

Counter-terrorism legislation and the protection of human rights: A survey of selected international practice

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Summary

The 11 September 2001 attacks in the USA have recast global attention on terrorism. Following the attacks, a number of governments around the world rushed to enact legislation against terrorism while others have either introduced or have been constrained to introduce anti-terrorist legislation by the USA and its ally, the UK — as part of their ‘either you are with us or you are against us’ global anti-terrorism campaign. Others have resurrected draconian colonial anti-terrorism legislative measures. Almost invariably, these laws have greatly impinged upon or have serious implications for human rights and freedoms, and for the fundamental principles of humanity. This article provides an overview of the range, and human rights implications of anti-terrorism legislative measures adopted in selected countries in different geo-political regions of the world since 11 September. The article considers these measures in the light of the fundamental principles of humanity as reflected in the Turku Declaration. It is argued that each state should have, in co-operation with others and in accordance with the dictates of international law, the liberty to adopt counter-terrorism legislation that not only is consonant with its local circumstances, but also helps it meet its obligations under international law, including the

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primary obligation to protect the rights of all people without discrimination of any kind. Significantly, there is a need for the international community to deal with the problem of terrorism in a holistic manner that ensures that, in their quest to effectively deal with the terrorist threat, states do not erode the rights of all persons subject to their jurisdiction.

1 Introduction

The 11 September 2001 (11 September) attacks in the United States of America (USA) have recast global attention on terrorism.¹ In the aftermath of the attacks, a number of governments around the world rushed to enact legislation against terrorism. Among others, Australia,² Britain,³ Canada,⁴ India⁵ and the USA⁶ have all passed anti-terrorism legislation. Further, a number of countries in Africa⁷ and other parts of the developing world have either introduced or have been constrained to introduce anti-terrorism legislation by the USA and its ally, the United Kingdom (UK) — as part of their ‘either you are with us or you are against us’ global anti-terrorism campaign.⁸ Others have resurrected draconian colonial anti-terrorism legislative measures.

¹ Terrorism is not a new phenomenon. For a historical background, see MC Bassiouni (ed) *International terrorism and political crimes* (1975); A Cassese *Terrorism, politics and law: The Achille Lauro affair* (1989) ch 1; J Murphy ‘Defining international terrorism: A way out of the quagmire’ (1989) 19 *Israel Yearbook on Human Rights* 13; HH Han *Terrorism and political violence: Limits and possibilities of legal control* (1993); OY Elagab *International law documents relating to terrorism* (1999) xx-xxi; W Laqueur *A history of terrorism* (2001); A Sinclair *An anatomy of terror: A history of terrorism* (2004); H Duffy *The ‘war on terror’ and the framework of international law* (2005); JM Lutz & BJ Lutz *Terrorism: Origins and evolution* (2005); B Hoffman *Inside terrorism* (2006); B Saul *Defining terrorism in international law* (2006).

² Australia’s raft of anti-terrorism laws includes the Security Legislation Amendment (Terrorism) Act 2002 (No. 2), Suppression of the Financing of Terrorism Act 2002, Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002, Telecommunications Interception Legislation Amendment Act 2002, and Border Security Legislation Amendment Act 2002.

³ Anti-Terrorism, Crime and Security Act 2001 (ATCSA). New legislation, the Prevention of Terrorism Act 2005, has been enacted to replace the part 4 powers in the ATCSA with a new scheme of control orders.

⁴ Anti Terrorism Act 2001.

⁵ Prevention of Terrorism Act 2002.

⁶ Among others, USA PATRIOT Act 2001 and Homeland Security Act 2002.

⁷ African countries that have introduced or are in the process of introducing anti-terrorism legislation include Algeria, Egypt, The Gambia, Kenya, Mauritius, Morocco, Namibia, South Africa, Swaziland, Tanzania and Uganda.

⁸ See eg J Mulama ‘East Africa: The church slams anti-terror bills’ <http://www.lewrockwell.com/ips/mulama1.html> (accessed 13 December 2004).

Almost invariably, these laws have greatly impinged upon or have serious implications for human rights,⁹ particularly those of criminal suspects, political oppositions, migrants, refugees and asylum seekers. The laws also have implications for the fundamental principles of humanity as reflected in the Turku Declaration.¹⁰

This paper provides an overview of the range, and human rights implications of counter-terrorism legislative measures adopted in selected countries in different geo-political regions of the world since 11 September 2001. The paper also considers these legislative measures in the light of the fundamental principles of humanity set out in the Turku Declaration. It is argued that each state should have, in co-operation with others and in accordance with the dictates of international law, the liberty to adopt counter-terrorism legislation that not only is consonant with its local circumstances, but also helps it meet its obligations under international law, including the primary obligation to protect the rights of all people without discrimination of any kind. Most importantly, there is a need for the world to deal with the problem of terrorism in a holistic manner that ensures that, in their quest to effectively deal with the terrorist threat, states do not erode the rights of all persons subject to their jurisdiction.

Although a number of states have since 11 September either introduced or revived anti-terrorism legislation, this paper does not provide an exhaustive treatment of their legislative practice in regard to countering terrorism. Rather, it offers an overview of legislative measures adopted post-11 September in selected countries around the world: Africa (Mauritius, South Africa and Uganda), the Americas (Canada, Guyana and the USA), Australasia (Australia, India and Singapore), Europe (Italy, Sweden and the UK) and the Middle East (Israel, Iran and Saudi Arabia). These countries have been selected as case studies for three main reasons: (1) they represent a diversity of legal systems and regions; (2) each is a party to one or more of the main international

⁹ In October 2001, Amnesty International raised the concerns that '[i]n the name of fighting "international terrorism", governments have rushed to introduce draconian new measures that threaten the human rights of their own citizens, immigrants and refugees . . . Governments have a duty to ensure the safety of their citizens, but measures taken must not undermine fundamental human rights . . .' Common features of the new anti-terror laws include broad or vague definitions of new offences, wide powers of detention without trial, prolonged incommunicado detention (which is known to facilitate torture), intrusions into privacy, and measures which effectively deny or restrict access to asylum or speeds up deportation.

¹⁰ See Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Abo Akademi University, Turku/Abo, Finland, 30 November to 2 December 1990.

human rights treaties,¹¹ and (3) each is a party to one or more of the various international and regional human rights conventions and agreements relating to terrorism. Ease of access to relevant national legislation was another factor influencing choice of case studies. It should be noted, however, that reference will be made where appropriate to the situation in other countries.

The human rights concerns explored in this paper include the effects of anti-terrorism legislation on refugees and minorities, access to legal representation, infringement of privacy, and limitations on political rights and freedoms.

It should be noted from the outset that there is no universally accepted definition of terrorism.¹² Since the 1920s, the international community has unsuccessfully attempted to formulate a universally accepted definition of terrorism. This 'definitional knot' is primarily attributable to the fact that terrorism is an inherently controversial and elusive concept which evokes strong emotional and contradictory responses. Although the use or threat of violence for the achievement of political ends is common to both states and non-state groups, there is no agreement on when use of violence may be considered legitimate. For example, while developing countries have tended to exempt the actions of national liberation movements from the concept of terrorism,¹³ developed countries have confined their use of the term to violence by those opposing the established order.¹⁴ Thus, it is common to hear of the relativist adage that 'one man's terrorist is another man's

¹¹ The principal international human rights treaties are the International Covenant on Economic, Social and Cultural Rights (CESCR); the International Covenant on Civil and Political Rights (CCPR); the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families (MWC). See Office of the United Nations High Commissioner for Human Rights *Status of ratifications of the principal international human rights treaties as of 9 June 2004* <http://www.unhchr.ch/pdf/report.pdf> (accessed 13 June 2006). It is notable that, in addition, some of these countries have constitutions that guarantee human rights.

¹² A 1988 study identified 109 definitions covering 22 definitional elements. See AP Schmid & AJ Jongman *Political terrorism: A new guide to actors, authors, concepts, databases, theories and literature* (1988) 5. See also R Higgins & M Flory (eds) *Terrorism and international law* (1997); B Golder & G Williams 'What is "terrorism"? Problems of legal definition' (2004) 27 *University of New South Wales Law Journal* 270; Saul (n 1 above); Duffy (n 1 above). See further http://www.unodc.org/unodc/terrorism_definitions.html (accessed 12 May 2007).

¹³ See eg sec 1(4) of the Protection of Constitutional Democracy Against Terrorism and Related Activities Act 33 of 2004 (South Africa), which exempts groups engaged in armed struggle for national liberation, self-determination and independence.

¹⁴ See J Lambert *Terrorism and hostages in international law* (1990) 30-31.

freedom fighter'.¹⁵ This ideological divergence has hampered the formulation of a clear, consistent and universally accepted definition of terrorism.¹⁶ For this reason (and given its nature which does not require a definition of terrorism), this paper does not attempt to define the term. Rather, it adopts the simplistic working definition that terrorism is the use of violence for political goals.

2 The international anti-terrorism legal framework

The international legal framework for counter-terrorism consists of 19 universal and regional instruments as well as numerous resolutions of the United Nations (UN) General Assembly and Security Council.

2.1 United Nations counter-terrorism measures

Terrorism is not a new phenomenon. The international focus on terrorism began as early as 1937 when the League of Nations held a conference on the issue in an attempt to adopt an international convention for the prevention or punishment of terrorism. However, the response of the international community has, for most of the period of the existence of the UN, not been robust. Since the massacres at Lod Airport in Israel and at the Olympic Games in Munich in 1972, however, the UN General Assembly has taken measures to deal with terrorism. Anti-terrorism treaties preceding 11 September range from the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft to the International Convention for the Suppression of the Financing of Terrorism of 1999.

There are currently 12 universal conventions on specific aspects of terrorism: hijacking of aircraft,¹⁷ the sabotage of aircraft,¹⁸ attacks on

¹⁵ See eg Bassiouni (n 1 above) 485. Illustratively, in 1985, the Angolan representative in the UN General Assembly stated that 'acts of terrorism cannot be compared under any pretext, with the act of those who are fighting colonial and racist oppression, and for their freedom and independence'. Cassese (n 1 above) 7.

¹⁶ Nonetheless, a variety of national and international laws have been used to characterise acts of terrorism as criminal. It is notable that the UN Working Group on Terrorism has identified broad elements of terrorism: 'Without attempting a comprehensive definition of terrorism, it would be useful to delineate some broad characteristics of the phenomenon. Terrorism is, in most cases, essentially a political act. It is meant to inflict dramatic and deadly injury on civilians and to create an atmosphere of fear, generally for a political or ideological (whether secular or religious) purpose. Terrorism is a criminal act, but it is more than mere criminality.' See United Nations *Report of the Policy Working Group on the United Nations and Terrorism*, Annex to A/57/273, S/2002/875, para 13 <http://www.un.org/terrorism/a57273.htm> (accessed 14 June 2006).

¹⁷ Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970.

¹⁸ Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on 23 September 1971.

'internationally protected persons', that is, heads of state and heads of government, foreign ministers, diplomats, etc,¹⁹ the taking of hostages,²⁰ terrorist bombings²¹ and the financing of terrorist activities.²² To these may be added the various international conventions on international humanitarian law,²³ which are designed, *inter alia*, to proscribe the use of terrorism during armed conflict. International humanitarian law prohibits terrorist activities in armed conflict by criminalising (1) attacks against other than military targets; (2) the use of force disproportionate to that needed to attain the military objective; and (3) the use of force that does not discriminate between the target of the attack and persons who are not the object of such attack. It also prohibits the unnecessary use of force under any circumstances.

Since September 2001, the UN Security Council has adopted several binding resolutions aimed at restricting terrorism and minimising the ability of terrorists to mobilise support. Significantly, on 28 September 2001, the Security Council adopted Resolution 1373. This Resolution criminalises the provision of funds and services to terrorists and freezes the financial assets of people who commit terrorist acts. As with most other international instruments on terrorism, the Resolution does not define 'terrorism'. It further obliges member states of the UN to take measures to implement the Resolution.²⁴ Resolution 1373 also establishes a Counter-Terrorism Committee (CTC) to monitor its implementation.²⁵ In April 2004, the Security Council passed Resolution 1540 which prohibits states from providing any form of support to non-state actors that attempt to acquire nuclear, chemical and biological weapons.

It is notable that post-11 September counter-terrorism initiatives at the universal level have not been limited to the Security Council. The General Assembly has established an *Ad Hoc* Committee on terrorism working primarily on developing a draft comprehensive anti-terrorism convention designed to fill the void left by the 12 sectoral treaties.

¹⁹ Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973.

²⁰ International Convention Against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.

²¹ International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.

²² International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999.

²³ The four Geneva Conventions of 1949 and their Additional Protocols of 1977.

²⁴ In February 2002, the Commonwealth Secretariat's Expert Working Group on Legislative and Administrative Measures to Combat Terrorism produced a report which offers a model framework for implementing UN Security Council Resolution 1373 of 28 September 2001.

²⁵ See para 6 of the Resolution. The CTC has instituted a periodic reporting system which requires states to submit reports on measures undertaken at national level to meet the commitments in the Resolution.

Although there are a number of international and regional treaties that aim to combat terrorism,²⁶ there is no single universal convention on the entire phenomenon of terrorism.

2.2 Regional counter-terrorism initiatives

A number of conventions on terrorism have also been adopted at the regional level. These include the Arab Convention on the Suppression of Terrorism, 1998; the European Convention on the Suppression of Terrorism, 1977; the OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, 1971; the OAU (African Union) Convention on the Prevention and Combating of Terrorism, 1999; and the Protocol to the AU Convention on the Prevention and Combating of Terrorism, 2004. Other anti-terrorism initiatives in Africa include the September 2002 African Union (AU) counter-terrorism conference in Algiers, the establishment of the African Centre for the Study and Research on Terrorism, the AU Declaration on the Prevention and Combating of Terrorism in Africa,²⁷ and support for UN Security Council Resolution 1373 which, *inter alia*, reaffirms that the suppression of acts of international terrorism (including state-sponsored terrorism) is an essential contribution to maintaining international peace and security.

In response to 11 September, the European Union has adopted a range of anti-terrorism measures, including the Council Framework Decision on Combating Terrorism and the Council Framework Decision on the European Arrest Warrant and Surrender Procedures between the member states.²⁸

Many states around the world have also concluded bilateral agreements to deal with the problem of terrorism. However, these measures largely deal with the rendition of fugitive offenders.

It is worthy of note that the international legal framework for dealing with terrorism has been criticised for a number of perceived shortcomings. According to Cassese,²⁹ there are three main limitations to international anti-terrorism measures: (1) inadequate ratifications; (2) the lack of effective enforcement mechanisms in the event of violation; and (3) the lack of specification that terrorist crimes are not 'political offences' and as such not exempt from extradition.

²⁶ A listing of these conventions is available at <http://untreaty.un.org/English/Terrorism.asp> (accessed 14 June 2006).

²⁷ Declaration of the Second High-Level Intergovernmental Meeting on the Prevention and Combating of Terrorism in Africa, 13-14 October 2004, Algiers, Algeria, adopted in October 2004 at Algiers Mtg/HLIG/Conv Terror/Decl (II) Rev 2 <http://www.africa-union.org/Terrorism/DECLARATION%20Algiers%20REV.pdf> (accessed 14 June 2006).

²⁸ Com (2001) 522 Final/2.

²⁹ Cassese (n 1 above) 11.

3 Anti-terrorism legislation: A survey of selected international practice

3.1 Overview

As a starting point, it is worth noting that, at the national level, anti-terrorism legislation is not a new phenomenon. In many African countries, the colonial governments maintained all kinds of legislation to deal with what they considered terrorist activities, but which the African people fighting for liberation and for their rights considered a just fight. Almost invariably, these activities were criminalised through penal codes for each colony based on some draconian law drafted in the far away colonial capitals of Brussels, Lisbon, London and Paris.

In South Africa, a plethora of laws enacted by the apartheid regimes prior to the democratic changes of 1993 ensured that the legitimate activities of the African National Congress (ANC) and other political parties in the struggle for freedom were curtailed and penalised through a range of criminal sanctions — from restrictions on movement to imprisonment and the death penalty. Under cover of the anti-terrorist legislation (for example the Terrorism Act 83 of 1967 and the Internal Security Act 74 of 1982), apartheid state security agents routinely and with impunity abridged the human rights of suspected freedom fighters (branded ‘terrorists’),³⁰ as well as members of their families, through arbitrary arrests, imprisonment without trial, torture and extra-judicial executions. One only has to browse through the report of the Truth and Reconciliation Commission to learn the ghastly details.

Another matter of note is that a number of countries are parties to the international conventions and protocols relating to terrorism (South Africa is a party to nine of these) as well as to the AU Convention on Terrorism (AU Convention). These instruments enjoin states to take measures, including legislative measures, to combat terrorism. Thus, the AU Convention enjoins the state parties to adopt ‘any legitimate measures aimed at preventing and combating terrorist acts in accordance with the provisions of [the] Convention and their respective national legislation’.³¹ However, the AU Convention cautions that:³²

Nothing in this Convention shall be interpreted as derogating from the general principles of international law, in particular the principles of international humanitarian law, as well as the African Charter on Human and Peoples’ Rights’.

³⁰ Eg, one of the world’s most respected statesmen, Nelson Mandela, was for long considered a terrorist, not only by the apartheid regime, but by countries such as the USA.

³¹ Art 4. See also art 5, which requires the states parties to co-operate in preventing and combating terrorism ‘in conformity with national legislation and procedures of each state’ and art 6, recognising the jurisdiction of each state party over certain ‘terrorist acts’.

³² Art 22 of the AU Convention.

Further, UN Security Council Resolution 1373 not only condemns the 11 September attacks in the USA, but also allows states to take the necessary steps to prevent the commission of terrorist attacks, including stopping the recruitment of members of terrorist groups, and adopting measures to prevent the financing, planning, facilitation and commission of terrorist acts.

Clearly, therefore, international law permits states to take national legislative measures to combat terrorism, but such measures must not offend against international law. However, the fact that most new anti-terrorism laws in Africa have been proposed or introduced under pressure from the USA³³ and the UK³⁴ makes it improbable that such legislation would reflect local concerns, including the protection of (usually, constitutionally guaranteed) human rights. As Makau Mutua, the Chairperson of the Kenya Human Rights Commission, has said in regard to his country's unpopular Suppression of Terrorism Bill of 2003:

It [the bill] was not drafted by Kenyans or based on Kenya's needs. It originated in the United Kingdom. It is also a fact that both the UK and the USA are intimidating and coercing Kenya into enacting this foreign and unnecessary law.

It is a well-established principle of international law that a state cannot legitimately invoke its domestic law to justify a failure to comply with its international treaty obligations and customary international law.³⁵ It is also important to note that a number of states have not considered it necessary to enact any specific new counter-terrorism legislation. These states assert that their existing criminal laws already cover the specific conduct referred to as 'terrorism'.³⁶ For instance, within the Southern African Development Community (SADC), only two (South Africa and Mauritius) of the 14 member states have enacted specific anti-terrorism legislation. Given the limitations of space, it is not possible to present more than an overview of the legislative responses in selected countries. Consequently, what follows is a survey of the anti-terrorism legislative

³³ Eg, in June 2003, the USA ambassador to Kenya publicly criticised Kenya's anti-terrorism efforts claiming that there had not been a single arrest since the 1998 car bomb attack on the USAembassy in Nairobi.

³⁴ It is noteworthy that the unpopular Kenyan Suppression of Terrorism Bill was a precondition for the lifting of the flight ban, which the UK government imposed earlier on all UK flights to Kenya, allegedly on the grounds that they could be targets of a terrorist attack. The ban was lifted in June 2003 only after the publication by the Kenyan government of the anti-terrorism bill. The draft legislation proposed life imprisonment for anyone committing terrorist acts and a 10-year jail term for anyone suspected to be in possession of weapons of mass destruction. Eighteen opposition MPs refused to support the bill, which they said, was draconian, unconstitutional and infringed fundamental civil rights.

³⁵ See *The Lotus* (1927) PCIJ Rep Ser A No 10.

³⁶ Eg, in a response to the UN Counter-Terrorism Committee on 19 June 2002, the government of Zambia stated that it has a number of provisions under its Penal Code (Cap 87 of the Laws of Zambia) that can be used to fight against terrorism in accordance with Security Council Resolution 1373.

measures adopted in selected member states of the UN representing different geo-political regions of the world.

3.2 Africa

3.2.1 Mauritius³⁷

Post-11 September anti-terrorism legislation in Mauritius was first introduced by that country's government in January 2002 and controversially passed by parliament despite a walkout by opposition parliamentarians. There are several key pieces of Mauritian legislation which aim to counter terrorism: the Prevention of Terrorism Act 2002, the Financial Intelligence and Anti-Money Laundering Act 2002, the Prevention of Corruption Act 2002, the Prevention of Terrorism (Special Measures) Regulations 2003 (as amended), the Financial Intelligence and Anti-Money Laundering Regulations 2003, the Anti-Money Laundering (Miscellaneous Provisions) Act 2003, and the Convention for the Suppression of Financing of Terrorism Act 2003.

The most controversial of these laws is the Prevention of Terrorism Act, which was adopted in circumstances that saw four presidents change office in one month in view of their refusal to sign the bill into law. It has been argued that the enactment of this Act was essentially a response to 'severe pressure that was threatening the country's economy'³⁸.

Section 3 of the Prevention of Terrorism Act defines an 'act of terrorism' as 'an act which may seriously damage a country or an international organisation; and is intended or can reasonably be regarded as having been intended to seriously intimidate a population' so as to unduly compel a government or an international organisation to perform or abstain from performing any act. The section further specifies activities which may constitute terrorism, including attacks upon a person's life that may cause death, kidnapping, seizure of aircraft, ships or other means of public transport, the manufacture, possession, acquisition or supply of weapons (including nuclear and biochemical weapons), and interference with public utilities the effect of which is to endanger life. The legislation also allows the police to detain 'terrorism' suspects without access to legal counsel for 36 hours and gives the

³⁷ The Republic of Mauritius is a party to three of the 12 UN Conventions on terrorism namely, the Convention for the Suppression of Terrorist Bombings, the Convention against Transnational Organised Crime and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. It is also a party to the AU Convention on the Prevention and Combating of Terrorism.

³⁸ A Thomashausen 'A comparative law assessment of the proposed South African anti-terrorism legislation' (2003) <http://www.pmg.org.za/docs/appendices/030624thomas.htm> (accessed 24 November 2004).

government the right to extradite them or deny them asylum and to return them to countries where they might face human rights risks.

Under section 10(6)(b) of the Prevention of Terrorism Act, the Minister responsible for national security may prohibit the entry into Mauritius of suspected international terrorists or terrorist groups. In terms of section 25, the Minister may, for the purposes of the prevention or detection of offences or the prosecution of offences under the Prevention of Terrorism Act 2002, give directions to service providers for the retention of communication data. Further, the police may obtain a court order authorising a communication service provider to intercept, withhold or disclose to the police information or communications.

Needless to mention, civil society groups, opposition parties, and Amnesty International have expressed concern that most of the provisions of the Act are too broad and do not meet the international standards of fairness. In particular, Amnesty International has expressed concern that the term 'acts of terrorism' could be broadly interpreted to undermine fundamental human rights.

The Prevention of Terrorism (Special Measures) Regulations 2003, which came into effect on 25 January 2003, gives effect to part II, section 10(6) of the Prevention of Terrorism Act 2002. It provides for the freezing of assets and funds of suspected international terrorists and terrorist groups. In terms of regulation 3, the Central Bank or the Financial Services Commission may give directives to any financial institution under its regulatory control to freeze any account, property or funds held on behalf of any listed terrorist. It is an offence for a national or any person within Mauritius to give funds or economic resources directly or indirectly to listed individuals or entities

The Financial Intelligence and Anti-Money Laundering Regulations provide for the verification of the 'true identity of all customers and other persons' with whom banks, financial institutions and cash dealers conduct business. The Anti-Money Laundering (Miscellaneous Provisions) Act 2003, which amends the Financial Intelligence and Anti-Money Laundering Act 2002 and establishes a National Committee for Anti-Money Laundering and Combating of the Financing of Terrorism, gives wide powers to the Central Bank and the Financial Services Commission to issue codes and guidelines on anti-money laundering. It also provides for derogation from the banks' duty of confidentiality to enable them report suspicious transactions.

The Convention for the Suppression of Financing of Terrorism Act was enacted in 2003 to give effect to the International Convention for the Suppression of the Financing of Terrorism 1999. The Act makes it an offence for any person to finance acts of terrorism and gives powers to courts to order forfeiture of funds intended to be used for or in connection with terrorist acts.

3.2.2 South Africa

In 2000, the South African Law Commission released a discussion paper (Discussion Paper No 92) on review of terrorism legislation (broad legislation inherited from the apartheid era) and draft legislation on terrorism. This attracted widespread condemnation and vehement public opposition because of the apprehension that it was an attempt to infringe on fundamental rights and freedoms in South Africa, thereby forcing the government to withdraw the draft legislation. However, in the aftermath of the 11 September 2001 attacks in the US, the South African government revived this legislation. The Anti-Terrorism Bill was tabled before the Parliamentary Portfolio Committee on Safety and Security in March 2003.

The Bill, which made provision for wide-ranging police powers to search vehicles and persons and provided for various offences, including providing support to or membership of a terrorist organisation, hijacking an aircraft, hostage taking and nuclear terrorism, was withdrawn after sustained public criticism. After some changes were made to it, the anti-terrorism legislation was re-introduced into parliament as the Protection of Constitutional Democracy against Terrorist and Related Activities Bill of 2003. On 12 November 2004, the new Bill was unanimously passed by the National Assembly. It became law on 14 February 2005.³⁹

The rationale for the enactment of the anti-terrorism Act is the necessity to comply with international instruments (particularly Security Council Resolution 1373). According to the Parliamentary Select Committee, the offence of terrorism in section 54 of the Internal Security Act (which the Act repeals) was too narrow and only provided for terrorism against the South African government — a situation that was contrary to global trends on international terrorism which can target any government.⁴⁰ Local legislation was also said to lack provision for specific offences which 'must be created in terms of international conventions'. In short, the claim was that local laws 'do not meet all the international requirements related to terrorism and related activities'. The purpose of the Act is:

To provide for measures to prevent and combat terrorist and related activities; to provide for an offence of terrorism and other offences associated or connected with terrorist activities; to provide for Convention offences; to provide for a mechanism to comply with United Nations Security Council Resolutions, which are binding on member states, in respect of terrorist and related activities; to provide for measures to prevent and combat the financing of terrorist and related activities; to provide for investigative measures in

³⁹ Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004.

⁴⁰ See Minutes of the Security and Constitutional Affairs Committee, 29 January 2004 <http://www.pmg.org.za/docs/2004/viewminute.php?id=3834> (accessed 24 November 2004).

respect of terrorist and related activities; and to provide for matters connected therewith.

Thus, the new anti-terrorism Act creates the offence of terrorism and prescribes a punishment of life imprisonment for the commission of a terrorist act and makes it illegal to belong to designated terrorist groups.⁴¹ Section 1 of the Act defines terrorist activity and terrorist-related acts, but does not define 'terrorism'. It is interesting to note that section 1(4) of the Act excludes 'any act committed during a struggle waged by peoples, including any action during an armed struggle' for 'national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces'.⁴²

The Act also provides for 'convention offences' based on the 12 UN anti-terrorism conventions and the AU Convention, which include the financing of terrorism, hijacking aircraft or ships, hostage taking, causing harm to 'internationally protected persons' and committing hoaxes involving biochemical agents. Other offences relate to harbouring and concealment of suspects and failure to report terrorist suspects to the authorities.

In terms of penalties, the Act provides for life imprisonment or a multimillion rand fine to be imposed on convicted terrorists (section 18). In addition to any such punishment, courts are empowered to make orders for forfeiture of property reasonably believed to have been used in the commission of an offence or in connection with the commission of an offence (section 19). The Act also provides for the making of court orders for the payment of wasted expenses incurred due to hoaxes.

It is notable that the Act provides for some safeguards. Thus, for instance, no investigating proceedings and no prosecution can be instituted without the written authority of the National Director of Public Prosecutions (NDPP). There is also a requirement that the NDPP promptly communicate the outcome of any prosecution to, *inter alia*, the UN Secretary-General. The question is how effective these safeguards would be. This is an assessment that can only be properly made once the Act has been tested in a court of law.

3.2.3 Uganda

The Ugandan Anti-Terrorism Act 2002 is aimed at suppressing acts of terrorism, both locally and internationally. It provides for the punishment of persons who plan, instigate, support, finance or execute acts of

⁴¹ This seems to be a common provision in counter-terrorism legislation. See eg the Anti-Terrorism Act of Canada and the Anti-Terrorism Act 2002 of Uganda.

⁴² This exemption is an example of the ideological divergence which renders it difficult for states to formulate a universally accepted definition of terrorism (see section 1 above).

terrorism,⁴³ prescription of terrorist organisations and punishment of persons who are members of, or who publicly profess to be members of, or who convene or associate with or facilitate the activities of terrorist organisations. The Act also makes provision for the investigation of acts of terrorism and the surveillance of terrorist suspects. Law enforcement officials have powers to monitor bank accounts, e-mails, telephone calls and other electronic communications of suspects.⁴⁴ Employers are obliged to report absent employees where they suspect these of involvement in terrorist activities.

Unlike most other anti-terror laws, the Act defines terrorism. Section 7 of the Act provides that 'terrorism' is any act which involves serious violence against a person or serious damage to property, endangers a person's life (but not just the life of the person committing the act), and creates a serious risk to the health or safety of the public. Any such acts must be 'designed to influence the government or to intimidate the public or a section of the public', and must be in pursuance of a 'political, religious, social or economic aim indiscriminately without due regard to the safety of others or property'. The section lists acts which constitute terrorism. The offence of terrorism carries a mandatory death sentence if the terrorist act directly results in the death of any person.

Section 8 of the Act provides for other terrorist offences including aiding, abetting, financing, harbouring or rendering support to any person, with the knowledge or belief that such support will be used for or in connection with the preparation or commission or instigation of acts of terrorism. Conviction for any of these offences carries the death penalty. Section 10 provides for official declaration of certain organisations as terrorist organisations. However, there is no provision for any appeal procedure to challenge prescription as a terrorist organisation.

3.3 The Americas

3.3.1 Canada

Canada's anti-terrorism legislation includes the Public Safety Bill 2002 and the Aeronautics Amendment Act 38 of 2001. The former was introduced to replace the Public Safety Act, Bill C-42, which was introduced on 22 November 2001 but withdrawn after significant public criticism. The Bill enacted the Biological and Toxin Weapons Convention Implementation Act and allowed cabinet ministers to respond immediately to terrorist threats. The latter allows Canadian air carriers to provide approved passenger information to approved countries.

⁴³ See also sec 26 of the Penal Code, Cap 120 of the Laws of Uganda (2000 Revised Edition) which relates to terrorism.

⁴⁴ Secs 19(5)(a), (b) & (f) Uganda Anti-Terrorism Act.

In the aftermath of the September 2001 attacks, Canada introduced the Anti-Terrorism Act (Bill C-36), which amended several acts including the Criminal Code, the Official Secrets Act, the Canada Evidence Act, and the Proceeds of Crime (Money Laundering Act) and the Immigration and Refugee Protection Act 2002. The Act gives the state power to restrain property linked to terrorist groups upon the granting of an order by the Federal Court.

Canada's definition of terrorist activity includes actions which are an offence under the UN anti-terrorism instruments or are undertaken for political, religious or ideological purposes that threatens the public, or national security by killing, seriously harming or endangering persons, causing substantial damage to property that is likely to seriously harm people, or by interfering with or disrupting an essential service, facility or system. The Act allows for the designation of terrorist groups. Knowingly participating in terrorist activity attracts a 10-year sentence of imprisonment.

3.3.2 Guyana

In December 2001, the government of Guyana introduced Circular No 66/2001 (later amended by Circular No 68/2001) requiring licensed financial institutions as a preliminary step to combat terrorism.

The concept of terrorism was introduced in Guyanese law in September 2002 through the Criminal Law (Offences) Amendment Act which amended the Criminal Offences Act. The amendment provides that anyone who threatens the security or sovereignty of Guyana or strikes terror into any section of the population commits a terrorist act. In terms of section 309A(1)(b) of the amendment Act, anyone who commits a terrorist act is guilty of an offence and if such act results in the death of any person, may be punished with a fine of G\$1 500 000 together with death. This penalty extends to anyone who 'conspires, attempts to commit or advocates, aids and abets, advises or incites or knowingly facilitates the commission' of terrorist acts.

3.3.3 The United States

The USA arguably has the largest collection of counter-terrorism legislation with a large number pre-dating 11 September. However, the aftermath of attacks witnessed a flurry of anti-terrorism legislative activity in the USA involving changes to existing legislation and enactment of new anti-terrorism legislation.

Post-11 September legislation includes the Financial Anti-Terrorism Act 2001⁴⁵ (which amends the Right to Financial Privacy Act 1978, the Fair Credit Reporting Act and other Federal laws governing records and reports in monetary transactions and requires institutions to share

⁴⁵ HR 3004.

customer financial information with Federal intelligence agencies for use against terrorism); the USA Patriot Act 2001⁴⁶ (which is designed to 'deter and punish terrorist acts in the USA and around the world, and to enhance law enforcement investigatory tools, and for other purposes); the Terrorist Bombings Convention Implementation Act 2001;⁴⁷ Bio-terrorism Response Act 2001;⁴⁸ Enhanced Border Security and Visa Entry Reform Act 2002;⁴⁹ Homeland Security Information Sharing Act; and Enhanced Penalties for Enabling Terrorists Act 2002.⁵⁰

On 18 September 2001, an Act authorising the President to use 'all necessary and appropriate force' against states, organisations or persons he determines planned, authorised, committed or assisted the 11 September attacks was passed.⁵¹ An amendment to the Immigration and Nationality Act⁵² in October 2001 grants permanent authority to the government to admit, in a temporary non-immigration status, aliens who possess or will supply to law enforcement agencies critical information concerning criminal or terrorist organisations. The Anti-Terrorism and Port Security Act of 2003 is intended to prevent and respond to terrorism at or through ports. The Terrorist Bombings Convention Implementation Act of 2002 (Title I) and the Financing of Terrorism Convention Implementation Act of 2002 (Title II) implement relevant international conventions previously signed by the USA.⁵³ The Terrorism Penalties Enhancement Act passed in 2004 increases criminal penalties for fatal acts of terrorism and denies federal benefits for convicted terrorists.

The main legislation against terrorism passed after 11 September is the Patriot Act 2001⁵⁴ and the Homeland Security Act 2002. The former introduced wide changes to the country's laws and provides for enhanced national security against terrorism, greater surveillance procedures, mechanisms to detect and report money laundering and currency crimes, stricter immigration measures, and procedures for

⁴⁶ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (HR3162), Public Law No 107-56.

⁴⁷ Public Law 107-197, Title I.

⁴⁸ HR 3448.

⁴⁹ HR 3525.

⁵⁰ S 1981.

⁵¹ Authorisation for Use of Military Force (S J Res 23, Public Law No 107-40).

⁵² Public Law No 107-45.

⁵³ HR 3275, Public Law No 107-197. The Acts implement the International Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppression of the Financing of Terrorism, signed by the USA on 12 January 1998 and 10 January 2000 respectively.

⁵⁴ Public Law 107-56 (see n 40 above).

co-operation and information sharing in the investigation of terrorism.⁵⁵ The Act defines 'terrorism' in terms of activities that:

- involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the USA or of any state, or that would be a criminal violation if committed within the jurisdiction of the USA or of any state;
- appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping.

The Act further defines 'terrorist organisation' as a group designated under the Immigration and Nationality Act or by the Secretary of State as a group of two or more individuals, whether related or not, which engages in terrorist-related activities. This includes providing material support to terrorists or soliciting funds for terrorist organisations.

The Act has extended the scope of existing surveillance powers to cover a range of terrorism-related offences, including the use of weapons of mass destruction, killing American citizens abroad and terrorism financing. It also updates the USA Penal Code in relation to terrorism and creates new penalties in respect of terrorism. Further, the Act gives the USA Attorney-General the power to detain foreigners suspected of terrorism where the Attorney-General has reasonable grounds to believe that the individual concerned has or will commit espionage or sabotage; attempt to overthrow the government; has committed or will commit terrorist acts; or is otherwise engaged in activities that threaten national security.

The Homeland Security Act created a new Department of Homeland Security to oversee matters relating to national security which had previously been the responsibility of 22 separate agencies. Other versions of the Patriot Act and related legislation have also been introduced.

3.4 Australasia

3.4.1 Australia

Australia has one of the largest collections of anti-terrorism legislation. Current federal anti-terrorism legislation in Australia includes the Criminal Code Act 1995 (which incorporates the main terrorism legislation

⁵⁵ The Act amended the Electronic Communications Privacy Act, the Foreign Intelligence Surveillance Act, the Family Education Rights and Privacy Act, the Money Laundering Act, the Immigration and Nationality Act, the Banking Secrecy Act, the Right to Financial Privacy Act and the Fair Credit Reporting Act. The Act amends the Federal Criminal Code to authorise the interception of wire, oral and electronic communications for the production of evidence of (1) specified chemical weapons or terrorism offences and (2) computer fraud and abuse. It also amends the Immigration and Nationality to widen the scope of aliens ineligible for admission or deportable due to terrorist activities.

enacted after 11 September as schedule 1, part 5.3 (Terrorism), divisions 100-103), Criminal Procedure Regulations 2002 (which lists proscribed terrorist organisations), Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002 (which provide for a list of terrorist organisations with which financial dealings are restricted), and the Australian Security Intelligence Organisation Act 1979 (ASIO) (which confers special powers on ASIO in regard to terrorism). Other notable legislation passed after 11 September 2001 include the Suppression of the Financing of Terrorism Act 2002 (which includes amendments to the Criminal Code 1995 to criminalise the financing of terrorism and amendments to the Charter of the United Nations Act 1945 to make it an offence punishable by up to five years' imprisonment to hold assets that are owned or controlled by terrorist organisations or individuals, or to make assets available to them), Security Legislation Amendment (Terrorism) Act 2002, Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002, Criminal Code Amendment (Anti-Hoax and Other Measures) Act 2002, Border Security Legislation Amendment Act 2002, and Telecommunications Interception Legislation Amendment Act 2002. All of these amended a range of legislation.⁵⁶

Each one of Australia's states and territories has also enacted anti-terrorism legislation in the post-11 September period.⁵⁷

3.4.2 India

India has a raft of counter-terrorism legislation predating 11 September 2001, such as the Prevention of Terrorism Ordinance 2001, the Terrorist and Disruptive Activities (Prevention) Act 1987, and the Prevention of Seditious Meetings Act 1911. In the aftermath of 11 September, several pieces of legislation designed to counter terrorism have been adopted including the Prevention of Money Laundering Act 2003 (which criminalises money laundering and enjoins banks to maintain

⁵⁶ Eg, the Security Legislation Amendment (Terrorism) Act 2002 amends the Criminal Code by, *inter alia*, introducing the offences of engaging in a terrorist act (punishable by life imprisonment) and providing or receiving training connected with a terrorist act.

⁵⁷ New South Wales (Terrorism (Commonwealth Powers) Act 2002 and Terrorism (Police Powers) Act 2002; Northern Territory (Terrorism (Northern Territory) Request Act 2003, Terrorism (Emergency Powers) Act 2003, and Criminal Code Act 1983, Schedule 1, Part III, Division 2 Terrorism (secs 50-55); Queensland (Terrorism (Commonwealth Powers) Act 2002, and Police Powers and Responsibilities Act 2000, Sections 132-137 Emergency use of surveillance devices); South Australia (Terrorism (Commonwealth Powers) Act 2002; Tasmania (Terrorism (Commonwealth Powers) Act 2002 and Classification (Publications, Films and Computer Games) Enforcement Act 1995, secs 3 & 10; Victoria (Terrorism (Commonwealth Powers) Act 2003, Terrorism (Community Protection) Act 2003, and Petroleum (Submerged Lands) Act 1982, sec 151B (emergency periods); Western Australia (Terrorism (Commonwealth Powers) Act 2002.

and furnish records), the Prevention of Terrorism (Repeal Ordinance) 2004 promulgated by the President of India on 21 September 2004, which repeals the Prevention of Terrorism Act 2002, and the Unlawful Activities (Prevention) Amendment Ordinance 2004 which amends the Unlawful Activities (Prevention) Act 1967. It is notable that the repeal of the Terrorism Act of 2002 does not affect anything duly done, or any right, privilege or obligation or liability acquired, accrued or incurred under the repealed legislation.

The Unlawful Activities (Prevention) Ordinance contains a wide definition of 'unlawful activity' and imposes a penalty for belonging to an 'unlawful association'. An 'unlawful activity' means any action taken by an individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise '(i) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or (ii) which disclaims, questions, disrupts or is intended to disrupt the sovereignty or territorial integrity of India; or (iii) which causes or is intended to cause disaffection against India'. A terrorist act, which is also widely defined, is punishable with death or life imprisonment, and a fine where such act results in the death of any person or in any other case, imprisonment for not less than five years which term may be extended to life.

The Ordinance also provides for forfeiture of the proceeds of terrorism, but allows for an opportunity to make representations by the person whose property is being seized and appeal to a court. It is an offence to support or fund a terrorist organisation.

3.4.3 Singapore

The United Nations Act, which entered into force on 29 October 2001, authorises the Minister for Law to issue regulations to give effect to UN Security Council anti-terrorism measures. The most notable of such regulations are the United Nations (Anti-Terrorism Measures) Regulations 2001 which define a 'terrorist act' and prohibit the financing of terrorism by persons in Singapore or by citizens of Singapore elsewhere.

The Terrorism (Suppression of Financing) Act 2003 aims to give effect to the International Convention for the Suppression of the Financing of Terrorism. Sections 3 to 6 of the Act comprehensively cover the scope of criminal activities set out in article 2 of the Convention.⁵⁸ The Act defines a terrorist as any person who commits or attempts to commit, any terrorist act, or participates in or facilitates the commission of any

⁵⁸ See Fourth Report of Singapore to the Counter-Terrorism Committee, S/2004/133, 20 February 2004 <http://daccessdds.un.org/doc/UNDOC/GEN/N04/247/93/PDF/N0424793.pdf?OpenElement> (accessed 14 June 2006).

terrorist act. A terrorist act includes releasing into the environment any harmful substance, chemical or biological agent, disrupting any computer systems, public utilities, public transportation or disruption to the police. The Act also imposes a duty to inform the police of terrorist activities. Failure to do so attracts a fine and/or imprisonment for up to five years.

3.5 Europe⁵⁹

3.5.1 Italy

The main Italian post-11 September counter-terrorism legislation consists of Law 438/2001 and Law 155/2005. Law 438/2001 of 15 December 2001 concerning Urgent Measures Against International Terrorism extended the scope of article 270 of the Penal Code to cover international terrorism. Article 270 *bis* provides for imprisonment of up to 15 years for individuals convicted of promoting, constituting, organising, leading or financing organisations which promote violence in aid of terrorism or to endanger democracy. Individuals who associate with such organisations are liable to imprisonment upon conviction for five to ten years. Article 270 *bis* provides for imprisonment for up to four years for persons harbouring or assisting terrorists.

Law 155/2005, which entered into force on 2 August 2005, widened the definition of terrorism in article 270 *bis*. In terms of the amendment, terrorism includes promoting, constituting, organising, managing or financing organisations which intend to carry out violent activities, or assisting any individual (with the exception of close relatives) who participates in such organisations. Also covered in the definition are enrolling or training individuals to carry out violent activities if, in view of their nature or context, such activities might cause grave harm to a country or international organisation, and are calculated to intimidate the population or to constrain the powers of the state or international organisations to carry out or not to carry out any activity, or to destabilise or destroy fundamental political, constitutional, economic and social structures of a country or of an international organisation. It is notable that this definition is in addition to other acts defined as terrorism in international treaties to which Italy is a party.

Law 438/2001 and Law 155/2005 give the police and other investigating agencies enhanced powers to pursue terrorists, including the use of false identities and interception of communications where necessary in order to obtain information for the prevention of terrorism, subject to specified safeguards. Thus, for example, there must be clear justification of the need and the information acquired in such circumstances can only be used for purposes of investigation, not in criminal proceedings.

⁵⁹ A number of European states, including France, Germany, Greece, Italy, Norway, Sweden and the United Kingdom have enacted anti-terrorism legislation.

Law 155/2005 strengthens the provisions in Law 438/2001 in a number of respects. Article 2 of Law 155 enables the discretionary granting of residence permits to illegal aliens who collaborate with the authorities. Other provisions include authorisation to take samples of saliva or hair for DNA testing without consent in cases of suspected terrorism. However, the dignity of the individual must be respected.

Law 189/2002, Law 271/2004 and Law 155/2005 permit the immediate expulsion of non-Italian nationals on terrorism-related grounds.

3.5.2 Sweden

Swedish counter-terrorism legislation includes the 2002 Act on Criminal Responsibility for the Financing of Particularly Serious Crimes and the 2003 Act on Criminal Responsibility for Terrorist Offences. The former implements the International Convention for the Suppression of the Financing of Terrorism and establishes the criminal responsibility for persons who collect, provides or receives funds or other assets with the intention that they should be used or in the knowledge that they are to be used in the commission of particularly serious crime.

In terms of the latter Act, a number of offences under Swedish law, including murder, manslaughter, gross assault, kidnapping, the spreading of poison or contagious substances, constitute a terrorist offence where the act in question might seriously damage a state or an intergovernmental organisation and the act is intended to seriously intimidate a population or part thereof, unduly force a public authority or an intergovernmental organisation to perform an act or to abstain from doing something, and seriously destabilise or destroy fundamental political, constitutional, economic or social structures of a state or intergovernmental organisation.

3.5.3 The United Kingdom

Counter-terrorism legislation in the UK is nothing new owing to the numerous incidents of political violence in the context of the Northern Ireland conflict. Notably such legislation includes the Prevention of Terrorism (Temporary Provisions) Act, in force since its passage in 1974 and until its replacement in 2000 with the Terrorism Act (which reforms and extends the pre-existing anti-terrorism legislation). In December 2001, the Anti-Terrorism, Crime and Security Act was enacted. The purpose of the Act is to enhance anti-terrorism measures and security, through new measures to block terrorist access to funding, better information sharing, and improving security at airports and nuclear sites. The Act also extends police powers. Part 4 of the Act, which deals with immigration and asylum, is controversial.⁶⁰ Section 23 of the Act gives

⁶⁰ The powers of detention under this Act were controversial as they were essentially a form of executive authorised detention exercise exclusively in regard to foreign nationals of the Muslim faith. See http://en.wikipedia.org/wiki/Anti-terrorism,_Crime_and_Security_Act2001 (accessed 14 June 2006).

the Home Secretary extensive powers to detain 'international terrorists' indefinitely. These provisions apply only to foreign nationals subject to immigration control that the UK proposes to remove or deport from the country but cannot for the time being so remove or deport. It is notable that the measures under part 4 have entailed derogation from the right to liberty and security in article 5(1) of the European Convention on Human Rights and article 9(1) of CCPR.

In March 2005, the UK enacted the Prevention of Terrorism Act 2005, which aims to replace the part 4 powers in the Anti-Terrorism, Crime and Security Act 2001 with a new scheme of control orders,⁶¹ allowing for the imposition of an extensive and non-exhaustive set of conditions on the movements of suspected persons with restrictions approximating a form of house arrest. Unlike part 4 of the 2001 Act, the powers under the new Act can be applied to British and non-British suspected terrorists alike.

Following the 7 July 2005 London transport network bombings, the British government proposed the creation of three new offences of 'acts preparatory to terrorism', 'terrorist training' and 'indirect incitement to terrorism'.⁶² There was also a controversial proposal to increase the maximum period of detention without charge from 14 days to three months.

3.6 The Middle East

3.6.1 Iran

The Anti-Terrorism Bill which was approved by Cabinet on 19 November 2003 and is under scrutiny by the relevant specialised committees of the Islamic Consultative Assembly (Parliament) provides that every deliberate violent act against internationally protected persons, sabotage of public and private assets and facilities, dangerous acts against aviation and airliners' security, hijacking, wrecking and damaging vessels, financing terrorism constitute criminal offences. The Act also makes provision for the confiscation of assets generated from terrorist activities.

A Money Laundering Bill has been adopted by parliament but not endorsed by the Guardian Council (Constitution supervisory body).

⁶¹ Sec 1 of the Act defines a 'control order' as 'an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism'. Control orders may be issued by the Secretary of State (except in the case of an order imposing obligations that are incompatible with the individual's right to liberty in art 5 of the ECHR) or by a court upon application by the Secretary of State (in the case of orders that include derogation).

⁶² See <http://www.cageprisoners.com/print.php?id=9336> (accessed 20 September 2005).

After its re-adoption in full by parliament, the Bill has been referred to the State Expediency Council for final review and approval.⁶³

It is worth mentioning that articles 512 and 516 of the country's Islamic Penal Code provides for the punishment of perpetrators of 'offences and crimes against other countries and the foreign security of the state'.⁶⁴

3.6.2 Israel

According to its initial report to the CTC, Israel has been under threat of terrorism since its independence.⁶⁵ Consequently, it has developed an 'extensive network of (agencies) and a body of domestic legislation' to counter terrorism. Anti-terrorism or terrorism-related laws pre-dating 11 September include the Defence Regulations (State of Emergency) 1945, Prevention of Terrorism Ordinance 1948, and Penal Law 1977. The Regulations and the Ordinance, *inter alia*, authorise the freezing or confiscating of assets of terrorist groups.

In the post-11 September period, it enacted the Prohibition on Money Laundering Orders which enjoin financial institutions to report financial transactions which appeared to them to be unusual.

In 2002, the Suppression of the Financing of Terrorism Law, which implements the Convention on the Financing of Terrorism, was adopted.

3.6.3 Saudi Arabia

Saudi Arabia has not adopted any specific anti-terrorism legislation as such. According to its compliance reports submitted to the CTC, Saudi Arabia enforces provisions of international conventions on terrorism in accordance with the principles of the Islamic Shari'a, which is the source of law in Saudi Arabia.⁶⁶ It has acceded to seven of the 12 universal conventions on terrorism.

In accordance with the Shari'a, terrorism and the financing of terrorism are characterised as 'spreading mischief in the land' or 'spreading

⁶³ See Fourth Report of the Islamic Republic of Iran to the Counter-Terrorism Committee, S/2005/224, 28 March 2005 <http://www.un.org/sc/ctc/countryreports/reportsA.shtml> (accessed 14 June 2006).

⁶⁴ As above.

⁶⁵ See Report of Israel to the Counter-Terrorism Committee, S/2001/1312, 31 December 2001 <http://daccessdds.un.org/doc/UNDOC/GEN/N02/229/21/PDF/N0222921.pdf?OpenElement> (accessed 15 June 2006).

⁶⁶ See Third Report of the Kingdom of Saudi Arabia to the Counter-Terrorism Committee, S/2003/583, 2 June 2003 <http://daccessdds.un.org/doc/UNDOC/GEN/N03/384/65/PDF/N0338465.pdf?OpenElement> (accessed 14 June 2006). International agreements relating to terrorism are enforced by royal decree and then referred to the authorities concerned for implementation by each authority in its own area of jurisdiction.

evil on earth' (*al-ifsad fi al-ard*) and crimes against society (*hirabah*) to which severe penalties, including death, apply.⁶⁷

By Royal Decree 39 of 18 August 2003, Saudi Arabia adopted the Money Laundering Statute to deal with the financing of terrorism. Article 2 of the Statute provides that the financing of terrorism terrorist acts or terrorist organisations constitutes a crime of money laundering which attracts severe penalties. In terms of article 12, funds suspected of being intended to finance terrorism may be seized upon suspicion or by order of a competent court.

4 The human rights implications of anti-terrorism laws

4.1 The primacy of international human rights law

The primacy of international human rights law derives from the UN Charter together with the Universal Declaration of Human Rights (Universal Declaration). Article 1(3) of the Charter sets human rights as the cornerstone for the achievement of the purposes of the UN. Article 55(c) provides that the UN will encourage 'universal respect for, and observance of, human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion', while article 56 imposes an obligation on UN member states 'to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in article 55'. It is therefore clear that UN member states are obliged to respect human rights. The pre-eminence of this obligation is confirmed by article 103 of the Charter:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

The Universal Declaration proclaims that it is 'a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society . . . shall strive to secure their universal and effective recognition and observance'. While the legal standing of the Universal Declaration is subject to debate, the constant references to it in numerous international fora, international human rights treaties and in the legislative and judicial proceedings of many countries, indicates that it has become a part of customary international law binding even on those states that did not approve it in the first place in 1948.

States have the primary responsibility for protecting the security of all persons under their jurisdiction. In this regard, states are at liberty to

⁶⁷ See Fourth Report of the Kingdom of Saudi Arabia to the Counter-Terrorism Committee, S/2004/884, 2 November 2004 <http://daccessdds.un.org/doc/UNDOC/GEN/N04/603/45/PDF/N0460345.pdf?OpenElement> (accessed 14 June 2006).

adopt measures to combat terrorism and to protect those subject to their jurisdiction. However, these measures must be consistent with international human rights standards. As the UN Working Group on Terrorism has emphasised, international law requires that states adhere to basic human rights standards in their fight against terrorism.⁶⁸ In 2003, the UN Security Council declared that 'states must ensure that measure(s) taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law'.⁶⁹ It is noteworthy that UN Security Council Resolution 1373 itself expressly calls upon states to 'take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts'. In its Preamble, the resolution also reaffirms the need to combat by all means, 'in accordance with the Charter of the United Nations', threats to international peace and security.⁷⁰

It is notable that all the countries surveyed in this paper are parties to one or more of the seven core international human rights treaties. These treaties impose legal obligations to respect, protect and implement fundamental rights and freedoms. They also include clear restrictions on the actions that states may take within the context of the fight against terrorism.

4.2 Counter-terrorism legislation and human rights

It is widely accepted that terrorism constitutes a violation of human rights, especially the rights to physical integrity, life, freedom and security and also impedes socio-economic rights.⁷¹ All acts of terror — whether by a state or groups of individuals — seriously impair the enjoyment of human rights by persons in the places targeted.

⁶⁸ See Report para 26.

⁶⁹ Security Council Resolution 1456 (2003), Annex. This position has been reaffirmed in subsequent Security Council Resolutions on terrorism.

⁷⁰ It is interesting to note, however, that the CTC, which is established in terms of Resolution 1373, maintains that 'monitoring performance (of states) against other international conventions, including human rights law, is outside the scope' of its mandate.

⁷¹ See eg Report of Working Group on Terrorism 1. See also OAU Convention on the Prevention and Combating of Terrorism 1999, Preamble, para 10; Arab Convention on the Suppression of Terrorism 1998, Preamble; OIC Convention on Combating International Terrorism 1999, Preamble; Draft UN Comprehensive Convention Against Terrorism, UNGA Res 51/210 (17 December 1996), 6th session (2002), UN Doc Supp 37 (A/57/37), annex I: Bureau Discussion Paper; European Commission, Proposal for a Council Framework Decision on Combating Terrorism, Brussels, 19 September 2001, COM (2001) 521 Final, 2001/0217 (CNS), Explanatory Memorandum, 2-3, 7; OAS General Assembly, AG/RES 1840 ('i-O/02), Preamble.

Thousands of people all over the world have lost their lives as a consequence of terrorist acts. The 11 September attacks in the USA are but one instance. Terrorism has a long history, with a variety of perpetrators: the Red Brigade in Italy and Bader Meinhof in the Federal Republic of Germany in the 1970s; American Central Intelligence Agency-sponsored terrorist activities against regimes that the USA administration did not favour; and the Israeli terror campaigns against Palestinians and *vice versa*, to name but a few. Africa has also had its fair share of 'terrorist' attacks — notably in Algeria, the 1998 bomb attacks on the USA embassies in Kenya and Tanzania which killed hundreds, and the October 2002 Soweto bombings alleged to have been carried out by members of the right-wing Afrikaner *Boeremag* organisation in South Africa.

All of the foregoing terrorist acts have resulted in loss of life and therefore in the curtailment of the right to life. However, it must be recognised that state efforts to curb terrorist activities have also culminated in the abridgment of many rights and freedoms, not only of the 'terrorist' suspects but also of innocent civilians. Some of the rights and freedoms infringed upon in the quest to curb terrorism include the rights to life, liberty, human dignity, expression, association, and fair trial. Often, state measures to curb terrorism offend against the fundamental principles of humanity.

However, since 11 September, many states have adopted draconian new 'anti-terrorism measures', including new legislation, which are in breach of their international obligations and pose a serious threat to human rights.⁷² The pressure on states to respond to the international terrorist threat has resulted in some states adopting legislative and administrative measures which effectively abridge or threaten to abridge human rights.⁷³ These include prolonged detention of suspects, curtailing the right of access to legal representation, removing the right of appeal, seizure of property and placing limits on freedom of expression. According to Amnesty International, these national legislative responses to terrorism are 'eroding human rights principles, standards and values'. In its report for 2004, Amnesty International says that countries have continued to flout international human rights standards in the name of the 'war on terror'. This has resulted in 'thousands of women and men suffering unlawful detention, unfair trial and torture — often solely because of their ethnic or religious background'.⁷⁴

⁷² The UN has recognised the threat to human rights posed by anti-terrorism measures through, *inter alia*, the appointment of an Independent Expert on Protection of Human Rights While Countering Terrorism.

⁷³ See also the Berlin Declaration adopted by the International Commission of Jurists (ICJ) on 28 August 2004.

⁷⁴ Amnesty International Report 2004 <http://web.amnesty.org/report2004/index-eng> (accessed 24 November 2004).

In recognition of the challenges to human rights posed by legislative responses to terrorism, on 25 October 2001, member states of the Commonwealth adopted a Statement on Terrorism in which they committed themselves to implementing UN Security Council Resolution 1373, 'in keeping with the fundamental values of the association including democracy, human rights, the rule of law, freedom of belief, freedom of political opinion, justice and equality'.⁷⁵ Significantly, the UN Security Council — the author of the resolution pursuant to which many of the states adopting anti-terrorism legislation purport to act — has recently reaffirmed 'the imperative to combat terrorism in all its forms and manifestations by all means, in accordance with the Charter of the United Nations and international law'.⁷⁶ It has also reminded states that 'they must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law'.

Both the UN General Assembly and the Commission on Human Rights have adopted resolutions focusing on the need to protect human rights and fundamental freedoms while countering terrorism. The UN General Assembly resolution adopted on 18 December 2002 affirmed that states must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular, international human rights, refugee and humanitarian law.⁷⁷ The resolution also requests the UN High Commissioner for Human Rights to take a number of actions, including examining the question of the protection of human rights while countering terrorism.

There are a number of controversial issues raised by anti-terrorist legislation. Significantly, vague definitions of 'terrorism' in most anti-terrorism legislation render the concept open to abuse. Such vague definition, has led, for example in the US, to laws stereotyping people of Arabic and/or Eastern descent as well as organisations considered to be 'left-wingers'. The definitional problem is perhaps best illustrated by the comments of the Chairman of the Kenyan Human Rights Commission on the Kenyan Suppression of Terrorism Bill of 2003:

The Bill defines terrorism in such broad and vague terms that it cannot withstand the scrutiny of logic. Terrorism is such an innocuous bogeyman that it can be used as an open-ended excuse to deny suspects a broad range of constitutional guarantees.

⁷⁵ See Report of the Commonwealth Committee on Terrorism (CCT): Commonwealth Plan of Action <http://www.thecommonwealth.org/Templates/Internal.asp?No-delID=35145> (accessed 14 June 2006).

⁷⁶ See UN Security Council Resolution 1566 (2004), S/Res/1566 (2004), adopted by the Security Council at its 5053rd meeting on 8 October 2004.

⁷⁷ General Assembly Resolution A/Res/57/219 of 18 December 2002. See also E/CN.4/Res/2003/68 adopted by the Commission on Human Rights at its 59th session on 25 April 2003.

Similar concerns formed part of the severe criticisms directed against the first post-11 September anti-terrorism legislation in South Africa.

While it is not intended to provide an exhaustive treatment of the human rights issues raised by anti-terrorism legislation, an overview of selected human rights may be instructive.

4.2.1 Refugees and asylum seekers

Some governments have used anti-terrorism legislation to suppress not only political oppositions but also minority groups. Some have used this legislation to evade their international obligations towards asylum seekers and refugees.⁷⁸ For example, Tanzania's Prevention of Terrorism Act 2002 gives immigration officers the power to arrest without warrant, any person suspected to be a terrorist or to have been involved in international terrorist activities. The minister responsible for immigration is empowered to refuse asylum to anyone.

In similar vein, the Mauritian Prevention of Terrorism Act of 2002 gives the government the right to extradite terrorist suspects or to deny such persons asylum and to return them to countries where they are at risk of persecution.

On 13 September 2001, Australian Defence Minister Peter Reith cited the 11 September attacks to justify his government's attempts to prevent asylum-seekers from entering Australia.

Given the proliferation of conflicts around the world and the attendant flow of displaced persons, such powers are too extensive and offend against the well-established international legal principle of non-refoulement.

4.2.2 Detention, torture and the right to a fair trial

One of the most important rights of a criminal suspect is the right to be informed of the reason for their detention and the right to seek legal advice. Anti-terrorist legislation often curtails these under the pretext that more detention time is required for the law enforcement officials to complete their investigations. Where it is permitted, the right to counsel is limited to consultation with 'approved' legal practitioners. Under the Prevention of Terrorism (Special Measures) Regulations 2003 (Mauritius), a terrorist suspect can be detained for up to 36 hours without access to anyone other than a police officer or medical officer on request.⁷⁹ In similar vein, anti-terrorism legislation passed in the UK, France, Germany and Italy introduced severe restrictions on freedoms including prolonged detention and refusal to grant the right of asylum

⁷⁸ See Human Rights Watch 'Opportunism in the face of tragedy: Repression in the name of anti-terrorism' <http://hrw.org/campaigns/september11/opportunismwatch.htm> (accessed 14 June 2006).

⁷⁹ The Anti-Terrorism (Amendment) Ordinance 2002 allows for detention without trial for up to 12 months!

and immigration on the mere suspicion that the individual or individuals concerned belonged to a terrorist group. In the aftermath of the July 2005 London underground and bus bombings, the British government proposes to increase the period of detention without charge of terrorist suspects from 14 days to three months.

In relation to USA anti-terrorism legislation, Human Rights Watch has expressed concern that: 'the breadth and vagueness of the criteria for the certification and detention of non-citizens raise the possibility of arbitrary or abusive application'.⁸⁰

In its report for 2004, Amnesty International has stated that, in 2003, torture continued to be widespread in Algeria, particularly in cases which the government described as 'terrorist activities'.⁸¹ According to Human Rights Watch, a number of people detained in a facility controlled by the Joint Anti-Terrorism Task Force in Uganda were tortured.⁸² In relation to the detention of individuals by the USA in its so-called 'war against terror', the UN Working Group on Arbitrary Detention concluded in 2003 that their conditions of detention were arbitrary.⁸³

In his statement to the Third Committee of the UN General Assembly, Theo van Boven, the Special Rapporteur on Torture, spoke of reported circumventions of the prohibition on torture in the name of countering terrorism. These attempts included the legal arguments of necessity and self-defence; attempts to narrow the scope of the definition of torture and arguments that some harsh methods should not be considered as torture but merely as cruel, inhuman or degrading treatment or punishment; acts of torture and ill-treatments perpetrated against terrorist suspects by private contractors; the indefinite detention of suspects (including children) without determination of their legal status and without access to legal representation. As the Special Rapporteur has rightly stated, the definition of torture contained in the Convention against Torture cannot be altered by events (such as terrorism) or in accordance with the will or interest of states. It should be noted that the prohibition against torture is now firmly established as a rule of customary international law and, arguably, has the character of *jus cogens*.⁸⁴

⁸⁰ See 'Human Rights Watch criticises anti-terrorism legislation' *Human Rights News* 22 October 2001 <http://hrw.org/english/docs/2001/10/22/usdom2947.htm> (accessed 22 September 2005).

⁸¹ See <http://web.amnesty.org/web/web.nsf/print/2004-dza-summary-eng> (accessed 24 November 2004).

⁸² See Human Rights Watch *World Report 2003: Uganda* <http://www.hrw.org/wr2k3/africa13.html> (accessed 24 November 2004).

⁸³ See Civil and Political Rights, including the Question of Torture and Detention, Report of the Working Group on Arbitrary Detention, E/CN.4/2003/8.

⁸⁴ Rules or principles of international law having a higher status and from which no derogation is permitted.

4.2.3 Freedom of association, expression and assembly

These are basic civil rights which are crucial to any functioning democracy. However, they are also rights which have increasingly been curtailed or are under threat from anti-terrorism legislation as governments move to ban public demonstrations in the name of state security. Anti-terrorism legislation threatens to undermine democracy, not only in Africa, but across the world. Such legislation can easily be used to suppress or undermine democratic opposition.

To illustrate, the Zimbabwean Public Order and Security Act of 2002 makes it an offence to publish statements that promote public disorder or undermine public confidence in the law enforcement officials or to insult the office of the President. The Ugandan government has been criticised for using the Anti-Terrorism Act of 2002 to 'repress political dissent and strictly limit freedom of expression'.⁸⁵ In September 2002, Ugandan radio stations were warned against giving publicity to an exiled political leader whom the government had labelled a 'terrorist' and threatened with prosecution under the Act, in terms of which it is an offence to give publicity to terrorists.

In its report for 2003, the UN Working Group on Terrorism expressed the concern that:

The rubric of counter-terrorism can be used to justify acts in support of political agendas, such as the consolidation of political power, elimination of political opponents, inhibition of legitimate dissent and/ or suppression of resistance to military occupation.

4.2.4 The right to privacy

The constitutions of most of the countries surveyed guarantee the right to privacy.⁸⁶ However, their legislation confers powers on law enforcement agencies that potentially threaten this right. Some of the anti-terrorist legislative measures give the police extensive powers to combat terrorism, including the use of electronic surveillance to identify terrorists.⁸⁷ As stated above, the Ugandan Anti-Terrorism Act gives law enforcement officials extensive powers to monitor bank accounts, e-mails, telephone calls and other electronic communications of suspects. The

⁸⁵ See M Kagari 'Anti terror bill an affront to human rights' *Daily Nation* 18 November 2003 <http://www.nationaudio.com/News/DailyNation/18112003/Comment/Comment181120036.html> (accessed 22 September 2005). See also CPJ *Attacks on the press in 2002* <http://www.cpj.org/attacks02/africa02/uganda.html> (accessed 22 September 2005).

⁸⁶ Constitution of Mauritius 1968, sec 9; Constitution of South Africa 1996, sec 14; Constitution of Uganda 1995, sec 27.

⁸⁷ Such provisions are not unique to African anti-terrorism legislation. Eg, the Canadian Anti-Terrorism Act also gives the police extensive powers of surveillance. Under the Anti-Terrorism, Crime and Security Act 2001 of the United Kingdom, the Home Secretary has powers to issue a code of conduct for the retention of communications data by communications service providers for national security reasons.

potential for abuse under these provisions is considerable. Thus, it has been argued, for instance, that the phrase ‘... articles of a kind which could be used in connection with terrorism ...’ in the Ugandan Anti-Terrorism Act is so ‘vague that it could be used to search for almost any object’.⁸⁸

4.2.5 Other human rights concerns

According to the UN Special Rapporteur on Religious Intolerance, anti-terrorist measures in a number of states have unduly limited freedom of religion or belief, in violation of international human rights standards.⁸⁹ Responses to terrorism have also led to new forms of racial discrimination and a growing ‘acceptability’ of the traditional forms of racism where certain cultural or religious groups are viewed as terrorist risks.⁹⁰ This has spawned new forms of racism that render it more difficult to combat racial discrimination and xenophobia.

Some of the anti-terrorism legislation surveyed *prima facie* poses a threat to the rights of the child. For example, while the Uganda anti-terrorist law imposes the sentence of death for the offence of terrorism; it does not expressly stipulate that it does not apply to children who might be involved in such activities. In view of the low age of criminal responsibility in Uganda, this *lacuna* is a serious concern.⁹¹

There are also concerns about the lack of procedural safeguards concerning the extradition or the surrender of suspects.⁹²

It should be noted that most of the countries surveyed have constitutional guarantees of human rights in their constitutions. Consequently, it will be interesting to see how the anti-terrorism legislative measures that have implications for human rights will be reconciled with the constitutional guarantees of human rights. Suffice to say, these constitutions are generally proclaimed to be the ‘supreme law’

⁸⁸ SB Bossa & T Mulindwa ‘The Anti-Terrorism Act, 2002 (Uganda): Human rights concerns and implications’ paper prepared for the Terrorism and Human Rights Network of the International Commission of Jurists, 15 September 2004 http://www.icj.org/news.php3?id_article=3517&lang=en (accessed 22 September 2005).

⁸⁹ Statement by Asma Jahangir, Special Rapporteur on Freedom of Religion or Belief to the Third Committee of the UN General Assembly, 3 November 2004. See GA/SHC/3798 <http://www.un.org/News/Press/docs/2004/gashc3798.doc.htm> (accessed 31 March 2007).

⁹⁰ Statement of the Special Rapporteur on Mercenaries to the Third Committee of the UN General Assembly, 3 November 2004. See GA/SHC/3798 <http://www.un.org/News/Press/docs/2004/gashc3798.doc.htm> (accessed 31 March 2007).

⁹¹ Bossa & Mulindwa (n 88 above).

⁹² Eg, questions have been raised about the extradition, without appropriate legal safeguards, of terrorist suspects by Pakistan to the USA.

of the countries concerned and that any law inconsistent with the constitution is void to the extent of the inconsistency.⁹³

The South African Anti-Terrorism Bill of 2003, which was designed to remedy the perceived shortcomings in existing legislation (including inability to curb urban terrorism), had wide-ranging implications for human rights and principles of humanity — its security measures seemed to contravene no fewer than 11 constitutional rights.⁹⁴ The Bill was criticised on several grounds. One issue was the broad definition of what constitutes a ‘terrorist act’. For example, the Bill defined any activity that might result in the ‘disruption of essential public services’ as a ‘terrorist’ act. Such wide and vague definition had the potential for abuse through, for example, characterisation of legitimate strikes by public sector workers, demands for land, and civil disobedience campaigns as ‘terrorism’. In effect, one could be guilty of a terrorist act when striking or participating in a public demonstration!

5 Terrorism and the fundamental principles of humanity

The Turku Declaration on the Fundamental Principles of Humanity affirms non-derogable minimum humanitarian standards, which are applicable in all circumstances. It provides, *inter alia*, that all persons (including those whose liberty has been restricted) are ‘entitled to respect for their person, honour and convictions, freedom of thought, conscience and religious practices’. It also prohibits a number of practices including outrages upon personal dignity.

On their face and with particular regard to the safeguards built therein, most of the anti-terror laws in the countries surveyed above respect these fundamental principles of humanity.⁹⁵ However, as indicated earlier, many of these laws have been roundly condemned as a threat to the rights enshrined in the countries’ constitution and in international human rights treaties.

While it is recognised that all countries have the responsibility and obligation under international law to give effect to the relevant UN and regional conventions and resolutions relating to terrorism, individual

⁹³ Eg, sec 2 of the Constitution of Mauritius 1968 proclaims: ‘This Constitution is the supreme law of Mauritius and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.’ See also Constitution of South Africa 1996, sec 2; and Constitution of Uganda 1995, sec 2.

⁹⁴ The Bill was subsequently withdrawn and replaced with the Protection of Constitutional Democracy Against Terrorism and Related Activities Bill which was passed by the National Assembly in November 2004 (see sec 3.2.2 above).

⁹⁵ Eg, a special interpretation clause requires the definition of ‘terrorist act’ to be interpreted in accordance with international humanitarian law. Persons detained in terms of the legislation are also entitled to consult with a legal and medical practitioner, and to be visited by a partner and chosen religious counsellor.

citizens have the right to be treated in accordance with the fundamental principles of humanity. In their current form, most anti-terrorism laws are likely to erode not only the human rights of the people but also the fundamental principles of humanity.

6 Conclusion

The legislative responses to terrorism in different countries around the world have the potential to impact negatively on human rights and freedoms such as the rights to freedom of expression, association, security of the person, religion, belief, opinion, assembly and demonstration, and to offend against the fundamental principles of humanity as defined in the Turku Declaration. As Amnesty International stated in May 2003:

The 'war on terror', far from making the world a safer place has made it more dangerous by curtailing human rights, undermining the rule of international law and shielding governments from scrutiny. It has deepened divisions among people of different faiths and origins . . .

The fact that many governments have been forced to introduce 'anti-terrorism' legislation by powerful states such as the USA and the UK in their prosecution of the so-called 'war against terror', without due regard to their local circumstances, not only enhances the likelihood that these countries have not given much thought to the implications of such legislation for human rights but also increases the risk of abuse by these states.

For these reasons, it is important that each state should have, in co-operation with others and in accordance with the dictates of international law, the freedom to adopt anti-terrorist legislation that not only suits it but also helps it meet its obligations under international law, including the obligation to protect the rights of all people irrespective of race, ethnic origin, political opinions, etc. Most importantly, there is a need for the world to deal with the problem of terrorism in a holistic manner that ensures that in their quest to deal with the terrorist threat, states do not erode the rights of all persons subject to their jurisdiction.

As the UN Policy Working Group on the UN and Terrorism stated in its 2002 Report:

Terrorism is, in most cases, essentially a political act. It is meant to inflict dramatic and deadly injury on civilians and to create an atmosphere of fear, generally for a political or ideological (whether secular or religious) purpose. Terrorism is a criminal act, but it is more than mere criminality. To overcome the problem of terrorism it is necessary to understand its political nature as well as its basic criminality and psychology.

In sum, national legislative efforts to curb international terrorism should take account of human rights and fundamental principles of humanity.