"INTERNATIONAL TERRORISM: A COMPARATIVE ANALYSIS OF REGIONAL RESPONSE", REGIONAL CONFERENCE ON TERRORISM,

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I. Introduction

It may be observed that all the twelve international instruments dealing with terrorism, place an obligation upon States Parties to implement their provisions. In order to fulfill this obligation, States Parties are, for example, required to; enact national laws which criminalize the offences set forth in the instruments and to prescribe suitable penalties, establish appropriate institutions, or take suitable administrative measures.

Although most States have been parties to a number of the twelve terrorism conventions for a considerable period, their response in implementing them has been slow. But following the 9/11 terror attacks in the U.S. and the adoption of resolution 1373 in 2001, which calls upon states to inter alia, " become parties as soon as possible to the relevant international conventions and protocols relating to terrorism," States have responded with exceptional speed in promptly taking actions which seek to comply with international

instruments relating to terrorism and implementing them through suitable measures. It is in this light that the series of national legislations which have been enacted, or are being contemplated, by States are discussed in this paper. The point of departure is therefore, the United Nations Security Council Resolution 1373 (2001) requiring States to take the following measures as appropriate;

a. Amendment of existing legislation that is useful in the fight against terrorism,
b. The enactment of new legislation in accordance to Security Council Resolution 1373 for the purpose of fighting against terrorism,
c. The establishment of institutions for the purpose of combating terrorism.

In response to the need to adopt appropriate measure to deal with terrorism, Kenya, for example, published the Suppression of Terrorism Bill in 2003. In its report dated 4th March 2004 to the Counter- Terrorism Committee, and in answer to queries arising from the second report to the Committee, Kenya reported that all measures that she had taken to combat terrorist acts were in compliance with its obligations under international law. Besides, it stated that the publication of the Suppression of Terrorism Bill had only elicited various comments from stakeholders which could be cured by building consensus among the various interested parties.

More importantly, the report stated that these measures, both legal and administrative, had been taken in a manner consistent with the Constitution, which embodies the principles set out in the various International Human Rights Conventions. Furthermore, the report explained that, owing to such compliance, no constitutional challenges had been raised against the

measures that had already been put in place.

Each of the Governments represented here has submitted reports to the United Nations Counter- Terrorism Committee indicating the legislative measures they had taken or are taking to respond to terrorism to avoid conflict with the Constitution or other national laws.

II. LEGISLATIVE RESPONSE TO TERRORISM

A. AN ANALYSIS OF THE USA PATRIOT ACT

The attack on the Pentagon and the Twin Towers, (the World Trade Centre) in the U.S.A. on September 11th 2001, involving the hijacking of civilian aircrafts and the murder of at least 3000 people led the U.S. Government to announce a "war on terrorism" involving legislative and other measures.

On the October 2001, U.S.A and its allies on the war on terror launched military action in Afghanistan targeting Taliban, Al Qaeda and Osama Bin Laden. Other measures included declaring organizations terrorist and freezing their assets; Military Co-operation with other governments of states that provide tactical and strategic avenue in the war on terror e.g. Kenya, Djibouti, and Philippines.

On the legislative front, the U.S congress passed the USA Patriot Act (The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act) in October 2001 whose Provisions included new governments powers to detain foreign nationals suspected of involvement in " terrorism" or " any other activity that endangers the national security of the United States" for 7 day without charge. The Act authorized the Attorney- General to continue to detain

indefinitely on, “national security grounds” foreign nationals charged with immigration violations whose removal was unlikely in the foreseeable future. The USA Patriot Act showers abundant new law enforcement powers on federal agents. Most of its offences are not limited to terrorist offences, but instead apply to all federal investigations.

On November 13th 2001, President Bush signed a highly controversial military order allowing for Non- U.S. citizens suspected of involvement in “international terrorism” to be tried by special military Commissions which would expressly bypass the normal rules of evidence and safeguards prevailing in the U.S. Criminal Justice System. Under the Order, the commissions could operate in secret and pass death sentences which could not be appealed to higher court, a key fair trial requirement under international law. He Cited the danger to national safety posed by international terrorism, claiming that it was "not practicable" to try terrorists under "the principles of law and the rules of evidence" that apply in the U.S.'s domestic criminal justice system.

Following the enactment of the Patriot Act by the U.S. Congress and the military order issued by the President establishing Special Military Commissions, more than 1200 people, mainly Non- U.S. Nationals from South Asia, Middle East and North Africa, were arrested and taken into custody.

Civil rights advocates in the U.S. expressed concern at the unprecedented levels of official secrecy surrounding the detentions and at reports that some detainees were denied prompt access to attorneys and relatives; that some Muslim detainees suffered physical and verbal abuse from guards or other

inmates; of cruel conditions of confinement including prolonged solitary confinement, inadequate exercise and the wearing of shackles during non-contact visits.

International human rights watchdogs such as Amnesty International and Human Rights Watch expressed grave concern at the reports on the plight of these detainees. A.I's concern included reports of incommunicado detention, ill-treatment of detainees in custody, indefinite

detention of foreign nationals on the basis of mere suspicion of involvement in terrorism, new powers of government to monitor communication between lawyers and detained clients on national security grounds, the potential use of secret evidence and the fact that trials under the special military commissions violated the principle of non-discrimination and international fair trial standards.

In 2002, Human Rights Watch, in a report entitled: "Presumption of Guilt: Rights Abuses of post September 11 Detainees" reported extensively on the failures by the Department of Justice, the FBI and INS to respect the basic human rights of the detainees.

On 3rd June 2002, the office of internal Oversight (OIG) an internal agency watchdog which acts like an ombudsman, released a 198 page report entitled " The September 11 Detainees: A Review of the Treatment of Aliens held on Immigration charges in connection with the Investigation of the September 11 Attacks" confirming abuses reported by Human Rights Watch and Amnesty International, including prolonged detention without charge, denial of access to legal Counsel, excessively harsh conditions of confinement; Blanket denial of bail, and the use of Immigration detention to investigate

criminal activity.

As at the date of the Publication of the OIG report, several detainees had already filed lawsuits against the U.S. Government and several of its agencies and officials.

The fact that an internal oversight agency like the OIG had issued such a damning report which is an indictment of the U.S. Government and its agencies of its unfair treatment of the detainees says a lot about the level of human rights abuse of the detainees in truth and reality. It could be worse.

The U.S. Government and its allies in the West maintain that the war on terror is not a war on Islam or on Muslims. However, the fact that most of the victims of this war on terror are mostly Muslims be they individuals, institutions or organizations have reduced the said statement to a mere rhetoric or cliché. It remains to be seen whether those involved in the war on terror can overcome their suspicion or mistrust of Muslims and turn them into Partners in the war on terror.

B. OTHER NATIONAL ANTI-TERRORISM LAWS

Other than the U.S, other countries in Europe, Asia and Africa that are party to the Global war on terror have also either passed similar anti-terrorism Laws or amended their existing Anti-terrorism laws to address post 9/11. They are U.K, Canada, Australia, France, Philippines, Indonesia, India, Pakistan, Japan, Uganda, Tanzania and now Kenya to name but a few. International human rights advocates have expressed the concern that the U.S. led war on terror and accompanying anti-terrorism laws have had a domino effect with other countries taking the cue from the U.S. and this has

the effect of scaling down international human rights standards.

Canada enacted the Anti-Terrorism Act (on 15/10/2001) whose highlights included Civil liberties protection and International Co-operation among other provisions.

On October 31, 2001 the French National Assembly approved a series of Anti—Terrorism amendments to a large security bill. The measures, initially introduced in the French senate on October 16 were scheduled to remain in force until December 31, 2003. They give the Police expanded powers to search private cars, monitor communications and heighten security in public places.

India has always had the Terrorist Affected Areas (Special Courts) Act and the National Security Act which were initially aimed at the Kashmiri Militants.

However in 2001 the Indian Parliament passed the Prevention of Terrorism Ordinance. The new law enacts a broad definition of terrorism that includes acts of violence or disruption of essential services carried out with "intent to threaten the unity and integrity of India or to strike terror in any part of the people". It also criminalizes the failure to provide authorities with "information relating to any terrorist activity".

In Japan the Anti-Terrorism Special Measures Bill was passed by the Diet on October 29, 2001. The proposed bill enables Japan to contribute actively and on its own initiatives to the efforts of the international community for the prevention and eradication of international terrorist acts, thereby ensuring the peace and security of the international community including

Japan, through such activities as Co-operation and support activities for the U.S. forces and others which aim to eradicate the threat of the terrorist attacks, search and rescue activities, and relief activities to affected people.

Pakistan has the Anti-Terrorism (Amendment) Ordinance, 1999 while in the United Kingdom the Anti-Terrorism, Crime and Security Act and the New Money Laundering Regulations on new measures to tackle international corruption were passed in 2001. These supplemented the Terrorism Act of 2000.

The Ugandans have The Prevention of Terrorism Act whilst in Tanzania it is known as the Anti-Terrorism Act.

C. AN ANALYSIS OF THE KENYAN DRAFT ANTI- TERRORISM BILL

Kenya has been a victim of terrorism before and after 9/11. Examples are: - the Norfolk Hotel bombing of 1970's, the August 1998 U.S. Embassy bomb blast and the December 2002 Paradise Hotel Bombing. Even though these terrorist acts were carried out by foreigners and aimed at American and Israeli interests, the majority of the victims have been Kenyans including Kenyan Muslims. Most of the 1998 Bomb Blast terror suspects were arrested, charged and/or extradited under the existing Criminal Laws of Kenya. However, after the 9/11 terror attacks in the U.S, the Government declared that it had joined the U.S. led global war on terror and the then President of Kenya even led a public demonstration in Nairobi, the first of its kind, against the 9/11 terror attacks.

Since the end of the first quarter of 2003, several western governments,

notably the U.S, U.K and Australia have declared Kenya as one of the countries facing potential and at times imminent terror attacks and have issued travel advisory and warning to their nationals not to visit Kenya. These fears were given credence by a statement from the minister for internal security for Kenya confirming the presence of a terror suspect in Kenya. This was followed very closely by a decision by the U.K government to cancel B.A flights to Kenya. This state of affairs is predictably going to negatively affect tourism in Kenya and by extension the Kenyan economy, as tourism is one of the major exports and foreign exchange earner for Kenya.

The new anti-terrorism bill published by the Kenya government must be seen in the context of the foregoing. Even before the publication of this bill and in an effort to restore confidence in Security in Kenya, the Government has embarked on what it describes as a crackdown on terror suspects and their networks in Kenya. This has come in the form of increased security and patrols at border points and the arrest and detention of many people, mainly of the Muslim faith on allegation of links to terrorists. Most of those arrested have been released without any charges after several days in custody. These arrests have provoked protests from the Muslim community with Supreme Council of Kenya Muslims (SUPKEM) accusing the government of targeting the Muslims for harassments and illegal arrests and detention.

The Muslims in Kenya have, since 9/11, been feeling targeted for harassments. Muslim charities have been closed and their Leaders deported. The loss of the aid these charities were providing is now being felt acutely, especially without any replacement institution to fill the gap left by the proscribed Muslim Charities. This, coupled with the continued Cases of

arrest and detention of Muslims, has made them feel persecuted and operate in a siege mentality. These concerns could best be addressed if the Government were to follow the due process of the Law when dealing with Investigations on terrorism and for its security forces not to operate as if the New Anti-terrorism Bill is Law.

The Suppression of Terrorism Bill, 2003 was published in a special issue of the Kenya Gazette as Supplement No. 38 on 30th April 2003. It is now awaiting debate and eventual enactment by the National Assembly.

Though the name of the Bill is, "Suppression of Terrorism", the short title of the Bill states that it is an Act of Parliament to provide measures for the " detection and prevention of terrorist activities and for related purposes."

The Bill contains 44 sections and 4 schedules and is divided into 9 parts. Part I deals with Preliminaries, Part II with Terrorist Offences, Part III with Declared Terrorist Organizations, Part IV with Terrorist Property, Part V with Terrorist Investigations, Part VI with Exclusion Orders, Part VII with Mutual Assistance and Extradition, Part VIII with amendments and Part IX with Miscellaneous Provisions.

1. The Bill sets out very stiff penalties for any person or organization associated or connected with terrorism, a terrorist or terrorist organization, whether directly or indirectly and in whatever form. The wide definition of terrorism under section 3 (2) of the Bill to cover offences committed outside Kenya shows that terrorism is now viewed as part of International crimes against humanity such as genocide, mass murder and other war crimes. However, the imprecise, equivocal and at times general language used in the definition of

offences created under the Bill coupled with the fact that the fines provided as alternative punishment to imprisonment are not clearly determined appear to offend section 77 of the Constitution which provides that no person shall be convicted of a criminal offence unless that offence is defined and the penalty thereof provided for. The definition of terrorism is the starting point of the problems with this Bill. It is too loose and broad sweeping. The effect is to give latitude to the Government to prefer charges of terrorism against almost any person suspected of an offence under the Penal Code. The definition can also criminalize activities of persons engaged in lawful dissent against the Government who may not have committed any offence known to our legal system. It is imperative that a narrow and reasonable definition is worked out.

2. The Bill creates certain offences of strict liability requiring no proof of intention and motive. (no mens rea, only actus reus) For example section 6 creates the offence of possession of an article for terrorist purposes and in sub-clause 3, it is provided that where such an article is found in any premises at the same time as the suspect, it shall be assumed that the suspect was in possession of that article whether he knew of its presence or not. This violates the rights of the suspect as stipulated in Section 9 of the Penal Code, Chapter 63, Laws of Kenya which provides that a person is not criminally responsible for an act or omission which occurs independently of his will. It also has the potential of abuse in that unscrupulous police officers could use this provision to "plant" evidence on suspects to their detriment.

3. The provisions of the Bill relating to the tracking, attachment, seizure and detention and forfeiture of terrorist property under sections 19, 20, 21

and 22 are flawed and legally untenable in the following manner: -

a. The use of the civil jurisdiction of the High Court and the Magistrate's Court to issues ex parte orders in what is a criminal investigation and/ or prosecution is unprocedural and an abuse of the court process.

b. The automaticity in the grant of the ex parte order, which have no proviso for setting aside or appeals and which violate the rules or natural justice, have the effect of presuming the guilt of the affected person or organization.

c. Compliance of the ex parte orders may lead to violation of the privileges of advocate- client relationship and the bank and its customer .

d. The appointment of a receiver by the court to manage the property of any suspect undermines the rights of such a suspect to be presumed innocent until proven guilty or he pleads so. Under the bankruptcy laws in Kenya, Chapter 53, Laws of Kenya a receiver is appointed only after proof of such bankruptcy or insolvency. The appointment of receiver under this new Law assumes guilt when innocence may eventually be proved.

e. The return of any detained or seized cash to the owner if found innocent is not clearly provided for. The ambiguity can be abused to deprive persons of money for the unjust enrichment of others.

f. The proviso that proof of terrorist property is on a balance of probability and not on proof beyond reasonable doubt as required in all criminal cases is to lower the standard of proof to the detriment of the suspect.

g. Express provision should be made for compensation (in appropriate circumstances) of persons who are wrongfully and without reasonable ground detained or charged under this legislation.

4. The extension of the definition of a terrorist under Section 24 to a person who has been concerned in terrorism before the enactment of the Act as law amounts to a retroactive or retrospective application of the Bill or creating offences retrospectively. This is against the principle of legality and violates Section 77(4) of the Constitution, which provides that no person shall be held to be guilty of a criminal offence on account of an act or omission that did not, at the time it took place, constitute such an offence.

5. The powers given to the police under Section 26 to detain any person found in a place which is the subject of an urgent search permits the collective punishment and deprivation of liberty rights of persons who may have nothing to do with the search. Further, the wide discretion given to any police officer, even one on general duty, beat and patrol, to arrest any person whose dressing is suspicious in his/her opinion coupled with the absence of a clear definition of what constitutes suspicious dressing cannot be justified in a reasonably democratic society.

6. Under Section 30 any police officer, above the rank of Inspector is allowed to hold a suspect incommunicado for upto 36 hours without access to a lawyer or family members. This is a very clear abrogation of the rights of such a detained person to be taken to Court within 24 hours and to have prompt access to a lawyer of his choice in

accordance with Section 72 of the Constitution. The holding in detention of such a person for 36 hours incommunicado amounts to inhuman and degrading treatment and mental torture of that person.

7. Section 37 of the Bill is speculative, presumptive and inconsistent with the practice in Kenya of domestication of international instruments. It assumes there will be an international convention on counter-terrorism to which Kenya will become a party and then makes that convention to be a basis for extradition. Clauses which remove the discretion of this country in dealing with "requests" from foreign states or which require (Clause 34(1) (b) that Kenya gives reasons to foreign states for her sovereign decisions should be expunged. There is no concept as an "international arrangement" and this should be expunged. Parliament should be required, by resolution, to endorse declarations of the Minister under Clause 9 within a specified period, failing which such declarations must lapse. Provision should be made that no Kenyan citizen shall be extradited to stand trial for an offence under the legislation.

8. The procedure for amending the schedules of the Extradition Acts under Sections 38 and 39 of the Bill is unusual. These Sections are amending a section of two schedules of two Acts concerning extradition by reference. This is as opposed to the other known procedure of amending Acts by the enactment of an amendment Bill e.g. Extradition Act (Amendment Bill) to amend the same Schedules. The latter would have taken longer to come into effect. This betrays the haste and urgency attending the Government to pass this Anti-Terrorism Law.

9. Section 40 of the Bill confers upon the police and other officers the power

to use reasonable force in the performance of their work and if from the exercise of such powers death or injury to a person or loss or damage to property is occasioned, they are indemnified from any claim in any civil or criminal proceedings. Given the fact that "reasonable force" and the scope of its application in the Bill is not defined, the blanket immunity given to the police for their actions, which immunity is not even given during a state of emergency, is a potential ground for abuse and the consequent violations of human rights of persons is quite high. This immunity is an unacceptable derogation from the right to life, liberty, and property of accused persons which cannot be taken away without the due process of the law.

III. CONCLUSION

The Kenya Suppression of Terrorism Bill as published has serious flaws and anomalies that necessitate its amendment before enactment. Several provisions of the Bill contravene and are inconsistent with the Constitution and other Laws. As the Kenyan Human Rights Network observed, no law may be passed in good conscience that alters the Constitution to the detriment of its citizens.

A careful analysis of the Bill reveals that it purports to set up a different criminal justice system for persons charged under the Bill separate from the other criminal justice system which applies to other accused persons. It severely limits the rights of the accused person as guaranteed in the Constitution and international fair trial standards. It shifts the burden of proof and assumes that any person or organization charged under this Act is

guilty until proven innocent. Its enactment in the form published will be a major reversal of the gains made in the human rights struggle in Kenya.

The Law Society of Kenya had appointed a Committee to study the draft Bill and make appropriate recommendations for amendments to address the concerns of the critics/opponents of the Bill. These amendments were presented to the Minister for Justice and Constitutional Affairs for incorporation into the Bill before it is laid before Parliament. It is hoped that these amendments would be accepted into the Bill otherwise, the Bill once enacted will be subject to multiple legal challenges under the Constitution and the Laws of Kenya.

END