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United Nations Office on Drugs and Crime



REPUBLIC OF KENYA



KENYA

**Human Rights and
Criminal Justice
Responses to Terrorism**



UNODC

United Nations Office on Drugs and Crime

Kenya Training Manual on Human Rights and Criminal Justice Responses to Terrorism

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It was written by:

- Florence Simbiri-Jaoko, Lecturer, University of Nairobi Parklands Law School
- Ulrich Garms, Programme Officer, TPB/UNODC
- Ruth M. Kiragu, Associate Programme Officer, TPB/UNODC and managed by George Puthuppally, Chief, Implementation Support Section II (Sub-Saharan Africa), TPB/UNODC.

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- *Joseph Karanja*, Magistrate, Judiciary/Judicial Training Institute
- *Victor Mule*, Assistant Director of Public Prosecutions, Office of the Director of Public Prosecutions
- *Rosemelle Mutoka*, Lecturer, Kenya School of Law
- *Dr. Simon Nyambura*, Head of the Counter Terrorism and Counter Violent Extremism Pillar, Intergovernmental Authority on Development (IGAD) Security Sector Program
- *Richard Ogetii*, Legal Officer, Joint Counter-Terrorism Analysis Centre
- *Charles Ogeto*, Senior Investigator, Anti-Terrorism Police Unit
- *Edwin Okello*, Assistant Deputy Director of Public Prosecutions, Office of the Director of Public Prosecutions
- *Samson Omondi*, Programme Officer, Kenya National Commission on Human Rights
- *Lucas Onyina*, Magistrate, Judiciary/Judicial Training Institute
- *Elsy Sainna*, Deputy Executive Director, Kenya Section of the International Commission of Jurists
- *Muthomi Thiankolu*, Lecturer, University of Nairobi Parklands Law School
- *Akademia Wandibba*, National Officer, Office of the United Nations High Commissioner for Human Rights in Kenya
- *Mary Wang'ele*, Senior Prosecution Counsel, Office of the Director of Public Prosecutions
- *Nelly Warega*, Programme Officer, Kenyan Section of the International Commission of Jurists
- *Charity Kagwi-Ndungu*, Head of Criminal Justice Programme, UNODC Regional Office in Eastern Africa
- *Joyce Matara*, Project Officer, Police Reform Programme in Kenya, UNODC Regional Office in Eastern Africa

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Preface

Message from the UN Office on Drugs and Crime

This year marks the tenth anniversary of the United Nations Global Counter-Terrorism Strategy, which was unanimously adopted by the General Assembly on 8 September 2006. During this ten years, terrorism continued to be a major challenge to the global community of nations. Member States individually and collectively, supported by the United Nations have intensified efforts to foster multilateral action to prevent and combat terrorism. In confirming the Global Counter-Terrorism Strategy on 19 July 2016, the General Assembly reaffirms “that 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, at threatening territorial integrity and the security of States and at destabilizing legitimately constituted Governments”

The Global Counter-Terrorism Strategy stresses the crucial role of respect for human rights and the rule of law as the fundamental basis of the fight against terrorism, including the need to promote and protect the rights of the victims of terrorism.

The United Nations Secretary-General, in his Plan of Action to Prevent Violent Extremism, observes that “[v]iolations of international human rights law committed in the name of state security can facilitate violent extremism by marginalizing individuals and alienating key constituencies, thus generating community support and sympathy for and complicity in the actions of violent extremists. Violent extremists also actively seek to exploit state repression and other grievances in their fight against the state.”

Human rights are at the foundation of UNODC’s mission: making the world safer from drugs, crime and terrorism. Crime and terrorism prevention and criminal justice strategies must be founded on a human rights approach. In this regard, UNODC is working closely with numerous Member States, including Kenya, to strengthen the capacity of national criminal justice systems to counter terrorism in compliance with the rule of law, including especially human rights. This includes assisting them to put into practice the conviction, solemnly stated in the Global Counter-Terrorism Strategy, that “effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing.”

It is in this context that Kenya and UNODC have worked together to produce the *Kenya Training Manual on Human Rights and Criminal Justice Responses to Terrorism*. It was written jointly by Kenyan criminal justice practitioners and academic experts and UNODC experts. It examines human rights issues that arise in the course of the investigation, prosecution, trial and punishment of terrorism offences, through an analysis of Kenyan law, as well as regional and international law. The practice of Kenyan courts reflected in this Manual is evidence of the high level of expertise in Kenya regarding complex human rights questions that arise in the criminal justice response to terrorism.

Our hope is that the Manual will aid criminal justice institutions in Kenya to further integrate human rights aspects of criminal justice processes in terrorism cases into their training curricula. The Manual is also intended to serve as a practical tool with which to deliver specialised training on the human rights aspects of counter-terrorism, thus building the capacity of Kenyan criminal justice practitioners to implement measures that are respectful of the rule of law and in accordance with international law, including international human rights law.

We are pleased to place this Manual at the disposal of our Kenyan counterparts as yet another contribution of UNODC efforts to counter the menace of terrorism in the region, in accordance with human rights and the rule of law.

The elaboration of this Manual was made possible through the generous support of the Government of Denmark and we are grateful for this. We are also deeply thankful to the Kenyan criminal justice, human rights and counter-terrorism experts, as well as to the Office of the UN High Commissioner for Human Rights, whose contributions were essential in preparing and reviewing this publication.

José Vila del Castillo

Representative
Regional Office for Eastern Africa
UNODC

George Puthuppally, Chief

Implementation Support Section: Sub-Saharan Africa
Terrorism Prevention Branch
UNODC

Preface

Message from the Director of Public Prosecutions

This Training Manual on Human Rights and Criminal Justice Responses to Terrorism is the fruit of close cooperation between Kenya and the United Nations Office on Drugs and Crime, with the contribution of the IGAD (Security Sector Program).

The Training Manual will be used as a training and reference tool for investigators, prosecutors and judicial officers. It will promote a shared understanding of both the terrorism menace and of the need to strictly comply with the rule of law and in particular suspects' fundamental rights. In the investigation, prosecution and adjudication of terrorism cases we must not forget the importance of gathering evidence in accordance with the dictates of the law. Kenya is a party to virtually all UN Human Rights Conventions and has expressly incorporated these conventions into our laws through the 2010 Constitution.

The Manual is informed by the enactment of the Prevention of Terrorism Act, 2012, and is intended to be a resource that prosecutor and investigating officers will refer to easily when preparing for court cases. It will in this respect complement the Points to Prove Handbook developed by the office of the Director of Public Prosecutions and the Anti-Terrorism Police Unit.

The Manual is a comprehensive piece of work covering all stages of the criminal justice response to terrorism, from the definition of "terrorist act" under POTA to the ingredients of offences under POTA, to human rights of a suspect during arrest and investigation until arraignment in court. The Manual informs investigators of how to effectively protect rights to a fair trial, the presumption of innocence, non-discrimination already at the investigation stage and of how to treat children suspected of committing terrorism offences.

The Manual will be particularly useful to prosecutors at the trial stage by alerting prosecutors to the need to ensure that due process was followed during the investigations and that the prosecution is not undermined by legal challenges during trial. Equally important, the Manual encourages prosecutors not to neglect the importance of protecting the rights of victims and witnesses. Finally, possible human rights challenges to international cooperation and matters of mutual legal assistance are also dealt with comprehensively in the manual.

This Manual is an accessible and exciting reading material with live case studies and hypothetical scenarios given, both Kenyan and international. It identifies the available tools, provides case studies, with activity boxes for trainees and suggests areas for further reading. To complete its use as a self-study and training tool, the Manual provides for self-assessment questions at the end of each chapter, which enable users to test their knowledge of the topics covered.

I believe this manual will enhance the capacity of our law enforcement agents to effectively investigate, prosecute and adjudicate cases of terrorism in a holistic manner and thereby achieve its intended purpose.

The Manual bears testimony to the unwavering support of UNODC for Kenya. The Manual also is evidence of the willingness of the numerous Kenyan actors who have an important role to play in the criminal justice response to terrorism – including in building knowledge and skills in this field – to work together: the Office of the Director of Public Prosecutions, the Anti-Terrorism Police Unit, the Judiciary, the Kenya National Commission on Human Rights, the Kenya Chapter of the International Commission of Jurists, the Kenya School of Law and the University of Nairobi.

Keriako Tobiko, CBS, SC

Director Of Public Prosecutions

Preface

Message from the Chairperson of the Kenya National Commission on Human Rights

Terrorism has remained a major global security challenge for many governments across the world, especially since terror attacks brought down the Twin Towers that were the World Trade Centre in New York on September 11, 2001. Kenya has been no exception to the rising specter of global terrorism. The first major terrorist act on Kenyan soil took place in 1998 when the American Embassy in Nairobi was attacked. Over 200 people lost their lives in that attack. In 2002, two terror attacks were carried out in the Coastal City of Mombasa. In one attack, an all-terrain vehicle crashed through a barrier outside the Paradise Hotel in Kikambala and blew up, killing 13 people and injuring 80. In another attack, terrorists fired two off-target surface-to-air missiles at an Israeli charter plane that was leaving the Moi International Airport. Following the 2002 attacks, Kenya maintained a relative time of calm for slightly over a decade. However, this peace has been violently disrupted over the last three years with the Country witnessing several attacks that have resulted in the loss of lives and property. The most notable attacks have been the Westgate Attack (2013), the Mpeketoni Attack (2014) and the Garissa University Attack (2015). Kenya has further borne the brunt of terrorism by sending its soldiers to the war-torn neighbouring Somalia under the aegis of AMISOM where several casualties and deaths have been reported despite the good progress made by the troops in neutralizing the threats of terrorism.

Global terrorism has made many governments in different parts of the world respond to this threat with maximum force, following the declaration of the “War on Terror” after the 9/11 attacks. Although the war on terror was aimed at neutralizing the threats of terrorism, ten years later, that goal has not been fully attained. On the contrary, the war on terror has instead seen the emergence of different forms of terror outfits such as the ISIS and Al Shabaab among others. The war on terror has also raised a number of serious human rights concerns. Different states have been accused of using “terror” to fight terror, which in the end, creates no distinction between the alleged terrorists who are determined to operate through extra-legal means and Governments that are expected to operate within the confines of the rule of law with the primary responsibility of being responsible duty-bearers in the promotion and protection of human rights of all their people. However the war against terror can only be decisively won if, in carrying out the said war, Governments commit to act with the confines of the rule of law and respect for human rights. Therefore, as daunting and as challenging as the threat of global terrorism is, all the actors involved in the fight against terrorism must adopt strategies that would, in the final end, lead to the defeat of this global menace in a manner that upholds the rules of law while promoting respect for human rights. Capacity building of the various actors, especially those in the criminal justice sector such as the police, the courts, the prosecution and the investigators, should be adopted so as to make the war against terror successful within the confines of law.

The KNCHR is thus pleased to have been part and parcel of the development of this customized training manual applicable to Kenya's war against terror in line with the rule of law and respect for human rights. This manual will be useful in building the capacity of actors in the criminal justice system to enable them fulfil their duty of the promotion and protection of human rights, even as they help Kenya safe and secure from the threat of terrorism. It is therefore my hope that this manual will serve to help us all in fulfilling both our national and international obligations within the context of fighting terrorism. The KNCHR as the institution that is constitutionally mandated with ensuring the promotion and protection of Human Rights in Kenya takes this opportunity to urge all actors to ensure the uptake and implementation of this manual. It will be our pleasure as the KNCHR to offer support to or work with all the key actors and institutions to ensure the successful uptake and implementation of this manual.

Kagwiria Mbogori,

Chairperson,

Kenya National Commission on Human Rights (KNCHR)

Preface

Message from the Director/Chief Executive Officer of the Kenya School of Law

“Effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing”. This position was adopted by the General Assembly in 2006 in its Global Counter-Terrorism Strategy. This is the essence of the Curriculum that has given birth to this training manual.

Counter-terrorism and human rights concerns bear similarities because they both affect the human race. The Global Counter-Terrorism Strategy position that the two issues are complementary and mutually enforceable, therefore creates a tight space within which States and their organs are supposed to strengthen their counter-terrorism efforts.

This manual comes at a crucial time when the World is faced by an escalation in terrorist activities, increased organization of terrorist groups and re-organization of how terrorism/terrorist ideas are expanded. State organs involved in the various activities of counter-terrorism; investigation; prosecution and adjudication need to be armed with the requisite skills to effectively undertake counter-terrorism actions without infringing on the rights of suspects and the public at large.

Although all rights should be accorded the same protection, the Right to Life is the fountain of all rights. This right has been referred to as ‘a supreme right’. Terrorism flies in the face of this right and each State is therefore expected to undertake positive action to protect persons within its borders against any threats of terrorism.

The manual is a bold and much needed training tool as it not only looks at terrorism and human rights but sensitizes State actors involved in counter-terrorism activities on the rights of accused persons and the permissible derogations.

The manual’s target audience are prosecutors and judges, investigators, policy makers and government officials among others. The manual has been drafted in concise terms, starting with an apt introduction into human rights law and its relations with International Humanitarian Law, International Refugee Law and International Criminal Law. This introduction is key to the target audience, as it lays foundation for the discussion of other pertinent issues in the manual.

The manual employs various innovative learning techniques like focus boxes, cases studies, activities, tools and assessment questions that will captivate the reader and assist the trainer in delivery of the subject matter. It also provides links to additional further reading that allows a trainer and reader to enrich their knowledge.

The manual is a culmination of the joint efforts by experts from the Office of the Director of Public Prosecutions Kenya (ODPP), the Kenya National Commission on Human Rights (KNCHR), the Anti-Terrorism Police Unit (ATPU), the Judiciary, the Joint Counter-Terrorism Analysis Centre (JCTAC), the University of Nairobi Law School, the Kenya Section of the International Commission of Jurists (ICJ), the Inter-Governmental Authority on Development (IGAD) and the Kenya School of Law (KSL).

The Kenya School of Law is delighted to be associated with the preparation of this manual and highly recommends it to anyone interested in understanding the inter-section between human rights and counter-terrorism activities.

Professor PLO Lumumba

Director/Chief Executive Officer
Kenya School of Law

Acronyms

ACHPR	African Charter on Human and Peoples' Rights
ACommHPR	African Commission on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ACHR	American Convention on Human Rights
ADRDM	American Declaration on the Rights and Duties of Man
AMISOM	African Union Mission in Somalia
AML	Anti-Money Laundering
ATPU	(Kenyan) Anti-Terrorism Police Unit
AU	African Union
AUC	African Union Commission
CAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	United Nations Convention on the Elimination of All Forms of Discrimination against Women
COE	Council of Europe
CERD	United Nations Convention on the Elimination of All Forms of Racial Discrimination
CFT	Counter Financing of Terrorism
CPC	(Kenya) Criminal Procedure Code
CRC	United Nations Convention on the Rights of the Child
CRPD	United Nations Convention on the Rights of Persons with Disabilities
DPP	Director of Public Prosecutions
EAC	East African Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
FATF	Financial Action Task Force
GCTF	Global Counterterrorism Forum
GPS	Global Positioning System
IACommHR	Inter-American Commission of Human Rights

IACHR	Inter-American Convention on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPPED	International Convention for the Protection of all Persons from Enforced Disappearance
IGAD	Intergovernmental Authority on Development
HRC	United Nations Human Rights Committee
ICC	International Criminal Court
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IPOA	(Kenya) Independent Policing Oversight Authority
KDF	Kenya Defence Forces
KLR	Kenya Law Reports
KNHREC	Kenyan National Human Rights and Equality Commission
KNCHR	Kenya National Commission on Human Rights
NGEC	(Kenya) National Gender and Equality Commission
NGO	Non-Governmental Organisation
NPO	Non-Profit Organizations
NPS	(Kenya) National Police Service
NSCVE	(Kenya) National Strategy to Counter Violent Extremism
OAS	Organization of American States
OAU	Organization of African Unity
ODPP	(Kenya) Office of the Director of Public Prosecutions
OHCHR	Office of the United Nations High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
POCA	(Kenya) Prevention of Organised Crime Act
POTA	(Kenya) Prevention of Terrorism Act
SIT	Special Investigative Techniques
SLAA	(Kenya) Security Laws Amendment Act
UDHR	Universal Declaration of Human Rights
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
UPR	Universal Periodic Review
UNTOC	United Nations Convention against Transnational Organised Crime
UNHCR	United Nations High Commissioner for Refugees

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Background

The United Nations office on Drugs and Crime (UNODC) is mandated by the United Nations General Assembly to provide assistance to requesting Member States on the legal and criminal justice aspects of countering terrorism. Its Terrorism Prevention Branch is leading this assistance delivery, hand in hand with UNODC Field Offices, by supporting Member States to ratify the international legal instruments against terrorism, incorporate their provisions in national legislation, as well as building the capacity of their national criminal justice systems to implement those provisions effectively, in accordance with the rule of law, including human rights.

Since 2013, UNODC has been providing specialised assistance to the Government of Kenya, within the context of UNODC's counter-terrorism programme for the Horn of Africa and neighbouring countries. Implementation of this programme of activities in Kenya has mainly focused on strengthening the ability of relevant national entities to implement a criminal justice response to terrorism, in compliance with the Constitution of Kenya, 2010, and international human rights norms and standards. This includes a series of training workshops for criminal justice officials on human rights issues in the context of countering terrorism.

In the Global Counter-Terrorism Strategy (A/RES/60/288) adopted by the United Nations General Assembly in 2006, Member States solemnly and unanimously stated that "effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing." The Global Strategy also "recognize[d] that States may require assistance in developing and maintaining ... effective and rule of law-based criminal justice systems, and [encouraged] them to resort to the technical assistance delivered, inter alia, by the United Nations Office on Drugs and Crime" (emphasis added).

As a key tool to fulfil this mandate, UNODC developed in 2013-2014 a training module on *Human Rights and Criminal Justice Responses to Terrorism*, as part of its *Counter-Terrorism Legal Training Curriculum*. The module was developed with the invaluable contributions of experts from international organizations, including the Office of the United Nations High Commissioner for Human Rights (OHCHR), as well as national counter-terrorism and human rights experts from countries around the world. It serves as an important resource to UNODC in delivering technical assistance on the human rights aspects of countering terrorism throughout the world, and is available to national training institutions for use in their training programmes.

In the course of their co-operation, UNODC and Kenyan authorities determined that the effectiveness of capacity building initiatives on criminal justice responses to terrorism would be significantly enhanced and made more sustainable if a customized Kenyan version of the UNODC training module, *Human Rights and Criminal Justice Responses to Terrorism (Module 4 of the Counter-Terrorism Legal Training Curriculum)*, was developed and made available to criminal justice sector training institutions in the country. To this end, an informal Working Group was formed, comprising UNODC and representatives from various national counterparts, and charged with its development.

This Manual was written by Florence Simbiri-Jaoko, Lecturer at the University of Nairobi Law School, as well as Ulrich Garms and Ruth M. Kiragu, Programme Officers at TPB/UNODC, under the management of George Puthuppally, Chief, Implementation Support Section II (Sub-Saharan Africa) of UNODC/TPB. Its international law segments are to a large extent based on the UNODC publication *Human Rights and Criminal Justice Responses to Terrorism*. Credit for these parts therefore goes to all those who contributed to that publication, and are listed in the acknowledgements section of *Human Rights and Criminal Justice Responses to Terrorism*.

AIMS AND METHODOLOGY OF THE TRAINING MANUAL

i. Objective and Target Audience

The principal objective of this Training Manual is to provide a tool for training Kenyan public prosecutors, judges, magistrates, investigators and other law enforcement officials, and defence lawyers. At the same time, it can serve as a manual for self-study and also as a reference book for practitioners to look up Kenyan and international practice on human rights questions arising in the criminal justice response to terrorism.

ii. Methodology








The training method envisaged by this Manual is designed to empower adult participants to effectively discharge their professional duties and responsibilities. The methodology adopted has therefore the following four characteristics:

- a) practical (as adult professionals learn by doing)
- b) interactive (in order to capitalize on the collective intelligence and expertise of the group)
- c) participant-centred (as the entire learning experience must focus on the participants' needs and expectations)
- d) based on a problem-solving approach (in order to immerse the participants in a real-life stimulating learning experience).

These are learning methods that encourage and indeed require participants to play an active role and take responsibility for their learning. Participants will be expected to work both as part of a small group, as well as individually, to explore problems through case studies and discussion platforms, and take initiatives that allow them to acquire the practical knowledge and skills that they need in their workplace. This Manual offers key learning objectives, lecture material, activities and case studies to enhance discussion and knowledge sharing. The Manual does not aim at providing abstract or theoretical knowledge of legal concepts, but rather to encourage trainers and participants to reflect upon the practical application and implications of the norms and principles discussed, and to think about the policy and ethical underpinnings of legal principles.

In support of the participant-centred and problem solving approach underlying the Manual, a number of training tools are used. To facilitate the use of these tools, they are identified throughout the Manual by graphic symbols.

These are the symbols used:

	Focus Boxes	Users are introduced by a series of boxes to topics of specific interest, providing more in-depth information or examples, and allowing a comparative approach to the subject.
	Case Studies	Studies of real cases from Kenya numerous other jurisdictions are provided to illustrate how legal concepts have been applied in practice by courts and other bodies.
	Activities	These boxes offer ideas for exploring how the various topics covered in the module are handled in practice in Kenya. Participants are encouraged to apply their skills and share their experience. Some of the activities are discussion points, others hypothetical case studies which can also be used to practice drafting an application or a motion on a point of law, or as basis for a mock hearing. During workshops, trainers may propose an activity to stimulate an initial discussion among participants, or to encourage application of the legal concepts to a hypothetical practical case. Persons studying independently will also be able to use the activity boxes to focus on the practical application of knowledge acquired.
	Self-Assessment Questions	At the end of each Chapter, assessment questions provide the possibility to test one's knowledge on the topics covered. Unlike the activities, the answers to assessment questions can generally be found in the text of the Manual. These questions are primarily intended as a tool for self-assessment by learners using the Manual for self-study. The assessment questions can also be used by trainers as a preliminary tool to identify training needs and the level of competence of participants, as discussion points during a training session, or to test impact at the end of a training session.
	Tools	This tool offers materials to assist criminal justice practitioners. It includes practical guides, manuals, treaties and model laws, databases and other sources. Website links have been added under each tool to enable practitioners to access them with just one click.
	Further Reading	This tool offers reference to additional material with a view to broadening knowledge or exploring application of the norms and concepts discussed in additional real cases.
	Cross-Reference	There is inevitably a degree of overlap within the various Chapters of this Manual. The reference symbol is used to inform users of the location of information covering the same or connected topics.

This Manual may represent a useful tool both for the trainer and the participants. The trainers will have to determine the most appropriate moment to distribute the Manual. In some cases, they might want to distribute it at the beginning of the course. In other cases, they might esteem more appropriate to share the Manual in its entirety with the training participants only at the end of the training. In this case, trainers should provide copies of assignments and other relevant materials already during the training.

1. COUNTER-TERRORISM AND HUMAN RIGHTS: INCORPORATION OF INTERNATIONAL LAW INTO KENYAN LAW

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1. Counter-Terrorism and Human Rights: Incorporation of International Law into Kenyan Law

1.1 OBJECTIVES

By the end of this Chapter, you will be able to:

- Discuss the mutually reinforcing relationship between the State's obligation to protect and observe human rights on the one hand, and to prevent and counter terrorism on the other
- State at least three policy reasons underlying the State's obligation to ensure respect for human rights and the rule of law as a fundamental basis for the fight against terrorism
- Distinguish between 'absolute' and 'non-absolute' rights and freedoms under Kenyan and international human rights law
- Describe the overarching principles most relevant to limitations of and derogations from human rights and fundamental freedoms
- Describe the international, regional and national legal framework for the protection of human rights, and identify the main mechanisms that exist at the international, regional and national levels for the enforcement of human rights
- Discuss the relationship between human rights law and other international legal regimes particularly relevant to counter-terrorism, in particular international humanitarian law, international refugee law and international criminal law.

1.2 OVERVIEW

This Chapter will provide an analysis of how international human rights law and the domestic legal system of Kenya interact and complement each other with regard to human rights while countering terrorism. In doing so, it will first discuss the obligation of the State to protect human rights and fundamental freedoms against acts of terrorism, including the rights to life, liberty and security of the person, as well as the complementarity between effective counter-terrorism measures and the protection of human rights. It will then explore how international human rights treaty norms and provisions are incorporated into the Kenyan legal system, and the extent to which the Constitution of Kenya and international law permit limitations of and derogations from human rights.

This will be followed by a succinct overview of the various mechanisms and institutions that exist for the protection of human rights in Kenya, as well as those at the international and regional levels, including the United Nations Human Rights Council and the African Commission on Human and Peoples' Rights ACommHPR) among others. Emphasis will then be laid on the relationship between human rights and other international legal regimes, in particular international humanitarian law, international refugee law and international criminal law. The Chapter will conclude with a set of assessment questions aimed at providing users with the possibility of testing their knowledge on the topics discussed herein.

1.3 INTRODUCTION

The Constitution of Kenya, which was promulgated on 27 August 2010, establishes a firm foundation for the observance, respect, promotion, protection and fulfilment of human rights. It contains one of the most progressive Bills of Rights, which articulates important human rights principles and standards that are significant for the well-being of individuals and communities, and essential components of social and economic progress. It further codifies national values and principles that must guide the review, formulation and implementation of public policies and administrative decisions, as well as the enactment and application of the law, including those pertaining to counter-terrorism.

In recognition of its primary duty to protect human rights, the Kenyan Government developed the National Policy and Action Plan on Human Rights in April 2014. It seeks to give effect to Chapter Four of the Constitution by providing a comprehensive and coherent framework to guide the Government and other actors in carrying out their work in a way that enhances the enjoyment of human rights. To this end, the National Policy and Action Plan on Human Rights focuses on certain priority areas. Key among these are the rights to life, liberty and security, which are enshrined in Articles 26 and 29 of the Constitution respectively.

1.3.1 The Obligation to Protect the Rights to Life, Liberty, Security and Other Human Rights against Acts of Terrorism

As in other parts of the world, terrorist attacks in Kenya have had a very real and direct impact on human rights. The United Nations General Assembly has noted that acts of terrorism “ai[m] at the destruction of human rights, fundamental freedoms and democracy [...], undermin[e] pluralistic civil society and hav[e] adverse consequences on the economic and social development of States.”¹ This has been further reinforced by the Security Council, which has observed that acts of terrorism have the impact of “endanger[ing] innocent lives and the dignity and security of human beings everywhere, threaten[ing] the social and economic development of all States and undermin[ing] global stability and prosperity.”² International human rights bodies have equally acknowledged the devastating impact of terrorism on human rights, as shown in the following press release by the African Commission on Human and Peoples’ Rights.



Press Statement by the African Commission on Human and Peoples’ Rights on Terrorism in Kenya

On 9 April 2015 in Banjul/The Gambia, the ACommHPR issued the following press release pertaining to terrorist attacks in Kenya, which is available at: <http://www.achpr.org/press/2015/04/d255/>

“Press Release on the terror attacks committed by Al-Shabaab in the Republic of Kenya”

The African Commission on Human and Peoples’ Rights (the Commission) is closely monitoring the human rights situation in Kenya and Somalia, which is afflicted by repeated and violent attacks by the terrorist group Al-Shabaab.

The Commission expresses its indignation and is deeply concerned by the escalating human rights calamities in the region created by deliberate and ruthless mass killings of civilians, including children, women and university students.

The Commission is particularly appalled by the recent attack on Garissa University College in North-eastern Kenya, which targeted young students and allegedly killed 147 innocent civilians, including University staff and students.

The Commission wishes to extend its condolences to the families of the victims and the people of Kenya and wishes to reassure its solidarity with the Government and the People of Kenya at this difficult time.

The Commission recognizes the role played by Kenya in the fight against Al-Shabaab as part of the African Union Mission in Somalia (AMISOM), and urges that military operations conducted by the Government of Kenya, in response to these attacks also be in a manner that upholds respect for human rights and full observance of applicable international humanitarian law principles, with a view to bringing perpetrators to justice and stability to the region.

1 General Assembly Resolution 48/122 (1993).

2 Security Council Resolution 1377 (2001).

The Commission urges the Government of Kenya to take the necessary measures to put an end to such human rights violations by the terrorist group and to ensure security throughout the country, in particular public places prone to attacks.

The Commission welcomes the commitment of Member States who have shown their support to the Republic of Kenya by contributing troops and police forces to assist the AMISOM in the fight against the terrorist group Al-Shabaab.

The Commission calls upon the Interim South West Administration in Somalia, the Inter-Governmental Authority on Development, the African Union, the United Nations and the international community to work together to put an end to the serious and massive human rights violations committed by the terrorist group Al-Shabaab.

The Commission further calls upon the Kenyan authorities and the international community to provide assistance to the populations devastated by the Al-Shabaab massacre and destruction, especially the women and children, vulnerable under such circumstances.

Faced with the threat and consequences of terrorism, Kenya and other States have a duty to protect individuals under their jurisdiction. They are also under an obligation to prevent terrorist acts and to bring those responsible for them to justice.



The Positive Obligation to Protect the Right to Life against Terrorist Threats

Under Article 21 (1) of the Constitution, it is the fundamental duty of the State and its organs to **observe, respect, protect, promote and fulfil** the rights and fundamental freedoms in the Bill of Rights.

The duty to respect human rights means that the State must refrain from violating human rights through public officials and others acting on its behalf. The obligation to protect means that in certain circumstances, the human rights' obligations of the State "will be fully discharged if individuals are protected by the State, not just against violations of [human] rights by its agents, but also against acts committed by private persons or entities,"³ including terrorist groups.

Fact Sheet No. 32 on Human Rights, Terrorism and Counter-terrorism, published by the Office of the High Commissioner for Human Rights (OHCHR), explains the implications of the "positive obligation" to ensure respect for human rights using the example of "the supreme right" of the right to life (at page 8):

"... 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. 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 prevent a recurrence of violations. In addition, international and regional human rights law has recognized that, in specific circumstances, States have a 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. Also important to highlight 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 its National Policy and Action Plan on Human Rights, the Kenyan Government has put emphasis on its obligation to respect and protect the right to life, as well as freedom and security of the person, which includes the right not to be subjected to any form of violence or torture in any manner, whether physical or psychological, from either public or private sources; not to be subjected to corporal punishment; or to be treated or punished in a cruel, inhuman or degrading manner.⁴ To address these challenges, the Government commits to strengthen policing and law enforcement institutions to make them more effective and responsive to allegations of human rights abuses.

3 Human Right Committee, General Comment No. 31, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 8.

4 Kenya National Policy and Action Plan on Human Rights, p 19.



The Protection of Victims of Acts of Terrorism

While in the context of criminal justice the rights of those charged with an offence have traditionally been the focus of human rights law, it is now well established that the human rights of victims of crime and witnesses also require attention. The rights and fundamental freedoms of victims and witnesses that are at stake include the rights to life, security, physical and mental integrity, respect for private and family life, and protection of dignity and reputation.

To give effect to Article 50 (9) of the Constitution, which requires Parliament to enact legislation providing for the protection, rights and welfare of victims of offences, the Victim Protection Act (No. 17 of 2014) was passed in August 2014.

At the international level, both the United Nations Global Counter-Terrorism Strategy (2006)⁵ and the Council of Europe (COE) Guidelines on the Protection of Victims of Terrorist Acts (2005) highlight the important role played by victims of terrorism and recommend certain measures that States should take to ensure that victims of terrorism are adequately protected, supported and compensated.

At the regional level, Article 3 (1) (c) of the 2004 African Union (AU) Protocol on the Prevention and Combating of Terrorism commits States Parties to *inter alia* identify, detect, confiscate and freeze or seize any funds and other assets used or allocated for the purpose of committing a terrorist act, and to establish a mechanism to use such funds to compensate victims or their families. This provision is similar to Article 8 (3) of the International Convention for the Suppression of the Financing of Terrorism, which also calls States Parties to consider establishing mechanisms whereby funds derived from the forfeitures referred to in that article are utilised to compensate victims of offences referred to in Article 2 of the Convention, and their families.

On 27-28 October 2014, the AU Commission organised a Symposium on Victims of Terrorist Acts in Algiers, the first of its kind in Africa.⁶ The Symposium highlighted the human cost of terrorism, and placed emphasis on the need for States Parties to further elaborate response mechanisms, taking into consideration the immediate, medium and long term needs of victims, their psychological well-being and the needs of different groups, such as women and children. It further agreed on the establishment of a Network of African Association of Victims of Terrorist Acts as a common platform for advocacy, joint action and the exchange of experiences.

In addition to victims of and witnesses to crime, other actors play an essential role in the investigation and in judicial proceedings involving acts of terrorism.⁷ These include investigators, informants, undercover agents, prosecutors, defence counsel and judges. It is therefore important that measures are put in place to protect their rights, as their ability to participate in investigations and/or criminal proceedings without fear of intimidation or reprisal is essential to maintain the rule of law.



Cross-Reference

The provisions of the Victim Protection Act and the Witness Protection Act are further discussed in Chapters 3 and 5.

5 Under Pillar I, the United Nations Global Counter-Terrorism Strategy identifies the “dehumanization of victims of terrorism in all its forms and manifestations” as one of the conditions conducive to the spread of terrorism, and calls on UN Member States to put in place “national systems of assistance that would promote the needs of victims of terrorism and their families and facilitate the normalization of their lives.” (General Assembly resolution 60/288). Under Pillar IV, the Global Counter-Terrorism Strategy also stresses “the need to promote and protect the rights of victims of terrorism.”

6 The Symposium was first step at the level of the AU Commission towards promoting an adequate response to the needs of victims and strengthening the role of the civil society in counter-terrorism, in line with the United Nations Global Counter-Terrorism Strategy, as well as relevant AU instruments and frameworks.

7 Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector, developed by the Global Counterterrorism Forum’s (GCTF) Criminal Justice Sector/Rule of Law Working Group, Good Practice No. 1.



Activity

- Review the recommendations made in the 2005 COE Convention on the Protection of Victims of Terrorist Acts (which are of course not binding for Kenya), and Fact Sheet No. 32 published by the OHCHR, both of which list a number of measures States Parties are obliged to take as part of their obligation to protect the right to life of all within their jurisdiction, including against the threat of acts of terrorism.

To what extent do you think they are relevant to the Kenyan context?

To what extent does Kenya have measures in place that are in practice similar to those recommended by the COE Guidelines?

- In France, the status of Ward of the Nation (Pupille de la Nation) may be granted to children of victims of terrorism, or to victims who were less than 21 years old at the time of the attack, provided that they are of French nationality. This status confers a range of benefits including subsidies for maintenance, upbringing, education, assistance in finding first employment and exemption from paying university tuition. In your opinion, is there anything special about victims of terrorist acts in comparison to victims of other serious crimes? Do victims of terrorism require special measures for assistance such as those that are provided in France? What would you propose could be done in Kenya in this regard?



Further Reading on Protection of Victims of Terrorism

- UNODC's publication Good Practices in Supporting Victims of Terrorism within the Criminal Justice Framework (October 2015) is available at: http://www.unodc.org/documents/terrorism/Publications/Good%20practices%20on%20victims/good_practices_victims_E.pdf. The Criminal Justice Response to Support Victims of Terrorism (2012 Revised Edition) is available at: https://www.unodc.org/documents/terrorism/Publications/Support_to_victims_of_terrorism/revised_edition_21_May_2012_12-53652_Ebook.pdf
- The Report of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, 2012, A/HRC/20/14, which addresses the framework principles for securing the human rights of victims of terrorism. It is available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-14_en.pdf
- The Report of the UN High Commissioner for Human Rights, "Summary of the Human Rights Council Panel Discussion on the issue of Human Rights of Victims of Terrorism," 2011, A/HRC/19/38. It is available here: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-38_en.pdf
- The Madrid Memorandum on Good Practices for Assistance to Victims of Terrorism Immediately after the Attack and in Criminal Proceedings, developed by the Global Counterterrorism Forum's (GCTF), highlights that "[p]rompt and efficient assistance and support to terrorism victims from the moment of the attack through normalization and beyond can have a positive effect on victims' mental health and ability to cope." It sets out a number of good practices in this regard. It is available here: https://www.thegctf.org/documents/10162/72352/13Sep19_Madrid+Memorandum.pdf
- The COE Guidelines on the Protection of Victims of Terrorist Attacks, adopted by the Committee of Ministers on 2 March 2005, are available here: <https://wcd.coe.int/ViewDoc.jsp?id=829533>
- The United Nations Handbook on Justice for Victims, which provides guidance as to the establishment of a social solidarity fund for victims of terrorism, is available at: https://www.unodc.org/pdf/criminal_justice/UNODC_Handbook_on_Justice_for_victims.pdf
- For an overview of good practice regarding support and assistance to victims during criminal proceedings: Commonwealth Secretariat, Victims of Crime in the Criminal Justice Process, The Best Practice Guide for the Protection of Victims/Witnesses in the Criminal Justice Process (London, 2011), pp. 43-53.

1.3.2 Synergies between Human Rights Protection and Counter-Terrorism



Kenyan High Court Affirms the Importance of Protecting Human Rights while Countering Terrorism

In the Security Laws (Amendment) Act (SLAA) case*, the High Court of Kenya made the following observations regarding the serious threat that terrorism poses to national security, and the need for the State to ensure that its counter-measures are in accordance with the Constitution, and in particular the Bill of Rights.

[252] “That terrorism is a serious threat to national and individual security is not in dispute [t]he National Police Service indicates that there were a total of 47 incidents of terrorism in Kenya in 2014, resulting in 173 deaths and 179 injuries. It states that a total of 409 suspects were arrested and profiled in court.

[254] It cannot be disputed that the fight against terrorism is an important purpose. The State has an obligation to protect its citizens from internal and external threats, . . . and it must maintain the delicate balance between protecting the fundamental rights of citizens and protecting them from terrorists by providing national security. The State thus has an obligation to satisfy the Court that the limitations it has imposed in the legislation under consideration is justified by the realities it is confronted with, and that they have a rationale nexus with the purpose they are intended to meet.”

In its concluding remarks, the Court further observed that:

[459] “In the fight against terrorism, there is an absolute need to balance the right to information with the commensurate duty to ensure that terrorists do not use media reports to achieve their deadly ends. The State has to be innovative in fighting terrorists, but within the framework of the Constitution, and particularly the Bill of Rights. ...

[461] Let this judgement therefore send a strong message to the Parties and the World; the Rule of Law is thriving in Kenya, and its Courts shall stand strong; fearless in the exposition of the law; bold in interpreting the Constitution and firm in upholding the judicial oath.”

**Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others*, [2015] eKLR

In the *SLAA* case discussed above, the High Court stated that “[t]he State has an obligation to protect its citizens from internal and external threats . . . and it must maintain the delicate balance between protecting the fundamental rights of citizens and protecting them from terrorists by providing national security.” The United Nations Global Counter-Terrorism Strategy states that in fact “effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing”. The next section will explore some reasons why there is synergy between protecting human rights and effective counter-terrorism measures.

1.3.2.1 Human Rights Violations are a “Condition Conducive to Terrorism”

Human rights violations, including arbitrary arrest and torture in police or military detention, cannot justify terrorism. There is little doubt, however, that such abuses are among the conditions that provoke tension, hatred and mistrust of governments. Many terrorist groups aim at provoking such hatred towards governments, and by resorting to torture, inhuman and degrading treatment, governments facilitate the achievement of one of the terrorists’ objectives. Human rights violations, particularly those committed in the name of combating terrorism can become terrorist groups’ most effective “recruiting sergeant.”



UN Secretary-General’s Plan of Action to Prevent Violent Extremism

In December 2015, the United Nations Secretary-General released his Plan of Action to Prevent Violent Extremism (A/70/674). The Plan of Action stresses the link between good governance, respect for the rule of law and human rights and the prevention of violent extremism (at para. 27):

“Violent extremism tends to thrive in an environment characterized by poor governance, democracy deficits, corruption and a culture of impunity for unlawful behaviour engaged in by the State or its agents. When poor

governance is combined with repressive policies and practices which violate human rights and the rule of law, the potency of the lure of violent extremism tends to be heightened. Violations of international human rights law committed in the name of state security can facilitate violent extremism by marginalizing individuals and alienating key constituencies, thus generating community support and sympathy for and complicity in the actions of violent extremists. Violent extremists also actively seek to exploit state repression and other grievances in their fight against the state. Thus, Governments that exhibit repressive and heavy-handed security responses in violation of human rights and the rule of law, such as profiling of certain populations, adoption of intrusive surveillance techniques and prolongation of declared states of emergency, tend to generate more violent extremists. International partners that are complicit in such action by States further corrupt public faith in the legitimacy of the wider international system.”

In a landmark report on the threats facing the world, former United Nations Secretary-General Kofi Annan made the following similar remarks on the importance of upholding human rights while countering terrorism:

“Terrorists are accountable to no one. We, on the other hand, must never lose sight of our accountability to citizens all around the world. In our struggle against terrorism, we must never compromise human rights. When we do so, we facilitate achievement of one of the terrorist’s objectives. By ceding the moral high ground we provoke tension, hatred and mistrust of Governments among precisely those parts of the population where terrorists find recruits.”⁸



Activity

Consider the following statements regarding terrorism and human rights:

“We can’t arrest terrorists and take them to court, who is going to be our witness? Let’s be fair here, we can’t allow criminals to terrorize people. They will be shot on sight.”

“It is unacceptable in modern society for X to impose on regular policemen and security agents the responsibility and authority of the judge and the executioner, under the guise of fighting terrorism. That is not only illegal, but also undermines legitimate efforts to find perpetrators and to engage communities in preventing attacks.”

“That camp has become a nursery for terrorists. The United Nations must now understand the security of Kenyans comes first. Even if it is about human rights, it should not be at our expense.”

- What do you think of the above statements?
- Do you agree with the statement that “effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing”?
- In what ways may observance of human rights standards in counter-terrorism operations enhance the effectiveness of the fight against terrorism? In what ways may a failure to adhere to human rights requirements harm efforts to combat terrorism?

1.3.2.2 Human Rights Abuse Undermines Terrorism Prevention and Investigation Work

In addition to aiding terrorist propaganda and recruitment efforts, human rights abuse of suspects and other persons thought to have information risks alienating those parts of the population whose grievances terrorist groups claim to be representing. Members of these often already marginalized communities are among the most important sources of information for police and security agencies on terrorist activity, including the identities, hiding places and plans of terrorists. When the relationship between the police and these communities is dominated by mistrust, or even hatred, serious damage is done to the Government’s ability to uncover terrorist plots, disrupt groups, prevent terrorist attacks, and investigate acts of terrorism.



The Adverse Impact of Discrimination in the Use of Law Enforcement Powers

In a report on profiling practices,* the Special Rapporteur on human rights and counter-terrorism wrote as follows:

“This stigmatization may, in turn, result in a feeling of alienation among the targeted groups ... victimization and alienation of certain ethnic and religious groups may have significant negative implications for law enforcement efforts, as it involves a deep mistrust of the police ... The lack of trust between the police and communities may be especially disastrous in the counter-terrorism context. The gathering of intelligence is the key to success in largely preventive law enforcement operations ... To be successful, counter-terrorism law enforcement policies would have to strengthen the trust between the police and communities.”**

Similarly, reflecting on the experience of several decades of counter-terrorism in Northern Ireland, the Northern Ireland Human Rights Commission writes that the discriminatory use of counter-terrorism powers by law enforcement agencies has a long-term negative impact on the effectiveness of crime prevention:

“The perception that the police force, which throughout the conflict had a significant under-representation of the Catholic community, and the armed forces, operated their emergency powers more frequently and aggressively in Catholic areas led to a persistent feeling of resentment towards law enforcement agencies. Overcoming this resentment and ensuring broader acceptance of the police service will take many years, and the impaired effectiveness of policing due to inadequate community support leaves those very communities vulnerable to crime and anti-social behaviour.”***

*Profiling has been defined as “the systematic association of sets of physical, behavioural or psychological characteristics with particular offences and their use as a basis for making law-enforcement decisions” (A/HRC/4/26, para. 33). On profiling in counter-terrorism investigations, see also the judgment of the Federal Constitutional Court of Germany summarized in section 3.7.3 below.

**A/HRC/4/26, para. 58.

***Northern Ireland Human Rights Commission, *Terrorism, Counter-terrorism and Human Rights: the experience of emergency powers in Northern Ireland*, Submission by the Northern Ireland Human Rights Commission to the International Commission of Jurists Eminent Jurists Panel, April 2006, para. 22.



Activity

Consider the above quotes from the Special Rapporteur and the Northern Ireland Human Rights Commission on the negative impact of profiling and discrimination on the use of police powers.

To what extent are the experiences in Northern Ireland relevant to Kenya?

What can authorities, in particular the police and other security sector agencies, do to avoid discrimination and stigmatization in counter-terrorism measures and the negative impact they may have on the prevention and investigation of terrorism offences?

1.3.2.3 Evidence Obtained Through Torture and Other Oppressive Means is Unreliable

When threatened with or subjected to torture, most persons in detention will sooner or later start talking; telling the torturers what they believe will make the pain stop. What a person subjected to torture states may happen to be true, in part or in its entirety, but it is inherently unreliable. Investigations based on information obtained under torture risk wasting precious investigatory resources. Where cases are brought to trial based on statements made under torture, there is a significant risk of the case collapsing in the courtroom. If the prosecution is successful, miscarriages of justice may ensue which, in addition to being an injustice, threaten to seriously undermine respect for and trust in the criminal justice system and the State’s response to terrorism.



Cross-Reference

The cases on the *Birmingham Six* and the CIA Enhanced Interrogation Technique Programme both illustrate this point and are discussed in detail in Chapter 3, section 3.7.

1.3.2.4 Human Rights Abuse Undermines the Ability to Obtain International Counter-Terrorism Cooperation

In addition to prohibiting States from engaging in serious human rights violations, human rights law also requires them not to become complicit in such acts committed by other States. The most prominent international law obligation in this regard is the *non-refoulement* principle, which prohibits States from extraditing a person to another State where there are substantial grounds for believing that he/she would be in danger of being tortured. A government that is reported to resort to torture will encounter great difficulties in obtaining the extradition of fugitive terrorism suspects. It may also encounter difficulties obtaining mutual legal assistance to support investigations and trials and other forms of cooperation.

Similarly, overly broad or vague definitions of terrorist offences in domestic criminal law, or the abuse of terrorism charges against non-violent political dissidents, will in many cases constitute an obstacle to obtaining international cooperation. Moreover, a growing number of States have legislation or policies in place that prohibit the provision of weapons and other police or military equipment and training to States that are reported to engage in serious human rights violations. A “bad reputation” as a country in which human rights abuse in counter-terrorism is widespread can thus become a significant obstacle in obtaining hard material and technical assistance vital to a government’s counter-terrorism efforts.

1.3.2.5 Respect for Human Rights, a Central Element to United Nations and African Union Counter-Terrorism Strategies

The United Nations Security Council and the General Assembly have consistently stressed that “States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights law, refugee law, and humanitarian law.”⁹

On 8 September 2006, all United Nations Member States, including Kenya, solemnly adopted a resolution in the General Assembly (A/RES/60/288), setting forth the Global Counter-Terrorism Strategy. This was a historical moment, as it is the first time that all Member States had agreed to a common strategic approach to fight terrorism. The Global Strategy has since been reaffirmed by the General Assembly every second year, most recently in September 2014. It states that:

“effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing.”



The Global Counter-Terrorism Strategy

The Global Counter-Terrorism Strategy organizes the practical steps States have resolved to take individually and collectively to prevent and combat terrorism into four Pillars. The measures range from strengthening state capacity to counter terrorist threats to better coordinating the United Nations system's counter-terrorism activities. While respect for human rights is specifically enshrined as one of the "Pillars" of the Strategy (Pillar IV), it permeates other parts of the Strategy as well.

The four Pillars are:

I. Measures to address the conditions conducive to the spread of terrorism

Under Pillar I, States resolve to undertake measures aimed at addressing "the conditions conducive to the spread of terrorism, including but not limited to prolonged unresolved conflicts, dehumanization of victims of terrorism . . . , lack of the rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, socio-economic marginalization and lack of good governance." In resolving to address these conditions, States "recogniz[e] that none of these conditions can excuse or justify acts of terrorism."

II. Measures to prevent and combat terrorism

III. Measures to build States' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in this regard

IV. Measures to ensure respect for human rights and rule of law as fundamental basis for fight against terrorism

The key commitments States made under Pillar IV of the Global Counter-Terrorism Strategy are:

- To ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law;
- To consider becoming parties without delay to the core international instruments on human rights law, refugee law and international humanitarian law, and implementing them, as well as to consider accepting the competence of international and relevant regional human rights monitoring bodies;
- To make every effort to develop and maintain an effective and rule of law-based national criminal justice system that can ensure, in accordance with their obligations under international law, that any person who participates in the financing, planning, preparation or perpetration of terrorist acts is brought to justice, on the basis of the obligation to extradite or prosecute, with due respect for human rights and fundamental freedoms. In this regard, the Global Counter-Terrorism Strategy encourages States to resort to the technical assistance delivered, inter alia, by the United Nations Office on Drugs and Crime; and
- To support and strengthen the capacity of multilateral institutions, in particular the United Nations, in promoting human rights and the rule of law while undertaking effective and targeted measures to combat terrorism.

The relevant organs of the AU have consistently adopted the same position. At a meeting of the African Union Peace and Security Council in Nairobi on 2 September 2014, the Heads of State and Government of the Member States of the African Union "[e]mphasized the imperative need, in the fight against terrorism and violent extremism, to uphold the highest standards of human rights and international humanitarian law," (Communiqué giving the verbatim of the decisions adopted by the AU Peace and Security Council on 2 September 2014, para. 28).

On 1 July 2004, the AU Heads of State and Government adopted the Protocol to the Organization of African Unity (OAU) Convention on the Prevention and Combating of Terrorism in Addis Ababa, in which they reiterate their "conviction that terrorism constitutes a serious violation of human rights and a threat to peace, security, development, and democracy." Through the Protocol, States Parties also commit themselves to "outlaw torture and other degrading and inhumane treatment, including discriminatory and racist treatment of terrorist suspects, which are inconsistent with international law," as provided for in Article 3 (1) (k).

Many of the measures States take to protect the population against terrorism and bring terrorists to justice can be adopted without affecting human rights. Some measures, however, will require a limitation of human rights

for the purpose of effectively preventing acts of terrorism and bringing terrorists to justice. Such limitations do not constitute a violation of human rights, as long as they are mandated by law, actually connected to the prevention of terrorist acts or to bringing terrorists to justice, and are within the limits of what is necessary in a democratic society.



Cross-Reference

- In Chapters 3, 4 and 5, we explore the extent to which human rights can be lawfully limited in detaining terrorism suspects, in the use of special investigation techniques, and in terrorism trials, and the requirements for such limitations to be in compliance with the 2010 Constitution, Kenyan legislation and international law.
- Some rights, particularly the prohibition of torture and inhuman and degrading treatment, are “absolute”, i.e. they can never be lawfully subjected to limitation, even in the investigation and prosecution of terrorism suspects. See sections 3.7 and 4.7.3 below.

1.3.2.6 International Law Provides for Respect and Protection of Human Rights

International law requires States to comply with human rights law in the measures they adopt to prevent, investigate and punish acts of terrorism. The international counter-terrorism treaties typically contain a provision reiterating that measures adopted under the treaty must respect human rights. An example of this clause is Article 14 of the 1997 Terrorist Bombing Convention, which reads:

“Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international law of human rights.”

The United Nations Security Council equally reaffirms in its resolutions dealing with the threat terrorism poses to international peace and security:

“[t]he imperative to combat terrorism in all its forms and manifestations by all means, in accordance with the Charter of the United Nations, and also stress[ed] that States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights law, refugee law, and humanitarian law”.¹⁰

1.4 THE RELATIONSHIP BETWEEN INTERNATIONAL HUMAN RIGHTS LAW AND NATIONAL LAW

Prior to the promulgation of the current Constitution on 27 August 2010, Kenya was a dualist State. International treaties were not considered as part of domestic law and could not be directly applied by the courts, tribunals or administrative authorities unless legislation was enacted to that effect. Notwithstanding this dualist position, however, the courts generally applied international law provided that it did not conflict with existing domestic law, even in the absence of implementing legislation. This position was affirmed by the Court of Appeal, then the highest court in the country, in *Mary Rono v Jane Rono*.¹¹

¹⁰ Security Council Resolution 1624 (2005). See, more recently, also Security Council Resolution 2178 (2014).

¹¹ *Mary Rono v. Jane Rono* [2005] eKLR.

The current Constitution contains explicit provisions that have transformed Kenya from a dualist to a monist State. Article 2 (6) deals with the application of international agreements and stipulates that “[a]ny treaty or convention ratified by Kenya shall form part of the laws of Kenya under the Constitution.” Generally speaking, this means that even in the absence of domesticating legislation international and regional treaties can now be invoked before the courts, tribunals and administrative authorities in the Republic.



Impact of Customary International Law on Kenyan Domestic Law

Article 2 (5) of the Constitution provides that “[t]he general rule of international law shall form part of the law of Kenya.” However, the exact meaning of this provision is unclear. There are two competing schools of thought on how to interpret the term “general rule.” One school holds that it refers to the rules of customary international law. The other holds that general rules means the general principles of international law, which could refer to customary law, general principles of law under Article 38 (1) (c) of the Statute of the International Court of Justice (ICJ), or more generally to any logical proposition that is an extension of pre-existing international law and based on judicial reasoning.

[Customary international human rights law is also discussed in section 1.8 below.](#)

Mention should also be made of Article 19 (3) (b), which provides that “[t]he rights and fundamental freedoms in the Bill of Rights do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with this Chapter.” The Constitution further provides a safeguard to ensure that treaties ratified by Kenya are not inconsistent with constitutional provisions, as well as national values and principles. Article 94 (5) specifies that no person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.

Ratification of international agreements is therefore regulated by the Treaty Making and Ratification Act (No. 45 of 2012), which applies to all multilateral and some bilateral treaties. Under the Act, the Executive is responsible for initiating, negotiating and ratifying treaties, while both the Cabinet and Parliament must approve all treaties before they are ratified.¹² The Act further requires the establishment of a registry that will be the custodian of ratified international instruments and country reports to the relevant treaty bodies.¹³ Once an agreement is ratified, it has a dual effect: the agreement binds Kenya in relation to other State signatories, and its provisions become authoritative within the country.

Below is a table reflecting some of the human rights treaties that Kenya has signed, ratified, acceded to and in some cases domesticated. In view of the discussion above, also those that have not been domesticated become part of Kenya’s domestic law by virtue of Article 2 (6) of the Constitution.

¹² Ibid, Section 8.

¹³ Ibid, Part IV.

Name of Treaty	Date of Ratification/ Signature/Accession by Kenya	Main Implementation Legislation
International Covenant on Economic, Social and Cultural Rights (ICESCR)	01 May 1972 (accession)	Article 43 of the Constitution; Preservation of Human Dignity and Enforcement of Economic and Social Rights Bill, 2015
International Covenant on Civil and Political Rights (ICCPR)	23 March 1976 (accession)	Although not specifically domesticated, its provisions are covered in Chapter 4 of the Constitution; Penal Code (Chapter 63, Laws of Kenya); Persons Deprived of Liberty Act (Chapter 133, Laws of Kenya) etc.
Convention for the Eradication of All Forms of Discrimination Against Women (CEDAW)	09 March 1984 (accession)	Chapter 4 of the Constitution; Sexual Offences Act (Chapter 62A, Laws of Kenya); Law of Succession (Chapter 160, Laws of Kenya); Prohibition of Female Genital Mutilation Act (No. 32 of 2011); Protection against Domestic Violence Act (No. 2 of 2015) etc.
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	06 October 2010 (ratification)	
International Convention on the Protection of All Persons from Enforced Disappearances (ICCPED)	06 February 2007 (signature)	Article 29 of the Constitution; Penal Code (Chapter 63, Laws of Kenya); Persons Deprived of Liberty Act (Chapter 133, Laws of Kenya) etc.
International Convention on the Elimination of all Forms of Racial Discrimination (CERD)	13 September 2001 (accession)	Article 27 of the Constitution; Employment Act (Chapter 226, Laws of Kenya) etc.
Convention on the Rights of Persons with Disabilities (CRPD)	19 May 2008 (ratification)	Article 27 of the Constitution; Persons with Disabilities Act 2003; National Security Act (Chapter 258, Laws of Kenya) etc.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	21 February 1997 (accession)	Article 29 of the Constitution; Prevention of Torture Bill, 2014
African Charter on Human and Peoples' Rights	23 January 1992 (ratification)	Chapter 4 of the Constitution; Preservation of Human Dignity and Enforcement of Economic and Social Rights Bill, 2015 etc.
Convention of the Rights of the Child (CRC)	30 July 1990 (ratification)	Children's Act (Chapter 586 of the Laws of Kenya); Sexual Offences Act (Chapter 62A, Laws of Kenya); Prohibition of Female Genital Mutilation Act (No. 32 of 2011) etc.
Child Rights Convention Optional Protocol on the Involvement of Children in Armed Conflicts	28 January 2002 (ratification)	
African Charter on the Rights and Welfare of the Child (ACRWC)	25 July 2000 (ratification)	

As demonstrated by the table above, the treaties that Kenya has ratified and domesticated have greatly influenced the development and expansion of the national human rights regime. Their impact is nevertheless hampered by a number of factors. This includes a general lack of understanding among law enforcement officials and even some judicial officers on the meaning of specific provisions of some of these treaties. Further, some domestic laws conflict with the provisions of ratified treaties, and therefore ought to be reviewed and repealed in order to achieve uniformity.

However, a number of positive factors have contributed towards addressing the gap between theory and practice. This includes significant legislative and institutional reforms in accordance with the spirit and purpose of the Constitution, academic publications, advocacy by civil society, as well as progressive judicial interpretation.



Kenyan Courts Affirm the Applicability of International Law under the 2010 Constitution

The change in the reception of international law in the Kenyan legal system following the promulgation of the 2010 Constitution has been confirmed in the following cases:

- In *Re the matter of Zipporah Wambui Mathara* (2010) eKLR, the High Court emphasized that by virtue of the provisions of Article 2 (6) of the Constitution, international treaties and conventions that the country has ratified are imported as part of the sources of Kenyan law. This includes the ICCPR, which Kenya ratified on 1 May 1972. The Court declared that the provisions of Kenya's Civil Procedure Code were in conflict with Article 11 of the ICCPR, which prohibits imprisonment for the inability to pay a civil debt.
- In the *Matter of the Principle of Gender Presentation in the National Assembly and the Senate*, [2012] eKLR, Chief Justice Willy Mutunga, in his dissenting opinion, observed that the CEDAW applies in Kenya by virtue of Article 2 (6) of the Constitution, having been acceded to by the State on 9 March 1984. He further noted that these provisions collectively call for the immediate removal of the disenfranchisement of Kenyan women in the political arena, through the empowerment of their representation in political office, with the CEDAW calling for stop-gap measures to reverse the negative effects of this systematic discrimination. While this was a minority opinion, it is nevertheless significant as a progressive interpretation that could guide future jurisprudence.

1.5 LIMITATIONS PERMITTED BY HUMAN RIGHTS LAW

Most counter-terrorism measures can and should be adopted and carried out without any interference with or restriction on human rights. In some circumstances, however, there may be a need to limit the enjoyment of certain rights for specific purposes set out under international and domestic law such as national security, or the life, physical integrity and fundamental freedoms of others.

Some of the rights and fundamental freedoms guaranteed in the Kenyan Bill of Rights are "absolute." These are enshrined under Article 25, which provides as follows: "Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited:

- a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
- b) freedom from slavery or servitude;
- c) the right to a fair trial; and
- d) the right to an order of habeas corpus."

The absolute character of these rights and fundamental freedoms means that it is not permitted to restrict them by balancing their enjoyment against the pursuit of a legitimate aim. In *Samuel Githua Ngari and Another v Republic*,¹⁴ the Court had this to say regarding the absolute character of the right to a fair trial: "[t]he right to a fair trial is absolute in the sense that under Article 25 of the Constitution, it is one of those rights and fundamental freedoms that cannot be limited." In the *SLAA* case,¹⁵ the Court reaffirmed this position when it stated that:

14 *Samuel Githua Ngari and Another v Republic* [2014] eKLR

15 *Coalition for Reform and Democracy (CORD) & 2 Others v. Republic of Kenya & 10 Others*, [2015] eKLR

“[a]ttempts to curtail this right, whether by legislation or in the course of criminal proceedings, must always be frowned at. The same way that it is the responsibility of a judge to ensure that proceedings are conducted in an orderly and proper manner which is fair to both the prosecution and the defence and in adherence to the Constitution is the same way it is the responsibility of the Legislature to ensure that the right to a fair trial, as a fundamental right, is not derogated from through legislation.”

However, most of rights guaranteed in the Bill of Rights are not absolute in character. As stipulated in Article 19 (3) (c) of the Constitution, “[t]he rights and fundamental freedoms in the Bill of Rights are subject only to the limitations contemplated in the Constitution.” The State can therefore restrict their exercise and/or enjoyment for valid/legitimate reasons, including the need to counter terrorism, as long as it respects a number of conditions. Article 24 (1) provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

- a) the nature of the right or fundamental freedom;
- b) the importance of the purpose of the limitation;
- c) the nature and extent of the limitation;
- d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- e) the relationship between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

Article 24 (2) further provides that “[d]espite clause (1), a provision in legislation limiting a right or fundamental freedom-

- a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental, and the nature and extent of the limitation;
- b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and
- c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.”

As stipulated in Article 24 (3), the State or the person seeking to justify a particular limitation shall demonstrate to the court, tribunal or relevant authority that the requirements of this Article have been satisfied.



Freedom of Expression: A Non-Absolute Right

Article 33 of the Constitution, which guarantees the right to freedom of expression, exemplifies the structure of these non-absolute rights.

Paragraph 1 sets forth the substance of the right as follows:

“Everyone person has the right to freedom of expression, which includes –

- a) freedom to seek, receive or impart information or ideas;
- b) freedom of artistic creativity; and
- c) academic freedom and freedom of scientific research.”

Paragraphs 2 and 3 provides the conditions under which this can be legitimately limited:

“The right to freedom of expression does not extend to –

- a) propaganda for war;
- b) incitement to violence;
- c) hate speech; or
- d) advocacy of hatred that –
 - i. constitutes ethnic incitement, vilification of others or incitement to cause harm; or
 - ii. is based on any ground of discrimination specified or contemplated in Article 27 (4)

“In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.”

In the case of some of the rights in the Bill of Rights, the conditions for legitimate limitations/restrictions are in-built into the constitutional provision enshrining the right in question. Examples are the rights to freedom of expression (Article 33), freedom of the media (Article 34) and the protection of the right to property (Article 40). These constitutional provisions allow for various grounds and conditions, such as national security, public purpose or public interest, which must be met in order for these rights to be legitimately limited.



Cross-Reference

See Chapter 2 regarding restrictions on freedom of expression to prevent incitement of terrorism, and restrictions on freedom of association as a consequence of measures against terrorist groups.

In the case of other rights, the Constitution provides that they may not be interfered with “arbitrarily.” This is for instance the case with Article 29 (1) of the Constitution, which guarantees that “[e]very person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause.” The notion of “arbitrariness” is not to be merely equated with “against the law,” but must be interpreted more broadly to also include elements of injustice, inappropriateness, lack of predictability and due process of law. In other words, the test for when detention is “arbitrary” is not dissimilar from the one for legitimate limitation of freedom of expression.



Cross-Reference

See Chapter 4 for a case study regarding the notion of “arbitrary detention.”

Finally, even the right to a fair trial, which is listed in Article 25 of the Constitution as a right that cannot be limited, has some “inherent” flexibility. For instance, Article 50 (e) of the Constitution enshrines the right of an accused person in a criminal case to have his/her trial begin and conclude without “unreasonable delay.” What amounts to a reasonable delay depends on the circumstances of each case, taking into account its complexity, which in terrorism cases may be considerable, particularly if evidence needs to be obtained abroad or extradition proceedings are pursued, although the authorities will need to demonstrate to the court that activity is ongoing and justify the precise reasons for any delay. Other factors to be considered would be the conduct of the accused, and the manner in which the matter was dealt with by the investigating and judicial authorities.



Cross-Reference

See Chapter 5 for more details and specific cases regarding procedural guarantees in terrorism trials and the permissible limitations to them.

The ACommHPR's Principles and Guidelines on Human and People's Rights while Countering Terrorism in Africa caution that States "shall not use combatting terrorism as a pretext to restrict fundamental freedoms, including freedom of religion and conscience, expression, association, assembly, and movement." Limitations "may not erode a right such that the right itself becomes illusory."¹⁶ "Only in exceptional circumstances may States restrict certain human rights and freedoms. The justification for any restriction must be prescribed by law, strictly proportionate with and absolutely necessary for addressing a legitimate need as set forth under the African Charter ... and in accordance with regional and international human rights law."¹⁷



Case Study: The SLAA Case*

The flexibility of human rights law and the way to examine whether measures limiting rights for counter-terrorism purposes are permissible was demonstrated by the High Court in the SLAA case.

Three consolidated petitions challenged the constitutionality of the SLAA, which amended the provisions of twenty-two (22) other statutes concerned with matters of national security. SLAA was enacted by the National Assembly on 18 December 2014, received presidential assent on 9 December 2014, and came into force on 22 December 2014.

The provisions of the SLAA that were challenged on the basis that they infringed the right to privacy under Article 31 of the Constitution were:

- Section 56 of SLAA, which allowed the National Intelligence Services (NIS) to undertake special/covert operations aimed at neutralising threats against national security, by amending Section 42 of the NIS Act, repealing Part V and substituting it with a new part altogether; and
- Section 69 of SLAA, as it allows the interception/surveillance of communication by all National Security Organs, by introducing Section 36A to the POTA

With regard to the nature/normative content of the right to privacy, the Court noted that "[s]urveillance in terms of intercepting communication impacts upon the privacy of a person by leaving the individual open to the threat of constant exposure. This infringes on the privacy of the person by allowing others to intrude on his or her personal space and exposing his private zone ... Any legislation that seeks to limit the right to privacy in a free and democratic open society must be such that it does not derogate from the core normative content of this right." (para 290-291)

It then made the following observations with regard to the importance of the purpose of limitation:

"The need to monitor communication permitted in both Part V of the NIS Act and the Prevention of Terrorism Act, which it is conceded limit the right to privacy has one purpose; to enhance national security by ensuring that national security agents, through their covert operations and monitoring of communication, can be one step ahead of terrorists, and are thus able to thwart terrorist attacks. This, we are convinced, is an extremely important purpose, recognized world over as justifying limitations to the right to privacy.

As O'Higgins C.J commented in *Norris vs Attorney General* (1984) I.R 587, a right to privacy can never be absolute. It has to be balanced against the State's duty to protect and vindicate life. What needs to be done, as was recognized in *Campbell vs MGN Ltd* (2004) 2 AC 457, is to subject the limitation and the purpose it is intended to serve to a balancing test, whose aim is to determine whether the intrusion into an individual's privacy is proportionate to the public interest to be served by the intrusion.

16 ACommHPR's Principles and Guidelines on Human and People's Rights while Countering Terrorism in Africa, Principles 1 (I) and 1 (M).

17 Ibid, p 15.

To our collective mind, and taking judicial notice of the numerous terrorist attacks that this country has experienced in the last few years, we are of the view that the interception of communication and the searches contemplated under the two impugned provisions of law are justified and will serve a genuine public interest. The right to privacy must be weighed against or balanced with the exigencies of the common good or the public interest: see *Haughey vs Moriarty* (1999) 3 I.R 1. In our view, in this instance, the scales tilt in favour of the common good.” (para 300-302)

The Court was further satisfied that there were sufficient safeguards to ensure that the limitation of the right to privacy is not exercised arbitrarily and on a mass scale. In particular,

- the new Section 36A of the POTA cannot be read in isolation, but rather together with Sections 35 and 36, which not only require the process is undertaken under judicial supervision, but also include penal consequences for the unlawful interception of communication (para 305)
- similarly, the monitoring of communication and searches authorized by Section 42 of the NIS Act contains safeguards. It requires that the information to be obtained must be specific, accompanied by a warrant from the High Court and be valid for a period of 6 months unless extended (para 306)

In light of the foregoing, the Court held that although the impugned provisions of the SLAA do limit the right to privacy, they are justifiable in a free and democratic society, and have a rational connection with the intended purpose - the detection, disruption and prevention of terrorism. Given the nature of terrorism, as well as the manner and sophistication of modern communication, the Court could see no less restrictive way of achieving the intended purpose (para 308).

**Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others* [2015] eKLR

1.6 DEROGATIONS IN TIMES OF PUBLIC EMERGENCY

In extreme circumstances, the State may take measures to derogate from the Bill of Rights i.e. to temporarily suspend or adjust its constitutional obligations, provided a number of conditions are met. The derogation clause that permits the suspension of certain rights and fundamental freedoms in the Constitution is set out in Article 58 (6), which provides as follows:

“Any legislation enacted in consequence of a declaration of a state of emergency -

- a) may limit a right or fundamental freedom in the Bill of Rights only to the extent that -
 - i. the limitation is strictly required by the emergency; and
 - ii. the legislation is consistent with the Republic’s obligations under international law applicable to the state of emergency; and
- b) shall not take effect until it is published in the *Gazette*.”

The application of emergency measures derogating from human rights obligations under the Constitution is therefore subject to strict requirements and principles. As stipulated by Article 58 (1), “[a] state of emergency may be declared only under Article 132 (4) (d) and only when:

- a) the State is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and
- b) the declaration is necessary to meet the circumstances for which the emergency is declared.”

Article 58 (2) and (3) provides that a declaration of a state of emergency, and any legislation enacted or action taken in consequence of the said declaration, shall only be effective prospectively; and for not longer than fourteen (14) days from the date of the declaration, unless the National Assembly resolves to extend it by resolution adopted following a public debate, by the majorities specified in clause (4), and for not longer than two months at a time. Article 58 (5) further grants the Supreme Court the power to decide on the validity of a declaration of a state of emergency; any extension of the said declaration; and any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.

As discussed in the previous section, it is important to remember that under Article 25, despite any other provision of the Constitution, “the following rights and fundamental freedoms shall not be limited:

- a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
- b) freedom from slavery or servitude;
- c) the right to a fair trial; and
- d) the right to an order of *habeas corpus*.”

When a State takes measures to temporarily suspend or adjust its constitutional obligations, these must not only conform to its constitutional law, but also to the provisions on derogation in the relevant human rights treaties to which that State is a party.

International and regional human rights treaties contain provisions circumscribing the circumstances in which it is permissible to derogate from human rights protections and establishing procedural requirements to be followed in case a state determines that it is necessary to make a derogation. At the international level, Article 4 of the ICCPR permits State Parties to take measures to derogate from the Convention “in times of public emergency which threatens the life of the nation” and lists the rights that cannot be derogated even in such times of emergency. At the regional level, the ACHPR, also known as the “Banjul Charter,” does not contain any provision on derogations (other regional human rights treaties, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Inter-American Convention on Human Rights (IACHR), do have derogation provisions). As mentioned above (section 1.5), the ACommHPR’s Principles and Guidelines on Human and People’s Rights while Countering Terrorism in Africa caution that States “shall not use combatting terrorism as a pretext to restrict fundamental freedoms, including freedom of religion and conscience, expression, association, assembly, and movement”, and that limitations “may not erode a right such that the right itself becomes illusory”.¹⁸

Kenya has not declared a state of emergency following the terrorist attacks in the country, nor has Kenya decided to make use of the derogation provision in Article 4 of the ICCPR with regard to its international obligations.



Requirements for Permissible Derogation under the ICCPR

Substantive Requirements and Principles

- **Existence of a Public Emergency:** There must be a “public emergency which threatens the life of the nation,” such as an armed conflict, civil and violent unrest, a terrorist emergency, or a severe natural disaster.
- **Principle of Conformity with International Obligations:** Derogations must remain consistent with other obligations under international law.
- **Principle of Proportionality:** Permissible derogation measures must limit derogated rights only to the extent strictly required by the exigencies of the situation (see Article 4 (1) of the ICCPR).
- General Comment No. 29 of the Human Rights Committee makes it clear that the requirement of strict necessity relates to the duration, geographical coverage and material scope of the derogation.
- Principle 54 of the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR states that “[t]he principle of strict necessity shall be applied in an objective manner ... and may not be imposed merely because of an apprehension of potential danger.”
- **Principle of Non-Discrimination:** Derogation must be applied in a non-discriminatory manner, without a distinction solely founded on grounds of race, colour, sex, language, religion or social origin.

Note the similarity between, on the one hand, the substantive requirements and principles for derogations to be permissible and, on the other hand, the conditions for the legitimacy of measures limiting non-absolute rights (1.5 above), particularly with regard to the principles of necessity, proportionality and non-discrimination. The *A and Others* case study below illustrates the application of this test.

Procedural Requirements

- **Official Proclamation:** Derogation measures in respect of public emergencies must be “officially proclaimed” in accordance with the legal provisions that govern such a proclamation.
- **International Notification:** Article 4 (3) of the ICCPR requires States seeking to declare a public emergency and to derogate from the requirements of the ICCPR to inform the UN Secretary General of this position.



Case Study on the Limits to Permissible Derogation from Human Rights Obligations

Case of *A and Others**: Following the terrorist attacks on the United States of America of 11 September 2001, the United Kingdom adopted legislation allowing the arrest and administrative detention of foreign nationals suspected by a government minister to be “international terrorists”. The detention decision was subject to review by a special immigration appeals court. Accepting that these detention powers might be inconsistent with Article 5 (1) of the ECHR, which protects the right to liberty, the Government sought to avail itself of the right of derogation under Article 15 (1) of the ECHR. The Government argued that foreign nationals present in the United Kingdom suspected of being involved in the commission, preparation or instigation of acts of terrorism constituted a threat to the national security of the United Kingdom and a public emergency.

A and Others were foreign nationals living in the United Kingdom. The Government suspected them of being international terrorists. However, the Government considered that human rights law, specifically the principle of non-refoulement (see Chapter 7 on this topic), prevented their deportation, as they would have been at risk of torture in their countries of origin. The government also considered that their prosecution in the United Kingdom would not be possible. The men were therefore placed in administrative detention under the new anti-terrorism legislation.

The validity of the United Kingdom’s derogation was examined by the House of Lords as the highest court in the United Kingdom and the European Court of Human Rights (ECtHR). The ECtHR observed that national authorities enjoyed a wide margin of appreciation in assessing whether the life of their nation was threatened by a public emergency. Weight had, therefore, to attach to the judgment of the government, Parliament and national courts in this regard. With some hesitation, both the House of Lords and the ECtHR accepted the government’s view that there was a public emergency threatening the life of the nation which could justify derogations from the ECHR.

However, the House of Lords and the ECtHR both took issue with the fact that the special administrative detention powers could be exercised only against foreign nationals and not against citizens of the United Kingdom suspected of being international terrorists. The two courts were not persuaded by the government’s reasons for this difference in treatment. The House of Lords and the ECtHR concluded that the derogating measures were disproportionate in that they discriminated unjustifiably against non-nationals, and therefore did not accept the validity of the derogation.

As a result of these judgments, the United Kingdom changed the law and abolished the specific administrative detention powers that had been successfully challenged.

*ECtHR, *A. and Others v. United Kingdom*, Application no. 3455/05, Judgment of 19 February 2009.



Emergency Powers, Counter-Terrorism Measures and Human Rights

This is a fictitious scenario to apply the rules on permissible and impermissible limitations to and derogations from human rights obligations.

Following a wave of terrorist attacks in the north of the country, in which numerous civilians and members of the security forces were killed and thousands were forced to leave their villages, the Security Minister holds a speech in which he announces that “it is time to protect the innocent victims of terrorism, and no longer the terrorists, and ensure order and justice in all of the country”. He therefore proposes that new legislation should be passed, which would provide for the following measures to prevent and combat acts of terrorism:

- 1) The Minister shall have the power to designate parts of the country in which counter-terrorism operations are in course as “no go zones”, excluding all persons who are not residents from travelling there. This, the Minister says, is necessary “to protect the law abiding population against the terrorists” and from becoming unintended casualties of counter-terrorism operations, and to allow the security forces to carry out counter-terrorism operations unhindered.
- 2) Police, security services and the armed forces can arrest persons they suspect of terrorism and detain them for up to one year without having to charge them with a crime or to present them to a judge. Arrested persons can be held in secret detention facilities. This, the Minister says, is necessary to give adequate time for complex investigations that need to proceed in secret, and to prevent detained terrorists from being freed by their accomplices.
- 3) Terrorism cases should be tried before special courts; to expedite proceedings and protect them against disruption, accused persons will have to choose their lawyer from a list provided by the government. Moreover, to avoid delays, there will be no right to appeal against the judgments of these courts.
- 4) The Minister shall have the power to designate companies or not-for-profit organizations as “supporters of terrorism.” This will have the following consequences:
 - It becomes an offence to take part in meetings of the organization or to provide financial or other support to it;
 - All assets of the organization will be frozen; and
 - The designated entity can apply for judicial review of the measure. In exceptional cases, the Minister can decide, however, that there shall be no judicial review for two years.
- 5) New media legislation will be passed. Media can be sanctioned with heavy fines and their owners and editors sentenced to prison terms if they publish reporting which
 - justifies acts of terrorism;
 - criticizes the counter-terrorism measures adopted by the authorities; or
 - discloses confidential information regarding counter-terrorism operations.

The Minister adds that these measures would be temporary, until the threat of terrorism is defeated. This should take only a couple of years if such decisive measures are adopted.

Assignment:

- Which rights are affected by the measures proposed by the (fictitious) Minister?
- Are the rights affected among the rights that can be limited under Kenya’s Constitution and/or under international law?

Assume that the human rights provisions of the Constitution apply, and that the country has ratified all major human rights treaties, including the ICCPR.

- Advise the Minister on which of the measures he proposes could be permissible and which ones are not compatible with constitutional law and international obligations.
- Advise the Minister on the arguments opponents of the measures are likely to make, and on whether and how he can, with regard to human rights law, justify the measures he proposes.



Further Reading

- Human Rights Committee, General Comment 29: States of Emergency (Article 4) is available here: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.11&Lang=en
- Chapter 16 of *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, published by the Office of the High Commissioner for Human Rights, deals with the administration of justice during public emergencies: <http://www.ohchr.org/Documents/Publications/training9chapter16en.pdf>

1.7 THE KENYAN HUMAN RIGHTS SYSTEM

As mentioned in section 1.3.1 above, the State has a positive obligation to protect the rights to life, liberty, security and other human rights against acts of terrorism. The following institutions have been established by the Constitution to further the promotion and protection of human rights in Kenya.

1.7.1 The Executive

1.7.1.1 The National Executive

According to Article 130, the National Executive of Kenya comprises of the President, the Deputy President and the rest of the Cabinet. Article 131 provides that the President is the Head of State and Government, and exercises the executive authority of the Republic with the assistance of the Cabinet. In doing so, the President is obliged to respect, uphold and safeguard the Constitution; as well as ensure the protection of human rights, fundamental freedoms and the rule of law.

1.7.1.2 The National Police Service

Article 243 establishes the National Police Service (NPS), which consists of the Kenya Police Service and the Administration Police Service. Article 244 sets out the objects and functions of the NPS, key among which are to comply with constitutional standards of human rights and fundamental freedoms. The functions of the Kenya Police Service are further articulated in Section 24 of the National Police Service Act and include the following:

- a) maintenance of law and order;
- b) preservation of peace;
- c) protection of life and property;
- d) investigation of crimes;
- e) collection of criminal intelligence;
- f) prevention and detection of crime;
- g) apprehension of offenders; and
- h) enforcement of all laws and regulations with which it is charged.

Pursuant to Article 245 of the Constitution and Section 8 of the National Police Service Act, the NPS is headed by the Inspector-General, who is appointed by the President with the approval of the National Assembly, and who is required to exercise independent command over the Service, and perform any other functions prescribed by the Act.



Cross-Reference

In section 1.3.1. we considered the State's "positive obligation to protect the right to life against terrorist threats". The functions of the Kenya Police Service as set forth in Section 24 of the National Police Service Act are central to the fulfilment of that positive human rights obligation.

1.7.1.3 The Director for Public Prosecutions

Section 157(1) of the Constitution establishes the Office of the Director for Public Prosecutions (DPP). The DPP has power to direct the Inspector-General to investigate any information or allegation of criminal conduct, and the Inspector-General is required to comply with that direction. Article 157 (6) confers on the DPP the State power of prosecution, including the power to:

- a) institute and undertake criminal proceedings against any person before any court, other than a court martial, in respect of any offence alleged to have been committed;
- b) take over and continue any criminal proceedings commenced in any court, other than a court martial, that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
- c) subject to clauses (7) and (8), discontinue at any stage before judgement is delivered any criminal proceedings instituted by the DPP or taken over by the DPP under paragraph (b).

In exercising the powers conferred by the Constitution, Article 157 (11) provides that the DPP shall have regard to the public interest, the interests of the administration of justice, as well as the need to prevent and avoid abuse of the legal process.

1.7.2 Parliament

Article 93 of the Constitution establishes Parliament, which consists of the National Assembly and the Senate. The roles of the National Assembly and the Senate are set out in Article 95 and 96 respectively, key among which is to enact legislation and participate in the oversight of State organs. In performing their respective functions, both the National Assembly and the Senate are required to observe and respect the Constitution, including the rights and fundamental freedoms enshrined in Chapter 4 of the Constitution.

1.7.3 The Judiciary

Article 22 of the Constitution provides for the enforcement of the Bill of Rights. It stipulates that "[e]very person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened." It further provides that in addition to a person acting in his/her own interest, such court proceedings may be instituted by:

- a) a person acting on behalf of another person who cannot act in their own name;
- b) a person acting as a member of, or in the interest of a group of class of persons;
- c) a person acting in the public interest; or
- d) an association acting in the interest of one or more of its own members.

Chapter X of the Constitution establishes the Judiciary. The Judiciary is headed by the Chief Justice, and consists of the Judges of the Supreme Court, the Court of Appeal and the High Court, as well as magistrates courts, which are subordinate courts established by Parliament in accordance with the Constitution. Such courts only have such powers and jurisdiction as the law may confer on them. Article 160 stipulates that in the exercise of judicial authority, the Judiciary shall be subject only to the Constitution and the law.

Article 163 provides for the Supreme Court as the highest court in the country. The Supreme Court also has appellate jurisdiction to hear and determine appeals from the Court of Appeal. Section 164 establishes the Court of Appeal, which only hears matters on appeal from the High Court and has no original jurisdiction to hear any matter.

Section 165 provides for the High Court with unlimited original jurisdiction in civil and criminal matters. The High Court also has jurisdiction to:

- a) determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, threatened or infringed
- b) hear any question relating to the interpretation of the Constitution, including the determination of
 - i. whether any law is inconsistent with or in contravention of the Constitution;
 - ii. whether anything said or done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution.

Thus, a complaint touching on the rights in the Bill of Rights or any of the human rights treaties that Kenya has ratified would be dealt with as a violation of fundamental rights, and would be heard by the High Court. If a person alleges that any of their fundamental rights have been, are being or are likely to be contravened, that person may apply to the High Court for redress. The High Court hears and determines such an application, and issues appropriate orders in accordance with section 84 of the Constitution.

1.7.4 Other Oversight Mechanisms

1.7.4.1 Article 59 Commissions

Article 59 (1) of the Constitution establishes the Kenya National Human Rights and Equality Commission (KNHREC), whose core mandate is to facilitate the promotion and protection of human rights in Kenya. Pursuant to Article 59 (4), Parliament enacted legislation in 2011 to confer the authority of the KNHREC to the following three successor Commissions:

1.7.4.1.1 The Kenya National Commission on Human Rights

The Kenya National Commission on Human Rights (KNCHR) is an autonomous national human rights body established pursuant to Article 59 (4) of the Constitution. Section 8 of the Kenya National Commission on Human Rights Act (No. 14 of 2011) sets out its functions, key among which are to:

- a) monitor, investigate and report on the observance of human rights in all spheres of life in the Republic, including observance by the national security organs;
- b) receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated;
- c) investigate or research a matter in respect of human rights on its own initiative or on the basis of complaints;
- d) act as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights;
- e) investigate any conduct in state affairs, or any act or omission in public administration in any sphere of government, that is alleged or suspected to be prejudicial or improper or to result in any impropriety or prejudice

The Complaints and Investigations Programme/Department receives complaints of alleged violations of human rights, investigates them and advises the Commission on possible options for redress. The Department also investigates human rights violations and endeavours to resolve the matters by conciliation, mediation and negotiation. Some of the complaints that are investigated by the Commission include: complaints against security agencies i.e. the police, armed forces, prison wardens, as well as complaints about denial of rights recognized in national law and international treaties that Kenya has ratified.

The Commission moreover submits annual reports to parliament on human rights issues and makes recommendations as to how various state agencies can comply with constitutional, regional and international human rights standards. KNCHR can also be required by parliament to provide special reports and on their volition can generate advisories to various state agencies including parliament on policy, legislation and administrative measures. It can hold public inquiries where systemic violations persist and make recommendations to concerned agencies. The Commission as an “A” accredited national human rights institution (accreditation is by the Global Alliance for National Human Rights Institutions) has the capacity to engage with the UN Human Rights Council, the African Commission on Human and People’s Rights and the various treaty body mechanisms. It can generate reports in response or addition to state reports. It can issue statements in these forums when Kenya is under examination or scrutiny on her human rights performance. Additionally the Commission collaborates with international and regional treaty bodies and special mechanisms during country visits or inquiries regarding Kenya.

1.7.4.1.2 The Commission on Administrative Justice (Office of the Ombudsman)

The Commission on Administrative Justice is a constitutional commission established under Article 59 (4) and Chapter Fifteen of the Constitution, as well as the Commission on Administrative Justice Act (Cap. 102A) in 2011. Section 8 of the Act sets out its main functions, key among which are to investigate complaints within the public sector, provide advisory opinions on the improvement of public administration, as well as take appropriate steps in conjunction with other State organs and Commissions to facilitate the promotion and protection of human rights in public administration.

1.7.4.1.3 The National Gender and Equality Commission

The National Gender and Equality Commission (NGEC) is a constitutional commission established by the National Gender and Equality Commission Act (Cap. 5C) in 2011. Section 8 of the Act sets out its functions, key among which are to promote gender equality and freedom from discrimination, investigate complaints and advise on the integration of the principles of equality and freedom from discrimination.

1.7.4.2 Independent Policing Oversight Authority

The Independent Policing Oversight Authority (IPOA) was established in 2011 through the Independent Policing Oversight Authority Act (Cap 88) and its inaugural Board was sworn into office in June 2012. Pursuant to Section 5 of the Act, the objectives of the Authority are to hold the NPS accountable to the public in the performance of its work; ensure independent oversight of the handling of complaints by the NPS; and give effect to Article 244 of the Constitution, which sets out the objects and functions of the NPS. Key among these is compliance by the NPS with constitutional standards of human rights and fundamental freedoms.

Section 6 of the Act further provides that the functions of the Authority shall be to -

- investigate any complaints related to disciplinary or criminal offenses committed by any member of the NPS, whether on its own motion or on receipt of a complaint, and make recommendations to the relevant authorities, and make public the response received to these recommendations;
- receive and investigate complaints by members of the NPS ;
- monitor and investigate policing operations affecting members of the public;
- monitor, review and audit investigations and actions taken by the Internal Affairs Unit of the NPS in response to complaints against the police;
- conduct inspections of police premises, including detention facilities under the control of the Service;
- co-operate with other institutions on issues of police oversight, including other State organs in relation to services offered by them;
- review the patterns of police misconduct and the functioning of the internal disciplinary process;
- present any information it deems appropriate to an inquest conducted by a court of law; and
- subject to the Constitution and the laws related to freedom of information, publish findings of its investigations, monitoring, reviews and audits as it sees fit, including by means of the electronic or printed media;

1.7.5 Civil Society

United Nations experts have pointed out that national and international non-governmental organizations (NGOs) can be key actors in effective counter-terrorism strategies.¹⁹ “Civil society organizations play a significant role in combatting terrorism. By their direct connections with the population and their prodigious work in, inter alia, poverty reduction, peacebuilding, humanitarian assistance, human rights and social justice, including in politically complex environments, civil society plays a crucial role against the threat of terrorism.”²⁰

Some NGOs contribute to the promotion of human rights through monitoring and reporting on human rights violations, including those committed in the name of countering terrorism.

While considering Kenya’s combined third to fifth periodic reports in March 2016, the Committee on the Rights to the Child made note of the positive participation of NGOs in the monitoring of the implementation of the CRC, through the National Council for Children’s Services.²¹ In 2011, the Committee on the Elimination of Discrimination against Women referred to the collaborative partnership between Government bodies and national civil society organisations, which facilitated the participatory process through which Kenya’s seventh periodic report to the Committee was prepared.²² Similarly, both the Committee against Torture²³ and the Committee on the Elimination of Racial Discrimination²⁴ have called on Kenya to continue expanding its dialogue with NGOs working in the area of human rights.

The human rights monitoring work of NGOs is protected under Kenyan and international law by the rights to freedom of expression and freedom of association, which are the cornerstones of a democratic society, as well as by the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, otherwise referred to as “[t]he Declaration on Human Rights Defenders” (A/RES/53/144).

1.8 THE UNITED NATIONS HUMAN RIGHTS SYSTEM

The United Nations Charter enshrines the protection and promotion of human rights as one of the overarching goals of the United Nations, and identifies human rights as a necessary condition for the promotion of peace and stability.

Alongside the Charter, the Universal Declaration of Human Rights (UDHR), the ICCPR and the ICESCR are fundamental to the international human rights framework. The UDHR was adopted by the General Assembly in 1948. While it is not binding as a General Assembly resolution, many of its provisions are recognized as enshrining binding rules of customary international law.

In addition to the two Covenants, there is a range of other universal and regional treaties of particular significance in the context of criminal justice responses to terrorism. Some of them address specific human rights violations such as torture, while others safeguard the rights of particular groups including people living with disabilities, women, children and ethnic and racial groups.

19 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/70/371, para. 7.

20 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, 2013, A/HRC/23/39, para. 26.

21 Committee on the Rights to the Child, ‘Concluding Observations on the Combined Third to Fifth Periodic Reports of Kenya,’ (2016), CRC/C/KEN/CO/3-5, para. 17.

22 Committee on the Elimination of Discrimination against Women, ‘Concluding Observations: Kenya,’ (2011), CEDWA/C/KEN/CO/7, para. 2.

23 Committee against Torture, ‘Concluding Observations on the Second Periodic Report of Kenya, adopted by the Committee at its Fiftieth Session (6 to 31 May 2013),’ (2013), CAT/C/KEN/CO/2, para. 32.

24 Committee on the Elimination of Racial Discrimination, ‘Consideration of Reports submitted by States Parties under Article 9 of the Convention: Kenya,’ (2011), CERD/C/KEN/CO/1-4, para. 32.

In addition to the international treaties, there is also a range of declarations, guidelines and principles (so-called “soft-law instruments”) relevant to the protection of human rights in counter-terrorism investigations and prosecutions. Whereas human rights treaties impose binding obligations on those States that have ratified them, soft-law instruments, often adopted in the form of resolutions by international bodies like the General Assembly, do not impose binding legal obligations on States, but provide important guidance in the interpretation of treaty provisions.

Although such “soft law instruments” are not legally binding in Kenya, the courts have shown their willingness to rely on this source of international law when interpreting hard law. For example, in *Salim Awadh Salim and 10 Others v Commissioner of Police and 3 Others*,²⁵ the High Court relied on General Comment No. 20 of the Human Rights Committee to interpret the provisions of Article 7 of the ICCPR, which prohibits acts of torture or other cruel, inhuman or degrading treatment or punishment.

Customary international law, which binds all States irrespective of their treaty obligations, is also an important source of binding human rights obligations. The provisions of treaties and of “soft law” instruments may constitute the expression of a customary law rule (its “codification”) or may become binding as a result of State practice following the adoption of the treaty or “soft law” instrument.



Treaties, Customary Law and “Soft Law”

A distinction must be drawn between human rights treaties or rules of customary international law, which impose binding obligations on States, and other international instruments containing principles which are not legally binding, but set standards and provide good practice guidance.

To take one example, the ICCPR is a binding treaty, which imposes obligations under international law, including in the context of counter-terrorism operations. By contrast, the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems were adopted by General Assembly resolution. Other instruments, e.g. the United Nations Basic Principles on the Role of Lawyers, were adopted by a United Nations Congress on the Prevention of Crime and the Treatment of Offenders. These non-binding instruments (also referred to as “soft law”) provide important guidance in the interpretation of treaty provisions.

Some human rights norms have customary law standard. They are binding on States whether or not they have ratified a treaty enshrining the right. There is no definitive list of human rights protected under international customary law. However, the prohibition of torture and inhuman and degrading treatment, the prohibition of arbitrary detention and the right to a fair trial are definitely among the rights protected under customary law.

The United Nations human rights system is made up of a broad range of human rights bodies and procedures concerned with the promotion and protection of human rights.

The Charter-based system relates to those human rights bodies, which ultimately derive their mandate from the United Nations Charter, including where they are established by a resolution of the United Nations General Assembly. Charter-based procedures and obligations therefore apply to all United Nations Member States, including Kenya, by virtue of their membership of the United Nations. The main Charter-based mechanisms are the Human Rights Council, the Universal Periodic Review (UPR) and the Special Procedures, which are independent human rights experts with mandates to report and advice on human rights from a thematic or country-specific perspective.

²⁵ *Salim Awadh Salim and 10 Others v Commissioner of Police and 3 Others*, Petition 822 of 2008, Judgement of 31 July 2013, para 88; the facts of this case are discussed in section 7.10 below.

Treaty-based bodies derive their mandate from the United Nations human rights treaties. Each of the core treaties sets up a so-called “treaty body,” which is a committee of independent experts that monitors the implementation of the treaty, but only with regard to those States that are parties to the treaty concerned. For instance, while all United Nations Member States have to report to and are reviewed under the UPR process, whether they have ratified one, two or nine of the core universal treaties, a treaty body such as the Committee against Torture will only review the implementation of the Convention against Torture in those States that have ratified this treaty.

1.8.1 The Human Rights Council and its Mechanisms and Procedures

1.8.1.1 Human Rights Council

The Human Rights Council is an inter-governmental body within the United Nations system responsible for strengthening the promotion and protection of human rights around the globe, addressing situations of human rights violations and making recommendations on them. It is made up of 47 Member States, which are elected by the General Assembly. It has the power to consider all thematic human rights issues and situations that require its attention throughout the year, and has devoted considerable attention to the protection of human rights while countering terrorism. In this regard, it mandates, receives and debates reports on this question from the Special Rapporteur on the promotion and protection of human rights while countering terrorism and from the OHCHR, and adopts resolutions based on these reports.

In November 2012, Kenya was elected to fill one of the five seats on the Human Rights Council reserved for United Nations Member States from Africa. Kenya’s three-year term ended in December 2015.

1.8.1.2 Special Procedures of the United Nations Human Rights Council

Special Procedures are mechanisms established by the Human Rights Council to report and advice on human rights issues from a thematic or country-specific perspective. Special Procedures are either an individual, referred to as “Special Rapporteur” or “Independent Expert,” or a working group usually composed of five members, one from each region of the world. Mandate-holders serve in their personal capacity, and their independent status is crucial for the impartial fulfilment of their functions. Some of the Special Procedures that have particular relevance to human rights and the criminal justice response to terrorism include:

- Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism
- Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
- Working Group on Arbitrary Detention



Activity

The Special Rapporteur on Torture and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions visited Kenya in 2000 and 2009 respectively, and submitted reports on their findings and recommendations. Find their reports online. What recommendations relevant to counter-terrorism do they contain?

1.8.1.3 Universal Periodic Review

The UPR is a reporting procedure put in place by General Assembly Resolution 60/251 (2006). Every four and a half years, the overall human rights situation in each Member State of the United Nations is examined by reference to the full range of human rights obligations by which they are bound. The UPR Working Group of the Human Rights Council conducts this process. It is therefore a peer review process where States review the implementation of human rights obligations by other States, as opposed to the treaty bodies and Special Procedures, which are composed of independent experts.

**Activity**

Find the most recent UPR report regarding Kenya. What recommendations relevant to counter-terrorism does it contain?

1.8.2 United Nations Human Rights Treaty Bodies

As discussed earlier, each of the core universal human rights treaties sets up “treaty bodies,” i.e. a body of independent experts to monitor the implementation of the concerned treaty. States Parties are obliged to periodically submit to the respective treaty body reports on the implementation of the concerned treaty. Some of the treaty bodies have specifically requested States to provide information on counter-terrorism measures in their periodic reports.²⁶ These reports are examined and discussed by the Committee in public meetings and in the presence of representatives of the State Party. Alternative reports may also be submitted by national human rights institutions and NGOs.

At the conclusion of its consideration of each State report, the Committee issues findings termed “Concluding Observations”. This reporting mechanism aims to create a dialogue between the relevant treaty body and the State Party concerned for the purpose of assisting the latter to introduce adjustments to its domestic law and practice required by its international treaty obligations. Treaty bodies also play an important role in examining complaints of human rights violations from individuals, termed as “communications,” provided that the State concerned has accepted this procedure, either by becoming Party to an optional protocol or by making a declaration to that effect.

At the time of writing, Kenya had not accepted the individual complaint procedure under any of the universal human rights treaties it has ratified, including under the Optional Protocol 1 of the ICCPR.

**Activity**

Find the most recent reports submitted by Kenya to the Human Rights Committee and the Committee against Torture, as well as the Concluding Observations made by these two Committees with regard to Kenya. What recommendations relevant to counter-terrorism do they contain?

1.8.3 The Office of the High Commissioner for Human Rights

The High Commissioner for Human Rights is the principal United Nations human rights official and spearheads the United Nations’ human rights efforts. The OHCHR is mandated to promote and protect the enjoyment and full realization of all rights established in international human rights law, through technical assistance and capacity-building initiatives, as well as monitoring, advocacy for and reporting on human rights-compliance, including in the counter-terrorism context. It also supports the various human rights bodies and procedures, including the human rights treaty bodies and special procedures mandates.

²⁶ See, e.g., Human Rights Committee, Guidelines for the treaty-specific document to be submitted by States parties under article 40 of the International Covenant on Civil and Political Rights, CCPR/C/2009/1.



Tools

- The Universal Human Rights Index is an online database providing easy access to country-specific human rights information emanating from international human rights mechanisms in the United Nations system: the Treaty Bodies, the Special Procedures and the Universal Periodic Review (UPR): <http://uhri.ohchr.org/en>
- Jurisprudence is an online database that provides easy access to the jurisprudence emanating from the United Nations Treaty Bodies which receive and consider complaints from individuals. It is intended to be a single source on the human rights recommendations and findings issued by all the UN human rights expert committees in their work on individual cases: <http://juris.ohchr.org/> .



Further Reading

- Information on the work of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: <http://www.ohchr.org/EN/Issues/Terrorism/Pages/SRTerrorismIndex.aspx>
- Information on other thematic Special Procedures mandates of the United Nations Human Rights Council particularly relevant to counter-terrorism can be accessed here: http://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=TM
- Fact Sheet No. 32 on Human Rights, Terrorism and Counter-terrorism, published by the Office of the High Commissioner for Human Rights, identifies critical human rights issues raised in the context of terrorism and highlights the relevant human rights principles and standards which must be respected at all times, and in particular in the context of counter-terrorism. It is available here: <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>

1.9 THE AFRICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS

The Banjul Charter was concluded under the aegis of the OAU, now the AU, and entered into force in 1986. Its distinguishing features are the prominent place it attributes, in addition to individual rights, to peoples' rights on the one hand (Articles 19-24) and to individuals' duties on the other (Articles 27-29). It establishes the African Commission on Human and Peoples' Rights (ACommHPR).

The ACommHPR can receive individual communications alleging human rights violations by a State Party to the Banjul Charter. These can be submitted by another State Party, or a person, group of persons or a non-governmental organization, provided that they have exhausted domestic remedies, i.e. they have made use of the mechanisms available at the national level to remedy the alleged human rights violation.²⁷ If a complaint is admissible, the ACommHPR will issue its views as to whether a violation has occurred and, if so, recommend reparation. The ACommHPR also considers and reports on thematic human rights issues, as well as the human rights situation in particular countries.

The ACommHPR has adopted several documents that provide a detailed elaboration of rights enshrined in the Banjul Charter. Of particular importance to the subject matter of this Manual are:

- Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa
- Guidelines and Measures for the Prohibition of Torture, Cruel, Inhuman or Degrading Treatment and Punishment in Africa ("Robben Island Principles")

²⁷ Article 56 of the Banjul Charter.

- Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; and
- Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (“Luanda Guidelines”)

These principles and guidelines adopted by the ACommHPR will be referred to throughout the Manual as very authoritative guidance on the interpretation of human rights provisions.

Kenya ratified the Banjul Charter on 23 January 1992, and has accepted its complaints procedure. This means that the ACommHPR can entertain inter-state and non-state complaints alleging violations of specific rights and fundamental freedoms by the State. The ACommHPR has indeed received and determined a number of communications pertaining to Kenya. Key among these is the case of *Endorois v Kenya*, which was the first to hold a State explicitly responsible for violating the right to development under Article 22 of the Banjul Charter, and which is highlighted below.



Landmark Decision by the African Commission pertaining to Kenya

*Centre for Minority Rights and Development (on behalf of Endorois Welfare Council) & 2 others v Kenya**

The complainants alleged that the Kenyan Government had violated the Banjul Charter by forcibly removing the Endorois Community from their ancestral land in the Rift Valley without proper prior consultations, as well as adequate and effective compensation. Attempts on their part to seek redress from the High Court in Kenya had not only proved unsuccessful, but had also paved the way for the demarcation and sale of their traditional land to third parties, as well as the granting of mining concessions by the Government. In 2009, the African Commission issued a landmark recommendation pertaining to the rights of indigenous communities in Kenya; it found that the ancestral land of the Endorois had been illegally encroached upon, mainly through expropriation and the effective denial of ownership by the Government. It further ruled that the forced evictions were in violation of the Banjul Charter, and recommended that the Government recognize the ancestral land rights of the Endorois, grant them unrestricted access to Lake Baringo and its environs, pay them appropriate compensation, as well as ensure that they receive royalties for on-going economic activity.

Regrettably, this decision was made seven years after the case was first seized by the African Commission. As of the time of this writing, the Government has yet to implement it.

*276/2003, *Centre for Minority Rights and Development (CEMIRIDE), Minority Rights Group International and the Centre on Housing Rights and Evictions (on behalf of Endorois Welfare Council) v Kenya*

A key challenge facing the ACommHPR is that its decisions are not binding. Article 52 of the Banjul Charter, which establishes the inter-state communication procedure, only requires the Commission to try all appropriate means to reach an amicable solution, failing which it is required to prepare a report and communicate it to the AU Assembly with such recommendations as it deems useful. As a State Party, Kenya is obliged under Article 1 to adopt legislative and/or other measures to give effect to the rights, duties and freedoms enshrined therein, including implementing the decisions of the ACommHPR.

Pursuant to Article 54 of the Banjul Charter, the ACommHPR submits a report of its activities to every ordinary session of the AU Assembly of Heads of State and Government. Decisions on communications that arise from complaints are also included in the report, and sent to the State Party involved as recommendations. In the case of recommendations made pursuant to in-depth studies of special cases revealing massive human rights violations, the measures remain confidential until publication is authorized by the Assembly. Although these recommendations are non-binding, they constitute soft law as they provide important guidance in the interpretation of the provisions of the Banjul Charter.

The unenforceability of the decisions of the Commission is expected to be remedied by the establishment of the African Court of Human and Peoples’ Rights (ACTHPR), pursuant to the entry into force of the Protocol to the African Charter on the Establishment of the African Court on 25 January 2004. Several innovative features set the (ACTHPR) apart from its American and European counterparts; it may apply the Banjul Charter, as well

as other international human rights treaties ratified by the State in question.²⁸ NGOs recognized by the AU can also apply to the ACtHPR for advisory opinions. Moreover, cases may be brought before the ACtHPR by the ACommHPR, States or individuals, but only in respect of those States that have ratified the Protocol and thereby permitted individual petition.

At the time of this writing, around 25 African States had accepted the ACtHPR's jurisdiction to hear disputes brought by the ACommHPR or other States, while only five had accepted the right of individual petition. Although Kenya has ratified the Protocol, it had not accepted the right of individual petition at the time of this writing. That notwithstanding, the ACtHPR has received one application pertaining to Kenya, which was submitted by the ACommHPR in July 2012, on behalf of the Ogiek Community, an indigenous minority ethnic group inhabiting the greater Mau Forest Complex.²⁹ The application alleges human rights violations arising out of the implementation of a thirty days eviction notice issued by the Government against the Ogiek and other settlers in the Mau Forest in October 2009.



Tools

- Information on the ACommHPR is available here: <http://www.achpr.org/>
- Further information about the ACtHPR is available here: <http://www.african-court.org/en/>
- The ACommHPR's Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa are available here: http://www.achpr.org/files/special-mechanisms/human-rights-defenders/principles_and_guidelines_on_human_and_peoples_rights_while_countering_terrorism_in_africa.pdf



Practical Guidance

The international procedures and complaints mechanisms cannot be a substitute for national mechanisms for the protection of human rights. The primary responsibility for the protection and promotion of human rights lies with States. International law requires each State to give effect to human rights obligations within their own national legal system and national agencies. National officials and courts are much better placed than international courts and supervisory mechanisms to protect and remedy human rights violations (and, even more importantly, to prevent such violations occurring in the first instance).

In addition to providing a remedy of last resort in case of alleged human rights violations, the international bodies and procedures provide very useful reference and guidance on Kenya's international legal obligations, which can be applied in domestic proceedings.

1.10 OTHER REGIONAL HUMAN RIGHTS SYSTEMS

In addition to the African system, there are other well-established regional systems for the protection of human rights, which have generated a vast body of useful practice relating to human rights in the criminal justice responses to terrorism and other national security threats.

28 The jurisdiction of the IACtHR also comprises certain other Inter-American human rights treaties (particularly the Inter-American Convention to Prevent and Punish Torture), but the jurisdiction of the African Court extends to "any other relevant Human Rights instrument ratified by the States concerned" (Article 3 of the Banjul Charter Protocol), including thereby the United Nations human rights treaties too.

29 African Court on Human and Peoples Rights, Application No. 006/2012, In the Matter of African Commission on Human and Peoples' Rights v. Republic of Kenya, Order of Provisional Measures (15 March 2013), para 1-4.

1.10.1 The Inter-American System

In 1948, the 21 States of the Americas signed the Charter of the Organization of American States (OAS) and the American Declaration of the Rights and Duties of Man (ADRDM). The central binding legal instrument for the protection of human rights within the Inter-American system is the American Convention on Human Rights (ACHR), which came into force in 1978. The Inter-American Commission of Human Rights (IACCommHR) receives communications from individuals alleging violations of either the ACHR or the ADRDM. There is no individual right of petition to the Inter-American Court of Human Rights (IACtHR). The Commission can issue non-binding views in response to communications. It can also bring cases before the Court, which has the power to issue binding decisions and award reparations.

1.10.2 The Council of Europe System

The COE was founded in 1949 with the aim of creating a common democratic and legal area throughout Europe, and ensuring respect for human rights, democracy and the rule of law. The most prominent COE treaty for the protection of human rights is the ECHR, which came into force in 1953. Since 1998, persons in all 47 member States of the COE have a right of individual petition directly to the ECtHR, provided that they have exhausted domestic remedies. The ECtHR has the power to issue binding judgments in respect of the complaints brought before it, deciding whether one or more rights enshrined in the ECHR have been violated. It also has power to require the State in question to afford “just satisfaction” to the victim of a violation, most often in the form of financial compensation.³⁰



Activity

- Article 50 of the Constitution has many similarities, including identical wording in some sub-sections, with the fair trial provisions in Article 14 of the ICCPR and Article 6 of the ECtHR.

Should Kenyan courts and other authorities make use of the interpretation of Article 14 of the ICCPR and Article 6 of the ECHR by the Human Rights Committee and the ECtHR respectively, in applying Article 50 of the Constitution?

1.11 THE RELATIONSHIP BETWEEN HUMAN RIGHTS LAW AND OTHER INTERNATIONAL LEGAL REGIMES

International human rights law, at the universal and regional levels, co-exists alongside other international legal regimes, which are also of relevance in the context of counter-terrorism. The most notable of these are international humanitarian law, international criminal law and international refugee law.

1.11.1 International Humanitarian Law

Counter-terrorism measures may take place in the context of widespread armed violence. In such situations, questions of compliance with international humanitarian law (IHL), which specifically regulates armed conflict, may arise. International human rights law and IHL share the goal of preserving the dignity and humanity of all.

In general, IHL becomes applicable where violence involving States and/or organized armed groups has reached an intensity sufficient to amount to an “armed conflict,” whether international or non-international. IHL is also applicable in circumstances of military occupation. IHL sets out rules with regard to the treatment of civilians in armed conflicts, the conduct of hostilities, the treatment of prisoners of war, rules relating to the use

³⁰ It is important to distinguish the CoE system for the protection of human rights from other systems for the protection and promotion of human rights in Europe, in particular the human rights instruments and mechanisms of the European Union and of the Organization for Security and Cooperation in Europe (“OSCE”).

of weapons and targeting among other matters. IHL rules on detention, torture, inhuman or degrading treatment, as well as the right to a fair trial may apply to persons detained in the context of an armed conflict and suspected of acts of terrorism.

While international human rights law and IHL share a number of protections and standards aimed at protecting civilians from the effects of war, it is important to determine whether the applicability of IHL rules has actually been triggered:

“because international humanitarian law gives States more leeway when they use armed force (for example, on the use of deadly force) and, according to certain States, when they detain enemies without judicial procedure (like prisoners of war in international armed conflicts), there may be a temptation to invoke rules of international humanitarian law in a situation where the threshold of armed force has not been reached. In those unclear cases it is essential to consider international human rights law as the only applicable legal regime, until such time that the threshold and conditions of an armed conflict have been met.”³¹

Kenya is signatory to a number of IHL treaties, and has domesticated some of them as part of its responsibility under these treaties to ensure that their provisions are given full effect through legislative and non-legislative measures.

Name of Treaty	Date of Ratification/ Signature/Accession by Kenya	Main Implementing Legislation
Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949	20 September 1966	The Geneva Convention Act (Chapter 198, Laws of Kenya).
Geneva Convention (II) for the Amelioration of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 12 August 1949		
Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949 and		
Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949		

International human rights law remains applicable during armed conflict, subject only to where specific provisions are derogated from on grounds of public emergency that threatens the life of the nation. In its 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice (ICJ), the United Nations’ principal judicial organ, observed “that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant, whereby certain provisions may be derogated from in a time of national emergency” (para. 25). The ICJ reaffirmed this in subsequent case law (e.g. the *Advisory Opinion on the Construction of a Wall in the Occupied Palestinian Territories*).

The Human Rights Committee has equally stated that international human rights law applies “also in situations of armed conflict to which the rules of international humanitarian law are applicable.” It added that “[w]hile, in respect of certain [rights protected by the ICCPR], more specific rules of international humanitarian law may be especially relevant for the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.”³²

31 OHCHR, *International Legal Protection of Human Rights in Armed Conflict*, page 40.

32 Human Rights Committee, General Comment No. 31, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 11.

1.1.1.2 International Refugee Law

International refugee law provides a specific legal framework for the protection of refugees, setting out the criteria for determining who is, and who isn't, a refugee; States' obligations towards those who meet the refugee definition; as well as the standards for their treatment. The 1951 Convention relating to the Status of Refugees and its 1967 Protocol relating to the Status of Refugees are the two universal instruments in international refugee law. At the regional level, the 1969 AU Convention Governing the Specific Aspects of Refugee Problems in Africa is relevant, as is the right to seek and enjoy asylum in the African Charter on Human and Peoples' Rights (Article 12(3)). Also important for forcibly displaced persons who have not crossed an international border, is the 2009 AU Convention for the Protection and Assistance to Internally Displaced Persons in Africa.

There are various aspects of international refugee law that are relevant to counter-terrorism. Persecution, conflict and violence involving terrorist groups are a cause for displacement, and the activities of such groups may also endanger the safety of refugees in the country of asylum, At the same time, individuals engaged in terrorist activities may have acquired refugee status or may be seeking asylum. International refugee law contains provisions enabling States to address such situations. This is discussed further in Sections 7.7.1. and 7.7.2. below).

Kenya has signed, ratified and or acceded to several international and regional instruments relating to the status of refugees and their protection. These are reflected in the table below:

Name of Treaty	Date of Ratification/ Signature/Accession by Kenya	Main Implementing Legislation
1951 Convention Relating to the Status of Refugees	16 May 1966 (accession)	Provisions of these treaties have been substantially domesticated by virtue of the Refugees Act (Cap. 173)
1967 Protocol to the Convention Relating to the Status of Refugees	13 November 1981 (accession)	
1969 AU Convention Governing the Specific Aspects of Refugee Problems in Africa	23 June 1992 (ratification)	

These treaties establish an international legal regime governing the status of refugees. They provide for a set of rights and benefits that States have agreed to accord to individuals who meet the eligibility criteria set out in the refugee definitions under the above-mentioned treaties. This includes, most importantly, the principle of non-refoulement, enshrined in Article 33(1) of the 1951 Convention relating to the Status of Refugees and Article II (3) of the 1969 AU Convention Governing the Specific Aspects of Refugee Problems in Africa. This principle is captured under Section 18 of the Refugee Act (Cap. 173), which provides that "[n]o person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or to be subjected any similar measure if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a country where-

- a) the person may be subject to persecution on account of race, religion, nationality, membership of a particular social group or political opinion; or
- b) the person's life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or the whole of that country.

Already prior to the enactment of the Act, Kenya considered itself to be under an obligation not to deport or expel refugees and other persons when there was a reasonable belief that they will suffer torture and other cruel, inhuman or degrading treatment or punishment³³. For instance, Kenya refused to hand over the late Alice Lakwena, who inspired a long-running insurgency in northern Uganda and died in exile at the Ifo Refugee Camp in northern Kenya in 2007, despite repeated requests from Uganda to do so. The Kenyan Government explained its position on the basis that it has reasonable belief that her safety would not have been guaranteed had she been returned to Uganda.



Cross-Reference

See Chapter 7 for more detailed discussion of some issues arising in the context of counter-terrorism and international refugee law.

1.11.3 International Criminal Law

International criminal law focuses on the responsibility of individuals rather than the responsibility of States. By virtue of the International Crimes Act, 2008, Kenya established a basis in domestic law for cooperation with the International Criminal Court (ICC), whose 1998 Rome Statute Kenya had ratified in 2005. The Act also makes genocide, crimes against humanity and war crimes offences under Kenyan law (Section 6), and defines them by referring to the definition of these offences in Articles 6 to 8 of the Rome Statute of the ICC. While this is not the place to explore in detail the elements of war crimes and crimes against humanity, two elements are very important:

- Regarding crimes against humanity, these are certain acts, such as murder, extermination, torture, rape, “when committed as part of a widespread or systematic attack directed against any civilian population” (Article 7 of the Rome Statute).
- Regarding war crimes, these are serious abuses committed in the context of an armed conflict of international or non-international character.

Under certain circumstances, an act of terrorism may also constitute a war crime or a crime against humanity, for example where – in the context of an armed conflict – an armed group carries out a number of deadly explosives attacks against members of an ethnic or religious minority group, with the aim of forcing them to leave their home and flee to a different part of the country or abroad. Counter-terrorism measures could also constitute an offence under international criminal law, for instance torture or summary execution of terrorist suspects apprehended during an armed conflict.



Boko Haram Crimes and the 2015 “Report on Preliminary Examination Activities” of the ICC Prosecutor

The possible overlap between terrorism offences and war crimes and crimes against humanity is illustrated by the discussion of acts committed by Boko Haram in the 2015 “Report on Preliminary Examination Activities” of the ICC Prosecutor.

The Report mentions “eight potential cases involving the commission of crimes against humanity and war crimes under Articles 7 and 8 of the ICC Statute: six for conduct by Boko Haram and two for conduct by the Nigerian Security Forces” (at para. 195). The potential cases for alleged Boko Haram conduct concern

- “attacks against civilians perceived as ‘disbelievers’” (at 196)

33 Committee against Torture, ‘Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Kenya,’ UN Doc. CAT/C/KEN/1 (16 August 2007), available at http://www.univie.ac.at/bimtor/dateien/kenya_cat_2007_report.pdf (accessed on 24 September 2015), para 53.

- “abductions and imprisonment of civilians, leading to alleged murders, cruel treatments and outrages upon personal dignity” (at 199)
- “attacks on buildings dedicated to education, teachers and students” (at 201)
- “recruitment and use of children under the age of 15 years to participate in hostilities” (at 203)
- “attacks against women and girls . . . rapes, sexual slavery and other forms of sexual violence, forced marriages, the use of women for operational tasks and murders” (at 205-206)
- “intentional targeting of buildings dedicated to religion, including churches and mosques” (at 208)

The potential cases for conduct by the Nigerian Security Forces relate to:

- “alleged mass arrests of boys and young men suspected of being Boko Haram members or supporters, followed by large-scale abuses, including summary executions and torture” (at 211) and
- alleged “attacks against civilians” (at 214)

As of 12 November 2015 (the date of the “Report on Preliminary Examination Activities”), these potential cases were at the preliminary examination stage, in which the ICC Prosecutor, having received information alleging the commission of offences within the ICC’s jurisdiction, examines whether to initiate an investigation. One of the key criteria in this regard (see Statute Articles 53 and 17 of the ICC Statute) is whether the State on whose territory the offences were committed is willing and able to carry out the investigation and prosecution.

In any event, the fact that certain conduct may amount to a crime under international law does not preclude the application of international human rights law to the investigation, prosecution and punishment of such acts. The statutes of the major international criminal tribunals indeed require tribunals to conduct their proceedings in a manner compatible with international human rights guarantees.



Activity

- Consider the following fictional report on an attack by the terror group X:

“Around 200 fighters affiliated with the terror group X attacked ABC village, 20 km from Mandera town on 16 March 2014. According to one eyewitness, who left the village after the attack, they drove into the market on motorcycles, shot civilians, killing dozens of them, stole supplies and set fire to shops. The eyewitness said the soldiers stationed in the village initially fired at the fighters from terror group X, but were overpowered.”

- Do you think this attack (or the numerous killings and acts of destruction perpetrated in the course of the attack on ABC village) should be considered a war crime, a crime against humanity or an act of terrorism, or all three of them?
- What difference does it make whether the attack on ABC village is investigated and prosecuted as a war crime or crime against humanity, or an act of terrorism? Consider Kenyan and international law with regard to the following aspects:
 - a. Elements of the offences criminalizing the alleged conduct of group X fighters, including such as context of the attack and purpose of the attackers
 - b. Investigation powers
 - c. Jurisdiction of courts in Kenya and other countries, or at the international and regional level over persons accused of being responsible for the attack
 - d. Obligation of other States to cooperate with Kenya in the investigation and prosecution of those who took part in planning, ordering, funding, carrying out or in any other way supported the attack
 - e. Availability of legal provisions and mechanisms to sanction persons or legal entities suspected of supporting terror group X in the absence of any evidence that they knew of the planned attack on ABC village
 - f. Rights of any captured suspects
 - g. Right to compensation and other remedies for the victims of the attack
- Under what circumstances could the Prosecutor of the International Criminal Court open an investigation into the attack on Mandera town in the scenario above?



Further Reading

- The UNODC publication *Frequently Asked Questions on International Law Aspects of Countering Terrorism* explains the relationship between terrorism and international criminal law (Chapter 2), international humanitarian law (Chapter 3) and international refugee law (Chapter 4): <http://www.unodc.org/documents/terrorism/Publications/FAQ/English.pdf>
- The website of the International Committee of the Red Cross provides questions and answers on international humanitarian law and terrorism: <http://www.icrc.org/eng/resources/documents/faq/terrorism-faq-050504.htm>
- OHCHR has published a manual on *International Legal Protection of Human Rights in Armed Conflict* available here: http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf
- The Report on the situation of detainees at Guantánamo Bay by five holders of human rights Special Procedures mandates (E/CN.4/2006/120) discusses the applicability of human rights and international humanitarian law to the situation of detainees at the United States Naval Base at Guantánamo Bay. It is available here: <http://www2.ohchr.org/english/bodies/chr/sessions/62/listdocs.htm>
- Key human rights guarantees are enshrined in articles 21-22 and 66-68 of the Rome Statute of the International Criminal Court (the Statute is available here: <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>). Also the Statute of the Special Tribunal for Lebanon, the first international criminal tribunal established to try terrorism cases, contains a section (articles 15-17) setting forth the rights of defendants and victims (<http://www.stl-tsl.org/en/STL-Documents/Library/Statute-of-the-tribunal>). These are elaborated and protected by the Tribunal's Rules of Procedure and Evidence.

1.12 SELF-ASSESSMENT QUESTIONS



Self-Assessment Questions

- What is the position of the United Nations General Assembly and the Security Council with regard to respect for human rights while countering terrorism?
- What is the legal status in Kenyan domestic law of international and regional human rights treaties that have been ratified by Kenya?
- Name five key pieces of legislation incorporating international human rights law into Kenyan law.
- Name the key provisions in Chapter IV of Kenya's Constitution regarding limitation of human rights.
- List the rights that cannot be limited (the "absolute rights") under Kenya's 2010 Constitution.
- Discuss the grounds on which human rights and fundamental freedoms can be limited or derogated from in accordance with international human rights law? Refer in particular to the ICCPR. How do these grounds correspond with or differ from those in the Constitution?
- Explain the nature and role of the Human Rights Committee and of the Special Rapporteur on human rights while countering terrorism. How do they assist Kenya and other States in respecting human rights while countering terrorism?
- Name no less than three instruments of the African human rights system that are of particular relevance to criminal justice and counter-terrorism.
- Identify the institutions that have been established to further the promotion and protection of human rights in Kenya.
- List five examples in which the application of human rights law overlaps with the application of other international legal regimes, in particular international humanitarian law, international refugee law and international criminal law.

2. THE CRIMINALISATION OF TERRORIST ACTIVITIES

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2. The Criminalisation of Terrorist Activities

2.1 OBJECTIVES

By the end of this Chapter, you will be able to:

- Describe the principle of “no punishment without law,” including the requirements of legality, predictability and accessibility of criminal laws, and the prohibition on retroactivity
- Discuss how these principles have been incorporated in the Kenyan legal system, and how the Kenyan Judiciary has sought to give effect to them
- Identify the circumstances in which the State may legitimately limit freedom of expression while countering terrorism
- Discuss how measures against terrorist entities can be adopted while upholding freedom of association, the right to equal participation in the political process and other rights.

2.2 OVERVIEW

This Chapter focuses on the criminalisation of terrorist activities, which raises a number of important issues under human rights law. Key among these is the principle of “no punishment without law” which is a fundamental principle of criminal justice and an essential safeguard against arbitrary prosecution, conviction and punishment of individuals. To begin with, the principles of legality and the attendant requirements of predictability and accessibility will be examined. The main requirement of this principle is that only the law can define a crime and prescribe criminal punishment, provided that it does so in a manner that gives fair and clear notice of the nature of conduct that is prohibited. Next will be an analysis of the prohibition on retroactive criminal laws, which is an essential corollary of the principle of no punishment without law.

The Chapter will then turn to the relationship between the obligation to prevent terrorism by criminalizing incitement to and recruitment for terrorism, as well as proscribing terrorist groups, and the freedoms of expression, assembly and association. Kenyan constitutional law, anti-terrorism legislation and judicial practice will be examined, and international cases and standards presented.

The Chapter will conclude with a set of assessment questions aimed at providing users with the possibility of testing their knowledge on the topics discussed herein.

2.3 INTRODUCTION

If terrorism is to be successfully combated through the criminal justice system, it is essential that terrorist activities are properly and adequately criminalized. 16 out of the 19 universal counter-terrorism instruments define terrorist offences (e.g. the hijacking of a plane or attacks against internationally protected persons) and oblige State Parties to establish them as criminal offence under their domestic law. Moreover, in resolution 1373 (2001) the United Nations Security Council decided “that all States shall ... [e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice.” The resolution further clarifies that this requires that “such terrorist acts [be] established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.”

Acts of terrorism can be criminalized through special counter-terrorism legislation or through offences in the ordinary penal laws, e.g. in the criminal code. Before 2012, Kenya did not have specific counter-terrorism legislation. It relied on various pieces of statute criminalizing certain aspects of terrorism.³⁴ These were not considered sufficient. The Prevention of Terrorism Act (POTA) was therefore enacted on 12 October 2012 to provide a comprehensive and effective legal framework to combat terrorism.

Part III of the POTA establishes offences related to terrorism and prescribes penalties ranging from imprisonment for a term not exceeding twenty years to life imprisonment where the offence results in murder. Some provisions of the Act have since been amended by the newly enacted SLAA 2014 in a bid to bolster counter-terrorism efforts.

In addition to establishing terrorism related offences, the POTA also provides for special investigative powers, as well as special powers of arrest and detention of persons suspected to have committed an offence under the Act. Human rights aspects of these powers will be discussed in the context of Chapters 3, 4, and 5 on investigation, detention and fair trial respectively.

2.4 NO PUNISHMENT WITHOUT LAW

The principle of “no punishment without law” is a fundamental principle of criminal justice and an essential safeguard against arbitrary prosecution, conviction and punishment. Its importance is such that no derogation from it is allowed even “in time of public emergency which threatens the life of the nation.” The Constitution provides in Article 50 (2) (n) that the accused has a right “not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya; or a crime under international law.” At the international and regional level, this principle is enshrined in Article 4 (2) of the ICCPR and Article 7 (2) of the ACHPR respectively.

The first implication of the principle of “no punishment without law” is that only the law can define a crime and prescribe a penalty. No prosecution may be initiated and eventual punishment meted out for conduct that is not proscribed as an offence by law. A second, equally important, aspect is the prohibition of retroactive criminal laws. The General Assembly has urged all United Nations Member States “to ensure that their laws criminalizing acts of terrorism are accessible, formulated with precision, non-discriminatory, non-retroactive and in accordance with international law, including human rights law.”³⁵

34 Such as the Penal Code (Cap. 63), the Criminal Procedure Code (Cap. 75), the Evidence Act (Cap. 80), the Official Secrets Act (Cap. 487), the Banking Act (Cap. 488) to name a few.

35 A/RES/64/168, OP 6 (k).



Activity

Kenya has ratified 14 of the 19 international conventions and protocols against terrorism.³⁶ Most of these treaties define offences that Kenya and other States are obliged to criminalize in their domestic legislation.

Can the definition of an offence in a counter-terrorism treaty ratified by Kenya be a sufficient basis for prosecution in Kenya?

2.4.1 Principle of Legality and Requirements of Predictability and Accessibility of Criminal Laws

The principle of “no punishment without law” is not confined to prohibiting the prosecution and punishment for conduct that is not proscribed as an offence. To provide an effective safeguard against arbitrary prosecution, conviction and punishment, laws imposing criminal punishment must be written in a way that gives “fair notice” of what conduct is prohibited. The practice of various human rights mechanisms and institutions at the international, regional and national level highlight several requirements deriving from this principle. As the ECtHR explained in a series of cases interpreting Article 7 of the ECHR,³⁷ which is very similar to Article 15 of the ICCPR and Article 50 (2) (n) of the Constitution:

- “Article 7 [no punishment without law] ... embodies, more generally, the principle that only the law can define a crime and prescribe a penalty.”
- “Criminal law must not be extensively construed to the detriment of an accused, for instance by analogy.” In other words, while in civil and administrative law it is generally permitted to apply a rule to situations that are analogous or similar to the one explicitly covered by a provision, this is not generally permissible in criminal law.
- The concept of “law” implies “qualitative requirements”, including those of accessibility and foreseeability. It follows that the offences and the relevant penalties must be clearly defined in law. This requirement is satisfied when the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it or by way of appropriate legal advice, to a degree that is reasonable in the circumstances, what acts and omissions will make him criminally liable.”



The “Void for Vagueness” Doctrine

In many common law jurisdictions such as Kenya, the requirement of foreseeability of criminal laws is upheld through the “void for vagueness” doctrine. This doctrine and its importance to the protection against arbitrary prosecutions was explained as follows by the United States Supreme Court:

“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who

36 These are the following: 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft; 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents; 1979 International Convention against the Taking of Hostages; 1980 Convention on the Physical Protection of Nuclear Material; 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation; 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; 1991 Convention on the Marking of Plastic Explosives for the Purposes of Detection; 1997 International Convention for the Suppression of Terrorist Bombings; 1999 Convention for the Suppression of the Financing of Terrorism; 2005 International Convention for the Suppression of Acts of Nuclear Terrorism; and 2005 Amendment to the Convention on the Physical Protection of Nuclear Material.

37 See, e.g., ECtHR, *Alimuçaj v. Albania*, Application No. 20134/05, Judgment of 7 February 2012, paras. 149-151.

apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”*

In the case *Uganda v. Sekabira*,** the High Court of Uganda held that the void for vagueness doctrine is encapsulated in article 27(8) of the Constitution of Uganda, which enshrines the principle of no punishment without law (“No person shall be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a criminal offence.”) The High Court agreed with defense counsel in this case that a sub-section of the Ugandan Anti-Terrorism Act of 2002 was (as it stood at the time) “vague, obscure, ambiguous and when read in the context of the rest of the section, [...] capable of being understood in two or more ways”, and could therefore not be a proper base for the terrorism charges against the accused.

*United States Supreme Court, *Grayned v. City of Rockford*, 408 U.S. 104 (1972), at 108-09.

**High Court of Uganda, *Uganda v. Sekabira and 10 Others*, Judgment of 14 May 2012.



Case Study: Unconstitutionality of Certain Media-Related Provisions in the SLAA

Among the provisions of the SLAA 2014 challenged in this case* where the new POTA Sections 30A (Publication of Offending Material) and 30F, which made it an offence to publish “any information which undermines investigations or security operations relating to terrorism” without prior authorization from the National Police Service. In declaring these provisions vague and unconstitutional, the High Court observed that:

“... a law that limits a fundamental right and freedom must not be so vague and broad, and lacking in precision, as to leave a person who is required to abide by it in doubt as to what is intended to be prohibited, and what is permissible. With regard to Section 30A for instance, how is “any information which undermines investigations or security operations relating to terrorism” to be interpreted? Who interprets what information “undermines investigations or security operations?” The effect of such a prohibition, in our view, would amount to a blanket ban on publication of any security-related information without consulting the NPS. In our view, the provisions of Section 30A and 30F are unconstitutional for limiting the rights guaranteed under Article 34 (1) and (2) ... It has not demonstrated the rational nexus between the limitation and its purpose, which, we reiterate, has been stated to be national security and counter-terrorism; has not sought to limit the right in clear and specific terms nor expressed the intention.”

**Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others [2015]* eKLR.



Cross-Reference

See section 2.5 for further discussion of the SLAA Case.



Foreseeability of Criminal Law and Judicial Interpretation

How can the requirement that criminal statutes must be of general and abstract nature, and open to application in situations which the legislator may not be able to envisage, be reconciled with the requirement that the law give “fair notice” of what conduct is prohibited? What is, in this respect, the role of interpretation of statutes by the courts? In the *Del Río Prada* case, which concerned a woman convicted on terrorism charges, the ECtHR made the following observations on these age-old questions, which are of the greatest importance to correctly understanding the “no punishment without law” principle:

“It is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorizations as opposed to exhaustive lists. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are

vague and whose interpretation and application are questions of practice (...). However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances (para 92).

The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (...). The progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition [The principle “no punishment without law”] cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (para 93).^{*E}

^{*E}ECtHR, *Del Río Prada v. Spain*, Application no. 42750/09, Judgment of 21 October 2013). This case is summarized in Chapter 6, section 6.3.

2.4.2 Definition of “Terrorism” and/or “Acts of Terrorism”

The universal counter-terrorism legal instruments negotiated within the framework of the United Nations, the International Civil Aviation Organization (ICAO), the International Maritime Organization (IMO) and the International Atomic Energy Agency (IAEA) do not establish a universally agreed upon general, comprehensive definition of terrorism.

Rather, these treaties take a so-called “sectoral approach”. Each treaty deals with offences against certain interests (such as the safety of international civil aviation, or international maritime navigation), against certain persons (diplomats, hostages) or committed with certain weapons (such as explosives or nuclear weapons). As a State Party to these instruments, Kenya has committed to incorporating those offences into its domestic criminal law, though not necessarily by taking over word by word the definition of the offence in the international treaty.

For the purposes of their domestic counter-terrorism legislation, however, many States – including Kenya – see the need to provide in their law a definition of “terrorism” or “acts of terrorism”.



Definition of a “Terrorist Act” under the POTA

The POTA does not define “terrorism.”

However, section 2 defines a “terrorist act” as an act or threat of action-

a) which -

- i. involves the use of violence against a person;
- ii. endangers the life of a person, other than the person committing the action;
- iii. creates a serious risk to the health or safety of the public or a section of the public;
- iv. results in serious damage to property;
- v. involves the use of firearms or explosives;
- vi. involves the release of any dangerous, hazardous, toxic or radioactive substance or microbial or other biological agent or toxin into the environment;
- vii. interferes with an electronic system resulting in the disruption of the provision of communication, financial, transport or other essential services;
- viii. interferes or disrupts the provision of essential or emergency services;
- ix. prejudices national security or public safety; and

- b) which is carried out with the aim of -
- i. intimidating or causing fear amongst members of the public or a section of the public; or
 - ii. intimidating or compelling the government or international organization to do or refrain from any act; or
 - iii. destabilizing the religious, political, constitutional, economic or social institutions of a country, or an international organization.

Provided that an act which disrupts any services and is committed in pursuance to a protest, demonstration or stoppage of work shall be deemed not to be a terrorist act within the meaning of this definition so long as the act is not intended to result in any harm referred to in paragraph (a) (i) to (iv)."

Section 4 provides that "[a] person who carries out a terrorist act commits an offence and is liable, on conviction, to imprisonment for a term not exceeding thirty years." The sentence is life imprisonment if the terrorist act results in death.

The subsequent Sections in the Act establish numerous offences, such as "possession of property for commission of terrorist acts" (section 6) or "recruitment of members for a terrorist group" (section 13), whose definition hinges on the section 2 definitions of "terrorist act" and "terrorist group."

In recent years, the Human Rights Committee, the Special Rapporteur on human rights while countering terrorism and the High Commissioner for Human Rights have frequently expressed the concern that the counter-terrorism legislation of States does not meet the requirements of accessibility and foreseeability. In reviewing counter-terrorism legislation of several United Nations Member States, they have, for instance, expressed the following criticism:

- "Lack of precision in the particularly broad definitions of terrorism and terrorist activity; ... the State party should: Adopt a narrower definition of crimes of terrorism limited to offences that can justifiably be equated with terrorism and its serious consequences";³⁸
- "The vaguely defined crime of collaboration [with terrorist organizations] runs the risk of being extended to include behaviour that does not relate to any kind of violent activity" and "the vagueness of certain provisions on terrorist crimes in the ... Penal Code carries with it the risk of a 'slippery slope', i.e. the gradual broadening of the notion of terrorism to acts that do not amount to, and do not have sufficient connection to, acts of serious violence against members of the general population";³⁹
- "The Committee notes with concern that the offence of 'encouragement of terrorism' has been defined ... in broad and vague terms."⁴⁰



Activity

- Refer to the definition of a "terrorist act" in Section 2 (a) of the POTA. In your opinion, does this definition meet the requirements of predictability, accessibility and foreseeability of criminal law? Is it sufficiently precise to give "fair notice" as to what conduct is punishable as terrorism under Kenyan law?
- In your professional experience with investigations and prosecutions of the offences in Sections 4 to 30 of POTA, did you encounter any difficulties related to the requirements of predictability, accessibility and foreseeability of criminal law?

38 Concluding Observations of the Human Rights Committee, Russian Federation, CCPR/C/RUS/CO/6, 29 October 2009, para. 3.

39 Report of the Special Rapporteur on Human Rights While Countering Terrorism, Spain, A/HRC/10/3/Add.2, 16 December 2008, paras. 9 and 52.

40 Concluding Observations of the Human Rights Committee, United Kingdom, CCPR/C/GBR/CO/6, 21 July 2008.

All criminal justice sector actors, the police, public prosecutors, defence counsel, judges and magistrates, have an important role to play in interpreting and applying offences under the POTA and other statutes, so that their approach is predictable and understandable to suspects and members of the public.

2.4.3 Prohibition on Retroactive Criminal Laws

The prohibition of retroactive criminal laws is an essential corollary of the principle of no punishment without law. It concerns only changes in the law that are to the detriment of an accused person, either because they create new offences, broaden existing ones, or provide for harsher penalties.

The Constitution has embodied this principle in the Bill of Rights, specifically Article 50, which provides for the right to a fair trial. Article 50 (2) (n) provides that “[e]very accused person has the right to a fair trial, which includes the right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya or a crime under international law.”

In addition, Article 50 (2) (p) entitles an accused person “to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.”

Under Article 25, the right to a fair trial is recognised as having absolute character, and cannot be limited under any circumstances. Under the ICCPR, too, the prohibition on retroactive criminal laws is absolute and cannot be derogated from even in “times of emergency threatening the life of the nation” as provided by Articles 4 and 15 of the ICCPR.

Violations of the principle of non-retroactivity of criminal law can result not only from changes in legislation, but also from changes in the courts’ interpretation of laws, when well-established case-law changes to a defendant’s detriment. This situation is illustrated by the *Del Río Prada* case,⁴¹ which is discussed in Chapter 6, section 6.5.



Activity

- In your professional experience, have you dealt with a criminal case in which retroactivity was an issue or are you aware of a case in Kenya posing a problem of retroactivity in criminal law?

2.5 THE RIGHT TO FREEDOM OF EXPRESSION AND TERRORISM-RELATED OFFENCES, PARTICULARLY INCITEMENT OF TERRORISM

Criminal law and criminal justice are, traditionally, primarily reactive. They respond to the commission of attacks against life, limb, property and other goods by providing for the identification and punishment of those responsible. The effective enforcement of criminal laws is expected to have a preventive effect by means of deterrence of potential offenders.

With regard to terrorism, however, there is agreement that a solely reactive criminal justice strategy is insufficient and that therefore action to combat terrorism should focus heavily on prevention. This includes making it a criminal offence to collect funds with the aim that they be used for the perpetration of terrorist acts. To many, a preventive criminal justice strategy against terrorism also needs to include offences to counter the spreading of ideas that incite others to commit terrorist acts. The Kenyan National Strategy to Counter

41 ECtHR, *Del Río Prada v. Spain*, Application no. 42750/09, Judgment of 21 October 2013.

Violent Extremism (NSCVE) identifies the “effective utilisation of law enforcement to deter and prosecute radicalisers” as one of the priorities.⁴²

In resolution 1624 (2005), the Security Council “[c]ondemns . . . in the strongest terms the incitement of terrorist acts and repudiates attempts at the justification or glorification of terrorist acts that may incite further terrorist acts.” The Security Council therefore calls upon all States - including Kenya - to “adopt the necessary measures to prohibit by law incitement to commit a terrorist act or acts,” “prevent such conduct and “[d]eny 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.”

The preventive potential of offences criminalizing speech that might encourage, incite or otherwise cause the commission of acts of terrorism has to be carefully balanced against the impact such legislation has on freedom of expression. In the *SLAA* case,⁴³ the High Court observed the following regarding the importance of the right to freedom of expression in a free and democratic society:

“The importance of freedom of expression including freedom of the press to a democratic society cannot be over-emphasized. Freedom of expression enables the public to receive information and ideas, which are essential for them to participate in their governance and protect the values of democratic government, on the basis of informed decisions. It promotes a market place of ideas. It also enables those in government or authority to public scrutiny and thereby holds them accountable.”⁴⁴

Security Council Resolution 1624 stresses that any restrictions on freedom of expression must be provided by law and necessary on the grounds set out in Article 19 (3) of the ICCPR. Criminalising incitement to terrorism and similar conduct implies a limitation to freedom of expression, which is enshrined in Article 33 of the Constitution, as well as Article 19 of the ICCPR and Article 9 of the Banjul Charter. In its General Comment No. 34, the Human Rights Committee calls on States Parties to ensure that counter-terrorism measures affecting freedom of expression are compatible with paragraph 3 of Article 19 ICCPR,⁴⁵ i.e. the provision governing the conditions under which it is permissible to limit freedom of expression.

The ACommHPR’s Principles and Guidelines on Human and People’s Rights while Countering Terrorism in Africa also caution that States “shall not use combatting terrorism as a pretext to restrict fundamental freedoms, including freedom of religion and conscience, expression, association, assembly, and movement”. Limitations “may not erode a right such that the right itself becomes illusory”.⁴⁶ The justification for any restriction must be prescribed by law, strictly proportionate with and absolutely necessary for addressing a legitimate need as set forth under the African Charter . . . and in accordance with regional and international human rights law.⁴⁷



Cross-Reference

Refer to **Chapter 1, section 1.5** for a discussion on the permissible limitations to the right to freedom of expression and other non-absolute rights.

42 NSCVE, pp. 10 and 16.

43 *Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others*, [2015] eKLR. The High Court’s ruling on freedom of expression related matters in the *SLAA Case* is further examined in a case study below.

44 *Ibid*, para 243.

45 Human Rights Committee, General Comment No. 34, Article 19: Freedoms of Opinion and Expression, (12 September 2011), CCPR/C/GC/34, para 46.

46 African Commission’s Principles and Guidelines on Human and People’s Rights while Countering Terrorism in Africa, Principles 1(I) and 1(M).

47 *Ibid*, p 15.

As discussed in Chapter 1 (section 1.5 above), Kenyan law (particularly article 24 of the Constitution) and international law provide that limitations of freedom of expression must pass a three part test to be permissible: the restriction or prohibition must be provided by law, be clearly and narrowly defined to serve a legitimate interest, and be necessary in a democratic society to protect that interest. With specific regard to the prohibition of speech alleged to be in support of terrorism, the following additional considerations should be kept in mind:

- The definition of offences such as “incitement to terrorism” has to be clear in two respects: the definition of what constitutes “incitement” and the definition of what constitutes “terrorism”.
- Article 20 (2) of the ICCPR provides that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” Paragraph 2 of article 33 of the Constitution contains a provision to the same effect, although there are significant differences in the way it is formulated.
- The Rabat Plan of Action⁴⁸ provides useful guidance for the interpretation of Article 20 ICCPR. With regard to the question whether the offence of incitement should require as an element that the incited conduct is imminent as a result of the incitement, the Rabat Plan of Action points out that:
 - “Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for that speech to amount to a crime. Nevertheless some degree of risk of harm must be identified. It means the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognising that such causation should be rather direct.”
- The Human Rights Committee goes on to say that offences such as “encouragement of terrorism,” “extremist activity,” “praising,” “glorifying” or “justifying” terrorism should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression.

Offences in POTA

Section 27 of the POTA criminalizes incitement and provides that “[a] person who publishes, distributes or otherwise avails information intending to directly or indirectly incite another person or a group of persons to carry out a terrorist act commits an offence and is liable, on conviction, to imprisonment for a term not exceeding thirty years.”

In addition to the offence of incitement under Section 27, the POTA contains a number of other offences that limit freedom of expression in order to prevent speech in support of terrorism, including:

- Section 12D: Radicalization;
- Section 29: Collection of Information;
- Section 30: Possession of an Article in Connection with an Offence under the Act;
- Section 30A: Publication of Offending Material (declared unconstitutional by the High Court in the *SLAA* judgment, see the case study below); and
- Section 30F: Prohibition from Broadcasting.

⁴⁸ Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, Conclusions and recommendations emanating from the four regional expert workshops organised by OHCHR, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2002.



Case Study: Constitutionality of Limitations on Freedom of Expression and the Media – The SLAA Case*

The case concerned the constitutionality of the SLAA, which amended POTA and various security laws and added several speech-related offences.

The State submitted that the SLAA was necessitated by the fight against terrorism. The State “argued that the country is at war, just that a war has not been formally declared. The stated purpose of the legislation, therefore, is to protect the public from terrorism, and it was the State’s case that the limitations contained in SLAA are justifiable in the circumstances.” [at para 228].

Section 12 of the SLAA amended the Penal Code by inserting a new section 66A to prohibit the publication, broadcasting or causing to be published or distributed “through print, digital or electronic means, insulting, threatening, or inciting material or images of dead or injured persons which are likely to cause fear and alarm to the general public or disturb public peace” and makes doing so an offence punishable, upon conviction, to a fine not exceeding five million shillings or imprisonment for a term not exceeding three years. This provision was challenged on the grounds inter alia that it was too broad, imprecise and went counter to Article 34(2) of the Constitution protecting freedom of the media, and which provides that: “The State shall not - (a) exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or (b) penalize any person for any opinion or view or the content of any broadcast, publication or dissemination.”

Additionally, the High Court examined the limitation on freedom of expression under Article 33(2) of the Constitution, which prohibits hate speech, propaganda for war, incitement to violence and advocacy of hatred that constitute ethnic incitement, vilification of others or incitement to cause harm.

Agreeing with the submissions of one of the interested parties, the Court noted that the new section 66A used very broad terms, such as “insulting, threatening, inciting material, images of the dead or injured persons,” which are not defined in the section, and are therefore left to subjective interpretation, misinterpretation and abuse. The Court held that the section clearly limited media freedom and its penal consequences run counter to the constitutional provisions.

Whereas the Court found that any broadcasts, publications and expression that fall under Article 33 (2) would be legally and rightfully prohibited by the State, in its view attempts to punish “insulting, threatening, or inciting material or images of dead or injured persons which are likely to cause fear and alarm to the general public or disturb public peace” was not the kind of limitation contemplated by the Constitution and in any case the language was so vague and imprecise that the citizen is likely to be in doubt as to what is prohibited. The Court clarified that “the principle of law with regard to legislation limiting fundamental rights is that the law must be clear and precise enough to enable individuals to conform their conduct to its dictates.”⁴⁹

The Court also considered the constitutionality of Section 64 of the SLAA, which sought to amend the POTA by inserting a new Section 30A to criminalize the publication of offending material as follows;

“A person who publishes or utters a statement that is likely to be understood as directly or indirectly encouraging or inducing another person to commit or prepare to commit an act of terrorism commits an offence and is liable on conviction to imprisonment for a term not exceeding fourteen years. A statement is likely to be understood as directly or indirectly encouraging or inducing another person to commit or prepare to commit an act of terrorism if the circumstances and manner of the publications are such that it can reasonably be inferred that it was so intended; or the intention is apparent from the contents of the statement. It is irrelevant whether any person is in fact encouraged or induced to commit or prepare to commit an act of terrorism.”

The Court concluded that this section was unconstitutional:

[at para 275] “As we observed above, a law that limits a fundamental right and freedom must not be so vague and broad, and lacking in precision, as to leave a person who is required to abide by it in doubt as to what is intended to be prohibited, and what is permissible. With regard to Section 30A for instance, how is *“any information which undermines investigations or security operations relating to terrorism”* to be interpreted? Who interprets what information *“undermines investigations or security operations?”* The effect of such a prohibition, in our view, would amount to a blanket ban on publication of any security-related information without consulting the National Police Service.

[at para 276] In our view, the provisions of Section 30A and 30F are unconstitutional for limiting the rights guaranteed under Article 34 (1) and (2). The State has not met the test set in Article 24. It has not demonstrated the rational nexus between the limitation and its purpose, which, we reiterate, has been stated to be national security and counter-terrorism; has not sought to limit the right in clear and specific terms nor expressed the intention to limit the right and the nature and extent of the limitation; and the limitation contemplated is so far reaching as to derogate from the core or essential content of the right guaranteed under Article 34.”

It is also noteworthy that the Court took into account the enormity of the challenges faced by the State in combating terrorism and stated as follows: “[W]e must observe that the concerns that precipitated the legislation now under challenge are real. However, we believe that rather than enacting legislation that goes against the letter and spirit of the Constitution and erodes the fundamental rights to freedom of expression and of the media, an approach that brings together the State and the media in finding a way to cover terrorism without compromising national security should be explored.” [at para. 280]

**Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others*, [2015] eKLR



Model Offences of “Incitement to Terrorism” and “Public Provocation to Terrorism”

Security Council resolution 1624 (2005) does not define what conduct would amount to the “incitement to terrorism” that it requests States to prohibit.

To assist States in crafting an offence that would fulfil their obligations under Security Council resolution 1624 while respecting human rights, the Special Rapporteur on human rights while countering terrorism has suggested a “model offence of incitement to terrorism”:

“It is an offence to intentionally and unlawfully distribute or otherwise make available a message to the public with the intent to incite the commission of a terrorist offence, where such conduct, whether or not expressly advocating terrorist offences, causes a danger that one or more such offences may be committed.”⁵⁰

This offence is very close to the offence of “public provocation to commit a terrorist offence” proposed to Council of Europe States by the 2005 Council of Europe Convention on the Prevention of Terrorism:

“For the purposes of this Convention, “public provocation to commit a terrorist offence” means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.”

The Council of Europe Convention also provides a definition for “recruitment for terrorism” which is useful to consider next to the public provocation offence:

“For the purposes of this Convention, “recruitment for terrorism” means to solicit another person to commit or participate in the commission of a terrorist offence, or to join an association or group, for the purpose of contributing to the commission of one or more terrorist offences by the association or the group”.



Activities

- Compare the definition of the right to freedom of expression under Article 19 of the ICCPR and Article 9 of the ACHPR, both of which Kenya has ratified, with Articles 33 and 34 of the Constitution. Also compare the grounds on which freedom of expression can be restricted (in which case, you will have to consider Article 24 of the Constitution as well). In what respects do they differ?
- Compare the Special Rapporteur's "model offence of incitement to terrorism" with the offence in article 27 of the POTA. In what respects do the two definitions differ?
- Nowadays, propaganda and recruitment by terrorist groups over the internet or social media play a significant role. Are the offences in the POTA allowing for the prosecution of propaganda, incitement and recruitment for terrorism adapted to these contemporary forms of communication? What are the specific challenges arising in this context?



Tools

- The Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility and Violence incorporates the conclusions and recommendations that emanated from four regional expert group workshops organised by OHCHR in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012. It is available here: http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf
- The UNODC publication *The Use of the Internet for Terrorist Purposes* provides examples of national legislative provisions criminalizing the use of the internet for terrorist purposes and actual cases prosecuted under these provisions. It also discusses human rights and rule-of-law concerns related to the criminalization of incitement through the internet. The publication is available at: http://www.unodc.org/documents/terrorism/Publications/12-52159_Ebook_Internet_TPB.pdf.

The Application of Incitement Provisions to Individual Cases

Until now, we have looked at how to criminalize speech that incites the commission of terrorism related offences at the general, abstract level of legislation while respecting the right to freedom of expression and related rights.

Equally important, however, is the question of the application of such legislation to the specific, individual case in the context of criminal justice. Any investigation and prosecution for conduct that constitutes the sharing of information (even if it is information on how to build improvised explosive devices) or expression of views, however hateful, potentially limits the right to freedom of expression. As discussed above, such limitations will be permissible if they meet the requirements of (i) legitimate aim, (ii) having an adequate legal basis, and (iii) necessity and proportionality.



Activities

The challenges of upholding freedom of expression while countering speech that could incite terrorist violence or threaten national security are illustrated by the following two cases from Turkey decided by the ECtHR. As you read through these case studies, analyse them through the lens of the following questions.

- Do you think that the national courts struck the right balance between upholding freedom of expression on the one hand and combating terrorist acts, or protecting national security more broadly, on the other?
- Imagine that Kenya's law had been the domestic law applicable to the facts of these cases. Consider not only offences relating specifically to speech that incites violence, but also those criminalizing support for terrorism, complicity in terrorism offences, or national security offences more broadly. Which offences could have been

charged in Kenya on the basis of the facts of these cases? As a prosecutor in Kenya, which of these cases would you seek to prosecute? What arguments would an experienced defence counsel in Kenya raise in each of the cases?

- In the case of Sürek and Özdemir, the prosecution is against the newspaper owner and editor who published statements by a terrorist leader, not against the speaker himself. Should a different standard apply in such cases?
- Would the statements made by the PKK (Kurdistan Workers' Party) leader in the interview with the weekly published by Sürek and Özdemir be punishable under Kenyan law (assuming the interviewed PKK leader was charged, and not the newspaper owner and editor)? Would the newspaper editor and owner be punishable under Kenyan law?



Case Studies: The Zana* and the Sürek and Özdemir Cases**

The Zana and Sürek and Özdemir cases took place against the background of serious disturbances in south-east Turkey, including deadly attacks against civilians by the PKK. The PKK is banned as a terrorist organization by the Government of Turkey and listed as a terrorist organization by a number of States and some international organizations.

Mr. Zana was a former mayor of Diyarbakir, the largest city in south-east Turkey. While serving a prison sentence, Mr. Zana gave an interview to a major national newspaper, in which he stated: "I support PKK national liberation movement; on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake ..."

The domestic court held that the PKK qualifies as an "armed organization" under the Criminal Code, that its aim was to bring about secession of a part of Turkey, and that it had committed acts of violence. Therefore, the statements by Applicant were an offense under Article 312 because they defended an act punishable by law as a serious crime. Mr. Zana was sentenced to twelve months' imprisonment, of which he could serve four-fifths on parole.

In its judgment, the ECtHR considered that the sentence imposed on Mr. Zana was based on law and pursued a legitimate aim, such as maintaining national security and public safety. As to necessity or proportionality, the ECtHR noted that the PKK was "a terrorist organisation which resorts to violence to achieve its ends". The ECtHR stressed that Mr. Zana's interview had to be viewed against the circumstances then prevailing in south-east Turkey and keeping in mind his role as former mayor of Diyarbakir. His statements could be regarded as likely to exacerbate an already explosive situation. The penalty could therefore be seen as answering a "pressing social need". The ECtHR majority concluded that the interference with Mr. Zana's freedom of speech was justified.

Eight of the twenty ECtHR judges sitting on the case disagreed with this conclusion. In their dissenting opinions they argued that, while expressing support for the PKK, Mr. Zana had distanced himself from the PKK's violent methods. They also doubted the possible effect an interview by a former mayor could have had on the "already explosive situation in that region."

In the Sürek and Özdemir case, Mr. Sürek was a major shareholder of a weekly review, of which Mr. Özdemir was editor-in-chief. The review published an interview with a leader of the PKK, in which he set out their tactics and objectives. The thrust of the PKK leader's statements was that the PKK would have to continue and increase the severity of its armed struggle against the State as the State was unwilling to accede to the demands of the PKK if put peacefully. Messrs. Sürek and Özdemir were charged under the then Turkish Prevention of Terrorism Act 1991. The court found the accused guilty of publishing declarations of terrorist organisations and disseminating separatist propaganda in violation of sections 6 and 8 of the Act. Mr. Sürek was given a heavy fine, Mr. Özdemir a fine and a six-month prison sentence.

Messrs. Sürek and Özdemir filed an application to the ECtHR. The ECtHR considered that the sentence imposed on the applicants was based on law and could be said to pursue the legitimate aims identified by the Government, namely the protection of national security, territorial integrity and the prevention of disorder and crime. In assessing whether the interference with freedom of speech was proportionate, the ECtHR held [at 58] "[w]hile the press must not overstep the bounds set, inter alia, for the protection of the vital interests of the State, it is nevertheless incumbent on the press to impart information and ideas on political issues, including divisive ones." A majority of ECtHR judges considered [at 61] that "the views expressed in the interviews could not be read as an incitement to violence; nor could they be construed as liable to incite violence." The ECtHR concluded that the conviction and sentencing of the applicants were disproportionate and therefore not "necessary in a democratic society."

*Zana v. Turkey, application no. 69/1996/688/880, ECtHR Judgment of 25 November 1997.

**ECtHR, Sürek and Özdemir v. Turkey, Application nos. 23927/94 and 24277/94, Judgment of 8 July 1999.

2.6 RESTRICTING FREEDOM OF ASSOCIATION IN COUNTERING TERRORISM

“One way of combating terrorism is to outlaw organizations that promote or foster it. By controlling these organizations, whether by confiscating their finances and other resources, or curbing their publicity, it may be possible to minimize and control the threat of terrorism. Making an organization illegal raises issues relating to the freedoms of association, assembly and expression, and to property rights. All of these rights permit qualification. It can therefore be lawful to interfere with them if there is a legal basis to do so and if it is also necessary, proportionate and non-discriminatory to limit those rights”.⁵¹

Freedom of association is protected under Article 36 of the Constitution as follows:

- 1) Every person has the right to freedom of association, which includes the right to form, join and participate in the activities of an associations;
- 2) A person shall not be compelled to join an association of any kind.
- 3) Any legislation that requires registration of an association of any kind shall provide that
 - a) registration may not be withheld or withdrawn unreasonably; and
 - b) there shall be a right to a fair hearing before a registration is cancelled.

It is therefore clear that Article 36 of the Constitution envisages a situation where associations could be denied registration. Moreover, the right protected in Article 36 can be limited under the circumstances provided in Article 24 of the Constitution.

At the international and regional level, freedom of association is protected in Article 20 of the UDHR, Article 22 of the ICCPR and Article 10 (1) of the ACHPR. It is a non-absolute right that can be restricted “in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others” (Article 19 paragraph 2 of the ICCPR), as long as the restrictions have a legal basis and are proportional.

Section 2 of the POTA provides a definition of “terrorist group,” as (a) “an entity that has as one of its activities and purposes, the committing of, or the facilitation of the commission of a terrorist act,” or (b) a specified entity. Section 3 further provides for a procedure to designate “specified entities,” i.e. groups preparing, attempting or committing terrorist acts, or groups associated thereto. In addition, there are a number of offences under the POTA that specifically pertain to terrorist groups:

- Section 5: Collection or Provision of Property and Services for the Commission of Terrorist Acts, in particular paragraph (1) (b);
- Section 8: Dealing in Property Owned or Controlled by Terrorist Groups;
- Section 9: Soliciting and Giving of Support to Terrorist Groups or for the Commission of Terrorist Acts;
- Section 11: Provision of Weapons to Terrorist Groups;
- Section 13: Recruitment of Members of a Terrorist Group;
- Section 14: Training and Directing of Terrorist Groups and Persons;
- Section 24: Membership of Terrorist Groups; and
- Section 25: Arrangement of Meetings in Support of Terrorist Groups.

In the following, we will consider human rights aspects of measures against “terrorist groups” from two perspectives. First, offences criminalizing membership or other involvement with a terrorist group. Second, non-criminal justice related measures against terrorist groups.

51 Organization for Security and Co-operation in Europe (OSCE), *Countering Terrorism, Protecting Human Rights: A Manual*, p. 216, available at: <http://www.osce.org/odihr/29103>.

2.6.1 Criminalisation of Group Membership

Section 24 of the POTA provides that “a person who is a member of, or professes to be a member of a terrorist group commits an offence and is liable, on conviction, to imprisonment for a term not exceeding thirty years”. Other POTA offences aim to criminalise financial support to a “terrorist group”. E.g., Section 5 (b) makes it an offence punishable by imprisonment not exceeding 20 years to directly or indirectly collect, provide, attempt to provide or invite a person to provide or make available funds, knowing or having reasonable grounds to believe that such funds shall be used “by a terrorist group for any purpose”.

In addition to questions of freedom of association, the experience of other countries shows that the criminalization of membership of a terrorist group can raise considerable challenges from the point of view of legal certainty. Contrary to legal associations, which might keep a register of their membership and issue membership cards, many terrorist groups do not have formalised membership criteria. This can raise difficult questions of what forms of support to or participation in the activities of a terrorist group amount to membership. Moreover, in many countries, including under Section 2 of the POTA, the definition of offences related to membership in or support to a “terrorist group” rests on the definition of what constitutes a “terrorist act.” If that definition is vague or overly broad, this may also affect the legal certainty regarding offences related to membership or support to a terrorist group.



Activities

- Does POTA provide a definition of what amounts to being a “member” of a terrorist group? If not so, is there any other provision in Kenyan law that can assist?
- Based on your knowledge of the terrorist groups operating in Kenya, are there formal procedures to accept and record members? If not, what elements would you say constitute membership of these groups for purposes of Section 24 of the POTA?
- In a prosecution under Section 24 of the POTA, how will the “terrorist group” element of the offence be proved? Does the prosecution have to prove at trial that the group has engaged in terrorist activities, or is designation of the entity as a specified entity sufficient proof at trial? Can there be membership (for the purposes of Section 24 of the POTA) of a “terrorist group” that is not a specified entity? Discuss the implications of different answers to these questions from the point of view of the prosecution and from the point of view of the human rights of a suspect or accused person.
- In the English case of *Rangzieb Ahmed and Habib Ahmed v. R.*, Habib Ahmed was charged with the offence of “belonging or professing to belong” to a proscribed organization under Section 11 of the Terrorism Act 2000. Habib Ahmed’s defence at trial was that although he had told people that he was a member of Al Qaeda, in fact he was not. He claimed he had been pretending that he was an Al Qaeda member in order to induce media organisations, such as television or newspaper companies, to pay money for colourful revelations. In fact, Habib Ahmed had giving the Sunday Times an interview asserting that he was an Al Qaeda fighter just back from Afghanistan. Would it be a defence under Section of the 24 POTA to have only claimed to be a member of a terrorist group?

2.6.2 Non-Criminal Justice Measures Against Groups Allegedly Involved In Terrorism



Case Study: The Mombasa Republican Council Case*

Already before the entry into force of Section 3 of the POTA, Section 22 of the Prevention of Organized Crime Act (POCA) Cap. 59 envisaged a procedure to proscribe “organized criminal groups.”

In 2010, the Government published Gazette Notice 12585 declaring the Mombasa Republican Council (MRC), the Republican Revolutionary Council (RRC) and 31 other groups “organized criminal groups” under the POCA, thereby outlawing them. Section 22 of the POCA provides for declaration of an organized criminal group where the Minister has reasonable grounds to believe a specified group is engaged in any organised criminal activity set out in Section 3 of the Act.

The petitioners filed a suit against the Gazette Notice. They challenged the proscription of the MRC on the basis that it contravened the provisions of Articles 36, 37, 38, 40 and 47 of the Constitution and hence limited their fundamental rights and freedoms. They disclaimed allegations of engagement in the criminal activities set out in Section 3 of POCA, and averred that they were a peaceful group whose objectives were to agitate for and attain economic and political rights, including those related to land and general advancement of indigenous Coastal people. The State responded that the Minister’s actions were compliant with the statute and constitutional powers vested on him and based on credible reports that led to reasonable apprehension that MRC was a threat to national security. The State alleged that the MRC was engaged in illegal activities including oathing and training of militia, and that the MRC was the “active arm” of the RRC.

The High Court established that there were two substantive issues to be determined: (i) whether the proscription restricted or limited the fundamental rights and freedoms of the petitioners and, if so, (ii) whether the restriction or limitation complied with the provisions of the Constitution. With regard to the first issue, the High Court determined that the freedoms of association and assembly and the right to participate in forming a political party and campaign for a political cause were affected. These freedoms were not unbound and could be limited under Article 24 of the Constitution.

The High Court noted that the “Minister acted pursuant to the provisions of a statute (POCA) whose constitutionality has not been questioned by the petition. What this Court must do is to test whether the action of the Minister conforms to the limitation clause (Article 24). Our reading of Article 24 (1) is that not only must the law limiting a right or fundamental freedom pass constitutional muster So both the law prescribing the limitation and the manner in which it is acted upon must satisfy the requirement of Article 24.” (at para. 48)

In applying the test, the High Court concluded that the State did not sufficiently demonstrate that the MRC was engaging in organized criminal activity and failed to place before it any evidence of the link between the RRC and the MRC. The High Court held that the State had not satisfactorily demonstrated that the proscription of the MRC was justifiable or proportionate. The Court declared that the Gazette Notice No. 12585 was unconstitutional with regard to the MRC, and lifted the ban on the group.

In reaching this conclusion, the High Court also dealt with the position of the State that it invoked the provisions of POCA in the interest of national security and that the courts should defer to its assessment of what national security requires. The High Court stated: “It is appreciated that the executive arm of the Government is charged with the responsibility of ensuring national security. (Chapter 14 of the Constitution.) That arm of Government is therefore the best suited to make decisions in respect of matters of national security. What it says about national security must ordinarily be believed. And in these matters it must be given some margin of appreciation. Where, however, there is a complaint raised as in this petition, that national security has been wrongfully invoked to take away a fundamental right the court needs to be judicially satisfied that the action of the State is reasonable and justifiable. If this were not so, then the State could make any decision or take any action in the name of national security with the comfort that it will never be required to account for that action. The State could be tempted to use the blank cheque to overdraw!” (at para. 53).

Upon appeal of the Attorney General, the Court of Appeal upheld the decision of the High Court. The Appellant, i.e. the Attorney General, had argued that “national security matters are the preserve of the executive arm of Government” and urged the Court to accept that the judiciary should not pass judgment on the Government’s determination that the MRC was a threat to national security (at para. 37). The Court of Appeal rejected this argument: “the suggested manner of interpretation of the law, where the court, in the present constitutional dispensation, ought not to question or interfere with any decision by the Executive, as long as that decision is based on national security, is completely unacceptable” (at para. 38). The Court of Appeal referred to Article 238 of the Constitution and concluded that “[u]nder our current Constitution, the legality of administrative decision or actions, even in matters touching on national security, including Acts of Parliament, can be scrutinized by the Judiciary.” (at para. 39)

**Randu Nzai Ruwa & 2 Others v Internal Security Minister & Another* [2012] eKLR, and *Attorney General & another v Randu Nzai Ruwa & 2 others* [2016] eKLR

The POTA defines a “terrorist group” as “(a) an entity that has as one of its activities and purposes, the committing of, or the facilitation of the commission of a terrorist act; (b) or a specified entity.” It also defines an “entity” as “a person, group of persons, trust, partnership, fund or an unincorporated association or organization.”

Section 3 provides for the procedure for declaring an entity a specified entity i.e. a terrorist group. This is done by an order of the Cabinet Secretary responsible for matters relating to internal security. The Cabinet Secretary can only make such an order on the recommendation of the Inspector-General where he has reasonable grounds to believe that an entity has committed, prepared to commit, attempted to commit, or participated in or facilitated the commission of a terrorist act, or where an entity is acting on behalf of, at the direction of or in association with, a terrorist group.

A particularly challenging situation from the point of view of fundamental rights of freedom of expression and association, as well as of the right to equal participation in the political process, arises when political parties or other movements taking part in the democratic process, e.g. running for election, are accused by the authorities of being “front organizations” of a terrorist group resorting to armed violence.



Case Study: The *Herri Batasuna* Case*

In June 2002, the Spanish Parliament enacted a new law on political parties, which in Chapter III regulates the dissolution by court of political parties that do not respect democratic principles and human rights. In March 2003, the Spanish Supreme Court declared *Herri Batasuna* and *Batasuna* (two separatist parties from the Basque region) illegal, pronounced their dissolution and the liquidation of their assets. The Supreme Court considered that *Herri Batasuna* and *Batasuna* had the same ideology as the terrorist organisation ETA (*Euskadi Ta Askatasuna*, meaning “Basque Homeland and Freedom”), were in fact tightly controlled by ETA and were instruments of its terrorist strategy. As evidence of this, the Supreme Court referred to incidents in which representatives of *Batasuna* had refused to condemn terrorist acts; had expressed support for detained ETA terrorists, including making them honorary citizens of municipalities governed by *Batasuna*; and had issued statements such as “ETA [does] not support armed struggle for the fun of it, but [it is] an organisation conscious of the need to use every means possible to confront the State.”

Herri Batasuna and *Batasuna* appealed to the ECtHR. The ECtHR stressed the linkage between freedom of expression and freedoms of association and assembly, and recalled [at 78] that “it is well-established in its case-law that drastic measures, such as the dissolution of a political party, may only be taken in the most serious cases.” The ECtHR agreed with the Spanish Courts that “the refusal to condemn violence against a backdrop of terrorism that had been in place for more than thirty years and condemned by all the other political parties amounted to tacit support for terrorism.” (at 88) It further recalled the universal condemnation of justification for terrorism and the international instruments obliging States to criminalize public provocation to commit a terrorist offence. The ECtHR concluded that the dissolution of the two parties could reasonably be considered as meeting a “pressing social need” and as proportionate to the legitimate aim pursued. The measure could accordingly be considered “necessary in a democratic society”.

*ECtHR, *Herri Batasuna and Batasuna v. Spain*, Application nos. 25803/04 and 25817/04, Judgment of 6 November 2009.

The sanctions imposed against *Herri Batasuna* and *Batasuna* discussed above were not criminal sanctions, but rather concerned the right to participate in elections and run for public office.

Under Kenyan law, Section 46 of the POTA provides for refusal and revocation of registration of associations linked to terrorist groups. The Cabinet Secretary responsible for internal security may, where he has reasonable grounds to believe that a registered company or association or an applicant for registration as a company or association has made or is likely to make available, directly or indirectly, any resources in support of a terrorist group, issue that an order to that effect be served upon the relevant Registrar and applicant or registered association. The Cabinet Secretary should also serve a copy of the order to the High Court, which will examine the matter and confirm or set aside the order. The applicant or registered association is to be given a reasonable opportunity to be heard. If the Court confirms the order, the Cabinet Secretary is to publish a notice of its confirmation in the Kenya Gazette. As a result, the Registrar shall deny an applicant registration or deregister a registered association.

Non-criminal measures might interfere with the freedoms of movement, expression and association of the members and sympathizers of the group, as well as with the right to property and respect for privacy and family life, the right to respect for one's honour and reputation,⁵² and the right to take part in the conduct of public affairs. Therefore, sanctions need to meet, in the specific case, the tests of provision by law, legitimate aim, non-discrimination, necessity and proportionality. Respect for due process safeguards, including the availability of judicial review of any measure, is an essential condition for respecting human rights in imposing sanctions against organizations alleged to be involved in terrorist activities.⁵³

Of particular relevance in the context of counter-terrorism measures, the right to raise funds and use them to carry out the activities of the association is an essential element of the right to freedom of association. "[F]unding restrictions that impede the ability of associations to pursue their statutory activities constitute an interference with [the right to freedom of association]."⁵⁴



Combating the Abuse of Non-Profit Organisations for Terrorism while Protecting the Legitimate Activities of Charities

All States are under the obligation to criminalize and prosecute the collection of funds to be used to carry out terrorist acts, and to freeze and seize all funds used for or allocated to terrorism financing. The Financial Action Task Force (FATF)* states in its Recommendation 8 that non-profit organizations are particularly vulnerable to being misused for the financing of terrorism. The FATF identifies three main ways in which non-profit organizations are misused by terrorists:

- "(a) By terrorist organisations posing as legitimate [non-profit] entities;
- (b) To exploit legitimate [non-profit] entities as conduits for terrorist financing, including for the purpose of escaping asset-freezing measures; and
- (c) To conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organizations."

The FATF Interpretive Note to Recommendation 8 on non-profit organisations (NPOs) stresses that "[m]easures adopted by countries to protect the NPO sector from terrorist abuse should not disrupt or discourage legitimate charitable activities. ... Actions taken for this purpose should, to the extent reasonably possible, avoid any negative impact on innocent and legitimate beneficiaries of charitable activity. However, this interest cannot excuse the need to undertake immediate and effective actions to advance the immediate interest of halting terrorist financing or other forms of terrorist support provided by NPOs." (FATF Best Practice, Combating the Abuse of Non-Profit Organisations (Recommendation 8), paragraph 3(c)).

FATF has developed a set of best practices to assist States in protecting legitimate activities of charitable organizations in their efforts to stop the misuse of non-profit organizations for terrorist financing. UN independent human rights experts, however, have expressed the concern that FATF Recommendation 8 might not include sufficient safeguards to protect the civil society sector from undue restrictions.⁵⁵

**The FATF is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction. The FATF Recommendations are recognized as the global anti-money laundering (AML) and counter-terrorist financing (CFT) standard.*

52 Human Rights Committee, *Sayadi and Vinck v. Belgium*, Communication No. 1472/2006, CCPR/C/94/D/1472/2006, 29 December 2008.

53 European Court of Justice, *Kadi and Yusuf v. The Council of the European Union*, 2008.

54 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/23/39, para. 16, and Report of the Special Rapporteur on human rights while countering terrorism, A/70/371, para. 12 and 17 and following.

55 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/23/39, para. 25, and Report of the Special Rapporteur on human rights while countering terrorism, A/70/371, para. 26.



Activities

- What rights are affected by the decision to close a non-profit organisation or to freeze its assets? Think of the persons working for the organisation, its donors, and those who have benefitted from its activities. What are the procedural safeguards in place under the Kenyan legal system when measures against a NPO suspected of involvement in terrorism financing are considered?
- The United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism recommends to United Nations Member States a set of procedural safeguards for human rights compliant procedures to designate terrorist entities (A/HRC/16/51, at para 35). Compare the safeguards proposed by the Special Rapporteur with those provided in POTA for the designation of specified entities.



Further Reading

- The Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/23/39, is available here: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf
- The Reports of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on freedom of assembly and association (A/61/267) and on the impact of counter-terrorism legislation on civil society organizations (A/70/371) are available here: http://ap.ohchr.org/documents/alldocs.aspx?doc_id=12600 and here: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/371
- The FATF Best Practices for Combating the Abuse of Non-Profit Organizations (Recommendation 8) are available here: <http://www.fatf-gafi.org/media/fatf/documents/reports/BPP-combating-abuse-non-profit-organisations.pdf>.
- The Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on *Ten areas of best practices in countering terrorism* (A/HRC/16/51) is available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-51.pdf>.

2.7 SELF-ASSESSMENT QUESTIONS



Self-Assessment Questions

- Name three requirements deriving from the principle of legality in criminal law (“no punishment without law”).
- Explain the “void for vagueness” doctrine.
- Security Council resolution 1624 (2005) requires Kenya and other Member States to prohibit “incitement to terrorism.” List the offences under POTA that criminalise “incitement to terrorism.”
- List at least three requirements under international law for any offence criminalizing “incitement to terrorism” or related offences criminalizing speech alleged to be supportive of terrorism.
- The right to freedom of expression is not an absolute right. Measures limiting this right for purposes of countering terrorism can be legitimate if they satisfy certain conditions. What are these conditions? (*In addition to Chapter 2, you will find assistance in answering this question in Chapter 1, section 1.6.4.*) Name three examples of counter-terrorism legislation that violate the rights to freedom of expression, and explain why the limitation of freedom of expression in these cases is not justified although it pursues the legitimate aim of protecting human lives and public security.
- Describe the conditions that have to be met for the banning of a political organization on grounds of counter-terrorism or related grounds to be legitimate under international human rights law.
- Discuss the human rights implications of measures to freeze, seize or confiscate assets alleged to be used to support terrorist activities.

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3. The Investigation of Terrorist Offences

3.1 OBJECTIVES

By the end of this Chapter, you will be able to:

- Describe overarching human rights principles most relevant to the investigation of terrorist offences
- Identify the rules that apply to the treatment of persons under age 18 suspected of terrorism offences
- Apply the right to effective legal representation to terrorism cases
- Describe the consequences attaching to the absolute prohibition of torture and inhuman and degrading treatment in the context of interviewing terrorism suspects
- Apply the rules relating to the exclusion of evidence allegedly obtained through treatment that violates the prohibition of torture, inhuman and degrading treatment
- Identify offences, procedural rules and practices that raise concerns with regard to the right against self-incrimination/the right to remain silent
- Describe human rights applicable to the search of persons and private property, and seizure of items in the course of investigating terrorism offences
- Name several special investigative techniques and discuss their importance to terrorism investigations
- Apply human rights law, in particular the right to privacy and the fundamental freedoms of religion, expression, assembly and association, to the use of special investigative techniques.

3.2 OVERVIEW

This Chapter will focus on the investigation of terrorist offences. In doing so, it will first explore a number of overarching principles of international human rights law, which must guide the investigation of any criminal offence, including those pertaining to terrorist activities. These principles include the presumption of innocence and equality before the law. They also include rules governing the treatment of juvenile suspects. Respect for these principles is crucial both during the investigative and trial phases of criminal proceedings, and the material in this Chapter will serve as an overall introduction to these principles.

The Chapter will next address a range of specific thematic areas concerning the investigation of terrorism offences. Key among these is the right of access to legal counsel. The central part of the Chapter will examine the absolute prohibition of torture and other cruel, inhuman or degrading treatment, and the implications of this prohibition for the interrogation of suspects and witnesses, as well as for the use as evidence of statements allegedly obtained through coercion.

The Chapter will then examine the human rights guarantees that pertain to the search of persons and property and to the use of various covert methods for detecting and investigating terrorism and other serious offences, including undercover agents and informants, interception of private communication and other forms of covert

surveillance. These special investigation techniques will be analysed in light of the relevant human rights considerations that come into play, in particular the right to privacy.

The Chapter will then conclude with a set of self-assessment questions aimed at providing users with the possibility of testing their knowledge on the topics discussed herein.

3.3 INTRODUCTION

The investigation of terrorism offences raises many complex challenges for investigators, prosecutors, judges and defence lawyers. Investigations that comply with human rights standards are much more likely to be effective than those that do not. For example, where an investigation procures evidence through the torture or ill-treatment of a suspect, the trial of the suspect may collapse. Similarly, evidence that is obtained in violation of other human rights standards, such as those limiting the investigators' powers to carry out surveillance of suspects' phone calls or e-mails, may be excluded at trial. Human rights compliant investigations also improve the relationship between the investigative authorities and the communities affected by terrorism, greatly increasing the chances of useful information coming from persons in those communities. Finally, respect for human rights helps address the conditions conducive to the spread of terrorism, by avoiding grievances of which terrorist groups may take advantage.

The POTA deals with the investigation of terrorist offences in Part IV, sections 31 to 37. These cover arrest and remand by court, which will be dealt with in Chapter 4, as well as special investigation powers, which are examined from a human rights perspective in the present Chapter. In section 35, the POTA provides that rights can be limited for the purposes of investigation into a POTA offence, subject to the requirements in Article 24 of the Constitution.

3.4 THE IMPORTANCE OF THE INVESTIGATIVE STAGE FOR THE EFFECTIVE PROTECTION OF THE RIGHT TO A FAIR TRIAL

The right to a fair trial is of crucial importance in the investigation, trial and punishment of terrorist offences. Safeguarding a fair trial is not a process that starts at the door of the court house, when the trial commences. A criminal justice system is a complex system comprising of a number of mutually interdependent actors: the police and other investigators, the prosecution, the defence, the judiciary and also the public. In order to reach a 'fair trial,' all actors have to fulfil their roles and responsibilities in a proper and professional way from the start of the investigation.

Fundamental problems of fairness that develop prior to court proceedings risk harming, and even rendering impossible a fair trial before the trial itself has even begun. For instance, failure to provide an individual with prompt access to a lawyer puts at risk the fundamental fairness of the eventual proceedings against the individual. Similarly, prejudicial comments by members of the judiciary or other public officials implying that a suspect is guilty before he/she has faced trial may call into question the fairness of any proceedings eventually brought. Thus, fair trial guarantees are all of crucial importance both before and in the course of court proceedings, if the guarantee of a fair trial is to be respected in practice.

The ACommHPR has also developed non-binding instruments to assist Member States carry out their obligations. Key among these is the Luanda Guidelines, which sets out standards for treatment of persons detained while awaiting trial.⁵⁶ These Guidelines borrow heavily from international and regional instruments on the right to a fair trial, as well as treatment of those held in places of detention, including preclusion and

56 Available at http://www.achpr.org/files/instruments/guidelines_arrest_detention/guidelines_on_arrest_police_custody_detention.pdf

criminalization of torture of detainees and suspects. The ACommHPR has also developed the 2003 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,⁵⁷ the 2008 Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa,⁵⁸ and the 2015 Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa.⁵⁹

The key human rights and principles commonly engaged in the investigation of terrorist offences,⁶⁰ which are also discussed in this Manual, include the following:

- Presumption of innocence
- Prohibition on discrimination
- Right to be informed of charges in a language one understands
- Right of access to a lawyer
- Right to adequate time and facilities to prepare defence, including access to concrete information about charges and concrete factual and evidentiary material supporting the charges
- Prohibition on torture and other cruel, inhuman and degrading treatment and on the use of confessions and material extracted by torture, including material received from other States
- Right against self-incrimination
- Right to private and family life.



Activities

- In your own work, have you experienced significant challenges or problems in ensuring that the rights listed above are effectively protected in practice during the investigative stage of the criminal process? What do these problems involve?
- Consider and discuss the causes of these problems. Is the legal framework inadequate or are there practical issues that prevent these rights from being safeguarded? If so, what are they?

Protecting the human rights of victims and witnesses during the investigation

Kenya is also under an obligation to protect the human rights of victims and witnesses during the investigation of terrorism cases. Their rights to life, security, physical and mental integrity, respect for private and family life, and protection of dignity and reputation can be put at risk not only by threats from those under investigation and their accomplices. Police interviews and other investigative activities can force victims and witnesses to relive traumatic experiences or otherwise expose them to psychological harm.

To protect the investigation, law enforcement authorities often only disclose limited information regarding progress of the investigation to victims. However, an unjustified refusal to provide information that could be disclosed can seriously affect the psychological well-being of victims and will affect their right of access to the courts. Finally, invasive media coverage can not only affect the right of the suspect to be presumed innocent, but can also have a grave impact on the mental integrity, family life and privacy of victims and witnesses.

57 Available at <http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/>

58 Available at <http://www.achpr.org/instruments/robben-island-guidelines-2008/>

59 Available at http://www.achpr.org/files/special-mechanisms/human-rights-defenders/principles_and_guidelines_on_human_and_peoples_rights_while_countering_terrorism_in_africa.pdf

60 For a more exhaustive list of the rights of a suspect, see Articles 49 and 50 the Kenya Constitution 2010.

61 Act No. 16 of 2006.

62 Act No. 17 of 2014.

Kenya has made provisions for the protection of witnesses through the Witness Protection Act⁶¹ and established an agency to protect witnesses who may be vulnerable. In addition, the Victims Protection Act⁶² provides for the incorporation of the interests and rights of victims within the criminal justice system. Both Acts seek to establish a fair balance between the rights of suspects and the need to protect vulnerable victims and other citizens affected by criminal acts.

3.5 OVERARCHING PRINCIPLES

A number of general human rights principles provide the framework within which the investigation of all suspected criminal offences, including terrorism offences, must be conducted. These principles include the presumption of innocence, equality before the courts and non-discrimination, and the principles of juvenile justice in case of suspects under the age of 18. The present section will explain these overarching principles and their application in the specific context of the investigation of terrorism offences.

3.5.1 The Presumption of Innocence

The presumption of innocence is fundamental to fair criminal proceedings. It must be respected not only during the trial, but also throughout the investigation of a criminal offence.

This principle is enshrined under Article 50 (2) of the Constitution, which provides that “[e]very accused person has the right to a fair trial, which includes the right to be presumed innocent until the contrary is proved.”

At the regional and international level, the presumption of innocence is guaranteed under Article 7(1)(b) of the Banjul Charter and Article 14(2) of the ICCPR respectively. In General Comment No. 32, the Human Rights Committee states that this principle:

- is fundamental to the protection of human rights,
- imposes on the prosecution the burden of proving the charge,
- guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt,
- ensures that the accused has the benefit of doubt, and
- requires that persons accused of a criminal act must be treated in accordance with this principle.

The presumption of innocence is further safeguarded through the provision of conditional release of suspects and accused persons pending trial. Article 49 (1) (h) of the Constitution states that “[a]n arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”



Case Studies: The Right to Bail and the Presumption of Innocence

The *Aboud Rogo* Case*

In this case, the applicants had been charged with the offence of engaging in an organised criminal activity in violation of the POCA, by being members of the outlawed organised criminal group Al-Shabaab. The applicants pleaded not guilty to the charges and made an application for bail pending trial which was refused by the Magistrate’s Court.

Upon appeal, the High Court found an absence of compelling reasons for the refusal of bail and the applicants were released pending trial. The High Court stated:

61 Act No. 16 of 2006.

62 Act No. 17 of 2014.

“For now, although the assertions of the state, that the applicants’ had some connection with the suicide bomber are not baseless, the court is obliged, by Article 50 (2) (a), to uphold the legal presumption, that the applicants were innocent until the contrary was proved. Therefore, because of the said legal presumption, it is not open to me to conclude, without the benefit of evidence, that the applicants had already been connected to Al-Shabaab. If I were to so conclude, the said conclusion would be inconsistent with the presumption of innocence. And if the legal presumption was to have tangible meaning, at this stage, I must interpret the Constitution in such a manner as to enhance the rights and freedoms granted, rather than in a manner that curtails the said right.”

The Joseph Marangu M’muriithi Case**

The applicants had been charged with murder, remanded in custody and subsequently applied for bail pending trial. The High Court held that the prosecution had demonstrated the existence of ‘compelling reasons’ not to grant the applicants bail in accordance with Article 49 (1) (h) of the Constitution.

The Court observed that while the standard to be applied in determining the existence of ‘compelling reasons’ is higher than a balance of probability, it is not expected to be one beyond reasonable doubt.

The Court further noted that such a finding was not reflective of the guilt of an accused, or an interference with the presumption of innocence, but rather a means of safeguarding the interests of justice in each individual case.

“Under Article 50 (2) of the Constitution, the accused will at all times be presumed innocent until proven guilty by a court of law. However, where the Court finds compelling reasons not to admit an accused to bail and proceeds to deny bail, such denial is not a statement of the accused’s guilt, but rather is a safeguard to ensuring that the interests of justice are served in each individual case. In my view, denial of bail is not an antithesis to the presumption of innocence.”

Based on the particulars of this case, the Court found that the release of the accused had the potential to jeopardise ongoing investigations to recover guns and ammunition, efforts to arrest the remaining suspects, as well as elicit the fear of and influence witnesses. The Court thus held that the interests of justice required the testimony of witnesses to be safeguarded.

**Aboud Rogo Mohamed & Another v Republic* [2011] eKLR

***Republic v Joseph Marangu M’muriithi Alias Kihara Alias James Mwangi Ndirangu alias & Another* [2013] eKLR

In addition to these constitutional provisions, the Judiciary and the National Council on the Administration of Justice have developed elaborate Bail and Bond Policy Guidelines.⁶³ According to Paragraph 1.9, one of the objectives of these Policy Guidelines is “to . . . guide the police and judicial officers as they exercise their powers to grant or deny bond and bail, so that they can ensure that the rights of suspects and accused persons to liberty and to be presumed innocent are balanced with the public interest, including protecting the rights of victims of crime.” (emphasis added)



Cross-Reference

Refer to Chapter 4, section for a discussion on the *Aboud Rogo Mohamed* case, in which the High Court considered the presumption of innocence with respect to remand detention of suspects in a terrorism case. In addition, Chapter 5 deals with additional aspects of the presumption of innocence, in particular the burden of proof at trial.

Adverse Comment by Public Officials: An important obligation deriving from the presumption of innocence is a restriction on adverse public comment by State and other public officials in respect of a person suspected or charged with a terrorism offence.



Case Study: The Krause Case*

Ms. Krause was detained on remand in Switzerland pending trial for terrorist offences. A terrorist commando composed of German and Palestinian terrorists had hijacked a plane. The commando demanded the release of various prisoners, including Ms. Krause, a woman connected to a German terrorist group.

The Swiss Federal Minister of Justice was asked on television how his Government intended to react. In a first interview, he stated that “Petra Krause cannot be considered a simple Palestinian freedom fighter. She has committed common law offences relating to the use of explosives. She will stand trial in autumn as a remand detainee. The fight against terrorism cannot be conducted by releasing terrorists.” In a second television interview, he declared that Ms. Krause was linked to several explosives incidents, “she has to stand trial – I do not know the judgment. Terrorism cannot be fought by renouncing the rule of law.”

Ms. Krause complained to the European Commission on Human Rights that these statements violated the presumption of innocence. The Commission stressed that the presumption of innocence would be violated where a public official declared that a suspect is guilty of an offence before a court has established guilt. At the same time, authorities will not violate the presumption by informing the public about ongoing investigations, arrests and confessions made by suspects.

The Commission noted that the Swiss Federal Minister of Justice could have chosen his words more carefully. However, he had made clear that Ms. Krause still had to stand trial. In the second interview, he had specifically stated that he did not know what the outcome of the court proceedings would be. The Commission therefore concluded that the presumption of innocence had not been violated.

*ECtHR, *Krause v. Switzerland*, Merits, Application no. 7986/77, Judgment of 3 October 1978.

Presumption of Innocence and Media Coverage: A difficult issue arises with regard to media coverage portraying a suspect or accused person as guilty before the matter has been decided by a court. On the one hand, media campaigns prejudging the outcome of criminal proceedings may create a climate in which the objective, detached collection and examination of the evidence in favour of or against a suspect’s guilt becomes very difficult. On the other hand, media coverage of criminal justice, and particularly of an issue as important as terrorism investigations and trials, is protected by the right to freedom of expression.

As highlighted by the *Krause* case, public officials must be careful when speaking to the media regarding ongoing terrorism cases, in order to avoid statements that could be seen as violating the presumption of innocence. To some extent, there is also a positive obligation on the authorities to ensure that, even in the absence of such prejudicial statements, media coverage does not become inflammatory as to prejudge the possibility of a fair trial taking place.

Where a court is trying an accused in relation to whom there has been sustained and highly damaging media coverage, it must first consider whether it is possible to ensure a fair trial, notwithstanding such publicity. Authorities may consider measures including imposing appropriately tailored and proportionate reporting restrictions on the trial, ensuring that witnesses have not seen or been unduly influenced by adverse media coverage, or possibly changing the trial venue. If, despite such measures, a fair trial is not possible, it may be necessary, as a last resort, to stay proceedings.



Activities

- Are there guidelines in Kenya regarding statements about ongoing investigations or trials by investigators, prosecutors or politicians? Do you recall cases in which such statements raised concerns from the point of view of the presumption of innocence?
- In your view, what concerns exist regarding how media reports investigations into and trials of terrorism cases relating to presumption of innocence? How can they be addressed?

3.5.2 The Principle of Non-Discrimination

The concept of non-discrimination is important in many aspects of counter-terrorism operations. The powers of criminal justice officials, such as search and seizure, surveillance or arrest, must be exercised in a non-discriminatory manner. Not every distinction in treatment will inevitably be discriminatory. Without objective justification, however, the differential treatment of different groups of people in the use of investigative powers is likely to be incompatible with the principle of non-discrimination.

Article 27 (1) of the Constitution provides that “[e]very person is equal before the law and has the right to equal protection and equal benefit of the law, while Article 27 (2) stipulates that “[e]quality includes the full and equal enjoyment of all rights and fundamental freedoms.” Article 27 (4) further provides that “[t]he State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”

Under international law, Article 2 of the ICCPR requires each State Party “to respect and to ensure to all individuals within its territory and subject to its jurisdiction, the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 26 adds that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.” The prohibition of discrimination is also enshrined in Articles 2 and 3 of the Banjul Charter.

Kenya has several laws, including the National Cohesion and Integration Act,⁶⁴ which not only prohibit discrimination, but also set out various requirements for the inclusion of citizens in all spheres. It is significant that this law, and the Commission established under it, provides for a structural approach to dealing with discrimination and exclusion, factors that often lead to disgruntlement and marginalization among certain communities, which can in turn be exploited by those keen to engage in criminal activities. Kenya has also developed a National Policy and Action Plan on Human Rights, which underscores Kenya’s human rights commitments, and acknowledges that all human rights standards must be implemented in a non-discriminatory manner, with a special focus on the impact on marginalised and vulnerable groups. Kenya has not yet, however, developed a comprehensive legal and policy framework on equality and non-discrimination.

There have been perceptions that terrorism investigations in Kenya often target certain communities. As discussed above, there is a constitutional obligation on the State not to discriminate persons on the basis of their religion or ethnic origin. While planning and executing their operations, it is important that security agencies keep in mind the principle of non-discrimination, and avoid targeting persons for belonging to certain ethnic or religious communities. Not only does this violate human rights, but it also risks having a negative impact on the prevention and investigation of terrorist offences.

64 Act No. 12 of 2008.



Cross-Reference

The adverse impact of discrimination in the use of law enforcement powers is discussed in Chapter 1, section 1.3.2.2

The prohibition of discrimination is so fundamental that even in “times of public emergency which threatens the life of the nation,” measures taken to derogate from human rights may not be discriminatory.⁶⁵ It is important to remember, however, that not every instance of differential treatment by law enforcement officials will constitute discrimination. If the criteria for the difference in treatment are reasonable and objective, and if the aim is to achieve a purpose that is legitimate, there will be no discrimination. A court considering whether difference in treatment amounts to discrimination must ask a number of key questions:

- Does the measure give rise to differential treatment on a prohibited ground under Article 27 (4) of the Constitution?
- If so, does the measure pursue a legitimate aim, such as the prevention of disorder and crime?
- Is there a reasonable and objective justification for the difference in treatment?
- Is the relationship between the aim and effects of the measure in question proportionate? Is the differential treatment necessary to achieve the aim pursued?

Proportionality: In answering the latter question, it is helpful to consider whether the aim achieved through the difference in treatment could be achieved by *less restrictive means*. It is also helpful to consider whether safeguards are in place, such as independent scrutiny or review by courts, to protect the interests of those who may be differentially treated and to consider independently whether the justification is indeed reasonable and objective and proportionate.

Burden of Proof: If there is a difference in treatment, the burden of proof is on the State to show that the differential treatment has a reasonable and objective justification. Where the aim of differential treatment is vaguely identified by a public authority, it will be much harder to show that the differential treatment is reasonable and objectively justified and/or proportionate, since there are likely to be many alternative means by which a vaguely identified aim could be pursued.



Case Study on Alleged Discrimination

Case of Hassan and Others*: The plaintiffs in this civil-rights suit claimed that, in the wake of the terrorist attacks on the United States of America on 11 September 2001, the New York City Police Department (NYPD) began a wide-ranging surveillance program with the goal of infiltrating and monitoring Muslim life in and around New York City, primarily in New Jersey. They claimed that the program targeted Muslim entities and individuals solely because they were Muslim rather than based upon evidence of wrongdoing. According to the claimants, the NYPD took pictures and videos and collected license plate numbers of mosque attendants and sent undercover agents into mosques, student organizations, businesses and Muslim neighbourhoods.

The City of New York as defendant argued that the allegations were implausible because “the more likely explanation for the NYPD’s actions is public safety rather than discrimination based upon religion.” It argued that the police could not have monitored New Jersey for Muslim terrorist activities without monitoring the Muslim community itself. The first instance court agreed with the defendant and dismissed the claim for lack of standing and for failure to state a claim.

The Court of Appeals stated that intentional discrimination does not need to be motivated by ill will, enmity or hostility. “Thus, even if the NYPD officers were subjectively motivated by a legitimate law-enforcement purpose (no matter how sincere), they’ve intentionally discriminated if they wouldn’t have surveilled Plaintiffs had they not been Muslim” (at page 37). The Court of Appeals acknowledged that a principal reason for a government’s existence is to provide security” (at page 53). It reasoned, however, that

“No matter how tempting it might be to do otherwise, we must apply the same rigorous standards even where national security is at stake. We have learned from experience that it is often where the asserted interest appears most compelling that we must be most vigilant in protecting constitutional rights.” (at page 54)

The Court of Appeals concluded that the plaintiffs had plausibly alleged that the NYPD engaged in intentional discrimination against them on grounds of religion, and that the defendant therefore had to rebut the presumption of unconstitutionality of such discrimination. It reversed the first instance ruling and remanded for further proceedings.

**Hassan and Others v. The City of New York*, United States Court of Appeals for the Third Circuit, 13 October 2015.



Cross-Reference

The prohibition of discrimination also played a central role in the A and Others case discussed in Chapter 1, section 1.6, and in the German Constitutional Court judgment regarding dragnet investigations (see section 3.9.3 below).



Tools

- General Comment No. 18 of the Human Rights Committee: <http://www1.umn.edu/humanrts/gencomm/hrcom18.htm>.
- The United Nations Counter-Terrorism Implementation Task Force (CTITF) Basic Human Rights Reference Guide on The Stopping and Searching of Persons: <http://www.un.org/en/terrorism/ctitf/pdfs/Basic%20Human%20Rights%20Reference%20Guide%20-%20The%20Stopping%20and%20Searching%20of%20Persons2014.pdf>. See particularly paragraphs 34 on “profiling” practices.
- OHCHR’s Manual on Human Rights in the Administration of Justice, Chapter 13, available at: <http://www.ohchr.org/Documents/Publications/training9chapter13en.pdf>.



Activities

- Are there any laws, codes of practice or other instruments specifically dealing with the prevention of discrimination in law enforcement? Is there case law on discrimination relating to law enforcement in Kenya?
- Do you have personal experience of the use of “profiling” based on national, ethnic or religious characteristics in law enforcement? What in your view would be best practice when dealing with individuals from groups or communities that you believe are associated with certain offences?

3.5.3 The Treatment of Children Suspected of Terrorist Offences

The recruitment and training of children by terrorist groups is a reality confronting many countries. Consistent with international and regional law, the law in Kenya establishes a very clear obligation to treat children and juveniles suspected of involvement in any criminal offence, including terrorist activities, differently from adult suspects and offenders because of their age-specific vulnerability.

Article 53 (1) (f) of the Constitution provides that “[e]very child has the right not to be detained, except as a measure of last resort, and when detained, to be held for the shortest appropriate period of time; and separate from adults and in conditions that take account of the child’s sex and age.” Article 53 (2) further provides that “[a] child’s best interests are of paramount importance in every matter concerning the child.” Similar to Article 1 of the CRC, Section 2 of the Children’s Act defines a child as “[a]n individual who has not attained the age of eighteen years.”

As a State Party to the CRC, Kenya is required under Article 40 (3) to set a minimum age of criminal responsibility (MACR), below which children shall be presumed not to have the capacity to infringe the law. This is provided under the Penal Code as follows:

- Section 14 (1) establishes an irrefutable presumption of law for criminal responsibility by providing that “[a] person under the age of **eight years** is not criminally responsible for any act or omission.” This includes terrorist acts. Hence, a child under the age of eight years is presumed not capable of committing a terrorist act and no charges ought to be brought against them.
- Section 14 (2) creates a rebuttable presumption of law by providing that “[a] person under the age of **twelve years** is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission, he had capacity to know that he/she ought not to do the act or make the omission.” This also includes terrorist acts.

Therefore, a child between ages eight and eleven is presumed not capable of committing a terrorist act in Kenya, unless it can be proved that at the time of committing the terrorist act, he/she had capacity to know that he/she ought not to commit the concerned act. It should be noted, however, that although the Committee on the Rights of the Child does not establish an international standard for the MACR, it considers that a MACR **below the age of twelve years**, as is the case in Kenya, is not internationally acceptable and encourages States to increase it to a higher age level.⁶⁶

In addition to the Children’s Act, Kenya has developed a Child Justice Bill (2014), which was pending before Parliament at the time of this writing. The Bill seeks to (i) establish a comprehensive criminal justice system for children suspected or accused of committing offences; (ii) enhance the protection of the rights of children as recognised in international and regional instruments, in particular the CRC and ACRWC; and (iii) increase the MACR of such children.⁶⁷



Cross-Reference

The detention of children suspected of involvement in terrorist offences is further discussed in Chapter 4, section 4.8.

⁶⁶ CRC/C/GC/10, para. 31.

⁶⁷ Preamble.



Age Assessment Procedures

In regions where birth registration is not universal, determining the age of an alleged child offender may pose a challenge. There may be doubts whether the alleged child offender is over 18 years of age and can therefore be treated as an adult, or whether he/she has reached the minimum age of criminal responsibility.

Section 143 of the Children Act addresses the presumption and determination of age:

"[w]here a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that such person is under eighteen years of age, the court shall make due inquiry as to the age of that person and for that purpose shall take such evidence, including medical evidence, as it may require, but an order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the court, and the age presumed or declared by the court to be the age of the person so brought before it shall, for the purposes of this Act and of all proceedings thereunder, be deemed to be the true age of the person. A certificate purporting to be signed by a medical practitioner as to the age of a person under eighteen years of age shall be evidence thereof and shall be receivable by a court without proof of signature unless the court otherwise directs."

When assessing the age of the child, the court must take into consideration all the information available. Medical and physical age assessment methods, such as bone x-rays, height, or signs of the onset of puberty, should be used only as a measure of last resort where there is reason to doubt the age of the child and where other approaches, such as interviews and attempts to gather documentary evidence, have failed to establish his or her age. A written record of the age assessment procedure must be kept, a copy of which must be made available to the alleged child offender.

The dignity of the child must be respected at all times. Therefore, the least invasive method of age assessment must be used in order to comply with international human rights standards. Age-assessment procedures should be gender-appropriate, multidisciplinary and carried out by independent professionals with appropriate expertise in and familiarity with the child's ethnic and cultural background. Physical, developmental, psychological, environmental and cultural factors must also be considered. Moreover, "the assessment of age is not an exact science. It is a process within which there will always be an inherent margin of error and a child's exact age cannot be established through medical or other physical examinations."**

Pending a conclusive determination of age by a judge or competent authority, law enforcement officers and prosecutors must treat the alleged terrorist as a child if he/she claims to or appears to be younger than 18. Where an age assessment fails to give certainty beyond reasonable doubt on the age of the alleged child offender, he or she must be regarded as a child. This means that in cases where there is doubt whether the alleged offender is a child or an adult – i.e., below or above the age of 18 – he/she must be considered a child and fall within the scope of the juvenile justice law.

*Article 11 of the UNODC Model Law on Justice in Matters Involving Children in Conflict with the Law and the commentary thereto.

** Smith, Terry and Brownlees, Laura, United Nations Children's Fund (UNICEF) Discussion Paper, Age Assessment: A Literature Review & Annotated Bibliography, UNICEF: New York 2011, p. 12.

International law norms affecting the treatment of children suspected of, charged with or convicted of being involved in terrorist offences are relevant at all stages of criminal proceedings. In dealing with access to legal counsel, compulsion to make self-incriminating statements, detention, trial and punishment, this Manual will highlight norms specific to the treatment of children. As with regards to fair trial guarantees in general, however, it is essential that specific safeguards regarding children are respected from the beginning of an investigation into terrorist offences.

Section 185 of the Children's Act provides that a Children's Court may try a child for any offence except murder, or an offence with which the child is charged together with a person or persons of or above the age of eighteen years. Section 186 further provides that where it appears to a court that a child is charged before it with murder and is not charged together with a person or persons of or above the age of eighteen years, it may remit the case to the Children's Court.

Consistent with core human rights principles regarding the treatment of children suspected of involvement in terrorist offences, Section 186 of the Children Act sets out the guarantees of a child accused of an offence in Kenya. It provides that “[e]very child accused of having infringed any law shall -

- a) be informed promptly and directly of the charges against him;
- b) if he is unable to obtain legal assistance, be provided by the Government with assistance in the preparation and presentation of his defence;
- c) have the matter determined without delay;
- d) not be compelled to give testimony or to confess guilt;
- e) have free assistance of an interpreter if the child cannot understand or speak the language used;
- f) if found guilty, have the decisions and any measures imposed in consequence thereof reviewed by a higher court;
- g) have his privacy fully respected at all the proceedings;
- h) if he is disabled, be given special care and be treated with the same dignity as a child with no disability.”

Section 187 (1) provides that every court shall have regard to the best interests of the child. Section 188 further provides that a Children’s Court shall have a setting that is friendly to the child offender.

Section 190 provides that no child shall be ordered to imprisonment, be placed in a detention camp, or be sentenced to death. Nor shall a child under ten years be ordered by a Children’s Court to a rehabilitation school. Section 191 further provides that where a child is tried for an offence and the court is satisfied as to his guilt, the court may deal with the case in several ways. This includes discharging the offender under Section 35 (1) of the Penal Code, making a probation order under the Probation of Offenders Act, or committing him to the care of a fit person.

Section 192 provides that if it appears to the court on the evidence of a medical practitioner that a child requires or may benefit from mental treatment, the court may, when making a probation order against him, require him to undergo medical treatment for a period not exceeding twelve months, subject to review by the court.

Section 194 provides that proceedings in respect of a child accused of having infringed any law shall be conducted in accordance with the rules set out in the Fifth Schedule of the Act, entitled Child Offenders Rules. Rule 12 (1) of the Child Offenders Rules in the Children’s Act provides that every case involving a child shall be handled expeditiously and without unnecessary delay. According to sub rule (3) and (4), where, owing to its seriousness, a case is heard by a court superior to the Children’s Court and is not completed within twelve months after the plea is taken, the case shall be dismissed and the child discharged. All other cases before the Children’s Court must be completed within three months after the plea has been taken.

At the time of this writing, the Child Justice Bill was under consideration in Parliament.

The implementation of the above-mentioned guarantees does have some specific aspects:

- **Promptness:** The requirement of a trial within a reasonable time is particularly important in the case of children. The time between the commission of an offence and the final response to this act should be as short as possible. Time limits provided in criminal procedure law should be much shorter for children accused of an offence than for adults.⁶⁸
- **Legal and other Assistance:** Legal assistance should be provided to children suspected of having committed an offence from the first steps of the criminal proceedings (see the *Salduz* case discussed in section 3.6.1 below). Parents or legal guardians should also be present at the proceedings because they can provide general psychological and emotional assistance to the child.

68 Committee on the Rights of the Child, General Comment No. 10, paras. 51-52.

- **Respect for Privacy:** According to the Beijing Rules (8.2), “[i]n principle, no information that may lead to the identification of a juvenile offender shall be published.” In the case of children alleged, accused of, or recognized as having committed an offence, as well as those involved in judicial proceedings as victims or witnesses, their right to privacy generally takes precedence over the principle of publicity of judicial proceedings.
- **Training and Specialization of Criminal Justice Officials Dealing with Children:** “[a] key condition for a proper and effective implementation of these rights is the quality of the persons involved in the administration of juvenile justice. The training of such professionals is crucial and should take place in a systematic and ongoing manner. They should be well informed about the child’s physical, psychological, mental and social development. They should also be well informed of the special needs of the most vulnerable children, such as children with disabilities, displaced and street children, refugee and asylum-seeking children and children belonging to minority groups.”⁶⁹



Tools

- Committee on the Rights of the Child, General Comment No. 10 on Children’s Rights in Juvenile Justice is available here: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f10&Lang=en.
- The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), A/RES/40/33, are available here: http://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Admin_of_Juvenile_Justice_Beijing_Rules.pdf.
- The United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (“the Havana Rules”), A/RES/45/113, are available here: <http://www.un.org/documents/ga/res/45/a45r113.htm>.
- UNICEF has published an Age Assessment: A Technical Note: [http://www.unicef.org/protection/files/Age_Assessment_Note_final_version_\(English\).pdf](http://www.unicef.org/protection/files/Age_Assessment_Note_final_version_(English).pdf)
- Where children become associated with a terrorist group in the context of an armed conflict between the government and the terrorist group (see section 1.11.1 on the concept of “armed conflict”), international law and policy regarding child soldiers becomes applicable. A particularly important instrument in this regard are the Principles on Children Associated with Armed Forces or Armed Groups (“The Paris Principles”), available here: <http://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf>.



Activities

- Identify and compile the references to the treatment of children suspected or convicted of terrorist offences in other parts of this Manual.
- Have there been cases of persons aged below 18 suspected of involvement in terrorist offences in Kenya? Were they dealt with in the ordinary/adult criminal justice system or in the juvenile justice system? Are there special challenges to dealing with juvenile offenders suspected of or linked to terrorist activities in Kenya?
- In your experience, are special arrangements made and precautions taken for the questioning of child victims or witnesses in Kenya?
- Review the Paris Principles on Children Associated with Armed Forces or Armed Groups. Which provisions do you think are particularly relevant to the context of children associated with terrorist groups? Are there any principles you believe cannot be applied to children associated with terrorist groups?

69 Ibid, para. 40; Beijing Rules 12 and 22.

3.6 THE RIGHT OF ACCESS TO LEGAL COUNSEL

There are a number of procedural guarantees designed to ensure that a suspect, and later an accused, has a fair opportunity to prepare his defence, and that the defence can be presented properly at trial. These include the suspect's and then accused's right to be adequately informed of the charges faced in a language he understands (see section 4.7.2 below), and the right to have adequate time and facilities in the preparation of the defence (see section 5.6 below). The right of access to legal counsel without delay is central to the protection of the right to fair trial.

3.6.1 Right of Access to Legal Counsel of One's Own Choosing

The right of access to legal counsel is often triggered by the arrest of a terrorism suspect. It also applies, however, where the suspect is not apprehended or released from detention while awaiting trial. Moreover, it is an essential guarantee for equality of arms and the right to a fair trial. It is in this last context that this right is enshrined under Kenyan law, as well as in the international and regional human rights treaties.

Article 50 (2) (g) of the Constitution provides that every accused person has the right to a fair trial, which includes the right "to choose, and be represented by, an advocate, and to be informed of this right promptly." Article 50 (2) (h) adds that every accused person has the right "to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly." Article 49 (1) (c) further provides that "[a]n arrested person has the right to communicate with an advocate, and other persons whose assistance is necessary."

The right of access to legal counsel is also protected by all major universal and regional human rights treaties, including Article 14 (3) (d) of the ICCPR and Article 7 (1) (c) of the Banjul Charter. Moreover, Principle 4 (d) of the Luanda Guidelines provides that all persons under arrest shall be afforded "the right of access, without delay, to a lawyer of his or her choice, or if the person cannot afford a lawyer, to a lawyer or other legal service provider, provided by state or non-state institutions."

In light of these provisions, individuals suspected or accused of terrorism related offences have the right to:

- Consult with a lawyer from the very first moment they are deprived of liberty;
- Have a lawyer present during any interviews;
- Be assisted by a lawyer in the preparation of their defence and at trial, as well as in any appeals proceedings; and
- Be provided with a lawyer free of charge if they do not have the means to retain a lawyer.

In addition to serving their clients' interest, lawyers serve in the public interest as a "watchdog of procedural regularity."⁷⁰ Full respect for the role of lawyers is among the most effective safeguards against human rights violations in criminal proceedings. "The right of access to a lawyer as from the outset of custody is a fundamental safeguard against ill-treatment. The possibility for persons to have rapid access to a lawyer will have a dissuasive effect upon those minded to ill-treat detained persons; further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs."⁷¹

⁷⁰ ECtHR, *Ensslin, Baader and Raspe v. Germany*, Merits, Application Nos. 7572/76, 7586/76 and 7587/76, Judgment of 8 July 1978, p. 114.

⁷¹ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Report to the Spanish Government on the visit to Spain carried out by the Committee from 19 September to 1 October 2007, para. 28.

On the independence of lawyers, the ACommHPR's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa stipulates that "States shall ensure that lawyers:

1. are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference;
2. are able to travel and to consult with their clients freely both within their own country and abroad;
3. shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics."⁷²

Moreover "[i]t is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time."⁷³

In terrorism cases, it is particularly important to keep in mind that, in the words of the United Nations Basic Principles on the Role of Lawyers, "[l]awyers shall not be identified with their clients or their clients' causes as a result of discharging their functions."⁷⁴ Governments are also obligated to ensure that lawyers are able to perform their professional functions without intimidation, hindrance, harassment or improper interference, and that they do not suffer, or are threatened with prosecution, administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.⁷⁵



Activity

- In your professional experience, what challenges have you come across in the course of providing legal representation to a person suspected or accused of terrorism activities or other serious offences in Kenya?
- The United Nations Basic Principles on the Role of Lawyers state that "[l]awyers shall not be identified with their clients or their clients' causes as a result of discharging their functions." In your view, are there challenges to the full application of this essential principle in the context of legal representation of terrorism suspects in Kenya? In other words, is there an identification of lawyers with the (alleged) terrorist cause of their clients, a perception that in exercising their functions on behalf of terrorism suspects lawyers become somehow "complicit"? If so, what should be done about this?

The following four aspects of the right to legal assistance are examined in more detail:

- Prompt access to a lawyer;
- Right to a lawyer of one's own choosing;
- Confidential communications with the lawyer; and
- Legal assistance free of charge.

Prompt Access to a Lawyer

An arrested person must be afforded access to legal assistance promptly upon his arrest. He/she must therefore be informed of his/her right to legal assistance of his own choosing immediately upon arrest. As discussed above, Article 49 (1) (c) of the Constitution provides that an arrested person has the right to communicate with an advocate, and other persons whose assistance is necessary. When read together with Article 50, Article 49 (1) (c) has the effect of ensuring that a suspect has access to legal representation from the onset of arrest through to trial.

⁷² ACommHPR's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, I (b).

⁷³ Ibid, I (d).

⁷⁴ United Nations Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990, p. 18.

⁷⁵ Ibid, p. 16.

At the regional level, the Luanda Guidelines provide that arrested persons have the right of access to a lawyer under Principle 4 (d), as well as the right to challenge promptly their arrest before a competent judicial authority under Principle 4 (j). Principle 8 (d) further elaborates that all persons detained in police custody enjoy the following rights in relation to legal assistance:

- i. "Access without delay to lawyers and other legal service providers, at the latest prior to and during any questioning by an authority, and thereafter throughout the criminal justice process.
- ii. Detainees shall be provided with the means to contact a lawyer or other legal service provider of their choice or one appointed by the State.
- iii. Access to lawyers or other legal service providers should not be unlawfully or unreasonably restricted."

Additionally, the ACommHPR's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provide as follows:

- a) "States shall ensure that efficient procedures and mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, color, ethnic origin, sex, gender, language, religion, political, or other opinion, national or social origin, property, disability, birth, economic or other status.
- b) States shall ensure that an accused person ... is permitted representation by a lawyer of his or her choice, including a foreign lawyer duly accredited to the national bar."⁷⁶

Similarly, the United Nations Basic Principles on the Role of Lawyers states that "[a]ll persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them at all stages of criminal proceedings." Moreover, States "[s]hall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence."⁷⁷ This principle also applies in terrorism cases.



Case Study: The *Salduz Case**

Mr. Salduz, who was aged 17 at the time of the facts, was arrested on suspicion of having participated in an unlawful demonstration in support of the PKK, proscribed as a terrorist organization in Turkey. He was interrogated and admitted to having had a lead role in its organization. Before and after the police interrogation, he was visited by a doctor, who stated that there were no traces of ill-treatment on his body. Before the police interrogation, Mr. Salduz had signed a form acknowledging that he had been informed of his right to remain silent. He repeated his confession the following day before a public prosecutor and an investigating judge.

Mr. Salduz was charged under the counter-terrorism law with aiding and abetting the PKK. During the trial before the State Security Court, he retracted his previous statements and denied his involvement in the demonstration, with the assistance of defence counsel. His co-accused, who had previously described him as one of the organizers of the demonstration, also retracted their statements. The Court, however, found him and some of his co-accused guilty on the basis of their previous statements, and sentenced him to four-and-a-half years' imprisonment. This judgment was upheld on appeal and by the Supreme Court.

Mr. Salduz applied to the ECtHR complaining that his right to a fair trial had been violated. The ECtHR recalled that although this right normally requires the accused be allowed legal assistance at the initial stages of police interrogation, it was capable of being restricted for good cause [at 52]. It considered however, that apart from his and his co-defendants' statements, the evidence against Mr. Salduz was rather weak. It also highlighted his young age of 17 years as a specific element of the case and concluded that the trial had been unfair: "In sum, ..., the absence of a lawyer while he was in police custody irretrievably affected his defence rights" [at 62].

76 ACommHPR's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, G.

77 See United Nations Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990, p. 1 and 5.

In a subsequent case concerning an adult man accused of being a member of a terrorist group, the ECtHR clarified that the right to be assisted by a lawyer, as soon as a person is taken into custody, applies in all cases, irrespective of the age of the suspect or arrested person.**

*ECtHR, *Salduz v. Turkey*, Application No. 36391/02, Judgment of 27 November 2008.

**ECtHR, *Dayanan v. Turkey*, Application No. 7377/03, Judgment of 13 October 2009, para. 32.

Some legal systems limit the right to prompt access to a lawyer in one way or the other: e.g., the lawyer may only be present at the first formal interrogation of a detained suspect, but not at prior informal interviews with the police; or the lawyer can be present but not intervene in interviews in police custody; or the detained suspect can only consult in private with the lawyer after the first interview, and not before. International human rights bodies have, however, insist that:

“The right to the presence of a lawyer when making a statement to the police is an important safeguard. However, the core of the notion of access to legal assistance for persons in police custody is the possibility for a detainee to consult in private with a lawyer, and in particular during the period immediately following his loss of liberty.

A right of access to legal assistance loses much of its effectiveness if it consists only of the presence of a lawyer when a statement is made and recorded, together with the possibility of a private consultation between the detainee and his lawyer after the completion of those proceedings. It provides little protection against the possible intimidation or physical ill-treatment of the detainee during the period prior to the interview at which his statement is given.”⁷⁸

Right to A Lawyer of One's Choice

Article 50 (2) (g) of the Constitution provides that “[e]very accused person has the right to a fair trial, which includes the right to choose, and be represented by an advocate, and to be informed of this right promptly.” As cited above, the right of every accused person “to defend himself in person or through legal assistance of his own choosing” is also guaranteed under Article 14 (3) (d) of the ICCPR, Principle 8 (d) (ii) of the Luanda Guidelines, as well as Principle A2 (e) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

In Kenya, there are no legal limitations on the right to a lawyer of one's choice, or access to a lawyer. In practice, however, many suspects are not able to access lawyers while in police custody due to procedural and logistical challenges.



Case Study: *The Law Office of Ghazi Suleiman Case**

Three men were arrested on suspicion for being involved in terrorism, as well as endangering the peace and security of Sudan. They were denied contact with their lawyers and families. The lawyers chosen by their families, Ghazi Suleiman and others, requested the competent authorities, including the Supreme Court, authorisation to visit their clients and, subsequently, to represent them at trial. This was however denied and the Military Court, which tried them, assigned other defence counsel to their case.

78 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Report to the Spanish Government on the visit to Spain carried out by the Committee from 1 to 12 April 1991, para. 50.

In its decision on the complaint brought by the Law Office of Ghazi Suleiman, the ACommHPR held [at 59] that “[t]he right to choose freely one’s counsel is fundamental for the guarantee of a fair trial. To recognise that the court has the right of veto on the choice of a counsel of one’s choice amounts to an unacceptable violation of this right.” The ACommHPR concluded [at 60] that refusing the victims the right to be represented by the lawyer of their choice amounted to a violation of Article 7 (1) (c) of the Banjul Charter: “Every individual shall have the right to have his cause heard. This comprises: ... the right to defence, including the right to be defended by counsel of his choice.”

*ACHPR, *Law Office of Ghazi Suleiman v. Sudan*, Communication nos. 222/98 and 229/99, 29 May 2003.

Confidential Communication with Lawyer

A further important element of the right of access to a lawyer is that a suspect is able to communicate with the lawyer in confidence. In Kenya, legal communication with one’s lawyer is privileged.

While this right is not expressly spelled out in the ICCPR, the Human Rights Committee has made it clear that “[c]ounsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications.”⁷⁹ In its Resolution on the Right to Recourse and Fair Trial, the African Commission on Human and Peoples’ Rights stated that, as part of the right to a fair trial, individuals are entitled to “communicate in confidence with counsel of their choice.”⁸⁰

In Principle 8 (d) (ii) of the Luanda Guidelines, the ACommHPR further elaborates on this principle: “[c]onfidentiality of communication, including meetings, correspondence, telephone calls and other forms of communications with lawyers and other legal service providers shall be respected. Such communications may take place within the sight of officials, providing that they are conducted out of the hearing of officials. If this confidentiality is broken any information obtained shall be inadmissible as evidence.”

In addition to evidence obtained by eaves-dropping or other covert surveillance of communications between a suspect or accused person and his counsel being inadmissible, case law shows that this is considered a particularly serious form of misconduct.



Case Study: The Grant Case*

The defendant had been charged with conspiring with two other individuals to murder his wife’s lover. Before the trial began, the defendant made an application to stay the proceedings as an abuse of the court process. He claimed that the police had deliberately eavesdropped upon and tape-recorded privileged conversations between him and his solicitor, which had taken place in the exercise yard of the police station following his arrest and in parallel with the interview process. The police asserted however, that the capture of privileged communication had happened inadvertently.

In rejecting the application for stay of proceedings, the trial judge held that there was no evidence that the defendant’s right to legal professional privilege had been deliberately disregarded and, in any case, since the interceptions had not given rise to evidence that was relied on by the Crown at the trial, he had suffered no prejudice. The defendant was subsequently convicted.

On appeal, the Court of Appeal held that the deliberate interference by the police with a detained suspect’s right to the confidence of privileged communications with his solicitor is unlawful and seriously undermines the integrity of the justice system and the rule of law. Accordingly, it observed that the proceedings at the trial court should have been stayed on the grounds of abuse of the court process, notwithstanding the absence of actual prejudice to the defendant. The Court therefore set aside the conviction.

**Regina v. Edward Grant* [2005] EWCA Crim 1089, Judgement of 4 May 2005.

79 General Comment No. 32, para 34

80 ACommHPR, Resolution 4 on the Right to Recourse and Fair Trial, 2 to 9 March 1929, Art. 2 (e) (i).

In the case of persons suspected or accused of terrorism offences, some Governments argue that there is a significant risk that lawyers may collude with detainees to convey messages to other members of the terrorist group, to intimidate witnesses, or for other purposes that create a risk to the integrity of the criminal justice process or to national security. They therefore see a need to exercise surveillance or censorship over communications between a detained terrorism suspect and his or her defence counsel.

The CoE Guidelines on Human Rights and the Fight Against Terrorism (Guideline XI) acknowledge that “[t]he imperatives of the fight against terrorism may ... 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 the regulations concerning communications and surveillance of correspondence, including that between counsel and his/her client.” Exceptionally, for compelling reasons, on the basis of precisely worded provisions and with robust safeguards, it may be permissible to restrict the confidentiality of these communications.



Cross-Reference

Module 4 of the UNODC Counter-Terrorism Legal Training Curriculum contains an analysis of the *Erdem v. Germany* case, a case in which the European Court of Human Rights found that safeguards were sufficient to make surveillance of the written communication (not of oral communication) between a terrorism suspect and his lawyer permissible. It is available here, at p. 68: http://www.unodc.org/documents/terrorism/Publications/Module_on_Human_Rights/Module_HR_and_CJ_responses_to_terrorism_ebook.pdf.

Right to Legal Assistance Free of Charge

Those suspected of having committed criminal offences may not be able to afford a lawyer. This is all the more likely in the case of potentially complex and lengthy criminal proceedings, which are frequent where charges connected with terrorism are brought. In order to ensure that the right of access to legal assistance is practical, effective and not merely illusory, it will often be necessary for individuals to be provided with legal aid to obtain assistance from a competent and experienced lawyer.

As discussed above, the right to legal representation is enshrined under Article 50 (2) (h) of the Constitution. It provides that “[e]very accused person has the right to a fair trial, which includes the right to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.” Under international law, this right is provided under Article 14 (3) (d) ICCPR, and further clarified in the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.⁸¹

Prior to the recent enactment of the Legal Aid Act, 2016, which now governs the provision of legal aid to indigent litigants in Kenya, the practice had been to provide pro bono lawyers to suspects facing murder and treason charges, both of which carry mandatory death penalties, and are exclusively tried in the High Court. Although terrorism-related offences do not—under the POTA—carry the death penalty, they are considered offences where substantive injustice would occur if the accused were to have no legal representation. As such, the practice in Kenya is that terrorism suspects are always represented, though there are no recorded cases of suspects seeking legal aid.

81 General Assembly Resolution 67/187 (2012).



Key Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*

- States should ensure that anyone who is arrested, detained, suspected of or charged with a criminal offence punishable by a term of imprisonment or the death penalty is entitled to legal aid at all stages of the criminal justice process.
- Legal aid should also be provided, regardless of the person's means, if the interests of justice so require, for example, given the urgency or complexity of the case or the severity of the potential penalty. Considering the gravity of the charges, in terrorism cases the interests of justice will as a rule require that legal aid is provided.
- Effective legal aid includes, but is not limited to, unhindered access to legal aid providers for detained persons, confidentiality of communications, information about charges, access to case files and adequate time and facilities to prepare their defence.
- States should ensure that, prior to any questioning and at the time of deprivation of liberty, persons are informed of their right to legal aid and other procedural safeguards as well as of the potential consequences of voluntarily waiving those rights.

These principles are captured in the Kenya Legal Aid Act, 2016, which seeks to give effect to Articles 19 (2), 48, as well as 50 (2) (g) and (h) of the Constitution. The Act sets out the circumstances and parameters under which an accused person is entitled to legal representation at the State's expense. It might be useful practice for security agents in Kenya to consider having lawyers on call for suspects of terrorist cases. Considering the sensitive and complex nature of these cases, this would protect investigators from accusations that could lead to premature dismissal of their cases. As indicated above, currently murder suspects tried before the High Court are administratively provided with pro bono lawyers without this being expressly required by law, and the same procedure could be adopted with regard to terrorism suspects.

*General Assembly Resolution 67/187 (2012).



Assistance for Juveniles upon Arrest

Like adults, children suspected of terrorist offences have a right to be represented by a lawyer.

In addition to the assistance of a lawyer, "[p]arents or legal guardians should be present at the proceedings because they can provide general psychological and emotional assistance to the child. However, the judge or competent authority may decide, at the request of the child or of his/her legal or other appropriate assistance or because it is not in the best interests of the child (Article 3 of CRC), to limit, restrict or exclude the presence of the parents from the proceedings." (CRC General Comment No. 10, paras. 53-54) Upon the apprehension of a child, his or her parents or guardian shall be immediately notified of such apprehension, and, where such immediate notification is not possible, the parents or guardian shall be notified within the shortest possible time thereafter. (Beijing Rules, Rule 10.1).



Tools

- The Basic Principles on the Role of Lawyers are available at: <http://www.refworld.org/docid/3ddb9f034.html>. Information concerning the activities of the UN Special Rapporteur on the Independence of Judges and Lawyers is available at: <http://www.ohchr.org/EN/Issues/Judiciary/Pages/IDPIndex.aspx>.
- The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems are available at: http://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf.
- The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the ACommHPR in Resolution 41 (1999) are available here: <http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/>.
- ACommHPR's Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, available here: http://www.achpr.org/instruments/guidelines_arrest_detention/



Practical Guidance

It is a fundamental principle of human rights law that rights must be practical and effective, and not merely exist on paper and remain illusory. This is highly relevant to the right to defend oneself with the assistance of a lawyer. Some practical obstacles that risk making the effective exercise of the right to a lawyer, and therefore equality of arms, illusory are:

- An accused person is detained at a remote location for most of his pre-trial detention period, making meetings with legal counsel and effective preparation of the defence case difficult;
- The legal aid system is insufficiently funded to function effectively to ensure adequate legal assistance in a legally and factually complex case;
- Language barriers prevent the accused person from communicating effectively with the lawyer, and no means are available to ensure free assistance of an interpreter.



Activities

- Have you experienced problems arising as a result of a failure to provide prompt access to a lawyer? If so, how could the legal system be reformed to address these problems? What changes – practical, procedural or to the law itself - would help?
- Does the Kenyan legal system provide effective access to a lawyer to persons accused of terrorist offences who do not have the means to retain legal counsel? Is a lawyer provided from the moment of arrest to appeals proceedings following conviction? How is the quality of legal assistance provided by legal aid lawyers ensured? Consider both the legal standards and practical aspects in discussing these questions.

3.7 TREATMENT OF SUSPECTS DURING AN INVESTIGATION

In the aftermath of a terrorist attack, the authorities are often under enormous pressure – both from political leaders and the public – to identify those responsible and bring them to justice without delay. The plot will often have been carried out by a highly sophisticated and secretive organization, making the identification and arrest of those responsible particularly challenging. Quickly identifying those responsible and gathering evidence against them can be exceedingly difficult.

Under these circumstances, the use of coercion against suspects or persons believed to have valuable information might appear the most effective way of ensuring a successful investigation. It is, however, of crucial importance that human rights guarantees, including the prohibition on torture and other ill-treatment, are adhered to in the course of a criminal investigation, including in terrorism cases.

Not only are torture and other ill-treatment in violation of a universally established rule of law, but such conduct can also fundamentally undermine the investigation since, as will be seen, evidence obtained by torture must not be relied upon during a criminal trial and may render trial proceedings as a whole unfair, resulting in a conviction being overturned.

When threatened with or subjected to torture, most persons in detention will sooner or later start talking, telling the torturers what they believe will make the pain stop. What a person subjected to torture states may happen to be true, in part or in its entirety, but it is inherently unreliable. Investigations based on information obtained under torture risk wasting precious investigatory resources.



Case Study: The *Birmingham Six Case**

In 1974, bombs placed in two pubs in Birmingham/England caused 21 deaths and injured more than one hundred persons. Six men suspected of being supporters of the terrorist organization Irish Republican Army (IRA) were arrested. In police custody, some of them made statements amounting to confessions. At trial, they retracted these statements, claiming that while in detention they had been subjected to various forms of coercion. Evidence of their confessions was admitted at trial. The jury found the six men guilty relying on the expert forensic evidence provided by the prosecution witness, although controverted by the defence expert witness, and the police interviews that included the defendants' confessions. Their conviction was upheld on appeal.

In the following years, investigative reporters and lawyers convinced of the Birmingham Six's innocence brought to light evidence suggesting police fabrication and suppression of evidence, which cast significant doubts on the police's version of how the interviews and confessions occurred. The forensic evidence relied on at trial was also shown to have been significantly inaccurate. In 1990, the Birmingham Six applied to have their cases reopened and the convictions overturned. The prosecution did not oppose this application.

The Appellate Court found that the evidence regarding the confessions to the police and the forensic evidence were so unreliable that the convictions were unsafe and unsatisfactory. The six men were released and each awarded compensation in the range of £840,000 to £1.2 million. As of today, the real perpetrators of this terrorist act, one of the worst to take place in the United Kingdom, have not been identified.

**R v. McIlkenny and Others*, 93 Cr. App. R. 287, Judgment of 27 March 1991.



Case Study: The CIA Enhanced Interrogation Techniques Programme

In December 2014, the Select Committee on Intelligence of the Senate of the United States of America published its "Committee Study on the Central Intelligence Agency's Detention and Interrogation Programme." It "documents the abuses and ... mistakes made [by the CIA] between late 2001 and early 2009," (foreword, p. 3), in its efforts to obtain information from terrorism suspects through the use of "enhanced interrogation techniques." The Committee's findings and conclusions include the following statements on the effects of using "enhanced interrogation techniques":

"#1: [...] The Committee finds, based on a review of CIA interrogation records, that the use of the CIA's enhanced interrogation techniques was not an effective means of obtaining accurate information or gaining detainee cooperation. [...]"

While being subjected to the CIA's enhanced interrogation techniques and afterwards, multiple CIA detainees fabricated information, resulting in faulty intelligence. Detainees provided fabricated information on critical intelligence issues, including the terrorist threats, which the CIA identified as its highest priority. [...]"

"#20: The CIA's Detention and Interrogation Programme damaged the United States' standing in the world, and resulted in other significant monetary and non-monetary costs. [...]"

3.7.1 Prohibition of Torture, Inhuman and Degrading Treatment

Article 29 of the Constitution guarantees every person the right to freedom and security of the person. In particular, under Articles 29 (d) and (f), this includes the right not to be "subjected to torture in any manner, whether physical or psychological," and not to be "treated or punished in a cruel, inhuman or degrading manner," respectively. Under Article 25 (a), the right to freedom from torture and cruel, inhuman or degrading treatment or punishment is an absolute right, which cannot be limited under any circumstances.

This is similar to Article 2 (2) of the CAT, which is, in turn, reflective of customary international law. It states:

"No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

At the regional level, the prohibition on torture, inhuman and degrading treatment is enshrined in Article 5 of the Banjul Charter. To give AU Member States concrete measures for the implementation of Article 5 of the Charter and other international instruments aimed at preventing torture, the ACommHPR developed the Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa.⁸²

In the context of non-international armed conflict (such as armed conflicts between government forces and a terrorist group), torture and “outrages upon personal dignity, in particular humiliating and degrading treatment,” are prohibited at all times, according to common Article 3 of the Geneva Conventions of 1949, and may constitute a war crime.

Kenya is yet to enact comprehensive legislation on the prevention and prohibition of torture despite being a State Party to the CAT and the Banjul Charter, as well as the above mentioned constitutional guarantees that safeguard the freedom from acts of torture and other forms of cruel, inhuman and degrading treatment.



Key Obligations in respect of Torture, Inhuman and Degrading Treatment or Punishment

All States, including Kenya, are under an obligation to: (i) prevent torture, inhuman and degrading treatment; (ii) investigate allegations of torture, inhuman and degrading treatment; (iii) prosecute or extradite persons suspected of such conduct; and (iv) ensure that a victim of an act of torture, inhuman or degrading treatment obtains redress.

These obligations are explicitly enshrined in the CAT, and have been elaborated upon by the Robben Island Guidelines. Other very important obligations also exist, notably the obligation of non-refoulement, which is further examined in Chapter 7.

Prevention: Article 2(1) of the CAT states that “[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” A range of measures are required including the training of relevant officials, safeguards with regard to places of detention, the criminalization of torture, the prompt investigation of allegations of ill treatment, and the appropriate punishment for those found to have been involved in such treatment.

Criminalization: Article 4 of the CAT requires States to ensure that all acts of torture and of complicity or participation in torture are offences under their criminal law.

Obligation to Investigate: Article 12 of the CAT provides that “[e]ach State Party shall 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 adds that State Parties shall ensure that any individual who alleges he has been subjected to torture 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.

Prosecution (or Extradition): Where a person alleged to have committed or been complicit in torture is found in the territory of a State, that State is obliged to either initiate an investigation with a view to prosecution, or to extradite the suspect to a requesting State. This obligation is given clear expression in Article 7 of the CAT.

Reparations: Article 14 (1) of the CAT states that “[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.”

**Activity**

- Refer to the above mentioned international and regional obligations in respect of torture, inhuman and degrading treatment or punishment. In your opinion, to what extent has Kenya implemented these key obligations?

**Cross-Reference**

The prohibition against torture and inhuman or degrading treatment is very closely related to human rights norms and standards regarding persons deprived of their liberty. These safeguards are discussed primarily in Chapter 4.

Elements of Torture, Inhuman and Degrading Treatment

Article 1 (1) of the CAT defines torture as:

- 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; and
- 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.

As the CAT is very widely ratified, its definition of torture has been widely accepted as reflective of customary international law. The second paragraph of Article 1, however, stresses that the definition is for the purposes of the Convention and does not prejudge broader concepts of torture in domestic law or under other international instruments.

Developments in international law since the CAT was adopted suggest that torture can be committed also without the instigation, consent or acquiescence of a public official or other person acting in an official capacity, e.g. for instance by perpetrators affiliated with a rebel militia or a terrorist group. The ICC Statute (Articles 7 and 8) and the Elements of Crimes adopted by the Assembly of States Parties to assist the Court in the interpretation and application of the Statute (Elements of Crimes Articles 7 (1) (f), 8 (2) (a) (ii)-1 and 8 (2) (c) (i)-4)), e.g., do not mention the perpetrator's acting in an official capacity as an element of torture.

None of the international and regional human rights instruments contain definitions of cruel, inhuman and degrading treatment. While both torture and inhuman and degrading treatment are prohibited at all times and under all circumstances, the distinction is relevant as the CAT attaches certain specific obligations to torture, and because of the special stigma attached to torture.⁸³ The Special Rapporteur against torture and the ICC Elements of Crimes (Article 7 (1) (f)) highlight that torture requires that the victim was in the custody or under the control of the perpetrator. Inhuman or degrading treatment can also be inflicted by excessive use of force in quelling a demonstration.⁸⁴

83 ECtHR, *Ireland v. the United Kingdom*, Application No. 5310/71, Judgment of 18 January 1978, para. 167; ECtHR, *Selmouni v. France*, Application No. 25803/94, Judgment of 28 July 1999, para. 96.

84 Report of the Special Rapporteur on the Question of Torture, E/CN.4/2006/6, paras. 34-41.

With regard to custodial settings, inhuman and degrading treatment need not be inflicted intentionally or deliberately. The IACrHR has found that “incommunicado detention, being exhibited through the media wearing a degrading garment, solitary confinement in a tiny cell with no natural light, blows and maltreatment, including total immersion in water, intimidation with threats of further violence, a restrictive visiting schedule (...), all constitute forms of cruel, inhuman or degrading treatment.”⁸⁵ The ECtHR has held that whether treatment amounts to inhuman and degrading treatment “depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.”⁸⁶



Impermissible Interrogation Techniques

Certain techniques that have been used against terrorism suspects to extract information or to humiliate them might not, in isolation, appear to cause the “severe pain or suffering” which is an element of torture under the definition in Article 1 of the CAT and under the ICC Statute and Elements of Crime. They include:

- 1) Wall-standing: forcing suspects to remain for periods of several hours in stress positions prior to interview;
- 2) Hooding: disorienting a suspect by placing a bag over their head;
- 3) Noise: subjecting a suspect prior to interrogation to loud or disorienting noise, including “white noise” of scrambled sound;
- 4) Sleep deprivation;
- 5) Deprivation of food and drink;
- 6) Using detainees’ individual phobias (such as fear of dogs) to induce stress;
- 7) Deprivation of light and auditory stimuli; and
- 8) Isolating the detainee from other detainees for prolonged periods of time (see section 4.7.2 below on solitary confinement) while still complying with basic standards of treatment.

These and similar techniques have, however, all been found to amount to inhuman and degrading treatment, if not to torture, particularly when used cumulatively.* They are therefore absolutely prohibited under international law.

*See Report on the situation of detainees at Guantánamo Bay by five holders of human rights Special Procedures mandates (E/CN.4/2006/120), paras. 49-53; ECtHR, *Ireland v. the United Kingdom*, Application No. 5310/71, Judgment of 18 January 1978; CAT, *Conclusions and Recommendations of the Committee Against Torture* CAT/C/USA/CO/2, 25 July 2006, para. 24. With regard to the first five techniques listed above, e.g., the Committee against Torture (*Concluding observations of the Committee Against Torture: Israel*, A/52/44, 9 May 1997, para. 257) found that they “constitute torture as defined in article 1 of the Convention [against Torture]. This conclusion is particularly evident where such methods of interrogation are used in combination, which appears to be the standard case.”

Out of Court Confessions Rules

Among the key instruments for governments to dissuade criminal investigators from resorting to torture or other prohibited treatment to obtain confessions from suspects are the rules governing interviews and the recording of confessions. In Kenya, the Attorney General, in consultation with the Law Society and the KNCHR, has issued rules governing out of court confessions.

The Evidence (Out of Court Confessions) Rules bar investigating officers from recording confessions, and only allow the Chief Inspector of Police and those of above rank to do so.⁸⁷ They have elaborate provisions on the processes and safeguards to be followed by recording officers.

85 IACrHR, *Loayza-Tamayo v. Peru*, Judgment of 17 September 1997 (Merits), para. 58.

86 ECtHR, *Kudla v. Poland*, Merits, Application No. 30210/96, Judgment of 26 October 2000, para. 92.

87 Available at http://www.kenyalaw.org/LegalNotices/pop_In.php?file=248.

In particular, Rule 4 pertaining to the rights of an accused person provides as follows:

- 1) "Where an accused person intimates to the police that he wishes to make a confession, the recording officer shall take charge of the accused person and shall ensure that the accused person –
 - (a) has stated his preferred language of communication;
 - (b) is provided with an interpreter free of charge where he does not speak either Kiswahili or English;
 - (c) is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment;
 - (d) is informed of his right to have legal representation of his own choice;
 - (e) is not deprived of food, water or sleep;
 - (f) has his duration, including date and time of arrest and detention in police custody, established and recorded;
 - (g) has his medical complaint, if any, adequately addressed;
 - (h) is availed appropriate communication facilities; and
 - (i) communicates with the third party nominated by him under paragraph (3) prior to the caution to be recorded under rule 5.
- 2) The recording officer shall not record a confession from any accused person who complains to him of being a victim of torture or whose physical appearance shows signs of physical injuries including open wounds, body swelling, or shows extraordinary fatigue or any other indicators that would suggest that the accused person has been tortured.
- 3) The recording officer shall ask the accused person to nominate a third party who shall be present during the duration of the confession session, and upon the appearance of the third party, the recording officer shall record the third party's particulars and relationship to the accused person."



Case Study: The *Kanini Case**

The appellant in this case was suspected of a double murder. She was charged shortly after the murders but released owing to a lack of evidence. Subsequently, she made a self-incriminatory statement in her evidence before an inquest into the deaths held before a Magistrate pursuant to Section 387 of the Criminal Procedure Code (CPC). The appellant was charged again and the statement admitted into evidence as a confession upon her trial. She then retracted the confession in her unsworn statement, stating that it was produced involuntarily and extracted from her by clan elders through compulsion and torture. The trial court nonetheless convicted her of two charges of murder on the basis of the retracted confession and sentenced her to death.

The Court of Appeal noted that "[i]n this appeal we sensed some assumption that an extra-judicial confession is only one that is made to the police and not that which is made to a judge or magistrate in court under Section 25A of the Evidence Act. In our opinion, extra judicial confessions are those made outside the trial court, while judicial confessions are those made before the trial court and which amount to pleas of guilty. A confession made before a judge or a magistrate under Section 25A who is not the trial judge or magistrate is still an extra-judicial confession and its admission is subject to all the safeguards prescribed by the law."

The Court of Appeal observed that the trial court was obligated to enquire into the circumstances under which the confession was made, to treat a retracted confession with utmost caution and convict on it only if fully satisfied of its truth or if the confession is corroborated by independent evidence.

"There is absolutely no scintilla of evidence that the appellant was ever cautioned before her confession was recorded. Worse still, there was sufficient evidence before the inquest court, which should have warned the court that the purported confession by the appellant was not truly voluntary. When PW5 testified on 30th May, 2005, he informed the court, among other things that the appellant had confessed to the murders of the deceased and his wife "because of the deaths of her two brothers and the fear of God."

The Court also observed that "[t]he onus of proving that a statement by an accused person is voluntarily made and not obtained by improper or unlawful methods is upon the prosecution and where there is doubt as to whether the confession was voluntary, the prosecution has not discharged the onus upon it." It thus found that the appellant's

confession was not voluntary and that there was no other evidence upon which the appellant's convictions could be sustained. It further found that the appellant ought to have been cautioned by the inquest court that her statement may be used in court in future. It also noted that the prejudice to the appellant was compounded by the fact that she was not represented by an advocate when she made the statement.

Moreover, there was evidence before the inquest court that should have warned that the confession was not truly voluntary. The Court opined that the trial judge should have exercised her discretion to exclude the confession even without recourse to Section 26 of the Evidence Act. Accordingly, the appeal was allowed and the conviction was quashed.

*Kanini Muli v Republic [2014] eKLR.



Tools

- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by United Nations General Assembly in Resolution 43/173 (1988) available at: <http://www.un.org/documents/ga/res/43/a43r173.htm>.
- Basic Principles for the Treatment of Prisoners adopted by United Nations General Assembly in Resolution 45/111 (1990), available at: <http://www.un.org/documents/ga/res/45/a45r111.htm>.
- Code of Conduct for Law Enforcement Officials adopted by United Nations General Assembly in Resolution 34/169 (1979) available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx>.
- 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 adopted by the United Nations General Assembly in Resolution 37/194, 18 December 1982 available at: <http://www.un.org/documents/ga/res/37/a37r194.htm>.
- Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the United Nations Commission on Human Rights in Resolution 2000/43 available at: <http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf>.
- Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa ("the Robben Island Guidelines"), adopted in Resolution 61 (2002) of the ACommHPR is available at: <http://www.achpr.org/sessions/32nd/resolutions/61/>.
- Torture is punishable under the Rome Statute of the ICC as a war crime and as a crime against humanity. The Elements of Crimes define the specific elements of the crime of torture for the purposes of Articles 7 (1) (f) and 8 (2) (a) (ii), 8 (2) (c) (i) of the Statute: <http://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf>.

3.7.2 Exclusion of Evidence Obtained through Torture, Inhuman or Degrading Treatment

Article 50 (4) of the Constitution provides that "[e]vidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice."

Under international law, Article 15 of the CAT states that "[e]ach State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings." In General Comment No. 2, the Committee Against Torture has clarified that this prohibition also applies in relation to inhuman and degrading treatment and that no limitation may be placed on this prohibition in any circumstances.⁸⁸

Similarly, the Robben Island Guidelines also require States to “[e]nsure that any statement obtained through the use of torture, cruel, inhuman or degrading treatment or punishment shall not be admissible as evidence in any proceedings except against persons accused of torture as evidence that the statement was made.”⁸⁹ The same position is set forth in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, which state (Article N. 6 (d)) that “[a]ny confession or other evidence obtained by any form of coercion or force may not be admitted as evidence or considered as probative of any fact at trial or in sentencing.”

A strict reading of Article 50 (4) of the Constitution would suggest that this provision falls short of the absolute prohibition on the use of statements obtained through torture in Article 15 of the CAT and the other international law provisions cited, as it would appear to make the exclusion of “torture evidence” subject to a condition, i.e. that “the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.” However, under Article 2 (5) and (6) of the Constitution, which incorporates general principles of international law and any international conventions ratified by Kenya as part of domestic law, Article 15 of the CAT would absolutely exclude evidence which is established to have been obtained as a result of torture.

Moreover, the Common Law has since long ago distinguished between the admissibility of improperly obtained confessions and the general position regarding evidence improperly obtained. In the well-known words of Lord Sumner in *Ibrahim v The King*:

“It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale.”⁹⁰

The law is now codified in Section 26 of the Kenya Evidence Act:

“A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.”



Activity: Policy Reasons for the Absolute Exclusion of Torture Statements

International law establishes that statements obtained by torture may not be admitted as evidence in any proceeding under any circumstances (except against the person accused of torture).

This is different from the position regarding evidence obtained in violation of other human rights, e.g. a search without warrant or an unlawful interception of a communication obtained in violation of the right to private life. In such cases, most international case law allows judges to balance the probative value of the evidence against the gravity of the human rights violation or other unlawfulness.

- Why do you think international law takes this inflexible stance regarding “torture statements”? Discuss the policy reasons behind this legal rule.

⁸⁹ ACHPR Robben Island Principles and Guideline.

⁹⁰ [1914] A.C. 599 at 609.



Activity

In the next pages four cases are presented, all relating to the use of statements alleged to have been obtained by torture or inhuman or degrading treatment as evidence in criminal proceedings. The cases illustrate several difficult issues that arise in this regard. As you read through them, consider the following issues and examine how the courts in these cases dealt with them:

- What is the relationship between the violation of safeguards regarding detention (such as access to a lawyer without delay) and the likelihood of torture occurring?
- Who bears the burden of proof regarding the question whether torture occurred? How does a violation of safeguards regarding detention (access to a lawyer, prohibition of incommunicado detention) affect the ability of the investigators to prove that self-incriminating statements were made voluntarily?
- In some cases, statements made under torture or other ill-treatment will lead investigators to other evidence. This “derivative evidence” can consist of objects or of the voluntary statements of a witness identified on the basis of the coerced statements. How do the courts deal with this situation?

Similar to other Common Law countries, Kenyan courts apply judges’ rules whenever the prosecution wishes to produce statements of confession, and a rebuttal by an accused person automatically shifts the burden to the prosecution to prove that it took the statement in compliance with statutory law and the judges’ rules.

To determine the issues raised by the accused, Kenyan courts conduct a trial within a trial; the objective and purpose of which is to enable the prosecution to fully establish that they fully complied with the legal requirements regarding the confession that they wish to rely on. Each party is allowed to call witnesses and the standard of proof is that of reasonable doubt.



Case Studies: The Exclusion of Evidence in Violation of Human Rights Law

The *Taba* Case:*

On 6 October 2004, bomb attacks in the Taba and Nouweiba tourist resorts on the Sinai Peninsula led to the death of 34 and injury of more than 100 Egyptians and foreigners. The Egyptian security forces arrested a large number of persons in the aftermath of the attacks, among them Mohamed Gayez Sabbah, Osama Mohamed Abdel-Ghani Al-Nakhlawi and Younis Mohamed Abu-Gareer. They were detained incommunicado (including without access to a lawyer) for about half a year, then tried by the Supreme State Security Court of Egypt, found guilty primarily based on confessions they made while in detention, and sentenced to death.

Two human rights organizations brought applications on their behalf before the ACommHPR. The ACommHPR found it established that the three men made their confessions after having been subjected repeatedly to torture (at paragraph 189). The three men were detained without access to the outside world for six to nine months. They complained about the ill-treatment a first time when they were brought before a prosecutor. The public prosecution had them medically examined and determined that they were free from external injuries. The defendants then complained to the trial court, which ordered a medical examination. In spite of the long time elapsed, the medical examination showed unexplained injuries compatible with the torture alleged by the three men, but the court did not investigate the matter further. Instead it sentenced the defendants to death relying on their confessions made to the security forces.

In its decision, the ACommHPR reiterated several very important principles also contained in the jurisprudence of the other international human rights bodies:

- When a person is injured in detention or while under the control of the security forces, there is a presumption that the person was subjected to torture or ill-treatment (at 168).
- If the prosecution wishes to rely on evidence which an individual claims was obtained through torture or ill-treatment, the burden falls on the prosecution to establish that evidence has not been obtained through torture or inhuman and degrading treatment. The ACommHPR stated that “once a victim raises doubt as to whether

particular evidence has been procured by torture or other ill-treatment, the evidence in question should not be admissible, unless the State is able to show that there is no risk of torture or other ill-treatment.” (at 212)

- Moreover, where a confession is obtained during incommunicado detention, it should be considered to have been obtained by coercion and not be admitted as evidence (at 212).⁹¹
- Access to a lawyer is one of the necessary safeguards against abuse during the pre-trial process (at 179).
- Prompt recourse to a judicial authority, independent of the authorities detaining, interrogating and ultimately prosecuting, constitutes a vital aspect of the prevention and deterrence of torture and other ill-treatment (at 183). Appearance of the detainees before a prosecutor is not sufficient to satisfy this requirement.

Among other remedies, the ACommHPR recommended to Egypt not to carry out the death sentences, to release the three men and to adequately compensate them. In February 2012 the Egyptian Government repealed the death sentences.

The Harutyunyan Case:**

Mr. Harutyunyan and other young men (A, H and T) were on a guard shift during military service. H was later found dead in a trench, having been killed by a machine-gun shot. Military police took Mr. Harutyunyan, A and T to their post and subjected them to prolonged severe ill-treatment to coerce them into revealing what had happened. On the second day of detention, T and A stated Mr. Harutyunyan had killed H. Mr. Harutyunyan was subjected to torture for over a month, until he confessed to an investigator (not the military police officers who had ill-treated him) that he had accidentally shot H. He was then charged with murder. On the following day, Mr. Harutyunyan was taken to the site of the incident, where he re-enacted what had happened according to his confession, which was video-recorded. Five months after the killing, a confrontation between Mr. Harutyunyan and T (who was still in military service), during which T confirmed his earlier testimony. T and A again confirmed their statements at a court hearing two months later.

The torture was subsequently reported to the military prosecutor, medical examination confirmed that the three men had injuries compatible with the treatment they alleged the military police had subjected them to, and criminal proceedings were initiated against the alleged torturers in which they were eventually sentenced to three years imprisonment.

The case against Mr. Harutyunyan proceeded to trial. At trial, the accused revoked his confession, while A and T (who had in the meantime both been demobilised) revoked their statements incriminating him, explaining that those statements had been coerced. The court, however, found the testimony of Mr. Harutyunyan, T and A at trial unconvincing. The court noted that the accused had confessed to an investigator, not the military police officers who had ill-treated him, and that T and A had confirmed the statements initially made under coercion from the military police several months later. The court also adduced other, rather weak, circumstantial evidence and found the accused guilty of murder. This judgment was upheld on appeal. All the courts involved accepted as a fact that Mr. Harutyunyan, T and A had been tortured.

The ECtHR found that the domestic courts had not adequately taken into account the impact of the torture on the fairness of the trial. It took the view [at paragraph 65] that “where there is compelling evidence that a person has been subjected to ill-treatment, including physical violence and threats, the fact that this person confessed – or confirmed a coerced confession in his later statements – to an authority other than the one responsible for this ill-treatment should not automatically lead to the conclusion that such confession or later statements were not made as a consequence of the ill-treatment and the fear that a person may experience thereafter. . . .

Finally, there was ample evidence before the domestic courts that witnesses T. and A. were being subjected to continued threats of further torture and retaliation Furthermore, the fact that they were still performing military service could undoubtedly have added to their fear and affected their statements, which is confirmed by the fact that the nature of those statements essentially changed after demobilisation. Hence, the credibility of the statements made by them during that period should have been seriously questioned, and these statements should certainly not have been relied upon to justify the credibility of those made under torture.”

⁹¹ The ACommHPR's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa equally state (Article N. 6 (d) (2)): “Any confession or admission obtained during incommunicado detention shall be considered to have been obtained by coercion.”

In the light of these considerations, the ECtHR concluded “that, regardless of the impact the statements obtained under torture had on the outcome of the applicant’s criminal proceedings, the use of such evidence rendered his trial as a whole unfair.” There had accordingly been a violation of the right to a fair trial.

The Mthembu Case:***

Mr. Mthembu, a former police officer, was charged with the theft of two vehicles and a robbery at a post office, at which he obtained a steel box with a substantial amount in cash. The prosecution case relied in large part on the statements of an accomplice, Mr. Ramseroop, and on the fact that one of the vehicles and the steel box had been found at Ramseroop’s home, where he had been concealing them on behalf of the accused. The second stolen vehicle had been found independently.

The case went to trial four years later. Mr. Ramseroop testified that the accused Mr. Mthembu had handed him the car and the steel box for hiding. It also emerged, however, that the investigators had tortured Mr. Ramseroop (including through the use of electric shocks) at the police station before he showed them where the vehicle and the steel box were hidden. The court found Mr. Mthembu guilty on all counts and sentenced him to 23 years’ imprisonment. It reasoned that the vehicle and the steel box existed independently of the accomplice’s coerced statements, and that they therefore constituted relevant and reliable evidence.

On appeal, the Supreme Court of Appeals distinguished between a confession extorted by improper means, which was not admissible as evidence, and the so-called “real evidence”, objects which were found as a result of information obtained improperly. The Supreme Court noted that traditionally real evidence was not excluded, as its reliability was not influenced by the means used to find it.

The Supreme Court went on to note, however, that this had changed with the entry into force of the Bill of Rights in the Constitution of South Africa in 1996, which provides in Article 35(5):

“Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.”

The Supreme Court reasoned that “to admit Ramseroop’s testimony regarding the [car] and the metal box would require us to shut our eyes to the manner in which the police obtained this information from him. More seriously, it is tantamount to involving the judicial process in ‘moral defilement’. This ‘would compromise the integrity of the judicial process (and) dishonour the administration of justice’. In the long term, the admission of torture-induced evidence can only have a corrosive effect on the criminal justice system. The public interest, ... , demands its exclusion, irrespective of whether such evidence has an impact on the fairness of the trial.”

The Supreme Court quashed the convictions for the theft of the vehicle found at Ramseroop’s home and for the post office robbery. It upheld the conviction for the theft of the other vehicle and reduced the sentence to four years.

In conclusion, the Supreme Court noted that Mr. Mthembu, “who ought to have been convicted and appropriately punished for having committed serious crimes, will escape the full consequences of his criminal acts. The police officers who carried the responsibility of investigating these crimes have ... , by torturing Ramseroop ... themselves committed crimes of a most egregious kind. They have treated the law with contempt and must be held accountable for their actions.” The Supreme Court therefore transmitted its judgment to the minister competent for the police, to the national police commissioner, to the South African Human Rights Commission and to the National Director of Public Prosecutions for follow-up action.

The Ghailani Case:****

Ahmed Khalfan Ghailani was on trial in the United States Federal Court in New York City charged with murder, conspiracy to commit terrorist offences, and other offences for his suspected involvement (he was accused of playing a key logistical role) in the terrorist bombings in 1998 of the United States Embassies in Kenya and Tanzania, which killed 224 people.

Mr. Ghailani had been captured in Pakistan in 2004 and had been detained at a secret detention facility of the United States CIA (a so-called “black site”) and at the Naval Base in Guantánamo for five years before being put on trial in civilian court. Under interrogation during his detention at the CIA “black site” Mr. Ghailani made statements which reportedly amounted to confessions of his role in the bombings. The prosecution made no attempt to introduce these statements as evidence at trial. Mr. Ghailani also made statements to the CIA investigators that led them to a man called Husein Abebe. Mr. Abebe subsequently told the investigators that he had sold Mr. Ghailani the explosives used in the attacks.

The prosecution considered Mr. Abebe a key witness, but Mr. Ghailani's defence objected to his being called to testify at trial on the ground that the information leading to the identification of Mr. Abebe as a witness had, allegedly, been extorted from Mr. Ghailani under torture. The United States Government declined to provide information to the judge on the circumstances under which Mr. Ghailani had been interrogated and accepted that the judge would, as a consequence, assume that Mr. Ghailani's statements had been coerced.

To decide on the question of the admissibility of Mr. Abebe's testimony, the judge held closed hearings at which he heard as witnesses persons who were present when Mr. Abebe was persuaded to confess his role, to implicate the accused, and to cooperate with the authorities. He then ruled that the US Constitution did not allow Mr. Abebe to take the stand as a witness because "the government has failed to prove that Abebe's testimony is sufficiently attenuated from Ghailani's coerced statements to permit its receipt in evidence." The Court added:

"The Court has not reached this conclusion lightly. It is acutely aware of the perilous nature of the world in which we live. But the Constitution is the rock upon which our nation rests. We must follow it not only when it is convenient, but when fear and danger beckon in a different direction. To do less would diminish us and undermine the foundation upon which we stand."

The Jury subsequently acquitted Mr. Ghailani on all but one of the more than 280 charges against him, including on charges of murder and conspiracy to use weapons of mass destruction. He was, however, found guilty on one count of conspiracy to destroy government buildings and property. The Court imposed a life sentence.

*ACommHPR, *Egyptian Initiative for Personal Rights and Interights v. Egypt*, Merits, Communication No. 334/06, at 185, 1 March 2011

**ECtHR, *Harutyunyan v. Armenia*, Application No. 36549/03, Judgment of 28 June 2007, at 63.

***Supreme Court of Appeals of South Africa, *Mthembu v The State*, Case no. 379/07, Judgment of 10 April 2008.

****US District Court Southern District of New York, *United States of America v. Ahmed Khalfan Ghailani*, Case no. S10 98 Crim. 1023(LAK), 12 July 2010.



Tools

- United Nations Guidelines on the Role of Prosecutors, in particular Principle 16, set out the professional responsibilities of prosecutors who come into possession of unlawfully obtained evidence. They are available here: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>.
- The *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* is intended to serve as international guidelines for the assessment of persons who allege torture and ill-treatment, for investigating cases of alleged torture and for reporting findings to the judiciary or any other investigative body. It is available here: <http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf>.



Further Reading

- The Special Rapporteur on torture has produced a report on the exclusionary rule (the absolute prohibition on the use of statements made as a result of torture or other ill-treatment), A/HRC/25/60: <http://www.refworld.org/docid/53185c254.html>.
- In the case of *A (FC) and others v Secretary of State for the Home Department* (decision of 8 December 2005) the United Kingdom's House of Lords examines the question of the admissibility of evidence possibly obtained under torture from the point of view of the common law: <http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd051208/aand-2.htm>.

3.7.3 Right against Self-Incrimination/Right to Remain Silent

Article 50 (2) (i) of the Constitution provides that “[e]very accused person has the right to remain silent, and not to testify during the proceedings,” while Article 50 (2) (l) stipulates more clearly the right “to refuse to give self-incriminating evidence.” With regard to arrested persons, Article 49 (1) (d) provides for the right “not to be compelled to make any confession or admission that could be used in evidence against the person.”

Under international law, the right to remain silent is enshrined in Article 14 (3) (g) of the ICCPR. Although there is no similar provision in the Banjul Charter, the right to a fair trial in this instrument has been interpreted as including the right against self-incrimination. This is clarified by the Principle 9 (b) of the Luanda Guidelines as follows; “[t]he right of persons undergoing questioning to remain silent shall be respected at all times. It shall be prohibited to take undue advantage of the situation of a detained person for the purpose of compelling or inducing him or her to confess, to incriminate himself or herself, or to testify against another person.”

Section 25 A (1) of the Evidence Act provides that “[a] confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person’s choice.” Section 26 further provides that

“[a] confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.”

Evidently, these provisions preclude the police or anyone from taking statements from suspects or accused persons by inducing or intimidating them into self-incrimination. It is often understood that only police officers and magistrates can obtain confessions. However, in the Kanini case discussed in section 3.7.1. above, the Court of Appeal was prepared to expand on those who could by their authority extract confessions and stated as follows;

“A chief was regarded, for purposes of statements made to him by an accused person, as a person in authority in *REX VS ERIYA KASULE & OTHERS* (1947-1949) EA 148, while in *GOPAS/O GIDAMEBANYA & OTHERS VS REGINA* (1952-1953) EA 318; a headman was treated as a person in authority. In an Africa context like that in which the appellant found herself, we would be slow to say that clan elders are “not persons in authority” in this case. On the evidence, the elders and the family of the appellant brought pressure to bear upon her to make the confession and to open negotiations with the family of the deceased so as to avoid evil of a temporal nature, namely further deaths in the family believed to be caused by the Kithutu oath. To that extent, the appellant’s statement was one extorted from her either by fear of prejudice to her family or hope of the advantage of preventing further deaths in the family. We would add even sheer terror of the oath.”

Suspects or accused persons therefore have the protection of opting not to give a statement. The practice in Kenya is for the trial court to explain to the accused person the process of conducting his/her defence, including the right to remain silent, and it is generally understood and accepted that no adverse inference may be drawn on the basis of whether the accused opts to give evidence or remain silent. Some authors have argued however, that the accused is best advised to say something in his/her defence unless there is a very good reason to remain silent.⁹² The centrality of this matter to the principles of a fair trial was further elaborated in the SLAA case discussed below.

92 Cross & Tapper on Evidence, 12th Edition at p. 416. <https://global.oup.com/academic/product/cross-and-tapper-on-evidence-9780199574148?cc=us&lang=en&#>



Case Study: The Right to Remain Silent in the SLAA Case*

One of the issues that the High Court had to consider was with regard to the amendments by SLAA to Section 20 (A) (6) of the Evidence Act. It was argued that the amendment created a requirement that if an accused person chooses to remain silent, then the facts in issue will be deemed to have been admitted, in contravention to Article 50 (2) (i) of the Constitution.

The Court examined the provision in detail, including the requirement that the accused had two days to examine and object to the production of the statement. In particular, it looked at subsection 4, which was interpreted to mean that once the two days had elapsed without the accused contesting the production of the statements, he/she could not subsequently contest them during the trial. While considering decisions from the other jurisdictions, the Court stated as follows:

"[369] Under subsection 4, if the accused person does not object to the production of the statement at least two days prior to the proceedings, it means by implication, the same statement will be tendered in evidence without his consent. His silence is construed as an admission. Once admitted, it is not open to the accused to challenge such admission. Subsection 4 generated even more controversy between the parties with the petitioners contending that it negated the right to silence.

[370] Foremost, we would point out that the rationale behind the right to silence is the concern for reliability: see *Beghal vs DPP* 2014, 2WLR 150 where the European Human Rights Court's decision at Strasbourg in *Saunders vs United Kingdom*, 1996, 23 EHR313 was cited with approval. The right, which runs from the moment an individual is arrested and throughout a trial, gives effect to the privilege against self-incrimination and buttresses the presumption of the accused person's innocence: see *Beghal vs DPP* (supra). Because of the latter presumption the accused person cannot be forced into assisting in his or her own prosecution.

[371] In our view, where a statute therefore states or purports to state that an accused person's non-reaction or silence in relation to what the prosecution seeks or says in relation to his indictment and trial including a statement(s) by the prosecution witness(es) means that the statement is to be admitted in evidence, then it would imply that the accused person is indirectly being forced to assist the prosecution in his own prosecution. This may also lead to the absurd scenario where there are no witnesses testifying but the accused is still convicted simply because he exercised his right to keep silent.

[372] Besides, admission of statements without the maker being called to testify and with the accused person having kept his peace would also mean that the right to challenge evidence prompted by Article 50(2) (k) particularly through cross-examination would be transgressed.

[373] For the reasons above we hold that Sections 26 of SLAA and 20A of the Evidence act as amended is unconstitutional as it limits the right to a fair trial by denying the accused the choice to keep silent."

**Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others* [2015].

In the context of counter-terrorism, POTA contains in Section 34 – “power to gather information” – a provision that raises interesting questions regarding the way it is to be coordinated with the right to remain silent and the privilege against self-incrimination. The aim of the provision appears to be to allow the police, under judicial control, to force a person who is reasonably suspected of having information that could allow the police to apprehend a suspect or thwart an attack under preparation, but is refusing to cooperate, to disclose what he or she knows. The drawback is that any information disclosed by the person subjected to the exercise of section 34 powers, as well as any evidence derived from the evidence obtained from the person, cannot be used “in any proceedings against that person, other than in a prosecution for perjury or giving false evidence.”



Activity

Carefully examine Section 34 of the POTA.

In its text, this provision appears to acknowledge that the powers it provides raise questions with regard to the privilege against self-incrimination: "A person shall not be excused from answering a question or producing a document or thing ... on the ground that the answer or document or thing may incriminate the person" (sub-section 7). Discuss

- In what situations should the police apply for and a magistrate grant the use of Section 34 powers?
- Assume that you have been retained as legal counsel by a person subjected to the use of Section 34 powers. This person admits to you that he has acted as driver for persons he suspects of being terrorist operatives. Your client is afraid of being charged with supporting terrorism and, even if he is not charged, of losing his job if he admits to the police his role and what he knows. What is your advice to him?
- Consider the case of *Heaney and McGuinness* below. How can the Irish law that was found to be incompatible with the privilege against self-incrimination and the right to remain silent in that case be distinguished from Section 34 of the POTA?



Case Study: The *Heaney and McGuinness Case**

A large explosion at army barracks killed five soldiers and a civilian. As part of the investigation in the immediate aftermath of the explosion, the police raided a house suspected to be used by the Irish Republican Army (IRA, an unlawful paramilitary organization), which was suspected to have carried out the attack. Items including balaclavas and latex gloves were found in the house. Heaney, McGuinness and others, suspected of being members of the IRA, were found at the house and arrested. Heaney and McGuinness were questioned about their movements that day, in particular their movements around the time at which the explosion occurred. The police also read out to them Section 52 of Ireland's counter-terrorism legislation, which makes it a separate offence not to provide an account of one's movements. They refused to answer.

After tests, the items found in the house proved not to be forensically linked to the bombing. Heaney and McGuinness were charged with membership of an unlawful organization (the IRA) and, under Section 52, with failing to provide an account of their movements during a specified period. Also at trial, Heaney and McGuinness remained silent. They were acquitted on the membership charges, but found guilty with regard to the failure to provide an account of their movements and sentenced to six months imprisonment.

Heaney and McGuinness brought their case before the ECtHR. The Government argued that Section 52 was a proportionate response to the threat posed by terrorism in Ireland at the time. The ECtHR found, however, that the degree of compulsion imposed on Heaney and McGuinness by Section 52 of the counter-terrorism law with a view to compelling them to provide information relating to the charges against them was such as to in effect destroy the very essence of the privilege against self-incrimination and the right to remain silent (at 55). The ECtHR therefore found a violation of the right to a fair trial. Moreover, the ECtHR noted the close link between the right not to incriminate oneself and the presumption of innocence and found a violation of the latter, too.

*ECtHR, *Heaney and McGuinness v. Ireland*, Application No. 34720/97, Judgment of 21 December 2000.



Case Study: The *Mogamat Phadiel Orrie Case**

This is a South African case in which the High Court had been called upon to determine the admissibility of a statement made by the second accused to the police during investigations into a murder. Both accused persons had been charged with the offence of murder; unlawfully killing two State witnesses who were in a witness protection programme.

South African law requires that before recording a statement with the police, a suspect should be informed of the right to remain silent and legal representation among others. The Court found that the accused had not been informed of the consequences of making any statement, i.e. that such a statement could be used as evidence against him in a court of law, and that he was entitled to a legal practitioner assigned by the State. The issue for determination was whether these shortcomings rendered the accused's trial unfair. In this regard, the question of the nature and extent of the prejudice suffered by the accused was considered relevant.

The Court opined that the admission of a statement obtained without warning that it may be used against the maker would inevitably taint the fairness of any subsequent trial. It was noted that

"although a statement may on the face thereof appear exculpatory, it may nevertheless have prejudicial consequences for the statement maker, for example, where the statement maker has furnished a false exculpatory explanation."

For purposes of deciding on the admissibility of such statements following a breach of the statement maker's constitutional rights, the Court found that this could be determined on the same basis as confessional statements, since, in both cases, the suspect or the accused is conscripted to give evidence against him/herself. It was assumed that the disputed statement, although not confessional in nature, compromised the accused in some way. The Court therefore declared that the statement was inadmissible on the ground that it was obtained from the accused in violation of the constitutional duty to inform him that any statement he made could be used against him in later proceedings.

**S v Orrie and Another* (SS 32/2003) [2004] ZAWCHC (14 October 2004)

3.8 SEARCH AND SEIZURE

The search of persons and property, as well as the seizure of property may engage several rights, including the right to a private and family life where law enforcement officials conduct a search of premises owned or used by a suspect and, where property is seized, the right to the peaceful enjoyment of possessions. It may also interfere with the right to a fair trial, where the premises of lawyers are searched, or the fundamental freedoms of expression and association.

Article 31 of the Constitution guarantees every person the right to privacy. This includes the right not to have "their person, home or property searched," under Article 31 (a) and "their possessions seized" under Article 31 (b). However, this is not an absolute right as it does not fall under the category of rights that cannot be limited under Article 25 of the Constitution. As in the case of other non-absolute rights, the essential requirements for the limitations of fundamental rights stipulated in Article 24 (1) of the Constitution are therefore applicable, and discussed in detail in Chapter 1, section 1.5.

The POTA also provides for limitation of certain rights and fundamental freedoms of a person or entity to whom the Act applies. In particular, under Section 35 (3) (a) (i) and (ii), the limitation of a fundamental right and freedom under the provision shall relate to "[t]he right to privacy to the extent of allowing a person, home or property to be searched and possessions to be seized." Under Section 35 (2), "[t]he limitation of a right or fundamental freedom such as the right to privacy applies only for the purposes of ensuring:

- a) the investigations of a terrorist act;
- b) the detection and prevention of a terrorist act; or
- c) that the enjoyment of the rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedom of others."

This is in line with Article 24 (2) of the Constitution, which provides that “[a] provision in legislation limiting a right or fundamental freedom -

- a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;
- b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and
- c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.”



Case Study: The *Abubakar Shariff Abubakar Case**

The petitioner claimed that in June 2011, while away from his home in Mombasa, police officers stormed his house armed with a search warrant issued that day at the Chief Magistrate’s Court. The warrant allowed for the search and seizure of “drugs, explosives, illegal firearms and military uniform.” The said items were not recovered in the house, but police seized other items instead. A list of the seized items, which included electronic equipment, phones and computer items, was prepared at the scene and signed by the petitioner’s wife who was present. They were later released to the petitioner in July 2011, after the Court found their continued retention by police to have been unlawful.

The petitioner averred that the search and seizure was illegal, and sought vindication for violation of his rights to equal protection and benefit of the law, as well as inherent human dignity, privacy and protection of property guaranteed by Articles 27 (1), 28, 31 and 40 (3) of the Constitution. In its reply, the State, through a Chief Inspector of the ATPU, submitted that the police had received credible intelligence information that the petitioner had stored illegal arms, military uniforms, narcotic drugs and explosive materials in a bunker inside his house. This information prompted the police to apply for a search warrant. The information received also revealed that the contraband material had been concealed in various items, hence justifying the seizure of items outside of the warrant.

The Court acknowledged that although the petitioner was guaranteed the right to privacy under Article 31, this could be lawfully curtailed as provided in Article 24 of the Constitution. It further noted that the existence of a valid search warrant and probable cause provides valid justification for the limitation of a person’s right to privacy and, as such, any search and seizure in pursuance of a lawful warrant cannot be said to amount to a violation of a person’s constitutional rights and freedoms. The Court therefore found that the search by police of the petitioner’s residence having been properly sanctioned by law did not amount to a violation of his fundamental rights and freedoms.

**Abubakar Shariff Abubakar v Attorney General & the D.P.P* [2014] eKLR.

3.9 SPECIAL INVESTIGATION TECHNIQUES

The clandestine nature of terrorist conspiracies and activities, as well as the mode of operation of terrorist organizations requires specialized investigation methods. With developments in modern technology, a wide array of investigative techniques lies at the disposal of law enforcement agencies when combating terrorism. Many different forms of covert surveillance are possible, covering all of the modern forms of communication, as well as visual surveillance of suspects or the audio surveillance of premises in which they live or meet. The use of covert human intelligence, whether undercover agents or informants, is also a common method used in preventing, detecting and prosecuting acts of terrorism.

The covert investigation techniques mentioned above are often referred to as “special investigation techniques” (SITs). There is no universally accepted definition or list of SITs, and their constant evolution as technologies change makes a comprehensive list elusive. In 2005, the CoE adopted recommendations to member States on SITs, and in that context defined them as follows: ‘Special investigation techniques’ means techniques applied by the competent authorities in the context of criminal investigations for the purpose of detecting and

investigating serious crimes and suspects, aiming at gathering information in such a way as not to alert the target persons.”⁹³

While these and other investigative techniques are useful and often necessary in combating terrorism, their very aim, i.e. to gather information about persons in such a way as not to alert the target, means that their use will nearly always involve an interference with the right to private life of the target and other persons. Moreover, the investigative agencies will often feel the need to prevent disclosure at the pre-trial and trial stages of how SITs were used. This can raise difficult questions from the point of view of the right to a fair trial, which are examined in Chapter 5, sections 5.10.4 and 5.10.5.

Additional human rights concerns surrounding the use of SITs include the risk of a discriminatory use in racial, political or religious profiling practices, and the impact of covert surveillance on the fundamental freedoms of religion, thought, expression, assembly and association. For all these reasons, their use must be regulated and carefully supervised, including judicial authorization, where appropriate, in order to ensure that human rights are respected.

3.9.1 Undercover Agents and Informants

The use of informants and undercover agents can be a key tool in the investigation of terrorist offences and, before an offence is committed, in gathering information about the activities of terrorist groups, disrupting their plans, and therefore saving innocent lives through the prevention of acts of terrorism.

The challenge faced by investigators and prosecutors usually springs from two angles. Firstly, how will the courts treat information gathered from such sources when informants are not called as witnesses, and secondly, how to treat informants and more particularly undercover agents who may have to engage in criminal processes and sometimes even encourage suspects to continue the pursuit of their criminal actions.

With regards to informants, the Court of Appeal in the case of *Kigecha Njuga*⁹⁴ stated that:

“Informants play a useful part no doubt in the detection and prevention of crime, and if they become known as informers to that class of society among whom they work, their usefulness will diminish and their very lives may be in danger. But if the prosecution desire the courts to hear the details of the information an informer has given to the police clearly the informer must be called as a witness.”

In the case of *Joseph Otieno Juma*⁹⁵ the Court of Appeal also observed as follows:

“Finally, whether the informers should have been summoned to testify, we are aware of the fact that their protection springs from public interest considerations, because were they to testify, their future usefulness is the same role could be extinguished or their effectiveness in their work considerably impaired!”

93 CoE, Recommendation Rec (2005) 10 of the Committee of Ministers to Member States on “special investigation techniques” in relation to serious crimes including acts of terrorism, Adopted by the Committee of Ministers on 20 April 2005.

94 *Kigecha Njuga v. Republic* [1965] E.A. 773.

95 *Joseph Otieno Juma v. Republic* [2011], eKLR.



Small Glossary Regarding Undercover Agents and Informants*

- Informant: A person who provides information to the authorities. Informants can be former criminals or suspected to be part of or otherwise associated with a terrorist group, as well as members of the public. Here the term is used primarily to refer to informants who are part of a terrorist group i.e. “participating informants”.
- Undercover Agent: A law enforcement officer or other person tasked by handlers with gathering information and evidence covertly, for instance by infiltrating an organization suspected of terrorism-related offences.
- Handler of the Informant or Undercover Agent: A law enforcement officer who is the point of contact for an informant or undercover agent.
- Entrapment: The act of government agents or officials that induces a person to commit a crime he or she is not previously disposed to commit.
- Agent Provocateur: An undercover agent who entices another person to commit an illegal act.

*This glossary intends to clarify the meaning of these terms, not to provide their official definitions.

In some circumstances, it will be possible for law enforcement agencies to infiltrate an undercover agent into the midst of a terrorist group or conspiracy. More often, law enforcement agencies, whether by inducement or threat such as that of prosecution, may be able to persuade an individual already involved in a terrorist grouping or conspiracy to provide information on the activities of the organization. This may involve the informant becoming enmeshed in a particular conspiracy so as to provide information on its development, or to participate in certain of the activities of the organization more generally. In return for this, it will usually be necessary for the informer to be promised some form of immunity from prosecution.

The United Nations Convention against Transnational Organized Crime (UNTOC) encourages States Parties, including Kenya, to make use of undercover agents and participating informants in the investigation of organized crime groups.



UNTOC Provisions on Undercover Operations and Use of Participating Informants

Under Article 20 (1), States are required, if permitted by the basic principles of their national legal systems, to allow for the use, where appropriate, of undercover operations or infiltration of criminal operations in their territory, for the purpose of combating organized crime. Article 26 of UNTOC deals with the use of participating informants. It reads:

Measures to Enhance Cooperation with Law Enforcement Authorities

1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in organized criminal groups:
 - (a) To supply information useful to competent authorities for investigative and evidentiary purposes on such matters as:
 - (i) The identity, nature, composition, structure, location or activities of organized criminal groups;
 - (ii) Links, including international links, with other organized criminal groups;
 - (iii) Offences that organized criminal groups have committed or may commit;
 - (b) To provide factual, concrete help to competent authorities that may contribute to depriving organized criminal groups of their resources or of the proceeds of crime.
2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence covered by this Convention.
3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence covered by this Convention.

As with other SITs, the use of informants and undercover agents will generally involve a covert intrusion into the private life of the persons targeted by the investigation and potentially other persons. There are also human rights concerns that are specific to their use, including:

- Considering that undercover agents and, to a lesser extent, informants, are acting on behalf of the State, to what extent should they be allowed to take part in committing crimes?
- Where is the line between the use of an agent or informer as a legitimate means of gathering information or evidence, and the point at which such activities amount to impermissible inducement to commit crime, also known as “entrapment” or use of an “agent provocateur”?
- Acting as undercover agent infiltrated into a terrorist group, or an organized crime group more generally, or as an informant on such a group will often be dangerous. To what extent does the State have an obligation to protect the life and security of the undercover agent or informant?

With regard to the first question, to be able to gain or maintain a role in the terrorist group that provides access to the information sought by the investigating agency, the undercover agent or informant will most often be involved in the criminal activities of the group. The UNODC Model Legislative Provisions against Organized Crime therefore provide that an officer infiltrated into a criminal group may “make available legal and financial means, transport, storage, housing and communications needed for the perpetration of those offences” without becoming criminally responsible.⁹⁶

In addition to the need for domestic law to provide a legal framework for such activities, there are important limitations imposed by international human rights law on the activities in which an undercover agent or participating informant can become involved. Where an informant is acting under the control of a State or its law enforcement agencies, it is clearly impermissible for a State to allow the informant to participate in the abuse of fundamental human rights, such as acts involving killing, enforced disappearance or torture and ill-treatment. The prohibition on torture and the arbitrary deprivation of life are absolute and cannot be justified, even by reference to important law enforcement goals such as the investigation of terrorism.

Regarding the second question, “sting” operations, whereby those suspected of serious crime are allowed by law enforcement agencies to commit crime within a controlled environment monitored by police for purposes of detection, arrest and prosecution, can provide an invaluable tool in preventing and suppressing serious crime. Indeed, Article 20 (1) of the UNTOC calls on Kenya and other State Parties to “take the necessary measures to allow for the appropriate use of controlled delivery ... by its competent authorities in its territory for the purpose of effectively combating organized crime.”

It is important, however, that such efforts do not transgress into the territory of encouraging and inducing the commission of crimes which otherwise would not have occurred. “Undercover agents must not provide an opportunity to commit an offence to a person they do not reasonably suspect to be engaged in criminal activities. Where they have such reasonable suspicion, they should not induce the commission of an offence where the person had no pre-existing intent of committing it.”⁹⁷ Whether that line was crossed will often be a question requiring a detailed examination of the facts of the specific case.

The issue of entrapment came up in *Mohamed Kuriow Nur vs AG*,⁹⁸ in which the High Court stated “[t]he law is that it is not acceptable that the State, through its agents, should instruct its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. That could be a misuse of state of power and an abuse of the process of the Court. The unattractive consequences, frightening and sinister in extreme cases, which the state conduct of this nature have are obvious ... It cannot be strongly emphasized that it is wholly wrong for a police officer to induce a person to commit an offence in order that an offence may be detected by the said officer...”

⁹⁶ UNODC Model Legislative Provisions against Organized Crime, Article 15, paragraph 3. The UNODC Model Legislative Provisions are intended to assist States in implementing the Convention

⁹⁷ Organization for Security and Co-operation in Europe (OSCE), Human Rights in Counter-Terrorism Investigations, p. 41.

⁹⁸ Mohamed Kuriow Nur v. Attorney-General [2011] eKLR



Two Cases on the Use of Agents Provocateurs

The following two cases deal with the question of where the line runs between the use of an agent or informer as a legitimate means of gathering information or evidence and impermissible inducement to commit crime.

The *Ramanauskas* case*: Mr. Ramanauskas was a prosecutor working in Lithuania. He was approached by AZ, a person unknown to him, who offered him a substantial bribe, in order to secure the acquittal of a person charged with a serious offence. AZ was in fact an officer of the police anti-corruption team. Initially, Mr. Ramanauskas refused the bribe, but accepted after AZ had reiterated the offer a number of times.

At [51 and 55], the ECtHR held that impermissible “police incitement occurs where the officers involved – whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed ...”

The ECtHR noted [67- 68] that it must consider the fact that there was no evidence that Mr. Ramanauskas had committed any offences beforehand, in particular corruption-related offences. Secondly, all his meetings with the undercover officer took place at the latter’s initiative. Thirdly, the suspect seemed to have been subjected to blatant prompting and encouragement. The ECtHR concluded that the actions of the undercover agent went beyond the mere passive investigation of existing criminal activity and that Mr. Ramanauskas’s prosecution contravened his right to a fair trial.

The *Nuttall and Korody* case**: In this case, a Canadian couple, Mr. Nuttall and Ms. Korody, conspired to plant explosives on the grounds of the legislature of British Columbia, a province of Canada. Undercover police played a decisive role in hatching the plan and in the logistics for the attack: the main undercover officer had acted as the couple’s “spiritual guide”, while other officers had impersonated members of a foreign terrorist group that threatened the couple if they were to back off from the attack plans. The jury convicted Nuttall and Korody of several terrorism offences. The defendants applied to the Supreme Court, arguing that the police’s “failure to respect the boundaries of permissible police conduct resulted in a police generated crime” (at para. 2), and that the proceedings should be stayed on grounds of entrapment and abuse of process by the police.

The British Columbia Supreme Court stayed the proceedings on both grounds advanced by the defendants. With regard to the defence of entrapment, the judge found that “[t]he police took two people who held terrorist beliefs but no apparent capacity or means to plan, act on or carry through with their religiously motivated objectives and they counselled, directed, urged, instructed and moulded them into people who could, with significant and continuous supervision and direction by the police, play a small role in a terrorist offence.” (at para. 775) The judge further concluded that “to permit the defendants’ conviction to stand in the face of this kind of police misconduct would be offensive and would cause irreparable damage to the integrity of the justice system.” (at para. 835) This was “one of the rare cases where a stay of proceedings is warranted due to an abuse of process” (at para. 837).

*ECtHR, *Ramanauskas v. Lithuania*, Application no. 74420/01, Judgment of 5 February 2008.

***R. v. Nuttall*, 2016 BCSC 1404, 29 July 2016.

Procedural Issues: In order to have a fair trial, an accused must be able to raise the question of entrapment at or prior to trial and to adduce evidence in relation to this. Where credible evidence of entrapment is raised by the defence, it will be necessary for a judge to decide whether evidence against the accused was obtained by entrapment. In the *Ramanauskas* case highlighted above, the ECtHR clarified that “[i]t falls to the prosecution to prove that there was no incitement, provided that the defendant’s allegations are not wholly improbable. In the absence of any such proof, it is the task of the judicial authorities to examine the facts of the case and to take the necessary steps to uncover the truth...”⁹⁹

99 ECtHR, *Ramanauskas v. Lithuania*, Application No. 74420/01, Judgment of 5 February 2008, para. 70.

Where an accused alleges that evidence has been obtained by entrapment, “the criminal courts must carry out a careful examination of the material in the file, since for the trial to be fair ... all evidence obtained as a result of police incitement must be excluded.”¹⁰⁰ In some circumstances, for example, where a charge relates to a specific incident arising from entrapment, this may mean that the prosecution is able to offer no evidence and a case cannot proceed. In other circumstances, for instance where a charge relates to a criminal conspiracy relating to a series of acts of which evidence derived from entrapment forms only one part, it may be possible for the case to proceed in the absence of the evidence in question.

To ensure that the use of undercover agents and participating informants remains within the bounds established by human rights law and domestic criminal law, it is good practice to establish written guidelines and provide robust training to undercover agents and their handlers.¹⁰¹



Activities

- Are participating informants permitted within the Kenyan legal system, in the fight against terrorism or other serious crime? Without disclosing any confidential information, have you, in your own professional experience, been involved in criminal investigations or trials in which they have been used? Where any problems encountered regarding their use either in those cases of which you have experience or of which you have knowledge? What were the key problems?
- If participating informants are used within the Kenyan legal system, what rules, procedures or guidelines exist, if any, to ensure that their use is properly controlled? Are there safeguards to ensure that their role maintains respect for fundamental human rights standards?
- Are the safeguards within the Kenyan legal system adequate in relation to the use of participating informants? What steps could (i) prosecutors or (ii) judges take in criminal investigations or trials to improve safeguards? What other legal reforms might, in your view, help improve the situation?



Tools

- UNODC Model Legislative Provisions against Organized Crime, in particular Model Article 14 on *Assumed Identities* and Model Article 15 on *Infiltration*. The commentary to the Model Provisions also contains numerous examples of actual legislation from UN Member States: http://www.unodc.org/documents/organized-crime/Publications/Model_Legislative_Provisions_UNTOC_Ebook.pdf.
- The Organization for Security and Co-operation in Europe (OSCE)'s Manual Human Rights in Counter-Terrorism Investigations provides guidelines for the use of undercover agents and informants (pp. 40-41): <http://www.osce.org/odihhr/108930>.
- The *Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector* of the Global Counterterrorism Forum (GCTF) dedicates one good practice recommendation to the use of undercover investigations: *Good Practice 3: Provide a Legal Framework and Practical Measures for Undercover Investigations of Terrorist Suspects or Organizations*, available here: <https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/A/GCTF-Rabat-Memorandum-ENG.pdf>; see also *Recommendations for Using and Protecting Intelligence Information in Rule of Law-Based, Criminal Justice Sector-Led Investigations and Prosecutions*, available at: https://www.thegctf.org/documents/10162/159887/14sept19_gctf+rabat+gp+6+recommendations.pdf

¹⁰⁰ *Ibid.* para. 60.

¹⁰¹ Examples of guidelines in this area are the United States Department of Justice *Guidelines Regarding the Use of Confidential Informants*, and *Covert Human Intelligence Sources: Code of Practice*, published by the United Kingdom Home Office

- The United States Department of Justice Guidelines for Confidential Informants which regulate the recruitment, operation, handling and deactivation of participating informants in organizations or groups involved in serious crime are available here: <http://www.justice.gov/ag/readingroom/ciguideelines.htm>.
- United Kingdom Code of Practice on the use of participating informers or agents by law enforcement agencies is available at: <http://www.homeoffice.gov.uk/publications/counter-terrorism/ripa-forms/code-practice-human-intel?view=Binary>.

3.9.2 Surveillance and Interception of Communications

On 18 December 2013, the General Assembly unanimously adopted a resolution entitled “Right to privacy in the digital age.” Its preamble “[emphasizes] that unlawful or arbitrary surveillance and/or interception of communications, as well as unlawful or arbitrary collection of personal data, as highly intrusive acts, violate the rights to privacy and freedom of expression and may contradict the tenets of a democratic society.” It notes “that while concerns about public security may justify the gathering and protection of certain sensitive information, States must ensure full compliance with their obligations under international human rights law.” The General Assembly finally “[reaffirms] that States must ensure that any measures taken to combat terrorism complies with their obligations under international law, in particular international human rights.”

In the prevention and investigation of suspected terrorist plots, the acquisition, analysis and use of information about terrorist groups by intercepting communications and other means of electronic surveillance are essential tools to pursue a legitimate and vital objective, i.e. the protection of lives and national security. Equally well-established are concerns about the impact such measures have on the enjoyment of human rights, in particular the right to privacy. The ECtHR has warned against “the risk that a system of secret surveillance for the protection of national security may undermine or even destroy democracy under the cloak of defending it.”¹⁰²



Electronic Surveillance: What Is It?

To better understand the kind of measures involved in electronic surveillance it is helpful to break this concept down into different illustrative elements.

Audio surveillance	Visual surveillance	Tracking surveillance	Data surveillance
Phone tapping	Hidden video surveillance devices	Global positioning systems (GPS)/transponders	Computer/internet (spyware/cookies)
Voice over internet protocol (VOIP)	In-car video systems	Mobile phones	Blackberries/mobile phones
Listening devices (room bugging)	Body-worn video devices	Radio frequency identification devices (RFID)	Keystroke monitoring
	Thermal imaging/forward looking infrared	Biometric information technology (retina scans at airports etc.)	
	CCTV		

*Source: Chapter 1.2, UNODC *Current Practices in Electronic Surveillance in the Investigation of Serious and Organized Crime*, p. 2.



Activity

Refer to the table above. Which of the surveillance measures are regulated under Kenyan law? Are the surveillance measures that are not regulated permissible as investigation techniques for law enforcement agents?

Under Article 31 (c) and (d), the Constitution includes the right not to have “information relating to their family or private affairs unnecessarily required or revealed,” and “the privacy of their communications infringed.” In the context of counter-terrorism, Section 36A (3) of the POTA provides that “[t]he right to privacy under Article 31 of the Constitution shall be limited under this section for the purpose of intercepting communication directly relevant in the detecting, deterring and disrupting terrorism.”

As in search and seizure of property, electronic surveillance measures must meet the conditions for legitimate interference with non-absolute rights, as discussed in Chapter 1, section 1.6.4. Because of the constantly evolving techniques of electronic surveillance, legislators have to take particular care in crafting a legal framework that is sufficiently precise to fulfil these requirements while maintaining a degree of flexibility that ensures its ability to remain relevant as technologies evolve.



Section 36 of the POTA. Power to Intercept Communication

- 1) Subject to subsection (2), a police officer of or above the rank of Chief Inspector of Police may, for the purpose of obtaining evidence of the commission of an offence under this Act, apply ex parte to the High Court for an interception of communications order.
- 2) A police officer shall not make an application under subsection (1) unless he has applied for and obtained written consent of the Inspector-General or the Director of Public Prosecutions.
- 3) The Court may, in determining an application under subsection (1), make an order –
 - (a) requiring a communications service provider to intercept and retain specified communication of a specified description received or transmitted, or about to be received or transmitted by that communications service provider; or
 - (b) authorizing the police officer to enter any premises and to install on such premises, any device for the interception and retention of a specified communication and to remove and retain such device.
- 4) The Court shall not make an order unless it is satisfied that the information to be obtained relates to –
 - (a) the commission of a terrorist act; or
 - (b) the whereabouts of the person suspected by the police officer to have committed the offence
- 5) Any information contained in a communication—
 - (a) intercepted and retained pursuant to an order under subsection (3); or
 - (b) intercepted and retained in a foreign state in accordance with the law of that foreign state and certified by a Court of that foreign state to have been so intercepted and retained, shall, subject to the provisions of any other written law, be admissible in proceedings for an offence under this Act.
- 6) A police officer who intercepts communication other than is provided for under this section commits an offence and shall on conviction be liable for a term not exceeding ten years or to a fine not exceeding five million shillings or to both

Section 36-A of the POTA. Interception of Communication by National Security Organs

- 1) The National Security Organs may intercept communication for the purposes of detecting, deterring and disrupting terrorism in accordance with procedures to be prescribed by the Cabinet Secretary.

- 2) The Cabinet Secretary shall make regulations to give effect to subsection (1), and such regulations shall only take effect upon approval by the National Assembly.
- 3) The right to privacy under Article 31 of the Constitution shall be limited under this section for the purpose of intercepting communication directly relevant in the detecting, deterring and disrupting terrorism.

Not all electronic surveillance techniques have the same level of intrusiveness into the private sphere of individuals. For example, a hidden video surveillance device recording a public place constitutes much less of an invasion of the private sphere of individuals than the interception of phone calls or e-mails. The graver the interference with legitimate expectations of privacy, the greater the need for a detailed legal framework and strong procedural safeguards and oversight.



Case Study: The Constitutionality of Interception of Communication*

The High Court addressed the constitutionality of Section 69 of the SLAA, which introduced Section 36A to the POTA, and allows National Security Organs to intercept communication for the purposes of detecting, deterring and disrupting terrorism. In upholding the constitutionality of this provision, the Court observed the following:

[at 303] “We are further satisfied that there are sufficient safeguards to ensure that the limitation of the right to privacy was not exercised ... arbitrarily and on a mass scale. Under the POTA, which had, prior to the enactment of SLAA and the introduction of Section 36A, already contained limitations of the right to privacy, there are, we believe, safeguards to ensure that the process is undertaken under judicial supervision.

[at 305] The new Section 36A of the POTA ... must be read with Sections 35 and 36, which not only require the involvement of the court, but also include penal consequences for the unlawful interception of communication.

[at 306] Similarly, the monitoring of communication and searches authorised by Section 42 of the National Security Act ... contains safeguards in the exercise of powers under the section. The new section requires that the information to be obtained under section 42 (3) (c) be specific, be accompanied by a warrant of the High Court, and be valid for a period of six months unless extended.

[at 308] While Section 65 of the SLAA and the new Section 42 of the NIS Act, as well as Section 69 of the SLAA and Section 36A do limit the right to privacy, they are justiciable in a free and democratic state, and have a rational connection with the intended purpose, the detection, disruption and prevention of terrorism. We are also satisfied that given the nature of terrorism and the manner and sophistication of modern communication, we see no less restrictive way of achieving the intended purpose and none was advanced by any of the parties in the course of submissions before us.”

**Coalition for Reform and Democracy (CORD) & 2 Others v Attorney General & 10 Others*, [2015] eKLR.

International human rights bodies, as well as national legislation and case-law of most countries agree that the interception of contents of communications must be authorised by judicial order. Legislation and courts of some countries take the view that so-called communications metadata, e.g. the phone record data showing which numbers were called from a given phone, at what time and for how long, and where the mobile phone was located at the time of the call, can be subjected to a lesser standard of protection, even though metadata can reveal an enormous amount about an individual.



Cross-Reference

Refer to the case study on *Digital Rights Ireland and Seitlinger and Others* in section 3.9.3, which further illustrates this point.

A growing number of legal systems, however, subject communications metadata to the same privacy protections as communications contents, the actual words communicated on the phone, or by e-mail.

Similarly, the gathering of GPS surveillance information, whether through the surreptitious placement of a GPS device in a suspect's car, or by obtaining location information through the metadata generated by a mobile phone, has the potential to interfere seriously with the right to privacy, as well as rights to freedom of expression and association.

As pointed out in a recent judgment of the United States Supreme Court:

"GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations . . . The Government can store such records and efficiently mine them for information years into the future. . . . And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: 'limited police resources and community hostility.

Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net result is that GPS monitoring - by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track - may 'alter the relationship between citizen and government in a way that is inimical to democratic society."¹⁰³



Case Studies: Electronic Surveillance

The *Uzun* Case:*

Mr. Uzun was suspected of involvement with a terrorist group and an investigation had been launched into charges that he, together with an accomplice, had participated in a number of bomb attacks. The investigation by German police into the activities of the applicant involved surveillance, as well as the use of phone taps and wireless transmitters. When the applicant and his accomplice destroyed the transmitters and stopped using the telephone, a GPS device was placed in a car that they regularly used.

At trial, the GPS evidence was used to corroborate information received through other surveillance methods and Mr. Uzun was convicted of attempted murder and causing explosions. He submitted that the authorities' use of the GPS had breached his right to privacy in that it had enabled them to draw up a comprehensive pattern of his movements, to share that with third parties, and to initiate further investigations.

The ECtHR found that his rights had not been violated by the placing of the GPS. It noted that extensive safeguards were available, and had been properly applied to prevent misuse of the power of surveillance. These included the fact that (i) the operation had been subject to judicial supervision throughout; (ii) its duration had to be authorized and approved by a court (iii) such an operation could only be ordered in relation to a crime of particular gravity; and (iv) the evidence obtained through use of GPS could be challenged and, if necessary, excluded at trial.

Finally, the ECtHR noted that the surveillance measures had been proportionate in that (i) other investigative means had been tried and failed owing to the conduct of the applicant; (ii) the investigation was into a serious matter, involving terrorist bombing; and (iii) the measures had only been employed for a short period of time. Given the safeguards and proportionality of the measures applied, the ECtHR considered that Mr. Uzun's right to privacy had not been violated.

The Escher Case:**

Social conflict, including disorder and violence, arose in the late 1990's out of land reform issues in Paraná, a municipal state within Brazil. A number of social organizations were involved in campaigning around these issues. The Military Police of Paraná requested that a specific phone number be monitored. Permission was granted by the court. A second request was subsequently submitted in relation to a phone line used by a different organization without any accompanying justification. This was also granted. Subsequently, various recorded conversations between those using the phone line were broadcast on national television.

The case was brought before the IACtHR alleging violations of the rights to judicial guarantees, privacy, freedom of association and judicial protection established in the ACHR. In its judgment, the Court emphasized the importance of independent supervision of surveillance. The Court acknowledged that Brazil had a system for judicial authorization of telephone intercepts in place, and that applications had been filed and approved by a judge in the case at hand.

The Court underscored, however, that the judge has a special role to play in dealing with ex parte applications, such as applications for surveillance measures: "In proceedings whose juridical nature requires the decision to be issued without hearing the other party, the grounds and justification must show that all the legal requirements and other elements that justify granting or refusing the measure have been taken into consideration. Hence, the judge must state his or her opinion, respecting adequate and effective guarantees against possible illegalities and arbitrariness in the procedure in question" (at 139).

In considering the way the Brazilian Court in the case had dealt with the applications submitted by the military police, the Court found that these requirements had not been met: "Contrary to the foregoing, [the judge] authorized the telephone interceptions with a mere annotation that she had received and examined the requests and granted them In her decision, the judge did not explain her analysis of the legal requirements or the elements that caused her to grant the measure, or the way in which the procedure should be carried out or its duration" (at 140). The Court also found that there had been insufficient safeguards to ensure that the private information was not obtained by third parties.

*ECtHR, *Uzun v Germany*, Merits, Application no. 35623/05, Judgment of 2 September 2010.

**Inter-American Court of Human Rights, *Escher et al. v. Brazil*, Judgment of 6 July 2009.

**Cross-Reference**

Where material is obtained through electronic surveillance in violation of domestic law or otherwise in violation of human rights law, the question of its admissibility as evidence in court arises. This is discussed in **Chapter 5, section 5.10.6** below.

**Tools**

- CoE, Committee of Ministers Recommendation 10 (2005) on Special Investigative Techniques in respect of Serious Crime including Terrorism adopted by the Committee of Ministers on 20 April 2005 is available at: <https://wcd.coe.int/ViewDoc.jsp?id=849269&Site=CM>. There is also an Explanatory Report to the Recommendation providing useful legal analysis: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805da764.
- UNODC Publication Current Practices in Electronic Surveillance in the Investigation of Serious and Organized Crime available at: https://www.unodc.org/documents/organized-crime/Law-Enforcement/Electronic_surveillance.pdf.
- UNODC Publication The Use of the Internet for Terrorist Purposes provides (in chapter IV) examples of investigative techniques used in the investigation of terrorism-related internet activities. The publication is available at: http://www.unodc.org/documents/terrorism/Publications/12-52159_Ebook_Internet_TPB.pdf.

- Model legislative provisions, which provide the necessary human rights safeguards in relation to surveillance and the interception of communications are available in the UNODC's Manual on Model Legislative Provisions Against Organized Crime, especially at Chapter IV. This publication is available at: https://www.unodc.org/documents/organized-crime/Publications/Model_Legislative_Provisions_UNTOC_Ebook.pdf.
- Further examples of model legislation in respect of data gathering and the proper use of electronic surveillance is set out in Chapter 4 of UNDOC's Model Legislative Provisions Against Terrorism available at: https://www.unodc.org/tldb/en/model_laws_treaties.html. Further legislative good practice produced by the Commonwealth Secretariat, is set out in Part IV Model Legislative Provisions to Combat Terrorism available at: https://www.unodc.org/tldb/pdf/Commonwealth_modellaw_terr.pdf.
- Report of the OHCHR on the "Right to privacy in the digital age," A/HRC/27/37 (30 June 2014), which was developed pursuant to General Assembly resolution 68/167. The report looks at the protection and promotion of the right to privacy in the context of domestic and extraterritorial surveillance and/or the interception of digital communications and the collection of personal data. It is available at http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A.HRC.27.37_en.pdf.
- Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, A/HRC/29/32 (22 May 2015), which addresses the use of encryption and anonymity in digital communications. It is available at <http://www.refworld.org/docid/5576dcfc4.html>
- Report of the Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism to the General Assembly, A/69/397). It addresses the use of mass digital surveillance for counter-terrorism purposes and the implications of bulk access technology for the right to privacy under Article 17 of the ICCPR. It is available at <http://www.ohchr.org/EN/newyork/Pages/HRreportstothe69thsessionGA.aspx>



Activity: The Case of the Emerald Temple Plotters

This is a fictitious case to explore issues surrounding the use of special investigative techniques.

The Greenies are an ethnic and religious minority in Blueland, making up around 15% of the population. They have long complained about their political and economic marginalization and about discrimination by the majority population. About three years ago, a shadowy armed group calling itself the Greeny Liberation Front (GLF) has started claiming responsibility for a series of attacks against police stations and army barracks. These attacks have so far caused the death of 24 police officers, 14 soldiers and 5 civilians, as well as considerable material damage.

Recently, the Anti-Terrorism Unit (ATU) of the Bluetown Police Department has received a confidential report from the Blueland Intelligence Services to the following effect: the security services of Redland, a neighbouring country with an equally unrestful Greeny minority, have captured an (unnamed) Greeny "terrorist", referred to as John in the report. The report alleges that under interrogation by his Redland captors John provided the following information: Luke, the leading preacher and spiritual leader at the Greeny Emerald Temple in Bluetown, recruits young men for the Greeny Liberation Front, including to attend GLF training camps in Redland. Luke identifies potential recruits at the open prayer services in the temple and invites them to attend meetings of a small circle (called the "prayer group") in the religious school attached to the temple, where they are then convinced of the need to take up arms against the governments of Blueland and Redland. The report also alleges that John further told his captors that Matthew, a successful businessman belonging to Blueland's Greeny community and well-known benefactor of the charitable activities of the Emerald Temple, provides funds to cover the expenses of young men undergoing training in camps in Redland.

The Blueland intelligence services state that their Redland counterparts will not disclose the identity of John or any other information about his capture and interrogation.

Note that while Blueland has, for the time being, tried to deal with the activities of the GLF primarily as a criminal phenomenon, Redland has declared a state of emergency and enacted security legislation that allows extended detention without charge for terrorism suspects. NGOs and United Nations human rights monitors have expressed concern regarding consistent allegations of torture by Redland's anti-terror police. Redland has dismissed these reports as unsubstantiated and expressed its dismay that United Nations experts have allowed themselves to become a tool for terrorist propaganda.

Possible Investigation Measures:

ATU investigators suggest the following investigative steps:

- 1) A CCTV camera will be placed covertly on the front of the apartment building in front of the Emerald Temple to record all persons attending the Temple.
- 2) A Bluetown criminal investigations department officer of Greeny origin (there are no Greenies in the ATU) will start regularly attending the prayer services at the Emerald Temple and covertly take pictures of all young men in attendance.
- 3) Covertly placing listening (audio-surveillance) devices in the Emerald Temple and all rooms of the adjoining religious school.
- 4) Placing the two mobile phones registered under Luke's name under surveillance, recording all conversations made from those phones.
- 5) Attempting to introduce an informer into the "prayer group". Benny is a small criminal of Greeny origin who has been a long time informer for the Bluetown police, primarily on car thefts (his area of activity). The proposal is that Bennie should start attending the Emerald Temple, attract Luke's attention and try to get invited to the "prayer group".
- 6) Seeking assistance from the Financial Intelligence Unit of the central bank of Blueland to identify all of Matthew's bank accounts, and then place the bank accounts under surveillance to track all suspicious payments made from them.

Assignment:

You are the commanding officer of the ATU. Assume that Kenyan law applies in Blueland.

- a) Are there any covert investigative measures you would adopt that have not been proposed by the ATPU agents?
- b) What role, if any, will the public prosecution play in deciding which covert investigation measures to apply for, and in executing them?
- c) What are the human rights considerations to be made with regard to the investigative measures proposed by your officers?
- d) Which measures would you support, and which ones would you reject? You can also modify the measures.
- e) Which measures can you as ATU commanding officer authorize? Which measures would need to be authorized by a higher ranking official in the police or ministry? Which measures would need to be authorized by a judicial authority?

Draft an application for a warrant to either (i) place the audio-surveillance devices in temple and school premises, or (ii) to place Luke's mobile phones under surveillance.

3.9.3 Protection of Personal Information Gathered Through Surveillance, Interception of Communications and Other Investigative Measures

The General Assembly resolution on the "Right to privacy in the digital age" expresses concern about the impact of mass collection and retention of communications data and other personal records may have on the enjoyment of human rights and fundamental freedoms. Information such as records of public housing agencies and other social service providers, universities, immigration offices and labour market services, are obtained and stored by those collecting them for purposes that are not related to the prevention or investigation of terrorist activities.

Law enforcement and other agencies involved in counter-terrorism efforts have, however, shown interest in these data sets for purposes of so-called "dragnet investigations", which raise delicate human rights questions, as illustrated by the following case. In its Report on "[t]he Right to Privacy in the Digital Age," the OHCHR states as follows:

"[a]ny capture of communications data is potentially an interference with privacy, and further, that the collection and retention of communications data amounts to an interference with privacy

whether or not those data are subsequently consulted or used. Even the mere possibility of communications information being captured creates an interference with privacy, with a potential chilling effect on rights, including those to free expression and association. The very existence of a mass surveillance programme thus creates an interference with privacy. The onus would be on the State to demonstrate that such interference is neither arbitrary nor unlawful¹⁰⁴

The OHCHR further notes that concerns about whether access to and use of data are tailored to specific legitimate aims also raises questions about the increasing reliance of Governments on private sector actors to retain data “just in case” it is needed for State purposes. “Mandatory third-party retention – a recurring feature of surveillance regimes in many States, where Governments require telephone companies and Internet service providers to store metadata about their customers’ communications and location for subsequent law enforcement and intelligence agency access – appears neither necessary nor proportionate.”¹⁰⁵



Case Study: Constitutional Court Decision Regarding Dragnet Investigations*

Following the 11 September 2001 attacks with airplanes on targets in the United States, the German police authorities launched a sweeping dragnet investigation aimed at the identification of terrorist “sleeper cells” in Germany. The police obtained from universities, colleges, immigration offices and other private and public entities holding such information data sets about several hundred thousand individuals. This information was then screened automatically with regard to certain criteria such as male gender, age between 18 and 40, Islamic religious affiliation, country of origin with a predominantly Islamic population. The names of all the persons fulfilling such criteria were collected in a file (the so-called “sleeper” file) and subsequently matched with the register of persons holding licenses to fly airplanes, with the aim to then initiate further investigation. This effort is not known to have resulted in the exposure of a potential terrorist, nor in any charges of membership in a terrorist organization being brought.

A 28-year old Moroccan man of Islamic faith attending university in Germany filed a complaint before the Federal Constitutional Court. The Court noted that each individual piece of information gathered had relatively limited relevance to the right to privacy. However, the covert nature of the collection of this information and the stigmatizing effect of the criteria used (the religious profiling which resulted in only information on persons of Islamic faith being collected) meant that a very strong justification would be needed for the mass data collection and screening. The Court noted that a situation of very specific heightened threat of a terrorist attack could have justified such measures. The general situation of heightened threat perceived in Germany following 11 September 2001, however, was not a sufficient justification.

**Bundesverfassungsgericht* (BverfG – Federal Constitutional Court) of 4 April, 2006 (1 BvR 518/02).



Cross-Reference

See also the *Hassan and Others v. The City of New York* Case examined in Section 3.5.2 above.

104 A/HRC/27/37 (30 June 2014), para 20.

105 Ibid, para 26.

Public authorities involved in the prevention and investigation of acts of terrorism and potential terrorist conspiracies have also shown great interest in ensuring that the records generated by communications service providers (e.g. public and private companies providing telecommunications and internet services) are available to them for the purpose of the prevention, investigation and prosecution of serious crime, including terrorism. The technology available in the digital age makes it possible to retain such data for all users of a communications service, raising issues related to the protection of the right to privacy and other rights that are quite different from those arising in the context of the “traditional,” individually targeted tapping of telephone communications.



Case Study: ECJ Judgment on the European Data Retention Directive*

In 2006, the European Union adopted legislation (the Data Retention Directive) intended to harmonize member States' provisions concerning the retention of data which are generated or processed by providers of communications services. The Directive provides that the service providers must retain traffic and location data as well as related data necessary to identify the subscriber or user for all fixed telephony, mobile telephony, Internet access, Internet e-mail and Internet telephony traffic. By contrast, it does not permit the retention of the content of the communication or of information consulted. The Data Retention Directive was challenged before the Court of Justice of the European Union (CJEU) as a disproportionate interference with the right to privacy.

The CJEU observed that, while the Directive does not permit the acquisition of knowledge of the content of the electronic communications as such, the collection and retention of traffic and location metadata constitutes a serious interference with the right to privacy (this aspect of the judgment is summarized above in section 3.7.2).

The CJEU then proceeded to examine this interference with the right to privacy in the light of the requirements of a legitimate aim and of proportionality. It noted that the purpose of the retention of the data is their possible transmission to the competent national authorities for the investigation, prosecution and adjudication of serious crime, which genuinely satisfies an objective of general interest [at 41].

Although the retention of the data was thus justified by a legitimate aim, the CJEU concluded that it was not sufficiently circumscribed to be considered strictly necessary, and therefore failed the proportionality test and constituted a violation of the right to privacy. The reasons for this finding included that:

- The Directive failed to lay down objective criteria which would ensure that the competent national authorities have access to the data and can use them only for the purposes of prevention, detection or criminal prosecutions concerning offences that may be considered to be sufficiently serious to justify such an interference [at 61].
- Regarding the duration of data retention period, the Directive imposed a minimum retention period of at least six months and a maximum of 24 months. It failed, however, to provide objective criteria on the basis of which the period of retention must be determined in order to ensure that it is limited to what is strictly necessary [at 64].
- The Directive it does not provide for any exception, with the result that it applies even to persons whose communications are subject, according to rules of national law, to the obligation of professional secrecy [at 58].
- Finally, the Directive did not provide for sufficient safeguards to ensure effective protection of the data against the risk of abuse and against any unlawful access and use of the data [at 66].

*Court of Justice of the European Union, Judgment in Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger and Others*, Judgment of 8 April 2014.



Further Reading

- Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, A/HRC/29/32 (22 May 2015), which addresses the use of encryption and anonymity in digital communications. It is available at <http://www.refworld.org/docid/5576dcfc4.html>
- Report of the Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism to the General Assembly (A/69/397). It addresses the use of mass digital surveillance for counter-terrorism purposes and the implications of bulk access technology for the right to privacy under Article 17 of the ICCPR. It is available at <http://www.ohchr.org/EN/newyork/Pages/HRreportstothe69thsessionGA.aspx>
- Report of the OHCHR on the “Right to privacy in the digital age,” A/HRC/27/37 (30 June 2014), which was developed pursuant to General Assembly resolution 68/167. The report looks at the protection and promotion of the right to privacy in the context of domestic and extraterritorial surveillance and/or the interception of digital communications and the collection of personal data. It is available at http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A.HRC.27.37_en.pdf.

3.10 SELF-ASSESSMENT QUESTIONS



Self-Assessment Questions

- List three consequences deriving for criminal proceedings from the presumption of innocence.
- What obligations does the presumption of innocence create for public officials with regard to media coverage of a terrorism investigation and trial?
- State the test to establish whether differential treatment may be justified or amounts to discrimination.
- State five principles applicable to the treatment by the justice system of persons under age 18 suspected of involvement in an act of terrorism.
- Why is the right to legal assistance at the pre-trial stage essential to the protection of the right to a fair trial? What other rights are protected by ensuring prompt access to legal assistance as soon as a terrorism suspect is arrested or, in case no arrest is made, as soon as a suspect is charged?
- What are the authorities' obligations with regard to legal assistance for a terrorism suspect who does not request the assistance of a lawyer or who cannot afford the services of a defence lawyer?
- List five measures criminal justice system authorities (legislators, judges, prosecutors, administrators of places of detention) should adopt to reduce the likelihood of the use of torture or inhuman or degrading treatment to compel confessions from terrorism suspects.
- Discuss the exclusion of evidence allegedly obtained by torture in light of Article 50 (4) of the Constitution, Article 15 of the CAT, and Section 26 of the Kenya Evidence Act.
- What are the essential requirements a warrant authorizing interception of a terrorism suspect's telephone must satisfy in order to be legitimate under the Constitution and under international human rights law?
- Discuss the conditions for the legitimate use of participating informants in a criminal investigation into the activities of a terrorist cell? If the investigators intend to subsequently use the participating informant as a witness at trial, what should they pay attention to?

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4. The Detention of Terrorist Suspects

4.1 OBJECTIVES

By the end of this Chapter, you will be able to:

- Discuss the application of the writ of habeas corpus in terrorism cases
- List the safeguards that apply to the arrest and detention of terrorist suspects in the criminal justice context
- List the elements that should be contained in a detention register
- Discuss the application of remand detention and the right to bail in the counter-terrorism context
- Discuss the concepts of confinement, segregation and solitary confinement
- Identify measures to prevent secret detention and disappearances in the counter-terrorism context
- Describe the relationship between the protection against arbitrary arrest and detention, and the prohibition against torture discussed under Chapter 3
- Identify key safeguards pertaining to the detention of persons under age 18 suspected of having committed terrorism related offences

4.2 SUMMARY/OVERVIEW

Detention often forms a central element of States' criminal justice response to terrorism. Imprisonment is by far the most frequent sanction for persons found guilty of terrorism offences. Detention prior to conviction may be used to prevent a suspect facing trial from absconding, intimidating witnesses or otherwise tampering with the evidence. Detention is also used to secure the presence of a person subject to extradition proceedings. In all these circumstances, the scope for the misuse of the power to detain is significant and the consequences for the individual of such misuse substantial. For this reason, Kenyan law carefully limits the extent to which an individual may be deprived of his or her liberty and subjects it to procedural safeguards, as required by international and regional human rights law.

This Chapter will therefore explore the limits of the powers to arrest and detain terrorist suspects, and the safeguards controlling their permissible use. In doing so, it will begin with an overview of detention and human rights, followed by a discussion on the use of force to effect an arrest or in detention. The Chapter will then discuss the requirements of legality and non-arbitrariness of detention and the writ of *habeas corpus*. It will then explore the specific safeguards pertaining to detention, such as access to legal counsel and communication with family, medical examination, and maintaining adequate records in places of detention. The right to be brought promptly before a judge, remand detention and bail are discussed in great detail.

The last part of the Chapter deals with conditions of detention, in particular solitary confinement, and the prevention of secret detention and enforced disappearances.

The Chapter concludes with a set of self-assessment questions aimed at providing users with the possibility of testing their knowledge on the topics discussed herein.

Human rights questions relating to the imprisonment of terrorist offenders following conviction and the imposition of a custodial sentence will be dealt with in Chapter 6.

4.3 DETENTION AND HUMAN RIGHTS: OVERVIEW

The Constitution guarantees the right to liberty under Article 29. In particular, Article 29 (a) provides that every person has the right to freedom and security of the person, which includes the right not to be “deprived of freedom arbitrarily or without just cause.” Article 29 (b) further provides that the right to freedom and security of the person also includes the right not to be “detained without trial, except during a state of emergency, in which case the detention is subject to Article 58,” which is the constitutional provision pertaining to a state of emergency.

While examining Kenya’s second periodic report in 2013, the Committee against Torture expressed concern that the legal safeguards afforded to persons in detention under Articles 2 and 11 of the CAT were not fully upheld in practice.¹⁰⁶ It therefore recommended the tabling of the Persons Deprived of Liberty Bill in Parliament. The Bill sought to give effect to Articles 29 (f) and 51 of the Constitution by outlining the rights of persons detained, held in custody or imprisoned, and the duties of persons in charge. It also established a consultative committee on persons deprived of liberty to resolve matters affecting them. The Bill was passed into law in 2014, thus signifying Kenya’s commitment to international human rights standards. It is therefore imperative that law enforcement agencies comply with its provisions to safeguard the credibility of their actions and conduct during investigations.

Section 3 (1) of the Persons Deprived of Liberty Act provides that “[e]very person deprived of liberty is entitled to the protection of all fundamental rights and freedoms subject to such limitations as may be permitted under the Constitution.”¹⁰⁷ As a demonstration of the seriousness of this and other provisions in the Act, Section 31 penalises anyone who, wilfully or without lawful justification, denies a person deprived of liberty any of the rights protected under the Act to a fine not exceeding 500,000 Kenya Shillings or up to 2 years imprisonment, or to both.

The right to liberty is also protected by all major international and regional conventions. Article 9 (1) of the ICCPR reads as follows: “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.” Similarly, Article 6 of the Banjul Charter provides that “[e]very individual shall have the right to liberty and security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.”

These provisions have a number of implications for the circumstances in which it is permissible to detain an individual.

- 1) Even if authorities have complied with the letter of national law, detention will be arbitrary where they have acted in bad faith, for instance, detaining a person on specious grounds of mental health in order to subsequently enable extradition for criminal offences.

¹⁰⁶ Concluding observations on the second periodic report of Kenya, adopted by the Committee at its fiftieth session (6 to 31 May 2013) CAT/C/KEN/CO/2, para 10.

¹⁰⁷ Act No 23 of 2014, available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/PersonsDeprivedofLibertyAct_2014.pdf

- 2) Detention must pursue a proper purpose and must be necessary in order to pursue that aim. Procedural safeguards must be in place to prevent the arbitrary exercise of the power of arrest or detention.
 - a) Judicial oversight and prompt access to courts to challenge lawfulness of detention;
 - b) A requirement as to the threshold that must be met (such as reasonable suspicion) before the power to detain can be exercised;
 - c) Reasons for detention, of which the detainee is informed at the point of detention;
 - d) Time limits on the period during which an individual can be lawfully detained before review of detention is necessary;
 - e) Access to a lawyer; and
 - f) Records as to the place, time, whereabouts and reasons for detention, as well as the circumstances and conditions of detention.

Alongside the jurisprudence developed by human rights courts, tribunals and supervisory mechanisms, various bodies of principles also assist in the implementation of the right to liberty. At the United Nations level, these include the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, the Standard Minimum Rules for the Treatment of Prisoners (the “Mandela Rules”), the Rules for the Protection of Juveniles Deprived of their Liberty, as well as the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders.

At the African regional level, the Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa, and the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (“Luanda Guidelines”), adopted by the ACommHPR to elaborate on the right in Article 6 of the Banjul Charter, constitute particularly important documents.¹⁰⁸



Arrest, Detention, Deprivation of Liberty and Restrictions on Freedom of Movement

The Persons Deprived of Liberty Act defines a “detained person” as “a person deprived of liberty under the authority of the law, either by a law enforcement official for the purpose of investigation of a crime or so as to be charged with an offence, or by a private person where there is reasonable suspicion that a crime has been committed; or a person deprived of liberty by order of or under the de facto control of a judicial, administrative or any other authority, for reasons of humanitarian assistance, treatment, guardianship or for protection.”

The National Police Service Act (Cap. 84) defines “arrest” as “the act of apprehending a person for suspected commission of an offence or by the action of legal authority.”

The Act also defines the following terms:

- “imprisoned person” as “a person held in lawful custody, whether or not convicted of an offence;” and
- “person deprived of liberty” as “a person who has been arrested, held in lawful custody, detained, or imprisoned in execution of a lawful sentence.”

The Bail and Bond Policy Guidelines define “pre-trial detention” as “[t]he confinement of arrested and accused persons in custody pending the investigation, hearing and determination of their cases.”

On their part, human rights treaties use the concept of “deprivation of liberty” as the overall concept. Examples of “deprivation of liberty” include, for instance, police custody, remand detention, imprisonment after conviction, house arrest, involuntary hospitalization, internment of captured combatants or civilians during armed conflict, and also include being involuntarily transported.

¹⁰⁸ Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, adopted on 8 May 2014, and Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa, adopted by the ACommHPR during its 56th Ordinary Session in Banjul/Gambia on 21 April to 7 May 2015.

4.4 USE OF FORCE TO EFFECT AN ARREST OR IN DETENTION

Law enforcement officials are permitted to use force in order to carry out an arrest. Such use of force must meet the twin requirements of “necessity” and “proportionality.”

Under Kenyan law, these requirements are captured in the Sixth Schedule of the NPS Act (Cap. 84), which stipulates the Conditions as to the Use of Force by Police Officers.¹⁰⁹ Section 1 of the said Conditions provides that “[a] police officer shall always attempt to use non-violent means first and force may only be employed when non-violent means are ineffective or without any promise of achieving the intended result.” Section 2 provides that “[t]he force used shall be proportional to the objective to be achieved, the seriousness of the offence, and the resistance of the person against whom it is used, and only to the extent necessary while adhering to the provisions of the law and the Standing Orders.”

The CPC further provides general guiding principles for effecting an arrest.¹¹⁰ In particular, Section 21 stipulates as follows:

- 1) In making an arrest, the police officer or other person making it shall actually touch or confine the body of the person to be arrested, unless there be a submission to custody by word or action.
- 2) If a person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, the police officer or other person may use all means necessary to effect the arrest.
- 3) Nothing shall justify the use of greater force than was reasonable in the particular circumstances in which it was employed or was necessary for the apprehension of the offender.

At the international level, Article 3 of the Code of Conduct for Law Enforcement Officials (A/RES/34/169) adopted by the General Assembly provides that “[l]aw enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.” Similarly, Article 3 (1) (c) of the Luanda Guidelines stipulates that “[t]he lawful use of force and firearms shall be a measure of last resort and limited to circumstances in which it is strictly necessary in order to carry out an arrest. If the use of force is absolutely necessary in the circumstances, the level of force must be proportionate and always at the most minimal level necessary.”¹¹¹

Regarding the use of firearms, the Sixth Schedule of the NPS Act sets out the Conditions as to the Use of Firearms. In particular, Section 1 of the said Conditions provides that “[f]irearms may only be used when less extreme means are inadequate and for the following purposes: (a) saving or protecting the life of the officer or other person; and (b) in self-defense or in defense of other person against imminent threat of life or serious injury.”

At the international level, Principle 9 of the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials states that “[l]aw enforcement officials shall not use firearms against persons except in self-defense or defense of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, *and only when less extreme means are insufficient to achieve these objectives*. In any event, *intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life*” (emphasis added). Principle 8 of the Basic Principles further adds that “[e]xceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.”

¹⁰⁹ CAP. 84, Laws of Kenya.

¹¹⁰ CAP 75, Laws of Kenya.

¹¹¹ *Ibid*, note 1.

Where an individual is taken into police custody in good health, but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue of torture or inhuman or degrading treatment arises.¹¹² The burden of proof is on the authorities to explain and justify any injuries sustained. For this reason, keeping careful records (as explained in section 4.6.7) in relation to those in detention is crucial. Medical examination of those detained is important both to prevent abuse and also to protect the officials involved in detention against false allegations (see section 4.6.8). Any injuries suffered by an individual in detention must be fully investigated and, if necessary, criminal proceedings brought against those responsible, as set forth in Chapter 3 (section 3.7).



Tools

- The National Police Service Act (Cap. 84), available at <http://www.kenyalaw.org/lex//actview.xql?actid=CAP%2084>.
- The Bail and Bond Policy Guidelines (March 2015), available at http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Bail_and_Bond_Policy_Guidelines.pdf
- The Code of Conduct for Law Enforcement Officials, adopted by General Assembly resolution 34/169 of 17 December 1979, is available here: http://www.unodc.org/pdf/criminal_justice/Code_of_Conduct_for_Law_Enforcement_Officials_GA_43_169.pdf.
- The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, are available here: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx>.
- The Special Rapporteur on extrajudicial, summary, or arbitrary executions has submitted to the General Assembly a report analysing the international standards applicable to the use of lethal force by law enforcement officers (A/61/311, paras. 33-45). The report can be of assistance in distinguishing the proportionality criterion from the necessity criterion and to fully evaluating the contribution each of the two safeguard makes.



Further Reading

- Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/26/36, submitted to the Human Rights Council pursuant to its Resolution 17/5. It discusses the protection of the right to life during law enforcement and makes the case for the need for a concerted effort to bring domestic laws on the use of lethal force by the police in line with international standards. It is available here: <http://www.refworld.org/docid/53981a550.html>
- The OSCE/ODIHR publication Human Rights in Counter-Terrorism Investigations. A Practical Manual for Law Enforcement Officers, sections 3.2 and 3.3, provides additional guidance and case studies on the use of force in effecting arrest and on body searches. It is available here: <http://www.osce.org/odihr/108930>.

¹¹² ECtHR, *Selmouni v. France*, Application No. 25803/94, Judgment of 28 July 1999, para. 87.

4.5 ARREST AND DETENTION: GENERAL REQUIREMENTS AND SAFEGUARDS

Kenyan law, as well as international and regional human rights law, imposes a number of obligations in relation to the arrest and detention of any individual, whether in the context of criminal justice proceedings or in other circumstances. Under Kenyan law, the Constitution enshrines the rights of persons detained, held in custody or imprisoned. In this regard, Article 51 (1) provides that “[a] person who is detained, held in custody or imprisoned under the law retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.”

4.5.1 Legality

The requirement of legality means that the arrest and detention of an individual must be authorized by domestic law. Article 6 of the Banjul Charter provides that “[n]o one may be deprived of his freedom except for reasons and conditions previously laid down by law.” Domestic law must be sufficiently precise to ensure that all those affected by its application can foresee the circumstances in which they may be lawfully arrested or detained, and the remedies available against deprivation of liberty, if need be with appropriate advice.

Even where the legal basis for detention is clear, the law must not confer overly broad discretion on police officers or other public officials as to the way in which it can be exercised. In its Concluding Observations on Trinidad and Tobago (2000), the Human Rights Committee stated:

“The Committee is concerned about chapter 15-01 of the Police Act which enables policemen to arrest persons without a warrant in a large number of circumstances. Such a vague formulation of the circumstances in the Act gives too generous an opportunity to the police to exercise this power.”¹¹³

Thus, even where the general legal basis for detention is clear, the law must provide a reasonably precise framework within which decisions to detain can be exercised.



Case Study: The *Mohamed Case**

The applicant had applied for habeas corpus on behalf of one Umurumani Hudhefa, who had been arrested and held at the Port Police Station in Mombasa. The application indicated that eight persons went to her house where they conducted an extensive search of her home without giving any reasons. Thereafter, they took Umurumani and held her incommunicado. The State submitted that while investigating a terrorist bomb attack, including the attempted shooting down of an Israeli aircraft, it came to light that Umurumani had information that could lead to a breakthrough in the investigations. She was therefore arrested in the wake of renewed threats of a repeat terrorist attack.

It was not stated, however, whether she was arrested as a suspect or a potential witness to the previous bombing, the attempted bombing of the Israeli plane or of the threatened repeat attacks. In the circumstances, the High Court held that the police have no lawful authority to hold in their custody witnesses to the commission of a crime where they have been summoned to the police station or presented to the police to record statements. It was further held that the police should unconditionally release witnesses to crimes once they have recorded statements, upon which they can only be bonded to give evidence in Court.

The significance of this decision to law enforcement officers is the need for clarity on the reason for holding an individual in custody. In this case, the police was found to have lacked clarity regarding (i) the capacity in which it was holding Umurumani, and (ii) the alleged incidents in relation to which Umurumani was being held.

**Mohamed v Attorney General & 3 Others* [2003] eKLR.

¹¹³ Concluding observations of the Human Rights Committee, Trinidad and Tobago, CCPR/CO/70/TTO, 3 November 2000.

4.5.2 Non-Arbitrary Detention

In addition to being based on adequate legal grounds, the exercise of the power to arrest or detain must be reasonable in the circumstances. In the Mukong case, the Human Rights Committee explained that “arbitrariness is not to be equated with ‘against the law,’ but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.”



Case Study: The *Mukong Case**

Albert Mukong was arrested and detained for several months on charges of “intoxication of the national and international public opinion” following an interview with a British television company in which he criticized the Cameroonian Government. He claimed that his arrest and detention were arbitrary. The Cameroonian Government claimed that the arrest had been carried out in accordance with its domestic law. It sought to justify its actions on grounds of national security and public order, by arguing that Mr Mukong had exercised his right to freedom of expression without regard to the country’s political context and high level of instability.

The Human Rights Committee found that Cameroon had violated Article 9 (1) of the ICCPR in that the author’s detention “was neither reasonable nor necessary in the circumstances of the case.” Cameroon had not shown that the detention was “necessary ... to prevent flight, interference with evidence or the recurrence of crime”. As regards the Government’s wider justification for arrest – the degree of instability facing the State – the Committee was of the view that “the legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights”. The Committee concluded that Mr Mukong’s right to liberty had been violated.

*Human Rights Committee, *Mukong v. Cameroon*, Communication No. 458/1991, Views of 21 July 1994.

4.5.3 Habeas Corpus – Right to Challenge the Lawfulness of Detention

In the words of the High Court in Nairobi in a recent terrorism related case, “[h]abeas corpus is a writ by which the Court commands someone who has detained another, to produce, the detained person, and to *show cause* why that person may not forthwith be set at liberty.”¹¹⁴ Where detention of an applicant is established, the burden of proving the legality of detention rests with the State.¹¹⁵

This right is enshrined in Article 51 (2) of the Constitution, which provides that “[a] person who is detained or held in custody is entitled to petition for an order of habeas corpus.” The exceptional importance of the constitutional right to petition for an order of habeas corpus is reflected by the fact that, under Article 25 (d) of the Constitution, it is a fundamental right that cannot be limited. Its application procedure is governed by the 1948 Regulations of the CPC.

Under international law, Article 9 (4) of the ICCPR provides that anyone who is deprived of liberty by arrest or detention is entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the detention and order release if the detention is not lawful.¹¹⁶ In its General Comment No. 35 on Article 9, the Human Rights Committee notes that this right applies to all persons deprived of their liberty, whether as part of criminal justice proceedings, military detention, security detention, counter-terrorism detention, involuntary hospitalization, immigration detention or detention for extradition.¹¹⁷ It also entitles persons held in solitary confinement to challenge the lawfulness of their confinement.

¹¹⁴ *Mariam Mohamed and Anor. v. Commissioner of Police and Another* [2007] eKLR.

¹¹⁵ *Masoud Salim Hemed & Another v Director of Public Prosecution & 3 Others* [2014] eKLR.

¹¹⁶ Article 9 (4) of the ICCPR.

¹¹⁷ Human Rights Committee, General Comment No. 35: Article 9 (Liberty and Security of the Person), CCPR/C/GC/35 (16 December 2014), para 40.

Rapidity is an essential feature of the writ of habeas corpus, both regarding the duration of the proceedings initiated by the *habeas corpus* petition and regarding the release of the subject if the petition is successful. In its General Comment No. 35, the Human Rights Committee makes it clear that Article 9 (4) requires that the reviewing court must have the power to release the person concerned from unlawful detention. When a judicial order of release under Article 9 (4) becomes operative, it must be complied with immediately; continued detention would be arbitrary and contrary to Article 9 (1).¹¹⁸

As the IACtHR has pointed out, *habeas corpus* is essential not only to the protection of the right to liberty, but also as a safeguard against torture, disappearances and extrajudicial executions: "... *habeas corpus* performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret"¹¹⁹

Because it is a vital safeguard for the protection of non-derogable human rights provisions, such as the prohibitions of torture and extrajudicial executions, international human rights bodies maintain (as dictated also by Article 25 (d) of the Kenyan Constitution), that the right to *habeas corpus* cannot be limited even in times of emergency threatening the life of the nation, although the right to liberty is not among the absolute rights.

"[t]he immediate aim of (Article 7 of ACHR, which corresponds to the habeas corpus right) is to bring the detainee before a judge, thus enabling the latter to verify whether the detainee is still alive and whether or not he or she has been subjected to torture or physical or psychological abuse. The importance of this remedy cannot be overstated, considering that the right to humane treatment recognized in Article 5 of the American Convention on Human Rights is one of the rights that may not be suspended under any circumstances." (IACtHR Advisory Opinion OC-8/87)

Where the Respondent Denies Having Custody of the Person

The use of the petition for an order of habeas corpus in cases of alleged secret detention, enforced disappearance or so-called extraordinary rendition may result in situations in which the respondent denies having custody of the person on whose behalf the writ is exercised.

The following two cases illustrate this situation and the way in which Kenyan courts have approached it:



Case Studies: The *Mariam Mohamed and *Masoud Salim Hemed Cases*****

In the *Mariam Mohamed* case, the ATPU had arrested Mohamed Abdulmalik, but subsequently released him because no substantial evidence against him could be gathered. Thereafter, according to the unchallenged affidavit filed by the petitioner, Kenyan authorities handed Mr Abdulmalik over to US forces, which acknowledged that he was now in their custody.

In ruling on the *habeas corpus* petition filed against the ATPU and the Attorney-General of Kenya, the High Court reasoned that

"[i]t is evident that, voluntarily or involuntarily, the respondents have placed themselves in a position in which it is *no longer within their power to produce* the Subject before this Court. This Court, within the concept of *Habeas corpus*, will be unable to make orders for the *production* of the Subject, because such an order would be *in vain*. It is a fundamental principle applicable in the judicial settlement of disputes, that a Court of law is not to make an order in vain. Courts' orders are focused, clear,

¹¹⁸ Ibid, para 41.

¹¹⁹ Inter-American Court of Human Rights, Advisory Opinion OC-8/87; (1989) 11 E.H.R.R. 33.

enforceable, and capable of being secured by applying the law of contempt, against those who disobey. From the facts placed before this Court, the respondents are, at this moment, *not in control* of the physical custody of the subject, and so they would not be in a factual *position to comply* with a writ of *habeas corpus*.

It follows that the applicants' Chamber Summons of 18th October, 2007 is either *overtaken by events*, or would have to remain in abeyance, until the Subject is physically in the custody of the respondents.

And just as the Court cannot, in the circumstances, ultimately issue a writ of *habeas corpus*, so would it serve *no practical purpose* to summon the several State officials proposed by the applicants, in connection with a *Habeas corpus* application. There is *no answer* which the said officials would be able to provide before this Court, which supports issuance of a writ of *Habeas corpus* – because they do not have the Subject in their custody."

The High Court went on to note that "the person who *made it impossible* for the Subject to enjoy those rights, committed a *constitutional and legal wrong* against him. Legal wrongs are always actionable, in any *common law* system such as that which applies in this country. Justiciability at common law is well expressed in the eternal maxim of civilized, law-based governance: *ubi jus ibi remedium*, meaning, where there is a right, there is a remedy This principle has been re-enacted and *reinforced* in Kenya's fundamental law of individual rights. . . . This, however, is not the question which has been placed before this Court, by the *Habeas corpus* application of 18th October, 2007; and it is for that reason, that a *different* application would have to be made before the High Court."

On these grounds, the High Court declared the *habeas corpus* application spent, and directed the applicants that they "may make a suitable constitutional application in the High Court".

In the *Masoud Salim Hemed* case, the application for *habeas corpus* was based on the fact that the subject had been arrested and detained by the police, but could not be traced. The High Court initially granted an order for *habeas corpus* based on pictures showing the applicant's arrest.

The police explained that he had been arrested during a raid at the Masjid Musa Mosque in Mombasa while participating in a jihadist convention. It was their contention that while being transported to the police station, the subject escaped, hence their failure to produce him in court.

The High Court held:

"When a person is alleged to be in police custody with the police admitting arrest but alleging subsequent loss of the suspect, or escape from custody, in circumstances where the suspects restraint at the time of arrest does not permit easy escape, no stone ought to be left standing and unturned in the quest not to discover the whereabouts of the person, which is an investigative function of the police and other specialised agencies, but to establish the *bona fides* of the escape theory and therefore justify the defence of loss of physical custody which would then excuse the non-compliance with the order of production. In default, the respondent would be in contempt of court for failing to produce the subject. That must be the practical meaning of unlimited right to *habeas corpus* – that all shall be done to give effect to the order of *habeas corpus* the right to which the person in custody is guaranteed by the Constitution of Kenya."

The High Court expressed strong doubts about the explanation given by the police and concluded that Hemed must be presumed dead.

Under these circumstances, the High Court considered what would be the appropriate remedial orders. It made orders for the Chief Magistrate's Court in Mombasa to carry out an inquiry into the circumstances of Hemed's death on the basis that he is now designated 'a missing person presumed dead' within the meaning of section 387 of the Criminal Procedure Code. The Court also ordered the police and the KNHRC, which is constitutionally mandated to investigate all cases of human rights violations, to conduct investigations in the matter and jointly with the Criminal Investigations Directorate to prepare a report for the inquest and this Court. It further noted that the petitioners may also file complaints with the IPOA.

**Mariam Mohamed and Another v Commissioner of Police and Another* [2007] eKLR

***Masoud Salim Hemed & Another v Director of Public Prosecution & 3 Others* [2014] eKLR

Fair Proceedings

Proceedings concerning the lawfulness of detention must have judicial character, be fair and ensure “equality of arms” between the parties.¹²⁰ This does not mean that all guarantees of a fair trial as set forth in Article 14 of the ICCPR and corresponding provisions in regional treaties must be fully ensured in all cases. For instance, whether it will be necessary for the court to hold an oral hearing and hear witnesses will depend on the type of detention in question and its duration.

Where a person in detention has no access to legal assistance, whether because it is denied by the authorities or because the detainee has insufficient means and no legal aid is available, this will often mean that, in practice, he has no means of challenging the decision to detain him. In the *Berry* case, Mr. Berry was in remand detention on murder charges.¹²¹ The Human Rights Committee found that, although he had theoretically available to him the writ of *habeas corpus*, in practice he could not make any such application without legal assistance, which had not been made available to him. The Committee concluded that there had been a violation of the right to challenge the lawfulness of detention.

Where persons are detained on suspicion of involvement with terrorism, the authorities might perceive a need not to disclose to the detainee some of the grounds and documents on which the suspicions are based. In other words, the authorities might seek to rely on “secret evidence” to justify the detention. Sometimes the authorities might also consider it necessary to withhold certain evidence from the accused on grounds of witness protection, of national security, or of other public-interest grounds.

As will be explored in Chapter 5 (section 5.7), the right to a fair trial requires disclosure of all material evidence in possession of the prosecution, both for and against the accused. According to the ACommHPR Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa, the right to a fair hearing includes the right of the accused to all relevant information held by the prosecution or other public authorities that could help the accused exonerate him or herself, or cast doubt on the State’s case against him or her.¹²²

These same issues may arise in habeas corpus proceedings. A fair balance between the authorities’ interest in keeping information from the detainee and the detainee’s right to be in a position to effectively challenge his detention must therefore be struck, as illustrated by the following case study.



Case Study: *The A and Others Case**

Following the terrorist attacks on the United States of 11 September 2001, the United Kingdom adopted legislation allowing the arrest and extended detention without charge of foreign nationals on the basis of a “certificate” issued by a government minister to the effect that the detainee was an “international terrorist.” A. and the other men in this case were detained under this administrative detention scheme for three-and-a-half years.

The “certificate,” and the administrative detention based on it, was subject to review by a Special Immigration Appeals Court (SIAC). In determining whether the Government Minister had had reasonable grounds for suspecting that the detainees were “international terrorists” whose presence in the United Kingdom gave rise to a risk to national security, SIAC used a procedure that enabled it to consider both evidence that could be made public (“open material”), and sensitive evidence that could not be disclosed for reasons of national security (“closed material”). The detainee and his legal representatives were given the open material and could comment on it in writing and at a hearing. The closed material was not disclosed to the detainee or his lawyers but to a “special advocate,” appointed on behalf of each detainee by the authorities. In addition to the open hearings, SIAC held closed hearings to examine the secret evidence, where the special advocate could make submissions on behalf of the detainee. However, once the special

120 ECtHR, *A. and Others v. the United Kingdom*, Application No. 3455/05, Judgment of 19 February 2009, paras. 203-204.

121 Human Rights Committee, *Berry v. Jamaica*, Merits, Communication No. 330/1988, CCPR/C/50/D/330/1988, 26 April 1994.

122 ACommHPR’s Principles and Guidelines on Human and Peoples’ Rights While Countering Terrorism in Africa, p. 25.

advocate had seen the closed material, he could not have any contact with the detainee or his lawyers, except with the leave of the Court. The special advocate could therefore not consult the detainee about any of the allegations contained in secret evidence.

The ECtHR examined whether this procedure met the requirements of procedural fairness and “equality of arms.” As its starting point, the ECtHR observed that there was an urgent need to protect the population of the United Kingdom from terrorist attacks, and a strong public interest in obtaining information about al-Qaeda and its associates, as well as in maintaining the secrecy of the sources of such information (at 216). Balanced against this public interest was the right of the detainees to procedural fairness. The ECtHR maintained that “in view of the dramatic impact of the lengthy – and what appeared at that time indefinite – deprivation of liberty on the [detainees] fundamental rights” (at 217), fair-trial guarantees had to be substantially respected. “[I]t was essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others.” (at 218).

The ECtHR noted that the SIAC, as a fully independent court which could examine both the “open material” and the “closed material,” was best placed to ensure that no material evidence was unnecessarily withheld from the detainees. The special advocates could provide an important, additional safeguard (at 219). The ECtHR found that, in the end, the decisive question to establish whether there had been a fair procedure was whether the detainee “was provided with sufficient information about the allegations against him to enable him to give effective instructions to [his representative and] the special advocate” and to refute the allegations (at 220). This was to be assessed on a case-by-case basis.

Where, for example, it was alleged that a detainee had attended a terrorist training camp, if the open material contained specific details about the dates and locations of the alleged training, that should have enabled the detainee to provide an alibi, even if the source of the allegation and other details were not disclosed to him. The same applied to allegations that a detainee had met on a specific date with a specific named terrorist (at 220-222).

On the other hand, in the case of one of the men the open material included evidence that he had been involved in raising money through fraud. However, the evidence which allegedly provided the link between the money raised and terrorism was not disclosed to the detainee. In these circumstances, the ECtHR concluded that, even with the assistance of the special advocate, the detainee was not in a position to effectively challenge the allegations against him. The right to challenge the lawfulness of his detention was violated (at 223).

*ECtHR, *A. and Others v. the United Kingdom*, Application no. 3455/05, Judgment of 19 February 2009. This case is also discussed in Chapter 1 (section 1.6) from the point of view of the permissibility of the derogation in times of emergency sought by the United Kingdom

4.6 ARREST AND DETENTION IN THE CRIMINAL JUSTICE CONTEXT

The rights and safeguards discussed up to here apply to all forms of deprivation of liberty. Additionally, there are a number of specific safeguards that apply to detention in the context of criminal justice processes, given the risk of individuals being detained unnecessarily or unreasonably through operation of criminal enforcement powers.

4.6.1 The Requirement of Reasonable Suspicion

Where an individual is detained in connection with a criminal charge, there must exist “reasonable suspicion” that the said individual has committed the offence in question. It is not sufficient for an arresting officer to genuinely believe that an individual may be responsible for a criminal act. As discussed above, Article 29 (a) of the Constitution provides that “[e]very person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause.” There is however, no explicit constitutional provision on the requirement of “reasonable suspicion” as a condition for detaining an individual. Section 31 of the POTA provides that “[a] police officer may arrest a person where he has reasonable grounds to believe that such a person has committed or is committing an offence proscribed under the Act.”

According to the ECtHR, “having a ‘reasonable suspicion’ presupposes the existence of facts or information, which would satisfy an objective observer that the person concerned may have committed the offence.”¹²³ Where a person is arrested and interrogated, but subsequently released without being formally charged and prosecuted for an offence, this does not mean that there was no reasonable suspicion justifying the arrest.



Activity

- Have Kenyan courts provided guidance on what constitutes “reasonable grounds” that a person has committed an offence, thereby justifying his/her arrest?

4.6.2 The Right to be Promptly Informed of the Reasons for Arrest or any Charges

Under the Constitution, this right is enshrined under Article 49 (1) (a), which provides that “[a]n arrested person has the right to be informed promptly, in language that the person understands, of:

- i) the reason for the arrest;
- ii) the right to remain silent; and
- iii) the consequences of not remaining silent.”

Where deprivation of liberty takes place in the criminal justice context, the arrested persons shall be promptly informed of any charges against them. For this reason, Section 7 (1) (a) of the Persons Deprived of Liberty Act provides that “[s]ubject to Articles 50 and 51 of the Constitution, any person arrested and held in lawful custody in relation to any criminal proceedings is entitled to the due process of law, and in particular the right to be promptly informed in a language the person understands of the reasons for their deprivation of liberty and of the charges, if any, preferred against them.”

Under international law, Article 9 (2) of the ICCPR provides that “[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.” This provision imposes two requirements for the benefit of persons who are deprived of liberty. First, they shall be informed, at the time of arrest, of the reasons for the arrest. This requirement applies broadly to the reasons for any deprivation of liberty, including outside the context of criminal justice. Secondly, those charged with an offence, shall be promptly informed of any charges against them.

One major purpose of requiring that all arrested persons be informed of the reasons for the arrest is to enable them to seek release if they believe that the reasons given are invalid or unfounded. The reasons must include not only the general legal basis of the arrest, but enough factual specifics to indicate the substance of the complaint, such as the wrongful act and the identity of an alleged victim. Although oral notification of reasons for arrest satisfies the requirement, the Human Rights Committee has noted that this information should also be subsequently given to the arrested person in writing.¹²⁴

These reasons must be given in a language that the arrested person understands. Ordinarily this information must be provided immediately upon arrest. In exceptional circumstances, such immediate communication may not be possible. For example, a delay of several hours may be required before an interpreter can be present.

¹²³ ECtHR, *Fox Campbell and Hartley v. United Kingdom*, Application Nos. 12244/86, 12245/86, and 12383/86, Judgment of 30 August 1990, para. 32.

¹²⁴ Human Rights Committee, *Concluding Observations: Sudan*, UN Doc. CCPR/C/79/Add.85 (1997), para 13; See also *Boyle v United Kingdom* (55434/00) European Court (2008), para 38.

Persons arrested for the purpose of investigating crimes they may have committed, or for the purpose of holding them for criminal trial, must be promptly informed of the crimes of which they are suspected or accused of. The arrested persons have to be informed “promptly” of any charges, not necessarily “at the time of arrest.” If particular charges are already contemplated, the arresting officer may inform the person of both reasons and charges, or the authorities may explain the legal basis of the detention some hours later.



Cross-Reference

The right to a fair trial also requires that any person charged with an offence be informed of the nature and cause of the charge(s) brought. This fair trial guarantee applies to all persons charged with an offence, whether they are arrested and detained for the purposes of the investigation or remain at liberty. The two rights are therefore related, but have a different scope.

4.6.3 Right to Consult with Legal Counsel

All persons deprived of their liberty are entitled to communicate and consult with legal counsel without delay. They must be given adequate time to consult with legal counsel in full confidentiality. Where a detainee does not have the means to pay for legal counsel, legal aid must be available. Under Kenyan law, Section 7 (1) (j) of the Persons Deprived of Liberty Act guarantees any person arrested and held in lawful custody in relation to any criminal proceedings, “the right to communicate privately with their advocate.”

Similarly, Principle 18 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that “[t]he 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.”



Cross-Reference

The right to be assisted by legal counsel is discussed in more detail in Chapter 3, section 3.6, which also provides case studies and reference materials.

4.6.4 Notification of and Communication with the Detainees’ Family or Other Person of their Choice

Section 7 (1) (g) of the Persons Deprived of Liberty Act guarantees persons arrested and held in lawful custody due to any criminal proceedings, “the right to communicate with family or other persons of their choice.” Section 8 (1) further provides them with the right to communicate, whether by telephone or other means, with any person of their choice while detained, held in custody, imprisoned or upon transfer from one institution to another. Pursuant to Section 8 (2), the person in charge of a facility where detainees are held is under an obligation to facilitate the communication without charge. Moreover, Section 8 (3) provides that the right of detainees to communicate with any other person is only subject to limitations specified by Regulations. As of the time of writing, however, no regulations had been made under the Act.

The United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides for (i) a right of any arrested or detained person to notify the family or other appropriate person of his arrest or detention, or to have them notified by the authorities; and (ii) a right to communicate with the family. In most cases, the exercise of these two rights will in fact coincide when the arrested person communicates to the family that he has been arrested.

The UN Body of Principles makes, however, a slight but important distinction: According to Principle 16(1), notification of the family or other appropriate persons of the detainee's choice by the authorities must be "promptly after arrest" and after each transfer. Principle 15 states that communication of the detainee with his family shall not be denied for more than a matter of days. Moreover, the right to communicate with the family or other appropriate person continues throughout detention.

With regard to the right of notification, Principle 16 (1) of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that "[p]romptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody."

Respect for these rights is an important safeguard against the risks of incommunicado or secret detention and ultimately of enforced disappearance.



Cross-Reference

Refer to Section 4.7 for discussion of incommunicado detention.

There may be circumstances, particularly when dealing with organised crime groups or terrorism, in which the authorities have good reasons to delay the notification of the family or other person of the arrested person's choice. This may be the case, for instance, when a series of coordinated arrests and searches are being carried out and there would be a risk of the first arrested persons tipping off their associates.

Taking such circumstances into account, Principle 16 (4) recognises that "the competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require." The following example from Spain illustrates the issues that arise in this regard.



Case Study: Incommunicado Detention of Terrorism Suspects in Spain

Under Article 520 bis of the Spanish Criminal Procedure Code, a person apprehended on suspicion of terrorist offences could be detained for up to five days without having the right to have the very fact and place of his detention disclosed to his family or a third party. This incommunicado detention was ordered by a judge upon application from the law enforcement agency. Also, access to legal counsel of his choice could be denied for up to five days (a lawyer was, however, officially appointed to assist the detainee).

The European Committee for the Prevention of Torture (CPT) accepted that the needs of the investigation may justify the withholding of information about the fact of someone's detention and the place where he is being held for a brief period of time. It remarked, however, that "the possibility under the law of withholding this information for several days (up to 5 days in certain cases) indicates that a proper balance has not been struck between the requirements of investigations and the interests of detained persons." The CPT recommended that this period of incommunicado detention be shortened substantially.*

Also the United Nations Special Rapporteur on human rights and counter-terrorism noted in his report on a visit to Spain (A/HRC/10/3/Add.2, para. 15) that "this regime is on its own highly problematic and both provides a possibility for the commission of prohibited treatment against the detainee and makes it difficult for Spain to defend itself against allegations of such treatment."

See more on incommunicado detention in section 4.7.3 below.

*European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Report to the Spanish Government on the visit to Spain carried out by the Committee from 1 to 12 April 1991, para. 47.

4.6.5 Right to Consular Assistance

Under Kenyan law, Section 11 of the Persons Deprived of Liberty Act provides that “[a]liens deprived of liberty, shall be informed, without delay and in any case before they make any statement to the competent authorities, of their right to consular or diplomatic assistance, and to request that consular or diplomatic authorities be notified of their deprivation of liberty forthwith. Where consular assistance is not available, the alien will be entitled to legal aid and assistance in accordance with any written law.”

Under international law, this right equally applies in terrorism cases. In recognition of the particular vulnerability of persons detained outside their home country, most international counter-terrorism instruments enshrine a right to consular assistance (applying to the counter-terrorism context a general principle codified in Article 36 of the Vienna Convention on Consular Relations of 1963). For instance, Article 7 of the 1997 Convention for the Suppression of Terrorist Bombings provides as follows:

“3. Any person [detained for the purpose of prosecution or extradition or otherwise subject to measures to ensure his attendance] shall be entitled to:

- a) communicate without delay with the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person’s rights or, if that person is a stateless person, the State in the territory of which that person habitually resides;
- b) be visited by a representative of that State;
- c) be informed of that person’s rights under subparagraphs (a) and (b).”

4.6.6 Informing Detainees of Their Rights

Section 7 (1) (d) of the Persons Deprived of Liberty Act reinforces Kenyan constitutional guarantees by providing that “[s]ubject to Articles 50 and 51 of the Constitution, any person arrested and held in lawful custody in relation to any criminal proceedings is entitled to the due process of law, and in particular the right to be informed of their constitutional rights and guarantees relating to personal liberty and other fundamental rights and freedoms.” Subsection (e) further entitles the detainee to be informed of the basis for limitation of those rights consistent with their arrest or detention, while Subsection (f) entitles the detainee to access the services of an interpreter or other intermediary during detention and legal proceedings.

Similarly, Principle 13 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that “[a]ny person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively, with information on and an explanation of his rights and how to avail himself of such rights.” Indeed, in the case of many persons arrested or detained, all other rights and safeguards will not be effective in practice, but remain illusory, unless they are provided with information on their rights, in a language they understand.



Practical Guidance

It is advisable to have an information sheet explaining in simple terms the basic rights of any person taken into police custody available in every police station. Where it is likely that detainees may not speak the official language, it is advisable to have the information sheet available in the languages most likely to be understood by detainees. In the report on its visit to Sweden, the Sub-Committee on Prevention of Torture stated

“The provision of information on rights is an important safeguard as well as a prerequisite for effective exercise of due process rights and the prompt production of the person concerned before a judge. The SPT emphasizes the duty of the Swedish authorities to ensure that all persons obliged to stay with the police are made aware of their basic rights as well as of all the relevant procedural rights that such persons may exercise at this stage of the proceedings. The SPT also stresses the obligation on the part of the police to assist in the exercise of all such rights as from the very outset of deprivation of liberty.

The SPT recommends that the information sheet listing the rights of the persons obliged to stay with the police be finalized as soon as possible and distributed to all police stations. Information on rights should be given orally for persons who do not know how to read and through interpretation for persons who do not have sufficient knowledge of any of the languages in which the written version is produced.*

*Report on the visit of the Sub-Committee on Prevention of Torture and other cruel, inhuman or degrading treatment or punishment to Sweden, CAT/OP/SWE/1, paras. 48-49.



Tools

- The United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (A/RES/173), is available here: <http://www.un.org/documents/ga/res/43/a43r173.htm>.
- The Convention for the Protection of All Persons from Enforced Disappearance, is available here: <http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx>.



Activities

- How is information pertaining to the constitutional rights and guarantees of persons deprived of their liberty in Kenya availed to arrested and/or detained persons in practice?
- Is there any exception under Kenyan law for those arrested and/or detained under the POTA?

4.6.7 Maintaining Records about Arrest and Detention

The authorities in charge of arrest and detention must maintain accurate and up-to-date records regarding all persons deprived of their liberty. This is crucial to safeguard the rights and well-being of detainees, including protecting them against torture, other ill-treatment and the risk of disappearances. It is equally crucial to protect the officials in charge of arrest and detention against false allegations of wrongdoing.

In this regard, Section 50 (1) of the NPS Act mandates every police officer in charge of a police station in Kenya, to keep a record in such form as the Inspector-General may, in consultation with the Deputy Inspector-General, direct and record therein all complaints and charges preferred, the names of all persons arrested and the offences with which they are charged.

Moreover, Section 3 (3) of the Persons Deprived of Liberty Act provides that “[a]n institution holding arrested persons shall maintain a register, which shall be used by the law enforcement official to record the following:

- personal details of the arrested person, including name, age, gender and address;
- physical condition of the person;
- reason for the arrest;
- steps taken, to ensure that the person arrested or detained is subjected to due process of the law; and
- the medical history of the person detained, held in custody or imprisoned.”

At the international level, Principles 12 and 23 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (A/RES/173) provides that the records kept shall comprise:

- The reasons for the arrest;
- The time of the arrest and the taking of the arrested person to a place of custody;
- The identity of the law enforcement officials concerned;

- Precise information concerning the place of custody;
- The time of the arrested person's first appearance before a judicial or other authority; and
- 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.

These records shall be communicated to the detained person or his counsel upon request.

At the regional level, Articles 16–19 of the Luanda Guidelines make similar provisions for maintaining of a register with records, including reasons for arrest and detention, condition and state of the detainee, amongst other requirements.



Registration of Detainees under the United Nations Convention on Enforced Disappearance

The recent ICPPED, which Kenya has signed but not yet ratified, reaffirms the importance of record-keeping in places of detention as an essential measure to prevent serious human rights violations.

Article 17 (3) of ICPPED sets out an obligation of registration, detailing what this obligation entails. It states:

“Each State Party shall assure the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of liberty, which shall be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose by the law of the State Party concerned or any relevant international legal instrument to which the State concerned is a party. The information contained therein shall include, as a minimum:

- a) The identity of the person deprived of liberty;
- b) The date, time and place where the person was deprived of liberty and the identity of the authority that deprived the person of liberty;
- c) The authority that ordered the deprivation of liberty and the grounds for the deprivation of liberty;
- d) The authority responsible for supervising the deprivation of liberty;
- e) The place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty;
- f) Elements relating to the state of health of the person deprived of liberty;
- g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains;
- h) The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.”

Articles 18 to 20 ICPPED provide that each State shall guarantee access to this information (with certain restrictions spelled out in these articles) “to any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representatives or their counsel.”



Activities

- What legislation or regulations applicable in Kenya establish what records must be kept about detainees in places of detention? Does this legislation apply to all places of detention and all authorities with power to detain?
- Compare the information that is recorded in police custody registers and other places of detention in Kenya with the requirements of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and of the Convention on Enforced Disappearance. Is there any information required by these international instruments that is not recorded in Kenyan jurisdiction? If so, why is that information important?

4.6.8 Medical Examination and Access to Medical Care

Under Kenyan law, Section 15 of the Persons Deprived of Liberty Act provides that “[a] person detained, held in custody or imprisoned is, on the recommendation of a medical officer of health, entitled to medical examination, treatment and healthcare, including preventive healthcare.”

In addition, Section 29 of the Prisons Act provides that:

- 1) There shall be a medical officer stationed in or responsible for every prison.
- 2) The medical officer shall be responsible for the health of all prisoners in a prison and shall cause all prisoners to be medically examined at such times as shall be prescribed.
- 3) A medical officer may, whether or not a prisoner consents thereto, take or cause or direct to be taken such action (including the forcible feeding, inoculation, vaccination and any other treatment of the prisoner, whether of the like nature or otherwise) as he may consider necessary to safeguard or restore the health of the prisoner or to prevent the spread of disease.
- 4) All actions of a medical officer, prison officer, medical orderly, or other person acting under the provisions of the preceding paragraph, or in pursuance of directions given thereunder, shall be lawful.

Section 16 further pertains to the confidentiality of health information. In particular, Section 16 (1) provides that “[a] person deprived of liberty has a right to confidentiality regarding his or her health status.” This provision is qualified by Section 16 (2), which states that “[a] medical officer of health shall disclose to the law enforcement official in charge of an institution, health information of a person deprived of liberty, which relates to infectious or communicable diseases in order to-

- a) facilitate effective health care for the person deprived liberty; and
- b) facilitate the protection of other persons deprived of liberty and the officers under whose charge such persons are accommodated.”

In practice, all prison facilities in Kenya have some medical personnel to attend to inmates and they would be the facility of first resort. If inmates require specialized treatment, it would be upon referral by the prison medical personnel. Secondly, inmates can make an application to court if they would like to be attended to by their own medical doctors or at a private medical facility. Persons held in police custody would have access to public health services and/or their personal medical doctors and it is the responsibility of police officers holding such persons to ensure proper medical attention.

At the international level, Principle 24 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that “[a] proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.”

Medical examination of a detainee as promptly as possible after his admission to the place of detention is essential not only for the protection of the welfare of detainees, but also to protect those detaining them. It assists in ensuring that unmeritorious claims of ill treatment can readily be disproved. As explained in Chapter 3 (section 3.7) in the context of the prevention of torture and other ill-treatment, where a person deprived of liberty is found to be injured, the burden is on the authorities to prove that they are not responsible for the injuries.

The medical examination of the detainee ought to be conducted out of hearing from those responsible for the detention. Attention must be paid to the gender of the examining medical officer. Medical details of detainees must be stored in circumstances that ensure their confidentiality, allowing access to such records by medical professionals, the detainee, his lawyer and family with the consent of the detainee, but preventing unauthorized access by officials other than those for whom access is necessary in the discharge of their functions.

Failure to provide medical treatment to a detained prisoner may amount to inhuman or degrading treatment. In the *Lantsova* case, a young man in pre-trial detention died of acute pneumonia leading to cardiac insufficiency.¹²⁵ The poor conditions of detention, including overcrowding, poor ventilation, as well as inadequate food and hygiene, contributed to the fatal deterioration of Mr. Lantsov's health. Mr. Lantsov received medical care only during the last few minutes of his life. It remained unclear whether the authorities had previously refused medical care, or whether Mr. Lantsov had not requested care. The United Nations Human Rights Committee noted that

“even if ... neither Mr. Lantsov himself nor his co-detainees had requested medical help in time, the essential fact remains that the State party by arresting and detaining individuals takes the responsibility to care for their life. It is up to the State party by organizing its detention facilities to know about the state of health of the detainees as far as may be reasonably expected. Lack of financial means cannot reduce this responsibility. The Committee considers that a properly functioning medical service within the detention centre could and should have known about the dangerous change in the state of health of Mr. Lantsov. It considers that the State party failed to take appropriate measures to protect Mr. Lantsov's life during the period he spent in the detention centre. Consequently, the Human Rights Committee concludes that, in this case, there has been a violation of [the right to life].” (at para 9.2).



Tools

- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by United Nations General Assembly in Resolution 43/173 (1988) available at: <http://www.un.org/documents/ga/res/43/a43r173.htm>.
- The ACommHPR adopted the Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa, which encourages as a best practice to link the health care for prisoners to the country's ministry of health. The Declaration and Plan of Action is available here: <http://www.achpr.org/instruments/ouagadougou-planofaction/>.
- In its 23rd General Report, at paras. 71-84, the European Committee for the Prevention of Torture sets out the standards, which it has developed as regards the documenting and reporting of medical evidence of ill-treatment. These are available here: <http://www.cpt.coe.int/en/annual/rep-23.pdf>.



Activities

- What are the rules applicable to notification of a detainee's family upon arrest or transfer from one place of detention to another in the Kenyan legal system, and regarding communication between a terrorism suspect and his family? Compare these rules to the international standards explained above.
- Have you been involved in cases concerning the detention of foreign terrorism suspects? How was their right to consular assistance handled?
- What are the rules governing the medical examination of detainees upon arrest or transfer from one place of detention to another in Kenya? Are these rules adequate to ensure that false claims of ill-treatment can be disproved, and to identify those responsible for ill-treatment which actually occurred?

125 Human Rights Committee, *Lantsova v. The Russian Federation*, Communication No. 763/1997, Views of 26 March 2002.

4.6.9 The Right to be Brought Promptly before a Judge

Article 49 (1) (f) of the Constitution provides that “an arrested person” has the right “to be brought before a court as soon as reasonably possible, but not later than:

- i) twenty-four hours after being arrested; or
- ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day.”

Section 32 (1) of the POTA reaffirms this constitutional requirement with regard to persons arrested on suspicion of terrorism related offences:

“A person arrested under Section 24 (referred to as the suspect) shall not be held for more than twenty four hours after his arrest unless—

- (a) the suspect is produced before a Court and the Court has ordered that the suspect be remanded in custody; or
- (b) the twenty-four hours ends outside ordinary court hours or on a day that is not an ordinary court day.”

Article 9 (3) of the ICCPR provides that “[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power.” Two of the elements in this provision deserve to be particularly highlighted:

- 1) “Anyone arrested or detained on a criminal charge” refers to any person arrested or detained on suspicion of criminal activity, whether formal charges have been asserted or not. In the case of *Marques de Morais*, for instance, a journalist was arrested and detained by rapid intervention police and criminal investigators. He was detained and interrogated for forty days before he was charged with defamation of the country’s president and brought before a judge, who ordered his release pending trial. The Human Rights Committee made clear that the right to be brought “promptly” before a judge applied as of the moment of his deprivation of liberty on suspicion of having committed an offence, even though charges were formalized only 40 days later.¹²⁶
- 2) The detainee must be brought to appear physically before the judge. Bringing the detainee before the judge is an automatic obligation. It does not depend on the detainee asserting his right to be brought before a judge. The physical presence of detainees at the hearing gives the opportunity for inquiry into the treatment that they received in custody. It also facilitates immediate transfer to a remand detention centre if continued detention is ordered.



Case Study: The *Mezgebo** and *Ann Njogu*** Cases

The *Mezgebo* Case*

The petitioner had brought a petition on behalf of her husband, an Ethiopian citizen, who had been removed from Kenya on 1 July 2011, on the basis of a deportation order dated 30 June 2011, issued by the Minister of State for Immigration and Registration of Persons. He had been arrested by the ATPU in Nairobi on 20 June 2011, on suspicion of being involved in trafficking of Ethiopian and Eritrean nationals to South Africa and Dubai. On 21 June 2011, an ex parte application was granted by the court for the accused to be remanded in police custody for a period of fourteen days to enable the ATPU complete investigations and obtain repatriation orders from the Minister. The petitioner’s grievance was that the subject was not taken to court within the 24 hours required and that the obtaining of an ex-parte order did not cure this breach.

126 Human Rights Committee, *Marques de Morais v. Angola*, Communication No. 1128/2002, CCPR/C/83/D/1128/2002, 1 April 2005, para. 6.3.

The High Court found that the constitutional provisions of Article 49 (1) (f) are clear that the person must be “brought before a court,” and such provision cannot be dispensed with by applying for a warrant ex-parte to extend the detention. The Court further noted that the reason for an accused person being brought to court is to ensure fulfilment of the right protected in Article 49 (1) (g), which stipulates that “...at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released.” The Court thus held that the subject ought to have been taken to court within 24 hours in the circumstances and by failing to do so, the State had breached Articles 49 (1) (f), (g) and (h) of the Constitution on rights of an arrested person.

The Ann Njogu Case**

The six applicants, who were arrested on 31 July 2007, were not brought before a Court within 24 hours of arrest in accordance with Section 72(3) of the Constitution of Kenya.

On 1 August 2007 the applicants filed an Originating Notice of Motion in the High Court under Sections 72 (1), 77 (1) of the Constitution of Kenya, Section 123 of the CPC and the inherent power and jurisdiction of the High Court. An interpartes hearing was fixed on 2 August 2007.

Despite being duly served on 1 August 2007, representatives of the Attorney-General’s office and Commissioner of Police failed to appear at the interpartes hearing. On 2 August 2007 the applicants were brought before the Nairobi Chief Magistrates Court where an attempt to charge them was blocked by their counsel.

The High Court found that the applicants’ constitutional and fundamental rights had been violated and accordingly, that any prosecution against them was null and void regardless of the weight of any evidence that the prosecution might have been collected in support of its case.

The Court noted that there is no cure for such a nullity nor any room for an extension of the 24 hour period proscribed by the constitution, observing that “At the tick of the 60th minute of the 24th hour, if they have not been brought before the court, every minute thereafter of their continued detention is an unmitigated illegality as it is a violation of the fundamental and constitutional rights of the applicants.”

**Milen Halefom Mezgebo v Attorney General & 2 Others* [2012] eKLR.

***Ann Njogu & 5 Others v Republic* [2007] eKLR.



Activities

Discuss the following questions:

- Why do Kenyan courts and international human rights bodies attribute such importance to respect for the right to be brought in person before a judge within a very short delay from arrest?
- Are these time-limits consistently respected in practice in Kenya? Are the detained persons always brought in person before the judicial officer? What are the challenges law enforcement and prosecutors face in respecting the statutory time limits?

4.6.10 Remand Detention

Right to Bail

Article 49 (1) (h) of the Constitution provides that an accused person is “to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

That remand detention is to be the exception rather than the rule is also recognised by international and regional human rights treaties, including Article 9 (3) of the ICCPR, as well as the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, in particular Principle 39.

In March 2015, the National Council on the Administration of Justice published the Bail and Bond Policy Guidelines.¹²⁷ Principle 3.1(b) recognises that “[e]very accused person has the right to liberty. As a general rule, therefore, every accused person should not be detained, but should be released subject to his/her guarantee to appear for trial. Pre-trial detention should therefore be a measure of last resort, and the criminal justice institutions should make every reasonable effort to avoid pre-trial detention.”

Courts in Kenya, as in many other jurisdictions, are faced with the challenge of determining how the right to be released on bail pending charge or trial is to be applied with regard to persons suspected of terrorism offences, considering the often exceptional gravity of the offences charged and the good reasons to believe (in many but not all cases) that the subjects concerned are highly dangerous.

The POTA makes clear that the right to be released on bail applies also when the offence suspected or charged is related to terrorism. Section 33 (1) of the Act stipulates as follows:

“(1) A police officer who detains a suspect may, where he has reasonable grounds to believe that the detention of the suspect beyond the period specified in section 32 [24 hours] is necessary -

- (a) produce the suspect before a Court; and
- (b) apply in writing to the Court for an extension of time for holding the suspect in custody.”

Sub-Section (7) specifies that where a Court makes an order for the remand of a suspect the period of remand shall not exceed thirty days.

Under Sub-Section (8), a “police officer who detains a suspect in respect of whom an order has been issued under subsection (4)(c) may, at any time before the expiry of the period of remand specified by the Court, apply to the Court for an extension of that period.”

Sub-Section (10) states that the extension of remand detention “shall not, together with the period for which the suspect was first remanded in custody, exceed three hundred and sixty days.”

To sum up, Section 33 appears to allow the Court to order remand in police custody without charges for up to 360 days. This is a very long period. As discussed in the following, courts need to exercise the greatest scrutiny in order to ensure that this provision is applied in a way that does not violate human rights, in particular the presumption of innocence, the right to remain silent, and the prohibitions against arbitrary detention and ill-treatment.

Sub-Section (2) requires the police officer making an application for remand detention to support the application by an affidavit and to specify -

- (a) the nature of the offence for which the suspect has been arrested;
- (b) the general nature of the evidence on which the suspect has been arrested;
- (c) the inquiries that have been made by the police in relation to the offence and any further inquiries proposed to be made by the police; and
- (d) the reasons necessitating the continued holding of the suspect in custody.

A Court deciding on an application for extension of remand detention will have to be convinced not only that one of the grounds for remand detention in Sub-Section (5) of Section 33 is met (these are discussed below). It should also review whether the “inquiries that have been made by the police in relation to the offence and any further inquiries proposed to be made by the police” justify continued police custody without charges. The longer the remand detention lasts, the more exigent this review by the Court will become.

127 Available at http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Bail_and_Bond_Policy_Guidelines.pdf

Grounds Justifying Remand Detention

As already alluded to above, the right to bail under Article 49 (1) (h) of the Constitution is not absolute and may be restricted if “*there are compelling reasons*” to do so (emphasis added).

Sub-Section (4) of Section 33 requires the Court to consider whether the objectives justifying remand detention could not be met by releasing the suspect with conditions. Remand detention must be based on an individualized determination that it is reasonable and necessary, and when measures alternative to custody, such as a night time curfew, daily reporting to police, the surrender of a passport, or even a so-called “electronic bracelet,” will not be sufficient. The individualized determination that remand detention is reasonable and necessary concerns at least two elements: firstly, that there is a reasonable suspicion that the accused has committed an offence; and secondly, that there are grounds justifying detention pending trial.

POTA Section 33 (5) provides that “[i]n making an order for remand in custody . . . , the Court shall have due regard to the following factors--

- i) there are compelling reasons for believing that the suspect shall not appear for trial, may interfere with witnesses or the conduct of investigations, or commit an offence while on release;
- ii) it is necessary to keep the suspect in custody for his protection or where the suspect is a minor, for the welfare of the suspect;
- iii) the suspect is serving a custodial sentence; or
- iv) the suspect, having been arrested in relation to the commission of an offence under this Act, has breached a condition for his release.”

POTA Section 33 (5) mirrors Section 36A of the CPC, which provides for circumstances under which a court may deny bail and require the accused to be remanded in custody pending trial.



Four Cases Regarding Remand Custody

The Mahadi Case*

The applicant was arrested and charged with sixty counts of murder arising out of terrorist attacks in Lamu between 15 and 17 of June 2014. He applied for bond. The High Court rejected the application, finding that there were *compelling reasons* to deny him bail.

In this regard, the Court was satisfied that *the gravity of the offence*, including the mandatory death sentence, could provide strong incentives for the accused to abscond pending trial. The Court also took judicial notice of the fact that in the recent past, suspects in similar cases such as one Aboud Rogo Makaburi had died under mysterious circumstances while out on bond awaiting trial.

The Judge concluded that “[I] am of the considered view that detention for the protection of the accused is a compelling reason.”

On a subsequent application for bail, the Court granted bail.

The Ahmad Abolafathi Mohamed Case**

In this case, the prosecution appealed against a decision of the trial court to grant bail to the respondents, who were Iranian nationals. It submitted that the respondents had no fixed abode or hosts in Kenya, that upon their arrest they had been checking out of a hotel and were about to exit the country, had not been candid about their identities, and accordingly, that they were a flight risk. It was noted that Kenya has not signed an extradition treaty with Iran and that the respondents could not be compelled to return if they fled. It was submitted that there had been no change in circumstance following two previous occasions upon which they had been denied bail. Further, a consignment of explosives linked to the respondents remained uncovered.

The Court observed that the constitutional right to bail applies to all persons who come before Kenyan courts regardless of whether they are citizens or foreigners. It disregarded previous cases involving foreigners who had absconded upon release, noting that each application must be determined on its own facts and merit and that “we cannot punish the respondents for the misdeeds of other foreigners who have been released on bail and absconded.”

However, the Court found in favour of the prosecution, affirming that the constitutional right to bail afforded by Article 49 (1) (h) is not absolute and may be denied at the discretion of the court where 'compelling reasons' are supplied. The Court considered the following criteria in determining whether 'compelling reasons' exist:

- a) The paramount consideration whether the individual will avail themselves for trial;
- b) Whether release of the individual would endanger public security, safety and overall interest to wider public;
- c) The nature of the charges, and the gravity of the punishment in the event of conviction;
- d) The strength of the evidence which supports the charge, and the likelihood of the accused interfering with witnesses or suppressing evidence that may incriminate him;
- e) The individual's previous criminal record;
- f) Whether detention is necessary for the protection of the individual.

The Court considered that whilst matters of security "make the granting of bail most unattractive, unlikely and unfavourable," courts must balance the interests of the State against those of the individual. It observed that "[t]he respondents have a right to enjoy their fundamental rights and freedoms, but it is my humble view that Kenyans and aliens of good will also have a right to the quiet enjoyment of their rights, and to go about their daily business without threat to life or limb, and without being placed in harm's way."

The Daniel Oraini Obwoni Case ***

In this case, the applicant had been tried and convicted of the offence of indecent assault and sentenced to 12 years imprisonment. He subsequently made an application to be released on bond pending the hearing of an appeal against conviction and sentence.

The High Court affirmed the right to bond enshrined in Article 49 (1) (h) of the Constitution in the absence of 'compelling reasons' to deny it, taking into account the criteria outlined by the Court in *Republic v Ahmad Abolafathi Mohamed & Another*, discussed above, and released the applicant.

The Court imposed a bond in the amount of Kshs. 1,000,000/= plus two sureties of a like amount, taking into account that the applicant was a convict and had been convicted of a serious offence with a mandatory minimum sentence and could become a flight risk.

The Jacob Kioko Mbutu Case****

The applicant sought review of the terms of his bail granted by the lower court, which was imposed with a bond term of Kshs. 2,000,000/=. The High Court found that "[w]here the court grants such stiff terms of bond in the circumstances of a case as to make them unattainable by the applicant that may be as good as denying him bail." The application was allowed and the applicant's bond terms were reduced to kshs. 100,000/= with one surety of like amount.

**Mahadi Swaleh Mahadi v Republic* [2014] eKLR

***Republic v Ahmad Abolafathi Mohamed & another* [2013] eKLR

****Daniel Oraini Obwoni v Republic* [2013] eKLR

*****Jacob Kioko Mbutu v Republic* [2014] eKLR

According to most international human rights bodies, there are three main grounds on which remand detention may be justified:

- 1) Risk of absconding;
- 2) Risk of the accused interfering with the investigation, e.g. by unduly influencing witnesses or evidence;
- 3) Risk of commission of a further offence.

These three grounds are reflected in POTA Section 33 (5) (a), which states them in the following terms: "there are compelling reasons for believing that the suspect shall not appear for trial, interfere with witnesses or the conduct of investigations, or commit an offence while on release".

Some international bodies have added the preservation of public order as a fourth ground for pre-trial detention.¹²⁸ The Human Rights Committee, however, has warned that “reasons of public security” is too vague a standard. The Committee was considering the Code of Criminal Procedure of Bosnia and Herzegovina, which provided that if the alleged offence is punishable by a prison sentence exceeding 10 years, the judge can place suspects in pre-trial detention on the ground that reasons of public security or security of property warrant such detention. The Committee recommended that “[t]he State Party should consider removing from [its] Code of Criminal Procedure ... the vague concept of public security or security of property as a ground for ordering pre-trial detention.”¹²⁹



Activity: Remand Detention for Purposes of Protecting the Accused

In the *Mahadi* case discussed above, the Judge concluded that “[I] am of the considered view that detention for the protection of the accused is a compelling reason.”

Remand detention for purposes of the protection of the accused is also listed as a possible ground in Section 36A of the Criminal Procedure Code, but it is not among the grounds accepted in the case law of international human rights bodies.

- Do you see any human rights concerns with regard to remand detention of a defendant for purposes of his or her own protection?
- Should the judge take into account whether the accused person wishes to be detained for his or her own protection? (In the *Mahadi* case, the judge refused an application for bail by Mahadi).



Practical Guidance

In determining whether any of the risk factors serves to justify the continued detention of an accused, the fact that other measures could be ordered so as to reduce the risk of the identified harm must be born in mind. If the judge can eliminate any real prospect of the identified risk (e.g. risk of flight, or of tampering with evidence) materializing by imposing one or a combination of measures alternative to detention, then pre-trial detention must not be ordered.

Because of the gravity of the threat of acts of terrorism, because the word “terrorism” doubtless invokes fear or even terror, there is sometimes a risk of investigators and prosecutors considering that it is sufficient to invoke “terrorism-related charges” to justify remand detention. However, as the High Court made clear in the case of *Abdikadir Aden alias Tulllu*,¹³⁰ which is discussed below, in order to show that there are compelling reasons justifying remand,

- the prosecution should be able to demonstrate and establish that there is a tangible factual basis for the suspicions or charges against the person whose detention on remand is being sought, or whose application for bail it resists; and
- the prosecution should be able to demonstrate and establish the need for remand detention with regard to the specific charges against the person concerned. In other words, different arguments might be necessary to show compelling reasons in the case of a person suspected to have disseminated a terrorist propaganda video online than are required in the case of a person suspected of being involved in the preparation of an explosives attack against a public place.

128 Inter-American Committee on Human Rights, *Report on Terrorism and Human Rights*, para. 123.

129 CCPR/C/BIH/CO/1, para. 18.

130 *Abdikadir Aden alias Tulllu & 2 Others v Republic* [2014], eKLR.

Moreover, the longer an accused person has been detained, the more exigent the courts should be with regard to the compelling reasons justifying continued detention in remand.



Case Study: The *Abdikadir Aden Case**

In this case, the applicants, who had been charged with the offence of possessing articles connected with a terrorism offence under Section 30 of the POTA, were denied bail by the Magistrates Court. In reviewing their application, the High Court made the following observations:

[12] I have considered the rulings of the learned trial magistrate in which bail was denied to the Applicants. I am impressed by the learned trial Magistrate's considerations and the manner in which he weighed all the factors and interests affecting the case.

[13] In my reading of the rulings, the reasons given why the applicants were denied bail are:

- a) Incidents of terrorist's acts are common to the point of being alarming in the country.
- b) The security situation in the country and it's against public interest to have the accused persons being released on bond

[14] I noted that the fourth person charged along with the applicants was granted bail. That was after an attempt by the State to withdraw the charges against that accused was declined.

[15]The bottom line is the applicants are charged with an offence of possessing articles connected with a terrorism offence in that the articles they had were for the use in instigating the commission of terrorist acts. Without appearing to belittle or trivialize the alleged offences, I note that what the applicants are alleged to have been found with are audio and visual material which could be used to investigate terrorist acts. They are in a foreign language. An appeal by the applicants counsel to know whether there has been an interpretation of the articles into the language of the Court went unanswered.

[16] In other words, the audio and visual material the applicants are alleged to have been in possession of are material to be use to influence people ideologically, to commit terrorist acts. The actual content and how appealing it is will be demonstrated at the hearing of this case. There is also likelihood that as of the moment, even the prosecution is unaware of the actual content of the articles and the impact or effect they may have on those coming across the same. This is more than just speculation. It means that the applicants are being held in custody on speculations.

[17] Article 19 (3) (a) of the Constitution makes it abundantly clear that the rights and fundamental freedoms in the Bill of Rights belong to each individual and they are for each individual to enjoy. The limitations upon which these rights and freedoms are subject to are spelt out under Article 49 (1) (h) of the Constitution, which in short if "*unless there are compelling reasons to decline bail.*"

[18] The burden lies with the prosecution to establish what the compelling reasons are. All the prosecution has said is that the applicants face terrorism connected charges. The word "terrorism" doubtless invokes fear or even terror. However, the prosecution should be able to demonstrate what exactly it is that constitutes the compelling reason. There must be some cogent or tangible basis for alleging so. In this case, nothing cogent or tangible has been demonstrated or placed before the court. For that reason alone, I find there is no compelling reason demonstrated to deny the applicants bail.

**Abdikadir Aden Alias Tullu & 2 Others v Republic* [2014] eKLR.



Alternatives to Detention for Terrorism-Related Cases

The Global Counterterrorism Forum (GCTF) has developed a set of non-binding recommendations regarding the range of measures that might be employed at the national or local level as an alternative to pre-trial detention or post-conviction incarceration for individuals charged with, or convicted of, terrorism-related offenses. As the GCTF "Recommendations on the Effective Use of Appropriate Alternative Measures for Terrorism-Related Offenses" acknowledge, the "idea of using pre-trial and post-conviction alternatives for persons charged with any terrorism-related offenses reflects a paradigm shift. Given the serious threat to national security that terrorism represents, the vast majority of States would not have even considered alternative measures for such individuals only a few years ago.

However, there may be a need to consider these types of measures in appropriate cases because of the broadening of some governments' counterterrorism strategies to include efforts to prevent and counter violent extremism."

Among the specific considerations that may warrant the use of alternatives to detention in terrorism related cases, the GCTF document lists

- "the expanded use of inchoate offenses/preparatory acts to arrest individuals at the earliest possible stage before they can travel, commit, or otherwise directly support an act of violence",
- "an increased presence of first-time offenders among those radicalized to violence" and
- "the concern about individuals becoming radicalized, or radicalizing others, to violence while in detention centers or prisons."

The GCTF document notes (Recommendation 7) that alternatives to detention may be particularly appropriate for certain categories of offenders including "juveniles, first-time offenders, and people suffering from diminished mental capacity."

Right to Bail and the Presumption of Innocence

As discussed in Chapter 3, section 3.5.1, the principle of presumption of innocence is central to criminal justice in Kenya and is further safeguarded through the provision of conditional release of suspects and accused persons pending trial, as stipulated in Article 49 (1) (h) of the Constitution.

Given the complexity of many terrorism investigations and trials, the risk of prolonged remand detention is particularly pronounced in terrorism cases. In this regard, in its Report on Terrorism and Human Rights, the IACommHR warns that where "a person is held [on remand] in connection with criminal charges for a prolonged period of time [...] without proper justification, [...], such detention becomes a punitive rather than precautionary measure that is tantamount to anticipating a sentence."¹³¹ Such abuse of remand detention violates the presumption of innocence.

It is in this context that Kenyan courts have considered the presumption of innocence with respect to suspects in terrorism cases. In the case of *Aboud Rogo Mohamed & Another v Republic* the High Court linked the right to bail to the presumption of innocence.



Case Study: The *Aboud Rogo Mohamed Case**

The applicants, who were alleged to be members of Al-Shabaab, had both been charged with the offence of engaging in an organized criminal activity, contrary to Section 3 (3) as read with Section 4 (1) of the POCA. They pleaded not guilty and applied for bail pending trial, which was denied by the trial court.

They moved to the High Court to contest the rejection, basing their application on Article 49 (1) (h) of the Constitution. They submitted that the replying affidavit sworn by the ATPU did not disclose any compelling reason to warrant their denial of bail. They contested the conclusion by the Unit that their phone numbers had been found in the diary of a suicide bomber was proof that they were connected to the acts of the said bomber. They further laid emphasis on the fact that they should be presumed innocent until proven guilty, thereby entitling them to bail.

On behalf of ATPU, the State submitted that investigations revealed that the applicants belonged to the proscribed group, Al-Shabaab. In particular, the first applicant was allegedly engaged in urging Kenyan youths to go to Somalia to train as jihadist alongside the terrorist group. Additionally, both applicants had left Kenya for Somalia in 2009 and returned clandestinely in 2010. During their stay in Somalia, they were spotted training in Barawa Camp. The State argued that these were compelling reasons to justify denial of bail and urged the Court to reject the application.

The Court, while allowing the application, held that it was the obligation of the State to demonstrate that there were compelling reasons to warrant the rejection of the application for bail. It observed that

“[a]lthough the assertions of the State, that the applicants had some connection with the suicide bomber are not baseless, the Court is obliged, by Article 50 (2) (a), to uphold the legal presumption, that the applicants were innocent until the contrary was proved. Therefore, because of the said legal presumption, it was not open to the Court to conclude, without the benefit of evidence, that the applicants had already been connected to Al-Shabaab. If I were to so conclude, the said conclusion would be inconsistent with the presumption of innocence.”

The Court further noted that “[i]f the legal presumption was to have tangible meaning, the Court must interpret the Constitution in such a manner as to enhance the rights and freedoms granted, rather than in a manner that curtails the said right.” Ultimately, the Court found that the State had not demonstrated any compelling reasons to warrant the denial of bail to the applicants. In doing so, it considered that it would be somewhat of a contradiction to deny bail to an accused who is presumed innocent until proven guilty.

**Aboud Rogo Mohamed & another v Republic*, [2011] eKLR.



Cross-Reference

See Chapter 3, section 3.5.1 for a further discussion on the principle of the presumption of innocence.

Procedural Guarantees

The proceedings in which a court decides whether remand detention should be ordered or extended “must be adversarial and must always ensure ‘equality of arms’ between the parties (...). An oral hearing may be necessary, for example in cases of detention on remand (...). Moreover, in remand cases, since the persistence of a reasonable suspicion that the accused person has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, the detainee must be given an opportunity effectively to challenge the basis of the allegations against him (...). This may require the court to hear witnesses whose testimony appears *prima facie* to have a material bearing on the continuing lawfulness of the detention (...). It may also require that the detainee or his representative be given access to documents in the case file which form the basis of the prosecution case against him.”¹³²

Where remand detention is sought on suspicion or charges of involvement with terrorist activities, the authorities might perceive a need not to disclose to the suspect some of the grounds and documents on which the suspicions are based. In other words, the authorities might seek to rely on “secret evidence” to justify remand detention. A fair balance between the investigators’ and prosecution’s interest in keeping information from the detainee and the detainee’s right to be in a position to effectively challenge his detention must be struck, as illustrated by the *A. and Others v. the United Kingdom* case summarised in section 4.5.3 above.



Cross-Reference

See Section 4.5.3 on the right to challenge lawfulness of detention. The same considerations regarding the fairness of proceedings to challenge detention apply to the proceedings regarding extension of remand detention.

132 ECtHR, *A. and Others v. the United Kingdom*, Application No. 3455/05, Judgment of 19 February 2009, para. 204.

Place of Detention on Remand

International human rights bodies have warned that detention on remand should not involve a return to police custody, but rather transfer to a separate facility under different authority, because continuing custody in the hands of the police creates too great a risk of ill-treatment. In its report on the Maldives, where at the time suspects could be kept in police custody for up to seven days, the Sub-Committee on Prevention of Torture noted its concern that suspects are “held in facilities which are under the responsibility of the police. For the prevention of ill-treatment, police investigations and custody should be separated both institutionally and functionally. The exercise by the police of both investigative and custodial functions may lead to the increased risk that police investigators try to exert strong influence over the persons held in custody or even to resort to ill-treatment for investigative purposes.”¹³³

Under Kenyan law, Section 33 of the POTA and Section 36A of the CPC do not specifically mention the transfer of a suspect to a separate facility upon order or extension of remand detention. Since under both statutes, it is a police officer who makes the application to the court for an extension of time for holding the suspect in custody, it may seem that the suspect will return to police custody. However, Section 31 of the Prisons Act provides for detention of remand prisoners. In particular, Section 31(1) provides that

“Every person remanded to any prison by any court or other competent authority, being a person charged with any crime or offence, shall be delivered to the officer in charge together with a warrant of commitment, and such officer in charge shall detain such person according to the terms of such warrant and shall cause such person to be delivered to such court or competent authority, or shall discharge such person at the time named, in and according to the terms of such warrant.”

In practice, the prosecution in Kenya will often specify whether they want to hold the suspect in their custody or in remand; in any event, the defence is allowed to object to such applications and the court has the final discretion as to whether to grant the order and in what terms. Whether a suspect is held in police or remand custody, the same guarantees on his rights and freedoms apply.



Tools

The “Recommendations on the Effective Use of Appropriate Alternative Measures for Terrorism-Related Offenses” of the Global Counterterrorism Forum (GCTF) are available here: <https://www.thegctf.org/Portals/1/Documents/Toolkit-documents/English-Effective-Use-of-Appropriate-Alternatives.pdf>

4.7 CONDITIONS OF DETENTION

4.7.1 Basic Requirements

The conditions in which individuals are detained, regardless of the reasons for their detention, must satisfy certain basic requirements. Under Kenyan law, the Persons Deprived of Liberty Act makes provision for these basic requirements. Section 5 (1) stipulates that a person deprived of liberty shall at all times be treated in a humane manner and with respect for their inherent human dignity. Several other provisions in the Act guarantee humane treatment for detainees by providing the right to:

¹³³ Report on the visit of the Sub-Committee on Prevention of Torture and other cruel, inhuman or degrading treatment or punishment to the Maldives, CAT/OP/MDV/1, para. 77.

- Reasonable accommodation (Section 12)
- Nutritional diet (Section 13)
- Decent bedding and clothing (Section 14)
- Healthcare (Section 15).

Article 10 (1) of the ICCPR provides that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” In particular, the conditions of detention must not amount to inhuman and degrading treatment or, of course, torture. A variety of factors, individually or in combination, may result in conditions of detention amounting to degrading treatment, including:

- Overcrowded cells or conditions of detention;
- Poor hygiene and sanitary conditions;
- Inadequate food or water;
- Spread of infectious diseases, where authorities have failed to take reasonable steps to prevent the spread;
- Poor ventilation or heating and lack of natural light; and
- Limited (or no) availability of exercise and recreation for those detained.

In general, the conditions of detention should not subject a prisoner to hardship of an intensity exceeding the level of suffering that is inherent in the fact of detention.¹³⁴



Cross-Reference

Other parts of this publication also deal with human rights aspects of conditions of detention:

- Chapter 3, section 3.7 on the treatment of suspects during an investigation;
- Chapter 4, section 4.6.8 on the obligation to ensure access to medical care for persons in detention;
- Chapter 4, section 4.8 on the detention of children; and
- Chapter 6, section 6.4 on the objectives of punishment.



Tools

The United Nations Standard Minimum Rules for the Treatment of Prisoners were adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955, and approved by the Economic and Social Council (resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977). They provide guidance on issues such as accommodation, hygiene, food, and medical care for prisoners, discipline, instruments of restraint and contact with the outside world:

http://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf.

¹³⁴ ECtHR, *Xiros v. Greece*, Application No. 1033/07, Judgment of 9 September 2010.



Activity: Conditions of Detention

An individual is detained for almost 9 months in extremely overcrowded conditions with little access to daylight, limited availability of running water, especially during the night, while being given limited food or bed linen. Conditions in the cell are generally cold, particularly at night, although not to the point where the detainees health is placed at risk.

- Do these conditions, individually or in the aggregate, amount to inhuman or degrading treatment? Explain your view.
- Does the question of whether these conditions of detention amount to inhuman or degrading treatment depend on the economic development of the country concerned?
- Under the Kenyan legal system, in circumstances such as these, what legal remedies exist for an individual to challenge the conditions of his detention?

In your experience, are these legal avenues procedurally fair and effective?

4.7.2 Separation of Terrorism Related Prisoners and Solitary Confinement

Separation

Authorities in Kenya have always maintained different security level prisons, with the highest being for those who have been convicted of serious offences and/or pose security threats to other convicts and the prison population generally.

Section 36A of the Prisons Act provides for the segregation of terrorism related detainees from the general prison population.¹³⁵ It provides: “The Commissioner shall confine persons who are imprisoned for committing an offence under the Prevention of Terrorism Act, 2012 or for committing a serious offence in a separate prison or in separate parts of the same prison in such manner as to prevent, as far as practicable, their seeing or conversing or holding any communication other than with a prisoner convicted of an offence under the Prevention of Terrorism Act, 2012.”

States often seek to hold detainees suspected of terrorism-related offences or convicted on such charges in special detention regimes, to prevent them from communicating with fellow detainees or other members of their terrorist organization outside the prison, from seeking to recruit other prisoners to their cause, or from preparing an escape. In this regard, the CoE Guidelines on Human Rights and the Fight against Terrorism state (Guideline XI) that:

- “1. A person deprived of his/her liberty for terrorist activities must in all circumstances be treated with due respect for human dignity.
2. 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:
 - a) the regulations concerning communications and surveillance of correspondence, including that between counsel and his/her client;
 - b) placing persons deprived of their liberty for terrorist activities in specially secured quarters;
 - c) 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.”

¹³⁵ This amendment was introduced through the SLAA.



Activity: Segregation of Terrorism Related Prisoners

Section 36-A of the Prisons Act states that the segregation of prisoners held under POTA from the rest of the prison population is “to prevent, as far as practicable, their seeing or conversing or holding any communication” with non-POTA prisoners.

- What are, in your view, the advantages and disadvantages of separating violent extremist offenders from the general prison population? You may wish to consider the advantages and downsides of separating terrorism related prisoners listed in Good Practice 4 of the GCTF’s Rome Memorandum on Good Practices for Rehabilitation and Reintegration of Violent Extremist Offenders (more on this below under 6.8).
- The CoE Guidelines on Human Rights and the Fight against Terrorism state (Guideline XI) recommend that the separation of persons deprived of their liberty for terrorist activities may be required “on condition that the measure taken is proportionate to the aim to be achieved”. What factors do you think should go into this proportionality analysis? In other words, when could the separation of terrorist offenders be a disproportionate measure?

Solitary Confinement

The Special Rapporteur on torture has dedicated a report to the question of solitary confinement. He notes that “[t]here is no universally agreed upon definition of solitary confinement. The Istanbul Statement on the Use and Effects of Solitary Confinement defines solitary confinement as the physical isolation of individuals who are confined to their cells for 22 to 24 hours a day. In many jurisdictions, prisoners held in solitary confinement are allowed out of their cells for one hour of solitary exercise a day. Meaningful contact with other people is typically reduced to a minimum.”

The Special Rapporteur takes the view that the use of solitary confinement of indefinite duration or of prolonged solitary confinement, which he defined as solitary confinement exceeding two weeks, constitutes a violation of the prohibition on torture, inhuman or degrading treatment.¹³⁶ “[T]he longer the duration of solitary confinement or the greater the uncertainty regarding the length of time, the greater the risk of serious and irreparable harm to the inmate that may constitute cruel, inhuman or degrading treatment or punishment or even torture.”¹³⁷

With regard to the criminal justice response to terrorism, he observes with concern [at 57] that

“The use of prolonged or indefinite solitary confinement has increased in various jurisdictions, especially in the context of the “war on terror” and “a threat to national security”. Individuals subjected to either of these practices are in a sense in a prison within a prison and thus suffer an extreme form of anxiety and exclusion, which clearly supersede normal imprisonment. Owing to their isolation, prisoners held in prolonged or indefinite solitary confinement can easily slip out of sight of justice, and safeguarding their rights is therefore often difficult, even in States where there is a strong adherence to rule of law.”

136 While there is no international agreement on what constitutes “prolonged” solitary confinement, also the European Committee for the Prevention of Torture has taken the view that fifteen days should be the maximum permissible duration of solitary confinement (21st General Report, pp. 39-50).

137 A/66/268, para.58.

Kenyan law does not specifically envisage solitary confinement of persons detained on terrorism related charges, neither as part of their sentence nor as a security measure. Rather, the Prisons Act deals with two measures that appear to be related to solitary confinement in Part IX of the Prisons Act on measures to deal with “offences by prisoners:”

- *Confinement in a Separate Cell:* Under Sections 51 and 52, “confinement in a separate cell on the prescribed diet for such period as may be prescribed” is one of the forms of punishment that may be imposed on prisoners for prison offences.
- *Segregation of Prisoner:* Section 56 provides for “segregation” of prisoners in the following terms: “Whenever it appears to the officer in charge that it is desirable for the good order and discipline of the prison for a prisoner to be segregated and not to work nor to be associated with other prisoners, it shall be lawful for such officer to order the segregation of such prisoner for such period as may be considered necessary.”

As we have seen, the Prisons Act provides for the separation of terrorism related prisoners from the general prison population, but not for any solitary confinement measures related to this status. It is important, however, to keep in mind that de facto solitary confinement may inadvertently result from the application of Section 36A Prisons Act when there is only one terrorism related prisoner in a specific detention facility. It can also occur where there is only one female terrorism related prisoner, or one juvenile terrorism related prisoner, as these groups have to be separated from the adult male prison population.

Because detainees in solitary confinement are “in a prison within a prison”, they are entitled to challenge the lawfulness of their placement in solitary confinement and to receive without delay a decision of a judicial authority (see section 4.5.3 above on the right to challenge lawfulness of detention). Considering the situation of detainees in solitary confinement, particular attention must be paid to ensuring that the right to challenge the lawfulness of detention not only exists on paper, but is effective in practice.

In this regard, according to the Persons Deprived of Liberty Act (Section 28), all disciplinary proceedings against persons charged with a prison offence “shall be conducted in accordance with the principles of fair administrative action prescribed under Article 47 of the Constitution. Section 53 of the Prisons Act provides that: “No prisoner shall be punished for a prison offence until he has had an opportunity of hearing the charge against him and making his defence.”



Standards on the Use of Solitary Confinement

Both the United Nations Special Rapporteur against torture and the European Committee for the Prevention of Torture urge States to minimise the use of solitary confinement. The standards they propose are not identical, but mutually reinforce each other. They can be summarised as follows:

- Solitary confinement should only be used in *exceptional circumstances, as a last resort*.
- Solitary confinement should be governed by a *clear legal framework*. The authority ordering solitary confinement should document to the fullest extent possible and keep a record of the reasons justifying its imposition and its duration, and should communicate these clearly to the detainee and his legal counsel.
- The detainee should have a *genuine and timely remedy* against orders placing him in solitary confinement, including the possibility of judicial review.
- Solitary confinement should be subject to *regular review and monitoring*, including monitoring of the detainees mental and physical health. If necessary measures should be put in place to mitigate the effects of solitary confinement, to provide physical and mental stimulus. This, however, is no substitute for the use of solitary confinement being as short as possible and as a last resort.
- *Reasons must be given* at the end of each review process for the continuation of solitary confinement. The longer the solitary confinement becomes, the more compelling the reasons for continuing solitary confinement must be.

- Solitary confinement should be *proportionate* to the reasons for its imposition and, the longer it is used, the stronger the reasons for it have to be. The impact on the detainee's mental and physical health should be continuously monitored by qualified medical personnel.
- Solitary confinement should never be imposed by a court as part of a sentence (i.e. as an aggravation of the sentence).
- Solitary confinement must not be used as a technique to extract confessions during pre-trial detention.
- The duration of solitary confinement should not be indefinite and should be communicated to the detainee. The maximum period of solitary confinement should be fourteen days. There should be no sequential periods of solitary confinement as disciplinary sanction, i.e. there should not be one period of solitary confinement following another.
- A prisoner in solitary confinement should have at least one hour's outdoor exercise per day and other appropriate mental stimulation.

(Source: Report of the Special Rapporteur against Torture, A/66/268, paras. 82-101; European Committee for the Prevention of Torture, 21st General Report, pp. 39-50)

The Istanbul Statement on the Use and Effects of Solitary Confinement states that: "The use of solitary confinement should be absolutely prohibited in the following circumstances:

- For death row and life-sentenced prisoners by virtue of their sentence.
- For mentally ill prisoners.
- For children under the age of 18."



Activities

- What distinguishes detention in high security detention facilities or wings used for terrorism-related detainees in Kenya from ordinary detention facilities?
- Compare the rules and procedures applying in Kenya to "confinement in a separate cell" and "segregation" to the standards recommended by the Special Rapporteur against torture and the European Committee for the Prevention of Torture. In what respects, if any, does the law and practice of Kenya fall short of those recommendations?
- Section 53 of the Prisons Act provides that: "No prisoner shall be punished for a prison offence until he has had an opportunity of hearing the charge against him and making his defence." According to the Persons Deprived of Liberty Act (Section 28), these disciplinary proceedings against persons charged with a prison offence shall be conducted in accordance with the principles of fair administrative action prescribed under Article 47 of the Constitution. Do these safeguards also apply to prisoners subjected to segregation under section 56, where segregation is imposed on the ground that it is "desirable for the good order and discipline of the prison for a prisoner to be segregated and not to work nor to be associated with other prisoners"?



Tools

- UNODC has published a Handbook on the Management of Violent Extremist Prisoners and the Prevention of Radicalization in Prisons: https://www.unodc.org/pdf/criminal_justice/Handbook_on_VEPs.pdf.
- The Report on solitary confinement by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/66/268, is available here: http://ap.ohchr.org/documents/dpage_e.aspx?m=103.
- The COE Ad Hoc Drafting Group on Dangerous Offenders has published a compilation of the case-law of the European Court of Human Rights, which analyses the most significant cases dealing with prison treatment of particularly dangerous offenders, including terrorists. It is available here: http://www.coe.int/t/dghl/standardsetting/CDPC/PC-GR-DD/Compilation%20case%20law%20dangerous%20offenders_EN.pdf.

- The Report of the European Committee for the Prevention of Torture on the question of solitary confinement is available here: <http://www.cpt.coe.int/en/annual/rep-21.pdf>.
- The Istanbul Statement on the Use and Effects of Solitary Confinement, which was adopted at an international medical symposium on psychological trauma, is available here: http://www.univie.ac.at/bimtor/dateien/topic8_istanbul_statement_effects_solconfinment.pdf.

4.7.3 Incommunicado and Secret Detention

Incommunicado Detention

Incommunicado detention refers to the practice whereby a detainee's communication with human beings that are not prison staff, investigators or co-detainees is either highly restricted or non-existent. In particular, a detainee held *incommunicado* is denied access to his family, friends and legal counsel, and is denied access to a court.

By cutting off contact with the outside world, *incommunicado* detention is likely to entail undue psychological pressure on the detainee which may be misused to compel a self-incriminating statement. Equally important, *incommunicado* detention greatly increases the likelihood of ill-treatment in detention and the risk of enforced disappearance. Moreover, because of the suffering entailed by detention without contact with the outside world, *incommunicado* detention for a prolonged or indefinite period constitutes in itself cruel, inhuman or degrading treatment.¹³⁸ The Human Rights Committee has therefore called on all States to abolish *incommunicado* detention.¹³⁹ The ACommHPR has also held that "where a confession is obtained during *incommunicado* detention, it should be considered to have been obtained by coercion and not be admitted as evidence."¹⁴⁰

In Kenya, in the *Salim Awadh Salim & 10 Others v Commissioner of Police & 3 Others* case (discussed in section 7.10 below), the Court found that the holding of the petitioners in *incommunicado* detention for a period longer than 24 hours was contrary to Sections 70 and 74 of the 1969 Constitution and was arbitrary, unlawful, unconstitutional and a violation of their fundamental rights to the integrity, dignity and security of the person and freedom against torture, cruel, inhuman and degrading treatment or punishment.

Secret Detention

The practice of secret detention is not permissible under Kenyan and international law. This practice has often been used in the national security or counter-terrorism contexts. A substantial body of case law and practice now exists making clear that secret detention is absolutely prohibited, as detention practices that place the detainee outside the protection of the law are incompatible with fundamental human rights guarantees, in particular the prohibition on torture, inhuman and degrading treatment and the prohibition on enforced disappearance.

138 Human Rights Committee, *Medjnoune v. Algeria*, Communication No. 1297/2004, CCPR/C/87/D/1297/2004, 9 August 2006, para. 8.4.

139 Human Rights Committee, General Comment No. 20 on Article 7 of the ICCPR (Prohibition on Torture, Inhuman and Degrading Treatment), para. 11.

140 See the *Taba* case in Chapter 3, Section 3.7.2.



Elements of “Secret Detention”

The definition of secret detention is addressed in the United Nations Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism. According to this report, “secret detention” is defined by three key elements:

- State authorities acting in their official capacity, or persons acting under the orders thereof, with the authorization, consent, support or acquiescence of the State, or in any other situation where the action or omission of the detaining person is attributable to the State, deprive persons of their liberty;
- The person deprived of liberty is not permitted any contact with the outside world (is detained incommunicado); and
- The detaining or otherwise competent authority denies, refuses to confirm or deny, or actively conceals the fact that the person is deprived of his/her liberty hidden from the outside world, including, for example, family, independent lawyers or non-governmental organizations, or refuses to provide or actively conceals information about the fate or whereabouts of the detainee.

The Joint Study emphasises that the concept of secret detention is not necessarily characterized by the location of the site of detention being secret (although it may be), “[w]hether detention is secret or not is determined by its incommunicado character and by the fact that State authorities, . . . , do not disclose the place of detention or information about the fate of the detainee”.

*Source: Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism (A/HRC/13/42), pp. 11-12.



Cross-Reference

As illustrated by the cases discussed in the Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism (A/HRC/13/42), secret detention is often linked to the unlawful transfer of terrorism suspects from one country to another (so-called “extraordinary rendition”). This is further examined in Chapter 7, section 7.10.



Tools

- The International Convention on the Protection of All Persons from Enforced Disappearance is available here: <http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx>.
- Information concerning the United Nations Working Group on Enforced or Involuntary Disappearances is available here: <http://www.ohchr.org/EN/Issues/Disappearances/Pages/DisappearancesIndex.aspx>.
- The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment Adopted by General Assembly resolution 43/173 of 9 December 1988, is available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/DetentionOrImprisonment.aspx>.



Practical Guidance

Principles 12 and 23 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, as well as Articles 17 and 18 of the ICPPED provide rules on maintaining records in places of detention. Maintaining such records in all places of detention constitutes an important protection against secret detention and disappearance. See section 4.6.7 above.



Further Reading

The Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism is available here: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf>.

4.8 DETENTION OF CHILDREN SUSPECTED OF INVOLVEMENT IN TERRORIST OFFENCES

Under the Constitution, the principles for the administration of juvenile justice are encapsulated in Article 53 (1) (f), which provides that “every child has the right not to be detained, except as a measure of last resort, and when detained, to be held:

- i) for the shortest appropriate period of time; and
- ii) separate from adults and in conditions that take account of the child’s sex and age.”

Section 18 (4) of the Children Act provides that “[a] child who is arrested and detained shall be accorded legal and other assistance by the Government as well as contact with his family.” The Persons Deprived of Liberty Act offers additional protection measures for children detainees such as:

- A nutritional diet that takes into account their nutritional requirements – Section 13 (2)
- Education that is integrated with the current system of education – Section 18 (3)
- Upon transfer to another institution, the competent authority is to notify the parent or guardian of the transfer within seven days – Section 21 (2)

Special rules apply to the detention of persons suspected of being involved in terrorist offences who were aged less than 18 years at the time of the offence. These are set out particularly in Article 37 of the Convention on the Rights of the Child, in the “Beijing Rules” (United Nations Standard Minimum Rules for the Administration of Juvenile Justice, A/RES/40/33), the “Havana Rules” (United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, A/RES/45/113), and in General Comment no. 10 of the UN Committee on the Rights of the Child, which deals with children’s rights in juvenile justice. They include:

- The arrest and pre-trial detention of a child (i.e. any person aged less than 18 years) shall be used only as a measure of last resort and for the shortest appropriate period of time. Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care placement with a family or in an educational setting or home.
- Delays in the criminal procedure should be minimised. Every child arrested and deprived of his/her liberty should be brought before a judge to examine the lawfulness of detention within 24 hours and to decide whether remand detention is necessary or can be substituted with an alternative measure. Strict legal provisions should ensure that the lawfulness of and continued need for pre-trial detention is reviewed regularly, preferably every two weeks. The right to trial within a reasonable time should be applied very strictly, adjournments once trial has started should be avoided.
- Every child deprived of liberty shall be treated in a manner which takes into account the needs of persons of his or her age. While in custody, children shall receive care, protection and all necessary individual assistance – social, educational, vocational, psychological, medical and physical – that they may require in view of their age, sex and personality.
- Every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.

Regionally, Article 17 (2) (a) of the ACRWC provides that State Parties in the administration of juvenile justice shall “ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment.”



Cross-Reference

The special international human rights law protections applicable to children accused of criminal offences are discussed in several places throughout this publication, including:

- Section 3.5.3 (treatment of children suspected of terrorism offences)
- Section 3.6.1 (right of access to legal counsel)
- Section 3.7.3 (right against self-incrimination)
- Sections 6.6 and 6.7 (death penalty and life imprisonment).



Tools

- Committee on the Rights of the Child, General Comment No. 10 on Children's rights in juvenile justice is available here: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f10&Lang=en.
- The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), A/RES/40/33, are available here: http://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Admin_of_Juvenile_Justice_Beijing_Rules.pdf.
- The United Nations Rules for the Protection of Juveniles Deprived of Their Liberty ("the Havana Rules"), A/RES/45/113, are available here: <http://www.un.org/documents/ga/res/45/a45r113.htm>.
- The "Recommendations on the Effective Use of Appropriate Alternative Measures for Terrorism-Related Offenses" of the Global Counterterrorism Forum (GCTF) are available here: <https://www.thegctf.org/Portals/1/Documents/Toolkit-documents/English-Effective-Use-of-Appropriate-Alternatives.pdf>



Activities

- Describe the law in Kenya regarding the detention of persons below 18 years of age suspected of criminal offences? In what respects does it differ from the generally applicable law?
- Are persons below 18 consistently separated from adult offenders in places of detention in Kenya?

4.9 SELF-ASSESSMENT QUESTIONS



Self-Assessment Questions

- Article 9 of the ICCPR is the central provision on the right to liberty and detention in the United Nations human rights instruments. It contains a number of rights and safeguards, some of them applicable to all forms of detention, others only to those deprived of their freedom in the context of criminal justice. List all the rights and safeguards in Article 9 and identify which apply also outside the context of criminal justice. List also the rights and safeguards discussed in this chapter that are not explicitly mentioned in Article 9.
- A person is arrested on suspicion of involvement in terrorist offences. The investigators and the prosecutor believe that, to protect the investigation, it is essential that the suspect remain in custody until his trial is over (and, thereafter, if convicted). Describe – in chronological order – the steps to be taken (under Kenyan law, the ICCPR and any regional treaty that Kenya is party to) to ensure that detention remains lawful under human rights law at all times.

- List the three grounds on which remand detention can be imposed in accordance with international human rights law. Also list at least three grounds that would not be sufficient or compatible with human rights.
- Can the right to petition for habeas corpus be limited under Kenyan law? Under international law? Motivate your answer.
- At what point following their arrest and detention do terrorist suspects have the right to access a lawyer in Kenya?
- On what grounds can remand detention be ordered under the Kenyan legal system? How is the burden of proof allocated regarding the need for remand detention? Is remand detention mandatory for any offences?
- Does the law in Kenya require the periodic review of the continued need for remand detention? At what intervals?
- What alternatives to remand detention are available in Kenya? What are the obstacles to their application in terrorism cases?
- Discuss, and distinguish, the terms “segregation”, “solitary confinement”, “incommunicado detention” and “secret detention”.
- In what circumstances and with which safeguards can the solitary confinement of a terrorism suspect be justified, on remand and following conviction?
- Name five legislative or administrative measures regarding detention in Kenya that constitute effective safeguards against torture, inhuman or degrading treatment, and disappearances in counter-terrorism.
- If a person is found by a judge to have been unlawfully or otherwise arbitrarily deprived of his liberty, is there a right in Kenya to compensation or reparation for unlawful or arbitrary imprisonment?
- Describe the special safeguards applicable to persons below 18 years of age deprived of their liberty under international law (consider both treaty provisions and soft law standards).

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5. The Trial of Terrorism Offences

5.1. OBJECTIVES

By the end of this Chapter, you will be able to:

- Identify the fair trial issues most likely to arise in the prosecution of terrorism cases
- Discuss the rights of victims and witnesses in the context of terrorism trials
- Discuss the importance of public trials in terrorism cases, as well as the circumstances under which limitations to the public nature of a trial are permissible
- Discuss the right to be informed of the nature and cause of the charge, and the right to adequate time and facilities to prepare one's defence
- Discuss the importance of the presumption of innocence and how it operates in connection with the burden of proof in criminal trials in terrorism cases
- Describe the application of the right to a fair trial in situations in which witnesses are not available at trial
- Discuss how to balance the requirements of witness protection with the accused's right to examine witnesses against him
- Identify the principles applicable to situations when the prosecution seeks the non-disclosure of evidence on grounds of "public interest"
- Apply the principles governing the exclusion of evidence obtained in violation of human rights

5.2 SUMMARY/OVERVIEW

This Chapter deals with the right to a fair trial in terrorism cases.

It begins by considering the human rights of victims and witnesses in relation to criminal proceedings pertaining to terrorism offences.

The Chapter then briefly discusses the accused's right to be informed of the nature and cause of the charge, as well as the right to adequate time and facilities to prepare one's defence. The presumption of innocence is considered in particular with regard to its implications on the allocation of the burden of proof. This is followed by an examination of the fundamental requirement that the trial must be conducted by an independent and impartial tribunal, as well as undertaken within a reasonable period of time.

The Chapter will then discuss the requirement that the administration of justice must be done openly and in the presence of the accused person, the role of the media, and the permissible limitations to public trials. The rights that pertain to the attendance and examination of witnesses, and the relationship between the rights of the defence and witness protection measures will be considered, as well as the exclusion of evidence on the grounds of public interest.

A further point examined in depth is the question of the exclusion of evidence on the ground that it was obtained in violation of human rights norms. Lastly, the right to review decisions of a lower court by a higher tribunal will be briefly examined. The Chapter will conclude with a set of assessment questions aimed at providing users with the possibility of testing their knowledge on the topics discussed herein.

5.3 INTRODUCTION

Terrorism criminal proceedings are often very complex, with considerable amounts of evidence being considered in respect of events that may have occurred a significant time before the trial takes place. The charges at issue may also encompass events alleged to have occurred as part of a wider conspiracy or across borders. A variety of complex legal issues may arise in the course of such a trial including the protection of witnesses, issues of disclosure and the use of sensitive evidence, and whether evidence obtained in violation of human rights guarantees should be excluded. Moreover, given the seriousness of charges commonly associated with terrorism, the stakes are high for those involved in terrorism cases.

Ensuring the fairness of proceedings at all stages, through proper protection of human rights standards is an international law obligation that applies in terrorism cases. Article 25 (c) of the Constitution protects the right to a fair trial emphatically by including it among the rights that cannot be limited listed in.

There are many component elements of a fair trial. As explained in Chapter 3, adherence to fair procedure prior to trial is absolutely vital to ensure that the trial itself is fair and respects the rule of law. The human rights guarantees for all persons charged with criminal offences, including those charged with terrorism offenses, require for instance, that an accused is properly informed of the charges faced and the alleged facts on which they are based to enable the defence to be prepared and to ensure that the accused is in a position to rigorously test the prosecution case at the trial. Prompt access to a lawyer plays a key role in ensuring a fair trial. Respect for guarantees during a trial is equally important. The presumption of innocence, judicial independence and impartiality, as well as the right of the accused to test prosecution evidence and its witness' testimonies at trial are also crucial.

Some guarantees of the right to a fair trial may need to be limited to protect competing legitimate interests: e.g., a witness' identity may only be disclosed at the last minute in order to protect him/her from intimidation, thereby affecting the defence's right to have adequate time and facilities for examination of prosecution witnesses. Nor does the violation of a human rights guarantee in one instance (e.g. a search carried out unlawfully and thus in violation of the right to privacy) inevitably mean that a trial cannot be fair. In both the case of permissible limitations and in the case of human rights violations in the criminal proceedings, the court will need to consider whether a fair trial is still possible or whether the accused cannot receive a fair trial. In this regard, it will be helpful to consider what measures could be taken or safeguards could be put in place to remedy unfairness.



The Right to a Fair Trial and Times of Emergency

Article 25 (c) of the Constitution prohibits placing limitations on the right to a fair trial.

Under international law, the right to a fair trial is not listed among the rights that do not allow derogation in times of emergency under Article 4 (2) of the ICCPR. The Human Rights Committee has clarified (General Comment No. 32, paras 6 and 59), however, that deviating from the fundamental principles of a fair trial, such as the presumption of innocence, is never permitted. Additionally, the prohibition against the use of statements obtained under torture as evidence is absolute and can never be compromised because it protects the absolute prohibition against torture. Moreover, because the right to life is a non-derogable right, if a trial can result in the death penalty being imposed, no derogation can be made from any fair trial safeguards.

The right to a fair trial is also vigorously protected in times of armed conflict by international humanitarian law: common Article 3 (1) (d) of the Geneva Conventions of 1949 prohibits the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Similar minimal guarantees are to be found in Article 75 (4) of Additional Protocol I, relating to international armed conflicts, and Article 6 (2) of Additional Protocol II, relating to non-international armed conflicts.



Further Reading

1. Human Rights Committee General Comment No. 32 on the Right to Equality Before Courts and Tribunals and to a Fair Trial is available here: <http://www.refworld.org/docid/478b2b2f2.html>.
2. The ACommHPR has adopted Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003), which elaborate in great detail on the right to a fair trial as enshrined in Articles 3 and 7 (1) of the Banjul Charter. They are available here: <http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/>.
3. The ACommHPR has also adopted the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, which further elaborates on the right to a fair trial in accordance with relevant international human rights standards. They are available here: http://www.achpr.org/files/special-mechanisms/human-rights-defenders/principles_and_guidelines_on_human_and_peoples_rights_while_countering_terrorism_in_africa.pdf

5.4 HUMAN RIGHTS OF VICTIMS AND WITNESSES IN CRIMINAL PROCEEDINGS IN TERRORISM CASES

In the context of criminal justice, the rights of those charged with an offence have traditionally been the focus of human rights law. It is now well established, however, that the rights of victims of crime and witnesses also require attention. The important role played by victims of terrorism is highlighted in the United Nations Global Counter-Terrorism Strategy.¹⁴¹ Among the rights of victims and witnesses at stake are the rights to life, security, physical and mental integrity, respect for private and family life, and protection of dignity and reputation.

The right to a fair hearing is guaranteed under Article 50 of the Constitution. Article 50 (7) provides that “[i]n the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.” This provision is intended to enhance the right to a fair trial for both the victim and the accused, and recognizes that they may need an intermediary other than the lawyer, in the case of the accused, or the prosecution, in the case of the victim. The innovation in allowing for an intermediary is particularly significant in terrorism cases where victims may be subject to intimidation by close family or community members.

Article 50 (9) requires Parliament to enact legislation to provide for the protection, rights and welfare of victims of offences. The Victims Protection Act elaborates on this constitutional undertaking.¹⁴² Section 3 spells out its aims and objectives, which are to provide for victims of crime and abuse of office the following:

- a) protection
- b) better information and support services

¹⁴¹ The United Nations Global Counter-Terrorism Strategy stresses “the need to promote and protect the rights of victims of terrorism” and identifies the “dehumanization of victims of terrorism in all its forms and manifestations” as one of the conditions conducive to the spread of terrorism (General Assembly resolution 60/288).

¹⁴² No. 17 of 2014.

- c) reparation and compensation
- d) special protection for vulnerable victims.

Section 4 sets out the general principles of the Act. It provides that a court, administrative body or a person performing any function under the Act shall ensure that it does not discriminate against any victim, and that every victim is given an opportunity to be heard and respond before any decision affecting him/her is taken; his/her dignity is preserved at all stages of a case involving him/her; and that he/she is accorded legal and social services of his/her own choice, including legal and social services at the State's expense if he/she is a vulnerable victim within the meaning of the Act.

Section 9 encapsulates the rights of victims during the trial process. Section 9 (1) provides that "[a] victim has a right to:

- a) be present at their trial either in person or through a representative of their choice;
- b) have the trial begin and conclude without unreasonable delay;
- c) give their views in any plea bargaining;
- d) have any dispute that can be resolved by the application of law decided in a fair hearing before a competent authority or, where appropriate, another independent and impartial tribunal or body established by law;
- e) be informed in advance of the evidence the prosecution and defence intends to rely on, and to have reasonable access to that evidence;
- f) have the assistance of an interpreter provided by the State where the victim cannot understand the language used at the trial; and
- g) be informed of the charge which the offender is facing in sufficient details."

Section 9 (2) further provides that "[w]here the personal interests of a victim have been affected, the Court shall-

- a) permit the victim's views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court; and
- b) ensure that the victim's views and concerns are presented in a manner which is not-
 - i. prejudicial to the rights of the accused; or
 - ii. inconsistent with a fair and impartial trial."

Under Section 9 (3) of the Act, the victim's views and concerns may be presented by the legal representative acting on his or her behalf.

In addition to the Victim Protection Act, Part IXA of the CPC has elaborate provisions for victim impact statements. These are statements that can be made to the court after conviction and prior to sentencing by either the primary victim, in their absence their next of kin, or by the prosecutor, in order to give clarity on the direct impact that the crime has had. While the court has discretion in accepting these statements, it is noted that the decision by the victims not to file the statements shall not be interpreted as lessening the impact of the crime. Typically, the impact statements would include the direct loss suffered as a result of the crime in question, such as death, incapacitation, income and the psychological factors associated therein.

Kenya has also enacted a Witness Protection Act,¹⁴³ which establishes an agency dedicated to providing protection to witnesses and their families should there be any threat to their lives arising from evidence that they may be required to adduce in the course of criminal investigations and trials. The provisions in the Witness Protection Act are applicable to all victims of crime, including those relating to terrorist acts.¹⁴⁴ The innovative

¹⁴³ Act No. 16 of 2006, L.N. 110/2008, Act No. 2 of 2010.

¹⁴⁴ Article 4 (3) of the Victims Protection Act provides that where there is sufficient reason to be believed that a victim is likely to suffer intimidation or retaliation from the accused, he/she is to be immediately referred to the Witness and Victim Protection Agency established under the Witness Protection Act.

use of these provisions can go a long way in ensuring that such cases are more successfully investigated and prosecuted without putting victims and witnesses at risk.

Additional protection to victims is provided by the Witness Protection Rules made pursuant to Section 36 (2) of the Witness Protection Act.¹⁴⁵ These rules make elaborate provisions for the protection of witnesses, including victims of crime, through various measures such as in camera hearings, as well as making judicial orders in the course of proceedings for protective measures by the Witness Protection Agency (WPA). They also require that, where the Court declines an application for protection, reasons be given in writing.



Recommendations on Witness Protection: Report of the United Nations High Commissioner for Human Rights on the Right to Truth (A/HRC/15/33)

OHCHR has reported to the Human Rights Council on the question of witness protection in the context of criminal proceedings relating to gross human rights violations. It notes [at 66] that “witness protection should start long before a trial is conducted” and that “measures taken during the first stages of investigation play a crucial role for the protection of witnesses”. Failure to do so may not only compromise the welfare of victims and witnesses but may also result in proceedings never reaching trial. The report [at 69] urges states to “consider developing comprehensive witness protection programmes covering all types of crimes...” and that “the effectiveness of witness protection methods should be ensured through the provision of adequate financial, technical and political support for programmes at the national level.”



Further Reading

- UNODC’s publication Good Practices in Supporting Victims of Terrorism within the Criminal Justice Framework (October 2015), which is available at https://www.unodc.org/documents/terrorism/Publications/Good%20practices%20on%20victims/good_practices_victims_E.pdf, and the Criminal Justice Response to Support Victims of Terrorism, which is available at: http://www.unodc.org/documents/terrorism/Victims_Rights_E-Book_EN.pdf.
- The Report of the Special Rapporteur on Promoting Human Rights While Countering Terrorism, 2011, A/66/310 addresses the rights of victims of terrorism and is available at: <http://www.ohchr.org/EN/Issues/Terrorism/Pages/Issues.aspx>.
- The United Nations Handbook on Justice for Victims, which provides guidance as to the establishment of a social solidarity fund for victims of terrorism, is available at: https://www.unodc.org/pdf/criminal_justice/UNODC_Handbook_on_Justice_for_victims.pdf.
- The Commonwealth Secretariat’s Victims of Crime in the Criminal Justice Process, The Best Practice Guide for the Protection of Victims/Witnesses in the Criminal Justice Process (London, 2011), pp. 43-53.

5.5 RIGHT TO BE INFORMED OF THE NATURE AND CAUSE OF THE CHARGE(S)

The right to be informed of the charge one is facing is absolutely crucial for fair pre-trial and trial procedures. This requirement is captured in Article 50 (2) (b) of the Constitution as an aspect of the right to a fair trial. It provides that “[e]very accused has the right to a fair trial which includes the right... to be informed of the charge, with sufficient detail to answer it.”

145 Available at http://www.judiciary.go.ke/portal/assets/filemanager_uploads/Downloads/witness%20protection%20Rules.pdf

The practice in Kenya is that the charge comprises of the statement of offence which indicates precisely, the provisions of the law that have allegedly been contravened. The second part is the particulars of offence. While it is not required to contain evidence, the elements of the offence with which the accused has been charged must be clear enough for the accused. These requirements safeguard the expectation that an accused person should be afforded the opportunity to prepare for his defence from the time of arrest and throughout the plea and trial process.



Case Studies: The Right to be Informed of the Charge

The *Thuita Mwangi* Case*

The accused had been charged with failure to comply with a curfew restriction order, contrary to Section 9 (1) of the Public Order Act, and the particulars failed to mention this fact, the court allowed the appeal and stated; “Charges and particulars should be clearly framed so that the accused persons know what they are charged with, and proper references should also be made otherwise confusion may arise; and if confusion arises, it cannot be said that failure of justice may have not been occasioned.”

**Thuita Mwangi & 2 Others v Republic* [2015] eKLR.

This right is also enshrined in all major universal and regional human rights mechanisms. For example, Article 14 (3) (a) of the ICCPR provides that “[i]n the determination of any criminal charge against him, everyone shall be entitled to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.” In its General Comment No. 13, the Human Rights Committee notes that Article 14 (3) (a) applies to all cases of criminal charges, including those of persons in detention.¹⁴⁶

The Nature and Extent of the Obligation: The purpose of the obligation to inform accused persons promptly as to the nature and cause of the charge laid against them is to ensure that they have the information they need to prepare and put forward their defence. The obligation – and the nature and extent of the information with which the accused must be provided – must be understood in light of this purpose.



Cross-Reference

The obligation to inform the accused of the charges they face applies to any instance in which criminal charges are brought, and not merely to those persons who are detained. There is a separate right (as part of the right to liberty) to be informed of reasons for the arrest and of the charges brought which is triggered as soon as someone is deprived of liberty. That right is discussed in Chapter 4 dealing with detention.

Promptly: This requirement is addressed in the Human Rights Committee’s General Comment No. 13 and 32, both of which state that the right to be informed of the charge “promptly” requires that “information be given as soon as “the charge is first made by a competent authority,”¹⁴⁷ “the person concerned is formally charged with a criminal offence under domestic law, or the individual is publicly named as such.”¹⁴⁸ General Comment No. 32 further states that the specific requirements of subparagraph 3 (a) may be met by stating the charge

¹⁴⁶ Human Rights Committee, General Comment No. 13, Article 14, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994), para 8.

¹⁴⁷ *Ibid*, para 8.

¹⁴⁸ Human Rights Committee, General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32, para 31.

either orally - if later confirmed in writing - or in writing, provided that the information indicates both the law and the alleged general facts on which the charge is based. In the case of trials in absentia, article 14, paragraph 3 (a) requires that, notwithstanding the absence of the accused, all due steps have been taken to inform accused persons of the charges and to notify them of the proceedings.”

Cause of the Accusation: This requirement consists of the acts the accused is alleged to have committed and on which the accusation is based. The ECtHR has stated that the accused must be told of “the material facts that form the basis of the accusation against him,” and that he “must at any rate be provided with sufficient information as is necessary to understand fully the extent of the charges against him with a view to preparing an adequate defence.”¹⁴⁹

Nature of the Charge: This is the offence on which the charge is based. “[I]n criminal matters, the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterization that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair”¹⁵⁰ The nature of the charges may change as the criminal process develops, perhaps in light of new evidence or in light of the information provided by the accused. For instance, a person may initially be charged with having committed a terrorist act, but in the course of the investigation, it may become clear that charges of aiding and abetting more aptly describe his/her conduct. Any such re-characterization of the facts must be notified to the accused in good time so that, he can prepare a defense case that will respond to the charges actually brought, with the assistance of defense counsel. The later it is in the criminal justice process or trial proceeding that a charge is sought to be amended, the more likely it is that the ability of the accused to fairly conduct his/her defense will be compromised.

In a Language which the Accused Understands: Language barriers must, if necessary, be overcome, by means of an interpreter to ensure that the accused understands the information he/she has been given. Article 50 (2) (m) of the Constitution enshrines the right of every accused person to “have the assistance of an interpreter without payment, if the accused person cannot understand the language used at the trial.” This right is also guaranteed by Article 14 (3) (f) of the ICCPR.

5.6 RIGHT TO ADEQUATE TIME AND FACILITIES IN THE PREPARATION OF A DEFENCE

A further key human rights guarantee during the investigation of crime is the right to adequate time and facilities in the preparation of a defence. This is indispensable to the overall right to a fair trial, which would prove illusory in the event that a defendant is not granted sufficient time and facilities to prepare. It is an essential aspect of the requirement of equality of arms between prosecution and defence.

The right is enshrined in Article 50 (2) (c) of the Constitution, which entitles every accused person “to have adequate time and facilities to prepare a defence.” It is also guaranteed in the major universal and regional human rights treaties dealing with the right to a fair hearing. For example, Article 14 (3) (b) of the ICCPR provides that in the determination of any criminal charge, each accused shall be entitled “to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.”

Adequate Time: What counts as “adequate time” depends on the circumstances of each case. If counsel reasonably feel that the time for the preparation of the defence is insufficient, it is incumbent on them to request the adjournment of the trial. There is an obligation to grant reasonable requests for adjournment, in

149 ECtHR, *Mattoccia v. Italy*, Merits, Application No. 23969/94, Judgment of 25 July 2000.

150 ECtHR, *Pélissier and Sassi v. France*, Application No. 25444/94, Judgment of 25 March 1999, para. 52.

particular, when the accused is charged with a serious criminal offence and additional time for preparation of the defence is needed. Generally, the adequacy of time depends on factors including

- The complexity of the case, including the volume of evidence and other material to be considered;
- Logistical constraints, such as the need to locate defence witnesses;
- The workload of the accused's lawyer;
- Whether there has been a change of lawyer, resulting in the need for the new lawyer to familiarize himself with the case.

Adequate Facilities: This must include access to documents and other evidence or material that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence, but also other evidence that could assist the defence, e.g. indications that a confession was not voluntary or going to the credibility of prosecution witnesses. Article 50 (2) (j) of the Constitution requires that an accused person is “to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.” There are a number of factors common to many terrorism cases that tend to create difficulties with regard to the requirement of “adequate facilities” for the preparation of the defence:

- i) The volume of evidence and other material to be considered;
- ii) Terrorism cases often involve expert forensic or other scientific evidence. In such cases, the defence must be placed in a position to scrutinize the results of forensic evidence, including through the provision of funding to instruct their own experts or to have evidence assessed using appropriate forensic procedures;
- iii) Terrorism cases often involve information (e.g., coming from intelligence sources) the disclosure of which may, according to the prosecution, affect the security interests of a State and that therefore cannot be disclosed to the accused, or not in its entirety, or only without indicating the source of the information;
- iv) Additionally, the practical obstacles to effective assistance by defence counsel can undermine the right to adequate facilities for the preparation of the defence.

Defence Right to Timely Disclosure of Prosecution Evidence: Timely disclosure of prosecution evidence is an important aspect of the right to adequate time and facilities in the preparation of a defence. A number of Kenyan cases have discussed this right within the context of the old and the 2010 Constitutions and have ruled that the right entails the prosecution availing information that would be useful to the accused in the course of the trial.



Case Studies

The George Ngodhe Juma Case*

The accused persons had applied before the magistrates court for an order compelling the prosecution to supply them with copies of statements, and exhibits, including copies of exhibits that the investigators had obtained from the accused persons. The trial court turned down this application. The accused moved to the High Court on the basis that their rights under Sections 70, 77 (1) and 77 (2) of the then Constitution of Kenya, which provided that for purposes of a fair trial accused persons are entitled to be given adequate time and facilities to prepare for their defence. While upholding the right of the accused to full disclosure by the prosecution, the Court noted as follows;

“We are fully aware that in the adversary process of adjudication the element of surprise was formerly accepted and delighted in as a great weapon in the arsenal of the adversaries. But in the civil process this aspect has long since disappeared, and full discovery is a familiar feature of civil practice. This change resulted from acceptance of the principle that justice is better served when the element of surprise is eliminated from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met. It is, therefore, surprising that in criminal cases in which the liberty of the subject is usually at stake, this aspect of the adversary system can be supported to linger on; and it is even more surprising that there should be resistance to any extent of discovery in

criminal practice. Non-disclosure is a potent source of injustice and even with the benefit of hindsight, it will often be difficult to say whether or not an undisclosed item of evidence might have shifted the balance or opened up a new line of defence.”

The Thuita Mwangi Case**

In this case, at a stage of the trial where there was one remaining witness, the prosecution applied to call a prosecution witness whose name and statement had not been previously disclosed. The prosecution had previously disclosed that it would be relying upon 29 witnesses and provided their names and statements. Defence successfully objected the application. The prosecution sought review of this decision.

The High Court noted that the case was complicated and trial had required extensive preparations, that the witness in question was a key witness who “would distort the applicant’s tone and mode of defence”, and that his identity should have been apparent to the prosecution as he had been named in an investigation diary available to the prosecution at the commencement of the trial.

The High Court found that the prosecution failed to afford sufficient notice to the defendant to prepare for his defence and that the accused’s rights in accordance with 50 (2) (j) of the Constitution had been infringed. Accordingly, the witness was not permitted to testify. The Court observed that allowing the prosecution to call the witness at such a stage of the trial “...would not only make a mockery of the provisions in the constitution but would also amount to an abuse of the Court process. It is untenable, in the circumstance, to assume that sufficient notice is not a pre-requisite to the process of a fair hearing.”

The Dennis Apaa Case***

The accused were standing trial in relation to charges under the Anti-Corruption and Economic Crimes Act (Act No. 3 of 2013) at the Nairobi Chief Magistrates’ Court. Counsel for the accused objected to the calling of ten witnesses by the prosecution whose names and statements had not been included in the list of witnesses and statements provided by the prosecution at the commencement of the trial. The trial had been ongoing for six months and ten witnesses had already testified. The objection was made on the basis that a failure to disclose the names and statements of the witnesses prior to trial breached the accused’s right to a fair trial guaranteed by Article 50 of the Constitution. The Magistrate permitted the calling of the witnesses but adjourned the matter to enable defence to have sufficient time to consider the new evidence.

The accused subsequently filed a petition in the High Court. The petition argued that it was wrong in law for the Magistrate to permit entry of the evidence of the witnesses whose evidence had been taken after the trial began. A permanent injunction, prohibition or declaration was sought to prevent the prosecution from adducing any evidence not already disclosed on the ground that it would be unconstitutional, null and void.

The High Court found that Article 50 (2) (j), which affords the accused the right ‘to be informed in advance’ of the evidence that the prosecution intends to rely upon, cannot be read restrictively to mean in advance of the trial. It was held that the prosecution’s duty of disclosure is a continuing obligation throughout the trial. It found that the Magistrate had not erred as the matter was correctly stood down to allow defence the opportunity to examine its case and as defence would have opportunity to recall and cross examine any witnesses in accordance with Section 150 of the CPC.

The Court observed that the accused must be given adequate facilities to prepare a defence when disclosure is made during the trial. It stated: “The duty imposed by the Court is to ensure a fair trial for the accused and the right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it.”

**George Ngodhe Juma, Peter Okoth Alingo, Susan Muthoni Nyoike v Attorney-General* [2003] eKLR

***Thuita Mwangi & 2 Others v Republic* [2015] eKLR

****Dennis Edmond APAA & 2 Others v Ethics and Anti-Corruption Commission & Another* [2012] eKLR



Cross-Reference

Rights in relation to witness attendance and examination and exclusion of evidence on public interest grounds are examined again from the perspective of the trial stage later in this Chapter, particularly sections 5.10.3 to 5.10.5.

5.7 PRESUMPTION OF INNOCENCE AT TRIAL AND THE BURDEN OF PROOF

The presumption of innocence is a crucial guarantee both during the investigation of terrorist offences and the trial itself. The nature and scope of this principle has been addressed in detail in Chapter 3. As regards the trial specifically, one of the most important implications of this principle concerns the burden and standard of proof. As the Human Rights Committee set out in its General Comment No. 32, in all criminal trials, the presumption of innocence requires that the burden of proof is placed on the prosecution to prove all of the essential elements of the crime. The standard of proof to which the prosecution must establish its case is “beyond reasonable doubt.”

In Kenya, Section 107 of the Evidence establishes the burden of proof as follows:

- 1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- 2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

In addition, Section 109 provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. Section 111 (1) further imposes the burden of proof on the accused person in certain cases. It provides as follows:

“[w]hen a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

Certain presumptions of fact or law may also operate against an accused. For example, in the context of the possession of illicit substances such as narcotics or explosive substances, some legal systems impose a rebuttable presumption that an individual has knowledge of such items when found in his/her possession. This places a burden on the accused to show, on the balance of probabilities, that he/she did not have knowledge of the illicit substance. For instance, Section 111 (2) (c) of the Evidence Act shifts the burden of proof to an accused person where his defence is that of intoxication or insanity.



Case Study: *Peter Wafula Juma Case**

The appellants had been convicted of assault causing actual bodily harm. One of the grounds for appeal was that the trial magistrate had erred in law by shifting the burden of proof from the prosecution to the accused. The appeal judge, however, disagreed. He nevertheless made important remarks about the subject of shifting the burden of proof. He noted that the expression ‘burden of proof’ entails two distinct concepts: ‘legal burden of proof’ and ‘evidential burden.’ In the Court’s opinion, the common law tradition was consistent with constitutional and human rights principles on the presumption of innocence.

He expounded as follows;

“According to the Halsbury’s Laws of England, 4th Edition, Volume 17, the legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial, he has failed to establish these to the appropriate standard, he will lose. Kenya adopted the common law tradition espoused by Viscount Sankey L.C in *Woolmington v D.P.P* [1935] A.C 462 pp 481 where the prosecution bears the legal burden of proof throughout the trial in criminal cases. The evidential burden initially rests on the party with the legal burden, but as the weight of evidence given by either party during the trial varies, so also will the evidential burden shift to the party who would fail without further evidence. It is the basis for the practice in criminal law where the trial court makes a ruling as to whether the prosecution has adduced *prima facie* evidence as to warrant the accused person to be placed on his defence.”

He further noted that “[i]n Kenya, a statutory provision which shifts the legal burden of proof in criminal cases is unconstitutional except in so far as it creates only evidential burden, relates to acceptable exceptions such as the defence of insanity, or other rebuttable presumptions of law. This law is consistent with and upholds the constitutional rights of the accused: the presumption of innocence, not to give incriminating evidence and to remain silent. As for the evidential burden, where it is properly created in law, the accused is entitled to call for evidence in rebuttal. Where it is not discharged, the accused may be convicted. However, this is only if the entire evidence after the accused has not offered any evidence is evaluated to determine whether the case has been proved beyond reasonable doubt before entering such conviction on the evidence. In this way, the accused’s right to presumption of innocence or to remain silent in criminal cases is, therefore, not infringed.”

**Peter Wafula Juma & 2 Others v Republic* [2014] eKLR



Case Study: The *Salabiaku* Case*

Mr. Salabiaku was convicted in France of smuggling prohibited goods, namely cannabis. Under the French customs code, it was not necessary for the prosecution to prove that an individual found in possession of such goods actually had knowledge of the illicit item found in his possession. A legal presumption operated to the effect that he was presumed to have had knowledge of the goods unless he/she could show, on the balance of probabilities, that he did not know of their existence.

The ECtHR noted that certain presumptions of fact and law are imposed on the defence in almost every legal system. The imposition of such presumptions is not inevitably contrary to the presumption of innocence, as long as such presumptions are kept within reasonable limits, which take into account the importance of what is at stake and maintain the rights of the defence.

In the *Salabiaku* case, the ECtHR found that the presumption of innocence had not been violated since the legal presumption was very narrowly confined to one issue in the case. Further, in considering the evidence against Mr. Salabiaku, the French Court was “careful to avoid automatically resorting to the presumption” laid down. The French Court had not found knowledge solely or mainly through the operation of the presumption, but had also considered evidence regarding Mr. Salabiaku’s reaction to the goods being discovered in his luggage.

*ECtHR, *Salabiaku v. France*, Application No. 10519/83, Judgment of 7 October 1988

The POTA contains at least two offences that could be seen to entail a partial shift of the burden of proof on the accused person. Section 12A of the POTA, introduced by Section 62 of the SLAA, reads:

- “(1) A person who is in possession of a weapon, an improvised explosive device or components of an improvised explosive device for purposes of terrorism commits an offence and is liable, on conviction, to imprisonment for a term of not less than twenty-five years.
- (2) Without prejudice to subsection (1), unlawful possession of improvised explosive devices, assault rifles, rocket propelled grenades or grenades shall be presumed to be for terrorist or criminal purposes.

- (3) The Cabinet Secretary shall, on recommendation of the National Security Council, by notice in the Gazette, publish a list of components of improvised explosive devices for purposes of subsection (1)."

Section 30C of the POTA provides that:

- "(1) A person who travels to a country designated by the Cabinet Secretary to be a terrorist training country without passing through designated immigration entry or exit points shall be presumed to have travelled to that country to receive training in terrorism.
- (2) Despite subsection (1), a person who ordinarily resides in Kenya within an area bordering a designated country is exempt from the provisions of subsection (1).
- (3) For the purpose of this section, the Cabinet Secretary may, through regulations, designate any country to a terrorist training country."



Activities

- Are the presumptions created by Sections 12A and 30C POTA rebuttable? If so, how is the burden of proof allocated with regard to rebutting the presumptions? What is the appropriate standard for an accused seeking to rebut the presumption? In your view, is there any difference between the presumptions created by Sections 12A and 30C POTA respectively?

- **Hypothetical Scenario:** A is stopped by customs officers at the Tanzania-Kenya border transporting a significant amount of potassium chloride, a compound used to produce disinfectant, fertilizers, firecrackers and improvised explosive devices. The customs officers were tipped off by national security agents who suspect that the jobless A is a low level terrorist operative. Under interrogation, A maintains that the potassium chloride was supposed to be used for the unlicensed manufacture of firecrackers. A is not able to provide a convincing explanation as to who would have purchased the chemicals from him to make the firecrackers. He says that he would have found a way of selling it on the black market. A does not dispute that he was engaged in unlawful activity, but he rejects the accusation that he is in any way connected to terrorism.

Police and prosecutors intend to charge A under Section 12A of POTA, also because they expect that the threat of a 25-year sentence may induce him to disclose who his associates are.

As defence counsel, what arguments could you make with regard to the presumption of innocence and burden of proof? As prosecutor, what would your arguments be if the constitutionality of Section 12A POTA was attacked in this case?

- In 2015, Australia introduced an offence to stop the flow of "foreign terrorist fighters" from Australia to conflict zones where terrorist groups operate. The offence (new section 119.2 of the Criminal Code Act) provides that the government shall designate certain regions (such as, e.g., Raqqa province in Syria) as "declared areas". Any travel to a declared area constitutes a terrorism offence, unless the accused person can prove that one of the legitimate purposes listed in the provision was his or her "sole motive" for travelling there.

Compare this offence to the offence in Section 30C of the POTA. What are the differences, particularly in terms of respect for the presumption of innocence?

You can read a summary of the debate in the Australian Parliament on this legislation (Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014), including human rights concerns, here: http://www.google.at/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjf4bqY6qbLAhWB7xQKHbUhB7gQFggBMAA&url=http%3A%2F%2Fwww.aph.gov.au%2F~%2Fmedia%2F02%2520parliamentary%2520business%2F24%2520committees%2F244%2520joint%2520committees%2Fpjcis%2Fforeign%2520fighters%2520bill%2Fcommitteereport_17oct2014.pdf&usg=AFQjCNE6cP0d3xJLsgx9KhthQU1Nd9a3cw .



Tools

An overview of international jurisprudence on the presumption of innocence and its implications for criminal trials is set out in the OHCHR Manual on Human Rights for Judges, Prosecutors and Lawyers, Chapter 6, The Right to a Fair Trial Part I: From Investigation to Trial, available at: <http://www.ohchr.org/Documents/Publications/training9chapter6en.pdf>.

5.8 TRIAL BY AN INDEPENDENT AND IMPARTIAL TRIBUNAL

Trial by a competent, independent and impartial tribunal is a fundamental human right. This right is enshrined under Article 50 (2) (d) of the Constitution, which provides that “[E]very accused person has the right to a fair trial, which includes the right to ... a public trial before a court established under this Constitution.” It is also protected, in similar terms, by Article 14 (1) of the ICCPR, as well as Articles 7 and 26 of the Banjul Charter. In particular, Article 14 (1) of the ICCPR provides that “[i]n the determination of any criminal charge against him [...] everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”.

The Human Rights Committee has held that the right to an independent, impartial and competent tribunal is absolute and not subject to any exception, even in wartime or during states of emergency.¹⁵¹ This is significant for Kenya as the right to a fair trial is one of the fundamental rights that may not be limited under the Constitution.¹⁵² As a consequence, “[a]ny criminal conviction by a body not constituting a tribunal is incompatible with the right to a fair trial. ... [T]he notion of a “tribunal” ... designates a body... that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature.”¹⁵³

1. **Independence:** Courts or tribunals trying criminal cases must be structurally and institutionally independent of the executive, which requires that there be safeguards in place. This requirement refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference.

The Constitution provides for an independent judiciary through various mechanisms such as the establishment of a representative Judicial Service Commission (JSC) under Article 171, which has the responsibility for recruiting all cadre of judicial officers through a competitive process. Article 173 establishes a Judiciary Fund, which receives funds directly from the consolidated fund and is operated by the Chief Registrar of the Judiciary for the running of the Judiciary. Additionally, the grounds and process for the removal of judges are set out under Article 168 with elaborate safeguards to ensure fairness and even-handedness.

2. **Impartiality:** There are a number of requirements imposed by the idea of impartiality. First, judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them. Impartiality also requires that any conviction is based solely on the evidence before the court and the facts it finds proven. In addition, not only must a tribunal be impartial, it must also appear to a reasonable observer to be impartial.

151 Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, 23 August 2007, para. 19.

152 Article 25 (c) of the Constitution of Kenya.

153 Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, 23 August 2007, para. 18.

5.8.1 The Use of Special or Military Courts in Terrorism Cases

The trial of civilians, including those accused of terrorism or national security offences, by special or military courts is generally impermissible under international human rights law and can only be used as a last resort. In its General Comment No. 32, the Human Rights Committee explains that “[t]rials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State Party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.”¹⁵⁴

Kenya’s legal system does not envision the trial of civilians in military courts. Court martials are provided for under Part VII of the Armed Forces Act (CAP 199), which applies to the members of the Kenya Defence Forces (KDF) who commit offences specified under the Act. The definitions therein exclude penal offences committed by civilians. With regard to terrorism-related offences, Section 38 of the POTA vests jurisdiction to try such offences in the subordinate courts where the act or omission constituting the offence is committed in Kenya.

At the regional level, the ACommHPR’s Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa prohibit the use of military courts over civilians regardless of the circumstance.¹⁵⁵



The Use of Specialized Judges to Try Terrorism Cases

While the use of “special courts” to try terrorism offences, typically with lessened procedural guarantees, is generally impermissible under international law, the use of judges specially designated and trained to try terrorism cases may be a good practice.

The GCTF Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses recommends as good practice to “identify and assign specially trained judges” to terrorism and national security cases.



Activities

- List the arguments in favour and, if any, against the use of specialized judges to try terrorism cases.
- In your view, what are the elements to distinguish between the permissible designation of specialized judges for terrorism cases and the impermissible creation of a “special court” to try terrorism cases?



Tools

- The GCTF Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses is available here: <https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/The%20Hague%20Memorandum%20-%20ENG.pdf?ver=2016-03-29-134018-493>.

154 General Comment No. 32 Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32, 23 August 2007, para 22.

155 ACommHPR’s Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa, p 24.

5.9 TRIAL WITHIN A REASONABLE PERIOD OF TIME

Terrorism-related proceedings are often complex as are the investigations that precede them. Expert evidence, including forensic evidence may need to be gathered, while issues of cross-border cooperation and legal assistance often create considerable delays. Nonetheless, it is important that those suspected and accused of involvement in terrorist offences face trial as quickly as possible. It is also important for the fairness of the trial itself, since the ability of witnesses to recall events accurately may diminish over time. Moreover, lengthy delay prior to a trial may amount to a violation of the presumption of innocence, particularly if the accused is detained on remand. Article 50 (2) (e) of the Constitution therefore guarantees the right of every accused person “to have the trial begin and conclude without unreasonable delay.”

A landmark decision by the Court of Appeal, whose reasoning endures to date, is the case of *Stanley Githunguri v Republic*.



Case Study: The *Githunguri Case**

The applicant in this case had been investigated for violation of the then foreign exchange regulations. In the course of a 9-year period his statement was taken, and he was also required to deposit the equivalent of the foreign currency with the investigators. Subsequently, six (6) years later, he was informed that no charges would be brought against him and his money was refunded, successive Attorney Generals also make statements in the National Assembly that the matter was closed. And therefore when the state re opened the case, he challenged it before a constitutional court, whose order the Attorney General ignored by persisting with the prosecution. Githunguri therefore applied for a prohibition order on the basis that the time taken to bring him violated Article 77 (1) of the then Constitution which is similar to Article 50 (2) (e) of the 2010 Constitution. Allowing the application, the Court stated thus:

“We also speak knowing that it is our duty to ask ourselves what is the use of having a Constitution if it is not honored and respected by the people. The people will lose faith in the Constitution if it fails to give effective protection to their fundamental rights. The people know and believe that destroy the rule of law and you destroy justice, thereby also destroying the society. Justice of any other kind would be as shocking as the crime itself. The ideals of justice keep the people buoyant.... We are of the opinion that to charge the applicant four years after it was decided by the Attorney-General of the day not to prosecute, and thereafter also by neither of the two successors in office, it not being claimed that any fresh evidence has become available thereafter, it can in no way be said that the hearing of the case by the Court will be within a reasonable time as required by Section 77(1). The delay is so inordinate as to make the non-action for four years inexcusable in particular because this was not a case of no significance, and the file of the case must always have been available in the Chambers of the Attorney-General.We are of the opinion that two infeasible reasons make it imperative that this application must succeed. First as a consequence of what has transpired and also being led to believe that there would be no prosecution the applicant may well have destroyed or lost the evidence in his favor. Secondly, in the absence of any fresh evidence, the right to change the decision to prosecute has been lost in this case, the applicant having been publicly informed that he will not be prosecuted and property restored to him. It is for these reasons that the applicant will not receive a square deal as explained and envisaged in Section 77(1) of the Constitution. This prosecution will therefore be an abuse of the process of the Court, oppressive and vexatious.”

**Stanley Munga Githunguri v Republic* [1986] eKLR

The obligation to try an accused without undue delay applies regardless of whether an individual is detained. The time runs from the moment an individual is charged in respect of a criminal accusation to the final appeal. It is also particularly important to note that where an individual is in detention awaiting trial, the obligation of expedition is all the more significant. Courts should examine any delays in proceedings where an individual has been remanded in custody with anxious scrutiny.

Key factors relevant in determining the reasonableness of a delay include the complexity of a case, the conduct of investigative, prosecutorial and judicial authorities, and the conduct of the defendant. Although complexity is an important consideration regarding reasonableness, the Human Rights Committee has made clear that where delays are caused by a lack of resources, additional resources should be allocated. Inadequacy of

resources cannot be relied upon to justify unreasonable delays. This was emphasised by the Human Rights Committee in the *Lubuto* case, where the State (Zambia) expressly relied on its limited resources as well as the country's economic situation to explain the difficulty it faced in ensuring the promptness of trials. The Committee emphasised that economic hardship could not be relied on to justify failure to comply with obligations under Article 14 of the ICCPR.¹⁵⁶



Activities

- Are delays in criminal trials a significant problem in Kenya? Does this problem affect trials in respect of terrorism and related offences?
- Identify the three most important factors which, in your experience, contribute to such delays. What steps could judges, prosecutors or others within the Kenyan legal system take to reduce delays? What reforms (legal, administrative or institutional) would assist in reducing delays in complex cases such as terrorism trials?



Good Practices to Avoid Delays in Terrorism Trials

The GCTF's Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offences recommends and explains numerous good practices that can significantly contribute to reducing delays in terrorism and national security cases, including:

- 1) the necessity for specially-trained judges;
- 2) the use of continuous trials in terrorism cases;
- 3) developing effective trial management standards; and
- 4) the establishment of special measures to protect victims and witnesses.

5.10 PROCEDURAL GUARANTEES AT TRIAL

Aside from the human rights protections that are necessary in relation to the court or tribunal before which terrorism trials are heard, a variety of protections are also necessary in respect of the trial itself. These will be examined in the following section.

5.10.1 Public Hearings and Publicly Accessible Judgments

An important element of the administration of justice is that justice be done openly, so that both the accused and the public in general can be reassured as to the standards of justice applied. Openness to scrutiny by the public acts as an additional safeguard to protect against improper procedure.

Article 50 (2) (d) of the Constitution provides that every accused person has the right to a fair trial, which includes the right to "a public trial before a court established under this Constitution." This is further reinforced by Section 77 (1) of the CPC, which requires that criminal trials be conducted in open court and defines what amounts to an open court.¹⁵⁷

¹⁵⁶ Human Rights Committee, *Lubuto v. Zambia*, Communication No. 390/90, CCPR/C/55/D/390/1990/Rev.1, 31 October 1995.

¹⁵⁷ "Subject to subsection (2), the place in which a criminal court is held for the purpose of trying an offence shall be deemed an open court to which the public generally may have access, so far as it can conveniently contain them."

The right to a public hearing right is also guaranteed by international and regional human rights treaties, including Article 14 (1) of the ICCPR. The requirement of publicity is, however, not absolute. Hearings may be conducted in sessions closed to the public, where this is necessary for the protection of a witness, and the witness protection needs cannot be achieved by other means. Appellate proceedings may be conducted in writing where this is appropriate. More generally, the press and the public may be excluded from all or part of a trial only where this serves a legitimate aim.

Similar to Article 14 (1) of the ICCPR,¹⁵⁸ Article 50 (8) of the Constitution provides that the right to a fair and public trial "... does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security." Section 77 (1) of the CPC also has a *proviso* that allows judicial officers to exclude the public or a section thereof from trials.¹⁵⁹ Moreover, Section 4 (3) of the Witness Protection Act allows for the WPA to request the court to allow for proceedings to be held *in camera* in order to protect witnesses.

The ACommHPR's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance elaborate in detail on the right to a public hearing (Principle A.3), including some very concrete guidance to ensure that this right is not only respected in theory but also in practice:

- "(a) All the necessary information about the sittings of judicial bodies shall be made available to the public by the judicial body;
- (b) ... ;
- (c) Adequate facilities shall be provided for attendance by interested members of the public;
- (d) ... ;
- (e) Representatives of the media shall be entitled to be present at and report on judicial proceedings except that a judge may restrict or limit the use of cameras during the hearings;
- (f) The public and the media may not be excluded from hearings before judicial bodies except if it is determined to be:
 1. in the interest of justice for the protection of children, witnesses or the identity of victims of sexual violence
 2. for reasons of public order or national security in an open and democratic society that respects human rights and the rule of law.
- (g) Judicial bodies may take steps or order measures to be taken to protect ... the identity of witnesses and complainants who may be put at risk by reason of their participation in judicial proceedings.

158 Article 14 (1) of the ICCPR provides that the press and the public may be excluded from all or part of the trial for reasons of morals, public order, national security, in the interests of the parties' private lives or in the interests of justice. Restrictions for any other purpose are therefore not generally permissible.

159 "Provided that the presiding judge or magistrate may order at any stage of the trial of any particular case that the public generally or any particular person shall not have access to or remain in the room or building used by the court."



Limitations to the Public Nature of Trials in the Interest of Child Defendants, Victims and Witnesses

Under Kenyan law, Section 186 (g) of the Children's Act provides that every child accused of having infringed any law shall have his privacy fully respected at all the proceedings. Section 74 gives the Children's Court the power to clear the court room. It provides that "where in any proceedings in relation to an offence against or by a child ... a person, who in the opinion of the court, is under eighteen years of age is called as a witness, the court may direct that all or any persons, not being members or officers of the court, or parties to the case or their advocates, shall be excluded from the court."

Under international law, Article 40 (1) of the CRC obligates States Parties to recognise the right of every child alleged as, accused or, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of his/her sense of dignity and worth. To this end, States Parties are required to ensure a number of guarantees, including the right of a child to have his/her privacy fully respected at all stages of the proceedings, as provided for in paragraph (2) (vii)

In its General Comment No. 10, U.N. Doc. CRC/C/GC/10 (25 April 2007), the Committee on the Rights of the Child recommends at paragraph 66 that "all States Parties introduce the rule that court and other hearings of a child in conflict with the law be conducted behind closed doors. Exceptions to this rule should be very limited and clearly stated in the law. The verdict/sentence should be pronounced in public at a court session in such a way that the identity of the child is not revealed. The right to privacy (Article 16) requires that all professionals involved in the implementation of the measures taken by the court or another competent authority to keep all information that may result in the identification of the child confidential in all their external contacts. Furthermore, the right to privacy also means that the records of child offenders should be kept strictly confidential and closed to third parties, except those directly involved in the investigation and adjudication of, and the ruling on, the case. With a view to avoiding stigmatization and/or prejudgements, records of child offenders should not be used in adult proceedings in subsequent cases involving the same offender."

In paragraph 67, the Committee further recommends that States Parties "introduce rules which would allow for an automatic removal of the criminal records of the name of the child who committed an offence upon reaching the age of 18, or for certain limited, serious offences where removal is possible at the request of the child, if necessary under certain conditions e.g. not having committed an offence within two years after the last conviction."

At the regional level, Article 17 (2) (d) of the ACRWC provides that States Parties to the Charter shall prohibit the press and the public from the trial pertaining to a child accused or found guilty of having infringed penal law. Similarly, the ACommHPR's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance elaborate in detail on the right to a public hearing (Principle A.3):

(f) The public and the media may not be excluded from hearings before judicial bodies except if it is determined to be 1. in the interest of justice for the protection of children

(h) Judicial bodies may take steps to protect the identity of accused persons, witnesses or complainants where it is in the best interest of a child.

Limitations to the public nature of the trial may also be sought by the accused person. As the following case makes clear, the principle of the public nature of proceedings is not only a right established in the interests of the accused, it is also a fundamental aspect of the administration of justice in democratic societies.



Case Study: Amos Gichuhi Kimeria Case*

The accused, who had been charged with murder, applied to the Court seeking that the proceedings be conducted in the absence of media and the general public, and that the media be prohibited from covering, airing and/or publishing any story related and/or connected to the case. The application was premised on the grounds that: the members of the public were unlawfully interfering with the applicant's representation by his counsel in court, which threatened the counsel's security, peace of mind, privacy and concentration in court proceedings; the media was misreporting facts and information about the case that might adversely affect the applicant's defence and intimidate his witnesses or prejudice his constitutional right to be presumed innocent until proven guilty; the reports by the media portraying the accused as a cannibal were prejudicial and should he be acquitted, his life would be endangered.

The accused alleged that his right to a fair trial under Article 50 (8) and to human dignity under Article 28 of the Constitution had been violated. The Court noted that freedom of the media must be exercised responsibly and without infringing on the enjoyment by others of their rights and freedoms. It found that the reports were prejudicial to the applicant's fair trial and that the manner in which the case had been publicized made the applicant and his counsel vulnerable persons under Article 50 (8), unless appropriate measures were employed.

The Court, however, acknowledged that there was need to balance the applicant's right to a fair and public trial and the citizens' right to information in taking appropriate measures. The media was therefore ordered to report accurately, fairly and only on matters or evidence that was adduced in court without drawing conclusions that could incite or influence public outrage against the applicant or his counsel.

**Republic v Amos Gichuhi Kimeria [2012] eKLR.*



Media Coverage of Terrorism Trials

As stated in the GCTF's Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses, "[t]rials involving the prosecution of terrorism offenses are generally high profile by their nature, inviting scrutiny from the general public and the media. As a general rule, timely access to accurate information of court proceedings increases transparency and public confidence in the fairness of the justice system. The judiciary should develop rules and procedures for media coverage of public judicial proceedings".

At the same time, as highlighted in Chapter 3 (section 3.5.1), media coverage can have a significant impact on the presumption of innocence and courts bear the, sometimes very challenging, obligation to balance freedom of expression and information in reporting terrorism trials with the rights of the accused. Also the rights to dignity and respect for privacy of victims and witnesses, and even their right to life, can be adversely affected by media coverage of trials.

In Good Practice 8, the Hague Memorandum recommends developing and articulating media guidelines for the court and parties as an important good practice for the adjudication of terrorism cases and identifies numerous specific measures courts can adopt.

Any judgment must be made accessible to the public, unless the interests of juvenile persons otherwise require, or the proceedings concern matrimonial disputes or the guardianship of children. This does not mean that all judgments must be read out in open court. In some instances, often in the case of appeals decisions, depositing the judgment in the court registry, which makes the full text of the judgment available to everyone, will be sufficient to satisfy the requirement of being publicly accessible. Moreover, any restriction that is placed on publicity must be proportionate in pursuit of the legitimate aim, bearing in mind the particular importance of the principle of open justice.

In Kenya, Sections 168 and 169 of the CPC provide that the main points of determination in a judgment shall be pronounced in open court. Similar to most jurisdictions, the decisions of the superior courts in Kenya are reported in law reports that are publicly accessible. Subordinate court decisions can also be perused by members of the public in court registries.

5.10.2 Trial in Presence of Accused/Trial in Absentia

The right to participate in one's own trial is clearly essential to the fairness of trial proceedings. The accused person is best able to adequately instruct defence lawyers, to identify points on which prosecution witnesses and evidence can be challenged, and to suggest appropriate lines of enquiry to be pursued. Article 50 (2) (f) of the Constitution enshrines the right of every accused person to be present during their trial, unless their conduct makes it impossible for the trial to proceed. This right is also provided under Article 14 (3) (d) of the ICCPR, as well as under regional instruments such as the Banjul Charter.



Case Study: The *Julius Mamica Ndiba Case**

The appellant had protested that he would not participate in the proceedings unless the case was heard afresh. The trial magistrate ordered that the appellant would not hold the court at his convenience, and that the case would proceed in his absence. The appellant refused to appear in court on some occasions and remained in the cells but had not expressly consented to the trial continuing in his absence.

On appeal, the court found that he had not conducted himself in a manner that made the continuance of proceedings in his presence impracticable. It noted that “an accused person must at all times during the hearing be present in court, and given the chance to defend himself, in person or through his lawyer.” The court also remarked that “the prosecution had a duty to bring the appellant to court, and the court had an obligation to ensure the appellant was physically in court, and an obligation not to proceed with *ex parte* criminal proceedings.” It held that the appellant’s right to attend hearing and consequently to a fair trial had been violated.

It is therefore clear that the threshold for barring the attendance of an accused is very high, and the conduct complained of must be one that is so disruptive as to make it impracticable for the trial to be conducted in his presence.

**Julius Mamica Ndiba v Republic of Kenya* [2013] eKLR.

The criminal procedure law of many countries (but not Kenya) allows the trial of a fugitive. This is not excluded by international human rights law. According to the Human Rights Committee, “[p]roceedings in the absence of the accused may in some circumstances be permissible in the interest of the proper administration of justice, i.e. when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present.”¹⁶⁰ Where trial in absentia is permitted, the authorities must take all due steps to notify an accused of the charges, as well as the date and time of trial. Where the authorities decide to proceed to try a fugitive, they need to appoint legal counsel to act on his behalf, in which case the trial will still be considered trial in absentia.

5.10.3 Rights in Relation to Witness Attendance and Examination

The Constitution does not expressly provide for the right to call and cross-examine witnesses. However, Article 50 (2) (k) includes the right “to adduce and challenge evidence” as part of the right to a fair trial. Section 137F (1) (a) (vii) of the CPC further recognizes the right of an accused to “examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution.” The court is therefore mandated to inform the accused of this right, among other rights, and determine that he/she understands it before recording a plea agreement.

Under international law, Article 14 (3) (e) of the ICCPR provides that, in the determination of any criminal charge, everyone shall be entitled to “examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.” Although the ACHPR does not expressly provide for the right to call and cross-examine witnesses as part of the right to a fair hearing, there is no doubt that the right to a fair trial in Article 7 of the Charter implies this requirement.

¹⁶⁰ Human Rights Committee, General Comment No. 32, CCPR/C/GC/32, 23 August 2007, para. 36. See also the Human Rights Committee’s views in the cases *Maleki v. Italy*, Communication No. 669/96, CCPR/C/60/D/699/1996, 15 July 1999 and *Mbenge v. Zaire*, Communication No. 16/77, CCPR/C/OP/2, 25 March 1983.

The ACommHPR's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa further elaborate on the right to a fair hearing under the Banjul Charter.¹⁶¹ Principle N.6 (a) provides that in "criminal proceedings, the principle of equality of arms imposes procedural equality between the accused and the public prosecutor", including that "[p]rosecution and defence witnesses shall be given equal treatment in all procedural matters."

As the ECtHR has explained, these provisions enshrine "the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings."¹⁶² The ECtHR derived two requirements from this general principle, which will be explored in turn:

1. There must be a good reason for the non-attendance of a witness.
2. When a conviction is based to a decisive degree on witness statements taken during pre-trial proceedings and the witness cannot be examined by the defence, this situation may be incompatible with the right to a fair trial even if there are good reasons for the non-attendance of the witness.

5.10.3.1 Commission to Depose a Witness whose Attendance Cannot be Procured

The CPC contains provisions allowing for the examination of witnesses who are unable to attend court physically. Section 154 provides as follows:

- "(1) Whenever, in the course of a proceeding under this Code, the High Court or a magistrate empowered to hold a subordinate court of the first class is satisfied that the examination of a witness is necessary for the ends of justice, and that the attendance of the witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, the court or magistrate may issue a commission to any magistrate within the local limits of whose jurisdiction the witness resides, to take the evidence of the witness.
- (2) The magistrate to whom the commission is issued shall proceed to the place where the witness is or shall summon the witness before him, and shall take down his evidence in the same manner, and may for this purpose exercise the same powers, as in the case of a trial."

Section 156 allows for a magistrate, other than a magistrate empowered to hold a subordinate court of the first class, to apply to the High Court for the issuance of a commission for the examination of a witness. Moreover, Section 155 provides that:

- "(1) The parties to a proceeding ... in which a commission is issued may respectively forward any interrogatories in writing which the court or magistrate directing the commission may think relevant to the issue, and the magistrate to whom the commission is directed shall examine the witness upon those interrogatories.
- (2) Any such party may appear before the magistrate by advocate, or, if not in custody, in person, and may examine, cross-examine and re-examine (as the case may be) the witness."

161 Available at <http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/>

162 ECtHR, *Al-Khawaja and Tahery v. United Kingdom*, Application Nos. 26766/05 and 22228/06, Judgment of 15 December 2011, para. 119.

Section 157 further provides that:

"[a]fter a commission issued under Section 154 or Section 156 has been duly executed, it shall be returned, together with the deposition of the witness examined thereunder, to the High Court or to the magistrate empowered to hold a subordinate court of the first class (as the case may be), and the commission, the return thereto and the deposition shall be open at all reasonable times to inspection of the parties, and may, subject to all just exceptions, be read in evidence in the case by either party, and shall form part of the record."

Sub-section (2) provides that "[a] deposition so taken, if it satisfies the conditions prescribed by Section 34 of the Evidence Act may also be received in evidence at a subsequent stage of the case before another court."

5.10.3.2 Non-Attendance of a Witness Requested by the Defence

Regarding the requirement that there must be a good reason for the non-attendance of a witness, some of the reasons particularly relevant to terrorism trials will be explored in the following sections, such as the witness' fear of retaliation or a public interest against the witness being called to testify. Other reasons may include the death of the witness, or that the witness is outside the jurisdiction and her attendance cannot be secured.

In Kenya, Section 211 (2) of the CPC provides that where the accused states that there are witnesses who are likely to give material evidence on his behalf but are not present in court, and the absence of such witnesses is not due to his fault or negligence, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses.

Where the defence requests the attendance of a witness and the request is refused or insufficient efforts are made to secure the presence of the witness, the right to a fair hearing may be violated.



Case Studies: The Right to Call and Examine Witnesses

The Grant's Case:* Mr. Grant was on trial for murder. His defence was one of alibi, namely that at the time of the crime, he had been at home with his girlfriend. At trial, it became apparent that the accused was unable to secure the attendance of his girlfriend. The judge instructed the police to contact the girlfriend who indicated that she had no means to attend. The Human Rights Committee found a violation of the right to a fair trial, on grounds that the judge should have adjourned the trial and issued a subpoena to secure the attendance of Mr. Grant's girlfriend in court and, if necessary, transportation should have been arranged to enable her to come to court, given the seriousness of the matters at stake in the trial.

Dugin's case:** Mr. Dugin and a friend, Mr. Egunov, got into a fight with two other men, Messrs. Naumkin and Chikin. Mr. Naumkin died of his injuries, and Messrs. Dugin and Egunov were charged with homicide. During the pre-trial phase, Mr. Chikin gave a statement incriminating Mr. Dugin. When the trial started, Mr. Chikin did not respond to the summons. The Human Rights Committee noted that while some efforts had been made by the authorities to trace Mr. Chikin, these had been insufficient. It also noted that the Court gave very considerable weight to the statement Mr. Chikin had made during the pre-trial proceedings. Yet Mr. Dugin was unable to cross-examine this witness and therefore unable to test the prosecution's case, which rested heavily on Mr. Chikin's statement. The Committee concluded that this amounted to a denial of justice.

*Human Rights Committee, *Grant v. Jamaica*, Communication No. 353/88, U.N. Doc. CCPR/C/50/D/353/1988, 31 March 1994.

**Human Rights Committee, *Dugin v. Russian Federation*, Communication No. 815/1998, U.N. Doc. CCPR/C/81/D/815/1998, 5 July 2004.



Practical Guidance

In terrorism trials, witnesses for both the prosecution and the defence will frequently be located abroad. This may constitute a considerable obstacle to obtaining statements from them during the investigation and to securing their attendance at trial. MLA may therefore become key to obtain not only evidence for the prosecution, but also to secure the accused's right to "adequate time and facilities" to prepare the defence and to "examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf". When statements from witnesses located abroad are obtained through MLA before trial and might become evidence at trial, it will be very important to consider ways to secure defence rights in the examination of the witness.

Expert Evidence

Expert evidence often plays an important role in terrorism trials. Given that terrorist offences often involve explosive devices or various forms of armaments, forensic evidence is often at the centre of evidence against an accused. In this context, it is very important that defendants are given time and facilities to examine expert evidence, including forensic evidence, where necessary with the assistance of defence experts. In part, this is an aspect of the right to adequate time and facilities in the preparation of an accused's defence.

Related to the right to adequate time and facilities in the preparation of a defence is the right to call expert witnesses or evidence, as an aspect of the overall right to call and examine witnesses. In the *Fuenzalida* case,¹⁶³ the accused had been convicted of rape. The prosecution relied on blood samples taken from the victim, which showed the existence of an enzyme the author did not have in his blood. The author requested that he be afforded opportunity to submit his blood to expert analysis and to call expert evidence. The court rejected this request. The Human Rights Committee found in favour of Mr. Fuenzalida, highlighting the importance of expert evidence to ensure a fair trial. It found that "the court's refusal to order expert testimony of crucial importance to the case" constituted a violation of this right.

The right to request the attendance and examination of witnesses and experts, however, is not absolute. In the *Gordon* case, the Human Rights Committee noted that Article 14 (3) (e) of the ICCPR, "does not provide an unlimited right to obtain the attendance of witnesses requested by the accused or his counsel," for instance, where it is not material to the matters in issue in a case or where the evidence is not relevant to the advancement of the case of the defence.¹⁶⁴ Moreover, it is generally for the accused and his lawyer to request the attendance of a particular witness at trial and, if necessary, to request an adjournment to enable the witness' presence to be secured.

5.10.3.3 Use of Pre-Trial Statements by a Witness as Evidence in case of Non-Attendance of the Witness

Section 33 of the Evidence Act provides that "statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in certain cases." For instance, under Section 33 (a), "where the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction that resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible, whether the person who made them was or was not at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

163 Human Rights Committee, *Fuenzalida v. Ecuador*, Communication No. 480/1991, CCPR/C/57/D/480/1991, 12 July 1996.

164 Human Rights Committee, *Gordon v. Jamaica*, Communication No. 237/1987, CCPR/C/46/D/237/1987, 5 November 1992.

International and regional human rights law does not provide detailed rules governing the admissibility of statements given by the witness to the police or to a judge prior to trial. That is also due to the fact that “[s]ystems of criminal law evolve rules for dealing with evidence which is not given orally [at trial] by someone speaking from personal knowledge. The solutions adopted vary for a number of reasons, not least because of different concepts of the trial process.”¹⁶⁵ This Manual is not the place to trace the evolution of the hearsay rule in the common law and in Kenyan law, or to discuss its intricacies in the current law of evidence in Kenya.

The ECtHR has generally held, however, that “when a conviction is based solely or to a decisive degree on depositions [witness statements made prior to trial] that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6.”¹⁶⁶ In other words, even when there are good reasons for the non-attendance of a witness at trial, such as the intervening death of the witness, courts must be exceedingly careful in admitting and relying on pre-trial statements by that witness, where those statements are decisive for the conviction of the accused.



Activities

1. What are the most frequent difficulties in obtaining attendance from witnesses at trial in terrorism cases in Kenya?
2. Refer to the rules in Kenya pertaining to the admission in evidence at trial of statements made by witnesses to the police or to a judge before trial, when the witness does not take the stand at trial and cannot be examined by the defence? Do you think that these rules ensure that the right to an overall fair trial is secured in all cases?

5.10.4 Rights of Defence and Witness Protection Measures

It is usually desirable that witnesses are examined in court and that the judge, the defendant and counsel have the opportunity to see their demeanour in person. However, the risk of witness intimidation or retaliation is particularly acute in terrorism cases. Witnesses may also be afraid to testify even though the accused has not threatened them. Witness protection measures therefore play an important role.

Section 4 (3) of the Witness Protection Act lists protection measures that the WPA may request the court to implement during court proceedings in Kenya. These include but are not limited to “holding in camera or closed sessions; the use of pseudonyms; the reduction of identifying information; the use of video link; or employing measures to obscure or distort the identity of the witness.” It is therefore expected that the prosecution or defence, depending on which witnesses require protection, have to work closely with the WPA.

It is important to distinguish between measures that prevent disclosure of the witness’s identity to the general public, and measures that limit the accused’s knowledge of the witness and therefore her ability to effectively challenge that witness’s testimony. The former measures are generally permissible if they are necessary in the interest of justice for the protection of witnesses, and as long as the judge keeps an eye on respect for the public nature of court proceedings. Measures that limit disclosure of witness identities to the accused, on the other hand, must be subjected to very strict scrutiny.

To fully exercise the right to “examine, or have examined, the witnesses against him,” an accused needs to know the identity of the witnesses. It will not be sufficient to learn their identity on the day of the trial hearing. Effective preparation for cross-examination of prosecution witnesses takes time: the sooner an accused knows

165 Supreme Court of the United Kingdom, *R v Horncastle & Others* [2009] UKSC 14, at para. 6.

166 ECtHR, *Al-Khawaja and Tahery v. United Kingdom*, Application No. 26766/05 and No. 22228/06, Judgment of 15 December 2011, para. 119.

the identity of the witnesses against him, the better his chances of identifying information that undermines their credibility. Moreover, it is not sufficient for the accused himself to know the identity of the witness. For example, a court's decision to shield a witness' identity from the public is only effective if it goes along with an order that the identity of the witness must not be disclosed to third parties. This in turn can be a significant obstacle to defence investigations into the background of the witness.¹⁶⁷

Human rights bodies at the universal and regional levels have re-iterated that an accused must be able to examine and challenge witness evidence adduced by the prosecution against him/her. For instance, the Human Rights Committee has repeatedly found that the practice of prohibiting an accused from cross-examining law enforcement officials violates the right to a fair hearing.

Where the threat to a witness's safety is particularly high and cannot be effectively mitigated by lesser measures, it may be permissible for that individual to give evidence anonymously. Three requirements are nevertheless important in this regard:

1. The use of anonymous witnesses should only be resorted to in exceptional circumstances and where it is strictly necessary for a legitimate aim such as the protection of a witness. The concerns for witness safety must be based on good evidence, not only on assertions from the police or the prosecution. If a measure less restrictive than witness anonymity can suffice, then that measure should be deployed
2. An accused should not be convicted "solely or decisively" on the basis of evidence furnished by anonymous witnesses.
3. Where evidence from anonymous witnesses is admitted at trial, sufficient steps must be taken to safeguard the rights of the defence and a fair trial.



Case Study: The *Van Mechelen Case**

The accused was alleged to have been involved in a sophisticated armed robbery and attempted murder. Investigative police had placed a caravan site under surveillance on suspicion that it was used as a base for organized crime. In the course of the surveillance, three cars left the caravan site and were then used in a robbery and attempted murder. A man identified by a surveillance officer as the accused was seen at the site shortly before the cars left. At trial, the investigating officers testified anonymously from a separate room by sound link. Their testimony was crucial in the conviction of the accused.

The ECtHR held [at 56] that the use of anonymous police witnesses gives rise to particular difficulties since "they owe a general duty of obedience to the State's executive authorities and usually have links with the prosecution." It further noted that:

1. The accused and his lawyers were unable to see or assess the witnesses' demeanour when giving evidence;
2. Although the investigating judge himself questioned the witnesses and produced a detailed report as to their reliability and credibility, this was not a proper substitute for the possibility of the defence questioning the witnesses in their presence and making their own judgment as to their demeanour and reliability;
3. Insufficient evidence had been produced to show a risk sufficiently real to justify the exceptional measure of anonymous evidence; and
4. Finally, the conviction of the accused was based to a decisive extent on these anonymous witnesses.

The ECtHR concluded that, taken together, these factors meant that Mr. Van Mechelen did not receive a fair trial.

*ECtHR, *Van Mechelen v. Netherlands*, Application No. 26668/95, Judgment of 23 April 1997.

¹⁶⁷ These points are discussed in more detail in the Commonwealth Secretariat publication *Victims of Crime in the Criminal Justice Process, The Best Practice Guide for the Protection of Victims/Witnesses in the Criminal Justice Process*, para. 1.6.1.



Case Study: *In the Matter of Application for Orders for Witness Protection Case**

This case involved robbery with violence. The Office of the DPP made an application seeking for their witnesses to testify in camera or closed session; that their statements be redacted before being given to the accused persons and that they be allowed to use pseudonyms during testimony. The application was supported by an affidavit sworn by a Protection Officer attached to the WPA who indicated that he had conducted a risk assessment and was of the view that the witnesses' lives might be endangered on the basis that the accused persons were members of a very dangerous gang, who together with their accomplices had recently murdered the complainant in the case, and had threatened to kill or harm any person testifying against them in court. The Protection Officer concluded that the threats were real and hence the need for the orders sought.

The Court accepted that the evidence adduced demonstrated that the lives of the witnesses were in danger by virtue of being witnesses in the specific case and granted the orders. While acknowledging the importance of both the need to protect the lives of witnesses and the defence's right to a public trial, the Court noted that, based on the circumstances, holding the trial in camera would not be prejudicial to the defence. The Court also found that redacting of the witnesses' statements to exclude their personal details such as the name, address and other personal particulars did not amount to a contravention of the provisions of Article 50 (2) (j) of the Constitution on the accused's right to be informed in advance of the evidence the prosecution intends to rely on and to leave reasonable access to that evidence. The Court further considered that the accused persons would have the substance of the evidence to be adduced at the trial, which is the tenet of protection accorded by Article 50 (2) (j). Lastly, as to the use of pseudonyms during the trial, the judge was satisfied that it did not in any way, violate the provisions of Article 50 of the Constitution.

**In the Matter of Application for Orders for Witness Protection* [2014] eKLR.



Practical Guidance

Witness protection measures can be very expensive. This is particularly the case of programmes providing relocation of witnesses or the creation of new identities. Other witness protection measures might involve technological means not available in Kenyan courts. There are, however, some highly effective measures that can be implemented at little cost, such as ensuring that witnesses do not enter into contact with the accused or the public when they come to the courthouse, using screens to protect witnesses from the sight of the public while they give testimony, or using pseudonyms to protect the witness's identity vis-à-vis the public.



Tools

- UNODC's Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime, (2008), available at: <http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf>.
- The Commonwealth Secretariat's Victims of Crime in the Criminal Justice Process, The Best Practice Guide for the Protection of Victims/Witnesses in the Criminal Justice Process (London, 2011).

5.10.5 Exclusion of Evidence on Grounds of Public Interest

The need to balance the public interest that certain documents should not be disclosed in a public trial and the competing public interest in the proper administration of justice, and the defendant's right to adequately prepare his defence, are not new. As the House of Lords observed in a judgment dating back to 1968: "The police are carrying on an unending war with criminals many of whom are today highly intelligent. So it is essential that there should be no disclosure of anything which might give any useful information to those who organise criminal activities." However, the judgment went on to state: "I would therefore propose that the House

ought now to decide that courts have and are entitled to exercise a power and duty to hold a balance between the public interest, as expressed by a Minister, to withhold certain documents or other evidence, and the public interest in ensuring the proper administration of justice.”¹⁶⁸

Experience shows that questions surrounding the proper balance between these competing interests and applications for the withholding of evidence on grounds of public interest are particularly likely to arise in terrorism cases, where the protection of intelligence information and other documents of national security relevance is often at stake.

Section 131 of the Evidence Act allows to limit the disclosure of documents whose production would harm the public interest. It provides that “[w]henever it is stated on oath (whether by affidavit or otherwise) by a Minister that he has examined the contents of any document forming part of any unpublished official records, the production of which document has been called for in any proceedings, and that he is of the opinion that such production would be prejudicial to the public service, either by reason of the content thereof or of the fact that it belongs to a class which, on grounds of public policy, should be withheld from such production, the document shall not be admissible.”

This provision, however, has to be applied in light of Article 35 of the Constitution, which guarantees every citizen the right of access to information; Article 50 on the right to a fair trial, particularly Article 50 (2) (c), which guarantees every accused person the right to have adequate time and facilities to prepare a defence, and Article 50 (2) (j), which guarantees the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

It must be noted that Section 131 of the Evidence Act may act not only to a defendant’s detriment, but may also prejudice the prosecution’s case as the court may rule in favour of an applicant whose right to rely on such information is limited by the State’s own application. The emerging jurisprudence in Kenya is that the courts are more inclined to uphold the rights to a fair trial of an accused person and disallow any attempt by the prosecution to withhold any evidence from the defence on grounds of public interest.



Case Study: Constitutionality of Disclosure of Evidence Provision in the SLAA Case*

This case concerned the constitutionality of the newly enacted SLAA that was passed to amend security laws. One of the sections that the High Court examined was Section 16 of the SLAA, which sought to introduce Section 42A of the Criminal Procedure Code on disclosure of evidence by the prosecution. This new section, besides re-encapsulating Article 50 (2) (j) of the Constitution as to disclosure by the prosecution, stated that in proceedings under the POTA, the Narcotic Drugs and Psychotropic Substances (Control) Act, the POCA, the AML Act and the Counter-Trafficking in Persons Act (“the Select statutes”), the prosecution may withhold certain prosecution evidence until “immediately” before the hearing, if the evidence may facilitate the commission of other offences or it is not in the public interest to disclose such evidence or there are grounds to believe that disclosure of the evidence may lead to attempts to persuade a witness to retract his original statement or not appear in court. The section also defined what evidence deemed to be in ‘public interest’ is, to include matters of national security; protection of identity of informants and witnesses; contains details which, if they became known, might facilitate the commission of other offences or alert someone not in custody that the person was a suspect; discloses some unusual form of surveillance or method of detecting crime. Finally, it provided that the disclosure of evidence under that section should be done in camera.

The petitioners submitted that the section offended the constitutional right to a fair trial. They argued that allowing access to the evidence immediately before the trial would mean the accused would not have sufficient time to prepare a defence as stipulated under Article 50 (2) (c), and was contrary to Article 50 (2) (j), which entitles the accused to the prosecution’s evidence in advance.

The Court noted that although there are circumstances that may exist where disclosure may seriously undermine and prejudice public interest, the right to a fair trial is absolute under Article 25 of the Constitution and cannot be derogated from even through legislation. It then stated that

“disclosure of evidence is prompted by fairness (...) and is required at the very early stage of the criminal justice process for the obvious reason that the accused person must prepare his defence (...) What must be disclosed is material relevant to the case. It does not matter whether it strengthens the accused person’s case or touches on issues of public interest.”

The Court further stated that

“[w]hile we agree that the doctrine of public interest immunity in relation to the State is forever alive to ensure that the administration of justice especially in the criminal sphere is never compromised, we would by the same vein express what the Court in the case of *Taylor Bonnet vs The Queen* (2013) 2 Cr. App R 18 stated: the overall fairness of a criminal trial should never be compromised even if a limitation on the rights to a fair trial is geared towards ‘a clear and proper public objective.’ The Court also cited with approval a statement by Lord Bingham in *R vs H and C* [2004] 2 AC 134, which was to the effect that public interest should never be the lead criteria behind a limitation to the right to fair trial.

The Court concluded that disclosure immediately before the trial would derogate from the right to be informed in advance of the evidence the prosecution intends to rely upon, guaranteed under Article 50 (2) (j), which would lead to trial by ambush and hence declared the section unconstitutional.

**Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others* [2015] eKLR

As already noted with regard to the use of anonymous witnesses, the general rule in international human rights law is that all material that the prosecution will rely on at trial must be disclosed to the defence, as must any evidence that may assist the defence. There are, however, certain exceptions to this principle as regards the disclosure of information that may raise concerns on grounds of public interest or in respect of the rights of others. Great caution, however, is required in this field.



Case Studies: Refusal of Disclosure on Grounds of Public Interest

The P.G. and J.H. case:* Relying on proactive covert investigation techniques, the police obtained information that P.G., J.H. and others were possibly planning to commit an armed robbery against a cash-collection van. They obtained warrants to subject the gang to surveillance measures, which in turn allowed the police to arrest P.G., J.H. and others before the robbery was committed. To protect the confidentiality of its covert investigative techniques, the prosecution did not disclose to the defence part of a report issued by the investigating police officer relating to the surveillance measures. Instead, the prosecution submitted the report to the judge. When this police officer gave evidence at trial, he refused to answer certain questions put in cross-examination by defense counsel that related to the background to the surveillance.

The judge decided to put those questions to the police officer in chamber, in other words, without the presence of the public and the defence. The judge then weighed the harm to the public’s interests against the benefit to the defence, and took the decision that part of the report and the oral answers should not be disclosed [at 70]. P.G. and J.H. were convicted of conspiracy to commit armed robbery and were sentenced to fifteen years’ imprisonment. Their domestic appeals failed and they subsequently appealed to the ECtHR.

The ECtHR recalled the general principle [at 67] that

“it is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (...). In addition, [the right to a fair trial requires] that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused (...).”

The ECtHR then proceeded to describe conditions for permissible limitation of the entitlement to disclosure of relevant evidence [at 68]

1. In any criminal proceedings, there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of criminal investigation, which must be weighed against the rights of the accused.
2. Only such measures restricting the rights of the defence which are “strictly necessary” are permissible. In other words, such measures are only permissible if there are no alternative ways (such as, e.g., witness protection measures) to protect the public interest at stake.
3. Procedural safeguards are necessary to ensure that the accused receives a fair trial. Any difficulties caused to the defence must be sufficiently counterbalanced by the procedures followed by the judicial authorities, in particular, the ability of the defence to challenge whether the exclusion of the evidence prejudices the overall fairness of the trial. This is something the trial judge must keep under constant review throughout the trial, as new evidence and information come to light.

The ECtHR then applied these principles to the case of P.G. and J.H.. It observed [at 71] that,

1. As far as was possible without revealing to them the material which the prosecution sought to keep secret on public interest grounds, the defence were kept informed and were permitted to make submissions and participate in the decision-making process regarding the disclosure of the sensitive material.
2. The questions which defence counsel had wished to put to the witness were asked by the judge in chambers.
3. The material which was not disclosed was not evidence against P.G. and J.H.; and,
4. Finally, throughout the trial the judge had continuously assessed whether the withholding of the evidence regarding the surveillance measures affected the overall fairness of the proceedings.

On these grounds, the ECtHR found that the decision not to disclose to the defence parts of the information on the surveillance measures had not affected the fairness of the trial.

Please also refer to Chapter 3, section 3.7.2 for the *Ghailani* case,** and Chapter 4, section 4.5.3 for the *A. and Others* case,*** both of which deal with the question of non-disclosure of evidence on public interest grounds.

*ECtHR, *P. G. and J. H. v. United Kingdom*, Application No. 44787/98, Judgment of 25 September 2001.

**US District Court Southern District of New York, *United States of America v. Ahmed Khalfan Ghailani*, Case No. S10 98 Crim. 1023(LAK), 12 July 2010.

***ECtHR, *A. and Others v. the United Kingdom*, Application No. 3455/05, Judgment of 19 February 2009, paras. 203-204.

In circumstances where the prosecution or another authority requests the non-disclosure of information or evidence to the defence, the judge will have to decide whether the information is such that it must be disclosed to the accused in order that a fair trial is possible. There are three possible options or scenarios.

1. It may be possible that the overall fairness of the trial and, in particular, the ability of a defendant to mount his/her defence do not require disclosure of the evidence or information. Great caution is required in reaching this conclusion. It may simply be impossible for a prosecutor to know whether information is or is not relevant or helpful to the defence. A judge may also face similar difficulties, even in the course of a trial, given that a complex trial often develops fluidly the direction of evidence and arguments often change, sometimes quite radically, in the course of the trial. Furthermore, a judge does not of course know all of the matters known to a defendant and may not therefore realize the significance of undisclosed material. In this scenario, at the very least, a judge will have to keep the need for disclosure of undisclosed public interest material under very careful review throughout the trial process. If the time comes, the judge must be willing to revisit his or her decision that the information or evidence need not be disclosed.
2. Second, the court may conclude that the fairness of the trial and the rights of the defence require the disclosure of the evidence. In this case, the court must order that, if the trial continues, the evidence is disclosed to the defence (perhaps with safeguards to protect, insofar as possible, the public interest).

Examples of information or evidence that fairness will likely require the disclosure of includes information which may call into question to truthfulness or reliability of a prosecution witness (for instance, that he has been receiving payments from the police may be an example of such information).

3. Third, a prosecutor may decide that rather than disclose the information in question, the charges or the case ought to be discontinued. If, all things considered, a judge concludes that it is necessary to disclose information in the interests of a fair trial, this leaves the prosecutor with the, perhaps difficult, choice of either disclosing the information or evidence to the defence or discontinuing the prosecution or those charges which cannot be fairly tried without the defence having access to the information in question.



Transforming Information Gathered in Clandestine Intelligence Activities into Evidence

In terrorism cases, issues surrounding the limitation of the accused person's full access to the evidence against him often arise in connection with information gathered by intelligence agencies in the exercise of their functions. To assist States in this respect, the GCTF has elaborated Recommendations for Using and Protecting Intelligence Information in Rule of Law-Based, Criminal Justice Sector-Led Investigations and Prosecutions.

From the point of view of the prosecution, it is important that investigators and prosecutors evaluate at an early stage the authenticity and reliability of the information received and determine whether and how it can be used in criminal proceedings. The GCTF Recommendations advise (Recommendation 4) that:

"In determining the authenticity or reliability of the intelligence information and whether it can or should be used to support an investigation or prosecution, consideration may be given to, *inter alia*, the legal authorities under which the intelligence was collected, the means or techniques by which the intelligence was collected, and the reliability of the source of the information. Such considerations may inform whether the use of the intelligence in a criminal proceeding is appropriate or, in certain instances, potentially prohibited under domestic or international law, including international human rights law."

Recommendation 5 advises on legal and practical arrangements to achieve the balance between the accused's right to a fair trial and the protection of national security and witnesses.

Recommendation 6 deals with the protection of information shared between States.



Activities

1. How would confidential information such as that relating to the police investigation methods in the P.G. and J.H. case be dealt with in the Kenyan legal system? Are there sufficient safeguards to protect information that should remain confidential in the public interest while meeting the requirements of the right to a fair trial in international human rights law?
2. In your own professional experience, have you encountered problems such as the one faced by the judge in the P.G. and J.H. case? Without revealing any confidential information, how did you deal with these problems? On reflection, is there anything now that you would do differently to ensure the requirements of the right to a fair trial are met?

The withholding of evidence on grounds of public interest raises not only questions related to defence rights and the public nature of the administration of criminal justice, it may also be an obstacle to accountability for human rights abuses committed in the name of counter-terrorism or national security. The UN High Commissioner for Human Rights has noted that

"[w]hile the legitimate use of a State secrets privilege – as in cases where it is invoked to exclude specific evidence, the exposure of which would necessarily harm national security – can be critical to considerations of national security, its overly broad application by some States has resulted in a lack of accountability including for serious human rights violations", and further that "[s]erious

concerns have been raised in the course of legal proceedings regarding the broad use of State secrecy in several countries.”¹⁶⁹



Further Reading

- The 2010 Annual Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, A/HRC/16/50, discusses specific challenges concerning the use of intelligence in the context of criminal justice processes, including the application of the national security or “State secrets” doctrine to prevent disclosure of information in the context of criminal trials: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-50.pdf>.
- The GCTF Recommendations for Using and Protecting Intelligence Information in Rule of Law-Based, Criminal Justice Sector-Led Investigations and Prosecutions: https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/sicherheitspolitik/14Sept19-GCTF-Rabat-GP-6-Recommendations_en.pdf.

5.10.6 Exclusion of Evidence Obtained in Violation of Human Rights Law

One of the most difficult problems dealt with in this Manual arises when it turns out that the outcome of an investigation or a trial against a person suspected of having committed a serious terrorist crime, even resulting in the murder of innocent people, depends on the use of evidence obtained in violation of human rights law. Article 50 (4) of the Constitution provides that “[e]vidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.”



Case Study: The *Antony Murithi Case**

In this case, the court granted an order of injunction restraining the respondents from adducing data obtained in contravention of the petitioner’s fundamental rights and freedoms as evidence. The petitioner had been arrested for allegedly having committed rape. He alleged that about a month later, he was secretly removed from the cells at Meru Police Station, handcuffed and taken to Meru General Hospital where blood was forcefully drawn from him and a mouth swab obtained despite his protests. He submitted that this was done while he was handcuffed and seated on the floor, and that he had not been informed about what was happening.

The High Court found that the manner in which the samples had been obtained amounted to torture and cruel, inhuman and degrading treatment, and was therefore in violation of the petitioner’s inherent dignity. As such, the illegally obtained samples, in breach of the constitutional protection of the rights of the suspect, could not be used in any proceedings, and were therefore declared null and void.

**Antony Murithi v O.C.S Meru Police Station & 2 others* [2012] eKLR.

Article 15 of the CAT provides that “[a]ny statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings.” This is an absolute rule that may not be balanced against other interests, however pressing they might be. It cannot be derogated from, even in time of emergency that threatens the life of the nation. Moreover, it is a position that does not merely apply to torture. The Committee Against Torture has stated in General Comment No. 2 (at paragraph 6) that this prohibition also applies in relation to statements made as a result of inhuman or degrading treatment.

¹⁶⁹ Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, A/HRC/16/50 [at 37], 15 December 2010.

Beyond this clear rule, however, many difficult questions arise. Here are some of them:

- What if statements obtained under torture or inhuman or degrading treatment lead the investigators to other evidence, sometimes referred to as “real evidence” or “derivative evidence,” which the prosecution then seeks to introduce at trial?
- What if statements made to an investigator under torture or inhuman or degrading treatment are then confirmed before a prosecutor or investigating judge?
- What if evidence is obtained in violation of other, less absolute and peremptory human rights guarantees, such as the right to assistance by legal counsel, or safeguards relating to surveillance measures and other special investigative techniques?



Cross-Reference

The first two questions are explored in Chapter 3, section 3.7.2, particularly through the case studies examined there. The first question is at the forefront in the *Mthembu* and *Ghailani* cases, the second in the *Haratyunyan* case.

In the following, we turn to the third question, i.e. evidence obtained in violation of human rights norms other than torture or cruel, inhuman or degrading treatment.

According to Guideline 16 of the United Nations Guidelines on the Role of Prosecutors, “[w]hen prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect’s human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.”

It is clear from the above that prosecutors’ professional responsibilities are not limited to eschewing evidence obtained through ill-treatment of suspects, as set out in Chapter 3. Prosecutors should also eschew other evidence that has been obtained in circumstances amounting to a grave violation of that individual’s human rights. It is incumbent on all prosecutors to exercise vigilance and caution in relation to the evidence they rely on at trial. While this Guideline provides important guidance, it leaves open which types of violations of human rights and procedural safeguards amount to “grave violations.”



Case Study: Admissibility of Unlawful Covert Recordings in the *Bykov* Case*

Mr. Anatoliy Bykov was suspected of involvement in serious organized crime and of ordering an associate to kill a rival, known as V.. The associate did not kill the rival but subsequently reported to the security forces that he had been asked to do so. The security forces arranged a ruse to obtain the Mr. Bykov’s confession. They arranged for a false news story to be placed stating that V. and another man had been killed in his house. The associate then met with Mr. Bykov at his country estate and told him that he had killed V. as per Mr. Bykov’s instructions. The associate also gave Mr. Bykov various objects belonging to the V. as proof that he had killed him. The whole conversation was recorded using a device attached to Mr. Bykov’s associate. The operation was not judicially authorized.

Mr. Bykov was tried on charges of conspiracy to murder. The prosecution sought to rely on the evidence of the covertly recorded conversations. Mr. Bykov challenged these on grounds that they had been obtained in a procedurally improper manner. The court rejected this challenge and the recording of Mr. Bykov’s conversation with his associate was played during the trial. The court found Mr. Bykov guilty as charged.

The ECtHR found that the recording of the applicant in the circumstances of the case had violated Article 8, ECHR, protecting the right to respect for private life. It found that the legal framework regulating the covert recording of conversations in these circumstances lacked legal certainty. It also found that there were insufficient safeguards (such as independent oversight by a judge) to protect against arbitrariness in the use of the power of covert surveillance.

The ECtHR also found, however, that, in the circumstances of the case, the introduction of this evidence did not deny Mr. Bykov a fair hearing. The ECtHR noted that key considerations as to whether the admission of the evidence had prejudiced the fairness of the proceedings included (i) whether Mr. Bykov was given the opportunity to challenge the authenticity of the evidence and to oppose its use (ii) the quality of the evidence, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy (iii) whether the evidence was independently corroborated by other evidence (iv) whether the conviction was based solely on the evidence obtained in violation of the Mr. Bykov's privacy and (v) the nature and gravity of the violation.

In applying these criteria, the ECtHR noted that (i) the evidence obtained from the covert operation was not the sole basis for Mr. Bykov's conviction, corroborated as it was by other conclusive evidence, (ii) Mr. Bykov had had ample opportunity to challenge the authenticity and reliability of the evidence and to seek to have it excluded on grounds of fairness (iii) in its judgment, the Russian court did not place a great deal of weight on the covert recordings which rather "played a limited role in the complex body of evidence considered by the [Russian c]ourt". In the light of these factors, the ECtHR considered that the right to a fair hearing had not been violated.

*ECtHR, *Bykov v. Russia*, Application No. 4378/02, Judgment of 10 March 2009.

Applying Article 50 (4) of the Constitution and Article 15 of the CAT, and on the basis of the cases examined in Chapter 3, section 3.7.2 and 3.7.3, relating to evidence allegedly obtained under torture or inhuman or degrading treatment, or in violation of the right to remain silent, and of the material considered in this section, it may be possible to draw the following conclusions:

1. Statements made as a direct result of torture or inhuman or degrading treatment can never be admitted as evidence at trial; admission of such evidence would always be detrimental to the administration of justice, irrespective of its probative value.
2. Where statements made under torture have led the investigators to other evidence ("real evidence" or "derivative evidence"), the use of such evidence will still be seriously "detrimental to the administration of justice", so that under Article 50 (4) of the Constitution it should not be relied on as evidence, irrespective of its probative value.
3. Where statements made under torture are subsequently confirmed under circumstances that do not, on their face, suggest any coercion, judges should still exercise great caution, both because the torture suffered may influence the statements of the victim long after the ill-treatment ended, and because the risk of tainting the integrity of the criminal justice process remains.
4. Evidence that has been obtained in violation of human rights guarantees other than the prohibition on torture or inhuman or degrading treatment is not necessarily rendered inadmissible at trial as a consequence of that violation. It may become inadmissible, by operation of the right to a fair trial, if the illegality or violation is such as to risk the fairness of the proceedings against an accused as a whole, or because its admission would be "detrimental to the administration of justice" within the meaning of Article 50 (4) of the Constitution.
5. In ensuring that the rights of the accused and the fairness of proceedings as a whole are given due consideration, regard must be had to:
 - a) whether the accused is afforded meaningful opportunity to challenge the authenticity and reliability of any evidence offered in contravention of human rights standards;
 - b) whether the trial proceedings as a whole are made unfair by the introduction of illegally obtained evidence into the proceedings; and
 - c) whether there is other evidence to corroborate that which has been illegally obtained. In this regard, where illegally obtained evidence is the main evidence against an accused, there needs to be a high degree of assurance as to the reliability and authenticity of the material, with very strong procedural safeguards.¹⁷⁰

¹⁷⁰ ECtHR, *Chalkley v. the United Kingdom*, Application No. 63831/00, Judgment of 12 June 2003; *Khan v. the United Kingdom*, Application No. 35394/97, Judgment of 12 May 2000.

In practice, the most significant safeguards will often be: (i) the ability of the defence to challenge at any stage of the trial the impact that the inclusion or exclusion of evidence has on the fairness of the proceeding as a whole; and (ii) the duty of the judge to keep the fairness of the trial as a whole under constant review. The latter is particularly important since the judge, unlike the defence, will know the content of the evidence that has not been disclosed to the defence and may be able to perceive an issue that the defence cannot see. For instance, the evidence might be that one of the prosecution's witness has received cash payments from the police. In this case, an issue arises as to the reliability of his/her evidence in light of such payments.

From the point of view of investigators, it may be concluded that the violation of human rights norms at the investigative stage of terrorism cases puts the successful prosecution at great risk, as the court may decide to order the exclusion of evidence that is important to the prosecution case, or even a stay of proceedings where a fair hearing has become impossible. Adhering to human rights guarantees is thus not only important in its own right, but it is also an important and essential aspect of an effective investigation and ensuring that those responsible for acts of terrorism are brought to justice.



Tools

The United Nations Guidelines on the Role of Prosecutors, in particular Principle 16, set out the professional responsibilities of prosecutors who come into possession of unlawfully obtained evidence. They are available here: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>.



Activity: The Case of the Ill Treated Father

Law enforcement officers have reason to believe that A from village V is a member of the terrorist group T.

They carry out a raid on the village. A cannot be found. The law enforcement officers, however, find his father F in his hut. F tells them that his son A is indeed an armed member of the terrorist group. He signs a statement to this effect. F also leads the law enforcement officers to a place outside the village where they recover a large cache of military weapons. Subsequently, forensic analysis of some of the military assault rifles shows A's finger prints on the weapons. Forensic analysis also shows that some of the rifles had in all likelihood been used in an attack by the terrorist group.

Two weeks later, A is captured. He is charged with numerous counts under the POTA. The prosecution's case is based to a very large extent on F's statement and on the forensic evidence relating to the weapons recovered from the cache.

At trial, A's defence calls F as a witness. He testifies convincingly that when they found him in his hut and he told them that he did not know the whereabouts of A, the law enforcement officers beat him with an iron rod until he led them to the weapons cache. A's defence also adduce medical evidence compatible with the ill treatment narrated by F. No other explanation of F's injuries is proffered.

A's defence moves to have the signed statement by F ruled inadmissible on the ground that it was obtained under torture. A's defence further moves to have the weapons and the forensic evidence linking the weapons to A excluded.

The prosecution argues that the weapons and the connected forensic evidence are objective and reliable facts independent of the way in which they were obtained. The prosecution further argues that the weapons and the connected forensic evidence prove that F's statement was reliable.

1. Write the motion for the defence.
2. Write the motion in reply for the prosecution.
 - Assume that in the above scenario, the raid on the village had been carried out by a military unit, and that the ill-treatment of the father and the seizure of the weapons had been carried out by military personnel for purposes related to the military operations. Would this change the legal position with regard to subsequent admissibility of the weapons seized at trial?

5.10.7 Other Procedural Rights at Trial

The right to assistance by competent legal counsel, if necessary, free of charge, and to confidential communication with that lawyer, the assistance of an interpreter if required, and adequate time and facilities in the preparation of a defence, are all essential to the overall right to a fair trial. These rights have been set out in some detail in Chapter 3 of this publication, to highlight that their protection must start long before the trial, at the time of arrest or when a suspect is informed of the charges brought against him/her.

5.11 The Right to Review by a Higher Tribunal

Article 50 (2) (q) of the Constitution provides that the right to a fair trial includes the right “if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.” Under international law, Article 14 (5) of the ICCPR provides that “everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”

This right has been elaborated by the Human Rights Committee, which clarifies that:

1. The right to review by a higher tribunal is violated not only if the decision by the court of first instance is final, but also where, following acquittal by a lower court, an accused is found guilty at the appeals stage and cannot obtain review of the conviction by a higher court.
2. The review by a higher tribunal must be substantive, covering both sufficiency of the evidence and the law, the conviction and sentence. A review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient. However, no full retrial or a “hearing” is required, as long as the tribunal carrying out the review can look at the factual dimensions of the case.
3. The right to have one’s conviction reviewed can only be exercised effectively if the convicted person is entitled to have access to a duly reasoned, written judgment of the trial court.
4. The right of appeal is of particular importance in death penalty cases. Legal aid cannot be denied to an indigent convicted person seeking review of the death penalty.

This right is also enshrined in the regional human rights instruments, with the exception of the Banjul Charter. The ACommHPR has held, however, that to “foreclose any avenue of appeal to ‘competent national organs’ in criminal cases bearing such penalties [imprisonment or the death penalty] clearly violates Article 7 (1) (a) of the Banjul Charter, and increases the risk that even severe violations may go unredressed.”¹⁷¹

¹⁷¹ African Commission of Human Rights, *Constitutional Rights Project (on behalf of Zamani Lekwot and six Others) v. Nigeria*, Communication No. 87/93, ACHPR/LR/A/1, at 12.

5.12 SELF-ASSESSMENT QUESTIONS



Self-Assessment Questions

- List and explain four aspects or consequences of the presumption of innocence (also consult the section on the presumption of innocence in Chapter 3 for this purpose).
- Explain the difference between the requirement of independence of a court and impartiality. Can any of the two be limited for compelling reasons of security in terrorism trials?
- Why are public trials in terrorism cases so important? For what reasons and in what circumstances can parts of a terrorism trial (or the whole trial) be held under exclusion of the public?
- Can there be a permissible reason to make the judgment rendered by the court in a terrorism case secret?
- Are trials in the absence of the accused permissible under Kenyan law? Under international human rights law? If so, under what circumstances?
- What obligation is on a State's authorities in circumstances where a witness, whose statements during the investigation phase the prosecution will introduce as evidence at trial, cannot be located?
- Identify the main disadvantages for an accused who faces evidence in court given by an anonymous witness. What alternative means could be used to protect a witness' safety other than giving evidence anonymously?
- In cases where the prosecution refuses to disclose evidence to the defence on grounds of national security, or to protect the confidentiality of the methods of intelligence agencies or investigators: What steps could a trial judge take to ensure that the refusal to disclose the information to the defence, either before or during the trial, does not cause unfairness?
- If a judge at the pre-trial or at the trial stage considers that the evidence the prosecution refuses to disclose to the defence is relevant to the defence, in that it may undermine prosecution's evidence, including the credibility of a prosecution witness, can the accused have a fair trial if the evidence is not disclosed?
- Does the right to a fair trial require the exclusion of all evidence obtained in violation of human rights law? If not, under what circumstances can such "tainted" evidence be permissible?
- Can the right to appeal against a conviction be abolished in counter-terrorism cases in the interest of national security?

6. THE PUNISHMENT OF TERRORIST OFFENCES

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6. The Punishment of Terrorist Offences

6.1 OBJECTIVES

By the end of this Chapter, you will be able to:

- Describe the objectives of punishment in the criminal justice system, and discuss how they play out in the punishment of terrorism related offences
- Apply the principle “no punishment without law” to terrorism related offences
- Apply the limitations international human rights law and Kenyan law place on the use of capital punishment, including the “most serious crime” requirement and the prohibition of the mandatory death sentence
- Describe the limitations international and regional human rights law places on the use of imprisonment for life sentences
- Identify human rights law aspects of the conditions of imprisonment of convicted terrorist offenders

6.2 SUMMARY/OVERVIEW

This Chapter will discuss the human rights considerations that typically arise in the context of the punishment of convicted terrorist offenders. To this end, it will examine four topics from the point of view of Kenyan law, as well as international and regional human rights law. It will begin with an overview of the various objectives that punishment serves in the criminal justice system, followed by an analysis of the principle of “no punishment without law,” which is fundamental to the rule of law and an essential safeguard against arbitrariness.

It will then examine the human rights considerations surrounding capital punishment, the prohibition on mandatory death penalty, and the right to seek pardon or commutation of death sentence. This will be followed by a discussion of life imprisonment, including the argument that life in prison without the possibility of parole may amount to cruel and inhuman punishment. The Chapter will conclude with consideration of human rights principles applicable to the conditions of imprisonment of convicted terrorist offenders.

6.3 INTRODUCTION

The universal counter-terrorism conventions and protocols typically require States to criminalize certain conduct for instance, “unlawfully and intentionally deliver[ing], plac[ing], discharg[ing] or detonat[ing] an explosive or other lethal device in, into or against a place of public use,”¹⁷² as well as the actions of those who participate as accomplices or organize or direct the commission of offences. The universal counter-terrorism

172 International Convention for the Suppression of Terrorist Bombings, Article 2(1).

instruments also require State Parties to “make those offences punishable by appropriate penalties, which take into account the grave nature of those offences.”¹⁷³ Not surprisingly, considering the great differences between approaches to punishment of criminal offences between the world’s legal systems, the universal counter-terrorism instruments do not indicate what the appropriate punishment for terrorist offences might be. Similarly, counter-terrorism instruments at the regional level generally do not provide guidance to States as to what adequate penalties for terrorism offences are.

The universal counter-terrorism treaties do, however, clearly indicate that domestic law and “international law, including international law of human rights” must be respected with regard to any measure taken with regard to persons suspected or convicted of terrorism offences, including with regard to sentencing and the carrying out of sentences imposed (Article 14 of the 1997 Terrorist Bombing Convention).

In January 2016, Kenya launched the Sentencing Policy Guidelines for the Judiciary, which were developed by the Task Force on Sentencing.¹⁷⁴ The Foreword to the Policy Guidelines stresses the importance and difficulty of sentencing:

“Reaching a fair decision in sentencing is neither an easy nor straightforward process; several considerations come into play. While sentences are defined by law, the measure of what is an appropriate sentence in a given case is left to the discretion of judges and magistrates. As Justice McArdle is famously quoted saying, *“Anyone can try a case. That is as easy as falling off a log. The difficulty comes in knowing what to do with a man once he has been found guilty.”*

Sentencing is as important as all other aspects of a criminal trial. Sentencing in Kenya has been marked by instances of unwarranted disparities, lack of certainty and transparency in decisions, disproportionate sentences and lack of uniformity in sentences with respect to same offences committed under similar circumstances. In other respects, lack of sufficient public education has contributed to misconceptions about sentencing, especially the undue focus on custodial sentences to the exclusion of other appropriate forms of sentences.”

The Sentencing Policy Guidelines stress the importance of sentencing to the enjoyment of human rights, and of human rights law to sentencing (at 3.5):

“The sentences imposed must promote and not undermine human rights and fundamental freedoms. In particular, the sentencing process must uphold the dignity of both the offender and the victim. Further, the sentencing regime should contribute to the broader enjoyment of human rights and fundamental freedoms in Kenya. Sentencing impacts on crime control and has a direct correlation to fostering an environment in which human rights and fundamental freedoms are enjoyed.”

Guideline 3.6 requires adherence to domestic law with regard to the sentences to be imposed for each offence, but states that also “international legal instruments, which have the force of law under Article 2 (6) of the Constitution of Kenya, should be applied. Reference should also be made to recognised international and regional standards and principles on sentencing, which though not binding, provide important guidance during sentencing.”

173 See e.g., Article 4 (b) of the International Convention for the Suppression of Terrorist Bombings. In resolution 1373 (2001) the Security Council similarly decided that “2. ... all States shall ... (e) Ensure that ... the punishment duly reflects the seriousness of such terrorist acts.”

174 The Judiciary Sentencing Policy Guidelines, available at http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Sentencing_Policy_Guidelines_Booklet.pdf

6.4 THE OBJECTIVES OF PUNISHMENT

The Sentencing Policy Guidelines (at 4) state that sentences are imposed to meet the following objectives:

- Retribution: To inflict punishment on the offender in a just manner, both in the sense of taking vengeance and of “punishment that fits the crime,”
- Deterrence: To deter both the offender and others who might be inclined to offend,
- Public protection: To incarcerate the offender so that he is not available to harm the public,
- Reformation and social rehabilitation of the offender;
- Restorative justice: To address the needs arising from the criminal conduct such as loss and damages; and
- Denunciation: To communicate the public’s condemnation of the criminal conduct.

The Sentencing Policy Guidelines note that these objectives are not mutually exclusive, but that there may be instances in which they may be in conflict with each other. As much as possible, sentences imposed by the courts should be geared towards meeting these objectives in totality.

International human rights law requires that criminal punishment should aim at the rehabilitation of offenders. For example, Article 10 (3) of the ICCPR demands that “[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.” The constitutional or criminal law of many States equally enshrines this principle.

Similar to international and regional human rights law, Kenyan law is not oblivious to the need to balance the objective of rehabilitating the offender with the competing need to protect society and the individual’s right to life and physical integrity against dangerous offenders.



Case Study: The *Maiorano Case**

In 1976, one Mr Izzo was sentenced to life imprisonment for the abduction, rape and brutal abuse of two young women and the murder of one of them. In spite of his involvement in numerous incidents in prison, which led to further convictions, in November 2004, the Court overseeing execution of prison sentences granted him day release as a measure to promote re-integration into society. While on day release, he murdered two women. He was re-arrested, tried and given a further life sentence. Following an administrative inquiry into the procedure, which had led to Mr Izzo being granted day release, the judges of the sentence-execution Court were reprimanded.

The relatives of the women killed by Mr. Izzo while on day release filed an application to the ECtHR alleging a violation of the right to life of their killed loved ones.

The ECtHR did not find fault with the arrangements in Italy for the rehabilitation of prisoners per se, as they afforded sufficient safeguards to ensure the protection of society. The ECtHR noted, however, that Article 2 of the ECHR, protecting the right to life, imposed a duty of care on the authorities. It took into account the various positive indicators which had led to the granting of measures to assist Mr. Izzo’s rehabilitation, in particular the favourable reports by probation officers and psychiatrists. But those had been counterbalanced by many others that should have counselled greater prudence. In addition to the incidents in prison, Mr Izzo had violated the conditions of his day release, and an informant in prison had told a local public prosecutor that Mr Izzo was planning a murder. These were not brought to the attention of the court overseeing execution of the sentences. The ECtHR, balancing Mr Izzo’s interest in his gradual social rehabilitation with the need to protect the community, concluded that there had been a breach of the duty of care arising from the obligation to protect life under Article 2 of the ECHR.

*ECtHR, *Maiorano and Others v. Italy*, Merits, Application No. 28634/06, Judgment of 15 December 2009.

6.5 THE PRINCIPLE “NO PUNISHMENT WITHOUT LAW”

The principle of “no punishment without law” is a fundamental principle of criminal justice and an essential safeguard against arbitrariness. This principle is enshrined in the Constitution under Article 50 (2) (n), which provides that “[e]very accused person has the right to a fair trial, which includes the right not to be convicted for an act or omission that at the time it was committed or omitted was not (i) an offence in Kenya; or (ii) a crime under international law.” Article 50 (2) (p) further provides that “[e]very accused person has the right to a fair trial, which includes the right to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.”

As provided in Article 4 (2) of the ICCPR, the importance of this principle is such that no derogation from it is allowed, even “in time of public emergency which threatens the life of the nation.” As discussed in Chapter 2, the principle prohibits the prosecution of and punishment for conduct that is not proscribed as an offence, as well as the retroactive creation or expansion of offences. It also requires criminal laws to be written in an accessible and foreseeable way that gives “fair notice” of what conduct is prohibited.

The principle of “no punishment without law” also prohibits retroactive changes to the criminal sanctions for offences, including terrorist offences. As stated in Article 50 (2) (p) of the Constitution and Article 15 (1) of the ICCPR, no heavier penalty may be imposed than the one that was applicable at the time when the criminal offence was committed. If, however, subsequent to the commission of the offence, the law is changed to provide for a lighter penalty, the offender shall benefit therefrom.



Case Study: The *Joseph Lolo Case**

The appellant in this case had been accused of committing the offence of defilement on 20 November 2005 in Vihiga District within Western Province, contrary to Section 145 (1) of the Penal Code, with the offence being punishable by up to 14 years imprisonment. Upon conviction, the Magistrate sentenced him to 20 years imprisonment, the minimum sentence under the Sexual Offences Act of 2006, based on the Transition Provisions, which provided inter alia that “any proceedings commenced under any written law or part thereof repealed by this Act shall, so far as practicable be continued under this Act.”

The Court of Appeal found this interpretation offensive to the maxim that a person should be charged and convicted of a known offence whose punishment is certain. It noted that having been convicted under a law that provided a less severe sentence than the newer Sexual Offences Act, the appellant was entitled to the least severe of the punishments and substituted the sentence.

**Joseph Lolo v Republic* [2014] eKLR.

Retroactive changes to the criminal law in violation of the principle of “no punishment without law” can be the result of new legislation. They also can, and possibly more frequently are, the result of a change in judicial practice, as illustrated by the following case.



Case Study: The *Del Río Prada Case**

Ms. Inés Del Río Prada was convicted of offences linked to terrorist attacks in eight criminal proceedings and sentenced to various prison terms. Served successively, the prison sentences would have totalled more than 3,000 years. Having regard to the close legal and chronological connection between the offences, the competent Court combined the various sentences and fixed a maximum term of imprisonment of 30 years. This was done in accordance with the then prevailing judicial interpretation of the relevant article of Spain’s criminal code.

At the time, this also meant that early release due to the benefit of remission for work performed in prison would be calculated on the basis of the composite 30-year sentence. When she had served 19 years, Ms. Del Río Prada would have come up for early release. The Supreme Court of Spain, however, had in the meantime changed its case-law on remission. Under the new interpretation of the law, remission for work done in prison was to be applied to each sentence individually, i.e. to the overall 3,000 years of imprisonment, and not to the maximum 30-year term. As a result, the Supreme Court ruled that Ms. Del Río Prada's date of release had to be re-calculated on the basis of the new case-law, which meant that she had to serve nine years more in prison.

Ms. Del Río Prada applied to the ECtHR. In its judgment, the ECtHR held that the principle of "no punishment without law," which includes the prohibition on retroactive criminal laws, had been violated, and that the continued detention of Ms Del Río Prada lacked a proper legal basis. In coming to this conclusion, the ECtHR considered that it had been impossible for Ms Del Río Prada to foresee the retroactive application of the change in the case-law on calculating remission, which resulted in an additional nine years to her sentence. It therefore ordered the Spanish Government to release her at the earliest possible date and pay a substantial sum as compensation for the non-pecuniary damage suffered as a result of the unlawful detention.

*ECtHR, *Del Río Prada v. Spain*, Application no. 42750/09, Judgment of 22 October 2013.

6.6 CAPITAL PUNISHMENT

In July 2014, then United Nations Secretary-General Ban Ki-moon declared that "the death penalty has no place in the 21st century," and called on States to take concrete steps towards abolishing or no longer practicing this form of punishment.

The Secretary-General's remark reflects the global trend away from capital punishment. Currently, about 140 of the 193 Member States of the United Nations are believed to have abolished the death penalty or introduced a moratorium, either legally or in practice. There are also 81 States Parties to the Second Optional Protocol to the ICCPR, which obliges States to abolish the death penalty.

Since 2007, the General Assembly has repeatedly adopted, by majority vote, a resolution calling upon Member States that maintain the death penalty to respect international standards, progressively restrict the use of the death penalty, reduce the number of offences for which it may be imposed, and establish a moratorium on executions with a view to abolishing the death penalty.¹⁷⁵ In establishing international criminal tribunals dealing with the most heinous crimes such as genocide, war crimes and crimes against humanity, the Security Council has also ruled out the imposition of the death penalty at these tribunals.

At the regional level, the ACommHPR has passed several resolutions aimed at encouraging States Parties to abolish the death penalty. For instance, Resolution 42 (XXVI) of 15 November 1999 calls upon all States Parties that still maintain the death penalty to: "a) limit the imposition of the death penalty only to the most serious crimes; b) consider establishing a moratorium on executions of death penalty; and c) reflect on the possibility of abolishing death penalty."

In its General Comment No. 3 of the Banjul Charter on the Right to Life (Article 4), the ACommHPR states that international law requires those States that have not yet abolished the death penalty to take steps towards its abolition in order to secure the rights to life and to dignity. It also calls on those States that have abolished the death penalty in law not to reintroduce it, nor facilitate executions in retentionist States through *refoulement*, extradition, deportation, or other means including the provision of support of or assistance that could lead to a death sentence. The ACommHPR further called on those States with moratoria on the death penalty to take steps to formalise abolition in law, allowing no further executions. Beyond the cessation of executions, a comprehensive moratorium on the death penalty would encompass sentencing, whereby prosecutors would refrain from seeking the death penalty or judges would choose not to impose it.

¹⁷⁵ General Assembly resolution 62/149 of 18 December 2007.

Although Kenya has been a party to the ICCPR since 1972, it has not signed or ratified the Second Optional Protocol to the ICCPR to abolish the death penalty.¹⁷⁶

Under the Penal Code (Cap 63), Kenya retains the death penalty for the following offences:

- (i) Administering an oath to commit a capital offence (Section 60);
- (ii) Murder (Sections 203 and 204);
- (iii) Treason (Section 40);
- (iv) Robbery with violence (Section 296 (2)); and
- (v) Attempted robbery with violence (Section 297(2)).

However, there has been a de facto moratorium on executions as no one has been executed in Kenya since 1986.

In enacting the POTA, Parliament decided not to provide for the death penalty, in spite of the exceptional gravity of some of the acts of terrorism committed in Kenya.



Activities

- In your view, why is imprisonment for life the maximum sentence available under the POTA, considering that the death sentence is still available under Kenya's Penal Code?
- Assume a case in which multiple murders are committed in the course of a terrorist attack.
 - 1) Could the prosecution charge both murder under the Penal Code and "commission of an act of terrorism" under Section 4 of the POTA?
 - 2) What considerations should guide the prosecution? Is the availability of the death penalty for murder a valid reason not to charge POTA offences in this scenario?
 - 3) Do the courts have a say in this?

In countries such as Kenya that have not abolished the death penalty, strict limitations apply to the use of capital punishment. These limitations are derived from international human rights treaties, the practice of international courts and treaty bodies, as well as the ACommHPR's General Comment No. 3 on the Right to Life (Article 4). They include:

- A death sentence may only be imposed following a trial in which the guarantees of a fair trial were most scrupulously respected.
- Fair trial guarantees, including the right to equality before the law and trial by an impartial tribunal; in death penalty cases, heightened attention must be paid to avoiding any racial, ethnic, political or other discrimination, or even only appearance thereof.¹⁷⁷
- A death sentence shall never be imposed for offences committed by persons below eighteen years of age at the time of the offence.¹⁷⁸ This principle is reflected in the Kenyan Penal Code, which provides that juveniles may not be sentenced to death. In lieu of a death sentence, the offender shall be "detained during the President's pleasure ... in such place and under such conditions as the President may direct."¹⁷⁹ This principle is also reflected in Section 190(2) of the Children's Act. In addition to the ICCPR, Kenya is a party to the CRC and the ACRWC, all of which prohibit the imposition of the death penalty against persons below eighteen years of age at the time of the offence.

¹⁷⁶ The Death Penalty Project website, <http://www.deathpenaltyproject.org/where-we-operate/africa/kenya/> accessed 23 June 2015

¹⁷⁷ IACHR, Report No. 57/96, Case 11.139, William Andrews, United States, 6 December 1996, paras. 144, 147–177.

¹⁷⁸ Article 37 of CRC; Article 6 (5) of ICCPR

¹⁷⁹ Section 25 (2) of Penal Code Laws of Kenya Rev. Ed. 2010 Ch. 63, Aug 1, 1930, as updated through to July 12, 2012.

- A death sentence shall never be carried out against pregnant women.¹⁸⁰ Moreover, international human rights bodies have called on States to exclude mothers with dependent infants from capital punishment.¹⁸¹ Under Kenyan Law, when a woman convicted of a death eligible offense is found to be pregnant, “the sentence to be passed on her shall be a sentence of imprisonment for life instead of sentence of death.”¹⁸²
- Persons suffering from any form of mental disorder or extremely limited intellectual competence must not be sentenced to death or executed.¹⁸³ Kenyan law does not make specific provisions regarding the death penalty and mental illness. There is also no clear practice on what happens to an offender who suffers mental illness at the time of execution of the death penalty.
- A death sentence may only be imposed for the “most serious” crimes. This requirement is discussed in detail below.
- A death sentence may not be mandatory for any crime. An independent judge who decides on the sentence must always be allowed to decide that under the circumstances of the case a prison sentence is more appropriate. This requirement is discussed in detail below.
- Anyone sentenced to death shall have the right to seek clemency, pardon or commutation of the sentence through a transparent process with due process of law. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
- Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible physical and mental suffering.¹⁸⁴

The fair trial guarantees that must be observed most scrupulously in capital punishment cases are the topic of Chapters 3 and 5 above. In the following, we will focus on the “most serious crime” requirement, the prohibition of the mandatory death penalty, and the right to seek pardon or commutation.

6.6.1 Sentence of Death May Only Be Imposed For The Most Serious Crimes

That capital punishment may only be imposed for the “most serious crimes” is enshrined in Article 6 (2) of the ICCPR.

Terrorism offences are of course grave crimes, as recognized in the international counter-terrorism instruments. However, the 1984 United Nations Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty provides that “capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes, with lethal or other extremely grave consequences.”

Other United Nations organs and international human rights bodies go further. The Human Rights Committee states that “crimes that do not result in loss of life” may not be punished by the death penalty.¹⁸⁵ The United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that “[i]t is clear that ‘most serious crimes’ only includes crimes where there was an intention to kill, which resulted in the loss of life” (A/HRC/4/20, para. 53). Also the ACommHPR confirms that the “most serious” crimes are understood to be crimes involving intentional killing.¹⁸⁶ The Human Rights Committee has also identified a wide range of specific offences that fall outside the scope of the “most serious crimes” for which the death penalty may be imposed. These include: abduction not resulting in death, illicit sex, theft or aggravated robbery, and political offences.

180 Article 6 (5) of ICCPR.

181 Commission on Human Rights resolution 2005/59, The question of the death penalty, para. 7 (b).

182 Sections 211–212 of the Penal Code Laws of Kenya Rev. Ed. 2010 Ch. 63. Aug. 1, 1930, as updated through to July 12, 2012.

183 Commission on Human Rights resolution 2005/59, The Question of the Death Penalty, para. 7 (c).

184 Commission on Human Rights resolution 2005/59, The Question of the Death Penalty, para. 7 (i).

185 Cf. Human Rights Committee, Concluding Observations on Iran, CCPR/C/79/Add.25, 3 August 1993, para. 8; Human Rights Committee, Concluding Observations on Iraq, CCPR/C/79/Add.84, 19 November 1997, paras. 10 and 11.

186 General Comment No. 3 on the Right to Life: Article 4.

187 *Republic v. Milton Kabulit & 6 Others* [2012] eKLR.

In *Republic v Milton Kabulit & 6 Others*,¹⁸⁷ the Kenyan High Court referred to Article 4 (2) of the ACHR adopted in 1969, which provides that the death penalty may only be imposed for the most serious crimes. The Court opined that the crimes of murder, robbery with violence and treason, for which an accused has been found guilty, are “serious crimes,” which have led to either the loss of life, or a serious threat to the life of other persons, in the case of robbery with violence, and to the Nation, in the case of treason. The position in Kenya is therefore complicated by the fact that there need not be loss of life as long as there is a “threat to life.”

Lastly, having domesticated the Rome Statute, which does not provide for the death penalty, this creates internal contradictions as one could be found guilty of serious offences against humanity and not be subject to the death penalty, while those convicted of murder would be subject to it. The same applies if one is convicted for a terrorist offence under the POTA, which does not impose the death sentence, as opposed to an offence such as murder under the Penal Code.



Case Study: The most serious crime requirement in the *Raxcacó-Reyes Case**

Mr. Raxcacó-Reyes and his accomplices abducted a child and demanded ransom from the child’s family. The following day, the police managed to find the child and captured the kidnappers. The kidnappers were brought to trial and found guilty. Three of them, including Mr. Raxcacó-Reyes, were found to be the perpetrators of the kidnapping and sentenced to death, while two accomplices were sentenced to forty and twenty years imprisonment respectively.

Article 201 of the Penal Code of Guatemala, the provision applied by the Court in sentencing, read:

“The death penalty shall be imposed on the perpetrators or masterminds of the crime of the kidnapping or abduction of one or more persons in order to obtain a ransom, an exchange of persons, or a decision contrary to the will of the person kidnapped, or with any similar or equal purpose In this case, no attenuating circumstances shall be taken into consideration.

Accomplices or accessories after the fact shall be punished with twenty to forty years of imprisonment.”

The IACtHR found that by making kidnapping subject to the death penalty, whether it had resulted in the death of the victim or not, the Guatemalan Penal Code violated the limitations international human rights law places on the use of the death penalty. It held that:

- “70. A distinction must be made between the different degrees of seriousness of the facts that permits distinguishing serious crimes from the “most serious crimes;” namely, those that affect most severely the most important individual and social rights and therefore merit the most vigorous censure and the most severe punishment.
71. The crime of kidnapping or abduction may include different nuances of seriousness, ranging from simple kidnapping, which does not fall within the category of the “most serious crimes,” to kidnapping followed by the death of the victim. Even in the latter case, which would constitute an extremely serious act, it would be necessary to consider the conditions or circumstances of the case *sub judice*. All of this must be examined by the court and, to this end, the law must grant it a margin of subjective appraisal.
72. In the case that concerns us, Article 201 of the Penal Code, applied to Mr. Raxcacó Reyes, punished both simple kidnapping and any other form of kidnapping or abduction with the death penalty, thus disregarding the restriction imposed by Article 4(2) of the ACHR regarding the application of the death penalty only for the “most serious crimes.””

*IACtHR, *Raxcacó-Reyes v. Guatemala*, Merits, 15 December 2005, paras. 67–72.

6.6.2 Prohibition on the Mandatory Death Penalty

The term “mandatory death penalty” is used to describe laws that establish the death penalty as the only possible penalty for a crime, in such a way that a judge is prohibited from taking the circumstances of an individual accused person into account in sentencing.

As noted earlier, the POTA does not provide for the death penalty, while the Penal Code provides for mandatory death penalty for certain offences.

In the case of *Godfrey Ngotho* (discussed below) the Court of Appeal found that the mandatory death penalty is unconstitutional. Subsequently, in the case of *Joseph Njuguna Mwaura and Others v Republic*, however, the Court of Appeal concluded that courts do not have discretion in respect to offences which attract a mandatory death sentence. At the time of writing, the Supreme Court had not yet taken a stance on this question. In the practice of the lower courts, there have been divergent views with some courts imposing custodial sentences for offences attracting the death penalty and others adhering to the mandatory terms of the statutes. The Sentencing Policy Guidelines advise that “[i]n the absence of law reform or the reversing of the decision in *Joseph Njuguna Mwaura and Others v Republic*, the court must impose the death sentence in respect to capital offences in accordance with the law.”



Case Study: The *Godfrey Ngotho Mutiso** and *Joseph Njuguna Mwaura*** Cases

In the *Godfrey Ngotho* case, the Court of Appeal ruled that

“... section 204 of the Penal Code, which provides for a mandatory death sentence [for murder] is antithetical to the constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. We note that while the Constitution itself recognizes the death penalty as being lawful, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed. *We declare that section 204 ...*, to the extent that it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of the constitution, which as we have said, makes no such mandatory provision.”

The Court of Appeal added that the same reasoning would apply to other crimes punished by the mandatory death sentence, such as robbery with violence and treason.

In the *Joseph Njuguna Mwaura* case, the Court of Appeal found that the death penalty is sanctioned by the Constitution by virtue of Article 26 (3), which limits the right to life where its deprivation is authorised by the Constitution or other written law. The Court argued that whether or not the mandatory death penalty is constitutional is a matter for the Legislature. It also held that the mandatory death penalty did not constitute cruel, inhumane and degrading punishment because it is not applied for sadistic purposes.

The Court further declared that the decision in the *Godfrey Ngotho* case was given per incuriam in so far as it purported to grant discretion in sentencing with regard to capital offences.

**Godfrey Ngotho Mutiso v Republic* [2010] eKLR.

***Joseph Njuguna Mwaura & 2 Others v Republic* [2013] eKLR .

These conflicting decisions will presumably be resolved in a challenge to the mandatory death penalty that is currently pending before the Kenyan Supreme Court. Therefore, the future constitutionality of the mandatory death penalty in Kenya is uncertain.

At the international level, the Human Rights Committee and other human rights bodies have concluded that a mandatory death penalty is not compatible with the limitation of capital punishment to the “most serious crimes.” Making the death penalty mandatory for certain crimes is therefore incompatible with Kenya’s obligations under international human rights law. This is not to say that countries such as Kenya that retain the death penalty are unable to apply that penalty in the majority of cases involving a most serious crime. They are, however, obligated to at least provide for the possibility that a judge might find a death sentence impermissible in a particular individual’s case because of mitigating circumstances of one kind or another.

In the *Raxcacó-Reyes* case discussed above, the IACtHR found also a violation on the ground that the death penalty for kidnapping was mandatory. It reasoned:

“Article 201 of the Penal Code, as it is written, has the effect of subjecting those accused of the crime of kidnapping or abduction to criminal proceedings in which the specific circumstances of the crime and of the accused are never considered, such as the criminal record of the accused and of the victim, the motive, the extent and severity of the harm caused, and the possible attenuating or aggravating circumstances, among other considerations concerning the perpetrator and the crime.”



Cases on the Mandatory Death Penalty from Other Jurisdictions

In addition to the international case-law regarding the mandatory death penalty, the highest national courts in a number of countries have found the mandatory imposition of the death penalty for murder to be incompatible with their Constitution or with international law obligations.

The first national court to strike down the mandatory death penalty as a violation of rights was that of the United States in 1976.*

In the *Mithu* case, the Supreme Court of India invalidated that country's last remaining mandatory death penalty law in 1983.** It reasoned that:

“a standardized mandatory sentence, and that too in the form of a sentence of death, fails to take into account the facts and circumstances of each particular case. It is those facts and circumstances which constitute a safe guideline for determining the question of sentence in each individual case.”

In Uganda, the Constitutional Court and the Supreme Court ruled in 2003 that:

“all those laws on the statute book in Uganda which provid[e] for a mandatory death sentence are inconsistent with the Constitution and therefore are void to the extent of that inconsistency. Such mandatory sentence can only be regarded as a maximum sentence.”***

**Woodson et al. v. North Carolina*, 428 U.S. 280 (1976).

***Mithu v. State of Punjab*, 2 S.C.R. 690 (1983), available at <http://www.indiankanoon.org/doc/590378/>.

****Susan Kigula & 416 Others v. A. G* (Constitutional Petition No. 6 of 2003), available at <http://www.ulii.org/ug/judgment/constitutional-court/2005/8-0>.

6.6.3 Right to Seek Pardon or Commutation of Death Sentence

Under Kenyan law, any person sentenced to death has the right to seek a pardon or to seek the commutation of a death sentence to a less severe one. Article 133 (1) of the Kenyan Constitution provides that “On the petition of any person, the President may exercise a power of mercy in accordance with the advice of the Advisory Committee by—

- a) granting a free or conditional pardon to a person convicted of an offence;
- b) postponing the carrying out of a punishment, either for a specified or indefinite period;
- c) substituting a less severe form of punishment; or
- d) remitting all or part of a punishment.”

“Any person” includes those sentenced to death and the practice has been to commute to life imprisonment. The Committee that advises the President has to look at various factors, including the nature of the offence and the conduct of the offender, as well as reports from external sources to the penal institution relating to the family, community and victims of the crime, to verify the suitability for mercy and the type of action that would be taken.

The right to seek a pardon or to seek the commutation of a death sentence to a less severe one is also reflected in international and regional instruments.¹⁸⁸ For instance, Article 6 (4) of the ICCPR reads: “[a]nyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.”

As the Special Rapporteur on extrajudicial, summary or arbitrary executions has pointed out, “[t]he right thus has two separate parts.

- a) The first is the right of the individual offender to seek pardon or commutation. This implies no entitlement to receive a positive response, but it does imply the existence of a meaningful procedure through which to make such an application.”¹⁸⁹ The Special Rapporteur has warned that this right can be rendered illusory if the relevant procedures are only a formality as a result of which no genuine consideration is accorded to the case for pardon or commutation, if the decision-making body does not meet, or if the procedure is entirely lacking transparency.
- b) The second part of the right is the need to ensure that neither the legislature nor other authorities can eliminate the possibility to apply for and obtain amnesties, pardons and commutations for certain offences such as terrorism.

The Special Rapporteur has further highlighted the important functions that this right plays within the legal system: “It serves:

- a) As a final safety valve when new evidence indicating that a conviction was erroneous emerges but in a form that is inadequate to reopen the case through normal procedures;
- b) To enable account to be taken of post-conviction developments of which an appeals court might not be able to take cognizance but which nevertheless warrant being considered in the context of an otherwise irreversible remedy;
- c) To provide an opportunity for the political process, which is rightly excluded from otherwise interfering in the course of criminal justice, to show mercy to someone whose life would otherwise be forfeited.”¹⁹⁰



Activity regarding clemency measures

- (1) What is the procedure to request a pardon or commutation of the death sentence in the Kenyan legal system?
- (2) Is the procedure to seek a pardon or commutation of sentence such that genuine consideration is given to the petition?
- (3) Are death row inmates seeking a clemency measure entitled to legal aid if they cannot afford the assistance of a lawyer?

6.7 IMPRISONMENT FOR LIFE

The POTA provides for the sentence of imprisonment for life to be imposed for some of the offences, e.g. the commission of a terrorist act resulting in the death of another person under Section 4 (2), and direction in the commission of a terrorist act under Section 12.

¹⁸⁸ The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has analysed this right in a report to the Human Rights Council. See Report of the Special Rapporteur Summary on Arbitrary Executions, A/HRC/8/3, 2 May 2008, paras. 59-67.

¹⁸⁹ Ibid. para. 60.

¹⁹⁰ Ibid. para. 62.



Activities

- Identify all the offences for which the sentence of imprisonment for life is provided under the POTA.
- Is the sentence of imprisonment for life mandatory for the offences in Sections 4 (2), 12 and others? In other words, can the court only impose a life imprisonment sentence upon finding a defendant guilty of “commission of a terrorist act resulting in the death of another person” [Section 4(2)] or “direction in the commission of a terrorist act” [Section 12], or are lesser sentences available?

As discussed in section 6.4, international human rights law enshrines the principle that the penitentiary system shall have as its objective the reformation and social rehabilitation of the prisoner. The punishment of imprisonment for life does not negate this objective as radically as the death penalty, but it has been criticized and challenged on this ground. A number of jurisdictions have found that to condemn a person to be imprisoned for the rest of his or her life without the possibility of release amounts to cruel or inhuman treatment. Some countries have abolished life sentences.

In Kenya, Section 48 of the Prisons Act provides for a Board of Review to be appointed by the President whose mandate is to review, at prescribed intervals or at such lesser intervals as circumstances may require, the sentences of all prisoners serving sentences of or exceeding seven years, including prisoners sentenced to imprisonment for life or to be detained during the President’s pleasure, and in each case tender advice to the President on the exercise of the prerogative of mercy.

The Sentencing Policy Guidelines note (at 6.6.) that “[s]ome offenders imprisoned at the President’s pleasure are held indeterminately with no recourse.” They advise (at 6.8) that “[t]o curb the indeterminate imprisonment at the President’s pleasure, the court’s recommendation to the President pursuant to section 25 (3) of the Penal Code should include the requirement for a review of the case after a fixed period.”

The United Nations International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) have imposed sentences of imprisonment for life, though less frequently than one could expect, considering the gravity of the offences they deal with. In the *Stakic* case, the defendant argued that a life sentence is a form of punitive retribution rather than social rehabilitation, and thus constitutes cruel, inhumane and degrading punishment. However, the Appeals Chamber of the ICTY disagreed: “[w]here the crimes for which the accused is held responsible are particularly grave, the imposition of a life sentence does not constitute a form of inhumane treatment but, in accordance with proper sentencing practice common to many countries, reflects a specific level of criminality.”¹⁹¹

To sum up, for adult offenders convicted of the most serious crimes the sentence of life imprisonment is compatible with international human rights law. There is, however, an emerging trend by national and international courts to find that a life sentence will violate human dignity and the prohibition against inhumane treatment, if the prisoner has no prospect of release after having served a substantial part of the life sentence, if the sentence is irreducible *de facto and de jure* and “locks the gates of the prison irreversibly for the offender” (in the words of the Namibian Chief Justice, see below).

As the cases below show, this does not mean that a prisoner sentenced to life should not remain in prison until the end of his life if his continued dangerousness and the protection of the public so require. What the prohibition against inhumane treatment requires, according to these courts, is that there should be a transparent legal process by which the continued need for detention of a life prisoner is reviewed at some point in time.

¹⁹¹ Appeals Chambers, *Prosecutor v. Stakic*, IT-97-24-A, 22 March 2006, paras 394-395.



National and International Cases Concerning Life Imprisonment

Namibia: The Namibian Supreme Court considered, in the case of a vicious double murder,* the compatibility of a life sentence with Article 8 (2) (b) of Namibia's Constitution, which provides "[n]o person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment." The Supreme Court noted that "[t]here can be little doubt that a sentence which compels any person to spend the whole of his or her natural life in incarceration ... is indeed a punishment of distressing severity." Civilised countries should resort to this punishment "only in extreme cases either because society legitimately needs to be protected against the risk of a repetition of such conduct by the offender in the future or because the offence committed by the offender is so monstrous in its gravity as to legitimise the extreme degree of disapprobation which the community seeks to express through such a sentence." (para. 19)

The Supreme Court also took the stance, however, that an irreducible sentence of life imprisonment would violate the prohibition of cruel or inhumane treatment:

"[A]n order deliberately incarcerating a citizen for the rest of his or her natural life ... cannot be justified if it effectively amounts to a sentence which locks the gates of the prison irreversibly for the offender without any prospect whatever of any lawful escape from that condition for the rest of his or her natural life and regardless of any circumstances which might subsequently arise. Such circumstances might include sociological and psychological re-evaluation of the character of the offender which might destroy the previous fear that his or her release after a few years might endanger the safety of others or evidence which might otherwise show that the offender has reached such an advanced age or become so infirm and sick or so repentant about his or her past, that continuous incarceration of the offender at state expense constitutes a cruelty which can no longer be defended in the public interest." (para. 20)

Peru: The Constitutional Court of Peru was called in 2003 to rule on the compatibility of the provisions allowing the imposition of life sentences in Peru's counter-terrorism legislation with the Peruvian Constitution.** The Constitutional Court noted that the rehabilitation of the offender and his reintegration into society were the objectives of criminal punishment under both the Constitution of Peru and Article 10 (3) of the ICCPR. It found that the imposition of life-long imprisonment is not compatible with these objectives.

The Constitutional Court of Peru also found that by taking away all the prisoner's hope of regaining freedom one day, a sentence of life imprisonment was incompatible with the principle of human dignity solemnly enshrined in Article 1 of the Constitution.

The Judges of the Constitutional Court concluded, however, that it was not necessary to eliminate the punishment of life imprisonment from the counter-terrorism law. What was required was additional legislation that would provide for mechanisms of early release for offenders sentenced to life imprisonment. In this regard, the Constitutional Court referred to the rules on review of life imprisonment sentences before the International Criminal Court (see the text box below) as a model.

European Court of Human Rights: In *Vinter and Others*,*** the ECtHR dealt with the case of three men sentenced to life imprisonment for murder in England and given "whole life orders" by the trial judge in consideration of the particular gravity of their crimes. The ECtHR observed that "issues related to just and proportionate punishment are the subject of rational debate and civilised disagreement" (at 105). States must "remain free to impose life sentences on adult offenders for especially serious crimes such as murder: the imposition of such a sentence on an adult offender is not in itself prohibited by or incompatible with [the prohibition against inhuman punishment]. This is particularly so when such a sentence is not mandatory but is imposed by an independent judge after he or she has considered all of the mitigating and aggravating factors which are present in any given case." (at 106).

The ECtHR, however, went on to state that the imposition of an "irreducible" life sentence would be a violation of the prohibition against inhuman treatment or punishment in article 3 ECHR. For a life sentence to be compatible with article 3 ECHR "there must be both a prospect of release and a possibility of review" of the sentence with a view to its commutation, remission, termination or the conditional release of the offender (at 109-110).

The ECtHR emphasised that "no article 3 issue could arise if, for instance, a life prisoner had the right under domestic law to be considered for release but was refused on the ground that he or she continued to pose a danger to society. This is because States have a duty under the Convention to take measures for the protection of the public from violent crime and the Convention does not prohibit States from subjecting a person convicted of a serious crime to an indeterminate sentence allowing for the offender's continued detention where necessary for the protection of the public [...]. Indeed, preventing a criminal from re-offending is one of the 'essential functions' of a prison sentence."

The ECtHR concluded “that, in the context of a life sentence, Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds.” (at 119)

Regarding the question of what could be an adequate minimum amount of a life sentence to be served before the question of early release is considered, the ECtHR observed that “comparative and international law materials [...] show clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter” (at 120).

*Supreme Court of Namibia, *State v. Tcoib*, Judgment of 6 February 1996.

**Constitutional Court of Peru, Exp. N° 010-2002-AI/TC, Judgment of 3 January 2003, paras. 178-190.

***ECtHR, *Vinter and Others v. United Kingdom*, Application nos. 66069/09, 130/10 and 3896/10, Grand Chamber Judgment of 9 July 2013.



Review of Life Imprisonment Sentences Before the International Criminal Court

The ICC is mandated to deal with some of the most serious crimes under international law, genocide, war crimes and crimes against humanity.

Article 77 of the Rome Statute of the ICC allows for the imposition of a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person. Article 110 (3) provides that when a person has served twenty-five years of a sentence of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time. Article 110 (4) and (5) provide:

- “4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:
- a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;
 - b) The voluntary assistance of the person in enabling the enforcement of the judgments and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or
 - c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.
5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.”

Rules 223 and 224 of the Rules of Procedure and Evidence set out the procedure and further criteria for review.



Prohibition of Life Imprisonment Without Possibility of Release in the Case of Children

Article 37 (a) of the CRC provides as follows:

“Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.”

Section 18 (2) of the Children’s Act reflects this prohibition. It reads: “Notwithstanding the provisions of any other law, no child shall be subjected to capital punishment or to life imprisonment.”

The Sentencing Policy Guidelines advise (at 6.2) that “[c]hildren in conflict with the law cannot be subjected to the death penalty. Further, the Criminal Procedure Code prohibits the imposition of the death penalty upon offenders

convicted of an offence punishable by death but which was committed when the offender was below the age of 18 years. Instead, such an offender is to be imprisoned at the President's pleasure. In such a case, the court is required to forward to the President notes of the evidence adduced during trial as well as a signed report expressing his/her observations or recommendations."



Case Studies: The Sentencing of Child Offenders Convicted of Capital Offences

The *JMK Case**

The appellant, who was 16 years of age at the time of the offence, was tried and convicted of a charge of murder and sentenced to be detained at the pleasure of the President.

The relevant time for determining the age of a child for the purposes of criminal liability is his or her age at the time of the offence. The offence of murder attracts a mandatory death sentence, however, the Children's Act prohibits the imposition of the death penalty upon a child offender.

Upon considering the appropriate sentence for a minor convicted of murder, the High Court took into account that Article 53 (2) of the Constitution and Section 4 of the Children Act provide for the consideration of the best interests of the child in all actions concerning children. It was further noted that Article 53 (1) (f) proscribes that detention must be a last resort and for the shortest appropriate period of time.

The High Court substituted the sentence with a term of ten years imprisonment to equip the appellant with the opportunity for rehabilitation and cognisance of his mistake.

The *JKK Case***

The appellant was convicted of a charge of murder and sentenced to death. The evidence presented at trial was that the deceased was chased and subsequently stabbed to death by the appellant.

The Children's Act prohibits the imposition of the death penalty upon a minor. On two occasions, the lower court observed that the appellant was aged 17 years or was under the age of eighteen years. On one occasion, the court made an order directing that the appellant be subject to an age assessment, however, the order was never effected. The appellant appealed against both conviction and sentence.

The High Court allowed the appeal against sentence, substituting the death penalty with a sentence of twelve years imprisonment. The court found that the trial court should have ensured that an age assessment was conducted to ensure that a lawful sentence was imposed.

The *Abuya Case****

The appellant, who was a Form 3 student at secondary school at the time of the offence, was tried and convicted of a charge of defilement of a 5 year old girl contrary to Section 8 (1) of the Sexual Offences Act (No. 3 of 2006) and sentenced to life imprisonment.

The trial court failed to establish the age of the appellant at the time of the commission of the offence with any certainty. Information that the appellant provided to the court suggested that he would have been sixteen to seventeen years of age at the time of the offence. A form in the record before the court suggested that seven days after the offence, the appellant's estimated age was eighteen years. However, no medical report or evidence was produced by the prosecution to conclusively show that the appellant was eighteen years of age upon the date of the offence.

As the Sexual Offences Act does not authorise the imprisonment of minors, and as the court was unable to rule out the possibility that the appellant was under eighteen when the offence was committed, the appeal was allowed and the sentence of life imprisonment was set aside. The matter was remitted to the High Court with a direction to call evidence establishing the appellant's age at the time the offence was committed and on such evidence, to determine the correct legal sentence to be imposed.

The Cheruiyot Case****

The appellant, a fifteen year old minor, was convicted of the offence of murder and sentenced to life imprisonment. Whilst an age assessment was not conducted, the age of the appellant was not in dispute. The Children Act does not provide for a term of life imprisonment. The High Court allowed an appeal against sentence and substituted the sentence of life imprisonment with a term of ten years imprisonment from the date of conviction.

The High Court observed that, “[t]he best interest of the appellant as a minor offender ought to have been of paramount consideration when passing the sentence. The life of a minor should be preserved, he must also be rehabilitated which in our view includes being brought to bear the consequences of his omission, errors of judgment and disregard of the rule of law.”

*JMK v Republic [2015] eKLR

**JJK v Republic [2013] eKLR

***Dennis Abuya v Republic [2010] eKLR

****Dennis Kirui Cheruiyot v Republic [2014] eKLR

**Activities**

As mentioned above, under Section 48 of the Prisons Act, a Board of Review to be appointed by the President reviews, at prescribed intervals or at such lesser intervals as circumstances may require, the sentences of all prisoners serving sentences of or exceeding seven years, including prisoners sentenced to imprisonment for life.

- What is the procedure before the Board of Review? Are prisoners able to make representations? To avail themselves of legal counsel? Are its recommendations binding?
- Assume a case in which a person is found guilty of an act of terrorism resulting in death. Could the court, in imposing an imprisonment for life sentence under Section 4(2) of the POTA, impose a “whole life order,” i.e. order that the convicted defendant may not be released, or otherwise seek to limit the possibility of early release?

6.8 OTHER PENAL AND CORRECTIVE SANCTIONS

The Sentencing Policy Guidelines list, beyond the death penalty and imprisonment, 13 other “penal and corrective sanctions recognised under Kenyan law” (at 5.1). Some of these are expressly mentioned in the POTA.

Forfeiture of Property

In section 40 (1) the POTA provides for the forfeiture of property used in connection with or received as payment or reward for the commission of a POTA offence upon conviction. The Court may make an order to that effect. To safeguard due process and the rights of third parties, Section 40 (2) requires that in making such an order, the Court to give every party who has an interest in the property an opportunity to be heard.

Police Supervision

By virtue of Section 18 of the SLAA, the CPC has been amended by inserting Section 344A on automatic police supervision upon release from prison. Section 344A(1) provides that “[a] person who is convicted of an offence under ... the Prevention of Terrorism Act ... shall be subject to police supervision for a period of five years from the date of his release from prison.” Section 344A (2) provides that a person who is subjected to police supervision by virtue of paragraph (1) “shall -

- reside within the limits of such area as the Commissioner of Prisons shall, in each case, specify in writing to the Inspector General of Police upon the person’s release;
- not transfer his or her residence to another area without the written consent of the police officer in charge of the specified area;

- c) not leave the area in which he or she resides without the written consent of the police officer of that area;
- d) at all times keep the police officer in charge of the area in which he or she resides notified of the house or place in which he or she resides;
- e) present himself or herself, whenever called upon by the police officer in charge of the area in which he resides, at any place in that area specified by that officer.”

According to Section 345(1), a person who fails to comply with a requirement placed upon him by virtue of Section 344A commits an offence and is liable, upon conviction, to imprisonment for a term not exceeding six months and on a second or subsequent conviction for that offence to imprisonment for a term not exceeding twelve months.

Alternatives to Imprisonment

The sanctions of forfeiture of property under Section 40 (1) POTA and police supervision under Section 344A (2) are additional to a sentence of imprisonment.

The question may be asked whether sentences alternative to imprisonment are available under the POTA. In this regard, it is important to note that the POTA contains some offences criminalising preparatory acts that may be far removed from the actual carrying out of a terrorist attack and non-violent, e.g. arranging a meeting in support of a terrorist group (Section 25), which is punished by imprisonment for a term not exceeding twenty years.

The Sentencing Policy Guidelines advise (in general terms, not with regard to POTA offences), that where “the option of a non-custodial sentence is available, a custodial sentence should be reserved for a case in which the objectives of sentencing cannot be met through a non-custodial sentence. The court should bear in mind the high rates of recidivism associated with imprisonment and seek to impose a sentence which is geared towards steering the offender from crime.” (at 7.18). In deciding whether to impose a custodial or a non-custodial sentence, gravity of the offence and criminal history of the offender are among the main factors to be taken into account (at 7.19). The Sentencing Policy Guidelines also advise (at 7.20) that where “there is evidence that the offender is likely to pose a threat to the community, a non-custodial sentence may not be the most appropriate. The probation officer’s report should inform the court of such information.”



Alternatives to Imprisonment for Terrorism-Related Offences

The “Recommendations on the Effective Use of Appropriate Alternative Measures for Terrorism-Related Offenses” developed by the Global Counterterrorism Forum (GCTF), presented in section 4.10 above, concern both alternatives to remand detention and alternatives to custodial sentences.

As discussed above, among the specific considerations that may warrant the use of alternatives to detention in terrorism related cases, the GCTF document lists

- “the expanded use of inchoate offenses/preparatory acts to arrest individuals at the earliest possible stage before they can travel, commit, or otherwise directly support an act of violence”;
- “an increased presence of first-time offenders among those radicalized to violence” and
- “the concern about individuals becoming radicalized, or radicalizing others, to violence while in detention centers or prisons.”

The GCTF document notes (Recommendation 7) that alternatives to detention may be particularly appropriate for certain categories of offenders including “juveniles, first-time offenders, and people suffering from diminished mental capacity.”

**Activity: Non-Custodial Sentences for Terrorism Related Offences?**

- In your view, are there circumstances in which a non-custodial sentence is appropriate for a person convicted of an offence under the POTA?
- Review the relevant parts of the Sentencing Policy Guidelines and consider also the “Recommendations on the Effective Use of Appropriate Alternative Measures for Terrorism-Related Offenses”. Discuss how the criteria identified there could apply in the case of POTA offences.

Sentencing of Children

The Children’s Act (Section 191(1)) provides for numerous alternatives to imprisonment in the case of persons under age 18. The Children’s Act stresses that these are available “[i]n spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt”.

The Sentencing Policy Guidelines state in this regard (at 7.20):

“Non-custodial orders should be imposed as a matter of course in the case of children in conflict with the law except in circumstances where, in light of the seriousness of the offence coupled with other factors, the court is satisfied that a custodial order is the most appropriate and would be in the child’s best interest. Custodial orders should only be meted out as a measure of last resort.”

6.9 CONDITIONS OF IMPRISONMENT OF CONVICTED TERRORIST OFFENDERS

Under international law, the principle whereby “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person,” as provided in Article 10(1) of the ICCPR, applies to the imprisonment of persons convicted of terrorist offences no less than to prisoners convicted of other offences. In general, the conditions of detention should not subject a prisoner to hardship of an intensity exceeding the level of suffering that is inherent in the fact of detention.¹⁹²

**Cross-Reference**

Basic requirements for the detention of all prisoners, including those convicted on terrorism offences, are discussed in Chapter 4, in particular section 4.7.1.

In Kenya, Section 36A of the Prisons Act, as amended by Section 32 of the SLAA, provides that “[t]he Commissioner shall confine persons who are imprisoned for committing an offence under the Prevention of Terrorism Act, 2012 or for committing a serious offence in a separate prison or in separate parts of the same prison in such manner as to prevent, as far as practicable, their seeing or conversing or holding any communication other than with a prisoner convicted of an offence under the Prevention of Terrorism Act.” This provision appears to be aimed at isolating terrorism suspects and offenders from other offenders, most probably to avoid the recruitment of common offenders into terrorist networks.

192 ECtHR, *Xiros v. Greece*, Application No. 1033/07, Judgment of 9 September 2010.

The GCTF's Rome Memorandum on Good Practices for Rehabilitation and Reintegration of Violent Extremist Offenders (see below) states in this regard:

“Separating this group from the general population could make them easier to manage and reduces the risk of malignant influencing. Moreover, necessary resources including extra security measures and training for instructors and specialist personnel may only be needed in a limited number of locations. However, there are also downsides to segregation, and countries should carefully weigh these various factors before making a decision to proceed. In some cultures, integrating extremist offenders among other categories of inmates may prevent the formation of tight groups and confronts extremists with alternative perspectives and ideas that might contribute to their de-radicalization. What works best may differ per State, and may depend on the various factors like the size of the inmate population and the individual characteristics and needs of the inmates involved in the rehabilitation programs.”



Cross-Reference

See Chapter 4, sections 4.7.1 and 4.7.2 for more information on conditions of detention and high security detention regimes, including solitary confinement.



Good Practices for Rehabilitation and Reintegration of Violent Extremist Offenders

The introduction to the GCTF's Rome Memorandum on Good Practices for Rehabilitation and Reintegration of Violent Extremist Offenders notes that

“[a]s part of the effort to counter violent extremism in all of its forms and manifestations, there is an increasing focus on prisons¹ for several reasons. First, absent the appropriate and necessary safeguards, prisons may provide a „safe haven where terrorists can network, compare and exchange tactics, recruit and radicalize new members, and even direct deadly operations outside the prison. Second, most imprisoned extremists will eventually be released. In order to reduce the likelihood that these individuals will return to terrorism after their release, it is essential to find ways to help them disengage from violent activities.

Finally, while prisons have at times been environments where violent extremism has festered, the prison setting can also present opportunities for positive change – serving as a place where the tide of violent radicalism can be reversed. Prisoners live in a controlled environment, where the negative influences from their past which pushed them toward violent extremism can be minimized. They can instead be surrounded by persons who encourage them to pursue a more positive path. There are examples of individuals who entered prison as extremists, were rehabilitated and were then released as enthusiastic messengers against violent extremist philosophies.

In recognition of the fact that prisons can be incubators for violent extremist ideology or be institutions for reform, a number of governments from different regions have established prison-based rehabilitation programs. ...”

The Memorandum sets forth 24 Good Practices, many of them highly relevant to the incarceration of terrorism related offenders. Good Practice Number 3, for instance, deals with developing an effective intake, assessment & classification system for new violent extremist inmates. Good Practice Number 4 provides guidance on the factors to consider in deciding whether violent extremist offenders should be segregated from or integrated into the general prison population.



Activities

Review the GCTF's Rome Memorandum on Good Practices for Rehabilitation and Reintegration of Violent Extremist Offenders.

- Which of the Good Practices identified in the GCTF's Rome Memorandum are relevant to the imprisonment of persons convicted under POTA in Kenya?
- Which of these Good Practices are being implemented in Kenya, and which ones are not? What, in your view, may be the reasons that Kenya is not (yet) implementing some of the Good Practices recommended?



Tools

- The Judiciary Sentencing Policy Guidelines are available at http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Sentencing_Policy_Guidelines_Booklet.pdf.
- The United Nations Standard Minimum Rules for the Treatment of Prisoners provide guidance on issues such as "discipline and punishment" within prison settings, instruments of restraint, contacts with the outside world and religion: available at http://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf.
- The GCTF's Rome Memorandum on Good Practices for Rehabilitation and Reintegration of Violent Extremist Offenders is available here: http://www.unicri.it/topics/counter_terrorism/Rome_Memorandum.pdf.

6.10 SELF-ASSESSMENT QUESTIONS



Self-Assessment Questions

- To what extent do the international counter-terrorism legal instruments provide guidance to States as to what is the appropriate punishment for terrorism-related offences?
- What limitations and safeguards does international law establish with regard to the use of the death penalty against persons found guilty of terrorist crimes, in countries such as Kenya that retain the death penalty?
- Explain the "most serious crime" requirement regarding capital punishment.
- Explain what is meant by a "mandatory death sentence." Why is legislation providing for a "mandatory death sentence" incompatible with international human rights law?
- What does international law say about clemency measures where the death penalty has been imposed for a terrorism offence?
- What limitations and safeguards does international law establish with regard to the sentence of life imprisonment against persons found guilty of terrorist crimes?
- What do Kenyan and international law say about the punishment of persons under age 18 found guilty of serious offences, including terrorism related offences?
- What grounds could justify the placement of a convicted terrorism offender in solitary confinement? What procedural safeguards would have to be in place to ensure compliance with international human rights law?
- Are non-custodial sentences an option in the case of persons convicted of a POTA offence?

7. INTERNATIONAL COOPERATION IN CRIMINAL MATTERS AGAINST TERRORISM

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7. International Cooperation in Criminal Matters against Terrorism

7.1 OBJECTIVES

By the end of this Chapter, you will be able to:

- List the permissible forms of transferring a terrorism suspect or convict from one country to another
- List at least three statutes that govern international cooperation in criminal matters between Kenya and other countries
- Discuss the legal framework for the arrest and detention in Kenya of persons sought for purposes of extradition
- Discuss the right to seek review of the decision to deport or extradite
- Discuss the principle of non-refoulement under Kenyan law and international refugee law
- Discuss the international principle of non-refoulement under international human rights law
- Discuss diplomatic assurances as a means to enable States to cooperate in the extradition of terrorism suspects or convicts, and the limitations human rights law places on the use of diplomatic assurances
- Discuss the doctrine of abuse of process in relation to the international transfer of terrorism suspects
- Identify the reasons for the prohibition of “extraordinary rendition”
- Identify the human rights principles applicable to the international transfer of sentenced persons
- Describe the human rights principles applicable to mutual legal assistance in terrorism cases

7.2 SUMMARY/OVERVIEW

This Chapter will focus on the human rights aspects of the transfer of persons suspected, accused or convicted of terrorist offences between Kenya and other States. In doing so, it will first discuss the fundamental principle of legality, which demands that extradition or any other transfer of persons must be on the basis of the law and undertaken in accordance with the rule of law. This will be followed by a discussion on deprivation of liberty in the context of extradition, as well as the right to an effective review mechanism for any decision to expel, deport or extradite, which is a procedural safeguard against abuse.

The Chapter will then examine in depth the key principle of non-refoulement. The scope and content of the non-refoulement principle will be examined under Kenyan law, international refugee law and international human rights law. With regard to refugee law, the interface between refugee protection and extradition in terrorism cases will be briefly covered. With respect to human rights law, the Chapter will discuss the application of the non-refoulement principle to the risk of torture, as well as to the other human rights violations to which it is applicable. The use of diplomatic assurances in relation to extradition and other forms of international transfer of terrorism suspects and convicts will be discussed.

Where extradition is not possible, the international law obligation to extradite or prosecute comes into play, as may alternatives to extradition. In this regard, the doctrine of abuse of process is discussed in relation to disguised extradition, as well as the prohibition of so-called “extradordinary rendition”.

The last two sections of the Chapter will examine the transfer of sentenced persons and human rights aspects of mutual legal assistance.

The Chapter will conclude with a set of assessment questions aimed at providing users with the possibility of testing their knowledge on the topics discussed.

7.3 INTRODUCTION

Due to terrorism’s transnational nature, no individual State can effectively deal with this threat on its own. Effective international cooperation is crucial to winning the struggle against terrorism, and ensuring that other forms of transnational crime do not similarly jeopardize national growth, prosperity and stability. The United Nations counter terrorism conventions and protocols, as well as binding Security Council resolutions, therefore commit Kenya and other States to cooperate in bringing terrorists to justice.

For example, Article 10 (1) of the 1997 Terrorist Bombing Convention requires “States Parties [to] afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect” of terrorist bombing attacks. The same obligation to “[a]fford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings” is also imposed by the Security Council in resolution 1373 (2001), operational paragraph 2 (f).

The obligation to afford the greatest measure of international counter-terrorism cooperation, however, must be discharged in accordance with international law obligations, including human rights and refugee law, as well as with Kenyan law. Flexibility in meeting requests for cooperation and in adapting to the needs of requesting States “is the hallmark of effective international cooperation”, but it cannot justify violations of the law, particularly not of human rights safeguards.



Case Study: The *Suleiman Case*.*

On 16 August 2010, the applicant sought for summons to be issued against the Commissioner of Police and the Commandant of the ATPU to appear before the High Court in person or through their advocates and show cause as to why her husband, Mohammed Hamid Suleiman, a Kenyan national, should not be released.

Mr. Suleiman had been arrested by ATPU on 13 August 2010 at their home in Nairobi. The following day, Mr. Suleiman managed to ring his mother and informed her that the ATPU officers had threatened to forcibly take him to Uganda in connection with the twin terrorist bombings in Kampala on 11 July 2010. On 14 August 2010, the applicant and her advocate went to Kasarani Police Station and were informed that Mr. Suleiman had been detained there overnight, but that ATPU officers had collected him that morning and taken him to an unknown destination. The ATPU Commandant later confirmed to the applicant’s advocate that the suspect would be forcibly removed to Kampala for what he termed as “associating himself with persons that had killed people.”

After hearing the facts of the case on 18 August 2010 – four days after the suspect had been rendered to Uganda – the High Court made the following observations regarding the arrest of the suspect:

“They quickly, within a few hours of arrest, handed him over to Uganda ... There was certainly no opportunity afforded for him to apply to the Kenyan Courts for release. There was no formal communication with his family or information that he was being taken out of jurisdiction. He is a Kenyan citizen who had immunity against expulsion. There was no formal request by the Ugandan authorities for him. There was no warrant issued by a court in Uganda seeking his arrest. All extradition provisions were disobeyed in his connection. In short, all evidence indicates he was illegally arrested, detained and removed from Kenya.”

The Court then noted that:

“[w]hether one is a terror suspect or an ordinary suspect, he is not exempted from the ordinary protection of the law. Whatever the security considerations that the police had in this case, the recognition and preservation of the liberties of this subject was the only way to reinforce this country’s commitment to the rule of law and human rights. Police must have the capacity to battle terrorism and enforce human rights at the same time as the two are not, and should not, be incompatible.”

The Court further observed that “no exceptional circumstances, whether state of war or terrorist actions, can be invoked to justify the treatment handed down to the subject.” The Court thus held that Mr. Suleiman’s arrest, detention and removal from Kenya to Uganda were illegal, and transgressed his fundamental rights and liberties.

**Zuhura Suleiman v Commissioner of Police & 3 Others* [2010] eKLR.



Lawful Inter-State Transfer of Detainees

In 2006, the European Commission for Democracy through Law, otherwise referred to as the “Venice Commission,” an expert advisory body of the COE, was asked by the COE Parliamentary Assembly to examine member States’ obligations with regard to the inter-State transfer of terrorism suspects. In its legal opinion, the Venice Commission observed as follows:

“10. Under international law and human rights law, there are four situations in which a State may lawfully transfer a prisoner to another State: deportation, extradition, transit and transfer of sentenced persons for the purposes of serving their sentence in another country.

11. *Deportation* is the expulsion from a country of an alien whose presence is unwanted or deemed prejudicial ...

12. *Extradition* is a formal procedure whereby an individual who is suspected to have committed a criminal offence and is held by one State is transferred to another State for trial or, if the suspect has already been tried and found guilty, to serve his or her sentence ...

17. *Transit* is an act whereby State B provides facilities for State A to send a prisoner through its territory. ...

23. States may enter into agreements concerning the *transfer of sentenced persons* for the purpose of serving their sentence in their country of origin. ...

24. A transfer is unlawful or irregular when the government of State B transfers a person from State B to the custody of State A, against his or her consent, in a procedure not set out in law (i.e. not extradition, deportation, transit or transfer with a view to sentence-serving).”*

**European Commission for Democracy Through Law, Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners (Opinion 363/2005): [http://www.venice.coe.int/webforms/documents/CDL-AD\(2006\)009.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2006)009.aspx).*



Activity: Foundations of Extradition Law

Identify and read the provisions concerning extradition in the 1997 International Convention for the Suppression of Terrorist Bombings and the London Scheme for Extradition Within the Commonwealth.

- Why do Kenya and other States enter into agreements regarding extradition?
- What are the interests, and/or legal rights, served by extradition law?
- Consider by comparison what are the interests served by the procedures for the removal of non-citizens under immigration law?

**Cross-Reference**

See the discussion of the international legal framework for extradition and international cooperation in counterterrorism efforts in UNODC's International Cooperation in Criminal Matters: Counter-terrorism, available at: http://www.unodc.org/documents/terrorism/Publications/Training_Curriculum_Module3/Module3_EN.pdf.

7.3.1 Legal Framework for International Cooperation in Criminal Matters

Kenya has adhered to numerous treaties pertaining to international cooperation in criminal matters. These include 14 of the 19 international conventions and protocols against terrorism. As part of the Commonwealth of Nations, Kenya is also a party to the London Scheme for Extradition within the Commonwealth, the Harare Scheme Relating to Mutual Assistance in Criminal Matters, and the Scheme for the Transfer of Convicted Offenders within the Commonwealth. Regionally, Kenya is a party to the AU Convention of the Prevention and Combating of Terrorism, the East African Community (EAC) Treaty and the IGAD Convention on Extradition. By virtue of Article 2 (6) of the Constitution, these treaties form part of Kenyan law.

**Cross-Reference**

See Chapter 1, sections 1.4 and 1.11 for a list of other international legal instruments ratified by Kenya, in the area of human rights law, IHL and refugee law, which are also relevant to international cooperation in criminal matters.

Kenya has an elaborate domestic framework governing international cooperation in criminal matters. The main statutes are:

- The Mutual Legal Assistance Act (No. 36 of 2011)
- The Extradition (Commonwealth Countries) Act (Cap 77)
- The Extradition (Contiguous and Foreign Countries) Act (Cap 76)
- The Fugitive Offenders Pursuit Act (Cap 87)

The following statutes also apply to matters pertaining to mutual legal assistance, extradition and deportation in Kenya:

- The Transfer of Prisoners Act (No. 22 of 2015)
- The Refugee Act (Cap 173)
- The Kenya Citizenship & Immigration Act (Cap 170)
- The Prevention of Organised Crimes Act (Cap 59)
- The International Crimes Act, 2008
- The Proceeds of Crime and Anti-Money Laundering Act (No. 9 of 2009)
- The POTA, as amended by the Security Laws Amendment Act, 2014

By virtue of Sections 51 and 52 of the POTA, any offence that constitutes a terrorist act under POTA is an extraditable offence. Pursuant to Section 7 and 8 of the Mutual Legal Assistance Act, Kenya may also request for and receive legal assistance from other States in the course of investigations, prosecutions and judicial proceedings related to an offence that constitutes a terrorist act under the POTA.

7.4 DEPRIVATION OF LIBERTY IN EXTRADITION PROCEEDINGS

Persons who are taken into custody for purposes of extradition on charges of a terrorist offence shall enjoy full respect of all their rights and guarantees in conformity with the law of Kenya and applicable provisions of international law, including international law of human rights.¹⁹³

Kenyan law and international human rights law require that any transfer of a terrorism suspect or convict to another State be based on law and follow the procedures set forth in law. Under Kenyan law, the basis and procedure for extradition is provided by two main statutes, namely the Extradition (Contiguous and Foreign Countries) Act and the Extradition (Commonwealth Countries) Act. The two Acts each have their own procedure for requesting the surrender of individuals, issuance of arrest warrants, proceedings for committal or discharge, as well as the surrender of the requested person. These statutory procedures are similar but not identical.

7.4.1 Requisition for Surrender

To initiate the extradition of an individual, an extradition request must first be made to the competent Kenyan authority by or on behalf of the Government of the requesting country in which the requested person is accused or was convicted. This requirement is provided for under Section 5 of the Extradition (Contiguous and Foreign Countries) Act, and Section 7 of the Extradition (Commonwealth Countries) Act.

7.4.2 Issuance of an Arrest Warrant

On receiving the extradition request, the competent Kenyan authority may give written authorization to a court to issue a warrant for the arrest and detention of the requested person, provided that there is evidence that would, in the opinion of the court, justify the issue of the warrant if the crime had been committed in Kenya, or if the requested person had been convicted for the crime in Kenya. This is provided for under Section 6 of the Extradition (Contiguous and Foreign Countries) Act and Section 8 of the Extradition (Commonwealth Countries) Act.

A court may also issue an arrest warrant without prior written authorization from the competent Kenyan authority, on the basis of information that the requested person is believed to be in or on his/her way to Kenya. If so, the court must send a report, together with the evidence and information relied upon to the competent Kenyan authority, who may either:

- order that the warrant be cancelled and the person who has been arrested and detained on its basis to be discharged;¹⁹⁴ or
- certify that a request has been made for the surrender of the person concerned.

7.4.3 Proceedings for Committal or Discharge

When a requested person is arrested in pursuance to an arrest warrant, he/she is to be presented before a court as soon as possible.

This is established in Section 6 (3) of the Extradition (Contiguous and Foreign Countries) Act, which provides that “[a] fugitive criminal when arrested on a warrant under this section shall be brought before a magistrate as soon as possible.” Similarly, Section 9 (1) of the Extradition (Commonwealth Countries) Act provides that “[a]

¹⁹³ See, e.g., Article 17 of the 1999 Convention for the Suppression of the Financing of Terrorism, Article 14 of the 1997 Convention for the Suppression of Terrorist Bombings, and Article 15 of the International Convention for the Suppression of Acts of Nuclear Terrorism.

¹⁹⁴ Section 8 (3) of the Extradition (Commonwealth Countries) Act; Section 6 (2) of the Extradition (Contiguous and Foreign Countries) Act.

person arrested in pursuance of a warrant of arrest shall (unless previously discharged under subsection (3) of section 8) be brought as soon as practicable before the court.”

The court shall then hear and determine the case for extradition. The magistrate shall hear the case in the same manner and have the same jurisdiction and powers, as nearly as may be, as in a trial before a subordinate court (Section 7 of the Extradition (Contiguous and Foreign Countries) Act).

Section 8 of the Act provides as follows:

- 1) “In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorizing the arrest of the criminal is duly authenticated, and such evidence is produced as, subject to the provisions of this Act, would according to the law of Kenya, justify the committal for trial of the prisoner if the crime of which he is accused was committed in Kenya, the magistrate shall commit him to prison, but otherwise shall order him to be discharged.
- 2) In the case of a fugitive criminal alleged to have been convicted of an extradition crime, if such evidence is produced as, subject to the provisions of this Act would, according to the law of Kenya, prove that the prisoner was convicted of such crime, the magistrate shall commit him to prison, but otherwise shall order him to be discharged.
- 3) If the magistrate commits such criminal to prison, he shall commit him to prison to await the warrant of the Minister for his surrender; and the magistrate shall forthwith send to the Minister a certificate of the committal and such report on the case as he may think fit.”

Similarly, under the Extradition (Commonwealth Countries) Act, Section 9 (5) provides as follows:

“Where the court has received an authority to proceed in respect of a fugitive arrested, and it is satisfied, after hearing any evidence tendered in support of the request for the surrender or on behalf of the fugitive, that the offence to which the authority to proceed relates is an extradition offence, and if further satisfied-

- a) where the fugitive is accused of the offence, that the evidence would be sufficient to warrant his trial for that offence if it had been committed in Kenya; or
- b) where the fugitive is alleged to be unlawfully at large after conviction of the offence, that he has been so convicted and appears to be so at large,

the court shall, unless his committal is prohibited by any other provision of this Act, commit him to custody to await his surrender, but if the committal is so prohibited, the court shall discharge him from custody.”

In *Republic v. Wilfred Onyango Nganyi alias Dadi & Another*,¹⁹⁵ the High Court described the scope of inquiry to be conducted by the court during extradition proceedings:

“[b]efore exercising his discretion to order the return of the prisoner, the Magistrate should peruse the entire evidence, and understand it, without taking the position of a trial Court. So, the degree to which the Magistrate has to be ‘satisfied’ is not expected to be as high as if any such satisfaction was derived from an analysis and evaluation of evidence adduced at a trial. The Magistrate is under no duty to [inquire] into the merits of the charges to be preferred. The Magistrate does not try or attempt to try any issue, because there is no hearing ... If there is some evidence which discloses a connecting factor between the prisoner and the alleged offences, the Magistrate should order the prisoner to be returned.”¹⁹⁶

¹⁹⁵ *Republic v. Wilfred Onyango Nganyi alias Dadi & Another* [2008] eKLR.

¹⁹⁶ *Ibid*, p 6 and 17.

7.4.4 Surrender of the Requested Person

The surrender of the requested person is subject to certain conditions. Under the Extradition (Contiguous and Foreign Countries) Act, Section 9 provides as follows:

- 1) "Whenever a magistrate commits a fugitive criminal to prison under this Part, he shall inform the criminal that he will not be surrendered until after the expiration of fifteen days and that he has a right to apply for the issue of directions in the nature of habeas corpus.
- 2) Upon the expiration of the period of fifteen days or, if directions in the nature of habeas corpus are issued, after the decision of the court upon the return to the directions, as the case may be, or after such further period as may be allowed in either case by the Minister, the Minister may by warrant under his hand order the fugitive criminal, if not set at liberty on the decision of the court, to be surrendered to such person as is in his opinion, duly authorised to receive the fugitive criminal by the country from which the requisition for the surrender proceeded, and the fugitive criminal shall be surrendered accordingly.
- 3) Any person to whom such warrant is directed, and the person so authorised, may receive, hold in custody and convey into the jurisdiction of that country the criminal mentioned in the warrant."

Similar provisions are contained in Sections 10 and 11 of the Extradition (Commonwealth Countries) Act. Section 10 provides as follows:

- 1) "Where a fugitive is committed to custody under application of section 9, the court shall inform him of his right to make an application for *habeas corpus* and shall forthwith give notice of the committal to the Attorney-General.
- 2) A fugitive shall not be surrendered-
 - a) in any case, until after the end of fifteen days beginning with the day on which the order for his committal to custody was made;
 - b) if an application for habeas corpus is made in his case, so long as proceedings on that application are pending."

Section 11 (1) provides as follows:

- 1) "Where a person is committed to await his surrender and is not discharged by order of the High Court, the Attorney-General may by warrant order him to be surrendered to the requesting country, unless-
 - a) the surrender is prohibited, or prohibited for the time being, by any of the provisions of this Act;
 - b) or the Attorney-General decided under this section not to issue the warrant in his case."

Section 11(6) further provides that "[n]otice of the issue of a warrant under this section shall forthwith be given to the fugitive who is to be surrendered or held in custody under it and the warrant may be executed according to its tenor."

7.5 CONTINUED DETENTION AWAITING EXTRADITION

Extradition proceedings can be complex and take considerable time. If a person is taken into custody following an extradition request, the overall length of his/her detention must be reasonable in all the circumstances. In other words, there may be a point at which, notwithstanding the efforts the State is making to deport or extradite an individual, it is no longer reasonable to detain that individual.

Reasonableness in this context is fact specific. Relevant considerations would include, for instance, the personal and family circumstances of the detainee, their health, the risk they pose on release, if any, and, crucially, the length of time during which they have been detained and the conditions of their detention. The same applies to persons detained pending a decision on their deportation.

One of the factors that may delay extradition and deportation proceedings in the case of persons suspected of involvement in terrorism is that the person to be extradited or deported alleges that he would be at risk of torture or other serious human rights violations in the country of destination. Where such allegations are arguably well-founded, the removal of the person from the State's territory may become very difficult or simply impossible. If there is no actual prospect of deporting or extraditing an individual, further detention cannot be justified on grounds of pending extradition or deportation proceedings. The power to detain for purposes of extradition or deportation can only be used where there is an intention and a prospect of deporting or extraditing the individual in question.

Under the Extradition (Commonwealth Countries) Act, Section 13(1) provides that "[a] fugitive who is remanded or committed to custody shall be committed to the like institution as a person charged with an offence before the court." Subsection (3) further provides that "[a] warrant of surrender shall be sufficient authority for all persons to whom it is directed and all police officers to receive the fugitive, keep him in custody and convey him into the jurisdiction of the requesting country."

The Act also limits the duration in which persons suspected or convicted of terrorism and other offences may be detained in Kenya while awaiting to be extradited to the requesting country. Section 12 stipulates as follows:

- 1) "If a fugitive committed to await his surrender is in custody in Kenya under this Act after the expiration-
 - a) in any case of two months beginning with the first day on which, having regard to subsection (2) of section 10, he could have been surrendered; or
 - b) where a warrant of surrender has been issued, of one month beginning with the day of the issue, he may, after giving at least one week's notice to the Attorney-General apply to the High Court for his discharge.

Where the High Court hears an application under subsection (1), and is satisfied that due notice has been given to the Attorney-General, it may, unless sufficient cause is shown to the contrary, order that the applicant be discharged from custody and, if a warrant of surrender has been issued, quash that warrant."

Similar provisions allowing for the discharge of the detained person when there has been a "delay" in extradition are contained in the Extradition (Contiguous and Foreign Countries) Act, in particular Sections 10 and 15 of the Act. Section 10 stipulates as follows:

"Whenever a fugitive criminal who has been committed to prison is not surrendered and conveyed out of Kenya within two months after the committal, or if directions in the nature of habeas corpus are issued, after the decision of the court upon the return to the directions, any judge of the High Court may-

- a) upon application made to him by or on behalf of the criminal; and
- b) upon proof that reasonable notice of the intention to make the application has been given to the Minister,

order the criminal to be discharged out of custody unless sufficient causes is shown to the contrary.

Section 15 provides as follows:

- 1) "Whenever a prisoner whose return is authorized in pursuance to this Part is not conveyed out of Kenya within one month after the date of the order for his return, a magistrate may-
 - a) upon application by or on behalf of the prisoner; and
 - b) upon proof that reasonable notice of the intention to make the application has been given to the person holding the warrant and to the Commissioner of Police or chief officer of the police of the district, city, town or area where the prisoner is in custody; and
 - c) unless sufficient cause is shown to the contrary, order the prisoner to be discharged out of custody.
- 2) Without prejudice to any application for directions in the nature of a writ of habeas corpus in respect of anything purporting to be done under this Part of this Act, any order or refusal to make an order of discharge under subsection (1) of this section may be the subject of an appeal to the High Court."

7.6 RIGHT TO SEEK REVIEW OF DECISIONS TO DEPORT OR EXTRADITE

Equally important to the fundamental requirement of legality is the right to an effective review mechanism for any decision to expel, deport or extradite. Under international law, this right is enshrined in Article 13 of the ICCPR, which provides as follows:

"An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

Although there is no corresponding provision to Article 13 of the ICCPR in the Constitution, this principle is nevertheless applicable to Kenya by virtue of Article 2 (6) of the Constitution. In addition to the rights guaranteed to an arrested person under Article 49, the Constitution also guarantees every person the right to fair administrative action, which is stipulated in Article 47 as follows:

- 1) "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- 2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
- 3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall
 - a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - b) promote efficient administration."

At the regional level, the Banjul Charter contains a similar provision to Article 13 of the ICCPR on the right to an effective review mechanism for any decision to expel, deport or extradite. Article 12 (4) provides that "[a] non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law." The ACommHPR has also emphasised in a number of cases in which "ouster legislation" had prevented individuals from accessing courts in order to challenge the

lawfulness of deportation decisions that it is a fundamental requirement of international human rights law that persons to be deported have access to the courts in order to challenge the legality of their removal.¹⁹⁷

Furthermore, the Human Rights Committee has made clear that the right to challenge an expulsion decision and to have one's case reviewed applies not only to expulsion and deportation decisions, but also to extradition. The review proceedings must provide a real opportunity to submit reasons against deportation or extradition, and not be a mere formality.

The right to be expelled, deported or extradited only on the basis of a decision adopted in accordance with the applicable law, and to submit reasons against expulsion and to have them examined, applies also in the case of terrorism suspects. Article 14 of the 1997 Terrorist Bombing Convention (and analogous provisions in other global legal instruments against terrorism) provides:

“Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international law of human rights.”

In the context of extradition proceedings in Kenya, the law gives the person who is the subject of an extradition request the opportunity to challenge the decision to extradite him/her, and have his/her case reviewed. This is provided for in the following circumstances:

Upon the Arrest of the Requested Person:

As already mentioned, when a person who is the subject of an extradition request is arrested in pursuance to an arrest warrant issued, he/she is to be brought before a court as soon as possible. This requirement is provided Section 6 of the Extradition (Contiguous and Foreign Countries) Act, and Section 9 of the Extradition (Commonwealth Countries) Act. In addition to hearing evidence in support of the extradition request, the court shall also receive evidence from the concerned person as to why the extradition request should not be granted, including that the offence of which he/she is accused or convicted of is not an extradition crime.

Upon the Committal of the Requested Person:

As already mentioned, whenever the court commits a requested person to custody, it is required to inform the concerned person of his/her right to make an application for *habeas corpus*. Where such an application is made, the State is prohibited from surrendering the requested person until the proceedings on that application have been finalised. This is specifically provided for in Section 9 of the Extradition (Contiguous and Foreign Countries) Act, and Section 10 of the Extradition (Commonwealth Countries) Act. The right to petition for an order of *habeas corpus* is also enshrined in Article 51(2) of the Constitution. By virtue of Article 25(d), it is a fundamental human right that cannot be subject to limitation.

Upon Application for Discharge where there is a Delay:

As already mentioned, a requested person who has been detained in custody pending extradition may apply to the High Court for discharge where there has been a delay in his/her return or surrender to the requesting country, or a delay in executing directions that have been issued in the nature of *habeas corpus*. This is provided for under Section 10 of the Extradition (Contiguous and Foreign Countries) Act, as well as Sections 12 and 15 of the Extradition (Commonwealth Countries) Act.

¹⁹⁷ *ACommHPR, Amnesty International v. Zambia*, Merits, 1999 Communication No. 212/98, Judgment of 5 May; *Kenneth Good v. Botswana*, Merits, Communication No. 313/05, Judgment of 26 May 2010.



Cross-Reference

See Chapter 4, section 4.5.3 for a further discussion on *habeas corpus* – the right to challenge the lawfulness of detention.



Case Studies on Procedural Safeguards regarding Deportation and Extradition

The Mohochi Case:* The applicant, a Kenyan citizen and human rights activist, travelled to Uganda as part of a delegation of the ICJ-Kenya Chapter to meet the Chief Justice of Uganda. Upon arrival, the applicant was arrested and detained by airport authorities and deported back to Kenya as a ‘prohibited immigrant.’ The applicant had not committed any immigration or criminal offences against the laws of Uganda or the East African community. He was not advised by immigration authorities of the reason that he was denied entry nor why he had obtained this status. The Uganda Citizenship and Immigration Control Act does not oblige authorities to furnish reasons.

The applicant subsequently initiated proceedings against Uganda in the East African Court of Justice. The court granted the applicant’s request for a declaration that it was unlawful not to subject him to any legal or administrative process before the decision was made to declare him a prohibited immigrant and deport him.

The Court found that Uganda had breached its obligations under Articles 6 (d), 7 (2) and 104 of the Treaty for the Establishment of the EAC, and Articles 7 (2) and 54 (2) of the East African Common Market Protocol. These provisions bestow upon parties an obligation of free movement and non-discrimination of East African citizens, to abide by principles of good governance, including adherence to the principles of democracy, the rule of law, accountability, transparency and the maintenance of universally accepted human rights as well as to provide redress.

The Court held that Uganda failed to afford the applicant due process of law and that his denial of entry, detention and removal to Kenya were “illegal, unjustified, unlawful and inconsistent with transparency, accountability, rule of law and universally accepted standards of human rights...” The Court found that Uganda had a duty to furnish the applicant with sufficient reasons, as well as an opportunity to be heard and to take into consideration what he had to say. It observed that, “[t]hese, in our view, are basic indicators of due process are the hallmarks of the rule of law and they distinguish a potentially just and fair process from a potentially unjust and unfair one.”

The Court noted that whilst the sovereignty of the Republic of Uganda permitted it to deny entry to unwanted citizens of partner States, it has legal obligations to ensure that it complies with the obligations of the treaty and protocol when doing so. It was observed that “[s]overeignty cannot act as a defence or justification for non-compliance, and neither can it be a restraint or impediment to compliance.”

The Giry Case:** Following a two-day visit to the Dominican Republic, Mr. Giry, a French citizen, went to the airport of Santo Domingo to take a flight back to his place of residence, Saint-Barthélemy (Antilles), a French overseas territory. At the airport, Dominican law enforcement officers, acting on information that he was sought on drugs trafficking charges by the United States, took him to the police office at the airport and, after less than three hours, forced him on a plane to the United States, where he was arrested and charged with drugs offences. He was subsequently sentenced to 28 years imprisonment by a United States court. The Government of the Dominican Republic justified this process on the ground that Mr. Giry was internationally sought on charges of drugs-trafficking, and therefore constituted a national security danger for the Dominican Republic, which, as any sovereign State, was entitled to take the necessary steps to protect national security, public order, and public health and morals (at 4.3).

The Human Rights Committee observed that extradition comes within the scope of Article 13 ICCPR. It further noted that Mr. Giry was neither afforded an opportunity to submit the reasons against the decision to remove him to the United States nor to have his case reviewed by the competent authority. The Human Rights Committee “stresse[d] that States are fully entitled vigorously to protect their territory against the menace of drug dealing by entering into extradition treaties with other States. But practice under such treaties must comply with Article 13 of the Covenant, as indeed would have been the case, had the relevant Dominican law been applied in the present case.” (at 5.5)

**Samuel Mukira Mohochi v. Attorney General of the Republic of Uganda*, East African Court of Justice at Arusha (First Instance Division), Case No. 5 of 2011.

**Human Rights Committee, *Giry v. Dominican Republic*, Communication No. 193/1985, 20 July 1990.

7.7 THE PROHIBITION ON “REFOULEMENT”

The principle of non-refoulement is a fundamental principle of international law, which has its origin in refugee law. The term comes from the French “*refouler*,” which can be translated as “pushing back” or “turning back” a person. This principle obliges Kenya and other States not to extradite, expel or otherwise remove a person to another State where that person faces a real risk of being subjected to arbitrary killing, torture or other serious violations of his/her human rights.

Kenya has acceded to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol to the Convention Relating to the Status of Refugees. It has also ratified the 1969 AU Convention Governing the Specific Aspects of Refugee Problems in Africa. Provisions of these treaties have been substantially domesticated by virtue of Article 2 (6) of the Constitution and the Refugees Act (Cap 173). The principle of non-refoulement originates in refugee law, but is also a fundamental principle of human rights law, particularly under Article 3 of the Convention Against Torture, as well as Articles 6 and 7 of the International Covenant on Civil and Political Rights. The principle is also a norm of customary international law and reflected in the international counter-terrorism conventions and protocols.



Cross-Reference

See Chapter 1, section 1.11.2 for Kenya’s ratification status of international and regional instruments relating to the status of refugees and their protection.

7.7.1 The “Non-Refoulement” Principle under the Refugee Act and International Refugee Law

The Office of the United Nations High Commissioner for Refugees (UNHCR) has called the principle of *non-refoulement* “the cornerstone of asylum and of international refugee law.”¹⁹⁸ In a *Note on the Principle of Non-Refoulement*, UNHCR explains:

“[f]ollowing from the right to seek and to enjoy in other countries asylum from persecution, as set forth in Article 14 of the UDHR, this principle reflects the commitment of the international community to ensure to all persons the enjoyment of human rights, including the rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of person. These and other rights are threatened when a refugee is returned to persecution or danger.”

Under Kenyan law, this principle is captured under Section 18 of the Refugee Act as follows:

“No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or to be subjected any similar measure if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a country where-

- a) the person may be subject to persecution on account of race, religion, nationality, membership of a particular social group or political opinion; or
- b) the person’s life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or the whole of that country.

198 UNHCR, *UNHCR Note on the Principle of Non-Refoulement*, November 1997, available at: <http://www.refworld.org/docid/438c6d972.html>.

At the international level, Article 33 of the 1951 Convention Relating to the Status of Refugees, together with its 1967 Protocol, provides that no State Party shall expel or return “a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Regionally, the principle of non-refoulement is captured by the 1969 AU Convention Governing the Specific Aspects of Refugee Problems in Africa, under Article II (3), which stipulates that “[n]o person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.”



Who is a Refugee?

The Refugee Act distinguishes between a statutory refugee and a prima facie refugee. Section 3 provides as follows:

- 1) A person shall be a statutory refugee for the purposes of this Act if such person
 - a) owing to a well-founded fear of being persecuted for reasons of race, religion, sex, nationality, membership of a particular social group or political opinion is outside of his country of nationality and is unable, or owing to such fear, is unwilling to avail himself to the protection of that country; or
 - b) not having a nationality and being outside the country of his former habitual residence, is unable or, owing to a well-founded fear of being persecuted for any of the aforesaid reasons, is unwilling to return to it.
- 2) A person shall be a *prima facie* refugee for purposes of this Act if such person owing to external aggression, occupation, foreign domination or events seriously disturbing public order in any part or whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside of his country of origin or nationality.

At the international level, Article 1 (A) (2) of the 1951 Refugee Convention, read alongside the 1967 Protocol Relating to the Status of Refugees, defines a refugee as “a person who is outside his or her country of nationality or habitual residence; has a well-founded fear of being persecuted because of his or her race, religion, nationality, membership of a particular social group or political opinion; and is unable or unwilling to avail him or herself of the protection of that country, or to return there, for fear of persecution.”

Regionally, Article 1 (1) of the OAU Convention Governing Specific Aspects of the Refugee Problem in Africa defines the term “refugee” in the same terms as the 1951 Refugee Convention. Article 1 (2) of this Convention further states that “the term ‘refugee’ shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”

Refugees are entitled to the rights conferred upon refugees by the Refugee Act, the 1951 Refugee Convention and the OAU Convention Governing Specific Aspects of the Refugee Problem in Africa. Given the declaratory nature of refugee status, the principle of *non-refoulement* applies even where individuals have not had their status as a refugee formally recognised by a host State or its courts, including, in particular, where individuals are asylum-seekers.

7.7.2 Exceptions to the Protection Offered to Refugees

Similar to the 1951 Refugee Convention, the scope of protection offered by the Refugee Act is very broad. Undoubtedly, it covers deportation, extradition or any other form of transfer to a risk of persecution or other forms of serious harm, as emphatically made clear by the principle of non-refoulement under Section 18. There are, however, a limited number of circumstances in which persons who would otherwise falling within the scope of the definition of refugee in Section 3 (1) of the Refugee Act, and Article 1 (A) (2) of the 1951 Refugee Convention, are excluded from the protection afforded therein. There are also very limited circumstances under which persons recognized as refugees may not avail themselves of protection against refoulement under international refugee law.

7.7.2.1 Grounds for Exclusion from Refugee Status

Those responsible for serious crimes are legally excluded from refugee status by virtue of the terms of the international refugee instruments.

Section 4 of the Refugee Act sets out the grounds for exclusion from refugee status:

“A person shall not be a refugee for the purposes of this Act if such person-

- a) has committed a crime against peace, a war crime, or a crime against humanity as defined in any international instrument to which Kenya is a party and which has been drawn up to make provision in respect of such crimes;
- b) has committed a serious non-political crime outside Kenya prior to the person’s arrival and admission to Kenya as a refugee;
- c) has committed a serious non-political crime inside Kenya after the person’s arrival and admission to Kenya as a refugee;
- d) has been guilty of acts contrary to the purposes and principles of the United Nations or the African Union; or
- e) having more than one nationality, had not availed himself of the protection of one of the countries of which the person is a national and has no valid reason, based on well-founded fear of persecution.”

In addition, Section 48 of the POTA allows the Commissioner for Refugee Affairs, having regard to the interests of national security, public safety and the 1951 Refugee Convention, to refuse the application of any persons applying for status as a refugee, “if the Commissioner has reasonable grounds to believe that the applicant has committed or is involved in the commission of a terrorist act.”

Under international law, Article 1 (F) of the 1951 Refugee Convention sets out the circumstances in which individuals are excluded from the protection afforded by the Convention on grounds related to criminal conduct. These are exhaustively enumerated in Article 1(F), which provides as follows:

“The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- c) he has been guilty of acts contrary to the purposes and principles of the United Nations.”

UNHCR encourages States to interpret the exclusion clauses in Article 1 (F) restrictively, yet use them rigorously and appropriately.¹⁹⁹ The exclusion clauses in Article 1 (F) of the Refugee Convention form part of the eligibility criteria for refugee status. They may be applied at the point at which the State determines whether an individual may benefit from the protection as a refugee, but also – where appropriate – where a refugee engages in conduct within the scope of Article 1 (F) (a) or (c) of the Refugee Convention, which may result in the revocation of refugee status already granted.

Regionally, Article 1 (5) of the OAU Convention Governing Specific Aspects of the Refugee Problem in Africa contains the same grounds listed under Article 1 (F) of the 1951 Refugee Convention. It also specifies that “the provisions of the Convention shall not apply to any person with respect to whom the country of asylum has serious reasons for considering that he has been guilty of acts contrary to the purposes and principles of the Organisation of African Unity.”

199 UNHCR, Addressing Security Concerns without Undermining Refugee Protection – UNHCR’s Perspective Rev.2 (December 2015), para. 18.



Application of the Exclusion Clause in the Case of Allegations of Involvement in Terrorism

In a note on *Addressing Security Concerns without Undermining Refugee Protection*,* UNHCR provides the following guidance regarding the application of the exclusion clauses:

- “22. In view of the seriousness of the issues and the consequences of an incorrect decision, the application of any exclusion clause should continue to be individually assessed, based on available evidence, and conform to basic standards of fairness and justice. As mentioned earlier, this assessment should be located within the refugee status determination process, albeit taking place in specially tailored procedures for exclusion.
23. The assessment should also, in UNHCR’s view, be sensitive to certain additional considerations. Firstly, in determining whether exclusion is justified, it is not sufficient to rely on the designation as “terrorist” of a particular crime, person or group. Rather than focusing on the label, it is necessary to determine whether the acts in question constitute crimes within the scope of article 1F. Secondly, exclusion requires a determination that the person concerned incurred individual liability for the acts in question, be it as a perpetrator or through his or her participation in the commission of these acts by another person. Thirdly, even though exclusion proceedings do not equate with a full criminal trial, the standard of proof (“serious reasons for considering”) has to be a higher threshold than a mere suspicion and, in UNHCR’s view, should be more than the balance of probabilities.
24. Where there is sufficient proof that an asylum-seeker belongs to an extremist group involved in the commission of serious crimes, including those considered to be of a terrorist nature, the information available about this group may support a finding that anyone who voluntarily becomes, or remains, a member may be considered to have incurred individual responsibility for the crimes in question. In asylum procedures, this may give rise to a rebuttable presumption of individual liability in such cases, resulting in the burden of proof shifting to the asylum-seeker. The position of the individual in the organization concerned, including the voluntariness of his or her membership, as well as the fragmentation of certain groups would nevertheless be examined and taken into account in reaching a determination on exclusion.”

*UNHCR, *Addressing Security Concerns without Undermining Refugee Protection – UNHCR’s Perspective Rev.2* (December 2015), paras 22-24.



Practical Guidance – Coordinating Asylum and Extradition Proceedings

In some cases, the country of asylum will receive an extradition request before the asylum claim has been decided. It may even occur that a person only makes claim for asylum after he learns that his extradition has been sought. In such cases, questions arise as to the order in which extradition request and asylum claim should be decided, and as to how material presented in one set of proceedings may be used in the other. The UNHCR note on *Addressing Security Concerns without Undermining Refugee Protection* states in this regard (para. 31):

“Asylum-seekers subject to an extradition request from the country of origin enjoy protection against *refoulement* pursuant to article 33(1) of the 1951 Refugee Convention while their claim is being considered, including at the appeals stage. In such cases, any information related to the extradition request will need to be considered, in light of all relevant circumstances. Asylum and extradition procedures may be conducted in parallel. The host State’s obligations under international refugee law require, however, that the asylum claim be determined by a specialized body competent to assess eligibility for international protection, and that the determination on the asylum claim must precede the decision on the grant of extradition.”

The UNHCR *Guidance Note on Extradition and International Refugee Protection* offers analysis and clarification of international law and legal standards regarding extradition procedures concerning refugees and extradition procedures concerning asylum seekers.²⁰⁰

200 UNHCR, *Guidance Note on Extradition and International Refugee Protection* (April 2008), at paras. 51 to 69, available here: <http://www.refworld.org/docid/481ec7d92.html>.

7.7.2.2 Exceptions to the Principle of Non-Refoulement

Section 19 of the Refugee Act provides that “[t]he Commissioner [for Refugee Affairs] may withdraw the refugee status of any person where there are reasonable grounds for regarding that person as a danger to national security or to any community of that country.”

Section 20 also provides that:

“(1) If, at any time, the Commissioner considers that there are reasonable grounds for believing that a person who has been recognized as a refugee for the purposes of this Act—

- (a) should not have been so recognized; or
- (b) has ceased to be a refugee for the purposes of this Act,

the Commissioner shall revoke such recognition and shall notify the person concerned in writing of the decision together with the reasons therefor.

(2) Where the Commissioner has under this section withdrawn the recognition of any person as a refugee, that person shall cease to be a refugee and any member of his family shall cease to be so recognized under this Act on the expiration of seven days after the date on which the Commissioner notifies the person concerned that his recognition has been withdrawn:

provided that nothing in this subsection shall prevent a member of the family of such a refugee from applying for recognition under section 11.”

Under Section 21, the Minister may, after consultation with the Minister responsible for matters relating to immigration and internal security, order the expulsion from Kenya of any refugee or member of his family if the Minister considers the expulsion to be necessary on the grounds of national security or public order, subject to the principle of non-refoulement in Section 18. Before doing so, the Minister shall act in accordance with the due process of law.

International refugee law permits exceptions to the principle of non-refoulement in the circumstances exhaustively provided for in Article 33 (2) of the Refugee Convention, which stipulates that “the benefit of [the prohibition on refoulement set out in Article 33 (1) of the Convention] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”

Article 33 (2) applies specifically in relation to decisions regarding the application of the principle of non-refoulement under the Convention. Persons falling within the scope of Article 33 (2) are not deprived of refugee status under the Convention nor are they deprived of its other benefits. In any event, application of the principle set out in Article 33 (2) must be construed restrictively and with caution. Moreover, its application is also subject to strict compliance with general principles of law, including due process of law, necessity and proportionality.

It is important to distinguish between exclusion and expulsion, as the two exceptions are based on different grounds and protect different interests:

“Expulsion and exclusion are two different processes. Exclusion denies refugee status to persons considered undeserving because they have committed certain serious crimes or heinous acts, while at the same time preventing fugitives from escaping justice for such crimes. Exclusion protects the integrity of the institution of asylum. Expulsion aims to protect the country of refuge and hinges on the appreciation of a present or future threat. The threshold for returning refugees

to their country of origin – as an exception to the *non-refoulement* principle – has to be particularly stringent.”²⁰¹

International refugee law does not preclude the extradition of recognized refugees or asylum-seekers in all circumstances. Extradition may, however, be granted only if the surrender of the wanted person to the requesting State is in conformity with the principle of *non-refoulement*. Pursuant to Article 33 (1) of the 1951 Refugee Convention, an asylum-seeker is protected against *refoulement* to the country of origin for the entire duration of the asylum procedure, while extradition to a country other than the country of origin may proceed if there is no risk of persecution and arrangements are made to ensure access to an asylum procedure. Where the wanted person is a recognized refugee, the situation is as follows:

- The refugee is extradited to a country other than his or her country of origin, where there is no risk of persecution or other serious harm, or
- The refugee can be extradited (or otherwise returned) to his or her country of origin under the very stringent circumstances of Article 33 (2) of the Refugee Convention, provided extradition is not precluded under the requested State’s *non-refoulement* obligations under international human rights law.²⁰²



Practical Guidance

The significance of these grounds for exclusion under refugee law is, in practice, diminished by the protections applicable under international human rights law, such as the prohibition on torture, inhuman and degrading treatment and the right to life, which remain applicable even when exclusion grounds under the Refugee Act, as well as international and regional law apply. This is discussed in the next section.



Tools

- The UNHCR Note *Addressing Security Concerns without Undermining Refugee Protection – UNHCR’s Perspective Rev.2* (December 2015) is available here: <https://data.unhcr.org/syrianrefugees/download.php?id=10020>.
- For further information about the separate but directly linked areas of law concerning extradition and asylum, see the Guidance Note on Extradition and International Refugee Protection (2008), available at the following address: <http://www.refworld.org/docid/481ec7d92.html>.

7.7.3 Protection against Removal under International Human Rights Law

Similar to international human rights law, Kenyan law prohibits the return or transfer of a person to a jurisdiction where he or she faces a real risk of being subjected to a violation of the right to life or torture, inhuman and degrading treatment. These prohibitions are absolute and cannot be derogated from in any circumstances. They are not subject to the exceptions set out in the Refugee Act, the 1951 Refugee Convention or the OAU Convention on the Refugee Problem in Africa. Moreover, the protection against expulsion where there is a risk of irreparable harm, applies to everyone, and not only to those who face such a risk on grounds of race, religion, nationality or membership of a particular social group or political opinion.

201 UNHCR, *Addressing Security Concerns without Undermining Refugee Protection – UNHCR’s Perspective Rev.2* (December 2015), para. 29.

202 UNHCR, *Guidance Note on Extradition and International Refugee Protection* (April 2008).

The practice of international human rights bodies and domestic courts has extended the scope of the non-refoulement principle in international human rights law beyond the risks of violations of the right to life or torture, to encompass also inhuman and degrading conditions of detention, serious violations of the prohibition of arbitrary detention and the right to a fair trial.

7.7.3.1 Torture, Inhuman and Degrading Treatment

The Constitution guarantees the right not to be subjected to torture. In particular, Article 29 (f) provides that “[e]very person has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading manner.”

Kenya is also a party to the CAT. Article 3 of the CAT stipulates that “[n]o State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” It adds that “[f]or the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.” Other human rights treaties do not explicitly enshrine the non-refoulement principle, but it has been derived from the prohibition of torture, for instance Article 7 of the ICCPR.



Case Study: The *Salim Awadh Salim Case*.*

The facts underlying this High Court judgment are summarised in section 7.10 below.

With regard to the principle of non-refoulement, the High Court stated as follows:

“I believe that the general principle of law is that a State is under an obligation not to send (“refoul”) to other States persons who are likely to face torture in the receiving State. It matters not whether the refouling State is doing so in protection of its ‘national interest.’ Case law shows that the reason for the extradition, or the fact that the person extradited is in fact a terrorist or a threat to national security, does not exonerate the State from its responsibility under international law not to refool a person to a State where he may be subjected to torture.” (at para. 113)

Further, the Court made reference to General Comment No. 20 of the Human Rights Committee, which addresses the unconditional nature of the prohibition on torture, cruel treatment or punishment under Article 7 of the ICCPR, to include the non-refoulement obligation;

“[S]tates Parties must not 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.

... the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation 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, such as that contemplated by Articles 6 [right to life] and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant’s obligations in such matters.” (at para. 117)

**Salim Awadh Salim & 10 Others v Commissioner of Police & 3 Others*, High Court of Kenya, Petition No. 822 of 2008.



The Standard and Burden of Proof as to the Risk of Torture or Other Irreparable Harm

When a person facing extradition or deportation objects to removal on the ground that he or she would be at risk of torture or other irreparable harm in the country of destination, key questions are:

- 1) By what standard should the authorities judge whether the risk is sufficient to trigger the obligation not to remove?
- 2) How is the burden of proof regarding this risk allocated between the authority seeking removal and the person resisting it?
- 3) How is the risk of torture or other irreparable harm to be proved?

As to the first question, Article 3 of the CAT stipulates that no one shall be removed to a country where “there are substantial grounds for believing that he would be in danger of being subjected to torture”. This same standard is contained in Article 16 of the CED. The standard “substantial grounds for believing that there is a real risk of irreparable harm” (General Comment No. 31, CCPR/C/21/Rev.1/Add.13, para. 12) is used also by the Human Rights Committee in non refoulement cases. Importantly, the Human Rights Committee adds that the risk is to be assessed with regard to “either [...] the country to which removal is to be effected or [to] any country to which the person may subsequently be removed”. The Committee Against Torture adds that “the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable. [...] The person opposing removal must establish] that such danger is personal and present.” (CAT General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications), paras. 6-7).

Some governments have argued that, because of the threat a terrorism suspect poses to national security, he should be required to present stronger evidence of the risk of ill-treatment in case of removal than would be required in ordinary deportation cases. The ECtHR Grand Chamber emphatically rejected this proposition. It held that “since protection against the treatment prohibited by Article 3 [ECHR, the prohibition on torture, inhuman and degrading treatment] is absolute, [...] it] is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion.”*

As to the second question above, the Committee Against Torture states that “the burden is upon the [person opposing removal to another State] to present an arguable case. This means that there must be a factual basis for [his] position sufficient to require a response from the State party” (Committee Against Torture’s General Comment No. 1, para. 5). However, “whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to [the prohibition on torture, inhuman and degrading treatment] if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged.”**

Regarding the third question, the Committee Against Torture states that “[a]ll pertinent information may be introduced by either party to bear on this matter” (Committee Against Torture’s General Comment No. 1, para. 7). With regard to claims that there is a risk of torture, such pertinent information includes (Committee Against Torture’s General Comment No. 1, para. 8):

- Is the State concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights? Is there a pattern of violations of the human rights of persons suspected of involvement in terrorist activities? Reports and observations of United Nations and regional human rights mechanisms are particularly authoritative sources of information with regard to these questions. However, also the reports of non-governmental organizations are regularly taken into account.
- Has the person opposing removal been tortured or maltreated by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity in the past? If so, was this in the recent past? Is there medical or other independent evidence to support the torture claims?
- Has the person opposing removal engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the State in question?
- Is there any evidence as to the credibility of the person opposing removal? Are there factual inconsistencies in the claims of the person opposing removal? If so, are they relevant?

*ECtHR, *Saadi v. Italy*, Application No. 37201/06, Judgment of 28 February 2008, at para. 138.

**ECtHR, *Ismoilov and Others v. Russian Federation*, Application No. 2947/06, Judgment of 24 April 2008, para. 126.



Case Study: The *Ismoilov* Case:*

Mr. Ismoilov and other Uzbek business men were arrested in June 2005 in Russia based on an extradition request from the government of Uzbekistan, which claimed that they had financed the May 2005 unrest in the Uzbek city of Andijan. They were held in detention with a view to extradition until March 2007, when they were released. In 2006, the UNHCR granted them refugee status determining that they each had a well-founded fear of being persecuted and tortured if returned to Uzbekistan. The Russian authorities, however, refused to give them protection under Russian refugee law. Instead, a deputy prosecutor general ordered their extradition to Uzbekistan after noting that they had committed acts of terrorism and other criminal offences. The Russian authorities also noted that they had received diplomatic assurances from the Uzbek government that Mr. Ismoilov and the others would not be tortured or sentenced to death upon their return. The extradition orders were upheld by the Russian courts.

Mr. Ismoilov applied to the ECtHR, which issued an interim measure asking the Russian authorities to put the extradition on hold until it had considered the case. In its decision on the merits of the case, the ECtHR set out to establish whether there existed a real risk of ill-treatment (in violation of article 3 ECHR) in the event of Mr. Ismoilov's and the other applicants' extradition to Uzbekistan. It considered the following factors:

- Past ill-treatment of the individuals opposing removal: The ECtHR found that most of the applicants had left Uzbekistan in order to flee persecution on account of their religious beliefs or of successful businesses. Some of them had experienced earlier ill-treatment at the hands of the Uzbek authorities, others had seen their relatives or business partners arrested and charged with participation in illegal extremist organisations.
- General situation in the requesting country regarding the treatment of terrorism suspects: the ECtHR reviewed reports by United Nations human rights mechanisms and non-governmental organisations, regarding both safeguards against torture in general and specifically the treatment of persons suspected of involvement in the unrest in Andijan.
- Measures taken by the State requesting extradition to combat torture: The Russian Federation argued that Uzbekistan had adopted certain measures designed to combat the practice of torture. The ECtHR recognised that such measures had been adopted, but found that there was no proof that those measures had returned any positive results and any fundamental improvement in the protection against torture.
- Assurances given by the Uzbek authorities to their Russian counterparts: the ECtHR reiterated that where the practice of torture or inhuman and degrading treatment is widespread or systematic, diplomatic assurances do not offer a reliable guarantee against the risk of ill-treatment.

Finally, the ECtHR observed (para 126) that it was "not convinced by the Government' argument that they had an obligation under international law to cooperate in fighting terrorism and had a duty to extradite the applicants who were accused of terrorist activities, irrespective of a threat of ill-treatment in the receiving country. [...] The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. The prohibition provided by Article 3 [ECHR] against ill-treatment is equally absolute in expulsion and extradition cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion or extradition. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration"

The cases of *Othman (Abu Qatada)* and *Al-Moayad* (discussed in the next sections) also deal with aspects of the non-refoulement principle in terrorism cases.

*ECtHR, *Ismoilov and Others v. Russian Federation*, Application No. 2947/06, Judgment of 24 April 2008.

7.7.3.2 Other Risks to which the Principle of Non-Refoulement Applies

In para. 12 of General Comment No. 31, the Human Rights Committee made clear that the obligation of non-refoulement applies not only where there is a real risk of torture, but also "where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 and 7 of the Covenant [e.g. violation of the right to life or torture, inhuman and degrading treatment], either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.

7.7.3.2.1 Capital Punishment

The death penalty is amongst the punishments provided for in Kenya under Section 24 of the Penal Code. The fact that a fugitive is likely to suffer the death penalty is not expressly listed amongst the restrictions for the surrender of a fugitive criminal under Section 16 of the Extradition (Contiguous and Foreign Countries) Act, or Section 6 of the Extradition (Commonwealth Countries) Act respectively.

However, Section 11 (4) (a) of the Extradition (Commonwealth Countries) Act allows the Attorney General to decide not to issue a warrant of surrender “if the fugitive is accused or convicted of an extradition offence not punishable with death in Kenya, and could be or has been sentenced to death for that offence in the requesting Country.”



Cross-Reference

See Chapter 6, section 6.6 on the death penalty under Kenyan and international law.

Under the ICCPR, “countries that have abolished the death penalty ... may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.”²⁰³

Similarly, because capital punishment is now regarded as impermissible under the ECHR, Council of Europe member States will refuse the extradition of an individual to a country where there are substantial grounds for believing that he or she faces a real risk of receiving the death penalty. Similarly, the ACommHPR calls on those States that have abolished the death penalty in law not to facilitate executions in retentionist States through *refoulement*, extradition, deportation, or other means including the provision of support of or assistance that could lead to a death sentence.²⁰⁴

Diplomatic assurances can in many cases be an effective and human rights compliant mechanism to overcome the obstacle of the risk of capital punishment and to enable international cooperation in criminal matters in such cases, including in terrorism cases, as explained below in section 7.6.

7.7.3.2.2 Inhuman or Degrading Conditions of Detention

Recent decisions of courts in the United Kingdom and of the ECtHR show that conditions of detention can amount to “inhuman or degrading treatment” barring extradition or deportation in a number of ways, including:

- prison overcrowding of a serious and endemic level²⁰⁵;
- effective loss of control by the prison authorities of the running of the prisons and management of the day to day lives of the prisoners; in this regard, in a recent case, the UK High Court of Justice held: “we consider that to send individuals into a prison outside the effective control of the authorities which is run by prisoners and gangs in an atmosphere of violence, intimidation and constant threat exposes an individual to inhuman or degrading treatment. It is not a question simply of whether the person concerned will end up as a victim of violence but living in fear and under threat in a lawless prison that crosses the threshold”²⁰⁶;

203 Human Rights Committee, *Judge v. Canada*, Communication No. 829/1998, CCPR/C/78/D/829/1998, 20 October 2003, para. 10.4.

204 ACommHPR, General Comment No. 3 of the Banjul Charter on the Right to Life (Article 4).

205 United Kingdom High Court of Justice Queen’s Bench Division Administrative Court, *Badre v Court of Florence*, [2014] EWHC 614 (Admin).

206 United Kingdom High Court of Justice Queen’s Bench Division Administrative Court, *Marku and Murphy*, [2016] EWHC 1801 (Admin), at para. 16.

- in the *Aswat* case, the ECtHR stated that a terrorism suspect, who had been transferred from prison to a high security psychiatric hospital in the UK because of his mental health situation, could not be extradited to the United States because of the risk of prolonged solitary confinement, which considering his condition would amount to “inhuman or degrading treatment”;²⁰⁷
- in exceptional cases, the non-availability of medical treatment creating serious and potentially fatal health difficulties.²⁰⁸

Under Kenyan law, Section 11 (5) of the Extradition (Commonwealth Countries) Act provides that:

“[w]here the Attorney General is of the opinion that it would be dangerous to the life or prejudicial to the health of a fugitive to surrender him, he may, in lieu of ordering that he be surrendered, by warrant, order that he be held in custody at the place where he is for the time being, or at any other place to which the Attorney General considers that he can be removed without danger to his life or prejudice to his health, until such time as he can without such danger or prejudice be surrendered.”

7.7.3.2.3 Arbitrary Detention and Denial of Fair Trial

The United Nations Working Group on Arbitrary Detention has issued a “Legal Opinion on Preventing Arbitrary Detention in the Context of International Transfer of Detainees, Particularly in Countering Terrorism”. The Working Group states that Governments should (in addition to the risk of torture) “include the risk of arbitrary detention in the receiving State *per se* among the elements to be taken into consideration when asked to extradite, deport, expel or otherwise hand a person over to the authorities of another State, particularly in the context of efforts to counter terrorism. To remove a person to a State where there is a genuine risk that the person will be detained without legal basis, or without charges over a prolonged time, or tried before a court that manifestly follows orders from the executive branch”²⁰⁹ would be incompatible with international human rights obligations.

Similarly, the ECtHR has ruled that the non-refoulement principle may prevent States from extraditing a terrorism suspect to a country where he would risk a “flagrant denial of a fair trial.” The ECtHR has found that a “flagrant denial of a fair trial, and thereby a denial of justice, undoubtedly occurs.”²¹⁰

- “Where a person is detained because of suspicions that he has been planning or has committed a criminal offence without having any access to an independent and impartial tribunal to have the legality of his or her detention reviewed and, if the suspicions do not prove to be well-founded, to obtain release;”²¹¹
- If there is “a deliberate and systematic refusal of access to a lawyer to defend oneself;”²¹²
- Where evidence obtained under torture may be admitted.²¹³

The cases of *Othman (Abu Qatada)* and *Al-Moayad* (the latter discussed in the next section) were cases of extradition or deportation of terrorism suspects in which the issue of an alleged risk of a “flagrant denial of justice” in the receiving State arose.

207 ECtHR, *Aswat v. the United Kingdom*, Application No. 17299/12, Judgment of 16 April 2013.

208 ECtHR, *N. v. United Kingdom*, Application No. 26565/05, Judgment 27 May 2008.

209 Report of the Working Group on Arbitrary Detention, A/HRC/4/40, para. 49.

210 ECtHR, *Al-Moayad v. Germany*, Admissibility, Application No. 35865/03, Judgment of 20 February 2007, para. 101.

211 *Ibid.*, para 101.

212 *Ibid.*, para 101.

213 ECtHR, *Othman v. the United Kingdom*, Application No. 8139/09, Judgment of 17 January 2012.



Case Study: Extradition, Deportation and the Prohibition on Torture, Inhuman and Degrading Treatment

The Abu Qatada Case:* Mr. Othman, a/k/a “Abu Qatada,” a Jordanian national, obtained asylum in the United Kingdom on grounds that he had been tortured in detention in Jordan and the risk, if he was returned, that such treatment might reoccur. While in the United Kingdom, Mr. Othman was a co-defendant in two terrorism trials in Jordan (the charges related to conspiracies to carry out bombings in Jordan) and was convicted in absentia in both cases. The statements implicating Mr. Othman were made by co-defendants during interrogation before the trial. At trial, these co-defendants retracted their statements claiming that they had been made under torture, but in both instances the court found the pre-trial statements credible and relied on them in convicting Mr. Othman. Jordan sought the extradition of Mr. Othman from the United Kingdom, but subsequently abandoned its extradition request.

In 2001, authorities in the United Kingdom became concerned that Mr. Othman was allegedly regarded by many terrorists as a spiritual adviser whose views legitimised acts of violence and began proceedings to deport him to Jordan. Before the United Kingdom courts and before the ECtHR, Mr. Othman objected to his deportation on two grounds: first, that he would be at risk of torture if removed to Jordan; and, second, that he would be re-tried and convicted on the basis of statements obtained under torture.

To counter the first of the two objections, the Government of the United Kingdom negotiated a memorandum of understanding with Jordan, which is discussed below in the section on “diplomatic assurances” (section 7.8).

Regarding the second ground for opposing deportation, the ECtHR found that Mr. Othman’s deportation would breach the right to a fair trial. It found that there was a real risk that evidence that had been obtained by torture may be used in trying him for terrorist offences and that the use of such evidence would amount to a flagrant denial of justice. This rendered his deportation contrary to the right to a fair trial. The Court held that where there was a real risk of torture evidence being admitted in evidence against a defendant, extradition would constitute a violation of the right to a fair trial by the requested State.

*ECtHR, *Othman v. the United Kingdom*, Application No. 8139/09, Judgment of 17 January 2012.

7.7.3.2.4 Request for Extradition Not Made in Good Faith

Under Kenyan law, Section 16 (3) of the Extradition (Contiguous and Foreign Countries) Act provides as follows:

“Where the return of a prisoner is sought or arranged under Part III and it appears to the magistrate that by reason of the trivial nature of the case, or by reason of the application for the return of the prisoner not being made in good faith in the interests of justice, or otherwise, it would, having regard to the distance, to the facilities of communication and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the prisoner either at all or until the expiration of a certain period, the magistrate may discharge the prisoner either absolutely or on bail or order that he shall not be returned until after the expiration of the period named in the order or may make such other order in the matter as the magistrate thinks proper.”

The London Scheme for Extradition within the Commonwealth, at paragraph 13 (b) and (c), provides that the extradition of a person sought will be precluded if-

- “(b) the competent authority is satisfied that by reason of
 - (i) the trivial nature of the case, or
 - (ii) the accusation against the person sought not having been made in good faith or in the interests of justice, or
 - (iii) the passage of time since the commission of the offence, or
 - (iv) any other sufficient cause,

it would, having regard to all the circumstances be unjust or oppressive or too severe a punishment for the person to be extradited or, as the case may be, extradited before the expiry of a period specified by that authority.

- (c) the competent authority is satisfied that the person sought has been convicted (and is neither unlawfully at large nor at large in breach of a condition of a licence to be at large), or has been acquitted, whether within or outside the Commonwealth, of the offence for which extradition is sought.”



Activity: Human Rights Based Objections to Extradition to Kenya

Assume Kenya is seeking the extradition of a person suspected to have had a key role in planning a suicide bomb attack in Kenya in 2014 that resulted in several deaths. The fugitive is likely to resist extradition and his defence counsel is likely to search the internet for reports about Kenya that will support an argument that the non-refoulement principle in human rights law prohibits extradition to Kenya.

- Assume you are a research assistant assisting the fugitive’s foreign defence counsel. You have been tasked with finding all the human rights information about Kenya useful to resist extradition to Kenya. Write up the argument to be made on behalf of the fugitive to resist extradition to Kenya.

In many countries, once the fugitive has moved before the extradition court to resist extradition on human rights grounds, the prosecution will seek advice from the Kenyan Government on how to react to the arguments made by the person sought.

- Assume you work for the Kenyan Attorney General/DPP. The fugitive terrorism suspect is resisting extradition on the human rights grounds researched under assignment (1) above. What arguments will you provide to the requested country’s prosecution to assist them in overcoming the obstacles raised by the fugitive and obtaining an order that extradition to Kenya can go ahead?

Activities (1) and (2) can also be split among two teams, one acting for the sought terrorism suspect, the other for Kenya’s Attorney General/DPP. Prepare written submissions and then hold a mock oral hearing.

7.7.4 The Non-Discrimination Clause in Universal Counter-Terrorism Instruments

Kenyan law allows the State to refuse international cooperation in criminal matters in terrorism and other cases where there is reason to believe that the prosecution in the requesting State may be motivated by discriminatory motives. It also allows the State to refuse/deny a request for extradition on the sole ground that it concerns a political offence.

Under the Extradition (Commonwealth Countries) Act, Section 6 provides that “[a] fugitive shall not be surrendered, or committed to, or kept in custody for the purposes of surrender, if it appears to the court of committal, or to the High Court on an application for *habeas corpus*, or to the Attorney General that –

- a) the offence of which the fugitive is accused or was convicted is an offence of a political character; or
- b) the request for his surrender (though purporting to be made on account of an extradition offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions; or
- c) that he might, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.”

Similarly, Section 16 (a) of the Extradition (Contiguous and Foreign Countries) Act restricts the surrender or return of a fugitive criminal “if the offence in respect of which his surrender is required, or the offence specified in the warrant, as the case may be, is one of a political character or if it appears to the court or the Minister that the requisition for the surrender, or the application for endorsement of a warrant and the return of the person named therein, has in fact been made with a view to punish him for an offence of a political character.”

The London Scheme for Extradition within the Commonwealth at paragraph 13 (a) also provides that the extradition of a person sought will be precluded by law if it appears to the competent authority that: (i) the request for extradition although purporting to be made for an extradition offence was in fact made for the purpose of prosecuting or punishing the person on account of race, religion, sex, nationality or political opinions, or (ii) that the person may be prejudiced at trial or punished, detained or restricted in personal liberty by reason of race, religion, sex, nationality or political opinions.

At the international level, universal counter-terrorism instruments contain a clause that allows States to refuse international cooperation in criminal matters in terrorism cases where they have reason to believe that the prosecution in the requesting State may be motivated by discriminatory motives. For example, Article 15 of the 1999 Convention for the Suppression of the Financing of Terrorism, e.g., provides:

“Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in Article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person’s race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person’s position for any of these reasons.”

Note that this non-discrimination clause in the universal counter-terrorism instruments provides an optional ground to refuse extradition and mutual legal assistance. It does not create an obligation to refuse cooperation. The obligation under refugee and human rights law not to extradite, expel or otherwise remove a person to another State where that person faces a real risk of arbitrary killing, torture or other irreparable harm, however, remains unchanged.

The universal counter-terrorism instruments also stress that terrorist acts cannot be considered “political offences.” For instance, Article 11 of the 1997 Convention for the Suppression of Terrorist Bombings provides that

“[n]one of the offences set forth in Article 2 [of the Convention, i.e. participation in acts of terrorist bombing,] shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.”

It is very important to keep this principle in mind when applying both the non-discrimination clause in the universal counter-terrorism instruments and the grounds of exclusion in Article 1 (F) of the Refugee Convention (see section 2.1 above).

7.7.5 Extradition and Non-Refoulement: Interim Conclusion

The preceding sections have highlighted the very considerable role the non-refoulement principle –under refugee law, and particularly under international human rights law – nowadays plays in extradition practice, including in terrorism cases. As observed in the UNHCR Guidance Note on Extradition and International Refugee Protection:

“Traditionally, extradition was viewed as a matter solely between States, and the wanted person was deemed to have standing to oppose his or her surrender to the requesting State only on the grounds that it would be in breach of the applicable inter-State agreement. Developments in international refugee and human rights law have fundamentally changed the position of the individual in the extradition process. A determination by the requested State on a request for

extradition clearly has a significant impact on the situation of the individual concerned. Given the potential consequences, procedural safeguards need to be in place to ensure that issues pertaining to the wanted person's circumstances and any risks which may result from his or her surrender to the requesting State are being considered as part of the extradition process."²¹⁴

These considerations apply also where the person whose extradition is sought, or transfer from one country to another is considered, is suspected or has been convicted of the commission of terrorism related offences.

Respect for the non-refoulement principle must be combined with respect for the obligation to ensure that terrorists are brought to justice and cannot find safe havens shielding them from prosecution or punishment by crossing borders. In the following sections, we will discuss two important tools in this regard: diplomatic assurances and the principle "extradite or prosecute". We will also explore why other "alternatives to extradition", namely so-called disguised extraditions and extraordinary renditions, have been found to be incompatible with the rule of law and human rights.



Tools

- For further information about the interplay between extradition and international refugee law, see the UNHCR Guidance Note on Extradition and International Refugee Protection, available at the following address: <http://www.refworld.org/docid/481ec7d92.html>.
- Further guidance as to the scope and content of the principle of non-refoulement in international refugee law is available here: <http://www.unhcr.org/refworld/docid/470a33af0.html>.
- The UNHCR Guidelines on the Application in Mass Influx Situations of the Exclusion Clauses of Article 1 (F) of the 1951 Convention relating to the Status of Refugees are available here: <http://www.refworld.org/docid/43f48c0b4.html> and further UNHCR guidance on "Addressing Security Concerns without Undermining Refugee Protection" (2015) is available here: <http://www.refworld.org/docid/5672aed34.html>.
- UNODC's publication Frequently Asked Questions on International Law Aspects of Countering Terrorism explains the relationship between counter-terrorism and international refugee law (chapter 4): <http://www.unodc.org/documents/terrorism/Publications/FAQ/English.pdf>.
- A report by the United Nations Special Rapporteur on human rights while countering terrorism dealing with refugee protection and counterterrorism is available here: <http://www.refworld.org/pdfid/472850e92.pdf>.
- The Committee Against Torture General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications) is available here: <http://www.refworld.org>.

7.8 DIPLOMATIC ASSURANCES

Diplomatic assurances are commitments given by the State to which the deportee or extraditee is to be transferred as to the treatment that he or she will receive upon transfer to the receiving State. These commitments may simply amount to written or verbal undertakings given by diplomats or other State representatives that an individual will be tried by a civilian court and not a military court, or that the prosecution will not seek the death penalty, or they can take the form of a formal memorandum of understanding between the States in question containing detailed arrangements for supervision or oversight.

Diplomatic assurances can be a very important mechanism to enable international cooperation in criminal matters in terrorism cases, and particularly the transfer of terrorism suspects from one jurisdiction to another. Assurances that the death penalty will not be sought or imposed are now given as a matter of course (in particular between the United States and the member States of the COE), and the ECtHR has been prepared

214 UNHCR, Guidance Note on Extradition and International Refugee Protection (April 2008), para. 46.

to uphold such assurances on a number of occasions.²¹⁵ Diplomatic assurances can also be requested and given regarding fair trial guarantees. E.g., before approving an extradition the requested government might seek assurances that the individual concerned will be tried by a regular civilian court. This was the case in the *Al-Moayad* case.



Case Study on Diplomatic Assurances: The *Al-Moayad* Case*

Mr. Al-Moayad, a Yemeni national, was arrested in Germany in January 2003 on the basis of an arrest warrant issued by the United States of America, where he was charged with providing money, weapons and equipment to terrorist groups. The United States then made an extradition request pursuant to the extradition treaty between Germany and the United States. Mr. Al-Moayad, supported by his lawyers, opposed the extradition and asked to be repatriated to Yemen.

The extradition treaty provided that where a person is extradited from Germany to the United States, the United States prosecuting authorities would not seek the death penalty. Additionally, in the course of the extradition proceedings, the United States Embassy in Germany gave an assurance to the German authorities that Mr. Al-Moayad would not be prosecuted by a military tribunal or an extraordinary court, and would not be detained outside the United States (i.e. he would not be detained at Guantanamo or Bagram airfield in Afghanistan).

Before the German courts, and then before the ECtHR, Mr. Al-Moayad claimed that in case of extradition to the United States he would, like other terrorism suspects, be detained at the detention facilities in Guantanamo Bay indefinitely without access to a court and a lawyer, be subjected to interrogation techniques violating the prohibition against torture or inhuman or degrading treatment, and be tried before a military commission. He supported his allegations with references to reports by non-governmental organizations and newspapers.

The ECtHR noted that all the reports referred to by Mr. al-Moayad related to the situation of persons detained at Guantanamo Bay or other United States detention facilities outside United States territory. In light of the assurances that Mr. Al-Moayad would be detained in the United States and tried by a civilian court, the ECtHR found that the assurances obtained by Germany were sufficient to avert the risks alleged by Mr. Al-Moayad. In this regard, the ECtHR also accepted that the German government was justified in relying on these assurances, as the experience showed that assurances given in extradition proceedings between Germany and the United States had always been respected in the past.

The ECtHR concluded that Germany would not violate Mr. Al-Moayad's human rights by extraditing him to the United States. Mr. al-Moayad was extradited to the United States and tried, convicted and sentenced to a prison term in a civilian court.

*ECtHR, *Al-Moayad v. Germany*, Application No. 35865/03, Decision on Admissibility of 20 February 2007.

While diplomatic assurances regarding capital punishment and fair trial guarantees are used regularly and accepted as compatible with human rights obligations, the situation is quite different with regard to diplomatic assurances concerning torture. The question whether diplomatic assurances can provide an adequate protection against torture and ill-treatment in the receiving State following extradition or deportation is highly contentious. The Special Rapporteur on Torture has stated that "diplomatic assurances with regard to torture are nothing but attempts to circumvent the absolute prohibition of torture and refoulement, and [States should] refrain from seeking and adopting such assurances with States with a proven record of torture."²¹⁶ Also, UNHCR the expressed concern about the use of diplomatic assurances to justify the transfer of individuals to countries where they may face a real risk of torture.²¹⁷

215 ECtHR, *Babar Ahmad v. the United Kingdom*, Application No. 24027/07, Judgment of 10 April 2012.

216 Report of the Special Rapporteur on the Question of Torture, E/CN.4/2006/6, 23 December 2005.

217 A/HRC/4/88, paras. 8-12.

Diplomatic assurances regarding torture and inhuman and degrading treatment have serious inherent weaknesses: as a matter of international law, torture and inhuman and degrading treatment are already prohibited in absolute terms in all States. Diplomatic assurances therefore provide little in terms of additional protection. On the contrary, where there is a need for such assurances, there is clearly an acknowledged risk of torture and ill-treatment. On a practical level, such assurances will be very difficult to verify, and if a violation is found, the torture victim and the State that requested and obtained assurances will generally have little effective remedies. “Due to the absolute nature of the prohibition of torture or inhuman or degrading treatment, formal assurances cannot suffice where a risk nonetheless remains.”²¹⁸

In its case-law, the ECtHR has “cautioned against reliance on diplomatic assurances against torture from a State where torture is endemic or persistent” (*Ismoilov* judgment, para. 127), and has generally found such assurances to be inadequate as protection against torture and ill-treatment in the receiving State following extradition or deportation. In the *Abu Qatada* case, however, the ECtHR found the memorandum of understanding negotiated between the United Kingdom and the Kingdom of Jordan to be sufficient to remove the risk that Abu Qatada be subjected to torture in case of transfer to Jordan.²¹⁹ The ECtHR noted that the assurances were very specific, that they had been given by an official who could bind the State, and that compliance with the assurances could be objectively verified through diplomatic or other monitoring mechanisms, including unfettered access to Abu Qatada by his lawyers. The ECtHR took the position that diplomatic assurances can, if very stringent conditions are met, be sufficient to remove any real risk of ill-treatment and thus justify the transfer of a person that would otherwise be incompatible with the non-refoulement principle. As mentioned above, the ECtHR nonetheless asked the United Kingdom not to deport Abu Qatada to Jordan because of the risk that statements obtained under torture might be used as evidence against him.



Activity: Human Rights Based Objections to Extradition and Diplomatic Assurances

- Has Kenya sought or received diplomatic assurances from another State as to the treatment a deportee or extraditee will receive if sent to that State? What form have these assurances taken?
- If a receiving State offering assurances has a poor record of complying with fundamental human rights obligations, how does this affect the assessment of the weight or reliance that can be placed on these assurances?



Further Reading

- The position of the High Commissioner for Human Rights on diplomatic assurances is set forth in this report: <http://www.statewatch.org/terrorlists/UNHRC-mar07.pdf>.
- UNHCR has published a *Note on Diplomatic Assurances and International Refugee Protection*: <http://www.refworld.org/pdfid/44dc81164.pdf>.
- The ECtHR has set forth its elaborate test regarding the sufficiency of assurances in the *Abu Qatada* case (ECtHR, *Othman v. the United Kingdom*, Application No. 8139/09, Judgment of 17 January 2012, para. 189): <http://www.refworld.org/docid/4f169dc62.html>.

218 Report by Mr. Alvaro Gil-Robles, COE Commissioner for Human Rights, on his visit to Sweden (21-23 April 2004), Comm DH (2004) 13, para. 19.

219 ECtHR, *Othman v. the United Kingdom*, Application No. 8139/09, Judgment of 17 January 2012, paras. 183 and following.

7.9 ALTERNATIVES TO EXTRADITION AND “DISGUISED EXTRADITION”

7.9.1 The “Extradite or Prosecute” Principle

There are instances in which a State prosecuting a terrorism suspect or seeking to obtain custody of a person convicted of terrorist offences will find it impossible to obtain custody through extradition proceedings. It may be that extradition proceedings were pursued but extradition was refused because the requested State requires a bilateral treaty, or on grounds of lack of dual criminality or on human rights grounds, or because the requested State does not, as matter of its constitutional law, extradite its own citizens, or because the requested State is providing *de facto* a safe haven to terrorism suspects.

The universal counter-terrorism instruments establish that in such cases the State refusing extradition is under an obligation to “submit the case without undue delay to its competent authorities for the purpose of prosecution” (e.g. Article 8 of the 1997 Terrorist Bombing Convention). This is commonly referred to as the *aut dedere aut judicare* (“extradite or prosecute”) principle.

As discussed under section 7.3 above, the obligation to extradite under Kenyan law is provided for under Section 4 of the Extradition (Contiguous and Foreign Countries) Act, and Section 5 of the Extradition (Commonwealth Countries) Act. Both Acts make provisions for the obligation of authorities in Kenya to surrender fugitive criminals. The principle of extradite or prosecute applies with equal measure. The purpose of this principle is to ensure that Kenya does not provide a safe haven for criminals.



Activity: Case Study on the “Extradite or Prosecute” Principle

T is a citizen of Greyland. He belongs to the Reddies, a religious and ethnic minority group in Greyland that has longstanding grievances against the central government. The Red Panthers are an armed group that has carried out explosives attacks against police stations and army barracks in Greyland. The Red Panthers argue that these attacks are committed to advance the cause of Reddy rights.

T is in Kenya, where he is employed with a regular work visa in a tourist hotel on the coast. The Government of Greyland requests from Kenya T’s provisional arrest and extradition on the basis of an arrest warrant issued by the Greyland special counter-terrorism court. The arrest warrant alleges that there are substantial reasons to believe that T was involved in several attacks against police stations in Greyland. Except for T’s presence on Kenyan territory, the alleged facts have no link to Kenya.

T successfully opposes the extradition request, which is refused.

- 1) What steps does the “extradite or prosecute” principle enshrined in numerous international treaties (including the 1997 Convention for the Suppression of Terrorist Bombings, ratified by Kenya) require of the Kenyan authorities in such a case?
- 2) What are the legal and practical obstacles to a prosecution in Kenya?
- 3) Are there any alternatives – acceptable under Kenyan and international law – to initiating criminal proceedings against T in Kenya? Would your position on this question change if T’s stay in Kenya was not in accordance with Kenyan immigration law?

Consider the questions above assuming in turn that the extradition request was refused on the ground that:

- a) While Kenya and Greyland are both parties to the 1997 Convention for the Suppression of Terrorist Bombings, there is no bilateral extradition treaty between the two countries, and Greyland is not a party to the London Scheme for extradition.
- b) Greyland’s Constitution prohibits the extradition of its own nationals, and would therefore refuse extradition of a Kenyan national sought by Kenya under analogous circumstances. The requirement of reciprocity is therefore not met, and Kenya will not extradite in the absence of reciprocity.

- c) United Nations reports on the human rights situation in Greyland state that the use of witness statements obtained under circumstances amounting to torture is frequent in trials on terrorism related charges in Greyland.
- d) T successfully argued in front of the Kenyan courts that the charges against him are not supported by any evidence and are motivated by the intention of the Greyland authorities to punish him for his peaceful activism on behalf of democracy and Reddy rights in Greyland.

7.9.2 Alternatives to Extradition and the Doctrine of Abuse of Process

In spite of the “extradite or prosecute” principle, some States have had recourse to alternative means to obtain custody of a fugitive terrorism suspect. These have included the use of deportation by the host State of the fugitive (following expulsion proceedings under immigration laws), lures to trick the fugitive to a territory where he can be arrested and from where he can subsequently be extradited, kidnapping of the fugitive (with or without the complicity of the authorities of the host State) and so-called “extraordinary rendition.”

International practice shows that these means of obtaining custody have been used not only where extradition was not possible or had been refused by the requested State, but also in some instances in anticipation of a possible refusal of an extradition request or out of impatience with the potential delays connected to extradition proceedings. Such practices raise complex legal problems, which have not received a univocal and clear-cut answer in the practice of governments affected and the case-law of international and domestic courts.

From the point of view of relations between States, where a State acts extra-territorially in seizing or detaining a suspect in a manner inconsistent with the sovereignty of the suspect’s host State, this will generally involve a violation of the rights of the host State under international law and may lead to tensions at the diplomatic level.

From the point of view of the human rights of the fugitive, issues may arise both in the State that has obtained custody of a fugitive abroad without resorting to extradition proceedings (discussed in the present section, 7.9.2), and in the State whose officials transfer the fugitive to a different jurisdiction for prosecution without extradition proceedings (discussed in the next two sections, 7.9.3 and 7.10).

Where authorities have obtained custody over a fugitive abroad without extradition proceedings, the question arises whether he can be lawfully detained and tried for terrorism offences. Schematically, two positions can be distinguished:

- The maxim *male captus, bene detentus* (Latin for “wrongly captured, properly detained”) expresses the principle that a court may exercise jurisdiction over an accused person regardless of how that person has come into the jurisdiction of the court.
- By contrast, courts in many national systems, as well as international human rights and criminal courts, adopt (or gravitate towards) a position of an “abuse of process” doctrine which was applied by the Appeals Chamber of the International Criminal Tribunal for Rwanda in the *Barayagwiza* case. According to this doctrine, a court may decline – as a matter of discretion – to exercise its jurisdiction in cases “where to exercise that jurisdiction in light of serious and egregious violations of the accused’s right would prove detrimental to the court’s integrity.”²²⁰

The “abuse of process” doctrine would appear to be better suited to ensuring respect for human rights, as it offers an effective remedy for serious human rights violations in obtaining custody of fugitives. What constitutes a human rights violation serious enough to warrant application of the abuse of process doctrine is a question that has received very different answers from one legal system to another.

220 *Barayagwiza*, Decision of the ICTR Appeals Chamber, 3 November 1999, para. 74.

National and international courts have, however, distinguished between extraterritorial abductions and other coercive action to secure custody of a suspect, and cases in which custody of a suspect abroad is obtained by trickery. The cases summarized below offer some examples.



Case Study: Abuse of Process – The Mullen Case*

British authorities, in disregard of available extradition procedures, initiated and procured the unlawful deportation of the appellant from Zimbabwe to England. The appellant was charged and tried for conspiracy to cause explosions likely to endanger life or to cause serious injury to property. It was alleged that he was a member of the IRA. In 1990, following a trial at the Central Criminal Court, he was convicted and sentenced to 30 years imprisonment. Some years later, the circumstances in which he was to be deported to England came to light.

On appeal, his conviction was quashed by the England and Wales Court of Appeal. In doing so, the Court held that:

"Furthermore, although abuse of process, unlike jurisdiction, is a matter calling for the exercise of discretion, it seems to us that Bennett-type abuse, where it would be offensive to justice and propriety to try the defendant at all, is different both from the type of abuse which renders a fair trial impossible and from all other cases where an exercise of judicial discretion is called for. It arises not from the relationship between the prosecution and the defendant, but from the relationship between the prosecution and the Court. It arises from the Court's need to exercise control over executive involvement in the whole prosecution process, not limited to the trial itself."

In particular, the Court observed as follows:

"This court recognizes the immense degree of public revulsion which has, quite properly, attached to the activities of those who have assisted and furthered the violent operations of the I.R.A. and other terrorist organizations. In the discretionary exercise, great weight must therefore be attached to the nature of the offence involved in this case. Against that, however, the conduct of the security services and police in procuring the unlawful deportation of the defendant in the manner which has been described represents, in the view of this court, a blatant and extremely serious failure to adhere to the rule of law with regard to the production of a defendant for prosecution in the English courts. The need to discourage such conduct on the part of those who are responsible for criminal prosecutions is a matter of public policy to which, as appears from *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42 and *R v Latif* [1996] 1 WLR 104, very considerable weight must be attached."

**Regina v. Mullen (Nicholas Robert Neil)*, Times 15-Feb-1999, [2000] QB 520, [1999] EWCA Crim 278, [1999] 2 CAR 143



Case Studies Regarding the Use of Lures

The Dokmanović Case:* Mr. Dokmanović was charged with crimes against humanity and war crimes in a "sealed", i.e. secret, indictment issued by the International Criminal Tribunal for the Former Yugoslavia (ICTY). In the aftermath of the war between Serbia and Croatia, Mr. Dokmanović was lured by the ICTY Prosecution from Serbia into a part of Croatia at the time under United Nations transitional administration by the prospect of compensation for real estate he owned in Croatia. Once in UN-administered territory, he was arrested at a United Nations base and taken to The Hague, Netherlands, to face trial before the international tribunal. The arrest was recorded on video, which was subsequently shown to the ICTY judges, who found that no force had been used. Mr. Dokmanović argued that the circumstances of his arrest violated his human rights and that he should be released.

The Trial Chamber reviewed case law from several jurisdictions and reached the conclusion that "there is strong support ... for the notion that luring a suspect into another jurisdiction in order to effect his arrest is not an abuse of the suspect's rights or an abuse of process." [at 68] ... "There are, however, cases in national jurisdictions where courts have frowned upon the notion of luring an individual into a jurisdiction in order to effectuate his arrest. However, in all the national or international cases with which we are familiar, which found luring to be a violation of some international law principle or a suspect's rights, there existed an established extradition treaty that was, in each case, circumvented, or there was unjustified violence used against the suspect." [at 74]

The ICTY Trial Chamber noted that in the case of Mr. Dokmanović no force was used, and there was “no inhumane or outrageous conduct”, “nothing about the arrest to shock the conscience” [at 75]. On this basis, it decided that the circumstances of the arrest did not warrant Mr. Dokmanović’s release and were not an obstacle to the prosecution going ahead in his case.

The Al-Moayad Case:** The human rights aspects of the extradition of Mr. Al-Moayad from Germany to the United States of America have been examined above. His arrest in Germany was preceded by the following circumstances, which also gave rise to human rights litigation before the German courts and the ECtHR. In considering this case, it is important to keep in mind that Yemen’s constitution prohibits the extradition of Yemeni nationals.

Mr. Al-Moayad was a national of Yemen working as an adviser to the Minister for Religious Foundations. An undercover agent approached Mr. Al-Moayad stating that he could connect him with a wealthy man who was willing to make a major financial contribution. The purpose of this donation was disputed, but was alleged by the United States to be for financing al-Qaeda activities. Mr. Al-Moayad was interested in this prospect and willingly travelled to Germany for the purposes of meeting the donor. There he was arrested by the German police based on an arrest warrant issued by the United States authorities, which was then followed by an extradition request. The Government of Yemen demanded that Mr. Al-Moayad be returned to his home country. Mr. Al-Moayad himself complained that Germany had violated the prohibition of torture, his right to liberty and security, and his right to a fair trial by luring him into their territory through trickery and subsequently arresting him and agreeing to extradition to the United States.

With regards to the use of luring by trickery for the purposes of circumventing a ban on extradition in the suspect’s State of origin (in this case, Yemen), the ECtHR (as before it the German Federal Constitutional Court) found that “there was no general rule of public international law, at any rate not in cases like the present one, to prevent the extradition of a person who had been lured, by trickery, from his State of origin to the requested State in order to circumvent a ban on extradition that was valid in the State of origin.” [para 84]. As noted by the Constitutional Court, the applicant in this case “travelled to [Germany] on the basis of an independent decision in order to pursue his own specific interests” [para 20]. The ECtHR warned, however, that the situation would have been different if Mr. Al-Moayad had been subjected to “direct force aimed at bending his will” or was “threatened with the use of force” [para 19].

*ICTY, *Prosecutor v. Mrksić and Others* (IT-95-13a-PT), Decision on the Motion for Release by the Accused Slavko Dokmanović, 22 October 1997.

**ECtHR, *Al-Moayad v. Germany*, Application No. 35865/03, Decision on Admissibility of 20 February 2007.

7.9.3 Disguised Extradition

Deportation is the expulsion from a country of an alien whose presence is unwanted or deemed prejudicial. Where expulsion and deportation proceedings are initiated by the authorities of a State hosting a terrorism suspect at the initiative of another State, which is looking to exercise jurisdiction for a criminal offence over the deportee, there may be an abuse of the immigration powers for extraneous purposes. The deportation may amount to a “disguised extradition.”

A “disguised extradition” raises issues with regard to the human rights obligations of both the deporting host State and the receiving State. The latter were discussed in section 7.9.2 above. As far as human rights obligations of the deporting host State are concerned, the following rights might be implicated:

- The right of an alien lawfully in the territory of a State to be expelled therefrom only in pursuance of a decision reached in accordance with law to submit reasons against his expulsion (Article 13 ICCPR);
- The right to liberty and prohibition of unlawful and arbitrary detention;
- The (non-refoulement) right not to be removed to a territory where one is at risk of torture, inhuman or degrading treatment, or other serious irreparable harm.



Case Study: Disguised Extradition

The *Bozano Case**: Italy had requested the extradition of Mr. Bozano from France after his conviction in absentia of serious crimes. That request received a negative ruling from the Limoges Court of Appeal in France.

One evening, Mr. Bozano was served with a deportation order made several weeks earlier and was taken forcibly by the French police to the Swiss border, where he was handed over to the Swiss police. He was then extradited from Switzerland to Italy.

The ECtHR noted that “lawfulness” was an essential requirement of the right to liberty and [at 59] that it implied the absence of arbitrariness. The Court held that it “attaches great weight to the circumstances in which the applicant was forcibly conveyed to the Swiss border”. The Court further noted that the applicant had been served with a deportation order on the day of his transfer, too late for him to effectively challenge the decision (made one month earlier). The Court concluded that the facts amounted “to a disguised form of extradition designed to circumvent the negative ruling of ... the Limoges Court of Appeal, and not to detention ... taken with a view to deportation”. The right to liberty had therefore been violated.

*ECtHR, *Bozano v. France*, Merits, 9 EHRR 297 (1986).

The following two cases discussed above can also be looked at through a “disguised extradition” lense.

The *Giry Case*: see section 7.6 above

The *Mullen Case*: see section 7.9.2 above



Activities

Assume that a terrorism suspect sought for prosecution by Kenya was a fugitive abroad and had been apprehended and brought to Kenya by the use of a lure similar to the one used in the *Al-Moayad* case. Would the Kenyan courts object to putting him on trial? What elements would they take into consideration in reaching their decision?

7.10 “EXTRAORDINARY RENDITION”



What is “Extraordinary Rendition”?

The terms “rendition” and “extraordinary rendition” are frequently used in the public debate to refer to irregular transfer and detention of persons suspected of terrorism from one country to another.

The United Nations Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism (A/HRC/13/42, at 36) refers to “extraordinary rendition” as the transfer of a person from one State to another “outside the realm of any international or national legal procedure.” It is in this sense that “extraordinary rendition” is used here.

The COE’s Venice Commission made the following observations regarding the terms “rendition” and “extraordinary rendition:”

“30. As regards the terminology used, [...] “rendition” [...] is not a term used in international law. The term refers to one State obtaining custody over a person suspected of involvement in serious crime (e.g. terrorism) in the territory of another State and/or the transfer of such a person to custody in the first State’s territory, or a place subject to its jurisdiction, or to a third State. “Rendition” is thus a general term referring more to the result – obtaining of custody over a suspected person – rather than the means. Whether a particular “rendition” is lawful will depend upon the laws of the States concerned and on the applicable rules of international law, in particular human rights law. Thus, even if a particular “rendition” is in accordance with the national law of one of the States involved (which may not forbid or even regulate extraterritorial activities of state organs), it may still be unlawful under the national law of the other State(s). Moreover, a “rendition” may be contrary to customary international law and treaty or customary obligations undertaken by the participating State(s) under human rights law and/or international humanitarian law.

31. The term “extraordinary rendition” appears to be used when there is little or no doubt that the obtaining of custody over a person is not in accordance with the existing legal procedures applying in the State where the person was situated at the time.”

European Commission for Democracy through Law, Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners (Opinion 363/2005), paras. 30-31)

In the United Nations Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism (A/HRC/13/42, at para 59), four Special Procedures reporting to the Human Rights Council note the strong relationship that exists in practice between, on the one hand, the unlawful transfer of terrorism suspects from one State to another outside the legal frameworks of extradition and deportation, and, on the other hand, serious human rights violations, such as secret detention, disappearances, torture, and unfair trials before military and special courts. At para 26, they observe that extraordinary rendition tends to have the inherent consequence of placing the person outside the protection of the law.

Moreover, extraordinary rendition inherently nullifies the safeguards in place to uphold the principle of non-refoulement. As observed by the United Nations Working Group on Arbitrary Detention, “what distinguishes deportation or expulsion from the practice of renditions ... is that they have a basis in national law and are preceded by an administrative process resulting in a decision which is notified to the person to be expelled or deported and can be challenged before a court. This opportunity to challenge the removal from the territory of the State is essential to uphold the principle of non-refoulement.”²²¹

Extraordinary rendition may render the transferring State co-responsible under international law for the human rights violations committed in the receiving State. The United Nations Joint Study states in this regard (at para. 159 (c)) that “when a State has actively participated in the arrest and/or transfer of a person when it knew, or ought to have known, that the person would disappear in a secret detention facility or otherwise be detained outside the legally regulated detention system” it becomes complicit in that person’s secret detention. Domestic and international courts dealing with extraordinary rendition cases have issued substantial compensation awards in favour of victims of extraordinary rendition and against the States that handed them over.²²²



Case Studies on Extraordinary Rendition: The *Salim Awadh Salim* Case*

Mr. Salim, a citizen of Kenya, and his wife Ms. Chande, a citizen of Tanzania, had been living in Somalia for three years. In January 2007, they crossed the border into Kenya and were arrested by Kenya’s anti-terrorism police on suspicion of being members of Al Qaida and supporters of the Islamic Courts Union in Somalia. The police detained them *incommunicado* for about three weeks, moving them from one police station to another. Finally, on the night of 27 January 2007, they were driven to an airport where they found themselves in the company of many other detainees, “all Muslims and dressed in Islamic garb” (at 97). The police confiscated all their belongings, handcuffed them with their hands behind their backs, blindfolded them and forced them aboard an aircraft.

According to Mr. Salim’s account, the detainees were flown to Somalia, where they were held for about ten days by military forces of Ethiopia and the Somali Transitional Federal Government. From Somalia, they were flown to Ethiopia. In a prison in Addis Ababa, Mr. Salim was kept for several months in solitary confinement with his hands manacled behind the back all day. For three weeks, he was taken to an isolated house where he was interrogated by white men,

221 A/HRC/4/40, para. 43.

222 See, e.g., the judgment of the ECtHR in the *Case of El-Masri v. The Former Yugoslav Republic of Macedonia*, Application No. 39630/09, Judgment of 13 December 2012, and the judgment of the High Court of Kenya in the case of *Salim Awadh Salim & 10 Others v Commissioner of Police & 3 Others*, Petition 822 of 2008, Judgment of 31 July 2013.

who did not identify themselves or their nationality, for many hours, without access to food or water. In August 2008, 18 months after his arrest, Kenyan anti-terrorism police visited Mr. Salim and the other Kenyan detainees, interrogated them, and took steps to determine their identity and nationality. In October 2008, they were released and returned to their home towns. They were never charged with an offence in Kenya, Ethiopia or Somalia.

In its judgement, the High Court observed (at 135) that the “threat posed by terrorism is beyond dispute, but it cannot be used as an excuse for weakening fundamental human rights enshrined in international law ... as well as in domestic constitutions.”

The High Court then approvingly quotes a report of the Special Rapporteur on Torture to the General Assembly: “However frustrating may be the search for those behind the abominable acts of terrorism and for evidence that would bring them to justice, I am convinced that any temptation to resort to torture or similar ill treatment or to send suspects to countries where they would face such treatment must be firmly resisted. Not only would that be a violation of an absolute and peremptory rule of international law, it would be also responding to a crime against humanity with a further crime under international law. Moreover, it would be signalling to the terrorists that the values espoused by the international community are hollow and no more valid than the travesties of principle defended by the terrorists.” (E/CN.4/2002/76, p.14).

In the case before it, however, the High Court found (at 137) that the evidence before it was not sufficient to conclude that the Kenyan authorities “knew, or ought to have known, that the petitioners would be taken from Somalia to Ethiopia, and be subjected to torture at the hands of security officers from various nations”. It therefore did not find the Kenyan authorities responsible for the treatment Mr. Salim and the others received in Somalia and Ethiopia.

The High Court did, however, find the Kenyan authorities responsible for the arbitrary and unlawful arrest, detention and removal to Somalia of Mr. Salim and the other petitioners. It ordered the authorities to pay compensation to each petitioner (the compensation awards ranged from two to four million Kenyan shillings).

**Salim Awadh Salim & 10 Others v Commissioner of Police & 3 Others*, High Court of Kenya, Petition 822 of 2008, Judgment of 31 July 2013.



Further Reading

- The United Nations Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism (A/HRC/13/42) is available here: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf>.
- The European Commission for Democracy through Law - better known as the Venice Commission - is the COE’s advisory body on constitutional matters. Its role is to *provide legal advice* to COE member States. Upon request of the Parliamentary Assembly of the COE, the Venice Commission issued an Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners (Opinion 363/2005): [http://www.venice.coe.int/webforms/documents/CDL-AD\(2006\)009.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2006)009.aspx).
- Several judgments by national and international courts and decisions by other human rights bodies dealing with extraordinary rendition cases are available online. They include the views of the Human Rights Committee in *Alzery v. Sweden*, CCPR/C/88/D/1416/2005, 10 November 2006 (<http://www.refworld.org/docid/47975afa21.html>), the judgment of the ECtHR in the *Case of El-Masri v. The Former Yugoslav Republic of Macedonia*, Application No. 39630/09, Judgment of 13 December 2012 (https://www.opensocietyfoundations.org/sites/default/files/CASE_OF_EL-MASRI_v__THE_FORMER_YUGOSLAV_REPUBLIC_OF_MACEDONIA_0.pdf).

7.11 THE INTERNATIONAL TRANSFER OF SENTENCED PERSONS

The increasingly transnational nature of terrorism means that it is becoming more and more common for countries around the world to convict and sentence foreign citizens involved in terrorist offences to imprisonment. Prisoner reformation and rehabilitation, which are among the essential aims of imprisonment under international human rights law (Article 10 (3) ICCPR, see Chapter 6.4 above), may be considerably more difficult in the case of foreign offenders.

The international transfer of sentenced prisoners aims to “enable the prisoners to serve out their sentences of imprisonment in the countries of their nationality or in countries with which they have community ties” (Section 2, Kenya Transfer of Prisoners Act), thereby facilitating their fair treatment and social rehabilitation. The recently enacted Transfer of Prisoners Act (No. 22 of 2015) details the conditions for the transfer of prisoners, as well as the eligibility for the transfers to and from Kenya.²²³



Tools

UNODC’s Handbook on the International Transfer of Sentenced Persons (2012 Edition) explains how transferring sentenced persons to serve their sentences in their home countries can contribute to their fair treatment and effective rehabilitation. It is available here: https://www.unodc.org/documents/organized-crime/Publications/Transfer_of_Sentenced_Persons_Ebook_E.pdf.

There are a number of human rights aspects that need to be taken into account with regard to the transfer of persons sentenced on terrorism related charges:

- The principle of *non-refoulement* applies equally to the transfer of sentenced prisoners. As discussed in section 7.7, a State cannot transfer a person if there is a threat to their life, or if they are likely to be subject to torture or to inhuman, degrading treatment or punishment in the country to which they are being sent. Inhuman or degrading treatment can also include inhuman or degrading conditions of detention or the lack of access to medical treatment the prisoner requires. Furthermore, the prohibition against transferring a person to a country where he or she would be at risk of discrimination on grounds of race, religion, nationality, ethnic origin or political opinion applies.
- Rules applying to pardon and remission may differ widely between the sentencing and administering State. It is paramount that there is clarity on which State’s rules apply to remission and early release, and which State’s authorities may grant pardon, amnesty or commutation, as this is likely to have a significant impact on the actual duration of the sentence served in prison, and arbitrariness must be avoided. In light of the high profile nature of many terrorism prisoners, authorities and public opinion in both countries are likely to pay attention to the application of benefits and clemency measures. These matters are regulated in Part V – Enforcement of Sentence (Sections 29 to 36) of the Kenya Transfer of Prisoners Act.
- Kenyan law requires the prisoner’s written consent for the transfer (see Section 7 (c) of the Kenya Transfer of Prisoners Act). Because of the considerable impact of a transfer on the prisoner’s life and the complexity and technicality of some of the potential consequences (e.g. different legal regimes applying to the enforcement of the prison sentence), the prisoner must give a genuinely informed consent. Prisoners should have access to legal advice, free of charge if they are indigent, in making their decision.
- The right to private and family life needs to be taken into account. A person sentenced to imprisonment for terrorism related offences in country A may be a citizen of country B, but have all his private and family life in country A.

7.12 MUTUAL LEGAL ASSISTANCE

The obligation to “afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings” concerning acts of terrorism,²²⁴ applies not only to extradition, but equally to police to police cooperation and mutual legal assistance. Indeed, police to police cooperation and mutual legal assistance

²²³ Section 7, 8, 9 and 10.

²²⁴ See, e.g., Security Council resolution 1373 (2001), operational paragraph 2 (f) and Article 10 (1) of the 1997 Terrorist Bombing Convention.

in the investigation of terrorism related offences and in gathering evidence for terrorism prosecutions make up the bulk of international cooperation in criminal matters against terrorism. Human rights questions however, tend to come up primarily in the context of extradition and other forms of transfer of suspects from one country to another. The reason for this is that extradition proceedings usually involve deprivation of liberty and the surrender of a person by one State to another, with obvious and far reaching implications for the fugitive's human rights. Human rights obligations affecting mutual legal assistance have understandably received far less attention.

This section will examine three important respects in which human rights have to be taken into account also in providing and receiving mutual legal assistance:

- Compliance with human rights in the gathering of evidence abroad to be used in proceedings in Kenya (where Kenya is the requesting State);
- Compliance with human rights in the gathering of evidence in Kenya for proceedings abroad (where Kenya is the State receiving a MLA request);
- Risk of "complicity" in human rights violations in the requesting State.

Most of this equally applies to police to police cooperation.

7.12.1 Gathering of Evidence Abroad for Proceedings in Kenya

As discussed in Chapter 5 (see particularly section 5.10.6), Article 50 (4) of the Constitution provides that "[e]vidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice."

According to Guideline 16 of the United Nations Guidelines on the Role of Prosecutors:

"[w]hen prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly,"

Prosecutors and courts accordingly have an obligation to be vigilant with regard to the use of evidence that might be tainted by human rights abuses. This responsibility becomes significantly more challenging to exercise when evidence has been collected abroad, by the authorities of a different State. Kenyan prosecutors and courts will have far lesser powers, factually and legally, to scrutinize the way evidence was obtained. Moreover, also for diplomatic reasons, they might be reluctant to inquire: questioning the way foreign authorities obtained evidence may be perceived as unfriendly and lacking in respect for the foreign State, jeopardizing future cooperation.

In spite of these considerations, the obligation to ensure that evidence collected through recourse to grave violations of human rights is not used in Kenyan courts in violation of Article 50 (4) of the Constitution remains, also with regard to material gathered abroad. In this regard, criminal investigators, prosecutors and judges should keep in mind at least the following three points.

First, procedures and safeguards relating to evidence-gathering vary from one country to another, depending on legal traditions and law in force. For instance, the requirements for carrying out a lawful search of a private residence will vary from one jurisdiction to another. This implies also variation in the way the right to privacy is protected from one country to another. Such differences do not of course mean that a search carried out abroad without respecting the safeguards established in Kenyan law constitutes a violation of human rights, as the right to privacy might be protected in a different but equally valid way in the jurisdiction where the search is carried out. Equally, the requirements for a valid witness examination, including respect for the privilege against self-incrimination, vary from one legal system to another.



Practical Guidance

Rules on procedures to validly gather evidence vary from one country to another: Which authority authorizes a search or a phone intercept? Who must be present during a search? How are its results recorded? What are the requirements to validly record a witness statement? It is very important for Kenyan authorities requesting MLA to convey clearly to foreign counterparts, where appropriate, what the requirements are under Kenyan law for the evidence to be admissible in court.



Tools

For a summary of differences between common law and civil law traditions regarding gathering of evidence, as well as practical suggestions to overcome related difficulties, see the UNODC *Manual on Mutual Legal Assistance and Extradition*, Chapter II, in particular pages 11 and following, available here: http://www.unodc.org/documents/organized-crime/Publications/Mutual_Legal_Assistance_Ebook_E.pdf.

Second, where there appears to have been a violation of Kenyan law or of the requested State's law in executing a mutual legal assistance request made by Kenya, this will not automatically render the evidence obtained by MLA inadmissible in Kenya. The court will exercise the discretion afforded to it by Article 50 (4) of the Constitution, including assessing whether "the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice" (see Chapter 5.10.6).

Third, the discretion afforded to Kenyan courts by Article 50 (4) of the Constitution with regard to the admission of "[e]vidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights", does not extend to the admission of evidence obtained through torture (see Chapter 3.7.2). Under Article 15 of the Convention Against Torture (CAT), "[a]ny statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings." This rule applies also to statements collected by foreign authorities abroad whose use in proceedings in Kenya is sought.

The difficult question for Kenyan authorities may, however, be how to establish whether a statement obtained by authorities of a third State and challenged in Kenyan court on the ground that it was obtained under torture, is to be considered as "established to have been made as a result of torture" for purposes of Article 15 of the CAT, and thus barred. There are legal and diplomatic limits to the ability of Kenyan investigators, prosecutors and courts to inquire into the circumstances under which a statement was obtained by another State's authorities. It will probably not be possible to obtain the attendance of the foreign officials who recorded the statement for trial within trial. At the same time, to comply with Kenya's obligations under the CAT (and therefore under the Constitution), it would be impermissible to use these difficulties as a pretext to refuse any inquiry into the circumstances under which an alleged foreign "torture statement" was obtained. The following case from Belgium illustrates the challenges and sheds some light on applicable standards.



Case Study: The *El Haski Case**

Mr. El Haski was a citizen of Morocco. Following periods in Syria, Saudi Arabia and Afghanistan (where he took part in military training with a militia leader) he entered Belgium illegally in 2004. After five months in Belgium he applied for asylum. Two weeks after his application, however, he was arrested and charged with participating, as a leader, in the activity of a terrorist group (the Moroccan Islamic Fighting Group or "GICM" after its French name *Groupe Islamique Combattant Marocain*) and other offences.

Evidence transmitted by the Moroccan authorities, obtained in the course of proceedings opened following the Casablanca bombings in 2003, was added to the criminal case file in Belgium. That evidence included witness statements describing the Mr. El Haski's involvement and activities in the GICM.

Mr. El Haski was tried, found guilty of participating in the activities of a terrorist group, and sentenced to seven years imprisonment. He appealed the judgment asking the appellate court to exclude the statements taken in Morocco, which he alleged had been obtained through torture or inhuman treatment. The Court of Appeal, however, considered that Mr. El Haski had provided no evidence capable of shedding "reasonable doubt" on the way in which the statements had been obtained. It therefore rejected the argument and upheld the judgment based, among other things, on the statements transmitted by the Moroccan authorities.

Mr. El Haski complained to the ECtHR. The ECtHR recalled the principle whereby the use of evidence obtained in violation of the prohibition against torture and inhuman or degrading treatment automatically renders the proceedings as a whole unfair.

The ECtHR noted that the statements at issue had been made by suspects questioned in Morocco in investigations and proceedings following the Casablanca bombings of 16 May 2003. On the basis of several reports issued by the United Nations and non-governmental organisations, the ECtHR found that there existed a "real risk" at the time that statements had been obtained using treatment contrary to the prohibition of torture or inhuman or degrading treatment, and that at in the aftermath of the Casablanca bombings the Moroccan judicial system did not offer real guarantees of independent, impartial and serious examination of allegations of torture.

The ECtHR held that in the circumstances it was sufficient for Mr. El Haski to have demonstrated to the domestic court that there existed a "real risk" that the statements had been obtained by torture or inhuman or degrading treatment. The Belgian courts should have assured themselves that this was not the case or otherwise have excluded the statements from the case file. Requiring Mr. El Haski to provide "concrete proof" capable of shedding "reasonable doubt" on the way the statements had been obtained was not an adequate response of the Belgian courts to Mr. El Haski's objections. The ECtHR concluded that there had been a violation of the right to a fair trial.

*ECtHR, *El Haski v. Belgium*, Application No. 649/08/03, Judgment of 25 September 2012.

7.12.2 Gathering of Evidence in Kenya in Execution of a Foreign MLA Request

In executing MLA requests, e.g. examining a witness or carrying out search and seizure of property, Kenyan authorities must comply with Kenyan law, including particularly the human rights provisions of the Constitution. Section 46 of the Mutual Legal Assistance Act states: "the law of Kenya shall govern the procedure for complying with a request and the admissibility of evidence to be gathered under this Act." Regarding covert electronic surveillance, Section 32 (2) of the Act, specifically requires that "[c]overt electronic surveillance shall take place in accordance with the procedures provided for under Kenyan law."

At the same time, the Mutual Legal Assistance Act requires the requesting State to clarify the requirements under its law for evidence to be gathered so that it is admissible. Section 15 on witness examination, e.g., states that the foreign request shall indicate "any special requirements as to the manner of taking evidence relevant to its admissibility in a requesting state", or "whether it is desired that an oath be administered to the witnesses or, as Kenyan law allows, that they be required to make their solemn affirmation".



Practical Guidance

Kenyan authorities executing MLA requests from other States should:

- Work with requesting State counterparts to understand the requirements under the requesting State's law for the evidence to be admissible in court; and
- Show the highest degree of flexibility permissible under Kenyan law in executing foreign MLA requests so that the evidence gathered will be admissible in the requesting State's courts, in line with the principle of "afford[ing] one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings" concerning acts of terrorism.



Activity

Under Tunisia's Law No. 2015-26 on the suppression of terrorism offences and money-laundering (Article 54), the same procedure applies to intercepting telephone communication and to obtaining call record data. Authorization from a prosecutor or judge is required for both. Under Kenyan law, on the other hand, authorization from the High Court is required to intercept telephone calls, while no judicial (or prosecutorial) authorization is required to obtain call record data from a communications service provider.

Scenario 1: In the course of a terrorism investigation in Kenya, a mutual legal assistance request has been made to Tunisia to place the mobile phone of a suspect under surveillance. The Tunisian authorities have complied with the request and provided to the Kenyan counterparts copies of the intercepted communications (in Arabic), which from a summary provided by the Tunisian authorities would appear to be highly relevant for the prosecution in Kenya. The copies of the registrations are authenticated to the satisfaction of the Kenyan judge. However, the Tunisian warrant authorizing the telephone surveillance was issued by a prosecutor, not by a judge (as permissible under Tunisian law).

At trial, the defence objects to the admissibility in evidence of the telephone intercepts on the ground that authorization by a judge, with accompanying guarantees of independence and impartiality, is an essential feature of human rights compliant gathering of intercept evidence under Kenyan law, including the Constitution. The Tunisian intercept evidence was obtained without judicial authorization and should therefore be ruled inadmissible, the defence argues.

- How should the Kenyan trial judge rule on this objection?
- Assume alternatively that the phone intercept in Tunisia was carried out without authorization by a prosecutor or judge, in violation of Tunisian law. How should the Kenyan trial judge rule on the objection in that case?

Scenario 2: Kenya receives a mutual legal assistance request from Tunisia, seeking call record data for K, a person resident in Kenya and using a Kenyan mobile phone, relating to the period from 1 January to 31 December 2015. The request explains that K is suspected of being an associate of T, a man under investigation in Tunisia on suspicion of involvement in terrorism financing. The request states that Tunisian law requires that the call record data must be obtained from the mobile phone company under a judicial warrant and asks the Kenyan authorities to proceed in accordance with this requirement. How should the Kenyan authorities react to this request?

7.12.3 Avoiding “Complicity” in Abusive Terrorism Investigations and Prosecutions Abroad

The international counter-terrorism treaties make clear that the obligation to “afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings” concerning acts of terrorism does not extend to circumstances where the requested State “has substantial grounds for believing that the request ... for mutual legal assistance ... has been made for the purpose of prosecuting or punishing a person on account of that person’s race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person’s position for any of these reasons.” (see, e.g., Article 15 of the 1999 Convention for the Suppression of the Financing of Terrorism).

This principle has been incorporated into Section 11 (e) of the Mutual Legal Assistance Act. It provides that a request for legal assistance under this Act shall be refused if, in the opinion of the Competent Authority,

“(e) there are substantial grounds for believing that the request is made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of the person’s race, sex, religion, nationality or political opinions.”

These provisions relate to circumstances in which there are substantial grounds to believe that the prosecution on terrorism charges in the requesting State is motivated by or serves as a cover for persecution on racial, religious or political grounds. Closely related issues may arise where Kenya is requested for mutual legal assistance in support of a terrorism prosecution in a country where there is a significant risk of violation of human rights protected by the Kenyan Constitution or international law.

As examined in depth above with regard to extradition (and deportation), when it comes to the question under what circumstances a terrorism suspect can be surrendered to the authorities of another State where he might be at risk of capital punishment, torture, arbitrary detention or unfair trial, the non-refoulement principle is fleshed out in a substantial body of international and national practice.

There is not the same level of guidance and practice regarding mutual legal assistance. It is probably fair to say that in the case of MLA, States are not generally expected to exercise the same level of care and scrutiny regarding human rights risks in the requesting State. Considering the much greater volume of MLA requests and the fact that executing an MLA request does not imply surrendering a person to the requesting State, there are good grounds to argue that MLA requests need not be subjected to the same level of scrutiny. Section 11 (e) of the Kenyan Mutual Legal Assistance Act and the practice of other States illustrated in the following Focus Box, however, show that also in the case of MLA requests human rights concerns regarding the requesting State cannot be disregarded.



Human Rights as a Ground for Refusal of MLA Requests

Many States have legislation that allows or requires them to refuse MLA requests if executing the request would prejudice their *ordre public*. This is recognized as an optional ground for refusal in Article 18 (21) (b) of the UNTOC. In countries that have abolished capital punishment, prejudice to the *ordre public* will often include that the death penalty could be imposed by the requesting State in the case in question. It might also include human rights violations such as torture, inhuman or degrading punishment, or serious violations of the right to a fair trial.

The United Kingdom Home Office, for instance, advises in its Guidelines for MLA* that United Kingdom authorities may refuse assistance if the death penalty will be imposed for the offence in question on the ground that in such cases “execution of the request would prejudice the *ordre public* of the UK” (p. 15). The Guidelines advise that if the death sentence is a possible sentence or penalty for the offence under investigation, requesting State authorities should provide an assurance that such a sentence will not be carried out or will be commuted (p. 10).

French legislation considers the death penalty a mandatory ground for refusal of MLA requests, except if assurances are given that the death penalty will be neither sought, nor imposed, nor executed. French legislation also considers the risk of torture or inhuman or degrading treatment a mandatory ground for refusal (Article 694-1 of the CPC).

In East Africa, Djibouti’s anti-money laundering legislation (Law No. 196 of 2002) provides that MLA may be refused if the request would prejudice Djiboutian *ordre public*. Djibouti has abolished the death penalty.

*Requests for Mutual Legal Assistance in Criminal Matters - Guidelines for Authorities Outside of the United Kingdom – 2015, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/415038/

The double criminality requirement as a human rights safeguard: According to Mutual Legal Assistance Act, Section 11 (a), a request for legal assistance under this Act shall be refused if, in the opinion of the Competent Authority, “the request relates to the prosecution or punishment of a person in respect of an act or omission that, if it had occurred in Kenya would not have constituted an offence under Kenyan law”. Where the requesting State is basing its request on an overly broad definition of terrorism related offences, for instance criminalising peaceful protests against the government, the principle of double criminality in Section 11 (a) could also be a ground to refuse cooperation, and thus act as a human rights safeguard.



Activity

Consider the following hypothetical scenarios:

- Kenya has received a request for MLA from country A, specifically to obtain copies of bank records held by a Kenyan bank. These records are, according to the request, of great importance for a terrorism financing investigation. Under country A's laws, terrorism financing is punished by imprisonment for a minimum of twenty years or the death penalty.
- Kenya has received a request for MLA, specifically obtaining the statement of a convicted terrorist imprisoned in Kenya, from country B. According to the request, the witness statement is of great importance for the prosecution of a person suspected of having had a leading role in organizing several suicide explosives attacks which resulted in scores of casualties. In country B, all terrorism cases are tried before military courts whose lack of independence has been criticised by NGOs and the United Nations Special Rapporteur on the independence of judges and lawyers.
- Kenya has received a request for MLA from country C, specifically a request to record the statement of a convicted terrorist imprisoned in Kenya. According to the request, the witness statement is of great importance for a prosecution on terrorism financing charges in country C. In country C, convicted terrorists often serve up to ten years of their sentence under circumstances of strict isolation resembling solitary confinement, which has been criticised by the Human Rights Committee in its concluding observations on country C's most recent report under the ICCPR.

Should these human rights concerns prevent the Kenyan authorities from providing the assistance requested? What is the procedure for deciding on this matter?



Activity: Human Rights Aspects of MLA and Extradition

Blueland is a fictitious country in Kenya's geographic vicinity. For the last twenty years, it has seen conflict between the central government and political movements claiming to represent the Southern Blueland population, in particular the Southern Blueland People's Party (SBPP). The central government has declared the SBPP to be illegal on account of its agenda, barred its activities and incarcerated many of its leaders on charges of treason, sedition and insurgency.

In the last four years, numerous explosives attacks have been carried out against government facilities, as well as oil and gas installations in Southern Blueland. While the attacks appear to have been aimed primarily at property, they have resulted in the death of overall twenty-one people. An armed group calling itself the Southern Blueland People's Army (SBPA) has claimed responsibility for them. Blueland security forces have been able to arrest members of the SBPA and some of its military commanders.

For the past twenty years, Kenya has seen a considerable influx of persons from Southern Blueland, who live and work in Kenya. SBPP representatives are among the Southern Blueland community in Kenya and have been able to meet, organise and publish their views unhindered. Recently, the Blueland government security services have approached their Kenyan counterparts and alleged that persons directing and providing active support to the SBPA are among the Southern Blueland community in Kenya.

Among the persons identified as terrorists by the Blueland security services is Mr. Bert, a South Bluelander living in Nairobi and well known for his blog and other publications in which he spreads the views of the SBPP. On 27 June 2014, Bert applied for recognition as a refugee in Kenya, arguing that because of his outspoken campaigning for the rights of the Southern Blueland people he is at risk of persecution in Blueland, including incarceration for his political views.

Legal Background Information

Blueland is a party to, *inter alia*, the following international instruments: 12 of the global counter-terrorism conventions and protocols, including the 1997 International Convention for the Suppression of Terrorist Bombings and the 1999 International Convention for the Suppression of the Financing of Terrorism, the London Scheme for Extradition within the Commonwealth, the ICCPR, the CAT and the Banjul Charter. There is no bilateral extradition treaty between Kenya and Blueland.

Blueland's Anti-Terrorism Act (ATA) provides in Article 2:

- "1) An act of terrorism shall be any act or threat of violence, whatever its motives or purposes, that occurs for the advancement of an individual or collective criminal agenda, causing terror among people, causing fear by harming them, or placing their lives, liberty or security in danger, or aiming to cause damage to the environment or to public or private installations or property or to occupy or to seize them, or aiming to jeopardize a national resource.
- 2) Whoever commits, plans, directs or otherwise is an accomplice in the commission of an act of terrorism, or is a member of a group engaged in the commission of acts of terrorism, is punished by imprisonment from ten years to life."

Question 1 (regarding provisional arrest):

On 5 September 2014, the competent Kenyan authorities received a request from the Blueland government to provisionally arrest Bert in view of an extradition request that would soon be submitted. Attached to the request for provisional arrest is an arrest warrant issued by a judge in Blueland's capital, charging Bert with being a member of a terrorist group (the SBPA), and having planned and organised explosive attacks in Southern Blueland, in violation of Article 2 of Blueland's Anti-Terrorism Act (ATA).

- Which authority in Kenya should the request for provisional arrest be addressed to?
- Should the Kenyan authorities proceed with the provisional arrest?
- If so, what is the procedure to be applied? How long can Bert be detained?
- What rights does Bert have under the Kenyan law, including the Constitution, and international instruments with regard to the provisional arrest and detention?

Question 2 (regarding the extradition request):

On 8 September 2014 ATPU arrested Bert and took him to a detention facility in Nairobi, where he has since then been in detention. On 25 October, the Kenyan Government receives an extradition request regarding Bert from Blueland. The extradition request:

- States that Bert is active in recruiting young men from the Southern Blueland community in Kenya to join the SBPA and in raising funds for the SBPA among Southern Blueland businessmen in Nairobi; and that Bert has personally given the order for SBPA attacks against two police stations and an oil pipeline in Southern Blueland, in which two people were killed;
- States that these facts constitute an offence under Article 2 of the Blueland ATA;
- States that the above allegations are proven by (1) the statements made by several SBPA members captured by the Blueland army and currently in detention in Blueland and (2) by Bert's own writings. Copies of pieces written by Bert are annexed. In them, Bert calls the Southern Blueland youth living in Kenya to "show their solidarity" with their brethren in Blueland, and opines that while one can disagree with the methods of the SBPA, the fault for their actions lies clearly with the Blueland government;
- Refers the Government of Kenya to its obligations under the UN conventions of 1997 and 1999 against terrorist bombings and terrorist financing, which Kenya has ratified, and to the London Scheme for Extradition.

Bert opposes his extradition on the ground that:

- a) The accusations against him are entirely false: he has always been an ardent but entirely peaceful supporter of the Southern Blueland cause. He has never called for violence and even less participated in violent actions.
- b) The statements by SBPA members implicating him must have been extorted under torture, which is widespread in Blueland's detention centres for political detainees, as documented by human rights NGOs (a copy of a report to that effect by a well-known international NGO is attached).
- c) The accusations against him are motivated by his political views and the extradition request is an attempt to persecute and silence him.
- d) The offences he is charged with are political offences, which are not extraditable.
- e) The definition of terrorism in article 2 of the Blueland ATA is so broad and vague that it can easily be abused to criminalise peaceful political opposition activity, which would not be criminal in Kenya. The double criminality requirement is therefore not met.

- f) He has applied for asylum in Kenya and therefore must not be returned to Blueland.
- g) If extradited, he would be faced with torture and arbitrary detention before trial and following conviction by a court lacking independence, in violation of fundamental human rights guarantees. Bert supports this last point by attaching a report from the international human rights NGO, which alleges that persons held on terrorism charges in Blueland are kept detained incommunicado without access to lawyers and families for long periods, are severely ill-treated to obtain confessions, and are then put on trial based on these confessions before courts that do not question the way the confessions were obtained. Bert also attaches the “Concluding Observations” of the UN Committee Against Torture regarding Blueland of 2010, which contain similar allegations.

The Blueland Government rejects all of Bert’s arguments and refers to its extradition request which, it states, proves Bert’s allegations wrong. With regard to Bert’s arguments (b) and (g), Blueland states that it has provided clear evidence disproving these allegations. Regrettably, the international NGO and the UN body have allowed themselves to be misused by the SBPP for its propaganda war.

1. At what stage of the extradition proceedings, if any, will Bert’s arguments under (a) to (g) above be considered?
2. Bert claims that he is entitled to legal counsel and to an interpreter (his English being allegedly rudimentary), that he does not have the means to retain them and should therefore be granted legal aid in the extradition proceedings. How should this claim be dealt with?
3. Examine Bert’s arguments under (a) and (b) above, considering also the arguments made by the Blueland Government. Should extradition be refused on grounds (a) and/or (b)?
4. Examine Bert’s arguments under (c) to (e) above, considering also the arguments made by the Blueland Government. Should extradition be refused on any of the grounds under (c) to (e)?
5. The asylum claim proceedings: How should the asylum proceedings in Bert’s case be coordinated with the extradition proceedings? Should extradition be refused on the ground (f)? Discuss this question assuming (A) that Bert’s claim for asylum is still pending, and (B) that on 1 September 2014 he was granted refugee status.
6. Examine Bert’s arguments under (g) above, considering also the arguments made by the Blueland Government? Should extradition be refused on ground (g)?

7.13 SELF-ASSESSMENT QUESTIONS



Self-Assessment Questions

- List the forms of transfer of persons from one national jurisdiction to another permissible under international law.
- List the main legislation governing extradition and mutual legal assistance in Kenya.
- Are there any provisions in the international human rights conventions and protocols to which Kenya is a party requiring respect for human rights in international cooperation in criminal matters regarding terrorism?
- Which authority orders the detention of a person in Kenya sought for extradition by another State? For how long can a person sought for extradition on terrorism charges be detained?
- Explain the differences between grounds of exclusion from refugee status and the exceptions to the non-refoulement principle under the Refugee Act and the 1951 Refugee Convention.
- Describe the difference between the principle of non-refoulement in Article 33 (2) of the 1951 Refugee Convention and in international human rights law, particularly Article 3 of the CAT. Compare both provisions with Section 18 of the Refugee Act.
- List the kinds of “irreparable harm” which give rise to an obligation not to deport, extradite or otherwise remove an individual to a State in which those risks exist. Is it relevant, in assessing those risks, whether extradition is requested on terrorism-related charges or on charges related to lesser, ordinary criminality?
- When a person whose extradition is sought on terrorism charges objects to extradition on the ground that he or she would be at risk if torture in the receiving country, frequently a dispute arises as to whether there actually is such a risk, how to prove it, and how the burden of proof is allocated in this dispute. Explain the answers to these questions based on the practice of international courts and other international human rights bodies.

- What are “diplomatic assurances” with regard to human rights objections to extradition? Are such diplomatic assurances permissible under international law? Discuss.
- Why is extradition the preferred way of transferring terrorism suspects or convicts from Kenya to another jurisdiction?
- Explain the position of international law regarding the apprehension of fugitive terrorism suspects abroad by the use of force lures or other trickery. Does it make a difference whether the States concerned are parties to multilateral or bilateral extradition treaties?
- What is “extraordinary rendition”? Why does Kenyan law, as well as regional and international law condemn “extraordinary rendition” of terrorism suspects?
- Discuss human rights considerations that may arise for the Kenyan authorities in a terrorism case with regard to a mutual legal assistance request where Kenya is the requested State.
- Discuss human rights considerations that may arise for the Kenyan authorities in a terrorism case with regard to a mutual legal assistance request where Kenya is the requesting State.

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