The elusive legal definition of terrorism at the United Nations: An inhibition to the criminal justice paradigm at the state level?

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Abstract

Terrorism is indisputably a serious security threat to states and individuals. Yet, by the end of 2016, there was still lack of consensus on the legal definition of terrorism at the United Nations (UN) level. The key organs of the UN, the Security Council (UNSC) and the General Assembly (UNGA), are yet to agree on a legal definition of terrorism. This disconnect is attributed partly to the heterogeneous nature of terrorist activities and ideological differences among member states. At the UN level, acts of terrorism are mainly tackled from the angle of threats to international peace and security. In contrast, at the state level, acts of terrorism are largely defined as crimes and hence dealt with from the criminal justice paradigm. This article argues that the lack of a concrete legal definition of terrorism at the UN level undermines the holistic use of the criminal justice paradigm to counter-terrorism at the state level. To effectively counter terrorism the UNSC and the UNGA have to agree on a legal definition of terrorism in their resolutions. This will streamline efforts to combat terrorism at the state level and consolidate counter-terrorism measures at the international level. The draft comprehensive Convention on Measures to Eliminate Terrorism (the Draft Convention) should be tailored to fill gaps and provide for a progressive legal definition of acts of terrorism.

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1. Introduction

Terrorism is undeniably among the greatest security threats of the 21st century.[1] This notwithstanding, the key organs of the United Nations (UN) are yet to reach a consensus on the legal definition of terrorism. This article interrogates the implications of the elusive legal definition of terrorism at both the Security Council (UNSC) and General Assembly (UNGA) levels to the criminal justice paradigm at the state level. The term 'criminal justice paradigm' as used in this article refers to the criminal justice enforcement model in a state and includes the processes and apparatus from criminalising an act or omission to its interpretation in a court of law.[2] Cognisance is taken that the issue of defining terrorism has been fodder for many scholars and they are numerous scholarly articles commenting on the subject.[3] It is not the intention of this article to regurgitate these. On the contrary, this article investigates whether the lack of a concrete legal definition of terrorism at the UN level undermines the effective utilisation of the criminal justice paradigm to counter-terrorism at the state level.

The article interrogates the question at hand in three main sections. The first section analyses a number of the most prominent resolutions that the UNSC has adopted and how they have attempted or failed to legally define terrorism. From the analysis it is apparent that UNSC is still struggling to adopt a legal definition of terrorism in exercising its powers under Chapter VII of the United Nations Charter (UN Charter).[4] Whereas the UNSC attempted to define terrorism in Resolution 1566 (2004), in its subsequent resolutions it has failed to formally adopt or expressly refer to the definition.[5] The UNSC resolutions have

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1 See the statement of the President of the Security Council at the 7690th meeting held on 11 May 2016 (S/PRST/2016/6) para 2 where on behalf of the Council the President reaffirmed that terrorism in all its forms and manifestation constitutes one of the most serious threats to international peace and security.

2 Davies M, Croall H and Tyrer J, *Criminal justice*, 3ed, Pearson/Longman, Harlow, 2005, 230. As Davies, Croall and Tyler observe 'the criminal law does not enforce itself.' Rather, people working in particular agencies: that is, the police, prosecutors, magistrates and judges, and probation and prison personnel. The criminal justice system is essentially a maze of agencies and processes that seek to control crime, minimise crime, and impose penalties for the commission of crimes.

3 Ganor B, 'Defining terrorism: Is one man's terrorist another man's freedom fighter?' *Police practice and research* (2010), 209 cites the book Schmidt and Jongman, *Political terrorism: A new guide to authors, concepts, data bases, themes and literature*, Transaction, 1988 that cited 109 different definitions of terrorism obtained in a survey of leading academics in the field. The recurring elements were violence, force, political, fear, threats, psychological effects and anticipated reactions, intentional, planned, and systematic among others.

4 *Charter of the United Nations*, 26 June 1945, 59 Stat. 1031.

5 UNSC S/RES/1566 (2004) Concerning threats to international peace and security caused by terrorism, 3.

mainly mentioned particular terrorist groups from the Middle East and more recently from West and East Africa.[6] The UNSC has resorted to a default mechanism of failing to define key terms and phrases related to terrorism as used in its resolutions on counter terrorism. It has advanced this mechanism irrespective of the fact that these resolutions impose obligations on member states that have far-reaching effects on their citizens.

The second section evaluates the tussle in the UNGA, especially the Sixth Committee, the Ad Hoc Committee, and Working Group, in building consensus on the definition of terrorism,[7] especially in the negotiation of draft comprehensive Convention against International Terrorism (the Draft Convention).[8] There have been several other inconclusive attempts by the UNGA to define terrorism in non-binding declarations such as those made in 1994 and 1996.[9] From these attempts a conclusion can reasonably be drawn to the effect that members of the UNGA attribute terrorism to criminal acts intended or calculated to provoke a state of fear in the general public. Nevertheless, the bone of contention arises on whether the definition would be applicable to states, liberation movements, the question of ideology and political inclinations.

The third section examines how the absence of a legal definition of terrorism at the UN level inhibits the effective use of a criminal justice paradigm to counter terrorism at the state level. It illuminates on the conceptual discord created with laid down tenets of criminal law, particularly the principle of legality. Municipal courts have had to deal with petitions to quash statutes touching

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6 Since the 9/11 attacks in New York there have been numerous UNSC resolutions passed to condemn and counter-terrorism. These resolutions can be accessed from the following website: http://www.un.org/en/sc/ctc/resources/res-sc.html. Initially the terrorist groups that have been the focus of the UNSC initially included Al'Qaida and the Taliban. Recently the focus of the UNSC has shifted to dangerous groups such as Al-Shabaab, Islamic State of Iran and Levant (1S), Al-Nusra Front and Boko Haram among others.

7 Ambassador Carolyn Schwalger in a speech delivered on 12 October 2015 to the Sixth Committee made the following statement: 'We welcome the current efforts of the chair of the UN Ad-Hoc Committee on Measures to Eliminate Terrorism, His Excellence Ambassador Perera, to reinvigorate discussion on this Convention. We are however realistic and recognize that differences remain between delegations, while these differences pertain to a relatively small number of issues, the positions are strongly held'. The speech can be accessed from https://www.mfat.govt.nz/en/media-and-resources/ministry-statements-and-speeches/sixth-committee-GA-measures-to-eliminate-international-terrorism/ on 4 March 2016.

8 *Draft Comprehensive Convention against International Terrorism*, Appendix II A/59/894. The draft that is being deliberated on by the Working Group can also be accessed as an appendix to the report of the Ad Hoc Committee on its Sixteenth Session A/86/37.

9 UNGA, *Declaration on Measures to Eliminate International Terrorism*, UN A/RES/51/210 (17 December 1996).

on terrorism on the ground of unconstitutionality. To demonstrate this specific argument, Kenya is used as a case study. In addition, the disparities in the manner states have legally defined terrorism in their national law affects their cooperation in prosecuting and extraditing terror suspects. The example given is the tension between the European Union (EU) and Turkey on the legal definition of terrorism. This example is used to illustrate how disparities in framing the legal definition of terrorism negatively affects the prosecution and extradition of terror suspects.

Finally, a conclusion is drawn that to a larger extent, failure to legally define terrorism at the UN level impedes the effective use of the criminal justice paradigm to fight terrorism. The use of a criminal justice paradigm has been lauded by Boaz Ganor as one of the effective and sustainable measures of combating terrorism that can be implemented at the state level.[10] For this paradigm to be used effectively to counter-terrorism, it is imperative that both the UNSC and UNGA agree on a legal definition of terrorism given the transnational nature of the crime. Yet the UNSC and the UNGA have both consciously meandered around the question of a legal definition of terrorism.

2. The UNSC's efforts to legally define terrorism

The UNSC has adopted numerous resolutions[11] on counter-terrorism without legally defining the term terrorism, with the exception of Resolution 1566/2004.[12] The resolutions on counter-terrorism that have been surveyed in this article date back to the regrettable events of 11 September 2001 dubbed 'the 9/11 attacks' in the United States of America (US). The main reason for this phenomena is that the 9/11 attacks triggered the active involvement of the UNSC in countering terrorism as a threat to international peace and security. Nevertheless, there are several other resolutions that the UNSC had adopted on combating terrorism before 2001 such as Resolution 1267 (1999) in response to the bombing of the US embassies in Nairobi and Tanzania.[13]

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[10] Ganor B, 'Defining terrorism: Is one man's terrorist another man's freedom fighter?' 300. Ganor in his article argues persuasively that 'a definition of terrorism is necessary when legislating laws designed to ban terrorism and assistance to terrorism, as well as when setting minimum sentences for terrorists or confiscating their financial resources and supplies'.

[11] The counter terrorism resolutions that have been adopted by the United Nations Security Council are available at: http://www.un.org/en/sc/ctc/resources/res-sc.html. on 24 July 2017.

[12] UNSC S/RES/1566 (2004) Concerning threats to international peace and security caused by terrorism, para 3.

[13] UNSC S/RES/1267 (1999), 15 October 1999.

Although this article focuses on post- 9/11 UNSC resolutions on counter-terrorism, not all the UNSC resolutions adopted after 9/11 attacks are discussed in detail or mentioned expressly. The article only analyses the most prominent UNSC resolutions on counter-terrorism especially those that call on states to enact penal statutes on specific terrorist activities. The barometer used in assessing the aforementioned resolutions is whether sufficient parameters have been given to states in terms of legal clarity of the terms and phrases related to acts of terrorism that have been referred to in the resolutions through definitions or adequate descriptions.

Notice is taken of the fact that the adoption of these resolutions involves the use of existing international law on the use of force (*jus ad bellum*) to terrorist activities carried out mainly by non-state actors.[14] This is demonstrated in the practice of the UNSC whereby it has mainly evoked its peace and security powers in adopting its counter-terrorism resolutions.[15] Nigel White has termed this development as a 'military/security response to combating terrorism'.[16] Nonetheless, the UNSC has until recently only taken non-forcible coercive measures under Article 41 of the UN Charter in contrast to authorised military action.[17] UNSC Resolution 2249 of 2015 seems to be a departure from the non-forcible coercive measures taken by the UNSC.[18] The Resolution lends itself to the interpretation that the UNSC has permitted the use of force in the fight against the Islamic State of Iraq and Levant (ISIL) in Syria and other regional pockets under their occupation.[19] Notwithstanding the military security approach discussed above, UNSC resolutions have condemned, warned, and outlined measures to counter terrorism directed at UN member states and occasionally individuals.

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14 Dinstein Y, 'The war on terrorism' in Antonio PF (ed), *International legal dimension of terrorism*, Martinus Nijhoff Publishers, the Hague, 2009, 241.

15 See, for instance, S/RES/2255 (2015), Preamble para. 29, 'Acting under Chapter VII of the Charter of the United Nations'.

16 White ND, 'The United Nations and counter-terrorism: Multilateral and executive law-making' in Salinas MA et al (eds), *Counter-terrorism: International law and practice*, Oxford University Press, New York, 2012, 59.

17 Giles-Carnero R, 'Terrorist acts as threats to international peace and security' in Antonio PF (ed), *International legal dimension of terrorism*, 63.

18 UNSC S/RES/2249 (2015) Threats to international peace and security caused by terrorism acts, para 5.

19 Hilpold P, 'The fight against terrorism and the UNSC Resolution 2249 (2015): Towards a more Hobbesian or a more Kantian international society?' *Indian Journal of International Law* 2016, 3.

One of the prominent resolutions adopted by the UNSC on counter-terrorism is Resolution 1373 (2001) which has been a subject of controversy.[20] In this Resolution, the UNSC mandated the UN member states to undertake a number of measures in the fight against terrorism. These measures include taking preventive and prohibitive measures toward any form of financing of terrorist acts including criminalising actions geared to that end such as collection of funds with the intention of financing terrorism, not supporting entities and persons involved in terrorist acts and punishing acts of terrorism harshly.[21]

In this particular Resolution, the UNSC has referred to the term 'terrorist acts' within paragraphs one to four and a closer reading of paragraph five expands the phrase to 'acts, methods and practices of terrorism'.[22] However, it neither defined nor described the acts, methods and practices that qualify as terrorism. Moreover, the preamble referred to international terrorism. The question that ensues is whether there is a difference between terrorist acts and international terrorism and if there are parameters determined by jurisdictional factors such as nationality and territorial boundaries.

The UNSC in Resolution 1566 (2004) mandated states to extradite, deny asylum or try perpetrators of acts of terrorism and their supporters.[23] It also recommended the establishment of an international fund to compensate victims of acts of terrorism. The Resolution equated acts of terrorism to criminal acts committed against civilians with the intention of causing death, serious bodily harm or taking of hostages;[24]

> The purpose of which is to provoke a state of terror to the general public, group of persons or to compel the action or inaction of either the government or international organisation.[25]

It also roped in offences proscribed in international conventions and protocols relating to terrorism.

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[20] The resolution was unanimously adopted after a Council meeting that officially lasted just three minutes on 28 September 2001, less than a fortnight following the devastating terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001 ('9/11'). See 'Sossai M: UNSC Res 1373(2001) and international law making: A transformation in the nature of the legal obligation for the fight against terrorism', http://www.esil-sedi.eu/sites/default/files/Sossai_0.PDF on 14 February 2017. Bianchi A, 'Assessing the effectiveness of the UN Security Council's anti-terrorism measures: Quest for legitimization', 17 *European Journal of International Law,* 5, 2007, 882-919.

[21] UNSC S/RES/1373 (2001) On threats to international peace and security caused by terrorist acts, 2(e).

[22] UNSC S/RES/1373 (2001).

[23] UNSC S/RES/1566 (2004) Concerning threats to international peace and security caused by terrorism, para 2.

[24] UNSC S/RES/1566 (2004) para 10.

[25] UNSC S/RES/1566 (2004) para 3.

This definition does not take into account the contested issue of state terrorism. Nonetheless, the possible non-inclusion of state terrorism does not create a *carte blanche* for states. States still incur responsibility for wrongful acts committed through their agents under the law of state responsibility. The Permanent Court of International Justice in the case of *Germany v Poland* reiterated the fundamental principle of state responsibility to make reparation for its wrongful acts.[26] This position is reinforced in Article 33 of the Fourth Geneva Convention, which prohibits undertaking measures of terrorism during an armed conflict against civilian populations,[27] although the application of this instrument is limited to international armed conflict. Furthermore, the UNGA, through its resolutions, requires states to refrain from participating in terrorist acts.[28]

In 2014, the UNSC unanimously passed Resolution 2178 (2014) that aims to impede the international flow of terrorist fighters to and from conflict zones with the intent of perpetrating terrorist acts.[29] UN member states are obliged to enact laws to suppress, combat, prosecute and penalise the recruiting, organising, transporting and equipping of foreign terrorist fighters in the following words:

> ... all states shall ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalise in a manner duly reflecting the seriousness of the offense.[30]

The Resolution does not define terms and phrases such as 'terrorist acts' and 'terrorist training' that are paramount in enacting criminal statutes that observe the strict and broad interpretation of the principle of legality. The Resolution only points to 'terrorism in all forms and manifestation'.[31] The conclusion that can reasonably be made is that member states have wide latitude on the implementation of this Resolution depending on their national penal laws.[32]

The same Resolution expressly mentions specific terrorist groups such as the ISIL, Al-Nusra Front (ANL) and other affiliates or splinter groups of Al-

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[26] *Factory of Chorzow (Germany v Poland)*, Judgment PCIJ Series A, No 17 (1928) 4, 29. Rene V, 'State responsibility for private armed groups in the context of terrorism' *Juridica* 1, (2006), 184-193.

[27] Article 33, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention),* 12 August 1949, 75 UNTS 287.

[28] UNGA, *Report of the International Law Commission on the work of its forty-sixth session*, UN A/RES/49/51, 9 December 1994.

[29] UNSC S/RES/2178 (2014) On threats to international peace and security caused by foreign terrorist fighters.

[30] UNSC 2178 (2014), para 6.

[31] UNSC 2178 (2014), para 2.

[32] Ambos K, 'Our terrorists, your terrorists? The United Nations Security Council urges states to combat "foreign terrorist fighters" but does not define terrorism" *EJIL Talk* 2 October 2014.

Qaida.[33] Although the list is not exhaustive, the fact that it does not expressly mention other notorious terrorist groups that have been wreaking havoc in West and East Africa, such as Boko Haram and Al Shabaab, adds credence to the double standard argument.[34] Given that the UNSC attempted to define terrorism in Resolution 1566 (2004), legal certainty would have required it to adopt the definition in its subsequent resolutions including Resolution 2178 (2014) with necessary modifications to suit the reality on the ground.

It would seem as though there is a default mechanism employed by the UNSC of adopting resolutions on counter-terrorism without concrete definitions of key terms and phrases or adoption of the definition contained in UNSC Resolution 1566 (2004).[35] Therefore, an assumption can be drawn that non-inclusion of a definition of terrorism is not an oversight but an escapist strategy of avoiding antagonism between the members of the UNSC and the rest of the UN member states. According to Ganor, there is an implicit concern among states that defining terrorism will change the requirements for normative behavior of states and state culpability especially during the conduct of armed conflict.[36] Therefore, states continue to lock horns on the issue of a legal definition of terrorism as they attempt to negotiate and adopt a comprehensive treaty on the same.[37] Due to the challenges posed by an attempt to define terrorism, the UNSC has resorted to a default mechanism of leaving it to member states implementing its resolutions to define the key terms and phrases referred to in its resolution as they enact laws to implement the resolutions.

Beryl Dedeoglu waded into these murky waters dubbed the 'Bermuda Triangle of Terrorism' by scoping how different scholars have attempted to define terrorism, acts of terrorism and related terms.[38] Some writers focus on the lack of consensus in the definition of terrorism.[39] Others are of the view that 'no common agreed definition can in principle be reached, because the very process

33 UNSC S/RES/2178 (2014), preamble.

34 There are those who criticise the UNSC on its response to terrorist attack from western countries and the US and those of African countries. See Lyman PN, 'The war on terrorism in Africa' in Harberson J et al, *Africa in world politics: Engaging a changing world order*, Westview Press, 2013.

35 UNSC S/RES/1566 (2004).

36 Ganor B, *Global alert: The rationality of modern islamist terrorism and the challenge to the liberal democratic world*, Colombia University Press, 2015, 11.

37 The details are appraised later in this article.

38 Dedeoglu B, 'Bermuda triangle: Comparing official definitions of terrorist activity' *Terrorism and political violence*, 2010, 86.

39 Dedeoglu B, 'Bermuda triangle: Comparing official definitions of terrorist', 86.

of definition is itself part of a wider test over ideologies or political objectives'.[40] Gilbert Ramsay questions whether terrorism should be defined in the first place and argues that defining terrorism will only complicate the application of the term rather than add clarity.[41]

This contribution is of the view that legal definitions of what amount to 'acts of terrorism' and 'international terrorism' are plausible as demonstrated by the attempt made by the UNSC in Resolution 1566 of 2004.[42] The definition is largely similar to the one provided for under the Suppression of Financing of Terrorism Convention (Financing Convention).[43] It has also been endorsed in the famous jurisdictional decision of the UN Special Tribunal of Lebanon, where the bench considered the definition as applicable during peacetime.[44] UNSC Resolution 1566 (2004) is clear that acts of terrorism cannot be justified on any ground whether political, philosophical, ideological, racial, ethnic or religious.[45]

Ideological and political objectives should not, as a result, be used by states as an obstacle to building up on the definition of terrorism enumerated in Resolution 1566 (2004). Antonio Cassese alludes to factors that point out to a generally agreed definition of international terrorism in time of peace. These factors range from the conventions on terrorism, national laws as well as national case law.[46]

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40 Cited in, 'Understanding the changing context for terrorism' in David O J et al., *Boko Haram: The socio-economic drivers*, Springer, 21-37.

41 Ramsay G, 'Why terrorism can, but should not be defined' *Critical Studies on Terrorism* (2015), 213.

42 UNSC S/RES/1566 (2004).

43 *International Convention for the Suppression of the Financing of Terrorism,* 10 April 2002, 2178 UNTS 197. For a detailed discussion see Wondwossen K, 'Rethinking the *No Definition* consensus and the *Would Have Been* binding assumption pertaining to Security Council resolution 1373' *Flinders Law Journal* (2015) 127-154.

44 *Interlocutory decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging Case* No STL-11-1/1(16 February 2011), 85. For a detailed discussion see Sharf M, 'Special tribunal for Lebanon issues landmark ruling on definition of terrorism and modes of participation' 15 *American Society of International Law,* 6, 2011. Almiro C, 'An examination of the special tribunal for Lebanon's explosive declaration of 'terrorism' at customary international law' Unpublished LLB Dissertation, University of Otago, October 2012.

45 UNSC S/RES/1566 (2004), para 3.

46 Cassese A, 'The multifaceted criminal notion of terrorism in international law' *Journal of International Criminal Justice,* 4, 2006, 933-958.

3. The UNSC Counter Terrorism Committee

In order to have a clearer picture of the matter at hand, the work put in by the UNSC Counter Terrorism Committee (hereinafter CTC) cannot be ignored. Rule 28 of the Rules of Procedure of the UNSC allows it to form a commission, a committee or rapporteur to investigate a specified question. Pursuant to these rules, the UNSC has formed a number of committees to deal with terrorism. These committees include: Resolution 1267 (1999) Committee,[47] the CTC, Resolution 1540 (2004) Committee,[48] and Resolution 1566 (2004) Working Group.[49] Besides, UNSC Resolution 1535 (2004) established the Counter Terrorism Committee Executive Directorate (hereinafter CTED)[50] to bolster the technical expertise of the CTC.[51]

The CTC's mandate is to oversee the implementation of Resolution 1373 (2001). The CTC deals with specific acts of terrorism rather than the holistic spectrum of terrorism.[52] As already mentioned, Resolution 1373 (2001) obligates member states to enact legislation preventing the financing of terrorism among other counter terrorism measures.[53] The CTC gives technical support to states to adopt legislations on matters relating to Resolution 1373 and their effective implementation.[54] Nonetheless, its mandate has been intermittently expanded in subsequent UNSC resolutions. A case in point is Resolution 1456 (2003) where the UNSC has called on the CTC to assist in rallying member states to implement the UN counter-terrorism strategy.[55]

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47 UNSC S/RES/1267 (1999) On the situation between Iraq and Kuwait, para 6.

48 UNSC S/RES/1540 (2004) Non-proliferation of weapons of mass destruction, para 4.

49 UNSC S/RES/1566 (2004), para 9.

50 The CTED structured into two tiers that are the Assessment and Technical Assistance Office (ATAO) and the Administrative and Information Office (AIO). For more information see UN fact file the Counter-Terrorism Committee Executive Directorate available from <http://www.un.org/en/sc/ctc/docs/presskit/2011-01-presskit-en.pdf> on 16 April 2016.

51 UNSC S/RES/1535 (2004) On combating terrorism.

52 UNSC S/RES/1378 (2001), para 6.

53 UNSC S/RES/1378 (2001), para 1-4. Member States are required to criminalise the financing of terrorists, freeze any funds related to persons involved in acts of terrorism, cut off financial supports for terrorists groups, share intelligence on terrorists and cooperate with other governments, criminalise any assistance to terrorists and implement effective boarder control.

54 Norman P, 'The United Nations and counter-terrorism after September 11: Towards and assessment of the impact and prospects of counter-terror 'spill-over' into international criminal justice cooperation' paper presented in the British Society of Criminology Conference 6-9 July 2004 University of Portsmouth.

55 UNSC S/RES/1456 (2003) On combating terrorism, 4.

The CTC has been instrumental in collecting information, issuing reports, conducting site visits and revamping the capacity of UN member states to counter terrorism. However, the CTC has also not attempted to balance the equation of defining terrorism and related terms and phrases referred to in UNSC resolutions. In contrast to the mandate of the Al Qaida and Taliban Sanctions Committee,[56] the CTC terms of reference are overarching. Furthermore, it has the technical expertise to meaningful engage in building consensus on legal definitions of terms and phrases that are referred to in the UNSC resolutions. These include 'international terrorism', 'foreign fighters', 'acts of terrorism', 'methods and practices of terrorist, and 'terrorist groups'.[57]

The CTC has the technical expertise and adequate budgetary support from the UN and hence it can do much more, including working on a more uniform counter-terrorism legal regime within UN member states. It is agreeable that such an objective seems ambitious but if it is feasible it will dramatically improve international efforts to counter terrorism. For these to be achieved the issue of definitions should be dealt with conclusively.

4. The UNGA and the quagmire of legally defining terrorism

The UNGA is actively involved in the fight against terrorism and has adopted sectorial treaties on combating this crime.[58] One of the agenda items of the 27th session of the UNGA in 1972 was on measures to eliminate international terrorism.[59] It is also in that session that the Ad Hoc Committee on International Terrorism was established. Subsequently, in the 51st session the UNGA, the tenure of the Ad Hoc Committee was renewed with an additional task of: 'address means of further developing a comprehensive legal framework of conventions dealing with international terrorism'.[60] Since its establishment, the Ad Hoc Com-

[56] Established under UNSC S/RES/2253 (2015) On renaming of Al-Qaida Sanctions Committee as '1267/1989/2253 ISIL (Da'esh) and Al-Qaida Sanctions Committee' and the Al-Qaida Sanctions List as 'ISIL (Da'esh) and Al-Qaida Sanctions Lists' and an extension of the mandate of the office of the ombudsperson for a period of 24 months from the date of expiration of its current mandate in December 2017.

[57] UNSC S/RES/2178 (2014) On threats to international peace and security caused by foreign terrorist fighters.

[58] The UNGA has gradually recognised UNSC resolutions for example through its UN Global Counter-Terrorism Strategy. UNGA, *United Nations Global Counter-Terrorism Strategy*, UN A/Res/63/281 (20 September 2006).

[59] Agenda Item 6, Session 27 of the United Nations General Assembly 1972.

[60] UNGA, *measures to eliminate international terrorism*, UN A/RES/51/210 (17 December 1996) para 9.

mittee has formulated a Draft Convention[61] but has been unable to build consensus among member states to adopt a comprehensive convention on international terrorism.

From 8 to 12 April 2013, the Ad Hoc Committee met to continue with negotiations on the Draft Convention.[62] More importantly, the meeting discussed the question of convening a high level conference under the auspices of the UN to discuss the Draft Convention. A decision was made to postpone the high level conference noting that more time was required to agree on outstanding issues. The UNGA adopted a resolution to recommend to the Sixth Committee to form a Working Group (at the seventieth session of the UNGA) to finalise the process of drafting the Draft Convention and the question of convening a high level conference on the same.[63]

On 26 October 2015, the Working Group concurred that three main outstanding issues evident in the negotiations for the Draft Convention are; a consensual definition of terrorism, scope of application, and the need to distinguish between acts of terrorism and the legitimate exercise of the right of self-determination.[64] In 2006, these concerns were addressed under draft Articles 2 and 18 of the Draft Convention, which provide for a definition and scope of application respectively.[65] Since then, several amendments have been made on the Draft Convention. The Ad Hoc Committee's current report states that the outstanding issues relate to draft Article 3 (formerly draft Article 18).[66] Draft Articles 2 and 3 are closely related, as they provide for both inclusionary and exclusionary elements in defining acts of terrorism respectively.[67]

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61 *Draft Comprehensive Convention on International Terrorism,* Appendix II A/59/894.

62 *Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996,* UN A/68/37 (8 to 12 of April 2013). Annexure III on Informal summary prepared by the Chair on the exchange of views during the plenary debate and the informal consultations.

63 UNGA, *Measures to eliminate international terrorism*, UN A/RES/69/127 (18 December 2014) para 24.

64 UNGA Sixth Committee, *Oral report of the Chairman of the Working Group* (Ambassador Rohan Perera (Sri Lanka) 13 November 2015. According the Chairman the Working Group has held five meetings, on 26 and 30 October and on 9, 11 and 13 November 2015.

65 Hmoud M, 'Negotiating the Draft Comprehensive Convention on International Terrorism' 4 *Journal of International Criminal Justice* (2006), 1032.

66 *Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996,* UN A/68/37 (8-12 April 2013). See Annexure II of the report on written proposals in relation to the outstanding issues surrounding the draft comprehensive convention.

67 *Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996,* UN A/68/37 (8 to 12 April 2013). Annexure I on Preamble and Articles 1, 2 and 4 to 27 of the draft comprehensive convention on international terrorism prepared by the bureau.

By the end of 2016, states under the auspices of the UNGA have not formally agreed on a legal definition of terrorism as demonstrated by ongoing negotiations on the Draft Convention.[68] During the 71st session of the UNGA, the Sixth Committee adopted a resolution that would facilitate the UNGA to recommend that it establishes a Working Group in the 72nd session of the UNGA with the same mandate as the previous one.[69] This session is scheduled to open on the 12 September 2017. This is recognition that more time is required to achieve substantive progress on the outstanding issues pointed out earlier.

The failure of states to reach a consensual definition of terrorism is a clear illustration of the variance in what states consider and accept as terrorism. This has led to an impasse which affects the scope of a comprehensive legal regime on terrorism. The practical reality of this variance is demonstrated by the civil war in Syria that has been raging on for more than five years and has brought to the fore the ramifications of international terrorist networks such as the ISIS. The Bashar al-Assad regime, supported by Russia, is of the view that the rebels are terrorists while the US-led coalition supports the Kurdish fighters.[70] Turkey has also been roundly criticised in the action it has taken against Kurdistan Workers' Party (PKK) in Southern Turkey.[71]

There are several contentious issues that have prevented states from building consensus at the UNGA. According to the chairperson of the Working Group Ambassador, Rohan Perera, delegates have emphasised on the relevance of having a definition of acts of terrorism that differentiates such acts from: the right of people to self-determination; the integrity of international humanitarian law; and eliminating impunity for military forces of a state in peacetime.[72]

The exercise of the right of self-determination and the question of terrorism has been a bone of contention among states due to concerns of classifying acts of resistance to foreign occupation and colonisation as terrorism. This prompted the emergence of the adage 'one's man terrorist is another man's freedom fighter.'[73] A number of states have emphasised on the need to draw a distinction between acts of terrorism and legitimate struggles of people to exer-

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68 *Draft Comprehensive Convention on International Terrorism*, Appendix II A/59/894.

69 UNGA, *Measures to eliminate international terrorism*, UN A/RES/71/151 (13 December 2016) para 24.

70 'Syria Crisis: Where key countries stand' BBC 30 October 2015.

71 'Turkey's war on the PKK' *Al Jazeera,* 2 April 2016.

72 UNGA Sixth Committee, Oral report of the Chairman of the Working Group (Ambassador Rohan Perera (Sri Lanka) 13 November 2015.

73 Walter C, 'Terrorism', *Max Planck Encyclopaedia of Public International Law,* 8th September 2013 <www.mpepil.com> on 30 April 2016.

cise their right of self-determination.[74] The Sixth Committee of the UNGA was also advised during the 71st session of the UNGA that a definition of terrorism should distinguish between acts of terrorism from the right of self-determination.[75]

The manner of addressing state terrorism has also proven to be problematic. There are states that are of the view that state terrorism, including acts committed by governments against innocent civilians, should be included in the definition of terrorism.[76] The underlying reason for calls to include state terrorism in the definition is to provide an avenue of dealing with acts of terror committed by the armed force of a state in peacetime or armed group that effectively receives the support of the state.[77] However, there are states that maintain that activities of military forces should be excluded because they are already covered by other regimes such as international humanitarian law.[78] Furthermore, terrorist acts are criminal and a multilateral treaty dealing with terrorism will be a law enforcement instrument.[79]

Whereas the UNGA has adopted multilateral treaties that are geared towards combating specific acts of terrorism, there is need for a comprehensive convention.[80] The sectorial multilateral treaties dealing with terrorism are cumbersome and ineffective in the fight against terrorism as the main enforcement mechanisms are periodic reports by states.[81] Even though this model is suitable for setting human rights standards, this is not the case with criminal acts such as terrorism that requires states to conduct thorough investigation, effect arrests, and conduct prosecution and sentencing of offenders. In addition, compliance

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74 UNGA, *Report of the Ad Hoc Committee established by General Assembly Resolution 51/210, UN A/RES/ Report on the 14th Session of the Ad Hoc Committee established by UNGA RES/51/210*, UN A/57/37 28-1 February 2002, 5.

75 UNGA, *Human rights must be core in fight against terrorism, Sixth Committee hears, as it takes up ongoing stalemate of draft convention to eliminate global threat*, UNGA/L/3517, 3 October 2016.

76 UNGA, *Report of the Ad Hoc Committee established by General Assembly Resolution 51/210, UN A/RES/ Report on the 9th Session of the Ad Hoc Committee established by UNGA RES/51/210,* UN A/60/37 Annex III (28 March-1 April 2005).

77 Hmoud M, 'Negotiating the Draft Comprehensive Convention on International Terrorism' 4 *Journal of International Criminal Justice* (2006), 1040.

78 Donnell D, 'International treaties against terrorism and the use of terrorism during armed conflict and by armed forces' 88 *International Review of Red Cross* (2006), 876.

79 Hmoud M, 'Negotiating the Draft Comprehensive Convention on International,' 1039.

80 Since the 1960s to date, the UNGA has adopted sixteen multilateral treaties that are geared towards combating specific acts of terrorism. These treaties are cited in the third section of the article.

81 For a more detailed elaboration see Schaefer BD, 'UN treaties and conferences will not stop terrorism', *The Heritage Foundation* http://www.heritage.org/research/reports/2002/01/un-treaties-and-conferences on 20 June 2016.

has been largely inadequate due to scarce resources for example of managing porous borders especially for least developed and developing countries. The poorly paid security officers in states such as Kenya are particularly susceptible to accepting bribes and orchestrating the defeat of the course of justice allowing the malady of terrorism to fester unabated.[82] The Kenya National Commission on Human Rights (KNCHR) identifies the endemic culture of corruption within the security agencies as a key driver of insecurity.[83]

Secondly, regulation of specific aspects of terrorism is the basis of fragmentation in the overall international legal framework on counter-terrorism.[84] Daniel Moeckli argues that fragmentation in international legal regime and proliferation of several implementation organs increases 'the opportunities for frictions and contradictions'.[85] Accordingly, fragmentation of the legal regime on terrorism is likely to lead to disparity in the domestication of the aforementioned treaties. Discord among member states in the domestication and implementation of the treaties undermines the effectiveness of the criminal justice paradigm entrenched in these treaties. Hence, the criminal justice paradigm entrenched in these treaties have increasingly been supplemented by collective security and occasionally forcible coercive measures.[86] Military force has been resorted to by a number of states to tackle the problem of terrorism – this has not been effective but only contributed to instability in those territories where the operation has been conducted.[87] The Draft Convention should be geared towards consolidating existing international legal counter-terrorism framework; given that it is highly fragmented to ensure effective use of the criminal justice paradigm to counter terrorism.

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82 OECD, *Terrorism, corruption and the criminal exploitation of natural resources* (February 2016) points out that corruption hampers countries ability to fight terrorism especially where state institutions are weakened by engrained and deep seated corruption.

83 KNCHR, 'Are we under siege? The state of security in Kenya. An occasional report (2010-2014)'.

84 Moeckli D, 'The emergence of terrorism as a distinct category of international law' 44:157 *Texas International Law Journal* (2008), 158.

85 Moeckli D, 'The emergence of terrorism as a distinct category of international law' 182.

86 Tams C, 'The use of force against terrorists' *European Journal of International Law,* 2009, 359-397.

87 The instability in Afghanistan and Iraq has been attributed to the war on terror that instigated the United States military invasion. *See* Rogers P, 'The 'War on Terror' and international security' 22 *Irish Studies in International Affairs*, 2011, 15-23.

5. The mirage of effectuating a holistic criminal justice paradigm at the state level without a legal definition of terrorism at the UN level

Both the UNSC and the UNGA call on states to criminalise acts of terrorism. Despite the elusive definition of terrorism at the UN level, majority of UN member states have made tremendous steps in criminalising acts of terrorism at the national level.[88] In addition, the CTED has offered assistance and technical expertise to many developing countries that have criminalised acts of terrorism.[89]

This notwithstanding, states face two pertinent legal challenges in their attempts to enact and enforce national laws on terrorism. These challenges may be partly attributed to the lack of consensus on a legal definition at the UN level. These challenges are; the failure of the statutes enacted on terrorism to comply with the principle of legality, and the difficulties in the prosecution and extradition of terror suspects. Kenya is used as a case study in this discussion. The differences between the EU and Turkey on the definition of terrorism under national law are also discussed, albeit briefly.

5.1 The challenge of complying with the principle of legality: A case study of Kenya

Any legislation that criminalises acts of terrorism must comply with the laid down tenets of criminal law,[90] especially the principle of legality, as expressed in the latin phrase '*nullum crimen, nulla poena sine lege*'. The European Court of Human Rights in the case of *Sunday Times v United Kingdom* aptly stated that the relevance of the principle of legality is to enable a person to reasonably foresee

[88] The section 83.01 of the Criminal Code of Canada partly defines terrorism as 'in whole or in part of a political, religious or ideological purpose, objective or cause with the intention of intimidating the public…with regards to its security, including its economic security, or compelling a person, a government or a domestic or an international organisation to do or to refrain from doing any act.' The British Terrorism Act defines terrorism as 'a threat or action designed to influence the government or to intimidate the public or a section of the public and is made for the purpose of advancing a political, religious and ideological cause'.

[89] Uganda and Tanzania enacted Anti-Terrorism Act and Prevention of Terrorism Act respectively in 2002. Kenya followed suit ten years later in October 2012 when it adopted the Prevention of Terrorism Act No 30 of 2012.

[90] The principle of legality has had a long history from Roman and medieval law. The principle has gained traction due to the ensuing international regime of human rights as enshrined in the Article 11(2), UNGA, *Universal Declaration of Human Rights*, UN A/Res/217(III) 10 December 1948. Article 15, *International Convention on Civil and Political Rights*, 19 December 1966, 999 UNTS 287 and Article 7, *African Charter on Human and Peoples Rights*, 27 June 1981, 1520 UNTS 217.

the consequences of his or her actions or the result of a given situation.[91] In its broadest interpretation, the principle of legality is applicable to criminal law to the following extent:

a) Non-retrospective application of criminal law *(nullum crimen, nulla poena sine lege praevia*) - This principle nullifies the use of *ex post facto* ('from after the action') criminal law;

b) Prohibition of establishing criminal liability through analogy (*nullum crimen, nulla poena sine lege stricta*) to ensure strict application of the law;

c) Certainty in the definition of criminal conduct and the resultant punishment (*nullum crimen, nulla poena sine lege certa*); and

d) Requirements of clearly defined and codified criminal provisions (*nullum crimen, nulla poena sine lege scripta*).[92]

Given the heterogeneous nature of terrorist activities, a number of states, in criminalising acts of terrorism, have found themselves at crossroad with the principle of legality as defined above. Initially, the traditional objective elements of acts of terrorism connoted acts of or threats of violence to persons. [93] However, the definition has also been extended to violence or destruction of infrastructure, information systems, and public transport, among other services.[94] The extension of the objective element to other targets other than human beings has expanded the definition of terrorism in national law.[95] The subjective elements revolve around the purpose and motive of undertaking the criminal acts that amount to terrorism. The intention of causing fear among members of the

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91 *Sunday Times v United Kingdom* Application 6538/74, ECtHR, 29 March 1979, para 49.

92 Kreß C, 'Nulla poena nullum crimen sine lege' *Max Planck Encyclopedia of Public International Law*', para 1, at www.mpepil.com on 21 April 2016.

93 The earlier international conventions on terrorism especially those adopted from 1963 to 1979 focused mainly on civilian protection. For example the *Convention on Offences and Certain Acts Committed on Board an Aircraft* adopted in 1963 criminalises terrorist acts affecting aircraft endangering the life of the crew and passengers. Others include the 1970 *Convention for the Suppression of Unlawful Seizure of Aircraft,* the 1971 *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,* the 1973 *Convention on Prevention and Punishment of Crimes against Protected Persons Including Diplomatic Agents* and the 1979 *International Convention against the Taking of Hostages*.

94 The more recent international conventions criminalise terrorist acts against installations and infrastructure. For example *International Convention for the Suppression of Terrorist Bombing,* 15 December 1997, 2149 UNTS 256 prohibits the unlawful use of explosives and lethal devices against public transportation system or a government facility. Others include the 1999 *International Convention for the Suppression of the Financing of Terrorism,* 9 December 1999, 2178 UNTS 197 and the 2005 *International Convention for the Suppression of Acts of Nuclear Terrorism,* 13 April 2005, 2445 UNTS 89.

95 *Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996,* UN A/68/37 (8 to 12 of April 2013).

public is an uncontested subjective element of the crime of terrorism.[96] The difference arises when measuring the degree of compulsion that a government or international organisation is subjected to.[97] There are legislations that use the term 'coercing' others use 'influencing' and even 'undue compelling.'[98]

Kenya has been a victim of a spate of terrorist attacks majorly engineered by the Al-Shabaab terrorist group. Al-Shabaab has carried out attacks in Lamu, Mpeketoni, Nairobi, and Northern Kenya.[99] The heinous Garissa University College attack clearly demonstrates the extent of the threat posed by foreign terrorist fighters.[100] In response to these series of terrorist attacks, Kenya enacted the Security Laws (Amendment) Act, No 19 of 2014 ('SLAA').[101] SLAA amended the provisions of twenty two statutes that are directly or indirectly applicable to national security.[102]

The coalition of political parties and the KNCHR swiftly moved to court and challenged the constitutionality of SLAA.[103] The main argument of the petitioners was that the amendments had the cumulative effect of eroding the Bill of Rights and other articles in violation of the Constitution.[104] SLAA had a total of 98 clauses, out of which the High Court granted conservatory orders suspending

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96 The intent requirement that is to terrorise the public or influence the behavior of government and international organisation is used in aforementioned existing treaties such as the *International Convention against the Taking of Hostages,* 17 December 1979, 1316 UNTS 205 and national laws for example section 2(1)(b)(i) and (ii) of the Prevention of Terrorism Act No. 30 of 2012.

97 Walter C, 'Defining terrorism in national and international law' in Walter C (eds), *Terrorism as a challenge for national and international law: Security versus liberty?* Springer, 2003, 342.

98 Walter, 'Defining terrorism in national and international law', 342.

99 'Westgate attack 21 September 2013: A timeline of events' *Daily Nation,* 19 September 2014; 'Al-Shabab massacres 28 Kenyan bus passengers', Aljazeera, 23 November 2014; 'Al Shabaab militants claim responsibility in death of 36 people in Mandera,' Standard, 2 December 2014; 'Kenya attack: 147 dead in Garissa University assault, BBC, 3 April 2015.

100 On the 24 September 2014 the UNSC unanimously adopted resolution S/Res/2178 (2014) to address the acute and growing threat of foreign terrorist fighters. The Counter Terrorism Committee defines foreign terrorist fighters as 'individuals who travel to a state other than their state of residence or nationality for the purpose of the perpetration, planning or preparation of, or participation in, terrorism acts or the providing or receiving of terrorist training including in connection with armed conflict'. See https://www.un.org/sc/ctc/focus-areas/foreign-terrorist-fighters/ on 18 June 2017.

101 The Security Laws (Amendment) Bill was published on 11 December 2014, It was debated on 18 December 2014 and passed. It received presidential assent on 19 December 2014 and commenced on 22 December 2014.

102 These include: Section 66A, *Penal Code,* Chapter 63; Section 42A, *Criminal Procedure Code,* Chapter 75; Section 20A, *Evidence Act,* Chapter 80; Section 59A, Refugees Act (No 13 of 2006); Part V, *National Intelligence Service Act;* Sections 30A and 30F, *Prevention of Terrorism Act* (Act No 30 of 2012).

103 *Coalition for Reform and Democracy (CORD) & Another v Republic of Kenya & Another* [2015] eKLR.

104 [2015] eKLR para 155.

eight clauses together with the amendments to the respective statutes pending the hearing and determination of the petition.[105]

On the hearing of the substantive petition, Article 19,[106] one of the petitioners, brought to the fore the challenges posed by failure to define pertinent terms. The petitioner argued that Section 12 of the SLAA, which adds a new section 66A to the Penal Code proscribing the publication of certain information, foils the principle of legality. This was on the basis, that:

> It does not peg the commission of the offence on intention (*mens rea*) on the part of the publisher of the material allegedly causing harm…the section deploys broad and imprecise terminologies without defining the target and the conduct sought to be prohibited.[107]

Other provisions of SLAA that were challenged due to broad terminologies instead of providing precise definitions were proposed additional sections 30A and 30F to the Prevention of Terrorism Act.[108]

The Suppression of Terrorism Bill of Kenya of 2003 (the Terrorism Bill)[109] never saw the light of day due to definitional challenges. The proposed definition of acts of terrorism in the Terrorism Bill was as follows:-

> The use or threat of action where the action used or threatened (i) involves serious violence against a person, (ii) involves serious damage to property, (iii) endangers the life of any person other than the person committing the action (iv) creates a serious risk to the health or safety or the public or a section of the public; or (v) is designed seriously to interfere with or seriously disrupt an electronic system…[110]

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105 Para 191, [2015] eKLR.

106 Article 19 is a human rights non-governmental organisation with the mandate of implementation, promotion and protection of the fundamental right of freedom of expression, opinion, and access to information.

107 [2015] eKLR, para 63.

108 Section 30A(1) titled 'Publication of offending material' read as follows –, A person who publishes or utters a statement that is likely to be understood as directly or indirectly encouraging or inducing another person to commit or prepare to commit an act of terrorism commits an offence and is liable on conviction to imprisonment for a term not exceeding fourteen years.' Section 30F (1) titled 'Prohibition from broadcasting' read as follows - 'Any person who, without authorisation from the National Police Service, broadcasts any information which undermines investigations or security operations relating to terrorism commits an offence and is liable on conviction to a term of imprisonment for a term not exceeding three years or to a fine not exceeding five million shillings, or both'.

109 Kenya Gazette Supplement, *Suppression of Terrorism Bill*, 2003, 38.

110 Clause 3(1)(a).

There was uproar because the proposed definition of acts of terrorism was too broad, vague and prone to abuse by state machineries.[111] It was not until a decade later that the Prevention of Terrorism Act 2012 (the Act)[112] was enacted. It is a marked improvement from the Terrorism Bill. The interpretational clause of the Act gives a more refined definition of terrorism as compared to the Terrorism Bill. The objective elements of the terrorist acts are somewhat similar to those of the Terrorism Bill. The difference lies in the subjective element where clause 3(1)(c) of the Terrorism Bill that read 'the use or threat is made for the purpose of advancing a political, religious or ideological cause' has been removed. In addition, a proviso has also been included in the Act that excludes actions that disrupts public services taken in pursuance of a protest, demonstration or stoppage of work.[113] This proviso was borrowed from Canada to restrict the wide definition of terrorism from being interpreted to include large-scale demonstrations that may sometimes turn violent.[114]

However, the unclear criteria of determining which associations or individuals support and fund terrorists may also lead to victimisation and profiling of particular communities. In pursuance of the Prevention of Terrorism Act, the Inspector General of Police issued a notice containing the names of 85 entities and individuals suspected to be associated with Al Shabaab.[115] Two of the entities mentioned in the notice moved to court to challenge the notice and the court appreciated the difficulty in balancing individual and public rights and called for sobriety as it issued conservatory orders.[116]

5.1.1 Challenges in the prosecution and extradition of terror suspects

The UNSC in Resolution 1373 of 2001 requires member states to criminalise an array of acts that amount to terrorism.[117] The UNGA through its multilateral treaties obligates member states to criminalise specific acts of terrorism in their national laws such as unlawful seizure of aircraft,[118] hijacking,[119] taking of

111 Kenya Human Rights Network, 'Campaign against the enactment of the Suppression of Terrorism Act' http://www.ogiek.org/sitemap/terrorism_bill.pdf on 6 June 2016.

112 *Prevention of Terrorism Act* No 30 of 2012.

113 Section 2, *Prevention of Terrorism Act* (Act No 30 of 2012).

114 Section 83.01, *Criminal Code of Canada* (RSC 1985).

115 Gazette Notice No 2326 of 2015.

116 *Muslims for Human Rights (Muhuri) and Another v Inspector-General of Police & 4 Others* [2015] e KLR.

117 White ND, 'The United Nations and counter-terrorism: Multilateral and executive law-making', 57.

118 Article 11, *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, 14 September 1963, 704 UNTS 219.

119 *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 14 December 1973, 974 UNTS 177.

hostages,[120] and terrorist attacks on ship.[121] In addition, they incorporate the customary principle of *aud dedere aut judicare* (extradite or prosecute).[122] For example, the 1999 Financing Convention requires states to criminalise terrorist financing and incorporate a definition of terrorism for its purposes.[123] Similarly, the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism requires states to criminalise attempts and threats to commit nuclear terrorism and integrates the principle of extradite or prosecute.[124] However, other treaties such as the 1997 *International Convention for the Suppression of Terrorist Bombings* provides for universal jurisdiction over unlawful and intentional use of explosives including attacks on chemical materials and biological agents.[125]

Despite the fact that states have criminalised acts of terrorism under their national laws, there are huge disparities in the acts or omissions that are described as terrorism from one state to another. This clearly negates the use of the principle of *aud dedere and aut judicare* (extradite or prosecute). It is anticipated that for states to fully cooperate in apprehending, investigating, and prosecuting or extraditing a suspected terrorist there is need for a largely similar legal definition on terrorism.

There are states that openly criticise others for the manner in which they have framed the definition of terrorism in their national law. A case in point is the EU criticism of Turkish Law on Fight against Terrorism which defines terrorism as:

> …any criminal action conducted by one or more persons belonging to an organization with the aim of changing the attributes of the Republic as specified in the Constitution, the political, legal, social or economic system, damaging the indivisible unity of the state with its territory and nation…[126]

According to the EU, the above definition is too broad, vague and imposes far reaching restrictions on the right to due process.[127] For this reason, the chanc-

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120 *International Convention against the Taking of Hostages*, 18 December 1979, 1316 UNTS 205.

121 *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 10 March 1998, 1678 UNTS 304.

122 Crawford J, *Brownlie's Principles of Public International Law,* 8 ed, Oxford University Press, New York, 2012, 721.

123 *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, 2178 UNTS 197.

124 *International Convention for the Suppression of Acts of Nuclear Terrorism*, 13 April 2005, 44 ILM 815.

125 *International Convention for the Suppression of Terrorist Bombings*, 9 December 1999, 217 UNTS 197.

126 Article 1, *Law on Fight against Terrorism of Turkey* (Act No 3713 (1991, as amended: 1995, 1999, 2003, 2006, 2010).

127 Zeldin W, 'Turkey: Counterterrorism and justice' *The Law Library of Congress*, 2015, 4.

es of a member state of the EU extraditing an individual charged with the offense of terrorism under the aforementioned law to Turkey are narrow. The lack of similarity in law negates the principles of extradite or prosecute as enshrined in the sectorial treaties mentioned earlier on.

For states to implement the principle of extradite or prosecute there is need for a generally accepted legal definition of terrorism. As Antonio Cassese observes in his article:

> Each state, in passing legislation on the matter, may and does of course define terrorism as it pleases. However, terrorism is a phenomenon that very often affects multiple states, which are all compelled to cooperate to repress it…how can states work together for the arrest, detention or extradition of alleged terrorists, if they do not move from the same notion?[128]

Consensus in the definition of terrorism will enable states to work from the 'same notion'. This may eliminate the need to resort to illegal detention and rendition as opposed to extradition. Rendition has been described as the process of transferring a suspect or fugitive from one state to another without following the due process of the law.[129] This is the situation that arose between Kenya and Uganda in the wake of the 2010 World Cup bombing in Uganda. According to a report compiled by the Open Society Justice Initiative, on the evening of 22 July 2010, the Kenya Anti-Terrorism Police Unit detained a number of Kenyans and rendered them to Uganda.[130] This was in violation of both its national and international obligations as the actions were conducted without recourse to established extradition procedures and due process of the law.[131] Furthermore, Article 3 of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* instructs states not to 'expel, return (refouler) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture'.[132]

This case demonstrates the possible challenges that may be encountered by states in effectively implementing the principle of extradite or prosecute in

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128 Cassese A, 'The multifaceted criminal notion of terrorism in international law', 934.

129 For more details see Garcia M, 'Renditions: Constraints imposed by laws on torture' Congressional Research Service, 2009.

130 Open Society Justice Initiative, 'Counterterrorism and human rights abuses in Kenya and Uganda the World Cup bombing and beyond,' 2013.

131 *East Africa Law Society v Attorney-General of the Republic of Uganda, Attorney-General of the Republic of Kenya and Secretary General of the East African Community,* East African Court of Justice at Arusha. Application No 6 of 2011.

132 *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 45.

combating terrorism. This is a clear manifestation that there is need to build consensus on the definition of terrorism and related terms and phrases at the UN level. The fact that states have criminalised acts of terrorism is a step in the right direction. However, the lack of clarity at the UN level inhibits the fight against terrorism and is counterproductive.

6. Conclusion

Formulating a consensual legal definition of terrorism at the UN level has remained problematic. This is exacerbated by the dimension taken by the UNSC of adopting blanket legislative resolutions imposing treaty obligations on states without providing concrete legal definition or clarity of key terms. On the other hand, the UNGA has embraced a sectorial approach of addressing specific aspects of the problem of terrorism and is yet to agree on a legal definition of terrorism in its negotiation for a comprehensive treaty. This has made the use of a criminal justice paradigm to counter terrorism at the state level difficult as states have faced legal challenges in enacting statutes that comply with the criminal law tenet of legality. Furthermore, it has affected the effective implementation of the principle of extradite or prosecute.

A consensually agreed upon legal definition of terrorism at the UN is critical in the fight against terrorism. A legally accepted definition of acts of terrorism at the international level is necessary for a criminal justice paradigm to be effectively utilised to combat terrorism at the state level. This is crucial in laying the parameters of what is included and excluded. The criminal law principle of legality requires that an act that constitutes a crime be certainly defined. Where a statute foils this pertinent requirement, a person suspected to have committed acts of terror may have to be released or a penal law declared unconstitutional by national courts at the state level.

The UNGA through its Sixth Committee working group that is currently propelling the negotiations for a comprehensive convention on measures of eliminating terrorism should expedite the process of closing in on contentious issues. These contentious issues include the definition of terrorism and scope of application of the convention. Completion of the negotiation process, formal adoption, ratification and domestication of the comprehensive convention would strengthen co-operation between states. In addition, it could build on the *aut dedere aut judicare* regime that acts as an effective legal tool for prevention and suppression particularly if states are in agreement on what legally constitutes terrorism.