can provide important guidance for judges and prosecutors and as well policy makers in the fight against terrorism under the auspices of the Law. In fighting terrorism under the Law, the security of prisoners is very paramount. “Security” of prisoners refers to the obligation of the prison service to prevent prisoners from escaping. The “safety” of prisoners refers to the requirement to maintain good order and control in prison to prevent prisoners being disruptive and to protect the vulnerable. Safety measures in prisons should be supported by a disciplinary system that is fair and just. Security and safety procedures include proper categorization and assessment, searching and standing operating procedures.The situation of people suspected of terrorism may be very different from that of other inmates. Exceptional security measures may often be justified provided it is legitimate. The proper classification of prisoners based on risk assessment is one of the most important steps prison managers must take to ensure safety and security in their prisons. The security measures to which prisoners are subject should be the minimum necessary to achieve their secure custody.Detainees and prisoners who are held in relation to terrorist activities or conspiracies may need special protection measures to ensure their safety. That often involves various forms of segregation or solitary detention. There is also the need to provide special safety measures for witnesses and informants who are also kept in the prison for safety purposes. Some special safety and protection measures are necessary when a witness or an informant is being detained. Witnesses who are incarcerated can be particularly vulnerable, and their protection poses some distinct challenges to the authorities, the most common

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Lawyers (1990) Guidelines on the Role of Prosecutors (1990) United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990) Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990) Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1991) Declaration on the Protection of All Persons from Enforced Disappearance (1992) Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) (1999) Investigation of torture Istanbul Protocol. The Commission on Human Rights, in its resolution 2000/43, and the General Assembly, in its resolution 55/89, drew the attention of Governments to the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) and strongly encouraged Governments to reflect upon the Principles as a useful tool in combating torture. It is imperative to understand that they are not laws and not binding.

relating to the presence of other inmates who want to prevent them from testifying or who may themselves intimidate or harm the witnesses. Co-mingling of protected witnesses with the general inmate population is generally inadvisable because it creates opportunities for violence, threats and intimidation. Co-mingling occurs always in Nigeria as apart from the segregation between males and females, there is no other segregation among inmates. This is due mainly to the fact that the Prison institution is poorly handled in terms of infrastructure that will hold the inmates most of whom are awaiting trials. Witness safety issues relating to communication with the outside world (such as by telephone or letters) and visits must be examined carefully[849]. Weaknesses in information management systems, at either the institution or the court level, can significantly add to the risks faced by the protected witness. Dangerous mistakes can also occur because of poor communication between prison authorities and professionals from other agencies who share a responsibility for the protection of the witnesses. There is often a need to take measures to protect the families of custodial witnesses. In some instances, the corruption or the intimidation of prison personnel can introduce a major element of risk for the witnesses who are being detained. It is therefore often necessary to limit the circle of individual staff members who have access to the protected inmates and to information about them. Apart from the witnesses who are in detention, there may be persons who are under preventive detention. Most of these detentions are administrative in nature for purposes of preventing the commission of crime. The problem with this method of detention is that they are usually for a long period of time. In recent years, there have been numerous reports, in the context of counter-terrorism measures, of situations in which individuals were detained for a long period of time without ever being charged for a specific offence, without access to counsel, access to courts or

[849]Communication in Nigerian Prisons is non-existent as the inmates are made to pay before they communicate.

information on the reasons for their arrest and detention"[850]. Most forms of preventive detention and administrative detention without a judicial order are contrary to fundamental human rights[851]. Administrative and preventive detention often lack the safeguards that are integral to the criminal justice system. For administrative detention to comply with human rights principles, it must be executed on such grounds and in accordance with such procedures as are established by law. Arbitrary detention is never justifiable[852]. It is therefore pertinent that States review their legislation and practice so as to ensure that persons suspected of criminal activity or any other activities giving rise under domestic law to deprivation of liberty are in fact afforded the guarantees applicable to criminal proceedings[853]. Finally, there is the need to upgrade the complaint procedures in our prison systems to be effective. There is the need to effectively make use of complaints made by prisoners as to their condition. Prisoners should be given written information about the complaints procedures, prison rules and regulations, as part of an information pack on entry to prison. The procedures should be clearly laid out in a way that can be understood both by prisoners and by the staff who deal directly with the prisoners. There must also be a procedure in place by which prisoners can make confidential written complaints to a person

[850].The Human Rights Committee has severely criticized those practices. The Committee issued a general comment on the lawfulness of preventive detention in 1982: "If so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law, information of the reasons must be given and court control of the detention must be available as well as compensation in the case of a breach Human Rights Committee, General Comment No. 8 on the right to liberty and security of persons (art. 9), para. 4, available at http://www2.ohchr.org/english/bodies/hrc/comments.htm.

[851] Edward J. Flynn, "Counter-terrorism and human rights …, p. 40. See also Ben Power, "Preventative detention of terrorist suspects: a review of the law in Australia, Canada and the United Kingdom", paper prepared for the 21st International Conference of the International Society for the Reform of Criminal Law, Vancouver, Canada, 22-26 June 2007, p. 2.

[852]The Working Group on Arbitrary Detention, in its reports to the Commission on Human Rights, expressed grave concerns about several instances in arbitrary detention where detainees had no right or means to challenge their unlawful detention. The Commission, in turn, reaffirmed that no justification can be used in any circumstances, whether conflict, war or state of exception, to abrogate the right to challenge unlawful detention.The Working Group on Arbitrary Detention found the following:The use of "administrative detention" under public security legislation, migration laws or other related administrative law, resulting in a deprivation of liberty for unlimited time or for very long periods without effective judicial oversight, as a means to detain persons suspected of involvement in terrorism or other crimes, is not compatible with international human rights law.

[853] E/CN.4/2005/6, para. 77

or institution independent of the prison administration, such as a prison ombudsman, a judge or magistrate, if they feel that the prison administration is failing to respond to their complaints or if they are lodging a complaint against a disciplinary decision. There must be effective processes in place for hearing appeals, complaints, allegations and grievances against the decisions made by the prison administration.[854]

[854]See Rules 35 and 36 of the Standard Minimum Rules for the Treatment of Prisoners "35. (1) Every prisoner on admission shall be provided with written information about the regulations governing the treatment of prisoners of his category, the disciplinary requirements of the institution, the authorized methods of seeking information and making complaints, and all such other matters as are necessary to enable him to understand both his rights and his obligations and to adapt himself to the life of the institution."(2) If a prisoner is illiterate, the aforesaid information shall be conveyed to him orally."36. (1) Every prisoner shall have the opportunity each week day of making requests or complaints to the director of the institution or the officer authorized to represent him."(2) It shall be possible to make requests or complaints to the inspector of prisons during his inspection. The prisoner shall have the opportunity to talk to the inspector or to any other inspecting officer without the director or other members of the staff being present."(3) Every prisoner shall be allowed to make a request or complaint, without censorship as to substance but in proper form, to the central prison administration, the judicial authority or other proper authorities through approved channels."(4) Unless it is evidently frivolous or groundless, every request or complaint shall be promptly dealt with and replied to without undue delay."

CHAPTER SEVEN

HUMAN RIGHTS IMPLICATIONS OF THE FIGHT AGAINST TERRORISM IN NIGERIA

7.0: **Background to Study**

The fight against terrorism will no doubt have an impact on the enjoyment of some human rights. To appreciate rightly these human rights and the extent of the impact of this fight on them, one needs to do a summarized overview of human rights and their enjoyments

7.0.1: **Nature of Human Rights**

Human rights are universal values and legal guarantees that protect individuals and groups against actions and omissions primarily by State agents and also by individuals that interfere with fundamental freedoms, entitlements and human dignity. The full spectrum of human rights involves respect for, and protection and fulfillment of, civil, cultural, economic, political and social rights, as well as the right to development. Human rights are universal and are interdependent and indivisible. Human rights are "commonly understood as inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being."[855] It is a right which stands above the ordinary laws of the land and which in fact is antecedent to the political society itself. It is a primary condition to a civilised existence and what has been done by our constitution, since independence, starting with the Independence Constitution, that is, the Nigeria (Constitution) Order in Council 1960 up to the present Constitution is to have these rights enshrined in the Constitution so that the rights could be "immutable" to the extent of the "non-immutability" of the Constitution itself. It is not in all countries that the Fundamental Rights guaranteed to the

[855] Sepúlveda Magdalena et al,*Human rights reference handbook* (3rd ed. rev. ed.)(Ciudad Colon,Costa Rica: University of Peace, 2004).p123

citizen are written into the Constitution. For instance, in England, where there is no written constitution, it stands to reason that a written code of fundamental rights could not be expected. But notwithstanding, there are fundamental rights. The guarantee against inhuman treatment, as specified in section 19 of the 1963 Constitution, would, for instance, appear to be the same as some of the fundamental rights guaranteed in England, contained in the Magna Carter 1215[856]International human rights law is reflected in a number of core international human rights treaties and in customary international law. Human rights are thus conceived as universal and egalitarian. These rights may exist as natural rights or as legal rights, in both national and international law.The doctrine of human rights in international practice, within international law, global and regional institutions, in the policies of states and in the activities of non-governmental organizations, has been a cornerstone of public policy around the world[857]. There is a growing body of subject-specific treaties and protocols as well as various regional treaties on the protection of human rights and fundamental freedoms[858].

According to Beitz,[859] "if the public discourse of peacetime global society can be said to have a common moral language, it is that of human rights." There has been a raging controversy over whether human rights are universal or not. Many are of the view that it is natural while there are yet opponents of this universality, others yet are in the middle

[856]*Ransome-Kuti v. A.-G. Fed.* (1985) NWLR (Pt.6) 211

[857] C R Beitz,*The idea of human rights,* (Oxford: Oxford University Press, 2009).p 2

[858]These treaties include in particular the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols. Other core universal human rights treaties are the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol; the Convention on the Rights of the Child and its two Optional Protocols; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The most recent are the International Convention for the Protection of All Persons from Enforced Disappearance, and the Convention on the Rights of Persons with Disabilities and its Optional Protocol, which were all adopted in December 2006.

[859]*Ibid*

referred to as the *via medium*[860]. Indeed, the question of what is meant by a "right" is itself controversial and the subject of continued philosophical debate[861].Many of the basic ideas that animated the movement developed in the aftermath of the Second World War and the atrocities of The Holocaust, culminating in the adoption of the Universal Declaration of Human Rights in Paris by the United Nations General Assembly in 1948. The ancient world did not possess the concept of universal human rights[862].Ancient societies had "elaborate systems of duties... conceptions of justice, political legitimacy, and human flourishing that sought to realize human dignity, flourishing, or well-being entirely independent of human rights"[863]. The modern concept of human rights developed during the early Modern period, alongside the European secularization of Judeo-Christian ethics[864]. The true forerunner of human rights discourse was the concept of natural rights which appeared as part of the medieval Natural law tradition that became prominent during the Enlightenment and featured prominently in the political discourse of the American Revolution and the French Revolution. From this foundation, the modern human rights arguments emerged over the latter half of the twentieth century. The modern sense of human rights therefore can be traced to Renaissance Europe and the Protestant Reformation, alongside the disappearance of the feudal authoritarianism and religious conservatism that dominated the Middle Ages. Human rights were defined as a result of European scholars attempting to form a "secularized version of Judeo-Christian ethics"[865]. Although ideas of rights and liberty have existed in some form for much of human history, they do not resemble the modern conception of human rights. According to Donnelly, in the ancient world, "traditional

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[860] IKE Oraegbunam,, 'Human Rights: A Jurisprudential Analysis of Theories and Conceptions',(2011) 1(1) *Sacha Journal of Human Rights*, 102-117

[861]Shaw Malcolm,*International Law* (6th ed.),(Leiden: Cambridge University Press, 2008).

[862] Michael Freeman, Human *rights: an interdisciplinary approach*, (Cambridge: Polity Press, 2002)p98

[863] Jack Donnelly,*Universal human rights in theory and practice* (2nd Ed.) (Ithaca: Cornell University Press, 2003).p58

[864]Micheline Ishay, The *history of human rights: from ancient times to the globalization era*, (Berkeley California: University of California Press, 2008)p 74

[865]*Ibid*

societies typically have had elaborate systems of duties... conceptions of justice, political legitimacy, and human flourishing that sought to realize human dignity, flourishing, or well-being entirely independent of human rights. These institutions and practices are alternative to, rather than different formulations of, human rights"[866]. One of the oldest records of human rights is the statute of Kalisz (1264), giving privileges to the Jewish minority in the Kingdom of Poland such as protection from discrimination and hate speech[867]. The basis of most modern legal interpretations of human rights can be traced back to recent European history.[868] The philosophy of human rights seeks to analyse the underlying basis of the concept of human rights and critically looks at its content and justification. One of the oldest Western philosophies of human rights is that they are a product of a natural law, stemming from different philosophical or religious grounds. Other theories hold that human rights codify moral behavior which is a human social product developed by a process of biological and social evolution[869]. Human rights are also described as a sociological pattern of rule setting.[870]These approaches include the notion that individuals in a society accept rules from legitimate authority in exchange for security and economic advantage[871]. The two theories that dominate contemporary human rights discussion are the interest theory and the will theory. Interest theory argues that the principal function of human rights is to protect and

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[866]*Ibid.*

[867] Isaac Lewin, 'The Jewish community in Poland', *Philosophical Library*,(Michigan: University of Michigan, 1985) p.19

[868]The Twelve Articles (1525) are considered to be the first record of human rights in Europe. They were part of the peasants' demands raised towards the Swabian League in the German Peasants' War in Germany. In Spain in 1542 Bartolomé de Las Casas argued against Juan Ginés de Sepúlveda in the famous Valladolid debate, Sepúlveda mainted an Aristotelian view of humanity as divided into classes of different worth, while Las Casas argued in favor of equal rights to freedom of slavery for all humans regardless of race or religion. In Britain in 1683, the English Bill of Rights (or "An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown") and the Scottish Claim of Right each made illegal a range of oppressive governmental actions. Two major revolutions occurred during the 18th century, in the United States (1776) and in France (1789), leading to the adoption of the United States Declaration of Independence and the French Declaration of the Rights of Man and of the Citizen respectively, both of which established certain legal rights. Additionally, the Virginia Declaration of Rights of 1776 encoded into law a number of fundamental civil rights and civil freedoms.

[869]Fagan, Andrew. 'Human Rights', (2005) *The Internet Encyclopedia ofPhilosophy*. available at<http:/ / www. iep. utm. edu/ hum-rts/> accessed on 23/12/2011. This theory is associated with Hume

[870]*Ibid.* This flowed from the sociological theory of law and the work of Weber

[871]*Ibid.*That is , a social contract according to Rawls

promote certain essential human interests, while will theory attempts to establish the validity of human rights based on the unique human capacity for freedom.[872]The strong claims made by human rights to universality have led to persistent criticism.[873] Political philosophy professor Charles Blattberg argues that discussion of human rights, being abstract, demotivates people from upholding the values that rights are meant to affirm.[874]

Human rights may be classified in a number of different ways; at an international level the most common categorization of human rights has been to split them into civil and political rights, and economic, social and cultural rights.[875] The UDHR included economic, social and cultural rights and civil and political rights because it was based on the principle that the different rights could only successfully exist in combination. In Nigeria, there is a codification of the Human rights provision in Chapter IV of the Constitution comprising 14 sections which deals with both life, economic, social, cultural and libertarian provisions. It is noteworthy that the history of human rights in Nigeria started with the 1960 Independent constitution. In 1979, the rights were guaranteed in the Constitution and since then it occupies a pride of place in our Jurisprudence. With increasingly activist Judges on the bench, human rights have become sacrosanct and a no go area for violent, dictatorial and illegal administrations.

The ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his

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[872]*Ibid*.

[873]*Ibid*. Philosophers who have criticized the concept of human rights include Jeremy Bentham, Edmund Burke, Friedrich Nietzsche and Karl Marx.

[874]C Blattberg, 'The Ironic Tragedy of Human Rights' in C Blattberg (ed) *Patriotic Elaborations: Essays in Practical Philosophy***,** (Montreal: McGill-Queen's University Press. 2010), pp. 43–59.

[875]Civil and political rights are enshrined in articles 3 to 21 of the Universal Declaration of Human Rights (UDHR) and in article 6 to 7 of the International Covenant on Civil and Political Rights (ICCPR). Economic, social and cultural rights are enshrined in articles 22 to 28 of the Universal Declaration of Human Rights (UDHR) and in articles 6 to 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

civil and political rights, as well as his social, economic and cultural rights[876].This is held to be true because without civil and political rights the public cannot assert their economic, social and cultural rights. Similarly, without livelihoods and a working society, the public cannot assert or make use of civil or political rights.The indivisibility and interdependence of all human rights has been confirmed by the 1993 Vienna Declaration and Programme of Action[877], "All human rights are universal, indivisible and interdependent and related. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis".[878]

Notwithstanding the fact that it was accepted by the signatories to the UDHR, most do not in practice give equal weight to the different types of rights. Some Western cultures have often given priority to civil and political rights, sometimes at the expense of economic and social rights such as the right to work, to education, health and housing. Similarly the ex-Soviet bloc countries and Asian countries have tended to give priority to economic, social and cultural rights, but have often failed to provide civil and political rights. In opposition to the indivisibility of human rights, it has been argued that economic, social and cultural rights are fundamentally different from civil and political rights and require completely different approaches[879]. Economic, social and cultural rights on the other hand have been argued to be positive, meaning that they require active provision of entitlements by the state, resource-intensive, meaning that they are expensive and difficult to provide, progressive, meaning that they will take significant time to implement, vague, meaning they cannot be quantitatively measured, and whether they are adequately provided or not is difficult to judge, ideologically divisive, meaning that there is no consensus on what should and

[876] International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights, 1966
[877] Vienna Declaration and Programme of Action, World Conference on Human Rights, 1993
[878]This statement was again endorsed at the 2005 World Summit in New York (paragraph 121).

shouldn't be provided as a right, socialist, as opposed to capitalist, non-justiciable, meaning that their provision, or the breach of them, cannot be judged in a court of law[880] and aspirations or goals, as opposed to real 'legal' rights. Similarly civil and political rights are categorized as negative, meaning the state can protect them simply by taking no action, cost-free, immediate, meaning they can be immediately provided if the state decides to, precise, meaning their provision is easy to judge and measure, non-ideological/non-political, capitalist, justiciable and real 'legal' rights[881]

Olivia Ball and Paul Gready argue that for both civil and political rights and economic, social and cultural rights, it is easy to find examples which do not fit into the above categorization. They highlight the fact that maintaining a judicial system, a fundamental requirement of the civil right to due process before the law and other rights relating to judicial process, is positive, resource-intensive, progressive and vague, while the social right to housing is precise, justiciable and can be a real 'legal' right[882].Another categorization, offered by Karel Vasak, is that there are three generations of human rights: first-generation civil and political rights (right to life and political participation), second-generation economic, social and cultural rights (right to subsistence) and third-generation solidarity rights (right to peace, right to clean environment). Out of these generations, the third generation is the most debated and lacks both legal and political recognition[883]. This categorization is at odds with the indivisibility of rights, as it implicitly states that some rights can exist without others. Prioritization of rights for pragmatic reasons is however a widely accepted necessity. Some human rights are said to be "inalienable rights". The term

[880] Like the provisions of Sections 16 – 18 of the Constitution as amended.

[881] Like the provisions of Sections 37 – 40 of the Constitution. See also *Merchant Bank Ltd v Federal Minister of Finance* (1961) 1 ALL NLR, 598, where a bank was held not to possess any civil rights within the meaning of the 1954 constitution then in force and that all they possessed was a privilege to carry on banking business within the meaning of the banking ordinance.

[882]Olivia Ball & Paul Gready,*The no-nonsense guide to human rights*, (Oxford: New Internationalist 2006).pg35

[883]See Chapter II of the Constitution of 1999 as amended.

inalienable rights (or unalienable rights) refer to "a set of human rights that are fundamental, are not awarded by human power, and cannot be surrendered."[884]

International human rights law is not limited to the enumeration of rightswithin treaties, but also includes rights and freedoms that have becomepart of customary international law, which means that they bind all States even if they are not party to a particular treaty. Many of the rights set out in the Universal Declaration of Human Rights are widely regarded to hold this character.[885]The prohibitions of torture, slavery, genocide, racial discrimination and crimes against humanity, and the right to self-determination are widely recognized as peremptory norms, as reflected in the International Law Commission's articles on state responsibility. The International Law Commission also lists the basic rules of international humanitarian law applicable in armed conflict as examples of peremptory norms. Human rights law obliges States, primarily, to do certain things and prevents them from doing others. States have a duty to respect, protect and fulfill human rights. Respect for human rights primarily involves not interfering with their enjoyment. Protection is focused on taking positive steps to ensure that others do not interfere with the enjoyment of rights. The fulfillment of human rights requires States to adopt appropriate measures, including legislative, judicial, administrative or educative measures, in order to fulfill their legal obligations. A State party may be found responsible for interference by private persons or entities in the enjoyment of human rights if it has failed to exercise due diligence in protecting against such acts[886]. Human rights law also places a responsibility on States to provide effective remedies in the event of violations. Those human rights that are part of

[884] National Open University of Nigeria Module for Human Rights Law

[885]The Human Rights Committee has similarly observed, in its general comments N° 24 (1994) and N° 29 (2001), that some rights in the International Covenant on Civil and Political Rights reflect norms of customary international law. Furthermore, some rights are recognized as having a special status as norms of *jus cogens* (peremptory norms of customary international law), which means that there are no circumstances whatsoever in which derogation from them is permissible.

[886]For example, under the International Covenant on Civil and Political Rights, State parties have an obligation to take positive measures to ensure that private persons or entities do no inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power.

customary international law are applicable to all States. In the case of human rights treaties, those States that are party to a particular treaty have obligations under that treaty. Moreover, and particularly relevant to a number of human rights challenges in countering terrorism, all Members of the United Nations are obliged to take joint and separate action in cooperation with the United Nations for the achievement of the purposes set out in Article 55 of its Charter, including universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. The nature of the general legal obligation of States parties in this respect is addressed in article 2 of the International Covenant on Civil and Political Rights. As confirmed by the Human Rights Committee in its general comment N° 31 (2004), this obligation on States to ensure Covenant rights to all persons within their territory and subject to their jurisdiction means that a State party must ensure such rights to anyone within its power or effective control, even if not situated within its territory. Furthermore, the enjoyment of international human rights is not limited to the citizens of States parties but must be available to all individuals, regardless of nationality or statelessness, such as asylum-seekers and refugees.

Terrorism is commonly understood to refer to acts of violence that target civilians in the pursuit of political or ideological aims. In legal terms, although the international community has yet to adopt a comprehensive definition of terrorism, existing declarations, resolutions and universal "sectoral" treaties relating to specific aspects of it define certain acts and core elements.[887]It is therefore the impact of the fight against terrorism on human rights that we shall direct our energies to in the next segment.

[887]In 1994, the General Assembly's Declaration on Measures to Eliminate International Terrorism, set out in its resolution 49/60, stated that terrorism includes "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" and that such acts "are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them." Ten years later, the Security Council, in its resolution 1566 (2004), referred to "criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to

7.1: **The Impact of the Fight against Terrorism on Human Rights**

The whole essence of society is to set limits to rights but such limits shall not be arbitrary. Human rights sometimes share the status of the supreme Law of the land especially where it was embodied into the Country's Constitution as is the case in Nigeria and in which case they are referred to as Fundamental rights; they are antecedent to political society and a primary condition to civilized existence.[888] The effort and ability to honour, apply and defend human rights is a major yardstick to measure true democracies and the prevalence of the rule of law. Without the rule of law, the claim to democracy is a mere sham. Infringement to Fundamental rights must be looked at without any restricted access to the courts. The courts would ensure that fundamental rights are not whittled down except by legislation not in conflict with constitutional provisions.[889]Terrorism aims at the very destruction of human rights, democracy and the rule of law. It attacks the values that lie at the heart of the Charter of the United Nations and other international instruments: respect for human rights; the rule of law; rules governing armed conflict and the protection of civilians; tolerance among peoples and nations; and the peaceful resolution of conflict. Terrorism has

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provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a Government or an international organization to do or to abstain from doing any act". Later that year, the Secretary-General's High-level Panel on Threats, Challenges and Change described terrorism as any action that is "intended to cause death or serious bodily harm to civilians or noncombatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act" and identified a number of key elements, with further reference to the definitions contained in the 1999 International Convention for the Suppression of the Financing of Terrorism and Security Council resolution 1566 (2004).The General Assembly is currently working towards the adoption of a comprehensive convention against terrorism, which would complement the existing sectoral anti-terrorism conventions. Its draft article 2 contains a definition of terrorism which includes "unlawfully and intentionally" causing, attempting or threatening to cause: "(a) death or serious bodily injury to any person; or (b) serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or (c) damage to property, places, facilities, or systems…, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act." The draft article further defines as an offence participating as an accomplice, organizing or directing others, or contributing to the commission of such offences by a group of persons acting with a common purpose. While Member States have agreed on many provisions of the draft comprehensive convention, diverging views on whether or not national liberation movements should be excluded from its scope of application have impeded consensus on the adoption of the full text.

[888]*Kuti & ors v AG Fed & ors*(2001) FWLR (pt 80) 1637 p1677

[889]*Elf Oil Ltd v Oyo State Board of Internal Revenue*(2003) FWLR (pt 138) 1352 p 1370-1 CA

a direct impact on the enjoyment of a number of human rights, in particular the rights to life, liberty and physical integrity. Terrorist acts can destabilize Governments, undermine civil society, jeopardize peace and security, threaten social and economic development, disrupt communications network and may especially negatively affect certain groups. All of these have a direct impact on the enjoyment of fundamental human rights. The destructive impact of terrorism on human rights and security has been recognized at the highest level of the United Nations, notably by the Security Council, the General Assembly, the former Commission on Human Rights and the new Human Rights Council. Specifically, Member States have set out that terrorism:

a. Threatens the dignity and security of human beings everywhere, endangers or takes innocent lives, creates an environment that destroys the freedom from fear of the people, jeopardizes fundamental freedoms, and aims at the destruction of human rights;
b. Has an adverse effect on the establishment of the rule of law, undermines pluralistic civil society, aims at the destruction of the democratic bases of society, and destabilizes legitimately constituted Governments;
c. Has links with transnational organized crime, drug trafficking, money-laundering and trafficking in arms, as well as illegal transfers of nuclear, chemical and biological materials, and is linked to the consequent commission of serious crimes such as murder, extortion, kidnapping, assault, hostage-taking and robbery[890];
d. Has adverse consequences for the economic and social development of States, jeopardizes friendly relations among States, and has a pernicious impact on relations of cooperation among States, including cooperation for development; and

[890] This is evident in Nigeria now

e. Threatens the territorial integrity and security of States, constitutes a grave violation of the purpose and principles of the United Nations, is a threat to international peace and security, and must be suppressed as an essential element for the maintenance of international peace and security[891].

International and regional human rights law makes clear that States have both a right and a duty to protect individuals under their jurisdiction from terrorist attacks. This stems from the general duty of States to protect individuals under their jurisdiction against interference in the enjoyment of human rights.[892] More specifically, this duty is recognized as part of States' obligations to ensure respect for the right to life and the right to security. The right to life, which is protected under international and regional human rights treaties, such as the International Covenant on Civil and Political Rights, has been described as "the supreme right" because without its effective guarantee, all other human rights would be without meaning[893]. As such, there is an obligation on the part of the State to protect the right to life of every person within its territory and no derogation from this right is permitted, even in times of public emergency[894]. The protection of the right to life includes an obligation on States to take all appropriate and necessary steps to safeguard the lives of those within their jurisdiction. As part of this obligation, States must put in place effective criminal justice and law enforcement systems, such as measures to deter the commission of offences and investigate violations where they occur; ensure that those suspected of criminal acts are prosecuted; provide victims with effective remedies; and take other necessary steps to

[891]Human rights and the fight against terrorism, The Council of Europe Guidelines, Directorate General of Human Rights Council of Europe, March 2005

[892] Section 13 of the 1999 Constitution provides that it shall be the duty and responsibility of all organs of government, and of all authorities and persons exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter of the Constitution

[893]That is also the reason why the right to life is the first right contained under Chapter 4 of the 1999 constitution as amended.

[894]Unfortunately, the Nigerian Constitution gave a leeway to derogate from this provision when it justified taking of life upon use of reasonable force for the defence of any person from unlawful violence or for the defence of property, or even upon effecting arrest or prevent the escape of s lawfully detained person or even for suppressing a riot, mutiny or insurrection, Section 33 (2)

prevent a recurrence of violations. Also, in specific circumstances, States have positive obligation to take preventive operational measures to protect an individual or individuals whose life is known or suspected to be at risk from the criminal acts of another individual which certainly includes terrorists. One other vital issue is the obligation on States to ensure the personal security of individuals under their jurisdiction where a threat is known or suspected to exist. This, of course, includes terrorist threats. In order to fulfill their obligations under human rights law to protect the life and security of individuals under their jurisdiction, States have a right and a duty to take effective counter-terrorism measures, to prevent and deter future terrorist attacks and to prosecute those that are responsible for carrying out such acts. At the same time, the countering of terrorism poses grave challenges to the protection and promotion of human rights. As part of States' duty to protect individuals within their jurisdiction, all measures taken to combat terrorism must themselves comply with States' obligations under the national and international laws, in particular international human rights and national human rights provisions. Since Terrorism has a direct impact on the enjoyment of human rights, States have a corresponding duty to take effective counterterrorism measures which will not only effectively check terrorism but also protect the rights of their citizens from abuse and violations often associated with counter terrorism measures. This will lead us to the role of government in promoting human rights while countering terrorism.

7.2: **The Promotion and Protection of Human Rights while Combating Terrorism**

Since terrorism impacts on human rights and the functioning of society, so too does measures adopted by States to counter terrorism affect human rights. Since terrorism has a serious impact on a range of fundamental human rights, States and indeed governments have a right and a duty to take effective counter-terrorism measures. Effective counter-terrorism measures and the protection of human rights are complementary and mutually reinforcing

objectives which must be pursued together as part of the country's duty to protect individuals within their domain. It is pertinent to state that sometimes the absence of human rights protection creates a favourable breeding ground for terrorist activities.[895]The Security Council[896] acted swiftly, following the terrorist attacks on 11 September 2001, to strengthen the legal framework for international cooperation and common approaches to the threat of terrorism in such areas as preventing its financing, reducing the risk that terrorists might acquire weapons of mass destruction and improving cross-border information-sharing by law enforcement authorities, as well as establishing a monitoring body, the Counter-Terrorism Committee, to supervise the implementation of these measures[897].

There has been a multiplication of security and counter-terrorism legislation and policy throughout the world since the adoption of Security Council resolution 1373 (2001), much of which has an impact on the enjoyment of human rights[898]. In doing so, most countries, have created negative consequences for civil liberties and fundamental human rights. The most relevant human rights concerns which countries should take seriously to ensure that any measure taken to combat terrorism complies with their obligations under human rights law were often overlooked. The international community has committed to adopting measures that ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism[899]. Member States have resolved to take measures aimed at addressing the conditions conducive to the spread of terrorism, including lack of rule of law and violations of human rights, and ensure that any measures taken to counter terrorism

[895] One should note that part of the agitations of the Boko Haram sect is the summary execution of their founder and leader Mohammed Yusuf

[896]Security Council resolution 1373 (2001),

[897]Regional approaches have also been developed in the context of the African Union, the Council of Europe, the European Union, the League of Arab States, the Organization for Security and Co-operation in Europe, the Organization of American States, the Organization of the Islamic Conference, the South Asian Association for Regional Cooperation and other organizations.

[898]Indeed Since 9/11 almost all the countries of the world had enacted one Terrorist related Law or the other.

[899]This is through the adoption of the United Nations Global Counter-Terrorism Strategy by the General Assembly in its resolution 60/288

comply with their obligations under national law, international law, in particular human rights law, refugee law and international humanitarian law.In 2004, the High-level Panel on Threats, Challenges and Change reported that recruitment by international terrorist groups was aided by grievances nurtured by poverty[900], foreign occupation, and the absence of human rights and democracy.[901]The General Assembly and the Commission on Human Rights have emphasized that States must ensure that any measure taken to combat terrorism comply with their obligations under international human rights law, refugee law and international humanitarian law and particularly under their national laws.[902] In his 2006 report[903] the United Nations Secretary-General described human rights as essential to the fulfillment of all aspects of a counter-terrorism strategy and emphasized that effective counter-terrorism measures and the protection of human rights were not conflicting goals, but complementary and mutually reinforcing ones. Universal and regional treaty-based bodies have likewise frequently observed that the lawfulness of counter-terrorism measures depends on their conformity with international human rights law.The United Nations Global Counter-Terrorism Strategy reaffirms the inextricable links between human rights and security, and places respect for the rule of law and human rights at the core of national and international counter-terrorism efforts. Member States have committed to ensuring respect for human rights and the rule of law as the fundamental basis of the fight against terrorism. To be effective, this should include the development of national counter-terrorism strategies that seek to prevent acts of terrorism and address the conditions conducive to their spread; to

[900]This could as well be true for terrorism in Nigeria

[901]The World Summit Outcome, adopted by the General Assembly in 2005, also considered the question of respect for human rights while countering terrorism and concluded that international cooperation to fight terrorism must be conducted in conformity with international law, including the Charter of the United Nations and relevant international conventions and protocols.

[902]The Security Council has done the same, starting with the declaration set out in its resolution 1456 (2003), in which the Security Council, meeting at the level of Ministers for Foreign Affairs, stated that "States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law."This position was also reaffirmed in Security Council resolution 1624 (2005).

[903]"Uniting against terrorism: recommendations for a global counter-terrorism strategy" (A/60/825),

prosecute or lawfully extradite those responsible for such criminal acts; to foster the active participation and leadership of civil society; and to give due attention to the rights of all victims of human rights violations.[904] Not only is the promotion and protection of human rights essential to the countering of terrorism, but States have to ensure that any counterterrorism measures they adopt also comply with their international human rights obligations.[905]Under the Charter of the United Nations, the Security Council has primary responsibility for the maintenance of international peace and security, including measures to address terrorism as a threat to international peace and security. In addition to the general obligation of States to act within human rights framework at all times, it should be noted that the universal treaties oncounter-terrorism expressly require compliance with various aspects of human rights law.[906] The truth is that the promotion and protection of human rights while countering terrorism is an obligation of States and an integral part of the fight against terrorism. National counter-terrorism strategies should, above all, seek to prevent acts of terrorism, prosecute those responsible for such criminal acts, and promote and protect human rights and the rule of law.

[904]With reference to the existing counter terrorism legislation in Nigeria, the position of victims is unknown, so also the role of civil societies.

[905]The General Assembly has adopted a series of resolutions concerning terrorism since December 1972, addressing measures to eliminate international terrorism as well as the relationship between terrorism and human rights. It has emphasized that States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular international human rights, refugee and humanitarian law.The Security Council has undertaken a number of counter-terrorism actions, notably in the form of sanctions against States considered to have links to certain acts of terrorism (primarily in the 1990s) and later against the Taliban and Al-Qaida, as well as the establishment of committees to monitor the implementation of these sanctions. In 2001, it adopted resolution 1373 (2001), which obliges Member States to take a number of measures to prevent terrorist activities and to criminalize various forms of terrorist actions, and calls on them to take measures that assist and promote cooperation among countries including signing up to international counter-terrorism instruments. Member States are required to report regularly to the Counter-Terrorism Committee on their progress.

[906]In the context of the International Convention for the Suppression of the Financing of Terrorism, for example, this is illustrated in article 15 (expressly permitting States to refuse extradition or legal assistance if there are substantial grounds for believing that the requesting State intends to prosecute or punish a person on prohibited grounds of discrimination); article 17 (requiring the “fair treatment” of any person taken into custody, including enjoyment of all rights and guarantees under applicable international human rights law); and article 21 (a catchall provision making it clear that the Convention does not affect the other rights, obligations and responsibilities of States).

It is important to highlight that the vast majority of counterterrorism measures are adopted on the basis of ordinary legislation. In a limited set of exceptional national circumstances, some restrictions on the enjoyment of certain human rights may be permissible. Ensuring both the promotion and protection of human rights and effective counter-terrorism measures nonetheless raises serious practical challenges for States. One such example is the dilemma faced by States in protecting intelligence sources, which may require limiting the disclosure of evidence at hearings related to terrorism, while at the same time respecting the right to a fair trial and the right to a fair hearing for the individual. These challenges are not insurmountable. States can effectively meet their obligations under international law by using the flexibilities built into the international human rights law framework. Human rights law allows for limitations on certain rights and, in a very limited set of exceptional circumstances, for derogations from certain human rights provisions. These two types of restrictions(limitation and derogations) are specifically conceived to provide States with the necessary flexibility to deal with exceptional circumstances, while at the same time—provided a number of conditions are fulfilled—complying with their obligations under international human rights law. We shall now deal with these two types of restrictions.

7.2.1: **Limitations**

States maylegitimately limit the exercise of certain rights, including the right to freedom of expression, the right to freedom of association and assembly, the right to freedom of movement and the right to respect for one's private and family life under international Law. In order to fully respect their human rights obligations while imposing such limitations, States must respect a number of conditions. In addition to respecting the principles of equality and non-discrimination, the limitations must be prescribed by law, in pursuance of one or more specific legitimate purposes and "necessary in a democratic society."Common to international, regional and domestic human rights instruments and guidelines is the

requirement that any measure restricting the enjoyment of rights and freedoms must be set out within, or authorized by, a prescription of law[907]. To meet the requirements of this, Laws must be adequately accessible so that individuals have an adequate indication of how the law limits their rights; and the law must be formulated with sufficient precision so that individuals can regulate their conduct. Apart from this issue, criminal laws must also comply with the principle of non-retroactivity.[908]Likewise, penalties are to be limited to those applicable at the time that any offence was committed and, if the law has subsequently provided for the imposition of a lighter penalty, the offender must be given the benefit of the lighter penalty.

On the other hand, the permissible legitimate purposes for the interference vary depending on the rights subject to the possible limitations as well as on the legislation in question. They are national security, public safety, public order, health, morals, and the human rights and freedoms of others. The important objective of countering terrorism is often used as a pretext to broaden State powers in other areas.States should ensure that offences which are not acts of terrorism, regardless of how serious they are, should not be the subject of counter-terrorist legislation and so also conduct that does not bear the quality of terrorism, shall not be the subject of other counter-terrorism measures, even if undertaken by a person also suspected of terrorist crimes. Further, before the state would step into any derogation or restriction on the rights of the citizens, such act has to be reasonably necessary.[909] This means that the restrictions must meet the test of necessity and the requirement of proportionality. So any limitation on the free enjoyment of rights and freedoms must be necessary in the pursuit of a pressing objective, and its impact on rights and freedoms

[907]It should be stated here that most of the Fundamental Rights Provisions under the 1999 Constitution contains some of such limitations. See for emphasis Section 42(3) of the 1999 Constitution as amended.

[908]Article 15 of the International Covenant on Civil and Political Rights requires, in this regard, that any provision defining a crime must not criminalize conduct that occurred prior to its entry into force as applicable law. See also Section 36(12) of the 1999 Constitution as amended

[909]Section 33(2) of the 1999 Constitution as amended

strictly proportional to the nature of that objective. Given the impact of terrorism on human rights, security and the functioning of various aspects of the society, there is no doubt that the countering of terrorism is an important objective which can, in principle, permit the limitation of certain rights. To be justifiable, however, the imposition of such a limitation must satisfy various requirements. Thus, the restrictions shall not be made for purposes of making such. It must be shown that the restriction was necessary and has a direct link to the objective for which it was restricted. We have earlier stated that such restrictions under our laws are being serially abused and at the end of the day, it could be found out that there was no need in the first place to restrict same. There must therefore exist a rational link between the limiting measure and the pursuit of the particular objective. The existence of a rational link will normally be accepted if the measure logically furthers the objective, although more evidence of this connection might be necessary if such a link is not plainly evident[910]. Thus prohibition of or restriction of any right must therefore comply with the requirements for a legitimate limitation on rights and freedoms. That is, the limitation must thus be prescribed by law; be in pursuit of a legitimate purpose; and be both necessary and proportional. The first requirement that any limitation must be prescribed by law, means that the prohibition should take the form of a provision within legislation. As to legitimate purpose, it must be shown that it is consistent with the protection of national security or public order, which are both set out as legitimate grounds for the limitation of freedom of expression.[911]. The final requirement of necessity and proportionality is relevant to the way in which the proscription is expressed in the legislation and how it is applied. The lawmust be expressed in a way that not only respects the principle of legality, but also ensures that it is restricted to its legitimate

[910]The issue of curfew becomes relevant here. In most states in the North curfew was imposed. The question is for what? Is there a rational link between the curfew and the movement of terrorists? It has not been shown that terrorists strike at night yet there is a dusk to dawn curfew which though could be rationalized by the law on the freedom of movement. Yet we think that such actions cannot meet the requirements of the law on restrictions and derogations for there is no rational link between the restriction and the objective sought to be achieved.

[911]See article 19 (3) of the International Covenant on Civil and Political Rights

purpose.[912] The provision, and the way in which it is applied, must also be proportional, i.e., for each measure, one must determine whether, given the importance of the right or freedom, the impact of the measure on the enjoyment of that right or freedom is proportional to the importance of the objective being pursued by the measure and its potential effectiveness in achieving that objective. The merit of any measure will depend on the importance of the counter-terrorism objective it pursues, as well as on its potential efficacy in achieving it. The imposition of a limitation on rights and freedoms for the purpose of countering terrorism, but by ineffective means, is unlikely to be justifiable. In assessing the impact of a counterterrorism measure on rights and freedoms, consideration must be given, case by case, to the level to which it limits the right or freedom, and also to the importance and degree of protection offered by the human right being limited.

7.2.2: **Derogations**

In a limited set of circumstances, such as a public emergency which threatens the life of the nation, States may take measures to derogate from certain human rights provisions. A state of emergency must be understood as a truly exceptional, temporary measure to which may be resorted only if there is a genuine threat to the life of the nation. Short of such extreme situations, States must develop and implement effective domestic legislation and other measures in compliance with their international human rights obligations[913].Through the intermediary of the United Nations Secretary-General, a derogating State must immediately inform other States parties to the Covenant of the provisions from which it has derogated and of the reasons for which it has done so. Moreover, the State party must be faced with a situation which constitutes a threat to the life of the nation and may take only such measures

[912] Article 19 of the International Covenant on Civil and Political Rights allows only limitations on the freedom of expression that are "necessary" for the achievement of the purposes listed in its paragraph 3.

[913] Article 4 of the International Covenant on Civil and Political Rights. See also Section 33(2) of the 1999 Constitution as amended.

as strictly required by the exigencies of that situation.This requirement relates to the degree of interference as well as to the territorial and temporal scope of the measure adopted. This implies that the necessity of the state of emergency itself and the derogation measures should regularly be reviewed by independent organs, in particular the legislative and judicial branch. The measures must also be consistent with other obligations under international law, particularly the rules of international humanitarian law and the peremptory norms of international law.[914] It is vital to state that there are some rights that are non derogable. Derogation from such rights is therefore prohibited under International human right treaties, even in a state of emergency[915]. In its general comment N° 29, the Human Rights Committee has also emphasized that the Covenant's provisions relating to procedural safeguards can never be made subject to measures that would circumvent the protection of these non-derogable rights. Regional human rights law has also emphasized the importance of procedural guaranteesFurther to this list of non-derogable rights, article 4 (1) of the Covenant specifies that any derogating measures must not be inconsistent with obligations under international law which, as the Human Rights Committee has pointed out in its general comment N° 29, includes obligations under international human rights law, international humanitarian law and international criminal law. The Committee also identified rights and freedoms under customary international law which is applicable to all States that may not be derogated from even if not listed in article 4 (2).[916] Compliance with

[914] Unfortunately, this is not so in Nigeria. There is derogation for the purposes of derogating which apparently were rolled out for no purpose. Citizens lose their life at will because of the derogations on the rights to life guaranteed by the 1999 Constitution as amended and yet there is always a defence for those whose acts led to the said derogations.

[915] Article 4 (2) of the International Covenant on Civil and Political Rights identifies as non-derogable the right to life, freedom from torture or cruel, inhuman or degrading treatment or punishment, the prohibition against slavery and servitude, freedom from imprisonment for failure to fulfill a contract, freedom from retrospective penalties, the right to be recognized as a person before the law, and freedom of thought, conscience and religion.

[916] The Human Rights Committee has identified as customary law rights: the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person; the prohibitions against the taking of hostages, abductions or unacknowledged detention; the international protection of the rights of persons belonging to minorities; the deportation or forcible transfer of population

international law obligations also prevents the adoption of derogating measures purporting to authorize conduct which would constitute a basis for individual criminal responsibility for a crime against humanity. As the right to a fair trial is explicitly guaranteed under international humanitarian law during armed conflict, the Human Rights Committee has expressed the opinion that the requirements of fair trial must also be respected during a state of emergency. So as to respect the principles of legality and the rule of law, the protection of those rights recognized as non-derogable requires that certain procedural safeguards, including judicial guarantees, are available in all situations. The Committee has emphasized that only a court of law may try and convict a person for a criminal offence and that the presumption of innocence must be respected[917]. In order to protect non-derogable rights, the right to take proceedings before a court (to enable the court to decide without delay on the lawfulness of detention) must not be diminished by a State party's decision to derogate from the Covenant. It is very vital here to state also that the ability to derogate from the rights previously mentioned can only be obtained in the case of an emergency threatening the life of the nation and to the extent required strictly by the exigencies of the situation.[918] This shows clearly that such derogations must be of a very temporary nature. It is pertinent to further state that under Article 4 (1), it specifies that any derogation of rights in times of emergency may not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. It also provides that any derogating measures must not be inconsistent with the derogating State's obligations under international law, which would

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without grounds permitted under international law; and the prohibition against propaganda for war or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence.

[917]This is also contained in Section 36 of the 1999 Constitution as amended

[918] Article 4(1) In its general comment N° 29, the Human Rights Committee has characterized such an emergency as being of an exceptional nature. Not every disturbance or catastrophe qualifies as such. The Committee has commented that, even during an armed conflict, measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation. Whether or not terrorist acts or threats establish such a state of emergency must therefore be assessed case by case. The Human Rights Committee further stated that the restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a State party derogating from the Covenant. Any measure derogating from the Covenant must be necessary and proportional

include obligations under international human rights, international humanitarian law and international criminal law.[919] Finally, as with limitations described above, any derogation must comply strictly with the principles of necessity and proportionality.

7.3. **Specific Human Rights Challenges In the context of Combating Terrorism**

Terrorism and counter-terrorism affect the enjoyment of human rights. In this section therefore we shall discuss a selection of current and emerging human rights challenges as it affects our Country Nigeria in this era of terrorism.

7.3.1:. **The Right to Life**

The right to life is not an absolute right. This is so because absolute rights would threaten the greater values of the society.[920]Both international and regional human rights law recognize the right andduty of States to protect those individuals subject to their jurisdiction. Particularly in Nigeria, the first section in Chapter IV of the 1999 Constitution deals with the right to life.[921] In practice, however, some of the measures that States/ governments have adopted to protect individuals from acts of terrorism have themselves posed grave challenges to the right to life. They include "deliberate" or "targeted killings" to eliminate specific individuals as an alternative to arresting them and bringing them to justice[922] and in some cases the "shoot at sight" order often handed down by our Security Chiefs to their subordinates in some cases of terrorism or other violent crime.[923]These orders form the

[919] Article 5 (1) is of relevance as well. It clarifies that nothing in the Covenant (including the article 4 ability to derogate) can be interpreted as implying any right to engage in activity aimed at the destruction of the rights and freedoms set out in it.

[920]*Kalu v State*[1998] 13 NWLR (pt 509) 531 where it was held that the death penalty was not a breach to the constitutional provision of right to life

[921]Section 33

[922]This was part of the reason given by the Islamic Militants Boko Haram for increased attacks on Security agencies when they alleged that their leader was extra judicially eliminated. We have also seen cases of death resulting from such indiscriminate killings. One of such was that of an accountant in the office of the Kaduna State Governor who was killed for allegedly driving like a terrorist.

[923]Recently, a young man was killed in Bauchi. The Joint Tax Force claimed he failed to stop when asked to stop and hence his car was riddled with bullet. Now the question is whether it is right to so eliminate the

gravest danger to the lives of individuals in any state where they exist. These are used to imply a new approach and to suggest that it is futile to operate inside the law in the face of terrorism. The Human Rights Committee has stated that targeted killings should not be used as a deterrent or punishment and that the utmost consideration should be given to the principle of proportionality. It is expected that State/Governmental policies should be spelled out clearly in guidelines to military commanders and complaints about the disproportionate use of force should be investigated promptly by an independent body. Before any contemplation of resort to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted[924]. In some cases, States/governments have adopted "shoot-to-kill" law enforcement policies in response to perceived terrorist threats.[925] In the context of counterterrorism, the High Commissioner for Human Rights[926] has emphasized the importance of ensuring that the entire law enforcement machinery, from police officers to prosecutors and officers operating detention and prison facilities, operates within the law.[927] As noted by the Special Rapporteur on extrajudicial, summary or arbitrary executions,

> the rhetoric of shoot-to-kill and its equivalents poses a deep and enduring threat to human rights-based law enforcement approaches. Much like invocations of 'targeted killing,' shoot-to-kill is used to imply a new approach and to suggest that it is futile to operate inside the law in the face of

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young man. Is there no other way of getting access to him? Cant the security agents force him to stop using other methods?

Section 33 1999 Constitution of the Federal Republic of Nigeria. Note the killing of Fabio in Kano on 22nd of January, 2012 which did not follow this laid down provision, See A/58/40 (vol. I), para. 85 (15). 52

[925] Like what is obtainable in Maiduguri. See also Philip Alston , 'Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur', (E/CN.4/2006/53, paras. 44–54) andMartin Scheinin, 'Report of the Special Rapporteur onthe promotion and protection of human rights and fundamental freedoms while countering terrorism, (A/HRC/4/26, paras. 74–78).

[926]Louise Arbor, 'A human rights framework for fighting terrorism ', Address by High Commissioner for Human Rights, Moscow State University/University of International Relations, 11 February 2005.

[927]*Ibid*. She has cautioned that, in the fight against terrorism, extreme vigilance should be applied by those in a position of authority against all forms of abuse of power, and that they should instill a culture of respect for the law above all by those entrusted with its application.

> terrorism. However, human rights law already permits the use of lethal force when doing so is strictly necessary to save human life. The rhetoric of shoot-to-kill serves only to displace clear legal standards with a vaguely defined licence to kill, risking confusion among law enforcement officers, endangering innocent persons, and rationalizing mistakes, while avoiding the genuinely difficult challenges that are posed by the relevant threat.[928]

The Special Rapporteur has further suggested that States that adopt shoot-to-kill policies for dealing with, for example, suicide bombers "must develop legal frameworks to properly incorporate intelligence information and analysis into both the operational planning and post-incident accountability phases of State responsibility."[929] They must further ensure that "only such solid information, combined with the adoption of appropriate procedural safeguards, will lead to the use of lethal force.[930]Under international and regional human rights law, the protection against arbitrary deprivation of life is non-derogable even in a state of emergency threatening the life of the nation[931]. Unfortunately the Nigerian Constitution provided a leeway for the security agencies to embark upon wanton killings all in the name of public safety.[932]To comply with international human rights law, any governmental policy

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[928]*Ibid*

[929]*Ibid*. In Nigeria, when a suicide bomber loses his life before his act could be perpetrated, we do not know whether there could have been another way of disarming him and if probable get further information on the main perpetrator of the act for indeed it is the pay master not the suicide bomber that is utmost importance

[930]*ibid*

[931] Both the International Covenant on Civil and Political Rights (art. 6) and the American Convention on Human Rights (art. 4) prohibit the arbitrary deprivation of life, whereas article 2 of the European Convention states that no one shall be deprived of life intentionally and that the use of force which is no more than absolutely necessary may be used in defence of any person from unlawful violence. See also Human Rights Committee, views on communication N° 146/1983, *Baboeram v. Suriname*, 4 April 1985: "The right enshrined in this article is the supreme right of the human being. It follows that the deprivation of life by the authorities of the State is a matter of the utmost gravity. This follows from the article as a whole and in particular is the reason why paragraph 2 of the article lays down that the death penalty may be imposed only for the most serious crimes. The requirements that the right shall be protected by law and that no one shall be arbitrarily deprived of his life mean that the lawmust strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a State" (A/40/40, annex X, para. 14.3).

[932]See Section 45. This section provides for the restriction on and derogation from fundamental rights. It therefore made right to life derogable provided it is taken in the interest of defence, public safety, public order, public morality, public health or for the purpose of protecting the rights and freedom of other persons. It is therefore clear that when an action which has all the elements of murder takes place, it can be

that allows the use of lethal force must, therefore, fall within those narrow cases in which the deprivation of life cannot be considered arbitrary. In order to be considered lawful, the use of lethal force must always comply with the principle of necessity and must be used in a situation in which it is necessary for self-defence or for the defence of another's life.[933]The Human Rights Committee has stated that "the protection against arbitrary deprivation of life… is of paramount importance. The Committee considers that States parties should take measures… to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.[934]" To comply with international human rights law, any State policy which allows the use of lethal force must, therefore, fall within those narrow cases in which the deprivation of life cannot be considered arbitrary. In order to be considered lawful, the use of lethal force must always comply with the principle of necessity and must be used in a situation in which it is necessary for self-defence or for the defence of another's life[935].It must always comply with the principle of proportionality, and non-lethal tactics for capture or prevention must always be attempted if feasible. In most circumstances, law enforcement officers must give suspects the opportunity to surrender and employ a graduated resort to force.[936]The State's legal framework must 'strictly control and limit the circumstances' in which law enforcement officers may resort to lethal force[937].

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rationalized on the ground that such action was taken for the purposes contained in the said Section 45 of the Constitution.

[933]This is also part of the defence of self defence in our Criminal Code under Sections283 -285. See also Sections 285 of the Criminal Code. This defence can only be invoked in accordance with the provisions of the Code which classified it into two versions, that for the initial aggressor and that for the victim.

[934] See Human Rights Committee, general comment N° 6 (1982). See also Inter-American Commission on Human Rights, "Report on terrorism and human rights" (paragraphs. 87 and 89), citing Inter-American Court of Human Rights, *Neira Alegría et al. v. Peru,* Judgment of 19 January 1995 (paragraphs. 74–75).

[935] This is also part of the defence of self defence in our Criminal Code Under Sections

[936] See Human Rights Committee, views on communication N° 45/1979**,** *Suárez de Guerrero v. Colombia, 31 March 1982 (A/37/40, annex XI, paras. 12.2, 13.1–13.3).* See also the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (A/CONF.144/28/Rev.1), the Code of Conduct for Law

7.3.2: **Right to Dignity of Human Person**

The right to dignity of human person prohibits all forms of cruel treatment, torture and other inhuman or degrading treatment or punishment absolutely under the domestic laws of Nigeria[938] and under international law. It is a peremptory norm—or a norm of *jus cogens*—and is non-derogable even in states of emergency threatening the life of the nation under international and regional human rights treaties[939]. It is imperative that we state that the prohibition of torture and other cruel, inhuman or degrading treatment does not yield to the threat posed by terrorism or to the alleged danger posed by an individual to the security of a State[940]. In practice, however, States have often adopted policies and methods to confront terrorism that, in effect, circumvent and undermine this absolute prohibition.[941] In most cases in Nigeria, the use of torture and other cruel, inhuman or degrading treatment to elicit information from terrorist suspects is absolutely prohibited, as is the use in legal proceedings of evidence obtained bytorture. One needs to mention too the abuse of human dignity and

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Enforcement Officials (General Assembly resolution 34/169) and the Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions (Economic and Social Council resolution 1989/65).

[937]See E/CN.4/2006/53, para. 48. On the strict requirements regarding the use of force under the European Convention on Human Rights, see, inter alia, European Court of Human Rights, *McCann v. United Kingdom*, N° 18984/91, Judgment of 27 September 1995.

[938] Section 34 of the 1999 Constitution

[939] See articles 7 and 4 (2) of the International Covenant on Civil and Political Rights, articles 3 and 15 (2) of the European Convention on Human Rights, articles 5 and 27 (2) of the American Convention on Human Rights, article 5 of the African Charter on Human and Peoples' Rights, and common article 3 of the four Geneva Conventions. See also Inter- American Commission on Human Rights, "Report on the situation of human rights of asylum seekers within the Canadian refugee determination system" (OEA/Ser.L/V/II.106, Doc. 40 rev., para. 118).

[940] See Committee against Torture, views on communication N° 39/1996, *Tapia Páez v. Sweden*, 28 April 1997: "[T]he test of article 3 of the Convention is absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. The nature of the activities in which the personconcerned engaged cannot be a material consideration when making a determinationunder article 3 of the Convention" (A/52/44, annex V). See also, Human Rights Committee: "The State party should recognize the absolute nature of the prohibition of torture, cruel, inhuman or degrading treatment, which in no circumstances can be derogated from. Such treatments can never be justified on the basis of a balance to be found between society's interest and the individual's rights under article 7 of the Covenant. No person, without anyexception, even those suspected of presenting a danger to national security or the safety of any person, and even during a state of emergency, may be deported to a country where he/she runs the risk of being subjected to torture or cruel, inhuman or degrading treatment" (A/61/40 (vol. I), para. 76 (15)).

[941] See, Manfred Nowak, 'The Report of the Committee against Torture' Report of the Special Rapporteur on the question of torture (A/59/44, paras. 67, 126 and 144) and (E/CN.4/2006/6).

the right of persons by security agencies under the guise of fighting terrorism. It is not in doubt that many a person's right to dignity of their persons have been flagrantly and wantonly violated all under the guise of concerted efforts to eradicate the menace of terrorism. The provisions of our statute books seek to ensure adequate protection for this right but in reality, the reverse is the case. Complaints have not ceased to flood in, in relation to the ways and manners members of the Joint Task Force operating in the Northern Part of the Country have so abused this particular provision. In most cases, people are directed to hands up whenever they are passing by check points manned by such officers. Any violation of this arbitrary rule will result in the individual being violently molested. Further, it is on record that motorists plying such routes are violently treated including beating up and roughly manhandled. Apart from the abuse to the dignity of the persons when not under any legal arrest, such abuses abound also even when the individual is under a legitimate arrest. Most of the information obtained by our security agencies are information obtained by way of torture and coercion contrary to laid down procedures of interrogation. The rights enshrined in the International Covenant on Civil and Political Rights apply to all persons who may be within a State party's territory and to all persons subject to its jurisdiction. The implication is that a State party must respect and ensure the rights laid down in the Covenant—including the absolute prohibition of torture—to anyone within its power or effective control, even if not situated within its territory. The Constitutional provision is explicit and it goes further to prevent holding in slavery or servitude.[942]

The Nation must ensure that the full range of legal and practical safeguards to prevent torture is available, including guarantees related to the right to personal liberty and security, and to due process rights[943]. These are, for instance, the right for anyone arrested or detained on criminal charges to be brought promptly before a judge and to be tried within a

[942]Section 34; See also *Uzoukwu & ors v Ezeonu II*& ors[1991] 6 NWLR (pt. 200) 78
[943]Sections 35 and 36 of the 1999 Constitution as amended.

reasonable amount of time or to be released. They also include the right promptly to challenge the lawfulness of one's detention before a court. The international human rights legal framework as well as the Nigeria National Legal Framework requires that any deprivation of liberty should be based on grounds and procedures established by law, that detainees should be informed of the reasons for their detention and promptly notified of the charges against them, and that they should be provided with access to legal counsel[944]. In addition, prompt and effective oversight of detention by a judicial officer must be ensured to verify the legality of the detention and to protect other fundamental rights of the detainee. Even in a state of emergency, minimum access to legal counsel and prescribed reasonable limits on the length of preventive detention remain mandatory. Moreover, national authorities have an obligation to prevent human rights abuses and to actively investigate and prosecute any allegation of practices which may involve the transfer or detention of individuals in a manner inconsistent with their obligations under international law. It is not in doubt that in this era of terrorism, a charge of terrorism albeit at the security agencies' office automatically precludes the suspect from enjoying any right in the Constitution. In some cases, the security agents will also prevent the suspect from having access to his lawyer, doctor or even family members. This is another form of torture as same may likely lead the suspect to agree to make a confessional statement just to leave the detention ground. At the end of the day, such a suspect comes to the court to deny such confessional statements. In such circumstance, the court conducts a trial within trial and if same is found not to be voluntary, then the suspect will be discharged for want of credible evidence implicating him in the crime. At the end it amounts to a total waste of money, time and resources.Regarding conditions of detention, practices such as the use of secret and

[944]Section 35

incommunicado detention[945],as well as prolonged solitary confinement and similar measures aimed at causing stress, may amount to torture, cruel, inhuman or degrading treatment[946].States must ensure that the full range of legal and practical safeguards to prevent torture is available, including guarantees related to the right to personal liberty and security, and to due process rights. These are, for instance, the right for anyone arrested or detained on criminal charges to be brought promptly before a judge and to be tried within a reasonable amount of time or to be released[947]. The international human rights legal framework requires that any deprivation of liberty should be based on grounds and procedures established by law, that detainees should be informed of the reasons for their detention an promptly notified of the charges against them, and that they should be provided with access to legal counsel. In addition, prompt and effective oversight of detention by a judicial officer must be ensured to verify the[948] legality of the detention and to protect other fundamental rights of the detainee. Even in a state of emergency, minimum access to legal counsel and prescribed reasonable limits on the length of preventive detention remain

[945] See also Commission on Human Rights resolution 2005/39: "… prolonged incommunicado detention or detention in secret places may facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and can in itself constitute a form of such treatment, and urges all States to respect the safeguards concerning the liberty, security and the dignity of the person" (para. 9).

[946] See, for example, Human Rights Committee, general comment N° 20 (1992), para. 6, and "Situation of detainees at Guantánamo Bay" (E/CN.4/2006/120, para. 53), *Uzoukwu & ors v Ezeonu II*& ors[1991] 6 NWLR (pt. 200) 78

[947] Section 35 CFRN;They also include the right promptly to challenge the lawfulness of one's detention before a court. The Human Rights Committee, in its general comment N° 29, has confirmed that this right is to be protected at all times, including during a state of emergency, thereby highlighting the crucial role of procedural guarantees in securing compliance with the absolute prohibition of torture or any other form of inhuman, cruel or degrading treatment.The entry into force of the Optional Protocol to the Convention against Torture on 22 June 2006 is a significant development towards ensuring the practical protection of detainees against torture and other cruel, inhuman or degrading treatment. It establishes an international Subcommittee on Prevention of Torture with a mandate to visit places of detention in States parties and requires States parties to set up national preventive mechanisms, which are also to be provided with access to places of detention and prisoners. The High Commissioner for Human Rights has encouraged all States to sign and ratify this instrument as an important practical measure and a demonstration of their commitment to preventing torture and ill-treatment, and protecting the human rights of those within their jurisdiction.

[948] See, for example, Human Rights Committee general comment N° 29; Siracusa Principles (E/CN.4/1985/4, annex, paras. 15 and 17); "Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights–Human rights: a uniting framework" (E/CN.4/2002/18, annex, paras. 3 (a) and 4 (a)); Council of Europe, Guidelines on human rights and the fight against terrorism (2002), Guideline III; andInter-American Commission on Human Rights, "Report on terrorism and human rights" (OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., para. 53).

mandatory. Moreover, national authorities have an obligation to prevent human rights abuses and to actively investigate and prosecute any allegation of practices which may involve the transfer or detention of individuals in a manner inconsistent with their obligations under international law[949]. However, this obligation also applies in cases involving a risk of irreparable harm and in cases of arbitrary deprivation of life (including undue imposition of the death penalty), enforced disappearance, torture or cruel, inhuman or degrading treatment, and exposure to a manifestly unfair trial[950]. The High Commissioner for Human Rights has emphasized that, as a practical matter, these arrangements do not work as in reality they do not provide adequate protection against torture and other ill-treatment, nor, as a legal matter, can they nullify the obligation of non-*refoulement*. In most cases, assurances are concluded between States which are party to binding international and regional treaties which prohibit torture and cruel, inhuman or degrading treatment or

[949]Particularly since 11 September 2001, some States have reportedly extradited, expelled, deported or otherwise transferred foreign nationals, some of them asylum-seekers, suspected of terrorism to their country of origin or to other countries where they allegedly face a risk of torture or ill-treatment, in violation of the principle of non-*refoulement.* This principle, set out in article 33 (1) of the 1951 Convention relating to the Status of Refugees, is also recognized in other international instruments, most notably in article 3 of the Convention against Torture and in article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance. It is also reflected in article 7 of the International Covenant on Civil and Political Rights, which the Human Rights Committee, in its general comment N° 20 (1992), has interpreted to include an obligation on States not to expose individuals to "the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*."According to general comment N° 31, article 2 of the Covenant also entails an obligation on States "not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm… either in the country to which removal is to be effected or in any country to which the person may subsequently be removed." It is well established in international law that the prohibition of *refoulement* is absolute if there is a risk of torture or other cruel, inhuman or degrading treatment. See for example, European Court of Human Rights, *Chahal v. United Kingdom*, N° 22414/93, Judgment of 15 November 1996, and Louise Arbour, "In our name and on our behalf", *International and Comparative Law Quarterly*, vol. 55, N° 3 (July 2006), p. 511.

[950]See, for example, European Commission for Democracy through Law (Venice Commission), "Opinion on the international legal obligations of Council of Europe members States in respect of secret detention facilities and inter-State transport of prisoners", 17–18 March 2006, Opinion N° 363/2005, CDL-AD(2006)009.The transfer of an individual which takes place outside the rule of law and without due process may lead to a number of human rights violations, notably infringements of the right to liberty and security of the person, the prohibition of torture and other cruel, inhuman or degrading treatment and punishment, the right to recognition everywhere as an individual before the law, the right to a fair trial, the right to private and family life, and the right to an effective remedy. Depending on the circumstances, it may also amount to an enforced disappearance.

punishment and *refoulement* to such practices, raising, in any event, the question as to why further bilateral steps are necessary. [951].

7.3.3: **Freedom from Discrimination**

In recent times in Nigeria, there is almost this classification that all Hausa people belong *to Boko Haram*. Yet this is far from being true. The Nigerian Constitution[952] made it very clear that nobody shall be discriminated against by reason of sex, origin, disability, religion, political opinion etc. Yet, many have reacted adversely in the presence of a Hausa man or any one from the Northern Part of the Country. In Nigeria, there is now this *Hausaphobia* hence the moment an Hausa man is seen there is an immediate perception that he has a bomb planted somewhere on him. This has led security agents to clamp down on some classes of person. Indeed in Nigeria, particularly in Borno State there have been series of allegations against the Special Joint Task Force that most of the corpses of alleged terrorists they have been parading are actually innocent people whose only crimes are that they are Hausa people. This also applies in the Niger Delta where a majority of their youths are labeled militants and summarily executed by the Joint Task Force Team. It is therefore a burden for all those who belong to a certain class of people to be labeled terrorists just because a segment of their population participates in such. It is therefore pertinent that the government should ensure that such discrimination is not practiced against its citizens as the Constitution has protected every citizen from discrimination on whatsoever ground. It is here that due process and judicial scrutiny is required. It is also part of the International Law provisions

[951] See, for example, "Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism" (A/HRC/4/88) and the High Commissioner's statement on Human Rights Day, December 2005; and E/CN.4/2006/6, chap. III. See also Committee against Torture, views on communication N° 233/2003**,** *Agiza v. Sweden*, 20 May 2005 (A/60/44, annex VIII, sect. A), and Human Rights Committee, views on communication N° 1416/2005, *Alzery v. Sweden*, 25 October 2006 (A/62/40 (vol. II), annex VII).The United Nations High Commissioner for Human Rights and the Special Rapporteur on the question of torture have emphasized the importance of remaining vigilant against practices that erode the absolute prohibition of torture in the context of counter-terrorism.

[952] Section 42

that no person shall be discriminated against. It is therefore not surprising when security operatives sweep in on a group of people and violently and wantonly abuse their rights to freedom from discrimination or even the right to life solely because they belong to a particular religion, sex or tribe. Yet still, the attitude of our security agencies regarding to men in cases of terrorism is a clear pointer to the fact that there exist a great deal of discrimination against them on the ground of their sex. The Law frowns at it and we should not because we want to win the fight against terrorism discriminate against the citizens who ordinarily have their rights protected. Adequate measures should be put in place to ensure that such acts of discriminations do not affect the general psyche of the society.

7.3.4: **Right to Liberty**

All persons are protected against the unlawful or arbitrary interference with their liberty[953]. This protection is applicable in the context of criminal proceedings, as well as other areas in which the State might affect the liberty of persons.[954] In practice, as part of her efforts to counter terrorism, Nigeria has adopted measures which have an impact on the liberty of persons, such as: pretrial procedures for terrorism offences, including provisions concerning bail and the remand of persons in custody awaiting trial; pretrial detention[955]; administrative detention[956]; control orders[957]; and compulsory hearings[958]. In its efforts to counter terrorism, a State may lawfully detain persons suspected of terrorist activity, as with any other crime[959]. It is however suggested that if a measure involves the deprivation of an

[953]Section 35 of the 1999 Constitution as amended

[954] Human Rights Committee, general comment N° 8 (1982) on the right to liberty and security of persons (art. 9), paras. 1 and 4.

[955]Detention before laying a criminal charge against a person for the purpose of further investigating whether that person was involved in the commission, or assisted in the commission, of a terrorist offence

[956]Detention to prevent a person from committing, or assisting in the commission of, a terrorist offence

[957]Imposing conditions on a person, short of detention, to prevent that person from committing, or assisting in the commission of, a terrorist offence

[958]Detention and compulsory questioning of a terrorist suspect, or non-suspect, to gather intelligence about terrorist activities

[959]On Nov 13, 2001, Presidential Military Order gave the US President power to detain a non-citizen suspected of connection to terrorists or terrorism as an unlawful combatant

individual's liberty, strict compliance with national, international and regional human rights law related to the liberty and security of persons, the right to recognition before the law and the right to due process is essential[960]. Any such measures must, at the very least, provide for judicial scrutiny and the ability of detained persons to have the lawfulness of their detention determined by a judicial authority.[961] Adherence to due process and the right to a fair hearing is essential for the proper safeguarding of a person's liberty and security.[962] It is therefore a trite postulation of Law that detention without trial is an infraction of the extant legislations in Nigeria.[963]

7.3.5: **Right to a Fair Hearing**

Guaranteeing due process rights, including for individuals suspected of terrorist activity, is critical for ensuring that anti-terrorism measures are effective and respect the rule of law. Fair hearing therefore forms the bedrock of enthronement of the rule of law in civilized society.[964]The human rights protections for all persons charged with criminal offences, including terrorism-related crimes, include the right to be presumed innocent, the right to a hearing with due guarantees and within a reasonable time, by a competent, independent and impartial court of law or tribunal, and the right to have a conviction and sentence reviewed by a higher tribunal satisfying the same standards[965]. It should be noted that fair hearing within a fair trial connotes trial and investigations conducted according to all rules

[960]In *Hamdi v Rumsfeld* 542 US 507(2004), O Connor J stated that state of war is not a blank cheque to eviscerate the limits placed on authority for the protection of the individual liberties of the citizenry

[961] See International Covenant on Civil and Political Rights (art. 9 (3)–(4)). See also African Commission on Human and Peoples' Rights, International Pen, Constitutional Rights Project, Interights on behalf of *Ken Saro-Wiwa Jr. and Civil Liberties Organisation v. Nigeria,* communications N° 137/94, N° 139/94, N° 154/96 and N° 161/97, para. 83.

[962]Section 36(1) of the 1999 Constitution as amended

[963] See Articles 6 and 7(1)d of the African Charter Cap A10 LFN, 2004. See also *Fawehinmi v Abacha*[1996] 9 NWLR (pt 475) 710 pp 746-7

[964]*Akulega v Benue State Civil Service Commission and anor [*2002], FWLR (pt 123)255 pp 288, *Orugbo and anor v Bulara Una and ors (*2002) 9 SCNJ 12

[965] Section 36

formulated to ensure justice[966]. Fair trial therefore connotes all the provisions as contained in Section 36(6) of the Constitution[967]. International humanitarian law provides for substantially similar protections for the trial of persons in the context of armed conflicts[968]. Fair hearing entails equality before the law and reasonable duration of trial.[969] Article 14 of the Covenant[970] aims at ensuring the proper administration of justice and to this end guarantees a series of specific rights, includingthat all persons should be equal before the courts and tribunals, that in criminal or civil cases everyone has a right to a fair and public hearing by a competent, independent and impartial tribunal, that everyone charged with a criminal offence should have the right to be presumed innocent until proved guilty according to law, and that everyone convicted of a crime should have the right to have his or her conviction and sentence reviewed by a higher tribunal according to law. It is therefore an aberration that the security agents shall constitute themselves into courts and try suspects and even execute them on grounds that they are terrorists[971]. The use of military and special tribunals or courts(where they exist) to try terrorist suspects may also have a serious impact on due process rights, depending on the nature of the tribunal or court and any restrictions placed on a person facing charges before it[972]In Nigeria recently, there has been this agitation for establishment of a Special Court to try terrorist offences. In as much as we are not opposed to the establishment of such courts, we wish to warn that such courts should not

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[966]*Ikeanyi v B.C.A. Company Limited*,(2007) 19 WRN, 89, see also *Ajayi v N.U.R.T.W*,[2008] 8 NWLR (pt. 1144)429

[967]*Iwuoha v Okoroike*[1996] 2 NWLR (pt. 429) 234, *Kotoye v CBN and ors* [1989] 1NWLR (pt 98) 419 pp444, *Esiaga v UNICAL and ors* (2004) All FWLR (pt 206) 381 pp 399-400

[968]In July 2007, the Human Rights Committee adopted general comment N° 32, revising its general comment on article 14 of the International Covenant on Civil and Political Rights on the right to a fair trial and equality before the courts and tribunals. The revised general comment notes that the right to a fair trial and to equality before the courts and tribunals is a key element of human rights protection and serves to safeguard the rule of law by procedural means.

[969]*Effanga v Rogers*(2003) FWLR(pt 157)1058 pp 1071

[970]International Covenant on Civil and Political Rights, See also Section 36 of the Constitution.

[971]This was actually what happened to the Founder of the Boko Haram set when he was openly executed as evidenced by still images of that dastardly act.

[972] See, for example, African Commission on Human and Peoples' Rights, Media Rights Agenda v. Nigeria, communication N° 224/98 (paras. 59–62) and Inter-American Court of Human Rights, *Castillo Petruzzi et al. v. Peru*, Judgement of 30 May 1999 (paras. 128–131, 172).

under any circumstance do away with the constitutional provisions pertaining to fair trial. We say so because the moment we begin to erode our constitutional basis we are constructing a highway to anarchy in a democratic state. At a minimum, the standards required to ensure fair and clear procedures must include the contents of Section 36 of the Constitution which in our mind ensures the old long saying that it is better to free nine thieves than to wrongly convict one innocent man. A situation where the innocent are made to dies because we are fighting terrorism will simply create more terrorists out to destroy the country.

7.3.6: **Freedom of Association**

The right to freedom of association[973], like the right to freedom of expression[974], is a platform for the exercise and defence of other rights, such as political participation rights and cultural rights. Human rights defenders often use this right as a legal basis for their action. It is central to a democratic society[975]. As we have seen in the International scene and other areas such rights are often limited by States in their response to a real or perceived terrorist threat. While the right to freedom of association may be subject to derogations and limitations under most human rights treaties and provisions, clear safeguards must exist to ensure that they are not used to curb the rights of political opposition parties, trade unions or human rights defenders. Indeed, it is on record that the Courts in Nigeria have struck down some offensive paragraphs of the Public Order Act[976] on the ground that they offend the constitutional provisions for freedom of association. It is not doubtful that in a short while

[973]Section 40 of the Constitution. In *Abubakar v A.G Federation*,[2007], 3 NWLR (pt 1022) 46, the Court was of the view that by virtue of Section 40 of the Constitution, that every person has a right to assemble freely and associate with other persons and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests and the right cannot be tampered with.

[974]Section 39

[975]See, for example, African Commission on Human and Peoples' Rights, Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights, *Association of Members of the Episcopal Conference of East Africa v. Sudan*, communications N° 48/90, N° 50/91, N° 52/91, N° 89/93 (paras. 78–80).

[976]Cap P42 LFN 2004

the nation may witness a barrage of proscription of certain societies and associations in the name of fighting terrorism. It is therefore very essential that before a society should be proscribed there must be a judicial opinion on same. As such, the onus must be on the State to show that the measures taken fall within the permissible aims under the national and international human rights law. This implies that States must not claim that the rights-limiting measures taken to preserve national security when they are in fact taken to effectively stifle all opposition or to repress its population. Apart from this, care should be taken to ensure that the principles of necessity and proportionality are respected in all cases; specific safeguards are required to ensure that the limitations to the right to freedom of association are construed narrowly. These measures include ensuring that the principle of legality is respected in the definition of terrorism, terrorist acts and terrorist groups. The courts shall ensure that such definitions are not too wide or vague as such definitions may lead to the criminalization of groups whose aim is to peacefully protect, inter alia, labour, minority or human rights. Any decision to proscribe a group or association needs to be taken case by case and no two cases shall be given the same treatment. To do so, there shall be need to ensure that the assessment is based on factual evidence of the group's activities, which implies that the government may not make the determination before registration has taken place and before the group has started to exercise its activities[977]. The assessment must be made by an independent judicial body, with full notice to the affected group as well as the possibility of appealing the decision.

7.3.7: **Right to Privacy**[978]

[977]See, for example, *Sidiropoulos and Others v. Greece*, N° 26695/95, European Court of Human Rights, Judgment of 10 July 1998: "the Court does not rule out that, once founded, the association might, under cover of the aims mentioned in its memorandum of association, have engaged in activities incompatible with those aims. Such a possibility, which the national courts saw as a certainty, could hardly have been belied by any practical action as, having never existed, the association did not have time to take any action" (para. 46).

[978]*Ezeadukwa v. Maduka* (1997) 8 NWLR (Pt.518)635

Article 17 of the International Covenant on Civil and Political Rights and Section 37 of the 1999 Constitution prohibits governmental parties from interfering with the privacy of those within their jurisdiction and requires them to protect those persons by law against arbitrary or unlawful interference with their privacy. Privacy includes information about an individual's identity, as well as the private life of the person[979] .

Since 9/11, most countries have stepped up security at airports and other places of transit, for instance by collecting biometric data from passengers (such as eye scans and fingerprints), photographs, passport details and the like. Countries including Nigeria have for a long time provided their security intelligence services with powers of surveillance, including wiretapping and the use of tracking devices. All of these practices involve the collection of information about a person[980]. They therefore limit the privacy of such persons, as well as raising questions about how the data are to be protected. Interference with privacy also arises in the security screening and searching of persons. Any act which has an impact on a person's privacy must be lawful, i.e., it must be prescribed by law[981] . The implication of this is that any search, surveillance or collection of data about a person must be authorized by law. The extent to which this occurs must not be arbitrary, which in turn requires that the legislation must not be unjust, unpredictable or unreasonable. The law authorizing interference with privacy must specify in detail the precise circumstances in which the interference is permitted and must not be implemented in a discriminatory manner. This does not mean, however, that countries enjoy an unlimited discretion to interfere with privacy, since any limitation on rights must be necessary to achieve legitimate

[979] See, for example, Human Rights Committee, views on communication N° 453/1991, *Coeriel et al. v. the Netherlands,* 31 October 1994 (A/50/40 (vol. II), annex X, sect. D). As to the meaning and extent of "private life" see, for example, European Court of Human Rights, *Amann v. Switzerland,* N° 27798/95, Judgment of 16 February 2000, and *Rotaru v. Romania,* N° 28341/95, Judgment of 4 May 2000.

[980] Section 24 of the Terrorism Prevention Act of 2011

[981] See article 17 (1) of the International Covenant on Civil and Political Rights, article 8 (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and article 11 (2) of the American Convention on Human Rights.

purposes and be proportionate to those purposes. Regard must also be had to the obligation of States to protect against the arbitrary exercise of such authorizations. Thus, in *Klass v. Germany*, the European Court of Human Rights stated that it must be satisfied that any system of secret surveillance conducted by the State must be accompanied by adequate and effective guarantees against abuse[982] .Where personal information is collected; the data must be protected against unlawful or arbitrary access, disclosure or use[983]. It is clear in Nigeria that several agencies have now been empowered to collect data; however what is confusing about same is the privacy of such collected data. It is not in doubt in Nigeria now to see websites selling *gsm* numbers of private individuals to the public for value even when the owner of such GSM number has no knowledge of who is in possession of his phone number that remains unlisted. It is therefore imperative that such collected data should align itself with the right to the privacy of the individual who owns such particulars. In Nigeria of present, we have varied such arrangements spreading over security and other paramilitary agencies[984]. The Council of Europe's Guidelines on human rights and the fight against terrorism, for example, state:

> Within the context of the fight against terrorism, the collection and the processing of personal data by any competent authority in the field of State security may interfere with the respect for private life only if such collection and processing, in particular:
>
> (i) Are governed by appropriate provisions of domestic law;

[982] *Klass v. Germany*, N° 5029/71, European Court of Human Rights, Judgment of 6 September 1978, para. 50

[983] Confer this with the FRSC and GSM providers registration of users and as well as the NIMC data collection. We also have the Police BCMR data collection of all vehicle owners. Are these information collected not a breach of the right to privacy especially when the person submitting the information has no control over who sees such data?

[984] As at the last count, Nigeria has NIMC, Police, FRSC, GSM service providers all collating identification particulars of Nigerians.

(ii) Are proportionate to the aim for which the collection and theprocessing were foreseen;

(iii) May be subject to supervision by an external independentauthority."[985]

Consequently, any interference with the right to privacy must be done within the four walls of the Law since the fight against terrorism cannot be won without due regard and respect for the individual's right to privacy.

7.3.8: **Economic, Social and Cultural Rights**

Most times, in trying to address the human rights implications of terrorism and counterterrorism measures there has been always an unintended likelihood to focus on the protection of civil and political rights, with little attention paid to their impact on the enjoyment of economic, social and cultural rights. It is clear that terrorism and counter terrorism measures adopted by countries are influenced by and in most cases do have an impact on the enjoyment of the economic, social and cultural rights of affected individuals, as well as on broader development objectives. It will not be possible to achieve national or even global security objectives without concerted efforts towards the realization of all human rights. Diligent effortis therefore a mustif we are to understand and address the linkages between terrorism and the enjoyment of economic, social and cultural rights. It is a trite issue in the fight against terrorism that countries recognize the need to tackle the conditions conducive to the spread of terrorism which oftentimes include addressing issues such as socio-economic marginalization, failure to respect human rights and a lack of good governance. It is clear that economic and social development can play a role in reducing support for terrorism by preventing the conditions that give rise to violence in general and to terrorism in particular, and of course they do so by contributing to long-term social and

[985] Confer this with the FRSC and GSM providers' registration of users. Are these information not breach of the right to privacy?

economic stability. One needs to note also that these may include measures to support structural stability, deny groups or individuals the means to carry out acts of terrorism, and sustain international cooperation. On the other hand, the diversion of resources normally allocated to social and economic programmes and sectors, development assistance and poverty reduction, in favour of security and counter-terrorism programming may have serious consequences for the affected countries and communities[986]. We need to realize that the adoption of specific counter-terrorism measures may also have a direct impact on the enjoyment of economic, social and cultural rights. In some instances, targeted sanctions against individuals suspected of involvement in terrorist activity, such as freezing their financial assets or imposing travel restrictions on them, may be an effective means for tracking, and even preventing, terrorist activity. There is the need to say at this juncture that targeted sanctions regime and ejection order on some people where terrorism thrives may pose a number of serious challenges, in particular related to the lack of transparency and due process in listing and de-listing procedures and as well the illegitimate ways of handing down the order[987]. A human rights analysis of the impact of the measures adopted in combating terrorism merits particular consideration in the light of the serious consequences they may have for the individual, as well as for his or her family and community.

[986] As stated by the Development Assistance Committee of the Organization for Economic Development and Co-operation (OECD), aid allocations should be calibrated carefully where the prevention of terrorism is a relevant development objective. In particular, "budget reallocations [should be] preceded by in-depth analysis of need and aid effectiveness so that development aid contributes to long-term structural stability and does not become an instrument of non-development interests. See, for example, Organization for Economic Development and Co-operation, A Development Co-operation Lens on Terrorist Prevention: Key Entry Points for Action, DAC Guidelines and Reference Series (OECD, 2003),available at www.oecd.org.

[987] Confer the eviction notice given recently to some communities in Jos by the Joint Tax Force and as well some of such orders given to some parts of Borno State

CHAPTER EIGHT

CONCLUSION AND RECOMMENDATIONS

8.0: **Conclusion**

In conclusion, it should be re-emphasized that the aim of this research as we already stated in the beginning is to show that with the Law playing its role effectively, we can win the war against terrorism. It is pertinent as shown in this work that we have Laws which if effectively implemented will a go a long way in checking this evil of terrorism without necessarily enacting new ones. However, it should be noted that terrorism is not *stricto senso* a crime standing alone, what is, however is the criminal components and the preceding intention of the acts that converts an ordinary criminal act to the status of terrorism. To allow the Law play its role, there needs to be a synergy between all the other arms of government and as well an effective implementation of the law with regards to the rights of the citizens. No nation can claim to be fighting terrorism if such a nation toys with the inalienable rights of its citizen for there can never be a better and faster way to enthrone dictatorship than on the heel of cries of terrorism. It is imperative that such Laws should be supported with the necessary political will taking into cognizance also the competing rights of individuals in a democratic setting, if we are genuinely committed to checking this ugly menace and protect the lives and citizens of the country and assuage the grief of victims of such terrorist activities. One needs to add further that the state must demonstrate to its citizens that it can protect them and offer them opportunity. The Law can and will effectively fight criminality but then the Law is neither human nor ghost. It requires effective implementation bearing in mind that existing Laws were equipped with respect for human rights. Emergency Laws made in the heat of terrorist attacks may suspend or affect the rights of citizens adversely and these same citizens will be expected to remain faithful to

the Laws after the era of terrorism. The existing Laws have looked at some if not most of these terrorist acts. It is therefore necessary to strengthen the weak aspect of the existing Laws as it affects terrorism. But in doing so regard must be had for the rights and safety of the citizens and there will be a more concerted synergy between the tripod of criminal justice administration for effective and complete tackling of this monster called terrorism.

8.1: **Recommendation**

Need to have one Law on Terrorism

It is noteworthy that an effective and prevention-focused response to terrorism should include a strongly based criminal justice element that is moderated by a normative legal framework which will have embedded in it the core principles of the rule of law, due process and respect for human rights. Perpetrators of terrorist acts are criminals, and should therefore be dealt with by the criminal justice process. This will also ensure that justice is achieved and that the rights of the accused are protected. It is therefore right to recommend that all the laws bordering on terrorism should be collated into one. This suggestion stems from the fact that the act of terrorism does not form the crime alone but there must be the addition of the component acts and the relevant intention. This therefore squarely falls within the domain of criminal law. This being so, there is the need to bring all offences related to terrorism within the four walls of the Criminal Code and or Penal Code just as Canada and Australia have done in their Criminal Code. This will therefore enable the Law officers and security agencies to work from a common front instead of working from a varied front.

Responsibility of the Judiciary to Individual Rights

One reminds that the human rights of the citizens should not be undermined while combating terrorism. It is the duty of the government to protect its citizens from terrorism

and terrorist governments. It will therefore be tantamount to giving with one hand and taking with the other for the citizens to be caught in the cross fire in the cause of their being prevented from terrorist attacks by their own government. The government therefore should always strive to strike a balance between protecting its citizens from terrorism and combating terrorism. The government should always defer to the Constitution as regards human rights and its protection. It is often believed that, in order to fight terrorism, limitations to certain fundamental human rights are allowed. The possibility of restricting or suspending the enjoyment of human rights in situations of emergency may be provided by the Statute with the aim of bringing the emergency back into the legal realm. Thus there exist constitutional provisions and laws which allow restricting, for example, personal security, freedom of movement, the right of defence, the principles of a fair trial, of humanity of punishment, of equality before the law. Truth however must be told that such emergency powers and the suspension or limitation of fundamental rights may in fact endanger the principles of the rule of law and may indeed affect the features of a democratic regime. Such risks have been the object of careful andpainful reflection by a great judge and lawyer, Aharon Barak, who in his capacity as both President of the Supreme Court of Israel and academic[988]wrote that:

> Terrorism poses... especially difficult questions for democracy, since not every effective means can be used... One pillar of democracy – the rule of the people through its elective representatives – may encourage taking all steps effective in fighting terrorism, even if their impact on human rights is harmful. The other pillar of democracy – human rights – may encourage protecting the rights of every individual, including the terrorist, even at the

[988]Barak, Aharon, "The Role of a Supreme Court in a Democracy, and the Fight Against Terrorism" (2003). Faculty Scholarship Series Paper 3693 available online at<http://digitalcommons.law.yale.edu/fss_papers accessed on 23/12/2011

> cost of undermining the fight against terrorism... We, judges in modern democracy, have a major role to play in protecting democracy. We should protect it both from terrorism and from the means that the State wants to use to fight terrorism.

In particular, he mentioned a famous decision, written by himself, in which the Israel Supreme Court held that torture in interrogation of a suspected terrorist is not permitted, even if using violence may save human life, by preventing impending terrorist acts[989]. It is necessary to state that a democracy that tends to intervene against terrorism with close-to-illegal tools may sooner than later outlive its existence. It is therefore relevant that attention must be devoted to the need to avoid new anti-terror offences which may be created in breach of the three fundamental principles of criminal law which represent the pre-condition for the protection of the rights of the accused.

The Judiciary therefore has the responsibility to assess whether the legislative responses to terrorist threats comply with the principle of legality, by, if need be, declaring the new offences inadmissible or non-applicable, depending on the specific features of the relevant legislation. Care should be taken in handling associative crimes which though may be an effective and useful tool to fight terrorism. However, it should be borne in mind that such associative crimes like membership of an organisation that was classified a terrorist organisation could lead to breach of the fundamental right to freedom of association.Clearly

[989] H.C. 5100/94, Public Committee Against Torture in Israel v. Israel). In this case Barak stated that 'we are aware that this decision does not ease dealing with that reality. This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties". When faced with the need to protect democracy from terrorism, the judiciary must be aware that a State that violates fundamental human rights in times of war and terrorism will also violate them in times of peace and security. It is a blissful illusion to believe that human rights will be sacrificed only in times of war and that they will automatically re-acquire their strength and inviolability in times of peace. Aharon Barak's conclusion is that "the struggle against terrorism can never be conducted outside the law, but always within the law, using tools that the law makes available to a democratic State. This is how we distinguish ourselves from the terrorists themselves

in the course of the trial of a suspected terrorist, there is this likely temptation by all involved in the trial to sacrifice the personal liberty of the accused, by having recourse immediately to preventive detention and by foreseeing very lengthy maximum terms or even death penalty upon determination of the matter. This violates the presumption of innocence[990]as most times the Security agencies oversee these preventive detention with the trial Judge lacking judicial control of the legitimacy of the grounds for detention: with the pretext of emergency and security needs and thus the accused may remain in the hands of his accusers even for months, without any impartial judicial control[991].

This indefinite preventive detention and deprivation of defence rights constitute an undue means of pressure on the accused to confess and turn in his possible accomplices. It is obvious that access to a lawyer from the very beginning of the proceedings could facilitate the accused's collaboration with the judiciary this time in a manner respectful of his fundamental rights and this collaboration may offer a crucial tool in countering and preventing terrorism. Terrorist threats often prompt the setting up of extraordinary or specialized courts as the calls have been stringent recently. Most times in establishing these courts certain laws are excluded entailing a violation of the right to be judged by an independent and impartial judge determined by law[992] ; the trial is often also run in an extraordinary manner, with limits to its publicity[993]. Most of the extraordinary procedural practice typical of emergency situations entails a clear breach of the fair trail guaranteed by Section 36 (1) of the 1999 Constitution as Amended.

[990] Art. 6(2) ECHR) See also S 36(5)of the 1999 CFRN as amended.
[991] Art. 5 (3) ECHR). S35 CFRN
[992] Art. 6 (1) ECHR) S36(1)
[993] S36(3)

Reviewing and monitoring of the Powers of the Police

In this era of emergency legislations, the powers of the police and of the security agencies must also be carefully monitored. As regards the investigations into terror crimes, the police and other security agencies are often given exceptional powers, such as the power to arrest or detain without the immediate ratification by a judge the power to interrogate the arrested person without the presence of his attorney[994], the power to carry out telephone and other tapping, the power to seize correspondence, to search and inspect without prior authorization by a judge[995], and so on. History has sadly shown that the power of the police or other security agencies to dispose of the "body" of the accused without the presence of his attorney encourages the use of violent means of interrogation including torture in breach of Section 34(1).The long preventive detention is of itself a serious breach of the right to personal liberty set forth in Section 35(1) and of the principle of the presumption of innocence in Section 36(5) but in addition to this is the premise to a degrading detention, if only on account of the lack of judicial control and contacts with the defence lawyer.Maximum security prisons, where terrorists and members of criminal associations ostensibly are detained, apply particularly harsh regimes as they have been originally set up to prevent escapes and communication and contact between the accused and the crime organisation. The prolonged isolation, the limited space available and the treatment meted out have however transformed this detention into an inhuman and degrading treatment in breach of Section34(1), which is consciously imposed, beyond the security needs, in order to weaken the resistance of the accused and push them to confess, assuming that they exist, his own responsibilities and those of the others.

[994] S27 Terrorist Prevention Act as amended
[995] S29 Terrorist Prevention Act as amended

Most of the achievements in the legal protection of human rights are under attack. Terrorism poses a serious threat to human rights. In adopting measures aimed at suppressing acts of terrorism, states must adhere strictly to the rule of law, including the core principles of criminal and international law and the specific standards and obligations of international human rights law, refugee law and, where applicable, humanitarian law. This will not only effectively check the issue of terrorism but also strengthen the democratic institutions. The odious nature of terrorist acts cannot serve as a basis for countries to disregard their national obligations, in particular in the protection of human rights.There is no conflict between the duty of states to protect the rights of persons threatened by terrorism and their responsibility to ensure that protecting security does not undermine other rights. On the contrary, safeguarding persons from terrorist acts and respecting human rights both form part of a seamless web of protection incumbent upon the state and their democratic existence. We shall therefore seek to adopt the view of the International Court of Justice in making our recommendations. The ICJ affirms that in the suppression of terrorism, states must give full effect to the following principles and these principles form the bedrock of our recommendations. We therefore recommend as follows:

Duty to Protect

The Nigerian government has an obligation to respect and to ensure the fundamental rights and freedoms of persons within their jurisdiction, which includes any territory under their occupation or control. Nigeria must take measures to protect such persons, from acts of terrorism. To that end, counter-terrorism measures themselves must always be taken with strict regard to the principles of legality, necessity, proportionality and non-discrimination.

Independent Judiciary

In the development and implementation of counter-terrorism measures, the government has an obligation to guarantee the independence of the judiciary and its role in reviewing state conduct. Nigerian Government should not interfere with the judicial process or undermine the integrity of judicial decisions, with which they must comply.

Principles of Criminal Law

The Nigerian government should avoid the abuse of counter-terrorism measures by ensuring that persons suspected of involvement in terrorist acts are only charged with crimes thatare strictly defined by law, in conformity with the principle of legality. She must not apply criminal law retroactively. Nigeria should not criminalize the lawful exercise of fundamental rights and freedoms. Criminal responsibility for acts of terrorism must be individual, not collective. In combating terrorism, states should apply and where necessary adapt existing criminal laws rather than create new, broadly defined offences or resort to extreme administrative measures, especially those involving deprivation of liberty.

Derogations

The government of Nigeria must not suspend rights which are non-derogable under treaty or customary law. Nigeria must ensure that any derogation from a right subject to derogation during an emergency is temporary, strictly necessary and proportionate to meet a specific threat and does not discriminate on the grounds of race, colour, gender, sexual orientation, religion, language, political or other opinion, national, social or ethnic origin, property, birth or other status.

Prohibition of Torture

The Nigerian government must observe at all times and in all circumstances the prohibition against torture and cruel, inhuman or degrading treatment or punishment. Acts in contravention of this and other peremptory norms of international human rights law, including extrajudicial execution and enforced disappearance, can never be justified. Whenever such acts occur, they must be effectively investigated without delay, and those responsible for their commission must be brought promptly to justice.

Deprivation of Liberty

The government of Nigeria may never detain any person secretly or incommunicado and must maintain a register of all detainees. They must provide all persons deprived of their liberty, wherever they are detained, prompt access to lawyers, family members and medical personnel. Nigeria has the duty to ensure that all detainees are informed of the reasons for arrest and any charges and evidence against them and are brought promptly before a court. All detainees have a right to habeas corpus or equivalent judicial procedures at all times and in all circumstances, to challenge the lawfulness of their detention. Administrative detention must remain an exceptional measure, be strictly time-limited and be subject to frequent and regular judicial supervision.

Fair Hearing

The government must ensure, at all times and in all circumstances, that alleged offenders are tried only by an independent and impartial tribunal established by law and that they are accorded full fair trial guarantees, including the presumption of innocence, the right to test evidence, rights of defence, especially the right to effective legal counsel, and the right of judicial appeal. Nigeria must ensure that accused civilians are investigated by civilian

authorities and tried by civilian courts and not by military tribunals. Evidence obtained by torture or other means which constitute a serious violation of human rights against a defendant or third party, is never admissible and cannot be relied on in any proceedings. Judges trying and lawyers defending those accused of terrorist offences must be able to perform their professional functions without intimidation, hindrance, harassment or improper interference.

Fundamental Rights and Freedoms

In the implementation of counter-terrorism measures, the government must respect and safeguard fundamental rights and freedoms, including freedom of expression, religion, conscience or belief, association, and assembly, and the peaceful pursuit of the right to self-determination; as well as the right to privacy, which is of particular concern in the sphere of intelligence gathering and dissemination. All restrictions on fundamental rights and freedoms must be necessary and proportionate. One may add here that though human rights are non derogable there is the need to touch on the right to silence of the accused in a trial for terrorism related acts. This is so because an accused that chooses to keep silence in the face of a terrorist related charge cannot be said to be innocent in view of the possible sentences available for such offences. This being so, we make bold here to suggest that the right to silence should be amended in such a way that the Judge officiating in the trial can draw any inference that the circumstance of the case may yield when drawing his judgment.

Remedy and Reparation

The Nigerian government must ensure that any person adversely affected by counterterrorism measures of a state, or of a non-state actor whose conduct is supported or condoned by the state, has an effective remedy and reparation and that those responsible for

serious human rights violations are held accountable before a court of law. An independent authority should be empowered to monitor counter-terrorism measures.

Protection of the Courts, Witnesses and Informants

We here also submit that apart from the above recommendations of the ICJ, we also further submit that the judiciary and legal profession have a particularly heavy responsibility during times of crisis to ensure that rights are protected. Indeed members of the legal profession and bar associations should express themselves publicly and employ their full professional capacities to prevent the adoption and implementation of unacceptable counter-terrorism measures. They should vigorously pursue domestic and international/intercontinental legal remedies where available to challenge counterterrorism laws and practices in violation of international and national human rights standards. Lawyers have an express and implied mandate to defend persons suspected or accused of responsibility for terrorist acts without fear or favour. In addition to working to bring to justice those responsible for terrorist acts, prosecutors should also uphold human rights and the rule of law in the performance of their professional duties, in accordance with the principles set out in our Constitution. They should also avoid the tag ‘persecutor’ as their ultimate aim is to achieve justice both for the accused person and for the victim. The prosecutor should in all this bear in mind that the crime committed is heinous and should allow seriousness to permeate his work of prosecuting. The judiciary must live up to its role as the protector of fundamental rights and freedoms and the rule of law and the guarantor of human rights in the fight against terrorism. In trying those accused of acts of terrorism, judges should ensure the proper administration of justice in conformity with the constitutional stipulations, due process and fair trial. Judges play a primary role in ensuring that national laws and the acts of the executive relating to counter-terrorism conform to the constitutional provisions.The Judges should ensure as

much as possible that judicial procedures aimed at human rights protection, such as habeas corpus, are implemented and the Laws of the land followed in such trial to the letters.

It is a common knowledge that witnesses and informants play an essential role in the investigation and prosecution of terrorist activities. Protecting them is therefore crucial to the success of the criminal justice process and for the effectiveness of the Law in fighting terrorism. Certain procedural measures therefore can be considered in order to better protect witnesses and informants whose assistance is essential to the prevention, investigation and prosecution of terrorist crimes. These measures must ensure an appropriate balance between the need to protect the safety and identity of witnesses and the obligation to safeguard the defendants' right to a fair trial under the Law.

Responsibility of the Security Agencies

Finally, the role of the police in preventing terrorism can be greatly supported by the quality of the relationship it maintains with the local population and with the various ethnic and cultural communities involved. Good relationships can lead to cooperation. Some countries have placed the police under statutory obligation to promote equality and prevent racial discrimination in carrying out its functions. Unfortunately in Nigeria, the relationship between the police and the populace is likely that of the cat and mouse. This could perhaps have been the reason why the Inspector General of Police is doing everything possible to ensure a cordial relationship between the two groups. Of course a cordial relationship could strongly boost the effectiveness of the Law in the fight against terrorism as these terrorists do not live in the bushes. They live among men. A variety of methods can be used to help the police improve its relations with ethnic and other potentially vulnerable community groups. Those methods include recruiting members of underrepresented minority groups in the police and ensuring that they have equal opportunities for progression in their careers;

training the police in cultural diversity and in policing a diverse society; establishing frameworks for dialogue and cooperation between the police and members of minority groups; and giving police access to interpreters and others who can facilitate communication between the police and members of minority groups. In some cases, the police can actively engage in a dialogue with various community groups or discuss with them their role in the prevention of terrorism. Many community groups will welcome the opportunity to share with the police some of their concerns about the perceived detrimental impact of various counter-terrorism measures on their lives. The media can also play an important role in helping the police communicate more honestly and more effectively with the public at large and with minority groups. The police must develop good relationships with the media and must communicate with the media in a manner that does not perpetuate hostility or prejudice towards members of certain groups. The executives should also provide the Police with the necessary support it needs to effectively tackle the menace of terrorism. There shall also be a re orientation of the policemen with a view to best known practices in investigation, intelligence gathering that are in line with international best practices. They should move away from the crudeness of their ways and come on board the modern way. Intimidating and harassing witnesses and citizens would be made away with. Corruption in the force and other security agencies shall be minimized to the barest minimum. Above all, a general enlightenment of the police and other security agencies involved in the fight against terrorism should be included in their training package on how to respect the dignity of human rights in accordance with the constitutional provisions.

In summary, we recommend the review of existing national policies, procedures and laws for dealing with victims of crime, abuse of power and violations of human rights and as well review how existing practices in every aspect of the criminal justice system are affecting victims of crime and how those practices can be improved. Victims should also be provided

with access to justice and redress and the conditions of that access and as well access by victims to legal counsel in seeking redress and access to justice. Developing the capacity of existing institutions and agencies to offer assistance services for victims and providing training for law enforcement and justice officials in human rights and the rights of victims are also welcome developments.

In conclusion, it is our submission that greater reliance on the instrumentality of the Law is the surest way we can make headway in the war against terrorism. We have to vigorously enforce the laws with all the zeal and seriousness it requires without trampling on the rights of the individuals and keeping to the rule of law.

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