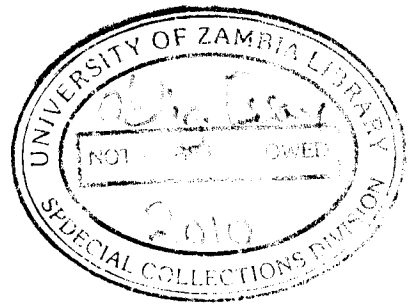
TORTURE IN THE DISCOURSE OF COMBATING TERRORISM [2001-2008]



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An Obligatory Essay submitted to the School of Law of the University of Zambia in the partial fulfilment of the requirements for the award of the Degree of Bachelor of Laws (LL.B).

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March, 2010.

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ABSTRACT

The period 2001-2008 saw an increase in resources, devotion and time in efforts spent to combat terrorism and in an attempt to prevent the spread of it by extremists to other regions of the world. This was manifested in United Nations Resolutions aimed at combating terrorism and efforts by individual UN member states at national level through their legislatures enacting national laws aimed at combating terrorism. However, this did come without any negative consequences on the part of enjoyment of basic human rights. Torture has emerged as one of the grave human rights abuses closely connected to efforts in combating terrorism. As such, it is absurd to create national laws which do not try to address the issue of torture within the discourse of efforts aimed at terrorism.

In showing the nexus between efforts in combating terrorism and ensuing result of suspects being tortured, this paper takes a close analysis of the Anti-Terrorism, No. 21 of 2007. It is hoped that the flaws identified will be looked upon by our legislature so as to safeguard our citizenry from future abuse by persons so engaged in combating terrorism from within the country, the region and the international community at large.

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DECLARATION

I do hereby declare that the work contained in this paper is my own, a result of my own personal research and ingenuity. I take full responsibility of any short-comings contained therein.

DEDICATION

I dedicate this work to my mum. Thanks for imparting the values and virtues of life in me. Thanks for making me live up to challenges I thought were insurmountable. "Without distinction of birth or fortune, with discipline, determination & focus, you can realise & acquire that which you have always visualized as being yours."

ACKNOWLEDGEMENTS

I express my gratitude and thanks to all the people who made it possible for me to complete this piece of writing. My family, friends and all who played a part in helping me do this piece of work. Many thanks go to Dr Simbyakula, N for all the timely counsel, help and encouragement I received during the entire period I was engaged in putting together this piece of work.

Despite the many help I received from different people whilst putting this work together, I take full responsibility for all the short-comings contained in it, and I do not impute any of the short-comings on any one.

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formulated to deal with such acts is welcome. However, it should be borne in mind that such legislation does not restrict basic freedoms and endanger the lives of innocent persons. This chapter seeks to provide an elaborate background and other aspects of both torture and terrorism, and consider these in the Zambian legal framework and international perspective.

1. (a) Context and Statement of the Problem

After the September 11 attacks on New York in the United States of America, nations and governments world over tightened their counter-terrorism tactics so as to curb or prevent terrorist attacks. Among them was the resort to legislating new laws so as to effectively curb threats of terrorism. Zambia, like other nations enacted the Anti Terrorism Act No. 21 of 2007, an Act chiefly dedicated to the fight and combating of terrorism.

However, the fight against terrorism has brought with it certain vices in society which are both locally and internationally detested or disapproved and not justifiable in any set of circumstances. Despite this detestation, nations have persistently and from time to time employed unconventional techniques to extract information from persons suspected of engaging in terrorist activities. It is in this regard that the old age concept of "torture" has surfaced in connection with anti terrorism measures.

Therefore, though nations world over co-operate in the fight against terrorism, much has not been done in their pieces of legislation to prevent the abuse and torture of suspects, which allow for or makes it possible for state agents to engage in the vice of torturing terror suspects. It has in certain been established that some states in their fight terrorism have formulated clandestine operations of interrogating terror suspects, using torture in its different typologies as a way of extracting information.

This research therefore lends itself to critically examine the Anti Terrorism Act No. 21 of 2007 in the context of torture of terror suspects. It will seek to establish whether the Act has enough or sufficient safeguards for persons detained under the provisions of the Act from being tortured whilst in custody both within Zambia's borders and other jurisdictions. It examines the concept of torture in light of the fight against terrorism.

1. (b) Justification

There is abundant literature on torture especially after the Universal Declaration of Human Rights was passed in 1948. Nations have endeavoured through all means possible to eradicate vices associated with torture and torture itself. However, the threat of terrorism possess a new danger to the existence of the state and its democratic tenets as people who do not appreciate these values engage in terrorist activities so as to achieve their political and other goals. As such governments around the globe, Zambia being no exception has put in place anti-terror laws so as to curb terrorism. However, in the execution of this very important duty some states have tortured terror suspects so as to gain insight into the activities of terrorist organisations. At no time can torture of any human being be condoned. In this context, the research lends itself to highlight the need to remove such impediments in the law so as to let individuals enjoy their freedoms to the possible maximum limit whilst being held as terror suspects, especially to be free from torture. This research will examine salient provisions of the Anti-Terrorism Act No. 21 of 2007, and try to see whether citizens of this nation are sufficiently protected from being victims of torture once held as terror suspects within our borders and if a situation arises were they must be extradited.

The study will serve as an addition to the already existing body of knowledge on the subject of torture and human rights, albeit, it will cover or introduce to this body of knowledge, the effect of Anti-Terrorism, laws on human rights and in particular the rise of torture as a means to extract information from terror suspects and whether such suspects have any greater right to be protected from torture. Therefore the study in all its undertaking seeks to underscore and highlight the Zambian experience and the need to reform it.

1. (c) Objectives of Research

General Objective: the main objective of the research is to consider the effect of the Anti-Terrorism Act on human rights in Zambia, in particular the very closely connected matter of torture of terror suspects, and whether the Act sufficiently protects such suspects from being subjected to such inhumane treatment.

Specific objectives:

- An analysis of the Anti-Terrorism Act with regard to matters which might lead to torture

- The inter-relation between torture and the fight against terrorism
- A consideration of possible lacunas in the laws relating to terrorism in the context of exposing citizens of Zambia to torture.
- Zambia's progress in the fight against the complete eradication of torture, and the human rights record with regard to torture suspects during the last eight years.

1. (d) Research Methodology

The research will be a qualitative one, being an elaborative analysis of the law and the implications the law has relating to the topic under consideration. It will mainly be based on desk research and field research.

Desk Research: this will involve secondary information, namely cases reported in our jurisdiction, journals on the subject matter and articles obtained from several sources. Writings of prominent jurists will also be consulted.

Field Research: In addition, personal interviews will be conducted with persons who are knowledgeable with the law regarding human trafficking and competent in issues relating to gender and the law. Such persons will include people from Human Rights Commission and Zambia Law Development Commission.

1. (e) Organisation of the Paper

The essay is divided into five chapters as follows:

Chapter one: Basically an introduction, looking into the rationale, justification, objectives, research questions and the methodology of the essay. It also delves into aspects of what the law in Zambia provides with regards to terrorism including the background of terrorism and torture of suspects, definition of torture and terrorism and causes of both torture and terrorism.

Chapter two: Assesses salient provisions of the Anti Terrorism Act which maybe be considered a leeway to torture of suspects. It also considers the matter of extradition in detail in relation to terror suspects of Zambian origin or citizens.

(submersion in water or dousing to produce the sensation of drowning), and denying food, water or sleep for days or weeks on end.

In relation to the definition of torture, two of the most sustained contemporary philosophical accounts on offer are those of Davis[2] and Sussman[3]. According to Davis, torture is (a) the intentional infliction of extreme physical suffering on some non-consenting, defenceless person, and; (b) the intentional, substantial curtailment of the exercise of the person's autonomy (achieved by means of (a)).[4]

However, Sussman argues that this is not an adequate definition of torture. Accordingly, he defines torture as : (a) the intentional infliction of extreme physical suffering on some non-consenting, defenceless person; (b) the intentional, substantial curtailment of the exercise of the person's autonomy (achieved by means of (a)); (c) *in general*, undertaken for the purpose of breaking the victim's will.[5]

Note that breaking a person's will is short of entirely destroying or subsuming their autonomy. Sussman implausibly holds the latter to be definitive of torture: "The victim of torture finds within herself a surrogate of the torturer, a surrogate who does not merely advance a particular demand for information, denunciation or confession. Rather, the victim's whole perspective is given over to that surrogate, to the extent that the only thing that matters to her is pleasing this other person who appears infinitely distant, important, inscrutable, powerful and free. The will of the torturer is thus cast as something like the source of all value in his victim's world"[6]. Such self-abnegation might be the purpose of some forms of torture, as indeed it is of some forms of slavery and brainwashing, but it is certainly not definitive of torture.

Here breaking a person's will can be understood in a minimalist or a maximalist sense. This is not to say that the boundaries between these two senses can be sharply drawn. Understood in

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[2] Davis, Michael, 2005, " The Moral Justification of Torture and other Cruel, Inhuman, or Degrading Treatment," *International Journal of Applied Philosophy*, Vol. 19, No. 2, pp. 161-78.

[3] Sussman, David, 2005, "What's Wrong with Torture?", *Philosophy and Public Affairs*, Vol. 33, pp. 1-33.

[4] Davis, Michael, 2005, " The Moral Justification of Torture and other Cruel, Inhuman, or Degrading Treatment," *International Journal of Applied Philosophy*, Vol. 19, No. 2, p. 162

[5] Sussman, David, 2005, "What's Wrong with Torture?", *Philosophy and Public Affairs*, Vol. 33, p.3

[6] Ibid,p.26

its minimal sense, breaking a person's will is causing that person to abandon autonomous decision-making in relation to some narrowly circumscribed area of life and for a limited period. Understood in its maximal sense, breaking a person's will involves reaching the endpoint of the kind of process Sussman describes above, i.e., the point at which the victim's will is subsumed by the will of the torturer.[7]

Given the above definition of torture, we can distinguish torture from the following practices:

Firstly, we need to distinguish torture from coercion. In the case of coercion, people are coerced into doing what they don't want to do. So coercion does not necessarily involve torture. Does torture necessarily involve coercion? No doubt the threat of torture, and torture in its preliminary stages, simply functions as a form of coercion in this sense. However, torture proper has as its starting point the failure of coercion or that coercion is not even going to be attempted. Torture proper targets autonomy itself, and seeks to overwhelm the capacity of the victims to exercise rational control over their decisions — at least in relation to certain matters for a limited period of time — by literally terrorizing them into submission. Hence there is a close affinity between terrorism and torture. Indeed, arguably torture is a terrorist tactic. In relation to the claim that torture is not coercion, it might be responded that at least some forms or instances of torture involve coercion, namely those in which the torturer is seeking something from the victim, e.g. information, and in which some degree of rational control to comply or not with the torturer's wishes is retained by the victim. This response is plausible. However, even if the response is accepted, there will remain instances of torture in which these above-mentioned conditions do not obtain; presumably, these will not be instances of coercion.[8]

Secondly, torture needs to be distinguished from excruciatingly painful medical procedures. These kinds of cases differ from torture in a number of respects. For example, such medical procedures are consensual and not undertaken to break some persons' will, but rather to promote their physical wellbeing or even to save their life.

Thirdly, there is corporal punishment. Corporal punishment is, or ought to be, administered only to persons who have committed some legal and/or moral offence for the purpose of punishing them. By contrast, torture is not — as is corporal punishment — limited by

[7] http://plato.standford.edu/entries/torture/#definition of torture. sat Jan 5, 2008 [accessed 24th June,2009]
[8] Ibid, p.7

normative definition to the guilty; and in general torture, but not corporal punishment, has as its purpose the breaking of a person's will. Moreover, unlike torture, corporal punishment will normally consist of a determinate set of specific, pre-determined and publicly known acts administered during a definite and limited time period, e.g. ten lashes of the cat-o-nine-tails for theft.[9]

Fourthly, there are ordeals involving the infliction of severe pain. Ordeals have as their primary purpose to test a person's will, but are not undertaken to break a person's will. Moreover, ordeals can be voluntary, unlike torture.

Having provided ourselves with an analytic account of torture and distinguished torture from some closely related practices, we now look at torture from a legal perspective both at national level and international level.

1.1[b] Legal Definition of Torture

The idea to have in place legislation and international conventions sprung from the aftermath of the Second World War. After witnessing some of the most brutal and gruesome methods of torture and warfare, nations through the United Nations (UN) sort once and for all to protect citizens of the earth from such gruesome violations of human dignity. On December 10, 1948 the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR). Article 5 states, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[10] Since that time a number of other international treaties have been adopted to prevent the use of torture. Two of these are the United Nations Convention Against Torture and for international conflicts the Geneva Conventions III and IV.

Since then, the UN has advocated for member states to provide for local legislation which seeks to protect its citizens from being tortured in the territory were such government administers its mandate, and also prevent cases of torture being carried on its sovereign territory. The one fine piece or convention in the pursuit of this the UN has devised is The

[9] Op cit, p.7
[10] Universal Declaration of Human Rights, United Nations, 10 December 1948

United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) which came into force in June 1987.

In relation to each state party and their obligations to this convention, Articles 1, 2, 3 and 16 are of particular importance and forms the basis upon which a country's compliance with the convention may be adjudged.

Article 1.1 defines torture as follows: "For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."[11]

The definition as provided for in this Article raises a number of matters that need to be considered for treatment of an individual to amount to torture. These matters will be considered in detail later.

Thus, member states that have ratified and acceded to this convention but do not have the requisite legislation in place to define and provide for other basic tenets the convention seeks to achieve in the fight against torture and its complete eradication can use this convention. Therefore, Zambia is among those states that rely on this definition of torture when litigation arises in connection with torture because there is no local legislation defining what torture is. In fact Article 15 of the Constitution[12] provides as follows in relation to torture:

"A person shall not be subjected to torture, or to inhuman or degrading punishment or other like treatment."

[11] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, 10 December 1984
[12] Chapter 1 of the Laws of Zambia

However, despite this provision nowhere in the Constitution does it (Constitution) define torture or provide for an Act of Parliament to define the same. Zambia acceded to the Convention on 8th October, 1998.

1.2 An Understanding of Terrorism

Terrorism is not new, and even though it has been used since the beginning of recorded history it can be relatively hard to define. Terrorism has been described variously as both a tactic and strategy; a crime and a holy duty; a justified reaction to oppression and an inexcusable abomination. Obviously, a lot depends on whose point of view is being represented. Terrorism has often been an effective tactic for the weaker side in a conflict. As an asymmetric form of conflict, it confers coercive power with many of the advantages of military force at a fraction of the cost. Due to the secretive nature and small size of terrorist organizations, they often offer opponents no clear organization to defend against or to deter. But despite its popularity, terrorism can be a nebulous concept.[13]

No single world wide accepted definition of the term "terrorism" exists; this is due to the fact that countries world over employ different definitions of terrorism in their national anti-terror legislation. However, generally understood, these definitions often include facets which are common regardless of which national definition is being considered. Thus the term can commonly be understood as the intentional use or threat to use violence against civilians and non-combatants "in order to achieve political goals". This tactic of political violence is intended to intimidate or cause terror for the purpose of "exerting pressure on decision making by state bodies."The term "terror" is largely used to indicate clandestine, low-intensity violence that targets civilians and generates public fear. Thus "terror" is distinct from asymmetric warfare, and violates the concept of a common law of war in which civilian life is regarded.[14]

Terrorism is more commonly understood as an act which is intended to create fear (terror), is perpetrated for an ideological goal (as opposed to a materialistic goal or a lone attack), and deliberately targets (or disregards the safety of) non-combatants. Some definitions also

[13] http://www.terrorism-research.com/what is terrorism [accessed 23rd June,2009]

[14] Ekaterina Stepanova, 2008.Terrorism in asymmetrical conflict: ideological and structural aspects. Stockholm International Peace Research Institute, Oxford University Press US, p.11

include acts of unlawful violence or unconventional warfare.[15] The difficulty of defining the term can further be illustrated by use of different definitions of the term by US government, where agencies responsible for different functions in the ongoing fight against terrorism use different definitions.

The United States Department of Defence defines terrorism as "the calculated use of unlawful violence or threat of unlawful violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological."[16] Within this definition, there are three key elements—violence, fear, and intimidation—and each element produces terror in its victims. The FBI uses this: "Terrorism is the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives."[17] The U.S. Department of State defines "terrorism" to be "premeditated politically-motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents, usually intended to influence an audience.[18]

There are greater variations in what features of terrorism are emphasized in definitions. The United Nations produced this definition in 1992;

"An anxiety-inspiring method of repeated violent action, employed by (semi-) clandestine individual, group or state actors, for idiosyncratic, criminal or political reasons, whereby - in contrast to assassination - the direct targets of violence are not the main targets."[19]

The most commonly accepted academic definition starts with the U.N. definition above, Less specific and considerably less verbose, the British Government definition of 1974 is"...the use of violence for political ends, and includes any use of violence for the purpose of putting the public, or any section of the public, in fear."[20]

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[15] Thalif Deen. Politics: U.N. Member States Struggle to Define Terrorism, Inter Press Service, 25 July 2005
[16] http://www.terrorism-research.com/what is terrorism [accessed 23rd June,2009]
[17] ibid
[18] Op cit
[19] United Nations Security Council Resolution 1373
[20] Supra note 15

The definition of terrorism and terrorist act is provided for in Zambian legislation in the Anti-Terrorism Act[21]. The definition is quiet wide and vague. It defines terrorism in section 2 of the Act in part as:

""terrorism and terrorist act" means an act or omission in or outside Zambia and is intended, or by its nature and context, may reasonably be regarded as being intended to intimidate or threaten the public or a section of the public or compel a government or an international organisation to do or refrain from doing, any act, and is made for the purpose of advancing a political, ideological or religious cause ...-"

It goes on further to enlist 12 different circumstances or situations which may be regarded as constituting terrorist activities. It is in an attempt to capture all acts considered as terrorism that the Zambian legislature opted for such a broad definition of terrorism.

Terrorism is a criminal act that influences an audience beyond the immediate victim. The strategy of terrorists is to commit acts of violence that draws the attention of the local populace, the government, and the world to their cause. The terrorists plan their attack to obtain the greatest publicity, choosing targets that symbolize what they oppose. The effectiveness of the terrorist act lies not in the act itself, but in the public's or government's reaction to the act. There are three perspectives of terrorism: the terrorist's, the victim's, and the general publics. The phrase **"one man's terrorist is another man's freedom fighter"** is a view terrorists themselves would accept. Terrorists do not see themselves as evil. They believe they are legitimate combatants, fighting for what they believe in, by whatever means possible. A victim of a terrorist act sees the terrorist as a criminal with no regard for human life. The general public's view is the most unstable.

1.3 Background and Causes of both Torture and Terrorism

Throughout history, authorities have engaged in all forms of torture. The Romans used torture for interrogation. Until the second century AD, torture was used only on slaves (with a few exceptions). After this point it began to be extended to all members of the lower classes. A slave's testimony was admissible *only* if extracted by torture, on the assumption that slaves

[21] Act No. 21 of 2007

could not be trusted to reveal the truth voluntarily. Crucifixion was not regarded as torture, though it was a deliberately horrible way to execute people as an example to frighten others. Prior to crucifixion, victims were often savagely whipped with barbed metal lashes, also to frighten others. Over time the conceptual definition of torture has been expanded and remains a major question for ethics, philosophy, and law, but clearly includes the practices of many subsequent cultures.[22]

Modern scholars find the concept of torture to be compatible with society's concept of Justice during the time of Jesus Christ. Romans, Jews, Egyptians and many others cultures during that time included torture as part of their justice system. Romans had crucifixion, Jews had stoning and Egyptians had desert sun death. All these acts of torture were considered necessary (as to deter others) or good (as to punish the immoral).[23] Many African societies burnt their victims or persons suspected of having deviated from what society expected fro them.

Torture was usually conducted in secret, in underground dungeons. By contrast, torturous executions were typically public, and woodcuts of English prisoners being hanged, drawn and quartered show large crowds of spectators, as do paintings of Spanish auto-da-fé executions, in which heretics were burned at the stake. While in Egypt in 1798, Napoleon Bonaparte wrote to Major-General Berthier that:

"The barbarous custom of whipping men suspected of having important secrets to reveal must be abolished. It has always been recognized that this method of interrogation, by putting men to the torture, is useless. The wretches say whatever comes into their heads and whatever they think one wants to believe. Consequently, the Commander-in-Chief forbids the use of a method which is contrary to reason and humanity."[24]

Modern sensibilities on torture have been shaped by a profound reaction to the war crimes and crimes against humanity committed by the Axis Powers in the Second World War, which have led to a sweeping international rejection of most if not all aspects of the practice. Even

[22] Peters, Edward. ***Torture.*** New York: Basil Blackwell Inc., 1985.

[23] Catechism of the Catholic Church, 1033, Libreria Editrice Vaticana,1994

[24] Napoleon Bonaparte, *Letters and Documents of Napoleon, Volume I: The Rise to Power*, selected and translated by John Eldred Howard (London: The Cresset Press, 1961), 274.

so, many states engage in torture; however, few wish to be described as doing so, either to their own citizens or to international bodies. A variety of devices bridge this gap, including state denial, "secret police", "need to know", denial that given treatments are torturous in nature, appeal to various laws (national or international), use of jurisdictional argument, claim of "overriding need", and so on. Many states throughout history, and many states today, have engaged in torture (unofficially). Despite worldwide condemnation and the existence of treaty provisions that forbid it, torture still occurs in two thirds of the world's nations.[25]

Physical torture methods have been used throughout recorded history and can range from a beating with nothing more than fist and boot, through to the use of sophisticated custom designed devices such as the rack. Other types of torture can include sensory or sleep deprivation, restraint or being held in awkward or damaging positions, uncomfortable extremes of heat and cold, loud noises or any other means that inflicts severe physical or mental pain. The boundary between torture and legitimate interrogation techniques is not universally agreed. Psychology uses non-physical methods which are used to cause psychological suffering. Its effects are not immediately apparent unless they alter the behaviour of the tortured person. Since there is no international political consensus on what constitutes psychological torture, it is often overlooked, denied, and referred to in different names.

Psychological torture is less well known than physical torture and tends to be subtle and much easier to conceal. In practice the distinctions between physical and psychological torture are often blurred. Physical torture is the inflicting of severe pain or suffering on a person. In contrast, psychological torture is directed at the psyche with calculated violations of psychological needs, along with deep damage to psychological structures and the breakage of beliefs underpinning normal sanity. There is also mind bending caused by administering of chemicals. Torturers often inflict both types of torture in combination to compound the associated effects.

[25] Hochschild,A(2004-05-23)."What's in a word? Torture". The New York Times. http://www.nytimes.com/2004/05/23/opinion/23HOCH.html?ex=1086315207&ei=1&en=dd8a4b003ac8f504. Retrieved on 2009-01-09.

"Terror" comes from a Latin word meaning "to frighten". The *terror cimbricus* was a panic and state of emergency in Rome in response to the approach of warriors of the 'Cimbri' tribe in 105BC. The 'Jacobins' cited this precedent when imposing a 'Reign of Terror' during the French Revolution. After the Jacobins lost power, the word "terrorist" became a term of abuse. Although the Reign of Terror was imposed by a government, in modern times "terrorism" usually refers to the killing of innocent people by a private group in such a way as to create a media spectacle. This meaning can be traced back to Sergey Nechayev, who described himself as a "terrorist". Nechayev founded the Russian terrorist group "People's Retribution" (Народная расправа) in 1869.[26]

Terrorism is the intentional use or threat to use violence against civilians and non-combatants "in order to achieve political goals". This tactic of political violence is intended to intimidate or cause terror for the purpose of "exerting pressure on decision making by state bodies." The term "terror" is largely used to indicate clandestine, low-intensity violence that targets civilians and generates public fear. Thus "terror" is distinct from *asymmetric warfare*, and violates the concept of a common *law of war* in which civilian life is regarded.

Terrorism has often been an effective tactic for the weaker side in a conflict. As an asymmetric form of conflict, it confers coercive power with many of the advantages of military force at a fraction of the cost. Due to the secretive nature and small size of terrorist organizations, they often offer opponents no clear organization to defend against or to deter. Because of the manner in which terrorism is employed in power struggles and bids to influence public opinions and office, Derrick asserts that: "Civilization is based on a clearly defined and widely accepted yet often unarticulated hierarchy. Violence done by those higher on the hierarchy to those lower is nearly always invisible, that is, unnoticed. When it is noticed, it is fully rationalized. Violence done by those lower on the hierarchy to those higher is unthinkable, and when it does occur is regarded with shock, horror, and the fetishization of the victims."[27]

The history of terrorist organizations suggests that they do not practice terrorism only for its political effectiveness; individual terrorists are also motivated by a desire for social solidarity with other members. Terrorism has been practiced by a broad array of political organizations

[26] http://www.papers.ssrn.com/Crenshaw, Martha, *Terrorism in Context*[accessed on 24th June,2009]
[27] Derrick Jensen *"Endgame: Resistance"*, Seven Stories Press, 2006, pg IX

for furthering their objectives. It has been practiced by right-wing and left-wing political parties, nationalistic groups, religious groups, revolutionaries, and ruling governments.

1.4 Zambia's Legal Framework with regards to Torture and Terrorism

Article 62 of the Constitution vests the legislative powers of the Republic in parliament. It provides as follows:

"The legislative power of the Republic of Zambia shall vest in Parliament which shall consist of the President and the National Assembly."[28]

Therefore, all the laws in the land are to be made by parliament without any exception. It is the supreme body in which legislative powers vest. Any legislation on any topical subject has to therefore, pass through parliament. However, because Zambia has signed and ratified a number of international instruments, these instruments are not regarded as over and above legislative powers assigned to parliament so that they can be directly applied to the Zambian legal system.

In relation to international instruments, Zambia follows the doctrine of dualism as opposed to monism and as such international instruments are not self-executing. This means that in order for any international instruments to have the force of law in Zambia, the Government must first sign and ratify or accede to the instrument. Secondly, the Zambian parliament should pass a law authorizing the application of such international instrument. Alternatively, parliament can enact a law whose contents would be those found in the international instrument.

In the case of **Zambia Sugar Company Ltd Plc V Fellow Nanzaluka**[29], the respondent was employed by the appellant in 1992. His employment was terminated without notice in 1996 and was paid three months salary in lieu of notice. He took out an action in the Industrial Relations Court. The Industrial Relations Court accepted that the conditions of service had been complied with but held that the action was contrary to the **International Labour Convention # 158 of 1982** which forbids termination of workers' employment without valid reasons. On appeal, the Supreme Court held that:

[28] Chapter 1 of the Laws of Zambia
[29] SCZ Judgement No.82 of 2001

"International instruments on any law although ratified and assented to by the State cannot be applied unless they are domesticated and Zambia had not domesticated this particular Convention."

1.4.1 Legislation on Torture

From the time Zambia gained independence in 1964, the Constitution in the Bill of Rights has always contained a provision with regard to torture. The 1964, 1973, 1991 and the present 1996 which is the current Constitution have had the Article on protection from torture, inhumane or degrading treatment lifted verbatim from the 1964 Constitution. It reads

"A person shall not be subjected to torture or to inhuman or degrading punishment or other like treatment."

Though this provision has been inscribed in the Grand Norm of the land, the legislature has not gone further to formulate or enact a law that clearly spells out torture and how it ought to be effectively dealt with in order to completely uproot it from the land. It is also surprising to note that, throughout parliament's existence, no attempt at providing for legislation to deal with torture whether as a separate piece of legislation or within our Penal laws has been made.

On 8th October 1998, Zambia acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It is now well over 10 years since Zambia acceded to the Convention and Parliament has not made any attempt to domesticate it or provide for legislation that would be essential in executing the Convention in our judicial system, having in mind the dualistic approach Zambia takes with regard to international instruments. Thus, the Convention and all its contents are just there on paper as they cannot be executed.

It is further noted that Zambia does not have a definition of torture both in the Grand Norm and other legislation. Without domesticating CAT, its provisions are as good as dead law. This lack of domestication does not help in any way in the crusade against torture. At its best, it only compounds the situation. Prevalence of torture is further compounded by the principles that were enunciated in the case of **Liswaniso V The People**[30]. In that case the applicant, an Inspector of Police, was convicted of official corruption, the allegation being

[30] (1976)ZR 277

that he corruptly received a sum of K80 in cash as consideration for the release of an impounded motor car belonging to the complainant. The evidence on which the applicant was convicted was obtained by means of a trap; the handing over of the currency notes in question by the complainant was pre-arranged with the police, and they were recovered from the complainant's house during a search conducted pursuant to a search warrant. It was common cause that at the time the police officer in question applied for the search warrant to be issued he swore that the money in question was in the applicant's house when in fact it was in that officer's possession. It was argued on behalf of the applicant that the search warrant was invalid and the resultant search illegal, and that any thing found as a result of such a search was inadmissible in evidence.

The Supreme Court held that, "Apart from the rule of law relating to the admissibility of in voluntary confessions, evidence illegally obtained, e.g. as a result of an illegal search and seizure or as a result of an in admissible confession is, if relevant, admissible on the ground that such evidence is a fact regardless of whether or not it violates a provision of the Constitution (or some other law)."

This stance taken by our courts does little to help fight or stop torture, as evidence if relevant to a case in question is obtained through illegal means say through torture; it is still admissible in the courts of law. This has therefore left some solace in those who opt to obtain evidence through illegal means, and nothing stands in there way as they continue to torture because they face no charge of torture.

This is to be contrasted with the view taken by the US case of **Miranda v Arizona**.[31] The court held that "a poison tree will yield poison fruit" such that if evidence is unlawfully obtained it cannot be used. This is the position in the US. The holding is based on the reasoning that the obtaining of evidence by torture is always illegal, unreliable and inadmissible.

1.4.2 Legislation on Terrorism

Though acts of terrorism have occurred in the past during the presidency of the first Republican President Dr Kenneth Kaunda and second Republican president Dr Chiluba, no steps were taken to put in place legislation that would help in the fight against the vice. During Dr Kaunda's era, emergency powers were resorted to instead and were throughout his

[31] [1920] 384 US 436

presidency used to counter such acts. In the 1990's Zambia was stung by a series of bomb attacks, one of which killed a police officer during the bizarre 'Black Maamba' episode of 1996.[32] However, like in the Kaunda era no step was taken to come up with legislation dealing with terrorism, bearing in mind that Zambia was a signatory to many international instruments intended for anti-terrorism.

A comprehensive Anti-Terrorism Act was assented to and became law on the 6th of September, 2007. It is an Act to prohibit the carrying out of any act of terrorism; provide for measures for the detection and prevention of terrorist activities; and for matters connected with or incidental to the foregoing.

1.5 Conclusion

Though a subject of controversy both locally and internationally, a common definition for terrorism looms at large with different and no specific definition. This is due to the complex nature of terrorism and the different perceptions given to it by different regions of the globe. However, this chapter has highlighted among others the various meanings attributed to it, that is, from the Zambian perspective and other jurisdictions within the commonwealth and the American attributes. Considered also has been the Zambian legal framework with regards to terrorism. It has been noted how hesitant Zambia was in enacting legislation to deal with terrorism in times when it was a target of numerous terrorist activities. It only managed to have legislation in place after the September 11 attacks on a far flung land of New York City and also due to international pressure on member states of the UN in the wake of these attacks.

Torture has also been extensively discussed in the context of our jurisdiction and why it persists after a decade or so after acceding to the Convention against Torture. Much has not been done in terms of domesticating the convention. The situation is further compounded by lack of a comprehensive law on how to effectively combat the scourge of torture in public institutions and other institutions in which it persists, and also lack of a definition in our penal laws. The causes have been outlined at length. Of importance considered have been the legal frameworks that are currently in place to combat both terrorism and torture. An inter-relation

[32] http://www.unza.zm/full/96hc2./ The People vs Senior Chief InyamboYeta.htm [accessed 29th October,2009]

between terrorism and torture has been highlighted and pointed to as torture being perpetrated in the name of counter terrorism measures by authorities in their different capacities.

The next chapter will extensively dwell on the provisions of the Anti-Terrorism Act, and also have an in-depth analysis of the provisions in relation to the prevention of terrorism and torture of terror suspects whilst in custody of both local authorities and member states with whom the provisions on extradition apply. Also, any other circumstance which may lead to citizens being detained and subjected to torture as a result of anti-terror laws. Of utmost importance will be a comparison in terms of safety of persons detained under our Act in relation to the laws of other nations when an extradition has been necessitated whether legally or illegally.

CHAPTER TWO

AN ASSESSMENT OF ZAMBIA'S ANTI-TERRORISM LAWS

2.0 Introduction

Chapter VII of the UN Charter grants the Security Council powers to take decisions binding upon all UN member States in order to maintain or restore international peace and security. In this respect, the Security Council may impose various forms of sanctions and, if other measures prove inadequate, it may authorise military action. Since the early 1990's, the Security Council has adopted a number of resolutions imposing sanctions on regimes found to support terrorism, including sanctions on the Taliban regime in Afghanistan.[33]

On 12 September 2001, the Security Council took the unprecedented step of determining that 'terrorism' constitutes a threat to international peace and security, in its Resolution 1368.[34] Equally important and unparalleled is the Security Council's subsequent Resolution 1373 (2001) of 28 September 2001 to create an international obligation to adopt specific measures to combat terrorism. Resolution 1373 also 'called on' States to take other steps to prevent and suppress terrorist acts. The Resolution included measures such as the screening of asylum seekers before granting refugee status and the criminalisation under domestic law of the provision of funds to terrorist organisations.[35]

Thus, implementing counter-terrorism measures is not a matter of national policy anymore. After 9/11, UN Member States are not only entitled to defend their "national security" against terrorist threats but now have an obligation under international law to implement specific measures as set out in Resolution 1373 as well as "other measures" to combat terrorism. Thus following these Security Council Resolutions Zambia followed suit and adopted the Anti-Terrorism Act[36] both as a domestic and international concern in the fight against terrorism and advancing peace and security.

This chapter takes a closer in-depth analysis of the provisions of the Anti-Terrorism Act with regard to how it has and indeed will help in the long term combat acts of terrorism. The chapter further considers what have been perceived and considered as drawbacks in some

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[33] Security Council Resolution 1267 (1999), 15 October 1999.
[34] The Resolution establishes: "*Determined* to combat by all means threats to international peace and security caused by terrorist acts" Security Council Resolution 1368 (2001), adopted by the Security Council at its 4370th meeting, on 12 September 2001.
[35] S/RES/1373 (2001).
[36] No. 21 of 2007

provisions of the Act in relation to the promotion of basic and fundamental human rights and dignity of every human being. It will consider this in light of respect for international law and observance for international instruments Zambia has signed and ratified but not yet domesticated its international obligations under these instruments.

Because Zambia has got legislation which deals with extradition in other pieces of legislation, the paper will also consider how safe these extraditions are in relation to the Anti-Terrorism act and fight against terrorism, and how other emerging trends on extradition matters have been dealt with by members of the international community in relation to counter-terrorism. The chapter will further consider how comprehensive and thorough with emerging trends in the discourse of the counter-terrorism and respect for human rights the Act is.

Lastly, the chapter will consider what might be termed missed important aspects in relation to the counter-terrorism theme the Act should have captured in its provisions considering that it was enacted almost six (6) years after the events of 9/11.

2.1 The Anti-Terrorism Act: An In-depth Analysis

Combating terrorism requires on the part of state actors enforcing such measures to take measures that ensure that respect for human life and dignity is respected as such agencies entrusted with powers to deal with terrorist suspects carry out their duties. Counter-terrorism measures are now mostly associated with human rights as such suspects have or rather face the risk of being harshly treated and interrogated. As such, national legislation should have in place within counter-terrorism measures to protect rights of suspects whilst being held in custody. It is also imperative that in so doing, such provisions do not undermine the efficacy of countering terrorism. As is naturally expected, the Anti-terrorism Act has provisions to that effect, and will now be considered below.

2.1. [1] Advantages Conferred By the Act

Before this Act was passed and assented to, Zambia relied on other provision of the law particularly the Penal Code to prosecute and deal with matters concerned with terrorism. However, with the coming into force of this Act, all incidences of terrorism are to be dealt with in accordance with provisions of the Act. This has eased the work and efforts needed in ascertaining which offence a suspect is to be charged with as offences have clearly been defined in the Act. Among the advantages have been the following:

Section two of the Act provides for the definition of terrorism and terrorist act in overly broad terms. This has advantages attached to such an approach of having overbroad definitions in legislation. Restricting the term terrorism to clearly defined "politically motivated" acts that reach the threshold of "severity" to become for example, crimes against humanity or war crimes are not always politically desirable.[37] It is a well known and established factor that "terrorism" is always linked with the political aim of challenging, destabilising or changing a regime and thus, by having unclear definitions of terrorism or simply no definition, States can label any dissident or rebel a 'terrorist'. By doing this, States can de-legitimise and demonise the dissidence or rebellion, as well as dehumanise the dissidents/rebels ("terrorists" are normally described as individuals or groups that indiscriminately kill people, have no respect for human lives, and prefer violence to peace and harmony).[38]

Although vague definitions allow for arbitrary enforcement, if States have a strong and independent judiciary the imprecise language is less problematic. For this reason, it is common to see that during "crisis" or "emergencies," governments tend to restrict the role of the judiciary in determining the appropriateness of security measures.[39]

Having a clear definition of terrorism poses a problem to States when scrutinising counter-terrorism activities. For this reason, States tend to be obscure in their domestic definitions of terrorism and in the way they use these definitions.[40] Thus following the above reasoning, the Anti-Terrorism Act does not or rather effectively avoids having a clear definition of torture so that as many activities as possible are considered when scrutinizing counter-terrorism measures.

Also, by providing long term jail sentences ranging from 10 years to up to life imprisonment for many of the offences in the Act, there is an effective deterrence mechanism in place which deters would be terrorists from engaging in any acts of terrorism as may have been stipulated in the Act. Among the notable offences with such hefty custodial sentences are the following:

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[37] The RedressTrust, July 2004. ***Terrorism, Counter-terrorism & Torture: International Law in the Fight against Terrorism***. London, The redress Trust,p11

[38] ibid

[39] Op. cit

[40] Noam Chomsky, (Penguin 2004) ***Hegemony or Survival,*** p. 110, pp. 3 citing Joseba Zulaika and William Douglas, ***Terror and Taboo*** (Routledge, 1996), p.12

9. (1) "A person who for purposes of or in connection with terrorism-

(a) collects, makes or transmits a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism; or

(b) possesses a document or record containing information likely to be used for a terrorist act; commits an offence and is liable, upon conviction, to imprisonment for a period of not less than ten years but not exceeding twenty years."[41]

14. "A person who conspires in or attempts to commit an act of terrorism commits an offence and is liable, upon conviction, to imprisonment for life."[42]

7. "A person who directs the activities of an organisation which is concerned in the commission of acts of terrorism commits an offence and is liable, upon conviction, to imprisonment for life."[43]

It should be noted that most offences under the Act have their custodial sentence as life imprisonment. This has been done with a view to deterring persons already engaged in such terrorist crimes from further carrying them on and would be terrorists. The line between terrorist acts and counter-terrorism activities is not always clear. "Counter-terrorism" measures need to be analysed according to the surrounding circumstances. This is because many of them have had some features in common with full-blown terrorism, however it is not possible to define 'terrorism' or 'counterterrorism' because it depends on the specific 'actors' and on the 'validity' of their aims.

2.1. [2] Drawbacks within Provisions of Act on Civil and Political Liberties

Most provisions in the Act it has been noted pause a serious threat to human rights issues as they fail to comply with internationally recognized principles on human rights and humanitarian law, and also fail to respect international *use cogens* principles. Also of serious concern is the replication into this Act of offences already provided for in other penal laws, but this time considered under this Act they carry hefty prison sentences. Thus being considered below are some of the draconian sections.

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[41] Anti-Terrorism Act No. 21 2007,section 9
[42] Ibid, section 14
[43] Op. Cit, section 7

i. Section 2 on the interpretation or definition of "terrorism and terrorist act"

The definition of terrorism and terrorist act is quiet wide and vague. It defines terrorism in section 2 of the Act in part as:

"terrorism and terrorist act" means an act or omission in or outside Zambia and is intended, or by its nature and context, may reasonably be regarded as being intended to intimidate or threaten the public or a section of the public or compel a government or an international organisation to do , or refrain from doing, any act, and is made for the purpose of advancing a political, ideological or religious cause ...-"

It goes on further to enlist 12 different circumstances or situations which may be regarded as constituting terrorist activities. This paper will look at seven of those other circumstances which are a clear replication of offences in other statutes. Firstly the above cited part of the violation presents the following problems:

- "or by its nature and context, may reasonably be regarded as being intended"- using this in part when formulating charges, a lawful act may unreasonably be regarded as being intended to amount to a terrorist act or activity because this wording quoted above allows for subjectivity. Hence many lawful activities may be deemed terrorist activities using this particular part of the definition.
- "public or compel a government ...to do , or refrain from doing, any act, and is made for the purpose of advancing a political... cause"- it is well noted that not all political causes advanced in a particular part of society or indeed, the whole country at large are harmful to the public. Such are the demands of a democratic society. This provision may be considered to be a leeway by the party in power to label as terrorist activities lawful political causes of opposition political parties in a bid to suppress them and remain in power.

Vague and/or overly broad definitions involve a fundamental measure of uncertainty and risk criminalising conduct that has nothing to do with what is normally understood by terrorism. Vaguely worded laws violate the fundamental principle of legality and lend themselves to arbitrary enforcement. These definitions may result in interpretations that unduly restrict

legitimate exercise of basic civil rights such as freedom of expression, association and assembly, or the rights of minorities to exercise their right to self-determination. What is more, these definitions lend themselves to selective application against opposition groups on the basis of political considerations.[44]

Vaguely worded definitions of terrorism in domestic laws are particularly worrisome when applied by States lacking general human rights safeguards. The use of the label "terrorism" can legitimise the measures applied by a government to counter the said activity. For example, the Russian Federation, by comparing its own campaign in Chechnya with the US led campaign against al-Qaeda and Osama bin Laden, has been able to reduce significantly the international scrutiny of its human rights record in Chechnya. And second, by defining the problem as "terrorism" States have the prospect of generating greater international support for their position and securing bilateral and multilateral assistance, such as transfers, extraditions of 'terrorist' suspects or obtaining military aid. As a recent report by a UN special working group on counter-terrorism policy concluded:

"labelling opponents or adversaries as terrorist offenders is a time-tested technique to de-legitimise and demonise them".[45]

ii. Enlisted circumstances or activities that are linked to definition of terrorism and terrorist act.

[a] "constitutes an offence within the scope of a counter terrorism convention listed in the Fifth schedule":

The fifth schedule has to it attached 16 different conventions aimed at different sets of crimes. What is surprising is that this provision does not leave out certain conventions because by their nature such terrorist activities cannot be committed in Zambia by the nature of her geographical location on the continent. An example of such a convention is the Convention for the Suppression of Unlawful Acts against Maritime Navigation of 1988.

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[44] The RedressTrust, July 2004. ***Terrorism, Counter-terrorism & Torture: International Law in the Fight against Terrorism***. London, The redress Trust,p11

[45] No. Report of the Policy Working Group on the United Nations and Terrorism, Annex to A/57/273, S/2002/875.

[b] & [d] "causes or is intended to cause death or serious bodily harm to a person" and "endangers a person's life"

The following sections in the Penal Code[46] provide the following crimes which seem to have been replicated in the Anti-Terrorism Act with penalties that substantially differ in strength and magnitude. Under the Act they carry life sentences whilst in the Penal Code they range from death sentence, life imprisonment, five years and seven years imprisonment respectively. They provide as follows:

200. "Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder... 201. (1) Any person convicted of murder shall be sentenced- (a) to death; or (b) where there are extenuating circumstances, to any sentence other than death ."[47]

229 "which provides that any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for seven years."[48]

248 " which provides that any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years."[49]

Having multiple legislation highlighting the same offence but with different penalties depending on which legislation one has been charged with does not for all intents and purposes serve any justice, but rather to the contrary raises serious flows in the quest for the delivery of justice to the country.

[c] "causes or is intended to cause serious damage to private or public property"

Chapter 34 of the Penal code[50] provides a broad array of offences concerned with destruction of private and public property in its various forms including attempts to destroy property by explosives, and provides sentences separately accordingly. However, the Anti-Terrorism Act makes no distinction of such and the penalty is one regardless of which form one might have engaged in, that is, life imprisonment.

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[46] Chapter 87 of the Laws of Zambia
[47] ibid
[48] Op. cit
[49] Supra note 12
[50] Chapter 87 of the Laws of Zambia

[h] "is designed or intended to disrupt any computer system or the provision of services directly related to communications, infrastructure, banking or financial services, utilities, transportation or other essential infrastructure or services".

The Computer Misuse Act[51] provides for offences related to the misuse of computer in the country. The title to the Act provides that its an Act to prohibit any unauthorized access, user or interference with a computer; to protect the integrity of computer systems and the confidentiality, integrity and availability of data, to prevent abuse of computer systems; to facilitate the gathering and use of electronic evidence; and to provide for matters connected with or incidental to the foregoing. The Act provides for 10 offences in sections 4 to 14 and these offences range in their penalties from a maximum of 5 years imprisonment alone or with a fine to a maximum of 10 years imprisonment with or without a fine.

However, the section which carries the heftiest sentence of them all is section 10 which provides Enhanced punishment for offences involving protected computers. The section reads as follows, "(1) Where access to any protected computer is obtained in the course of the commission of an offence under section four, five, six or eight, the person convicted of such an offence shall, in lieu of the penalty prescribed in those sections, be liable on conviction to imprisonment for a term of not less than fifteen years but not exceeding twenty-five years, or to both."

(2) For the purpose of subsection (1), a computer shall be treated as a "protected computer" if the person committing the offence knew, or ought reasonably to have known that the computer, program or data is used directly in connection with or is necessary for-

(a) **the security, defence or international relations of the State**;

(b) the existence or identity of a confidential source of information relating to the enforcement of a criminal law;

(c) **the provision of services directly related to communications infrastructure, banking and financial services, public utilities, public transportation or key public infrastructure**[52];

(d) the storing of classified Government information, or

[51] No. 13 of 2004
[52] Emphasis added

(e) the protection of public safety and public health, including systems related to essential emergency services such as police, civil defence and medical services[53].

The Act therefore provides a penalty which has in part, that which is provided for in the subsection under consideration but only carries a maximum sentence of 25 years imprisonment. Thus having such a provision in the Anti-Terrorism Act which has almost the same offence as the one found in the Computer Misuse Act but carrying a penalty of life imprisonment is a not welcome in the interest of justice. This is because public prosecutors might target charging certain individuals with provisions of the Anti-Terrorism Act which carries heftier sentences than those of the principle Act.

iii. **Section 2(3) "Any protest, demonstration or stoppage of work shall not be considered as a terrorist act if the act is not intended to result[54] in any serious bodily harm to a person, damage to property, endanger a person's life or create a risk to human health or public safety."[55]**

The right to hold public gatherings or freedom of association is constitutionally guaranteed, and following the decision by the supreme court in the case of **Christine Mulundika and 7 Others V the People**[56] which struck down section 5(4) of the Public Order Act[57] for being in contravention of Articles 20 and 21 of the Constitution, the holding of public gatherings or demonstrations has become a part of our democracy, as indeed is expected of any true democracy.

This provision pauses a threat to peaceful protests, demonstrations or stoppage of work which might turn out to be violent though not originally intended to be violent resulting in the serious bodily harm to a person, damage to property, endanger a person's life or create a risk to human health or public safety. This is in line with the history of demonstrations in Zambia. History has it that some have turned out to be violent although not intended to be so, as a result of police intervention in trying to disperse crowds. This subjective section leaves room for authorities to manipulate it and deem certain protests, demonstrations, work stoppages to constitute terrorist activities.

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[53] The Computer Misuse Act No. 13 of 2004
[54] Emphasis added
[55] Anti-Terrorism Act No. 21 of 2007
[56] S.C.Z. Judgment No. 25 of 1995
[57] Chapter 104 of the Laws of Zambia

2.3.0 Emerging Trends on Counter-Terrorism not Captured by the Act

The fight against terrorism carries with it certain responsibilities. With such commitments from world over to combat terrorism, new trends bordering on or dealing with human rights have emerged, and these need to be looked at or taken seriously because they go to the very root of human dignity. Six years elapsed since the events of 9/11 on New York before Zambia could come up with any anti-terrorism legislation. Because of the time frame, one would expect that the Act captured and dealt with at length these emerging trends so as to protect its citizens and those of others from being subjected to all sorts of treatment that is unacceptable. It should be borne in mind that all these new trends or phenomena are closely related. Below are some of the trends connected with the fight against terrorism that were clearly evident by the time the Act was being legislated upon but surprisingly not captured or addressed.

a) Deportation and Extradition

Deportation is the enforced removal of an alien from a country in which he or she is a resident to the country of his or her origin. Extradition, in law, is the surrender by one sovereign power to another of a fugitive from justice. Between nations, it is the right of one power to demand of another the extradition of a fugitive accused of crime, and the duty of the country in which the fugitive has found asylum to surrender this person, and which exists only when created by treaty. Because the political systems and penal codes of various nations differ considerably, most nations have given definite expression in treaties to their mutual obligations regarding extradition.

Deportations or expulsions are distinct from extraditions in that they involve a unilateral act by a State to expel an "undesired foreign national".[58] With deportation or expulsion, the emphasis is on the sending 'from' a particular country. This differs from extradition, where the emphasis is on the sending 'to' a particular country. The purpose of deportation or expulsion is therefore different from that of extradition but they are also subject to procedural safeguards, in particular, the obligation of non-*refoulement.* The UN Human Rights Committee explained in its General Comment No. 15:

[58] Katz, A., "Extradition of a terrorist", seminar paper presented at ISS Seminar: Terrorism in South Africa, 18 - 19/09/03, [http://www.iss.co.za/Seminars/terro19sep03/Extradition.pdf.]

"The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment, and respect for family life arises."[59]

Extradition can also be refused if the individual may face the death penalty in the requesting State, although the surrendering State may seek diplomatic assurances that the death penalty will not be imposed. States cannot extradite a person to a country where there are substantial grounds to believe that he or she may be submitted to torture or cruel, inhuman or degrading treatment or punishment (non-*refoulement*).[60]

The Immigration and Deportation Act[61] carefully provides for the law in Zambia dealing with immigration and deportation of non citizens when found wanting or in contravention of certain provisions provided for in the second schedule to the Act, which schedule provides for classes of prohibited immigrants. Though this Act provides for such, it is not comprehensive enough and has not in any one section looked at deporting a person for his involvement in terrorist activities. This is because both citizens and non citizens need to be protected from being arbitrarily deported, as this has been the trend by certain nations in a bid to lay charges of terrorism on them.

The Extradition Act[62] provides for matters related and incidental to extradition in the Republic with other nations with whom it has such diplomatic understanding. The Act provides in greater detail the Extradition to and from Foreign Countries with whom Zambia has entered into agreements with or have both signed an international instrument binding them with such an undertaking, and also considers extradition to and from declared commonwealth countries. The concluding part of the principle act provides for general provisions on extradition.

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[59] Human Rights Committee, General Comment No. 15, *The position of aliens under the Covenant,* 27th session 1986.

[60] The RedressTrust, July 2004. ***Terrorism, Counter-terrorism & Torture: International Law in the Fight against Terrorism.*** London, The redress Trust.p, 28

[61] Chapter 123 of the Laws of Zambia

[62] Chapter 94 of the Laws of Zambia

These two Acts have been considered in this part in relation to certain policy adopted by certain nations in their fight against terrorism. Persons have been caused to be deported at their request or with the help of their intelligence being accused of atrocities they have not played any part in. Such deportations and extraditions have led some to being tortured or subjected to cruel inhuman and degrading treatment. As a signatory to CAT, Zambia's laws on deportation and extradition need to be revised so as to reflect and address the dangers brought about by the war on terror with regard to preventing persons being deported to certain destinations not to be subjected to torture and other cruel and inhuman degrading treatment. Since these concerns are not addressed in the two Acts of parliament, it would have been advantageous to address them in the Anti-Terrorism Act.

b) Renditions/ Extraordinary Renditions

The United States (U.S.) has detained a large number of persons in various parts of the world for investigative purposes. Attention has been focused on the variety of settings and circumstances in which these persons are detained, including at military installations both inside and outside the U.S. and secret detention facilities in foreign States. *Renditions to justice*, which is apprehension of suspects without recourse to judicial proceedings by U.S. officials who are brought to U.S. or another State for trial or questioning on specific crimes, have been in existence since the 1980's. However another "tactic" in the "War on Terror" that has come to light is the practice of "Extraordinary Rendition". Extraordinary Rendition is the transfer of an individual, with the involvement of the U.S. or its agents, to a foreign State in circumstances that make it more likely than not that the individual will be subjected to torture or cruel, inhuman, or degrading (CID) treatment. "Reverse rendition" occurs when foreign authorities picking up persons in non-combat/battlefield situations and handing over to U.S. custody without basic legal protections.[63]

Persons suspected of terrorist or criminal activity may be transferred from one State (i.e., country) to another to answer charges against them. The surrender of a fugitive from one State to another is generally referred to as "rendition". A distinct form of rendition is extradition, by which one State surrenders a person within its territorial jurisdiction to a

[63] Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture By Proxy: International Law Applicable To "Extraordinary Renditions"* (New York: ABCNY & NYU School of Law, 2005),p 6

requesting State via a formal legal process, typically established by treaty between the countries. However, renditions may be effectuated in the absence of extradition treaties, as well. The terms "irregular rendition" and "extraordinary rendition" have been used to refer to the extrajudicial transfer of a person from one State to another, generally for the purpose of arrest, detention, and/or interrogation by the receiving State. Unlike in extradition cases, persons subject to this type of rendition typically have no access to the judicial system of the sending State by which they may challenge their transfer. Sometimes persons are rendered from the territory of the rendering State itself, while other times they are seized by the rendering State in another country and immediately rendered, without ever setting foot in the territory of the rendering State. Sometimes renditions occur with the formal consent of the State where the fugitive is located; other times, they do not.[64]

As the term suggests, this "extraordinary" practice appears to be a perversion of what is an acknowledged practice – the covert rendition by U.S. officials of individuals suspected of involvement in terrorism to justice"– *i.e.*, for trial or criminal investigation either to the U.S. or to foreign States. According to press reports, "regular" renditions – *i.e.*, transfers made without recourse to the regular legal procedures of extradition, removal, or exclusion, but not involving allegations of involvement in torture – have been occurring for more than a dozen years, and have included numerous transfers in the years leading up to September 11, 2001.[65]

What is "extraordinary" about this more recent, post-September 11 form of rendition is the role of torture and CID treatment reportedly involved in such transfers: U.S. officials reportedly are seeking opportunities to transfer terrorist suspects to locations where it is known that they may be tortured, hoping to gain useful information through the use of abusive interrogation tactics. Usual destinations for rendered suspects are reported to be States such as Egypt, Jordan, Morocco, Saudi Arabia, Yemen and Syria, all of which have been implicated by the U.S. State Department in using torture in interrogation. In this way, there has been a shift that focuses less on rendition to "justice" in the form of criminal

[64] Michael John Garcia, April 28, 2005. **Renditions: Constraints Imposed by Laws on Torture.** Legislative Attorney American Law Division

[65] Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture By Proxy: International Law Applicable To "Extraordinary Renditions"* (New York: ABCNY & NYU School of Law, 2005),p 6

investigation and trial in the U.S. or abroad, and more on interrogation – often in circumstances that indicate torture was at least a foreseeable possibility.[66]

Two other points about the definition of Extraordinary Rendition should be made here. First, the practice of Extraordinary Rendition entails many different levels of involvement of U.S. and other foreign State actors. Second, the definition of extraordinary rendition uses the "more likely than not" standard for assessing an individual's risk upon transfer to a certain state because this is the test that the U.S. employs when assessing that risk: that is the risk of torture.

It is in this regard that it becomes important and imperative that Zambia takes steps to put in place laws in its anti-terror legislation that counters this U.S policy of renditions even though they (U.S) government officially deny the practice. This practice violates international laws as well as domestic laws of Zambia because she is a signatory to CAT, hence the need to make manifest her (Zambia) firm resolves to uphold the principles embodied in CAT.

c) Torture within the discourse of terrorism

Torture and cruel, inhuman or degrading treatment or punishment has been recognised around the world as one of the most serious crimes, and its prohibition as a fundamental standard of the international community. Moreover, as a peremptory norm, the prohibition of torture is placed at the highest level of international law and takes precedent over conflicting rules of treaty law or customary international law.[67]

In their war against terrorism, the U.S and some of its allies have employed intensive interrogation techniques that otherwise qualify to be torture, inhuman and degrading treatment. Hence the war on terror has had torture as one of the techniques involved at the helm of many other interrogation techniques employed in the quest for extracting useful data from suspected terrorist. This being the case, and looking at the *use cogens* nature of the law on torture in international law, Zambia as a signatory to CAT and the African Charter on Human and People's Rights, has as its basic obligation to protect its citizens and any other individual on her soils from being subjected to such treatment. Hence the need to embed some guidance on how to handle terror suspects in its ant-terror legislation. Otherwise, left

[66] ibid
[67] Article 53 of the Vienna Convention on the Law of Treaties, 1969

unchecked as it is in its present form, it leaves enough room for Zambian citizens and non citizens alike who are in her territory to be rendered illegally to U.S authorities and their allies to be subjected to such ill treatment.

The prohibition on torture and cruel, inhuman or degrading treatment or punishment is set out in all the major international instruments dealing with civil and political rights, including: Article 5 of the Universal Declaration of Human Rights 1948; Article 7 of the International Covenant on Civil and Political Rights 1966; the 1984 UN Torture Convention; Article 3 of the European Convention of Human Rights; Article 5 of the American Convention of Human Rights; Article 5 of the African Charter on Human and People's Rights; and the Inter-American Convention to Prevent and Punish Torture. It is also prohibited by the four Geneva Conventions of 12 August 1949 and their two Additional Protocols and in national Constitutions and domestic legislation throughout the world.

The Convention Against Torture definition provides that torture is "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions."[68] This definition has been held to constitute customary international law.[69]
The definition of torture has been analysed by the European Court of Human Rights, that found that torture is deliberate inhuman treatment causing very serious and cruel suffering. It also held that so-called "disorientation" or "sensory deprivation" techniques, such as "wall standing", hooding, subjection to continuous loud noise, sleep deprivation, and deprivation of food and drink combined, are prohibited by international law as "cruel, inhuman or degrading treatment."[70]

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[68] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, 10 December 1984,Article 1.1
[69] Prosecutor v. Anto Furundzija

[70] *Ireland v. United Kingdom*, Eur. Ct. H.R., *Series A*, No. 25, para. 167.

There is a core group of rights from which there can never be derogation, even in times of war or during an emergency threatening the life of the nation, either because derogation from these rights is specifically prohibited by relevant human rights conventions or/and the rights at issue are peremptory norms of customary international law.

It is well-established under international law that the prohibition of torture has achieved the status of *jus cogens* - in other words that it is a 'peremptory' and non-derogable norm of general international law, which holds the highest hierarchical position among other norms and principles.[71] In **Furundzija** the International Criminal Tribunal for the former Yugoslavia stated:

"... because of the importance of the values it protects, [the prohibition of torture] has evolved into a peremptory norm or jus cogens, that is a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules... Clearly the jus cogens nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate."[72]

Under international law, violations of *jus cogens* norms are recognised to be of universal concern. As a result, every State has the obligation to investigate with a view to prosecuting the alleged perpetrators[73] irrespective of where the alleged offence took place.[74]

The prohibition against torture is non-derogable and therefore allows for no exception in times of war or public emergency. International humanitarian law explicitly prohibits torture

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[71] The concept of obligation *erga omnes* and *jus cogens* is found in the ICJ's advisory opinion on *Reservations to the Convention on the Prevention and Punishment of Genocide,* 1951 ICJ Rep. 15 (May 28). The concept also finds support both in the ICJ's *South West Africa* cases (Preliminary Objections) (*Ethiopia v. South Africa; Liberia v. South Africa*), 1963 ICJ Rep. 319 (Dec. 21) as well as from the *Case of the Barcelona Traction, Light and Power Co. Ltd.* (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5) [Hereinafter *Barcelona Traction*]. It should be noted that the *Barcelona Traction* case concerned an issue of civil law. Article 53 Vienna Convention on the Law of Treaties define *jus cogens* norms as: "For the purposes of the present Convention, a peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character" Article 53 Vienna Convention on the Law of Treaties.

[72] Supra note 37

[73] United Nations War Crimes Commission for Yugoslavia, UN Doc. S/1994/674, annex, p.42 (1994);

[74] *Demjanjuk v Petrovsky* (1985) 603 F Supp 1468; 776 F 2d 571

and ill-treatment (in the four Geneva Conventions of 1949 and their two Protocols). States have recognised that even in times of war, certain practices must be prohibited even if some military advantage can be gained. Similarly, procedural rights designed to guarantee the protection from cruel, inhuman or degrading treatment or punishment are not subject to limitations or derogations.

d) Non-Refoulement of Terror Suspects To Countries Implicated In Torture

International law recognises an absolute prohibition against forcibly sending, transferring or returning a person to a country where he or she may be submitted to torture and cruel, inhuman or degrading treatment or punishment (non-*refoulement*) and requires the implementation of effective remedies to guarantee the protection of this right. The principle of non-return or of non-*refoulement* has traditionally been associated with refugee law. The prohibition of the return of a refugee to "territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group" was first recognized in Article 33(1) of the 1951 UN Convention on the Status of Refugees. The scope of the principle of non-*refoulement* is now considered to apply to torture and cruel, inhuman or degrading treatment or punishment. However, the application of this principle under human rights law is broader in that it applies to all persons and not only to refugees.[75]

This principle has now been affirmed in numerous international instruments, including: article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and article II (3) of the Organization of African Unity's Convention Governing the Specific Aspects of Refugee Problems in Africa. For example, Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states:

"1.No 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.

[75] Sir Elihu Lauterpacht CBE QC and Daniel Bethlehem, The Scope and Content of the Principle of *Non-Refoulement* (Opinion), 20 July 2001, para. 132. Available from the website of the UN High Commissioner for Refugees, Global Consultations, Second track, expert meetings, at http://www.unhcr.ch.

2. For 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 consisted pattern of gross, flagrant or mass violations of human rights."

The jurisprudence that has developed within the European Human Rights system confirms the protection of persons against expulsion to a country where he or she is at risk of torture and cruel, inhuman or degrading treatment or punishment. The European Court of Human Rights has held that a State party to the Convention may itself be responsible for violating the prohibition of torture if it sends a person to a State when there are substantial grounds to believe that they may suffer torture. The United Nations Human Rights Committee also considers that the prohibition against torture present in Article 7 of the International Covenant on Civil and Political Rights (ICCPR) encompasses the prohibition against forcibly sending persons to countries where they may be subjected to torture or ill-treatment. In its General Comment 20 the UN Human Rights
Committee stated that:
"In the view of the Committee, States 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. States parties should indicate in their reports what measures they have adopted to that end."[76]

It is an established factor that the U.S and its allies were involved in the refoulement of persons to countries implicated in serious torture abuses and other degrading human treatment despite being signatories to all major international instruments concerned with non refoulement, and having even gone further in their national laws not to expose its citizens to such treatment. Hence it is important that Zambia puts in place legislation to counter states that might be involved in refoulement of persons to countries were they are likely to be tortured. This is in light of persons who are Zambian citizens who were seized and refouled to the U.K and U.S respectively.

[76] General Assembly Resolutions: 8(x), OP© (ii), 12 February 1946, 52/132, pp. 12, 12 December 1997, 56/137, OP, 19 December 2001, 57/187, OP4, 18 December 2002 Commission on Human Rights Resolution on Torture and other, cruel inhuman or degrading treatment or punishment, http://www.unchr.info/resolution/E-CN4-2004-L61-asterix-0419.pdf

Martin Mubangu, a British Muslim, but Zambian citizen was similarly in Zambia in 2002 and taken to the US detention camp in Guantanamo Bay, where he was held without charge until his release in 2005.In the end, despite being there for well over three years, he was not charged with anything and no compensation granted to him. It is a well known factor that Guantanamo is a helm of torture by the U.S of terror suspects it holds their.[77] Because of such experiences, it is imperative to legislate so as to have a stronger protection of her citizens and non citizens alike from being arbitrarily detained.

e) Torture By Proxy

"Torture by proxy" is used to describe situations in which the United States has purportedly transferred suspected terrorists to countries known to employ harsh interrogation techniques that may rise to the level of torture. There seems or rather seemed to be a growing consensus among nations actively involved in combating terrorism during the period 2001-2008 to hold and subject to torture persons suspected of terrorism on behalf of the state requesting such. This was especially actively pursued by the U.S, were by it requested its Arab allies to hold and torture on its behalf persons it returned to such nations on suspicions of having links to terrorist networks. Among the examples of such transactions include the following:

In September 2002, U.S. immigration authorities, reportedly with the approval of then Acting Attorney General Larry Thompson, authorized the "expedited removal" of a Syrian-born Canadian citizen, **Maher Arar**, to Syria under section 235(c) of the Immigration and Nationality Act 1952. U.S. authorities alleged that Arar had links to Al Qaeda. While in transit at John F. Kennedy International Airport in New York, Arar was taken into custody by officials from the F.B.I. and Immigration and Naturalization Service (since reorganized into the Department of Homeland Security) and shackled. Arar's requests for a lawyer were dismissed on the basis that he was not a U.S. citizen and therefore he did not have the right to counsel. Despite the fact that he is a Canadian citizen and has resided in Canada for seventeen years, Arar's pleas to return to Canada were ignored. Officials repeatedly questioned Arar about his connection to certain members of Al Qaeda. Arar denied that he had any connections whatsoever to the named individuals.

[77] African terrorism bulletin September 2005 | Issue 004

He was eventually put on a small jet that first landed in Washington, D.C., and then in Amman, Jordan. Once in Amman, Arar was allegedly blindfolded, shackled and transferred to Syria in a van. Arar was then placed in a prison where he was allegedly beaten for several hours and forced to falsely confess that he had attended a training camp in Afghanistan in order to fight against the U.S. Arar remained in Syria for ten months during which he was repeatedly beaten, tortured, and kept in a shallow grave. Arar has subsequently been released and returned to Canada. No charges were ever filed against him in any of the countries involved in his transfer. Following intense public pressure, Canada initiated a public inquiry into the circumstances surrounding Arar's transfer. The U.S. has refused the invitation to participate in the Canadian inquiry. U.S. officials, speaking on condition of anonymity, have said that the Arar case fits the profile of extraordinary rendition.[78]

Ahmed Agiza and **Mohammed al-Zari** were expelled from Sweden on December 18, 2001, and transferred to Egypt. According to the Swedish TV program Kalla Fakta, both men were flown on a Gulfstream V jet alleged to be owned by a U.S. company and which reportedly is used mainly by the U.S. government. The Swedish government relied upon "diplomatic assurances" from Egypt that the two men would not be tortured and would have fair trials upon return. U.S. agents were involved in the transfer of Agiza and al-Zari. The U.N. Committee against Torture recently held that in deporting Agiza and al-Zari to Egypt, Sweden violated the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[79]

Thus, it cannot be emphasised why Zambia should put into its ant-terror legislation its resolve not to align itself with states engaged in such violations. And also, to reassure its citizenry of her protection from nations wishing to lay such unfounded charges, only to be subjected to torture, inhuman and degrading treatment.

f) Concept of State-sponsored Terrorism

The Act does not capture the concept of state sponsored terrorism. It would therefore become problematic if the government of the day started violating rights of a certain group of individuals in society especially those who are known to be opponents of the government in

[78] Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture By Proxy: International Law Applicable To "Extraordinary Renditions"* (New York: ABCNY & NYU School of Law, 2005),p7

[79] ibid

power. This is necessitated by the fact that section 16 of the Act[80] enables the minister to declare certain organisations as terrorist organisations.

"*16.* (1) For the purposes of this Act, an organisation is a declared terrorist organisation if-
(a) the Minister has, by notice, under this section, declared the organisation to be engaged in terrorism..."

In this regard, room is left for the government in place to declare certain organisations which might otherwise be political organisations, to be terrorist organisations. It fails to grasp the concept of state sponsored terrorism.

4.0 Conclusion

In light of the campaign taken by many nations to combat terrorism, it has also become a major part of the obligation of the state to promulgate laws that ensure that the pursuit of such a nature does not jeopardise the freedom of its citizens and enjoyment of basic rights as accorded by the state. This chapter has looked at and analysed the provisions of the Anti-Terrorism Act, it provided reasons as to some of the advantages conferred by the Act in combating terrorism. However, it also considered some drawbacks in the provision of the Act that impact on certain basic human rights especially those related to torture. The chapter went further to consider emerging trends in the war on terror that other nations seem to be pursuing despite them being illegal. It also considered how these emerging trends have not being considered in the Anti-Terrorism Act in an effort to safeguard the citizenry of Zambia.

The next chapter places emphasis on the bodies that have been tasked with overseeing that torture does not occur in Zambia and the weaknesses embodied herein in such bodies and the laws by which they operate. It will also consider why torture persists in Zambia, and also certain provisions in the law and agencies entrusted to deal with such matters related to the fight against terrorism.

[80] Anti-Terrorism Act,# 21 of 2007

CHAPTER THREE

PERSISTANCE OF TORTURE IN ZAMBIA, IS THERE A CURE?

3.0 Introduction

The birth of Zambia in 1964, from the colonial administered Northern Rhodesia had come as a long struggle against white minority rule. This struggle was partly precipitated by the white minority rule, which oppressed the indigenous people with draconian laws and subjected them to torture and other forms of cruel, inhuman and degrading treatment so as to inspire fear and maintain a strong grip on them. However, due to a desire for self-rule and a desire to have laws in place that did not discriminate against any group in what made that society, the struggle for independence ensued which culminated into independence in 1964.

One of the first things realised was the putting in place a new Constitution, with a Bill of Rights embedded in it. This would guarantee each and every citizen basic freedoms, among these being the freedom from being subjected to torture, cruel inhumane and degrading treatment. Zambia committed itself to uprooting this ill practice and enshrined its commitment in the Constitution. However, more than forty (40) years after having committed itself to undertake the combating of such ill treatment, the practice still persists on a large scale.

This chapter considers the pertinent laws that have been put in place to help fight the scourge of torture, cruel inhuman and degrading treatment, but which laws have not been sufficiently drafted to combat the scourge effectively. Further, the paper will briefly look at bodies or agencies that have been set up and tasked with over-seeing the implementation and monitoring of the progress being made in the fight against completely uprooting torture, cruel inhuman and degrading treatment, and also prosecution of persons alleged to having been involved in acts of or incidences of torture.

3.1 A Weak Legal Framework

Zambia's legal framework with regards to torture stems from Part III of the Constitution itself. Article 15 provides that: "A person shall not be subjected to torture, or to inhuman or degrading punishment or other like treatment."[81] Despite this provision, it is worrying to note that it does not go further to define what torture is, or set a minimum standard of what

[81] Chapter one, The Constitution of Zambia, Amendment No.18 of 1996

constitutes cruel, inhuman and degrading treatment. This provision however does not define the term torture neither does it provide for an act of torture as a crime. A more worrying thing is that there is no other provision to deal with how persons implicated in acts of torture are to be dealt with. This weakness is observed in other forms of legislation ordinarily expected to have provisions tackling the incidence of torture, cruel inhuman and degrading treatment. It is important to note that there is no other provision in the laws of Zambia that provides for torture as a crime in Zambia. This in itself has perpetuated acts of torture.

The Penal Code[82] does not have any provision on torture or cruel inhuman and degrading treatment. There is no criminal offence of torture, and the Act does not define what torture is. Hence, prosecution for offences that would ordinarily be labelled as acts of torture are not charged and prosecuted as torture but are commenced in the name of other sections of the Penal Code. To this effect officers implicated in acts of torture are charged with the offence of causing grievous bodily harm and not torture. Such officers are charged in accordance with sections of the Penal Code which include:

- section 229 - which provides that any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for seven years,
- section 232 - which provides that any person who unlawfully wounds another or unlawfully, and with intent to injure or annoy any person, causes any poison or other noxious thing to be administered to, or taken by, any person, is guilty of a felony and is liable to imprisonment for three years,
- section 247 - which provides that any person who unlawfully assaults another is guilty of a misdemeanour and, if the assault is not committed in circumstances for which a greater punishment is provided in this Code, is liable to imprisonment for one year,
- section 248 - which provides that any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.

The other fact that perpetuates acts of torture in Zambia is the fact that *derivative evidence* is admissible in the courts of law. This basically means that if a suspect is tortured during the interrogation process and as a result of the torture that suspect reveals the whereabouts of

[82] Chapter 87, of the laws of Zambia

stolen property and based on that information the officers recover the stolen property, the courts will accept the exhibits as evidence regardless of the means that the officers used in obtaining that evidence. Therefore, it can be concluded that the measures adopted in law are not sufficient to end acts of torture in Zambia.[83]

When a suspect confesses to a crime after being tortured, the court will not admit that ***confession*** on grounds that it was illegally obtained. However, the court will admit any ***'consequential discovery'*** arising from the illegally obtained confession. This means that the court will admit any other evidence uncovered as a result of the torture confession obtained by police and use it to convict the accused.

This has proved to be one of the main reasons why torture has not been effectively eradicated in this country. For as long as police officers know that they can torture a suspect into giving them information leading to the solution of a crime, torture will continue to be a hallmark of Zambia's police system.[84]

Because of such a lack of a well drafted legislation and criminalisation of torture, and Zambia being a signatory and ratified United Nations Convention Against Torture (UNCAT) which has clearly spelt out what constitutes torture, cruel inhuman and degrading treatment, these provisions would ordinarily be expected to bridge this gap in the domestic law. However, although Zambia has signed and ratified the UNCAT, this does not help in any way in the fight against the complete eradication of torture, as no domestic enabling legislation has been put in place to pave way for the application of UNCAT domestically.

Amid such a lack of serious laws in place, one would thus be inclined to think that there is a lack of consensus or political will on the part of legislators, and the many successive governments that have held power in the last 46 years since independence was gained. This statement is made in light of the fact that civil society, non governmental organisations and many other stake holders have repeatedly raised their concerns and made calls for the revising of laws so as to criminalise torture and domesticate UNCAT, but these concerns seem to have fallen on deaf ears. The laws currently in place have been drafted in such a way that torture will continue for a long time to come if active steps are not taken to revise these

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[83] World Organisation Against Torture (Organisation Mondiale Contre la Torture) *Human Rights Violations in Zambia Part I: General situation Shadow Report* UN Human Rights Committee 90th session July 2007 Lusaka and Geneva, June 26th 2007

[84] http://www.jctr.org.zm/#43 First Quarter 2000:*Torture In Zambia's Police Cells*

laws. Further, the signing and ratification of UNCAT in its current form is a disguise by the Zambian government to the international community that it has complied with the *jus cogens* norm of eradicating torture in its territory, when it has neither criminalised torture nor taken active the initiative to domesticate UNCAT.

Zambia has neither incorporated CAT into its legislation nor introduced corresponding provisions in respect of several articles, in particular:

The definition of torture as contained in art 1 of CAT.[85] It has not taken any steps to criminalize torture as contained in art 4. There is yet to be legislation on the prohibition of cruel, inhuman or degrading treatment in the penal system. This is in recognition of the provisions of art 16. Article 25 of Zambia's Constitution does not clearly stipulate the absolute prohibition of torture, regardless of whether a state of war or a public emergency has been declared. Zambia has yet to recognize that torture is an extraditable offence as contained art 8 of CAT There is currently no systematic review of interrogation rules in the country, yet it has ratified CAT and as contained in art 11. This is the most telling legal loop hole for the continuance of torture in Zambia, because most cases of torture ensue from interrogations by members of the police force and other investigative wings of the government. Zambia has not clearly spelt out its jurisdiction over acts of torture, including those committed abroad (art 5) by citizens and non citizens alike.[86]

It is accordingly recommended that she incorporates speedily CAT into the legal system and to include in the criminal legislation and other provisions criminalizing acts of torture, provide a definition of torture that covers all the elements contained in article 1 CAT and appropriate penalties that take into account the grave nature of such acts. Incorporate in the Constitution and other laws the principle of an absolute prohibition of torture whereby no exceptional circumstances whatsoever may be invoked to justify it.[87]

3.2 Weak Institutional Framework

In the quest to safeguard human rights abuses from governmental agencies likely to engage in acts of torture, the government has legislated for the creation of certain organisations to keep

[85] See appendix 1 for detailed provisions of UNCAT

[86] http://www.universalhumanrightsindex.org/CAT/C/ZMB/CO/2 (CAT, 2008)

[87] Ibid

a watchful eye on the activities over such bodies or agencies. This means that any state official could potentially be involved in torture or ill-treatment. However, considering the common purposes of torture, which may be to obtain information during an interrogation, or, increasingly, to intimidate the population as a whole in the face of insurrection or disturbance, it is unsurprising that the principal perpetrators are those officials involved in the criminal investigation process, and those responsible for the security of the state. This means that those most likely to be involved in torture and other forms of ill-treatment include: The police, the *gendarmerie* (in countries where this institution exists), the military, paramilitary forces acting in connection with official forces, State-controlled contra-guerrilla forces.

But could also include: Prison officers, Death squads (torture following disappearance and preceding killing), Any Government official, Health professionals - doctors, psychiatrists or nurses may participate in torture either by act (direct involvement which may include certifying someone fit for interrogation) or by omission (falsifying medical reports or failure to give appropriate treatment), Co-detainees acting with the approval or on the orders of public officials.[88]

It will be noted the weaknesses embodied in such bodies which hinder the progress of them effectively carrying out their tasks as maybe assigned by the legislation creating them. This section will also take time to consider provisions of the Police Act, since this branch of the government has been held or seen to be the worst of them all agencies having its officers engaged in acts of torture in the execution of their duties. That the police force engages routinely in acts of torture is precipitated by the fact that they in ordinary day to day activities try by all means to keep the peace in our society, hence are in constant contact with offenders and would be offenders of the law.

3.2.1 The Human Rights Commission

The Human Rights Commission was established following a recommendation by the Munyama Human Rights Commission of Inquiry, appointed in 1993 to investigate the human rights situation in the Second Republic after 31st October 1991.[89] The establishment of the Human Rights Commission is another effort by the State to help reduce acts of torture by

[88] Camille Giffard.2000.The Torture Reporting Handbook.Wivenhoe Park,Colchester. UK, p 15

[89] World Organisation Against Torture (Organisation Mondiale Contre la Torture) *Human Rights Violations in Zambia Part I: General situation Shadow Report* UN Human Rights Committee 90th session July 2007. Lusaka and Geneva, June 26th 2007

officers on inmates of suspects in their custody. This body is competent to receive complaints of cases of torture or ill-treatment.

Pursuant to section 9 of the Human Rights Commission Act[90], the functions of the Commission are:

· Investigate human rights violations
· Investigate any maladministration of justice;
· Propose effective measures to prevent human rights abuses;
· Visit prisons and places of detention or related facilities with a view to assessing and inspecting conditions of persons held in such places and make recommendations to redress existing problems;
· Establish a continuing programme of research, education, information and rehabilitation of victims of human rights abuses to enhance the respect for protection of human rights; and
· Do all such things as are incidental or conducive to the attainment of the functions of the Commission.

With regard to the investigation of human rights violations, the Human Rights Commission has the powers to investigate either on its own initiative or on receipt of a complaint or allegation by

(i) an aggrieved person acting in such person's own interest,
(ii) an association acting in the interest if its members,
(iii) a person acting on behalf of an aggrieved person, or
(iv) a person acting on behalf of and in the interest of a group or a class of persons.[91]

Following the investigation, the Commission may issue recommendations "to the appropriate authority" for any victim of an abuse of human rights, which recommendations may include release of a person from detention; payment of a compensation or seeking for redress before a court. The "appropriate authority must, within 30 days, make a report to the Commission, on any action taken by such authority to redress human rights violations".

3.2.1[a] Main weaknesses of the Commission:

(a) Lack of independence of the Human Rights Commission

The Commissioners are appointed by the President, who has the power to decide upon the composition of the Commission. The Commissioners, who are appointed by the President, are ratified by Parliament. It is important to note that the President has power to relieve any of the Commissioners of their duties if they grossly misconduct themselves. Currently, none

[90] Chapter 48 of the Laws of Zambia
[91] Ibid, Section 10

of the Commissioners has been dismissed on these or any other grounds. However, the weakness of the Human Rights Commission is not so much in the security of tenure of the Commissioners but in the powers given to the Commission in the executions of its mandate. Much as the power to visit detention facilities and investigate cases of human rights violations, the Commission does not have the power to take any act against persons found guilty as it can only make recommendations to the relevant authorities on what actions should be taken in relation to the findings of the Commission. These recommendations can either be adopted or ignored by government authorities.

(b) Lack of enforcement power

This is one of the main weaknesses of the Commission, which is not in a position to take any further action once the recommendations are issued, especially in the case where a recommendation issued is not implemented by the "appropriate authority". Additionally, the Commission is not competent to initiate legal proceedings on behalf of the complainants. The dependence by the HRC on other authorities to take action does not give assurance to the complainant for redress. This procedure also unduly prolongs the possible proceedings.

(c) Lack of funding

The budget of the Commission, which is adopted by the Parliament, remains extremely low and does not cover the basic expenses of the Commissioners[92]. The Commission is not allowed to receive grants or any other financial support from international institutions or other donations from any source, unless they have been expressly approved by the President. This may also undermine appropriate funding and result in an unnecessary administrative burden.[93]

However, as mentioned, the Human Rights Commission may only make recommendations to the State. In both provinces, cases of torture are listed. According to a study of the Human Rights Commission, for 2006, 160 complaints have been introduced from different sources. Regarding the crime of torture, 24 complaints have been introduced with the following repartition on the year.[94]

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[92] Op cit, section 22

[93] World Organisation Against Torture (Organisation Mondiale Contre la Torture) *Human Rights Violations in Zambia Part I: General situation Shadow Report* UN Human Rights Committee 90th session July 2007. Lusaka and Geneva, June 26th 2007

[94] Human Right Commission, Drafting of the 2006 annual report

		Male	Female
1st quarter	2006	6	0
2nd quarter		4	1
3rd quarter		9	3
4th quarter		0	2
1st quarter	2007	1	1
Total		20	7

3.3 Zambia Police Service

The organisation functions and discipline of the Zambia Police Force is governed by Chapter 107, The Zambia Police Act. The Act provides offences within the framework of the organisation and not outside the organisation by the officers. Even within these offences, torture is not highlighted despite the force being implicated as the number one violator of basic human rights in the execution of their duties, torture being one of these violations.

However to carter for offences against members of the public and in pursuit of disciplining members of the force, the Act was amended by Act No. 14 of 1999 to provide for the establishment of the Police Public Complaints Authority, which Authority has been tasked with hearing grievances from the public against any member of the police force, having misconducted themselves in course of their employment.

3.4. Police Public Complaints Authority (PPCA)

Repeated calls from civil society, non governmental organisations and other stake holders concerned with abuse by officers in the police in police cells and other forms of indiscipline when detaining suspects led to the creation of the Police Public Complaints Authority (PPCA),[95] which institution was created to address complaints from members of the public caught up as victims of gross police misconduct in the execution of their duties, and that in the process they grossly violate certain basic human rights. Such misconduct includes ill-treatment of detained suspects in police cells and custody, the use of extreme interrogation techniques as a means to coercing suspects to divulge certain information. All these forms of ill-treatment either constitute in themselves torture, cruel treatment or inhuman and degrading treatment.

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[95] Zambia Police (Amendment) Act No. 14 of 1999

The Authority was established to address such matters or complaints from the public as against members of the police force in the execution of their duties. The functions of the Authority among others include the following as laid down in the Act:

"(1) The functions of the Authority shall be-

(a) to receive all complaints against police actions;

(b) to investigate all complaints against police actions which result in serious injury or death of a person;

(c) to submit its findings, recommendations and directions to-

(i) the Director of Public Prosecutions for consideration of possible criminal prosecution;

(ii) the Inspector-General for disciplinary action or other administrative action; or

(iii) the Anti-Corruption Commission or any other relevant body or authority."[96]

3.4. [a] Weaknesses of the Authority

While the usual known abuses which police officers engage in are known, they are not spelt out in the Act as some of the offences with which police officers can be charged with in the criminal courts of law. Among these offences are- bribery, torture of suspects, the use extreme interrogation techniques which amount to cruel inhuman and degrading treatment. The Act in not clearly spelling out these offences obscures such officers from being so charged once brought before the courts of law.

The injustice done by this Act can be clearly be observed in section 57G (b) were the legislators opted not to come out clean on the stance against torture and related treatments whilst its a known fact that these have resulted in so much distress by the victims. Section 57G (b) reads in part:

"to investigate all complaints against police actions which result in serious injury or death of a person."[97]

It is a known fact that such injuries or deaths are as a result of torture being used as a form of interrogation technique, and cruel inhuman and degrading treatment by officers while they detain suspects. The Act instead opts to remain silent on the matter.

[96] Section 57G of the Zambia Police (Amendment) Act No. 14 of 1999

[97] Emphasis added

Further, section 57G.2 provides that the Authority can only make recommendations and give directives to the Director of Public Prosecutions for consideration of possible criminal prosecution; the Inspector-General for disciplinary action or other administrative action; or the Anti-Corruption Commission or any other relevant body or authority. This is one of the main weaknesses of the Authority, which is not in a position to take any further action once the recommendations are issued, especially in the case where a recommendation issued is not implemented by the "appropriate authority". Additionally, the Authority is not competent to initiate legal proceedings on behalf of the complainants.

In most instances in cases recommended or directives given to the Inspector General, he has in many instances just suspended the implicated officers for a given period of time, relieved some officers of there duties which has happened in rare cases; or demoted such implicated officers to a lower rank. Hence, most of them have gotten away without ever being prosecuted for such impunities they were implicated in. One of the characteristics of these cases is the impunity of the perpetrators. Indeed, in spite of the numerous complaints of inmates, few cases have been brought to the courts to date. It is important to note that since 2005, officers found guilty by the PPCA have been dismissed or discharged of their duties on recommendation by the PPCA. However, none of the perpetrators of torture has been prosecuted.[98]

3.5 The Dangers of Integrating into the Sub-Region with a Weak Legal and Institutional Framework (in fighting terrorism)

It is a well founded fact that the fight against terrorism is of global concern, hence national, regional and international co-operation has been encouraged since the advent of the events of 9/11. Therefore, any weaknesses in a country's internal laws with regard to how they treat suspects and the levels of upholding their human rights, may lay them bare to being mistreated by intelligence officials of other nations citing these weak laws as the law upon which they are acting.

In their eagerness to prevent future terrorist attacks, many nations have focused on intelligence gathering in lieu of prosecution. But that focus poses its own security threat by

[98] ZAMBIA: Contribution from the World Organisation Against Torture (OMCT) to the Universal Periodic Review (UPR) Process

ignoring the problem of what to do with terrorist suspects once they are captured. Thus, citizens of Zambia maybe held without prosecution in foreign nations without ever being prosecuted. This was the case of Mubanga who was held at Guantanamo for well over two years without ever being prosecuted.

Further, because of the legal loop hole in our internal laws on evidence illegally obtained being admissible in the courts, member states of SADC may take advantage and subject Zambian nationals in their custody to torture, cruel inhuman and degrading treatment. This use of coercion to extract testimony from suspects renders those suspects virtually unprosecutable, as prosecutors face the nearly impossible task of proving that evidence was not derived from mistreatment. The way the Anti-Terrorism Act has been drafted is in such a way that it allows for other nations to engage in acts of rendition on the Zambian soils, this is in light of the fact that it does not take into account this new trend in the war on terror.

3.6 Conclusion

The cure into the persistence of torture and related cases in Zambia lies in overhauling the legal and institutional framework that is currently in place. The current system does not yield effectively to the fight against torture in the country. Further, changing these laws in place and institutional framework will enhance human rights safeguards of our citizenry both at a domestic and regional level. This chapter has looked at the causes of why torture and other related acts persist in Zambia. The paper has identified the weak laws in place that make it difficult for the complete eradication of torture. Further, it considered the weak institutional framework currently in place for the monitoring of violations of certain basic human rights. It concluded by looking at the dangers involved in integrating into the regional framework with weak domestic laws and institutions in combating terrorism in a manner that does not violate basic human rights of suspects.

The next chapter considers Zambia's integration into the sub region in the quest to safeguard the region from terrorist attacks. It will further look at the efforts that the Zambian government is making towards reaching a comprehensive anti-torture system and also looks at the regional (SADC) mechanisms and systems in place and will look at the international law obligations and assesses whether these are adequate to combat torture in the course of fighting terrorism.

CHAPTER FOUR

TOWARDS REGONAL INTEGRATION IN THE FIGHT AGAINST TERRORISM WITH LAWS CONSISTENT WITH RESPECT FOR AND OBSERVANCE OF HUMAN RIGHTS (Specifically Addressing Torture in the Fight Against Terrorism).

4.0 Introduction

Southern Africa has not received much international attention in connection to transnational terrorism. Although there is no indication that al-Qaeda or groups associated with its global terrorist network operate in significant numbers in the region and it is not currently a hot-bed for recruitment and radicalisation, terrorism should nevertheless not be ignored. On 8 August 1998, Khalfan Khamis Mohammed crossed into Mozambique from his native Tanzania. The previous day, two massive explosions had destroyed the American embassies in Nairobi and Dar es Salaam, killing more than 200 people – Mohammed had helped to prepare the attack in Tanzania. Little more than a week later, Mohammed would cross into South Africa with a visitor's visa he had acquired in Dar es Salaam the day before the bombing. Before finally being detected and arrested in October 1999, Mohammed had lived and worked in Cape Town for more than a year, seeking asylum under a fictitious name.[99]

In the aftermath of what was, to that point, one of the worst terrorist attacks anywhere in the world – one-half of which occurred in a SADC (South African Development Community) country – one of the perpetrators traversed the borders of three SADC states, finally seeking asylum in one. Indeed, nearly every southern African country has been affected by this kind of violence, or the repercussions of such acts, in one way or another. The region has not been immune from local terrorism and has had – and may have – sinister links to international terror. However, despite this experience much remains to be desired when it comes to counterterrorism measures in the region. SADC has however put in place certain measures to address the same.

This chapter takes a look at the framework(s) in place to address various sources of concern with effect on destabilizing the region in its effort in being a peaceful region. The paper will begin by looking at the regional framework in place in the fight against terrorism which has

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[99] Michael Rifer, SADC and Terrorism: Where is the regional strategy? African Security Review Vol 14 No 1, 2005: *pp*107–116

not yet been fully put in place. Thereafter it will consider other frameworks that are in place which can be used in the fight against terrorism, which would only require to be strengthened so as to meet the challenge. It will then consider how the regional framework can be strengthened so as to have in place all necessary safeguards for the respect for and observance of human rights in accordance with the UN Strategy that has been formulated in this war on terror. In conclusion a summary will be made and a conclusion drawn from there.

4.1 Regional Framework in Place in the Fight against Terrorism

The primary sub-regional organisation in southern Africa is the Southern African Development Community (SADC). Although SADC has yet to devise a sub-regional response or mechanism to address terrorism, it has adopted a number of protocols related to security that, although they do not contain the terrorism or counterterrorism label, nevertheless relate to certain aspects of the issue, for example small arms and drug trafficking. SADC's difficulties in formulating an effective sub-regional response to terrorism largely reflect not only the lack of a common threat perception among its members, but also their more urgent political priorities. As a result, most of the counterterrorism activities in the sub-region have been carried out by individual SADC members, not by or through the organisation itself. Following from this, the SADC secretariat does not have staff or resources devoted to counterterrorism *per se*, although its legal unit has sought to provide guidance on implementation of the international conventions and protocols related to terrorism and relevant Security Council resolutions. Generally speaking, much of SADC's work in the field of terrorism, as in other areas, has been conducted at its annual gatherings of heads of state, without necessarily mandating further action by the body's secretariat between the meetings.[100]

In discussing regionalism in southern Africa, it is important to underscore the fact that the region is characterised by acute imbalance and inequities; on one hand, South Africa is in many ways a developed nation, while Malawi and Mozambique are less so. On the other hand, the DRC, raven by conflict for a decade, is still struggling to emerge as a functioning state. Faced with different priorities, challenges, and capabilities, there are wide disparities in the willingness and ability of individual SADC states to confront the issue of terrorism. In a

[100]Nyang'oro, J E 2007. Terrorism threats and responses in the Southern African Development Community region. In A le Sage (ed), *African counterterrorism cooperation: assessing regional and subregional initiatives.* Washington, DC: National Defense University Press and Potomac Books.p106

region with the world's highest prevalence rates of HIV/AIDS, a region plagued by conflict, poverty, and underdevelopment, it is not hard to understand why. Still, while terrorism may not rise to the priority that it enjoys in the West, or even in other parts of Africa, its potential implications warrant that SADC states take the issue seriously. Indeed, prudent action now could prevent terrorism – and any perceived vulnerability to it – from becoming a greater issue in the future.

Perhaps the greatest obstacle to improving counterterrorism cooperation in southern Africa is the lack of any urgent or common perception of the threat posed by international (as opposed to domestic) terrorism. Although many states in southern Africa have suffered and continue to suffer from domestic terrorism over the years, they have tended to view international terrorism as primarily a Western problem, which is less salient to their own concerns than issues such as public health and crime.[101]

Just as the region needs to be – and is – able to coordinate its militaries in preparation for an (unlikely) external attack, so too should it prepare to coordinate its law enforcement capabilities, border controls, and judicial systems to ward off – or respond to – terrorist action. Similarly, it is in SADC's interest to take whatever steps will help it to avoid being seen as 'vulnerable' to terrorism and militate against whatever economic shocks such a label would surely bear. This is what the global security situation demands at the moment. Indeed, from a need to get in line with the international community to improving security domestically, as well as across the region, SADC nations should create a collective approach to anti-terrorism.

Although terrorism has not been viewed as a top priority in the sub-region as a whole, some states have made progress in strengthening their counterterrorism capacities since September 2001.[102] In most cases, however, the motivating factor has been internal governance issues rather than terrorism *per se*.[103] Despite this recent progress, significant capacity gaps remain,

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[101] ibid

[102] United Nations Security Council 2006. *Report of the Counter-Terrorism Committee to the Security Council for its consideration as part of its comprehensive review of the counter-terrorism committee executive directorate* (S/2006/989). New York: United Nations.p20

[103] Nyang'oro, J E 2007. Terrorism threats and responses in the Southern African Development Community region. In A le Sage (ed), *African counterterrorism cooperation: assessing regional and sub regional initiatives.* Washington, DC: National Defense University Press and Potomac Books.p108–109

whether it be the lack of a legal framework to deal with terrorism, limited capacity to prevent terrorist financing, low ratification of international counterterrorism instruments, or lack of effective border controls.

There are further signs of progress within SADC. For example, the SADC secretariat is in the process of conducting the first sub-regional threat assessment with a view to devising a sub-regional counterterrorism strategy and has now established formal contact with the ACSRT[104]. Other possible SADC activities could include formal endorsement of the UN Global Counter-Terrorism Strategy, and convening of sub-regional functional workshops, which might bring together experts from across the sub-region to receive training on specific elements of the Strategy.[105]

4.2 Expanding on Existing Framework to Encompass Terrorism

Perhaps more evident is the fact that SADC has put in place various organs and protocols to deal with matters related to defence, security and peace in the sub region, which would otherwise result from such crimes as trafficking in small arms, ammunition and other related explosive materials. Further, other sub regional groupings within SADC were SADC has access to them have put in place a unit to deal with matters related to terrorism financing. Albeit such mechanisms in place however, there is currently no organ or protocol in place directly charged with overseeing and combating terrorism in the region. This does not however mean that the political will to combat such a confrontation is lacking at its very bare minimal level in the region. Witness to this fact is the effort the regional grouping has put in place to combat various risks that might afflict the sub region.

SADC already has a significant capacity for law enforcement cooperation. This is perhaps the most critical step in the creation of a meaningful anti-terrorism partnership. In an issue obviously related to terrorism, SADC has adopted a protocol on the control of firearms, ammunitions, and other related materials. Identifying small arms as another trans-border threat, 'State Parties undertake to improve the capacity of police, customs, border guards, the

[104] Algiers Centre on the Study and Research of Terrorism
[105] Eric Rosand and Jason Ipe. **Enhancing counterterrorism cooperation in southern Africa**. African Security Review Vol 17 No 2

military, the judiciary and other relevant agencies to fulfil their roles in the implementation of this Protocol'. It also provides for cooperation between law enforcement agencies and mutual legal assistance. This indicates that SADC members have – or are at least working towards – the capacity to address this type of trans-national threat, and are building functional relationships between their respective agencies.[106] Below is an analysis into what is already in place and which could be utilized once an organ to deal with terrorism is put in place.

(a) The Southern African Regional Police Chiefs Co-operation Organisation (SARPCCO)

The Southern African Regional Police Chiefs Co-operation Organisation (SARPCCO) 'is the primary operational mechanism in southern Africa for the prevention and fighting of cross-border crime, including the trafficking of weapons'. Having designated the Interpol sub-regional bureau in Harare as its secretariat, SARPCCO is essentially a part of that international crime-fighting body. This gives southern African police chiefs direct access to Interpol's resources and expertise, and therefore a unique capacity for combating crime across borders and throughout the region. SARPCCO is able to disseminate relevant intelligence and information to the appropriate bodies across the region and coordinate joint-enforcement strategies to combat trans-national crime.

Like the protocol on firearms[107], SARPCCO demonstrates that there is both the capacity and the will in southern Africa to coordinate law enforcement and to combat cross-border crime. However, SARPCCO cannot entirely be a proxy for a regional anti-terrorism programme. For one, the DRC is not a member of SARPCCO, though an important member of SADC. Beyond that, combating terrorism in southern Africa goes beyond mere law enforcement. Financial instruments, national defence and national security agencies, and national legislatures will all be required to play important roles.

The 12-member SARPCCO was established in September 1994 as an independent international police organisation, with a focus on the prevention and fighting of cross-border crime, including the trafficking of weapons. It is now part of SADC's Organ for Politics, Defence and Security. While its 12 members ostensibly have access to Interpol's I-24/7

[106] Michael Rifer, SADC and Terrorism: Where is the regional strategy? African Security Review Vol 14 No 1, 2005: *pp*107–116

[107] SADC, Protocol on Firearms, Ammunitions, and other Related Materials

network, the extent to which they make effective use of this and other Interpol tools, including by making access to them available at critical frontline locations such as border crossings and airports, varies significantly from country to country.[108]

As a result of its close relationship with Interpol, with its wealth of expertise and resources, and the fact that law enforcement officials in southern Africa do in fact see terrorism and the related threat of cross-border crime as priorities, SARPCCO has been able to develop and implement a series of practical counterterrorism programmes. These include the creation of a counterterrorism desk at Interpol's sub-regional bureau to assess relevant legislation in member countries, determine gaps and strengths, and make recommendations to the SARPCCO legal sub-committee; the SARPCCO model counterterrorism law; a counterterrorism training curriculum to ensure that regional and international obligations with regard to the prevention and combating of terrorism are understood by trainees; and a human rights training programme to ensure respect for human rights and rule of law by law enforcement officers.[109]

(b)The Eastern and Southern African Anti-Money Laundering Group (ESAAMLG)

The 14-member Eastern and Southern African Anti-Money Laundering Group (ESAAMLG) has a critical role to play in building regional anti-money laundering and counterterrorism efforts by promoting the adoption and implementation of the 40 recommendations on money laundering and nine special recommendations on terrorist financing of the Financial Action Task Force (FATF). ESAAMLG was established as a FATF-style regional body in 1999 in the eastern and southern regions of Africa and operates under a memorandum of understanding in terms of which all member countries are committed to the implementation of the FATF standards, as well as any other relevant measures contained in multilateral agreements to which they are party and relevant UN Security Council resolutions. Among ESAAMLG's core activities are researching the trends and types of money laundering and financing of terrorism activities in the region with a view of understanding emerging vulnerabilities and developing appropriate actions to prevent the threats.[110] The organisation

[108] Eric Rosand and Jason Ipe. **Enhancing counterterrorism cooperation in southern Africa.** African Security Review Vol 17 No 2
[109] ibid
[110] Kisanga, E J 2007. [ESAAMLG Executive Secretary to the Center on Global Counterterrorism Cooperation about ESAAMLG's counterterrorism-related activities]

is also engaged in a programme of mutual evaluation of the anti-money laundering and counterterrorist financing regimes operating in member countries. These assessments provide information on weaknesses that exist in the member countries and provide recommendations on the actions needed to strengthen their laws and regulations.[111]

As the regional arm of a global standard-setting body, ESAAMLG has succeeded in placing the global FATF standards in the appropriate regional and cultural context and therefore helped enhance political support for those standards among the members of ESAAMLG.

Despite ESAAMLG's achievements, the capacities of its member countries to implement the FATF standards remain low. For example, most countries still have limited capacity to prevent the financing of terrorism or to prosecute and investigate terrorist cases, and few have made progress on issues such as regulating alternative remittance systems. As of May 2007, only Mauritius and South Africa had established financial intelligence units or centres.[112] In addition, ESAAMLG is limited in that four countries in the sub-region, namely Angola, the Comoros, the Democratic Republic of Congo and Madagascar are not members. It has, however, made those countries targets for absorption.

(c) SADC's Organ on Politics, Defence and Security Co-Operation

Since SADC's establishment in 1992, a comprehensive and ambitious security project has unfolded. This new "security architecture" in the region provides for collaborative security, collective security, and collective self-defence. SADC's Organ on Politics, Defence and Security was established in 1996, and a protocol on Politics, Defence and Security Co-operation[113] was signed in 2001. Its objective was to establish policies to both streamline the foreign policies of SADC states and to implement peace and security initiatives that addressed conflict prevention, and peace building. The protocol also established a mechanism in the form of a one-year revolving chair of the Organ. This system – known as "the troika" - is comprised of three member

[111] ibid

[112] Egmont Group, November 2007. Financial intelligence unit definition. List of operational financial intelligence units [online]. Available at http://www.egmontgroup.org/list_of_fius.pdf [accessed 12th November 2009].

[113] Appendix 2

states which are supported by the SADC secretariat: an outgoing Chair; a serving Chair; and an incoming Chair.[114]

In 2004, SADC consolidated its peace and security plan through its Strategic Indicative Plan for the Organ on Politics, Security and Defence Co-operation. SIPO has devised strategies for development in four broad sectors: politics; defence; state security; and public security. SIPO is described by the organisation as an "enabling instrument for the implementation of the SADC developmental agenda". As part of its framework, a regional early-warning centre has been established, and a Strategic Analysis Unit, responsible for managing a Situation Room, has also been set up. SIPO envisages cooperation among member states to address a number of other defence and security issues in the region, including combating terrorist activities; countering trafficking in small arms; protecting strategic infrastructure; combating stock theft; protecting wildlife; streamlining immigration legislation between member states; and addressing refugee issues; law enforcement at sea; and joint border control.[115]

By adopting Resolution 1373, the Council clearly establishes that terrorism is a threat to international peace and security, which seems to be the litmus test for the SADC Protocol for Policy, Defence, and Security Cooperation. The preamble to the protocol recalls 'that Chapter VIII of the UN Charter recognizes the role of regional arrangements in dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action'. But beyond having a clear UN mandate to undertake anti-terrorist actions, the protocol would itself seem to charge the organ with confronting evolving security threats, like international terrorism. Among the Articles relevant to the subject of terrorism are the following as are outlined below:

Article 2.2.a[116] charges the organ to 'protect the people and safeguard the development of the Region against instability arising from the breakdown of law and order, intra-state conflict, inter-state conflict and aggression'. Although terrorism isn't specifically mentioned, it certainly represents a breakdown of law and order, is an act of aggression, and is something against which 'the people' deserve protection.

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[114] **"SADC: Building an Effective Security and Governance Architecture for the Twenty First Century"** The Centre for Conflict Resolution Cape Town, South Africa, February 2007

[115] ibid

[116] SADC Protocol for Policy, Defence, and Security Cooperation

Article 2.2.i[117] obliges the organ to 'develop close co-operation between the police and state security services of State Parties in order to address: (i) cross border crime; and (ii) promote a community-based approach to domestic security'. This point clearly should apply to terrorism given its nature; it being a trans-national threat and a law-enforcement issue as much, or more, than it is a military issue.

Articles 11.2.a.iii and 11.2.b.iv give the organ jurisdiction over 'conflict which threatens peace and security in the Region or in the territory of another State Party'. Although it is difficult to define terrorism as a conflict (per se), the adoption of Resolution 1373 declares it to be a threat to global peace and security, and therefore a threat to peace and security both in the region and within any member state. Article 11.2.c gives the organ authority to act in concert with the UN Security Council.

Article 11.1.d instructs the organ to 'seek to ensure that the State Parties adhere to and enforce all sanctions and arms embargoes imposed on any party by the United Nations Security Council'. Security Council Resolution 1373 effectively declares an embargo on all terrorist-related financing and support, and taken in this context, SADC – and specifically the security organ – is obliged to ensure that all member states take the appropriate measures to that end.

(d)SADC, Protocol on Firearms, Ammunitions, and other Related Materials

This protocol essentially was formulated to counter the problem of illegal trafficking in small fire arms, ammunition and other related materials in the sub region so as to foster peace and stability in the region. Among some critical provisions of the protocol include the following which would otherwise complement the work of efforts aimed at combating terrorism:

Article 4[118] encourages states 'to consider becoming parties to international instruments relating to the prevention, combating and eradication of illicit manufacturing of, excessive and destabilising accumulation of, trafficking in, possession and use of firearms, ammunition and other related materials and to implement such instruments within their jurisdictions'.

[117] ibid
[118] SADC, Protocol on Firearms, Ammunitions, and other Related Materials

Article 5.1[119] states that 'State Parties shall enact the necessary legislation and take other measures to establish as criminal offences under their national law to prevent, combat and eradicate, the illicit manufacturing of firearms, ammunition and other related materials, and their excessive and destabilising accumulation, trafficking, possession and use'.

Article 6[120] calls upon members to 'undertake to improve the capacity of police, customs, border guards, the military, the judiciary and other relevant agencies to fulfil their roles in the implementation of this Protocol ...' and goes on to demand better coordination, better databases of information, better intra-national communication, and joint training.

Article 15[121] obliges signatories to 'establish appropriate mechanisms for co-operation among law enforcement agencies of the State Parties to promote effective implementation of this Protocol ...' including improved direct communication across the region, better-equipped border facilities, cooperation with international authorities, and effective extradition agreements. Combating any trans-national threat demands the establishment and improvement of the infrastructure – both tangible and intangible – that enable each agency from each country to most effectively do their jobs. In the case of terrorism, the region should have a similar authority to 'establish appropriate mechanisms' to ensure the best information, intelligence, and coordination.

Given the above provisions[122], it is quite evident that improving on these already existing frameworks so as to counter the new face of terrorism would not be a process emanating from scratch as most of these provisions can be incorporated into a protocol addressing terrorism in the sub region head on.

4.3 Strengthening the Regional Framework

While it may be as much a preventative measure as it is a response to an immediate threat, the need for SADC to embrace a regional anti-terrorism body should be clear. Perhaps less clear is how to create such a body, and what form it will take. The region will have to find

[119] ibid
[120] Op. cit
[121] Supra note 17
[122] See appendix 3 for detailed provisions of SADC, Protocol on Firearms, Ammunitions, and other Related Materials

unique ways to amalgamate existing arrangements with international structures and best practices.

Perhaps the first place to start is to demonstrate the will and commitment of all member governments with the adoption of a *SADC protocol on terrorism*[123]. That SADC would have protocols for issues like wildlife law enforcement but not one for terrorism belies the global security realities of today. While terrorism as an issue may have been placed at the -international forefront by the United States (US) and -others, it is not without implications for southern Africa. The absence of an anti-terrorism protocol is a glaring omission to a collection of protocols which otherwise cover the entire spectrum of human security'. Taking that measure would be an important first step in bringing southern Africa into compliance with UN Security Resolution 1373 and in line with the efforts of regions and sub-regions around the world. Below is a hypothetical form a body with such a mandate should take.

(a) Southern African Anti-terrorist Secretariat (SAATS)

The protocol component is important. For one, it gets all signatory governments on board – it would be difficult to combat an issue like terrorism, which demands things like revised legislation and national militaries, without the full commitment of all member states. While the bulwark of a region's anti-terrorism efforts will occur below the state, the state needs to still be involved because it still has an important role to play. Regional anti-terrorism efforts in southern Africa, as elsewhere in the world, demand both a top-down and bottom-up approach to implementation. Beyond that, signing a protocol or resolution would give SADC the legal authority to create a regional anti-terrorism body.[124]

A SADC protocol on terrorism should include an Article and under authority of that article, the region should establish a Southern African Anti-terrorist Secretariat (SAATS). Not only would the creation of a terrorism body bring SADC in line with its international contemporaries, but it would operationalise a truly regional response to the issue. Having many state bodies – no matter how well organised and concerted their efforts – is no substitute for having a single regional body. If such an endeavour were to integrate Interpol –

[123] Emphasis added

[124] Michael Rifer, SADC and Terrorism: Where is the regional strategy? African Security Review Vol 14 No 1, 2005: *pp*107–116

by making SARPCCO a permanent advisor to the group – it would serve as an important and accessible resource to all member states and their sub-state agencies.[125]

A secretariat created by such an Article should be empowered to oversee the overall progress on terrorism related programmes in the region and as such, should operate on a permanent basis. In as much as it would be desirable to have such a secretariat on a full time basis, it should also be well equipped in all manner and senses, that is, it should have the necessary human resource, enough finances and other relevant equipment that would enable it to carry out its functions. It should also be kept in mind that it would be in the interest of the sub region to let such a secretariat have at its disposal a surveillance network of persons within the member states and persons entering such member states, effective border controls, an intelligence gathering unit system much like that which SARPCCO utilizes, which system should be available to member states in case need arises when they need such intelligence. Further the secretariat should act as a coordinating point for the work of other bodies within the region established by other protocols but which bodies operate in a field related to the tackling of terrorism in one way or the other. In this way, it will have at its disposal all information and intelligence necessary in the execution of its obligations. It will further act as a liaison to the necessary UN bodies concerned with combating terrorism.

A transnational SAATS could integrate and coordinate the actions of state bodies in a more effective and efficient way. And a regional body would be the perfect forum through which to conduct capacity-building of members, by hosting joint exercises and sharing the expertise of the best that the region has to offer. Finally, being responsible for the region's implementation of Resolution 1373 and the creation of a regional anti-terrorism strategy, a SAATS would be the best-qualified actor to recommend appropriate anti-terrorist legislation to member parliaments in the name of regional harmonisation. As confidence and coordination are built between members, a regional anti-terrorism centre could even conceivably become a forum for intelligence-sharing and cooperative anti-terrorist policing. Building on SADC's existing capabilities and integrating international models; such a body would build unprecedented linkages between member states' respective law enforcement, defence, and financial communities, contributing to the overall deepening of regional ties

[125] ibid

and, "a better functioning sub-regional body capable of delivering the economic, social, political, and security goals of the sub-region".

(b) Integrating UN Strategy in Formulation of SADC Protocol on Terrorism

The UN Global Counter-Terrorism Strategy has devised four ways on how regional and sub regional organisations can help in the fight against terrorism using these bodies as a primary body to deal with matters related to terrorism since they best well understand and know the problems in their regions. Further, a regional based approach to the fight against terrorism is well suited as contrasted to a global one. Thus, in its quest of coming up with a body with the primary mandate of combating terrorism and related matters, SADC will have to incorporate into such a protocol creating such a body and within that body the four pillars of the UN Global Counter-Terrorism Strategy. These are outlined below and how they will help enhance and effectively combat the scourge of terrorism. Given their comparative advantages, Regional and Sub Regional bodies have a central role to play in devising tailor-made approaches for implementing each of the UN Global Counter-Terrorism Strategy's four pillars among their respective members. The general nature of many of the Strategy's provisions allows regions and sub regions a degree of latitude as they seek to develop implementation plans and programs. This flexibility is significant because the nature and scope of the terrorist threat vary from region to region.[126] The following are the four pillars which will need to be included in the protocol on terrorism.

Pillar I:[127] Measures to address conditions conducive to the spread of terrorism

The UN Global Counter-Terrorism Strategy enumerates a series of possible conditions conducive to the spread of terrorism—prolonged unresolved conflicts, dehumanization of victims of terrorism, lack of rule of law and violations of human rights, ethnic, national, and religious discrimination, political exclusion, socioeconomic marginalization, and lack of good governance. Thus, tackling these questions in regional and sub regional contexts is more likely to address the concerns of local stakeholders and thus may bear more fruit.

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[126] Eric Rosand, Alistair Millar, Jason Ipe, Michael Healey. *The UN Global Counter-Terrorism Strategy and Regional and Sub regional Bodies: Strengthening a Critical Partnership.* Centre on Global Counterterrorism Cooperation October 2008, p6

[127] ibid

One of the most important contributions that SADC through the protocol on terrorism can make to addressing conditions conducive to the spread of terrorism is in the realm of preventive diplomacy and working to resolve and prevent the regional and sub regional conflicts that fuel terrorism. Many of the conflicts often linked to the spread of terrorism (e.g., Israel/Palestine and India/Pakistan) are regional in nature and require regional solutions.

Pillar II:[128] Measures to prevent and combat terrorism

SADC through the protocol on terrorism can play key roles in working with its members to monitor and foster implementation of the preventive counterterrorism measures that constitute the Strategy's second pillar. For example, it can promote the development of a uniform regional or sub regional counterterrorism regime to allow for the necessary judicial and law enforcement cooperation between and among countries to help ensure that suspected terrorists are prosecuted or extradited. Due to what is often a shared perception of the threat posed by transnational crime at regional and sub regional levels, SADC may have a comparative advantage in getting its member states to strengthen their coordination and cooperation in combating crimes that might be associated with terrorism.

Pillar III:[129] Measures to build states' capacity to prevent and combat terrorism and to strengthen the role of the UN system in this regard

SADC through the protocol on terrorism can play important roles in both the facilitation and delivery of capacity building assistance. It can help identify capacity gaps in the region and disseminate among its members information regarding relevant bilateral and multilateral capacity-building programs, with a view to, among other things, fostering donor coordination. In addition, SADC could help ensure that the regional Strategy-related capacity needs are presented to the relevant UN bodies. This can be achieved by developing a unified set of regional priorities and technical assistance requests that cut across a range of Strategy-related areas, helping to ensure that the United Nations better understands the needs and priorities of countries in the region and enhancing the communication between the United Nations and the geographical area of SADC.

SADC can also offer platforms for training seminars conducted by bilateral and/or multilateral donors, the provision of assistance, and, more broadly, supporting the

[128] Op. Cit
[129] Supra note 126,p 65

development of regional as well as national capacity. Finally, if given a sufficient mandate and adequate resources, SADC can offer institutional infrastructure that can maintain the necessary focus on Strategy-related issues long after assistance providers have departed, to help ensure the long-term sustainability of these capacity-building programs and that the assistance is actually implemented by the states.

Pillar IV:[130] Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism

Grounding the Strategy, and all global counterterrorism efforts, firmly in the context of human rights and the rule of law is one of its significant achievements. SADC can contribute in a number of ways to furthering this cross-cutting theme.

SADC through its protocol on terrorism can work to improve the capacity of its members by propagating standards of conduct and providing training for security, law enforcement, and judicial officials engaged in combating terrorism. In particular, regional human rights commissions and courts can play an important role in interpreting human rights obligations for states and investigating and shedding light on abuses, providing for recourse above the national level. SADC can serve as forum for conducting peer reviews and other monitoring mechanisms to ensure that national counterterrorism efforts comply with international and regional human rights standards, and it can apply political pressure on local states in cases where they do not.

Finally, SADC can contribute to the development and maintenance of effective, rule of law–based criminal justice systems within its member states, which the Strategy highlights as being critical to implementing a human rights–based approach to countering terrorism. The Strategy recognizes that many states will require assistance in developing and maintaining such a system. As in other capacity-building areas relevant to the Strategy, however, SADC has a key role to play in offering the necessary expertise and other resources, providing a forum for interaction with civil society to ensure that the assistance being offered is tailored to the particular needs of the region, and ensuring its sustainability.

[130] Ibid, p8

Thus, as a way of concluding SADC should: Endorse the UN Global Counter-Terrorism Strategy so that during the process of drafting its protocol on terrorism, provisions of this Strategy are taken into account. Further, it should establish counterterrorism units or focal points within its secretariat for Strategy and counterterrorism-related issues. As a further measure there is need for the establishment of a regional task force or designate a lead body for coordination of Strategy-related efforts in coordinating the works of other bodies created by other protocols related to combating terrorism.

4.4 Conclusion

Ultimately the fight in combating terrorism and extremism is inseparable from the discourse of human rights. As has been noted in the foregoing, what begun as a post 9/11 quest by the US government to bring those responsible for the attacks to justice has grown into world wide phenomena, as various countries have been confronted at their door steps with the problem. In the early years, the US and its allies were implicated in grossly violating human rights as they embarked on this quest, especially torture with regards how they treated terror suspects (subjected them to extreme interrogation techniques and torture itself). This in itself created another evil, tantamount to what was being sort to be prevented. CAT provisions in relation to torture were violated.

Thus, this points to the fact that SADC countries need to present a united front in their quest of devising an antiterrorism strategy. As such, it should be a priority that such a strategy devised effectively safeguards rights of every individual especially with regards to torture. The framework needs to be devised in such a way that respect for and observance of human rights are protected. The paper demonstrated how SADC could achieve this through a protocol on terrorism creating a secretariat incorporating the principles as set out in the UN Global Counter-Terrorism Strategy. However, the various current frameworks in place meant for addressing different aspects of terrorism related matters should not be discarded but built upon and create channels to link them to the main secretariat on terrorism which will serve as a focal point. To achieve this effectively, all SADC member states should be taken on board through the signing of a SADC terrorism protocol.

CHAPTER FIVE

TORTURE IN DISCOURSE OF TERRORISM, LESSONS LEARNT: 2001-2008

5.0 Introduction

The lessons learnt from the period 2001 to 2008 in the discourse of terrorism in relation to torture are quite vast and need to be followed with keen interest if the war on terror is to be won without human rights abuses especially torture. This concluding chapter gives a summary of the last four chapters considered and gives some insight into lessons that have been learnt. Among others, whether these have been put into timely use or not and the need to act on certain aspects of the lessons learnt in pursuit of combating terrorism both within the national and regional context as SADC. The paper concludes by giving recommendations.

5.1 Conclusion

Though a subject of controversy both locally and internationally, a common definition for terrorism looms at large with different and no specific definition. This is due to the complex nature of terrorism and the different perceptions given to it by different regions of the globe. However, various meanings attributed to it have been considered, that is, from the Zambian perspective and other jurisdictions within the commonwealth and the American attributes. The Zambian legal framework with regards to terrorism has been discussed at length. It has been noted how hesitant Zambia was in enacting legislation to deal with terrorism in times when it was a target of numerous terrorist activities. It only managed to have legislation in place after the September 11 attacks on a far flung land of New York City and also due to international pressure on member states of the UN in the wake of these attacks.

Torture has been extensively discussed in the context of our jurisdiction and why it persists after a decade or so after acceding to the Convention against Torture. Much has not been done in terms of domesticating the convention. The situation is further compounded by lack of a comprehensive law on how to effectively combat the scourge of torture in public institutions and other institutions in which it persists, and also lack of a definition in our penal laws.

In light of the campaign taken by many nations to combat terrorism, it has also become a major part of the obligation of the state to promulgate laws that ensure that the pursuit of such

a nature does not jeopardise the freedom of its citizens and enjoyment of basic rights as accorded by the state. Chapter two looked at and analysed the provisions of the Anti-Terrorism Act, among others, advantages conferred by the Act in combating terrorism have been highlighted. However, drawbacks in the provision of the Act that impact on certain basic human rights especially those related to torture have also been considered. Further, emerging trends in the war on terror that other nations seem to be pursuing despite them being illegal have been put in context. It has been shown how these emerging trends have not being considered in the Anti-Terrorism Act in an effort to safeguard the citizenry of Zambia, and how they adversely affect the country's human rights record.

The cure into the persistence of torture and related cases in Zambia lies in overhauling the legal and institutional framework that is currently in place. The current system does not yield effectively to the fight against torture in the country. Further, changing these laws in place and institutional framework will enhance human rights safeguards of our citizenry both at a domestic and regional level. The causes of why torture and other related acts persist in Zambia have been highlighted. These include among others the weak laws in place that make it difficult for the complete eradication of torture. Further, weak institutional framework currently in place for the monitoring of violations of certain basic human rights is another source of concern as to why torture persists.

SADC countries need to present a united front in their quest of devising an antiterrorism strategy. As such, it should be a priority that such a strategy devised effectively safeguards rights of every individual especially with regards to torture. The framework needs to be devised in such a way that respect for and observance of human rights are protected. The paper demonstrated how SADC could achieve this through a protocol on terrorism creating a secretariat incorporating the principles as set out in the UN Global Counter-Terrorism Strategy. However, the various current frameworks in place meant for addressing different aspects of terrorism related matters should not be discarded but built upon and create channels to link them to the main secretariat on terrorism. To achieve this effectively, all SADC member states should be taken on board through the signing of a SADC terrorism protocol.

5.2 Recommendations:

1. ***Definitions to criminalise "terrorist offences" and "terrorist groups" should be clear and precise and include references to the gravity of the acts.***

Terrorism should only apply to the most serious crimes. 'Terrorism' is a term that is highly politically charged and there is no global definition of terrorism under international law. There are many legal consequences triggered by defining an act as terrorism; States can derogate from certain human rights obligations, there is no recourse to the political offence doctrine, funds and other financial assets or economic resources can be frozen. The Security Council has said that terrorism is an act that constitutes "a threat to international peace and security". In this sense, the measures specified in Resolution 1373 and the other counterterrorist measures it request States to implement, refers only to the most serious crimes under international law. This characteristic (the gravity of the act) needs to be reflected in our Anti-Terrorism laws when defining acts as terrorist offences, groups as terrorist organisations, and generally when implementing security measures to combat "terrorism".

2. ***Amend legislation to include and criminalize torture***

Zambia should amend its legislation to ensure that torture and cruel, inhuman or degrading treatment or punishment is criminalized. The definition of torture should comply with Article 1 of the Convention against Torture and other cruel, inhuman or degrading treatment or punishment.

3. ***The prohibition against torture or cruel, inhuman or degrading treatment or punishment and the principle of non-refoulement are absolute, admit of no exception or justification and leave no room for balancing.***

Due to the *jus cogens* character of the norm prohibiting torture under international law, a balancing act would be contrary to general international law: In the same way, Zambia cannot rely on "diplomatic assurances" when extraditing, deporting or expulsing an individual to a country where the person is at risk of torture or cruel, inhuman or degrading treatment or punishment. Zambia cannot expect countries that systematically commit torture or ill treatment to be able to *assure* that the person extradited/deported will be protected. It should therefore adhere to the *use cogens* character of non-refoulement with no exception or justification.

a. Effective safeguards against torture

As recent events have shown, ***torture and ill-treatment will occur if there are no proper safeguards in place.*** Is not only important to allow individuals to challenge governmental actions but it is also necessary to put in place effective mechanisms to prevent such violations. If there are no mechanisms in place to prevent torture and ill-treatment in detention centres and during interrogations, these violations are more likely to occur. General safeguards include access to the outside world, to lawyers, medical examinations, and the right to challenge the legality of the detention. Therefore, there is need to overhaul institutional and legal framework concerned with detention centres, interrogations, and other areas where possibilities of violations are high.

It is also vital to ***allow access to detention facilities to international organisations.*** In particular, in cases where credible allegations of torture and cruel, inhuman or degrading treatment or punishment have been made, it is imperative to have an external review of the conditions of detention (and to assess whether detainees are held without charges, for an indefinite period of time and/or without recourse to an effective remedy). The use of secret detention centres must end.

b. ***Judicial review should not be limited during states of emergencies or armed conflicts.***

It is precisely during these periods when it is most important to have an effective control of the security and armed forces (especially when States have derogated from human rights obligations that security and armed forces traditionally must comply with). Zambia must recognise that the conduct of security and armed forces must be reviewable "at all times".

4. Human Rights Commission

The Human Rights Commission should be established in full conformity with the Principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles) annexed to General Assembly resolution 48/134. To that end, the State party should:

a. reinforce the independence of the Commissioners, especially with regard to the appointment process
b. ensure that the recommendations adopted by the Human Rights Commission are fully and promptly implemented
c. allow the Human Rights Commission to receive funds to carry out its activities.

5. ***The rule of law needs to be respected at all times including when countering 'terrorism'. At the same time, Zambia need to acknowledge that there is a high risk of undermining human rights when implementing security measures.***

There is, therefore, a clear need to implement mechanisms to review the legality of counterterrorist measures in the light of international human rights and humanitarian law. This needs to be done at the domestic. In this regard, the UN Counter-Terrorism Committee (CTC) should request Zambia to report on its compliance to implement counterterrorist measures comprehensively. In other words, Zambia should include in its reports information on how it is implementing counter-terrorism measures— the effectiveness of the said measures and their compatibility with other international obligations, including, in particular, with international human rights and humanitarian law.

a. National security can only be achieved when all individuals are safe.

Zambia cannot claim to be secure if the government is committing, condoning or acquiescing to violations of fundamental human rights. It is precisely the argument that national security can overcome fundamental human rights that has created an environment where numerous grave violations of human rights are being committed (such as torture and ill-treatment, illegal rendition and *refoulement*). Therefore it should strive to secure individual human rights in its quest to combat terrorism.

b. States have an obligation to follow legal procedures in inter-State transfers of individuals, whether it is an extradition, a deportation or expulsion.

Within these legal procedures, Zambia should implement safeguards against torture and cruel, inhuman or degrading treatment or punishment. Zambia should guarantee an effective remedy for individuals to challenge their extradition/expulsion/ deportation orders.

c. The practice of "renditions" must stop.

It is impossible to prevent arbitrary transfers if they are executed completely outside of the law. And it is impossible to protect individuals from torture and other human rights violations, if governments do not provide an opportunity to their own judicial and/or administrative authorities to intervene in these procedures. Therefore, Zambia should make a policy and law not to align or acquiesce itself with nations engaged in the practice of renditions. The Anti-terrorism laws should also effectively address the matter of renditions.

5.3 Recommendations for SADC as A Regional Grouping

SADC has not explicitly endorsed the UN Strategy nor devised a sub regional response or mechanism to address terrorism, but it is working with both UNODC and CTED to enhance

collaboration on counterterrorism in the SADC region and is undertaking a regional threat assessment with an eye toward devising a regional counterterrorism strategy.[131] Therefore, as a Sub regional organization, SADC should endorse the Strategy and reiterate calls in regional and sub regional ministerial statements for states to implement the Strategy. It also adopt and implement existing regional counterterrorism frameworks. SADC should devise plans of action for Strategy implementation and commit to reviewing implementation efforts on a regular basis. In this regard, it should establish counterterrorism units or focal points within its Secretariat for counterterrorism-related issues. The secretariat should be provided with the mandate and resources to engage with its member states and the United Nations on Strategy issues.

Pillar I: Measures to address conditions conducive to the spread of terrorism

- Promote inter-cultural and inter- and intra-religious dialogues and develop culturally sensitive projects aimed at empowerment of moderates, religious scholars, and civil society.
- Work to devise effective mechanisms of preventive diplomacy and work to resolve regional and sub regional conflicts that fuel terrorism.

Pillar II: Measures to prevent and combat terrorism

- Promote the development of a uniform regional counterterrorism regime to allow for the necessary judicial and law enforcement cooperation between and among member states to help ensure that suspected terrorists are prosecuted or extradited.[132]

Pillar III: Measures to build states' capacity to prevent and combat terrorism

- Work to facilitate and deliver capacity-building assistance to aid its members in implementing the Strategy. It can help identify capacity gaps in the region and disseminate among its members information regarding relevant bilateral and multilateral capacity building programs, with a view to, among other things, fostering donor coordination.[133]

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[131] Eric Rosand, Alistair Millar, Jason Ipe, Michael Healey. *The UN Global Counter-Terrorism Strategy and Regional and Sub regional Bodies: Strengthening a Critical Partnership.* Centre on Global Counterterrorism Cooperation October 2008, P35

[132] ibid

[133] Op cit

- Work with member states to articulate their needs and priorities to the relevant UN bodies (or perhaps the Task Force's working group focusing on integrated implementation of the UN Strategy) in a coherent manner, and ensure that the discussions in New York and within the Task Force are rooted in the on-the-ground realities, needs, and priorities of the region and are responsive to them.
- Provide a forum for training seminars involving bilateral and/or multilateral partners, the provision of assistance, and, more broadly, supporting the development of regional, sub regional, as well as national capacity.
- Organize workshops with technical experts from relevant functional bodies to ensure that local officials are provided with the training and skills needed to implement the international standards and best practices.
- Engage with assistance providers and member states to help maintain necessary focus on Strategy-related issues after assistance providers have departed to help ensure the long-term sustainability of these capacity-building programs and that the assistance is implemented by the states.

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

- Encourage members to "accept the competence of the international and relevant human rights monitoring bodies" as called for in the Strategy, support and cooperate with the OHCHR, and support and liaise with the Special Rapporteur as well as other relevant UN special procedures mandate holders. SADC can invite the Special Rapporteur to conduct regional or sub regional visits and co-host workshops with the Special Rapporteur and OHCHR, focusing on the human rights framework in the Strategy.[134]
- Work to ensure the human rights–based approach to combating terrorism that underpins the Strategy is reflected in all counterterrorism-related declarations, statements, or other documents.
- Adopt human rights conventions or charters and devise other human rights institutions—or implement existing regimes—which place the universal human rights obligations within the regional context and help to ensure a shared regional interpretation of those obligations.

[134] ibid

- Provide members with guidance on the sharing of best practices and a forum for discussion among countries that may face many of the same human rights and counterterrorism challenges.
- Improve the human rights capacity of members by propagating standards of conduct and providing human rights training for security, law enforcement, and judicial officials engaged in combating terrorism.
- Provide a role for regional human rights commissions and courts in interpreting human rights obligations for states and investigating and shedding light on abuses, providing for recourse above the national level.
- Consider conducting peer reviews and other monitoring mechanisms to ensure that national counterterrorism efforts comply with international and regional human rights standards, and apply political pressure on local states in cases where they do not.
- Develop and maintain effective, rule of law–based criminal justice systems within member states by offering the necessary expertise and other resources, and by providing a forum for interaction with civil society.

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