PROTECTING THE STATE: A COMPARATIVE ANALYSIS AND CONSTITUTIONAL ASSESSMENT OF NIGERIAN AND UNITED KINGDOM LEGAL RESPONSES TO TERRORISM

by

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ABSTRACT

Since 2009, terrorism has become one of the biggest challenges facing the Nigerian State. As a legal response to this, the National Assembly in 2011 enacted the Terrorism (Prevention) Act (as amended). However, there have been heated debates amongst scholars, lawyers and human rights organisations about the relevance and coherence of the Act in addressing terrorism in Nigeria.

This thesis discusses the measures adopted by Nigeria against terrorism and their effects on human rights. A fundamental question that will be addressed in this thesis is: how can Nigeria deal with its domestic terrorism, through the Terrorism Act, without unnecessarily infringing on human rights? The thesis analyses and assesses the Terrorism (Prevention) Act 2011 (as amended) to find out whether the Act provides a 'coherent' legal code relevant to terrorism in Nigeria? In order to determine this, the thesis juxtaposes the provisions of the Terrorism Act by reference to Nigeria's domestic, regional and international constitutional obligations under the Constitution of Nigeria 1999, the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights (ICCPR) respectively. The research also compares the TPA 2011 with the United Kingdom's Terrorism Act 2000. Although emphasizing the major differences in the nature of the challenges faced by the UK and Nigeria, the thesis explores whether there are elements of the UK's legal measures in preventing terrorism from which Nigeria could learn. And if so, what possible recommendations for law reforms would flow from this?

The main theme that emerges from this research is that several inadequacies exist under the Terrorism (Prevention) Act 2011 (as amended). The measures adopted by Nigeria against terrorism are generally inconsistent with human rights provisions in the country. For example, the police in Nigeria arrest individuals without a reasonable suspicion of committing an offence and detain terror suspects for as long as they want without judicial approval. These measures are also inconsistent with Nigeria's human rights obligations under the Constitution 1999, the African Charter and under the ICCPR. The current view is that the measures adopted by Nigeria against terrorism, especially under the TPA 2011, needs to be reviewed. In order to address this, the research puts forward proposals and recommendations which Nigeria should adopt to make her counter-terrorism law and practices human rights compliant and fit for purpose.

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List of Abbreviations

ACHPR African Charter on Human and People's Right

AI Amnesty International

AQIM Al-Qaeda in Islamic Maghreb

ART Article

AU African Union

BH Boko Haram

CC Criminal Code

CFRN Constitution of Federal Republic of Nigeria 1999

ECHR European Convention on Human Rights

EFCC Economic and Financial Crimes Commission

ECrtHR European Court of Human Rights

FRN Federal Republic of Nigeria

HRA Human Rights Act 1998

HRW Human Rights Watch

HRC United Nations Human Rights Committee

ICCPR International Covenant on Civil and Political Rights

IRA Irish Republican Army

JTAC Joint Terrorism Analysis Centre

JTF Joint Military Task Forces

MLPA Money Laundering (Prohibition) Act

NHRC Nigeria's National Human Rights Commission

OAU Organisation of African Unity

POAC Proscribed Organisation Appeal Committee

PICTU Police International Counter Terror Unit

S. Section

SC Supreme Court

SARS Special Anti-Robbery Squad

TA Terrorism Act

TPA Terrorism (Prevention) Act 2011

TPAA Terrorism (Prevention) (Amendment) Act 2013

TPIMS Terrorism Prevention Investigation Measure

UK United Kingdom

US United States of America

UN United Nations

UNGA United Nations General Assembly

UDHR Universal Declaration of Human Rights

CHAPTER 1

INTRODUCTION

This thesis is based on a comparative analysis and constitutional assessment of Nigeria and United Kingdom's legal responses to terrorism. The study explores the constitutionality of some key provisions under the Terrorism Acts of both States, at the national level, the domestic level and at the international level.

The study has been significantly influenced by the emergence of the terrorist group "*Boko Haram*" in Nigeria and the legality of government responses, especially under the Terrorism (Prevention) Act 2011. The writer is concerned about the effects of the counter-terrorism measures adopted under the Nigerian TPA 2011 Act on human rights and the rule of law in the Country.

'*Boko Haram'* whose original name is "*Jama'atu Ahlis Sunna Lidda' await Wal-Jihad*" (meaning -people committed to the propagation of the prophet's teachings and jihad) vowed to establish an Islamic caliphate ruled by Sharia law (the Islamic legal code) throughout Nigeria.[1] According to Sanni, the group emanated from an orthodox teaching slightly resembling that of the *Taliban* in Afghanistan and Pakistan.[2] Since 2009, terrorist attacks by *Boko Haram* have continued unabated.[3] In fact, the Global Terrorism Index (GTI) for 2015 described *Boko Haram* as the "world deadliest" terror group, responsible for 81% of deaths in Nigeria in 2013 and 86% in 2014.[4] In 2016, the Global Terrorism Index ranked Nigeria third in its list of countries most impacted by terrorism with about 4,095 people killed by *Boko Haram* within that year alone.[5] The report described *Boko Haram* as having the second highest death toll out of all terrorist groups since 2000. Only the Taliban has killed more people than *Boko Haram.*[6]

As a result of the terror attacks from *Boko Haram*, the Nigerian government adopted far-reaching measures against terrorism in the Country. One of these is the enactment of the

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[1] Michael Mwankpa, 'The Politics of Amnesty International in Nigeria; A comparative Analysis of the Boko Haram and the Niger Delta Insurgencies' Journal of Terrorism Research , Vol 5, Issue 1 http://ojs.standrews.ac.uk/index.php/jtr/article/view/830/709 accessed 24th June, 2016

[2] Shehu Sanni, 'Boko Haram; History , Ideas, and Revolt', Journal of Constitutional Development, Vol 11 No 4, [2011] Pg 26

[3] Its violent attacks on media houses, government offices, the United Nations office in Abuja, Churches, Mosques, School, Markets places threatens to destabilize the country.
Andrew Walker, What is Boko Haram? Special Report U.S institute for Peace May 30, 2012 http://www.usip.org/publications/what-boko-haram accessed 2nd of June, 2015

[4] Global Terrorism Index 2015, Institute for Economic & Peace http://economicsandpeace.org/wp-content/uploads/2015/11/Global-Terrorism-Index-2015.pdf accessed 20th Jan 2016

[5] Global Terrorism Index 2016, Institute for Economic & Peace Pg 26 http://economicsandpeace.org/wp-content/uploads/2016/11/Global-Terrorism-Index-2016.2.pdf accessed July 2017

[6] Ibid Pg 26

Terrorism (Prevention) Act (TPA) 2011. In addition to that, in June 2011, the Nigerian Government set up a special Joint Military Task Force (JTF) in Maiduguri consisting of the army, navy, air force, department of state security and the Nigerian Police to tackle terrorism in the country.[7]

1. The Research Agenda/ Aims and Objectives

Although the measures adopted by the Nigerian government could arguably be seen as a genuine response to terrorism, it has also created some human rights controversy. This controversy is rested upon the alleged brutality unleashed by the security forces, and some "draconian" measures adopted by the Terrorism Prevention Act which, if unchecked, could impact negatively on the human rights of individuals in the country. For instance the JTF have resorted to the extra-judicial killings of terror suspects, arbitrary arrest of innocent citizens, prolonged detention of terror suspects, and clamp downs on media houses under the guise of fighting *Boko Haram*. These events have raised serious concerns from local and international media, domestic/international human rights organisations, as well as western nations especially over the significant number of casualties arising from the anti-terror activities of the JTF.[8]

Serious concerns have also been raised by scholars and human rights proponents about the relevance and coherence of the Terrorism (Prevention) Act 2011 (as amended) in addressing terrorism in the country.[9] To be clear, this thesis acknowledges that States are able to derogate from certain liberties and human rights freedoms under international law in emergency situations such as terrorist attacks. However it is not certain whether the measures adopted by Nigeria under its Terrorism Act can be said to fall within these derogations. Likewise, the constitutionality, fairness, and appropriateness of some of the provisions under the TPA (2011) are in doubt. It is against this background that the present study aims to evaluate the Nigerian Terrorism Act 2011 (as amended) to determine whether it is internally coherent and

[7] Hussein Solomon, Counter-terrorism In Nigeria Responding to Boko Haram, The RUSI Journal [August 2012] VOL.157 No 4 Pg7

[8] Hakeem Onapajo, 'Why Nigeria is not winning the anti-boko Haram war', E-International Relations [2013] Pg 4

[9] For instance Ekundayo voiced concerns about the excessive and draconian character of the Act which is gradually leading to a weakening of human rights in the country
Vera Ekundayo, 'Nigerian Terrorism Act: A right step forward', *Punch Newspaper* (January 24, 2012) http://www.punchng.com/opinion/nigerian-terrorism-act-a-right-step-forward/ accessed 6th February, 2012

constitutionally justifiable in providing a legal code relevant to terrorism? And more importantly, assess the effects of the Act on human right provisions in Nigeria?

This thesis also compares key provisions under the Nigerian Terrorism Act with similar provisions under the UK's Terrorism Act. In so doing, the terrorism laws in the two states, their variations, and their effects on human rights will be discussed. Although the study admits that there are differences in the challenges and nature of the terrorist threats faced by the UK and Nigeria, as well as differences in cultural, legal and constitutional backgrounds within both states, nonetheless the writer is of the opinion that there are lessons which Nigeria could learn from the UK to further improve its terrorism law, and *vice -versa*.

In analysing, assessing and comparing the Nigerian TPA 2011 with UK's TA 2000, the study focuses on five main provisions under the Acts. These are the definition of terrorism, the powers of arrest, the pre-charge detention of terror suspects, proscription, and encouragement of terrorism. This will be followed by an assessment of the Acts by reference to Nigeria and the UK domestic, regional and international human rights constitutional obligations.

At the domestic level, Nigeria's TPA 2011 (as amended) will be assessed by reference to the Constitution 1999 while the UK's Terrorism Act of 2000 will assessed by reference to the Human Rights Act 1998. At the regional level, Nigeria's TPA 2011 will be assessed by reference to the African Charter on Human and People's Rights while the UK's TA 2000 will be assessed by reference to the European Convention on Human Rights. At the international level, the Terrorism Act of both states will be assessed by reference to the International Covenant on Civil and Political Rights.

The justification for the choice of the Constitution 1999 and the Human Rights Act 1998 as a yardstick for determining whether the Terrorism Act is human right "compliant" at the domestic level is that in the case of Nigeria, the Constitution is the final and supreme law in the country.[10] Section 1(3) of the Nigerian Constitution provides that "*if any law is inconsistent with the provisions of the Constitution, the constitution shall prevail, and that law shall to the extent of the inconsistency be void.*" Secondly, the Constitution expressly guarantees the fundamental human rights for every person in Nigeria.[11] Unlike Nigeria, the UK does not have a single written Constitution that spells out citizens' rights. Much of what can be regarded as

[10] S.1 CFRN 1999
[11] Ss 33-46 CFRN 1999

the UK's 'Constitution' can be found in Statutes, Acts of Parliament, Court judgements, Treaties, Protocols, Covenants, and European Union (EU) law. However, the UK Parliament enacted the Human Rights Act 1998, which incorporates the European Convention of Human Rights (ECHR) into domestic law. Section 3 (1) HRA provides that; "*so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights*."[12]

The rationale for choosing the African Charter and the ECHR as the basis for determining the "coherence" and "consistence" of Nigeria's TPA 2011 and the UK's Terrorism Act 2000 at the regional level is because the *African Charter* is the regional "legal code" that protects human rights on the African continent. In fact, Nigeria's National Assembly incorporated the African Charter into the domestic law of Nigeria through the African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act 2 of 1983 and is now contained in Cap 10, Laws of the Federation of Nigeria, 1990. As a result of this, the African Charter is now part of the laws in Nigeria. As the name suggests, the European Convention of Human Rights protects human rights freedoms within the European region. Art 1 of the Convention imposes a positive obligation on the Contracting Parties to the convention. It provides that '*the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention*.' This section clearly obliges Contracting Parties not to infringe the rights protected in the Convention and to apply the Convention rights within its jurisdiction.

The justification for the choice of the ICCPR as a basis for assessing Nigeria's TPA 2011 (as amended) and the UK's TA 2000 by reference to international constitutional obligations is because of the positive obligation it imposes on state parties to promote universal respect for, and observance of, human rights and freedoms as recognised under the ICCPR.[13]

The result of the assessment of Nigeria's TPA 2011 and the UK's Terrorism act 2000 by reference to their regional constitutional and international obligations will be used as a yardstick for assessing whether the Acts are coherent, consistent, and or whether they unnecessarily infringes human rights? It is however important to note that given the dangers of assuming causal relations between enacting any laws and empirical changes to, say, the

[12] HRA 1998

[13] Pre-amble ICCPR Para
Art 2(1) ICCPR specifically obliges ''each State Party to the Covenant to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.''

distribution and extent of political violence, the research restricts itself to issues concerning Nigeria anti-terrorism's internal coherence, constitutionality and consistency with the most credible interpretation of applicable international standards. It does not address the fraught question of practical "success" of Nigerian law as to answer this would entail a large-scale multi-disciplinary social scientific project beyond the scope of a single PhD, even then it could involve highly speculative contentions because any empirical correlation between legal changes and increases or decreases in the extent or distribution of acts of political violence would not in themselves establish any causal link sufficient to assess the "effectiveness" of the former.

1.1 **Aims & Objectives of the research**

The aims of the research are to critically analyse key sections of the Nigerian Terrorism (Prevention) Act 2011 (as amended), critically analyse key sections under the UK's Terrorism Act 2000, and undertake a comparison between the provisions of the Nigerian Terrorism 2011 (As amended) with the United Kingdom's Terrorism Act 2000.

The research also aims to undertake a comparative socio-legal assessment of key provisions under the Nigeria's Terrorism (Prevention) Act 2011 and the UK Terrorism Act 2000/2006 to determine how the provisions of the Acts are applied in principle and in practice with particular attention to the need for a proper balance between legitimate security interests and the protection of fundamental rights.

Furthermore, the research aims to assess Nigeria's existing legal measures in preventing terrorism by reference to its domestic, regional, and international constitutional obligations under the Constitution of the Federal Republic of Nigeria, the African Charter on Human and People's Rights and the ICCPR.

Equally, the research will assess the UK's existing legal measures in preventing terrorism by reference its domestic, regional and international constitutional obligations under the Human Right Act 1998, the ECHR and the ICCPR.

Assuming Nigeria's legal measures in preventing terrorism disproportionately infringe its domestic constitutional, regional constitutional obligations, what legal measures could Nigeria learn from the UK, and vice-versa? If relevant, proposals for Nigerian law reform will be formulated.

Also, assuming the UK's legal measures in preventing terrorism disproportionately infringe on its domestic constitutional obligation under the Human Rights Act 1998 and/or its regional constitutional obligation under the European Convention on Human Right, what legal measures could the UK learn from Nigeria, if any at all? If relevant, proposals for the UK law reform will be formulated.

1.2 **Justifications for Focusing on Five Provisions Under the Terrorism Acts of Nigeria**

The writer chose to focus on the definition of terrorism, pre-charge detention of terror suspects, arrest, proscription and encouragement for two main reasons. The first is simply that it will be almost impossible to analyse, assess, and compare the entire provisions of the Nigerian and the UK's Terrorism Act within a single PhD Thesis. The second reason is that these five provisions of the Terrorism Act raises the most concern over their interference with the fulfilment of human rights freedoms in Nigeria. This conclusion is based on preliminary readings, assessment, and the writer's previous law practice in Nigeria. The Nigerian Police and the Department for State Security are notorious for making arbitrary arrests and prolonging the detention of suspects without due consideration for human rights provisions. These fears are further heightened by the broad definition of terrorism under the Act and wide ranging powers given to the law enforcement agencies to counter terrorism in the country. Without adequate judicial supervisions, these five provisions under the Nigerian Terrorism Act could have devastating consequences on the human rights of terror suspects in Nigeria. [14]

The justification for selecting the definition of terrorism as the first issue to be analysed is that the definition provided under the Terrorism Acts of both States becomes the 'gateway' to counter terror powers such as arrest and detention of terror suspects, exercised by the state agents of Nigeria and the U.K. The definition spells out what constitutes acts of terrorism in the country. Without a proper understanding of the exact meaning of the terms used in the definition of terrorism under the Act it will be difficult to critically analyse and assess the Act. Also, the definition points the direction of the law to acts which are prohibited. any person who commits these prohibited acts are arrested and charged under the Terrorism Act. The meaning attributed to terrorism under the Act is crucial to establishing its scope as well as the power of the state to impose criminal sanction on breaches. A failure to properly analyse the meaning

[14] Amnesty International Report NIGERIA 2014/15
https://www.amnesty.org/en/countries/africa/nigeria/report-nigeria/ accessed 20th June 2015

given to the definition of the Act could have an impact on all other analyses that will be done under the Act.

The justification for choosing arrest and pre-charge detention as the second and third issue to be analysed is that since the emergence of *Boko Haram* in 2009, the manner by which the Police and other security agencies make arrests and detain terror suspects under the guise of preventing terrorist attacks is questionable. According to Nigeria's Human Rights Commission (NHRC), innocent civilians are arrested arbitrarily and held in unofficial detention sites, with inadequate documentation and outside the safeguards provided by the Constitution of Nigeria and the African Charter on Human and Peoples' Rights.[15] Accordingly, the study will seek to find out whether the power of arrest and pre-charge detention of terror suspects under the Terrorism Act is consistent with human rights provisions in Nigeria and also whether these arrests/pre-charge detentions follow the rule of law and due process or whether they violate domestic and international norms and individual legal rights to liberty and security.

More than ever before, people are able to disseminate information with ease and relative anonymity. This is made possible with the existence of chat rooms, internet forums and social media apps like Facebook, Twitter, Instagram and You-Tube. These platforms have opened up a world of possibilities to radicalise people into committing terrorist acts. In order to address this, the Nigerian TPA 2011 (as amended) made provisions for encouragement of terrorism as an offence. Without doubt, these offence raise serious concerns about freedom of expression, and without adequate checks and balances, fundamental liberties such as freedom of speech and the press, or the right to privacy, may be infringed upon unnecessarily under the guise of countering-terrorism.

In order to address a complex crime such as terrorism, one of the basic tools available to government is to identify and ban terrorists groups or their affiliates. This is called proscription. However, without proper safeguards, the State's powers to proscribe an organisation under the Nigerian Terrorism Act raise concerns about the right to assembly and freedom of association. The Nigerian government have in the past (between 1994 and 2008) banned non-violent organisations/groups such as the National Association of Nigerian Students (NANS), the Academic Staff Union (ASUU), and the Movement for the Survival of Ogoni People

[15] Atika Balal, 'JTF committing atrocities, says rights commission', *Daily Trust* (01 July 2013), http://www.dailytrust.com.ng/daily/old/index.php/top-stories/58113-jtf-committing-atrocities-says-rights-commission accessed 7th Oct, 2013.

(Mosop).[16] It is against this background that "proscription" is chosen as the last provision for analysis and assessment in this study.

The most common argument against adjustments in the balance between individual rights and the state obligation to provide security is where to draw the line? The research seeks to demonstrate the extent to which the current anti-terrorism legislation in Nigeria and the UK has negatively impacted on human rights in both countries, as well as how the States' duty to combat terrorism must comply with international human rights norms.

2. Justifications for Comparing Nigeria's Terrorism Act 2011 with the United Kingdom's Terrorism Act 2000, 2006.

A principal aim of this thesis is to critically analyse and assess the Nigerian TPA 2011 (as amended) in the light of the experiences of another common law jurisdiction in dealing with terrorism. The writer's choice of the UK is not unexpected. According to Walker, the UK has witnessed episodes of political violence during its troubles with the IRA in the 70's, 80's, and 90's.[17] The UK has also faced, and is still facing, terrorist attacks and threats from domestic and international terrorist organisations such as *Al-Qaida* and *ISIL*. These events have shaped the British counter-terrorism measures under its Terrorism Acts.[18] Having fought terrorism for more than five decades, it is safe to assume that the UK has "significant" experience in tacking terrorism. Nigeria on the other hand is fairly new to terrorism challenges, at least when compared to the UK, although it would be historically inaccurate to claim that what is happening in Nigeria is the same or even broadly similar to the IRA attacks against the British Government in the 1970's, 80's and 90's. The aims and methods of the IRA were different from those of *Boko Haram*, but more importantly the context in which the British state responded to the IRA attacks were clearly different from that of Nigeria presently. What however does need to be recognised is that the UK Terrorism Act 2000 as amended has been described to be 'amongst the most extensively and fiercely debated of a device in the past decade.'[19] The counter-terrorism measures adopted under the TA 2000 have been extensively challenged and criticised on various constitutional and human rights grounds which this thesis

[16] George Kieh, '*Beyond State Failure and Collapse: Making the State Relevant in Africa'* (Lexington) 2000 Pg 163-165

[17] Clive Walker, 'Terrorism and Criminal Justice', [2004] Crim LR 311

[18] The UK government when faced with terrorist threat from the IRA adopted the Prevention of Terrorism (Temporary Provisions) Acts (PTA).

[19] C. Walker, *Blackstone's Guide to the anti-terrorism Legislation* (3nd Edition, Oxford University Press, 2009) Pg 9

will attempt to show. On the other hand, the Nigerian TPA 2011 (as amended) remains largely unchallenged with little or no research that compares the Act with another Terrorism legislation, and it is possible that where it overlaps with the British legislation it could be open to similar challenges and critique. Comparing the Terrorism Acts of both states provides an opportunity for an evaluation of the strengths and weaknesses of the Nigerian and UK Terrorism Acts with a view to acquiring knowledge on how to improve the Nigerian TPA 2011 and how to make it human rights compliant.

It is important to note that notwithstanding the U.K's successes in preventing terrorism, it would be erroneous to think that the Terrorism Act 2000 is faultless. It has its flaws too. According to Rowe, some powers under the Act are intrusive and unnecessarily violate the ECHR.[20] He contends that individual cases of arrest and detention may unlawfully engage Article 5(1). It is against this background, for example, that the UK's Terrorism Act 2000 will be critically analysed and assessed to determine if it is consistent with human rights provisions in the UK and then compared with Nigeria's TPA 2011 (as amended).

Comparative legal research such as this necessitates that both jurisdictions have similar legal systems. Both Nigeria and the UK operate a common law legal system. However, it must be noted that the legal system of both countries reflects not only different national cultures and local traditions, but also different kinds of power structures, degrees of civil society development, faith in state institutions and styles of legal interpretation and application. But despite the admittedly limited commonalities between the two States and national differences, the comparative research is interested in developing and testing theories that would be applicable beyond boundaries of a single society, regardless of cultural, historical, and political difference.[21]

In any comparative legal research, there is the problem of 'comparability' of the empirical units selected for comparison and analysis.[22] This problem was addressed in this research as the writer compared and also contrasted 'like' for 'like'. For example definition, arrest and pre-charge detention of suspect under Nigeria's TPA 2011 is contrasted and compared with the definition, arrest and detention under UK's T.A 2000. Although there are commonalities in

[20] J.J Rowe, 'The Terrorism Act 2000' [2000] Crim LR 1

[21] According to Oyen, There is a demand for cross-national comparison to specific problem, the aim which is to reduce unexplained variance and find patterns and relationships. Else Oyen *Comparative methodology Theory And Practice In International Social Research* (Sage Publisher, 1990) Pg 1

[22] Difficulties could arise due to confusion in the two legislation's logical interrelationship. There could also be a tendency to trying to link logical propositions devoid of any empirical content

the provisions of the Acts in both states, terrorism remains unpredictable. This is because its multiple contexts are dynamic, nonetheless there are great insights that we can learn from the comparative study.

3. **Defences against 'legocentricism'**[23]

To guard against 'legocentric' bias, the thesis makes clear that even though the law is a strategic tool in countering terrorism, it does not view the law as the only way to address terrorism in Nigeria. Terrorism is multifaceted and as such can only be addressed through a multi-dimensional approach. It is also important to state here that the fact that a country has a well-developed counter-terrorism law does not necessarily mean that it is more capable of preventive responses or more likely to use lawful methods in counter-terrorism.[24] In the same way, the lack of formal counter-terrorism legislation does not necessarily mean that a country is "quiet" in dealing with terrorism.[25] The research compares the anti-terrorism statutes and policies of both states, the goal of which is to learn lessons concerning their internal coherence and constitutionality rather than creating and testing socio-legal theories or causal hypotheses.

The comparative research looks at legal problems and legal institutions with a view of making observations and gaining insight that, owing to the often parochial and nationalistic orientation of legal research, are often missed by those whose study is limited to the law of a country.[26] Countries that are similar are more likely to borrow from one another, even if those similarities are an illusion of doing better in one area.[27] To guard against lifting measures adopted by the UK without a thorough scrutiny, the writer adopts an objective test where necessary. The study also adopts a realistic approach by looking at other areas outside the law which the UK adopts in tackling terrorism, for instance the "CONTEST" Strategy, with the aim of providing new insight to tackle terrorism in Nigeria.

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[23] "Legocentricism" means that the law is treated as a given necessity and a natural path to the ideal, regional or optional conflict resolution and ultimately to social order guaranteeing peace and harmony.
G. Franken, 'Critical Comparisons; Re-thinking Comparative Law', (1986) 26 Harvard Int. Journal 441 at 445

[24] J. Ford, 'African Counter-terrorism Frameworks a decade after 2001', (2011) Institute for Security Studies pg 44-45

[25] ibid

[26] K. Zweigert and H. Kots, *An Introduction to Comparative law* (Tony Weirs Trans, 2nd Edition, 1987) Pg 1

[27] Henry Teune, ''Comparing Countries: Lessons Learned"in Else Oyen, (ed) *Comparative Methodology* (Theory and Practice in International Social Research London: Sage, 1990) 38.

3.1 Explanation of key terms - *"Consistent" "Coherent" "Comprehensive"*

Black's Law Dictionary defines "Consistent" as 'following the rules of standards.' According to Professor MacCormick, for a law to be "consistent," the requirement is that the standard to which it is made must not conflict with an accepted rule of the legal system.[28] MacCormick also defines the term "coherent" as the standard of having a general 'fit' with the other rules of the system.[29] He refers to "coherence" of the law as the "test of its soundness" which is not fully satisfied by mere consistency.'[30] He stated further that coherence of the law is a "matter of their making sense" by being rationally related as a set instrumentally and intrinsically, either to the realisation of some common values of the fulfilment of some common principles. [31]

Unlike coherence, the term "comprehensive" has different meanings. In this thesis the term is used to determine whether the TPA 2011 (as amended) is 'thorough' and 'exhaustive' in its provisions. This "term" would be considered in this thesis particularly as it concerns the offence of encouragement of terrorism.

From the writer's viewpoint, the "coherence" of the TPA 2011 to provide a legal code relevant to terrorism in Nigeria connotes the justifiability of the Terrorism Act, when taken together with reference to other laws, legislations, Charter, Conventions or statutes in Nigeria. It could also mean "soundness" of the Act. The test for coherence or soundness of the TPA 2011 in the research is determined whether it "has a general fit" (*borrowing McCormick's definition*) with the Constitution 1999, the African Charter and the ICCPR.

4 Methodologies

Since the aim of the research is to analyse, assess, and compare the Nigerian and the UK's Terrorism Acts, the study will adopt a combination of the black-letter methodology, the socio-legal methodology, and the comparative methodology.

[28] Stair Memorial Encyclopaedia, Reasoning and the requirements of consistency, coherence and consequences. Sources of Law (Volume 22) 5. Legal Method and Reform 622.
[29] Ibid
[30] Neil MacCormic, 'Coherence in Legal Justification', in ed, *Theory of Legal Science* by Aleksander Peczenik, L. Lindahl (Springer 1983) Pg 235
[31] Ibid 239

4.1 **Black-letter methodology and ; Rationale, Strength and Limitations**

The 'black-letter' approach will be adopted in this study because it is a starting point for legal analysis. This approach to research aims to describe, often in great detail, the technical, purely legal meaning of rules and principles. In this thesis, emphasis will be placed on providing a detailed description of formal legal rules and principles under the Terrorism Acts of Nigeria and UK. The main advantage of the black-letter methodology is that it focuses on legal doctrines that are contained in primary sources of law. This approach to legal research is consistent with the law and it is readily available for verification.

The use of the black-letter approach alone is restrictive as it does not treat the topic in its wider perspective.[32] The black-letter approach will show you "what," but not "why," and more importantly the effect of the law in practice. The black-letter will for example speak of 'reasonable,' and 'necessary' but what is defined in practice as 'reasonable' and 'necessary' and the public understanding of these and their effect will require more than a doctrinal interpretation especially from the various 'actors' involved. The black-letter is also selective in interpreting rules and describes commentary on points of law within a legal doctrine only. It relies on court judgments and statute to explain the law.[33] More importantly, the black-letter methodology does not answer some of the specific research questions that this study has put forward such as how are the provisions of the Terrorism Acts in Nigeria and the UK applied in principle and in practice? And, does the Police and other security agencies in implementing the provision of the Act pay particular attention to the protection of fundamental rights of terror suspects? The questions will require more than doctrinal approach.

In analysing and examining the terrorism legislation of Nigeria and the UK , criticisms under the black-letter are limited in nature and scope in exposing ambiguities and loop–holes within existing law.[34] The black-letter does not access legislation in its critical form, as such does not encourage intellectual inputs. Another disadvantage of this approach is that it does not relate law in books to law in action thereby ignoring the fact that laws are made for certain purposes and in interpreting the law the intention of the parliament has to be considered to determine its failures or success.

[32] Reza Banakar, *the Paradox of Contextualization in Socio-legal Research* (I.J.L.C 487, 2011) Pg 487
[33] Wing Hong Chui & Mike McConville, *Research Methods For Law* (Edinburg University Press, 2007) Pg 3
[34] Ibid Pg 45

4.2 **Socio-legal methodology; Rationale, Strength and Limitations**

Since the black-letter methodology alone is not adequate enough to address the research questions posed in this thesis, the writer will also adopt the socio-legal methodology. Socio-legal methodology exposes discrepancies between law in books and law in action.[35]Socio-legal approach assumes that no account of legal rules is complete unless it is based on an empirical grasp of how rules are used in practice. This methodology transcends doctrinal analysis of legal texts. The socio-legal research will focus on the policy behind the legal rule as much as the rule itself. Accordingly, this methodology will be used in this research to investigate how the Terrorism Acts of Nigeria and the UK are applied in practice. But firstly, it should be noted that there are many types of "socio-legal" research that can be applied to a broad range of research topics.[36] This is because the approach encompasses a diversity of interdisciplinary and multi-disciplinary contextual approach within a legal research. This methodology bridges the divide between law and sociology, social policy and economics. In this thesis, the socio-legal methodology will be used to investigate the impact of the law in action as well as the key role played by ideological factors including public policy.[37] The main strength of the socio-legal approach is that it exposes discrepancies between law in books and law in action.[38] This approach portrays the social effect of law as a meeting point of societal outlook and legal output. For example, the legal basis for an arrest and the pre-charge detention of a suspect under

[35] Although it is difficult to comprehensively define 'socio-legal' approach to legal studies, Philip Thomas summed it up as the understanding of law as a "component part of a wider social and political structure inextricably related to in in an infinite variety of ways, which can only be understood if studied in that context."
Philip Harris , 'Curriculum Development in Legal studies' (1986) 20 Law Teacher 112

[36] According to the Socio-legal Studies Association (SLSA), while some studies within the socio-legal school focuses on the place of the law in relation to other social institution, others seek to understand legal decision making by individuals or groups. Some other studies seeks to describe and explain legal system and identify patterns of behaviour, while others focus on the impact of the law or reforms and the criminal justice system and the roles played by legal actors. (This thesis focuses on the latter). Salter & Mason, Op Cit 2007 Pg 123
In addition to the diversity of topic that can be addressed using the socio-legal research, this approach can be used under four different contextual methods. These are; Empirical socio-legal research (that is, the gathering and analysis of facts about law in action, experiences of the practical impact of legal proceedings upon different groups in the society);Theoretical Socio-legal research (that is, the debates over the validity of different concepts in law and understanding the law in terms of competing theories of society more generally); Policy Oriented research (which questions how any existing area of legal regulation reflects changing government policies); and lastly, the Comparative socio-legal approach. These approaches can be used individually and, or in a combination with other methods.
Salter & Mason, Op Cit 2007 Pg 165

[37] Ibid Pg 119

[38] Ibid pg 119-120

the Nigerian Terrorism Act is 'reasonable suspicion to have committed or likely to commit an offence.' Whilst the black-letter approach defines and explains the content of this legal rule under the Act, the socio-legal approach focuses on the social nature, functions, and the implications of this rule. This is done by investigating and exposing the behaviour of legal actors like the Police/Military in the implementation of the law. This way we understand the operation and the practical impact of the law in action. For instance, In Nigeria, it is alleged that even where legal rules apply in principle, they are in practice often either selectively enforced or bypassed This approach to legal research involves the relationship between legal rules and the society they serve.[39] The socio-legal approach believes that the law does not exist in a vacuum, but directly incorporated into the social political and economic ethos of the surrounding society. Through this, the researcher records events, situations and actions of the people and the society and correlate this observation to the law as it is. For example, the offence of encouragement of terrorism will be looked at from the context and means through which the statements alleged to incite/encourage terrorism were made and how it was understood by members of the public.[40]

An important point to recognise is that, rules (law) do not exist independently of their use, social actors use them strategically to further their interests and their desires in a particular context of interaction.[41]The ideas behind the socio-legal theory of law are to keep a close eye on what legal actors and non-actors are doing relative to law, and to discover and pay attention to the ideas that informs their actions. Tamanaha argues that it is these ideas, beliefs, and actions that give rise to law, determine the uses to which the law is put, and constitute the reactions and consequences of law.[42]This standpoint signifies that the law must be viewed both as intervening in the complex of their activities and as itself a social process. The question then is how will a researcher identify those social practices which involve 'law' as opposed to something? The writer is of the view that there is no clear cut answer to this question. Nevertheless, spending some time in a society gives an individual the chance to get ideas about the operation of the law in that society. As Nelken recognises, living in a country allows you

[39] Ibid pg 138 These actors include Judges, Magistrate, prison officials and law enforcement agencies
[40] The outcome of this approach to legal research reveals a theoretical empiricism which is from a display of policy-oriented approaches covering huge range of situation. According to Lewin, the Socio-legal methodology is often referred to as 'action research method' because the researcher is actively involved with the subject of study. Lewin Kurt, Socio-legal, in (ed) TR.g Cummings and C.G Worley, *Organisation development and change* (Ohio, 1997) Pg 113
[41] Ibid pg 163
[42] Ibid Pg 65-66

to see whether you have the grasp of the way the culture works through the experience of trying to work with the rules and through making group affiliations, and at the same time a person can witness social change at first hand.[43] But while the Socio-legal methodology allows for the inclusion of diverse methods and perspectives, critics argue that this approach could sometimes be seen as compilations of observation and information with no direct value.'[44] Another criticism of the socio-legal approach is that it takes legal research outside the legal 'realm' and supplements or replaces it with a different type of research drawn largely from the social sciences. Also, this approach appears to pull ideas from different directions thereby creating conflicting results and making its reforms intellectually weak. In the course of pulling ideas from different sources, distortions could be introduced into the analysis and the purpose of law could be substituted for the researcher's own-or someone else's-view.[45]

4.3 **Comparative Methodology; Rationale, Strength and Limitations**

Since the principal aim of this study is to compare the Nigerian Terrorism (Prevention) Act 2011 (as amended) with the UK's Terrorism Act 2000, the writer will also adopt the Comparative methodology. The comparative approach provides a valuable framework through which conflicts and differences between legal concepts and particular provision can be explained and common ground solutions identified. Comparative research introduces legal concepts, styles, ideas, and categorisations that are previously unknown thereby opening possibilities in the very notion of law.[46] Lessons from a comparative legal research can be helpful in understanding the workings of a foreign legal system and at the same time helps to understand our own laws and culture better.[47] Likewise, comparing a law with a similar legislation in another jurisdiction makes us question and re-examine core principles of constitutional order and human rights values and through this ideas, rules, norms, principles are revealed that could improve the status quo. This is in turn may lead us to question our presuppositions about justice, fairness, rule of law, and the way in which the law is created in our legal culture. As a result of globalisation, we are increasingly affected by what is done elsewhere and increasingly aware of developments in other places. The comparative

[43] David Nelken, 'Doing Research into Comparative Criminal Justice,' in Ed, Brian Tamanaha, *Realistic Socio-legal Theory.* (Oxford Clarendon Press 1997) Pg 257
[44] Brian Tamanaha, *Realistic Socio-legal Theory.* (Oxford Clarendon Press 1997) Pg 15
[45] C. E Reasons and R.M Rich, *The sociology of law: A conflict perspective* (Butterworth, 1978) pg 28.
[46] David Price, *Legal and Ethical Issues of Organ Transplantation* (Cambridge University Press, 2000) Pg 8
[47] Edward Eberle, the Method and Role of Comparative Law (The Washington University Global Studies Review, Vol 8, 2009) Pg 451

methodology allows borrowing of ideas and concepts from other jurisdictions and disciplines and attempts to develop new paradigm.[48] Comparing and contrasting our statutes and judicial decisions with that of other legal systems can challenge our received categorisations and shed light on some of our laws as inaccurate or inconsistent. For example, insights derived from comparing Nigeria's TPA 2011 with UK's Terrorism Act could honed and then applied to Nigeria's legal patterns in order to improve her own terrorism legislation. Lessons derived from comparing our domestic law and legal cultures with foreign law and legal cultures is also helpful in enhancing one's ability to critique our domestic law.

However comparative legal research raises a series of interesting methodological issues which can affect the degree and nature of the comparative enterprise itself. As Tamanaha rightly pointed out, laws and practices in States have histories and can change with time.[49] Hence there must be a careful transposition of ideas with much attention paid to the cultural origins and social preconditions of the country that they are introduced. It is also important to bear in mind that applying lessons and insights derived from the comparative analysis of our own law with that of another State/legal system may not always produce the same result. It could also produce conclusions and results that are not realistic. This is because terrorist attacks are sudden and unpredictable. The Writer is mindful of this fact and will be careful in putting forward proposals and recommendations that are common grounds solutions to both Nigeria and UK, especially those that can be applied to Nigeria's domestic legal patterns.

4.4 **Implication of linking the black-letter and socio-legal approach**

The implication of linking the black-letter and the socio-legal methodologies are that the research could produce a biased conclusion. While the black-letter methodology views conclusions and recommendations outside its scope as a compilation of opinions, the socio-legal on its part aims to expose the failings of the law and operation of the legal system. According to Eser, the first step in a comparative research is to define the problem which is to be investigated in view of different legal orders.[50] This is because legal norms need to be

[48] Reza Benakar, Max Travers, *Law Sociology and Method: Theory and Methods in Socio-legal Research*. (Hart Publishing, 2005) Pg 10-11

[49] Brian Tamanaha, *A General Jurisprudence of Law And Society* (Oxford Uni Press, 2001) Pg 165

[50] Albin Eser, The Importance of Comparative Legal Research for the Development of Criminal Sciences (Sonderdrucke aus der Albert-Ludwigs-Universität Freiburg 1997) Pg 510 http://www.freidok.uni-freiburg.de/volltexte/3759/pdf/Eser_The_importance_of_comparative_legal_research.pdf accessed 20th July, 2015

correctly understood as they do not draw their meaning from themselves but from a social problem to be regulated by each case.[51]

Furthermore, because the law keeps changing through amendments, the black-letter approach continues to produce expositions on new/different aspects of legal doctrine.[52] This requires the researcher to exclude all references to historical, political, social, and all cultural factors as forces that shapes the operation of the law as a social phenomenon. This is the direct opposite of the socio-legal approach, which analysis has the potential of changing the status quo. It is not enough to simply compare the words on the pages. The law seats within a culture, hence there is a need to look at the structure at which a law operates within the society to understand what it is and how it functions[53] and more importantly to have a more realistic look at the legal system that is investigated.[54]

Adopting the black-letter and the socio-legal methodologies makes the research interesting. This is because once the writer has revealed the legal meaning and rules as contained in the Terrorism Act of both States, then it becomes possible to systematically assess these interpretations to what obtain in real practice.[55] The black-letter and the socio-legal approach have distinct ideologies/normative agendas which leads to specific value judgement for the research, bearing in mind that the Terrorism Act 2011 is made for a particular purpose and therefore needs to be critically assessed not only in terms of its formalistic sense but also in the

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[51] Consequently, to satisfy the requirement of a comparative research one must first of all refer back to the social assumption and social integration in the use of a legal norm in a particular legal system instead of bothering whether a comparable term exist in another legal system with similar concepts or by means of other rules. The real 'subject of comparison is not only the norm, but rather its presupposed real-life situation as a problem of social order to be regulated by law.' Ibid Pg 511
*Rodolfo Sacco reiterates this by arguing that the law cannot be applied until it is interpreted. According to him, there must be an interpretation between a primary source such as statute or precedent and the interpretation given to it.
Rodolfo Sacco, *Legal Format; A Dynamic Approach To Comparative Law* (1999) The American Journal of Comparative Law, Vol 39, No 2 1999, Pg 345

[52] Each time an amendment is made, the researcher is required to interpret the law on the basis that it forms a system of interrelated-rules. This can be very time-consuming. Salter and Mason, ' *Writing Law Dissertation*' (Pearson, 2007) pg 189

[53] Edward J. Eberle, *The Method And Role of Comparative Law* (2009) Global Studies Law Review, Vol 8, No 23, Pg 451

[54] Lirieka Meintjes-Van Derwalt, *Comparative Method; Comparing Legal Systems or Legal Culture* (Speculum Juris, 2006) Pg 58

[55] The synthesis of the doctrinal (Black-letter) approach and socio-legal is not only possible within a comparative legal research, but also gives birth to the 'contemporary interdisciplinary approach which is able to comprehensively coincide with contemporary trends in legal methodology'.
Vitalij Levičev, *the Synthesis of Comparative and Social Legal Research as the Essential Prerequisite to Reveal the Interaction of National Legal Systems*' Pg 168
http://www.tf.vu.lt/dokumentai/Admin/Doktorant%C5%B3_konferencija/Levicev.pdf accessed 20th July, 2015

light of the success or failure in realising the specific policy goal of the Acts/policy lessons to be learned.

4.4 **Issues behind comparative legal research in relation to the thesis**

As Walker rightly stated, comparative law exercises are fraught with dangers because of explicit and sometimes subtle differences in law and practice.[56] Even though Nigeria and UK operate the common law system, the response by the British government to terrorists attacks is clearly different from Nigeria's response to *Boko Haram* attacks. Furthermore, there is a big difference in national culture, local traditions, power structures, belief in state institution, and difference in the degree of civil society development. More importantly, there is a difference in the style of legal interpretation and the application of legal issues. There could also be a problem in the two statute's logical interrelationship. But despite all these differences, comparative research such as this is mainly interested in developing and testing theories that could be applicable beyond boundaries of a single society, irrespective of cultural, historical or political differences.[57] More than any time in history there is a demand especially in developing countries for cross-national comparisons of specific problems with the aim of reducing unexplained variance and finding patterns and relationship to solve to these problems.[58] Besides, the problem of 'comparability' of empirical units selected for comparison and analysis is eliminated in this research because the research compares and contrasts 'like for like.' For example, the definition of terrorism, arrest, pre-charge detention, and proscription of terror suspect under the Nigeria's TPA 2011 is compared and contrasted with the definition of terrorism, arrest, pre-charge-detention and proscription under the UK's T.A 2000. However, it is important to bear in mind that applying lessons and insights derived from the comparative analysis of our own law with that of another State/legal system may not always produce the same result. It could also produce conclusions and results that are not realistic. This is because terrorist attacks are sudden and unpredictable. The Writer is mindful of this fact and will be careful in putting forward proposals and recommendations that are common grounds solutions to both Nigeria and UK, especially those that can be applied to Nigeria's domestic legal patterns.

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[56] C. Walker, Op cit 2011 Pg 4

[57] Else Oyen, *Comparative Methodology Theory and Practice in International Social Research* (Page Publisher, 1990) Pg 1

[58] ibid

5 Sources and problems encountered

The research is entirely library based. It might have helped if the Writer was able to travel to Northern Nigeria to obtain first-hand accounts from the victims of *Boko Haram* attacks as well as victims of government forces brutality and abuse, however getting ethical approval for this would be impossible. This is because of the grave risk involved in going to Northern Nigeria for field assessment. In lieu of this, the writer relied on primary and secondary sources of law such as legislations/statutes, textbooks, journal articles, online sources/materials from West Law and Lexis Nexis, case law/law reports, academic papers, reports, news reports and newspapers publications.

Access to information, reports, commentaries, statistics, and law reports relating to the United Kingdom was achieved with ease, unfortunately there are few textbooks, reports, legal commentaries available on terrorism and law/counterterrorism in Nigeria (especially those that analyses the TPA 2011). Information and data were gathered from multiple sources throughout the course of writing this thesis. As a result there would be good reasons to be sceptical of some of the sources used especially on Nigeria because of the difficulty in ascertaining their authenticity and credibility. To address this, the writer consciously used reports and journals from internationally recognised human rights organisations such as Amnesty International Reports, Human Rights Watch report, and other international online journals that could be verified (including the date published and date accessed).

Other difficulties encountered in the course of this research is the non-availability of a record of the number of suspects arrested or detained, and even on court cases on terrorism in Nigeria. This is because there has been no controlled study on counter-terrorism by the Nigerian government, or a national information gathering system, or a national counterterrorism centre. Nevertheless, this has not in any way affected the over-all results, findings, or recommendations of the research.

6 Outline of the thesis

Chapter two of the thesis positions the thesis within the existing literature in the field. This is done by identifying academic writings on the legal measures adopted under the Nigerian and the U.K Terrorism Acts, their strengths, achievements, limitations, criticisms and inadequacies whilst also identifying areas that require further explanations. Other major theoretical academic arguments and counter-arguments on the topic will also be discussed. This review will also

shed some light on some of the questions put forward by this thesis and establish the rationale for doing so. In so doing the thesis's original contribution to knowledge will be established.

Chapters 3 and 4 focuses on the "black-letter" analysis of the key provisions under the Nigerian TPA 2011 (as amended) and the UK Terrorism Act 2000. These critical analysis focuses on the legal meaning of the definition of terrorism, arrest, detention, proscription, and encouragement of terrorism under the Acts. The emphasis here is on the wordings, legal principles, legal precedents, and technical terms used under these provisions. Several questions and inadequacies under the Acts will be raised in the course of the analysis. This analysis is limited in approach and will not assist in exposing discrepancies between law in books and law in action. As a result, a further socio-legal assessment of these provisions will be required in later chapters of the research

Chapter 5 briefly highlight some terrorist atrocities in Nigeria and the UK as well as each states responses to address them. More importantly, this chapter compares and contrasts the Nigerian TPA 2011 (as amended) and the UK TA 2000. The aim of this comparative analysis is to identify the similarities, differences, as well as strengths and weaknesses of the provisions of the Acts of both States. This comparative discussion takes into account the judicial interpretations/legal precedents as well as reasoning, deductions, translations, and the legal implications from these precedents. This chapter enables us to understand the variances in the Terrorism Acts of both states, from which Nigeria can learn to improve her law.

Chapters 6 and 7 assesses how the Nigerian TPA 2011 (as amended) and the UK TA 2000 are used in practice. These chapters exposes the discrepancies between "law in books" and how the laws are applied in practice. The chapter will explain how the provisions under the Act are interpreted and applied in practice and their effects/impacts, especially on human rights in the country.

Chapter 8 compares and contrasts the practical application and usage of key provisions under the Terrorism Acts of Nigeria and the UK, as well as their effects and impacts on human rights. This chapter juxtaposes the way and manner which the five key provisions under review are applied in practice with the aim of identifying lessons that Nigeria can learn from the UK, vice versa.

Chapter 9 undertakes a further assessment of Nigeria's TPA 2011 (as amended) by reference to its domestic, regional, and international constitutional obligations. This chapter will uncover

those legal measures adopted under the Act that that are not consistent with provisions of the Nigerian Constitutions 1999, the African Charter, and the ICCPR. The chapter will also set the tone for legal reforms that will be proposed by the writer.

Similarly chapter 10 pursues an assessment of the U.K's Terrorism Act 2000 by reference to its domestic, regional, and international constitutional obligations. In this chapter, an assessment of the Act will be done by reference to the Human Rights Act 1998, the ECHR, and the ICCPR will be done.

Chapter 11 focuses on the lessons that Nigeria can learn from the UK's experience in countering terrorism and vice versa. This chapter will be used to present proposals and recommendations for law and policy reforms in Nigeria and UK based on lessons learnt from the comparative critical analysis and socio-legal assessment of the Nigerian TPA 2011 and UK TA 2000.

Chapter 12 is the final and conclusive chapter. This chapter highlights and brings together salient issues identified throughout the study.

CHAPTER 2

LITERATURE REVIEW

1. Introduction

Before reviewing the literature on Nigeria and United Kingdom's legal responses to terrorism, it is important to note that "terrorism" cuts across different academic fields. As a result, it might be impossible to capture the wide range of discussions on the topic under a single study. Equally, there are probably hundreds of definitions of terrorism spanning across different academic fields, hence the writer will not attempt to add to this list by trying to define the term.

Since 9/11, States have taken various measures domestically and internationally to counter-terrorism. These measures inevitably have an impact not only on civil liberties and human rights but also breach the State's domestic and international human right laws.[59] States are then faced with the problem of protecting national security on the one hand, and upholding the fundamental human rights of the citizens on the other hand.

While countries took measures to tackle terrorism in the aftermath of the 9/11, Nigeria did not feel the need to enact a comprehensive anti-terrorism legislation.[60] However, a series of serious terrorist attacks by '*Boko Haram*' made the enactment of a comprehensive anti-terrorism statute in Nigeria a matter of necessity rather than choice.[61] Since the enactment of the Terrorism (Prevention) Act in 2011, there have been arguments and counter-arguments about its usefulness and coherence in addressing terrorism in the country. Some of this arguments will be discussed later on in this chapter. This has become one of the most significant current discussions amongst human rights proponents in Nigeria. This disagreement by scholars/academics led to the research question: is the Nigerian TPA 2011 a credible and internally coherent response to terrorism in the country that reflects lessons learned in drafting such legislation elsewhere?

Being a Nigerian, the writer's quest for answers to the above was borne out of genuine concern, especially as *Boko Haram* attacks have become more coordinated and extensive. Over the past eight years (2009-2017), media reports on terrorism related atrocities by *Boko Haram* on one

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[59] Steve Forster, *Human Rights and Civil Liberties* (Longman Pearson 3rd Edition, 2011) Pg 738

[60] Ebenezer Okpokpo, 'The Challenges Facing Nigeria's Foreign Policy in the Next Millennium' (1999) African Studies Quarterly Pg 13

[61] Isaac Terwase Sampson, Freedom C. Onuoha, 'Forcing the Horse to Drink or Making it Realise its Thirst? Understanding the Enactment of the Anti-Terrorism Legislation' *[2011]* Perspective on Terrorism Vol 5, Issues 3-4 Pg 38 http://terrorismanalysts.com/pt/index.php/pot/article/view/154/305%20a accessed 12th July 2014

hand and extra-judicial killings by government security forces on the other hand have been widespread in Nigeria. '*Boko Haram'* and its splinter group, '*Ansaru*', have engaged in indiscriminate killings of innocent civilians and the Police, kidnappings, bombings, suicide assaults and the destruction of properties worth billions of Naira.[62] Government forces have also been accused of series of human rights violations. These events have led to the intimidation of the general population and created an atmosphere of fear and general insecurity in Northern Nigeria. Consequently it has become imperative to subject Nigeria's TPA 2011 to an appraisal in terms of how its provisions are used in practice and to challenge the constitutionality of some of its provisions on both human rights and other legal grounds.

The methods currently adopted by the Nigerian Security forces in fighting terrorism have attracted several condemnations both domestically and internationally. It is therefore important to educate the Nigerian government on how terrorist suspects should be treated if domestic, regional and international obligations are to be respected.

Suffice it to say at this point that while there are huge volumes of literature that addresses U.K's anti-terrorism legislation, there are few literature that critically analyses or assesses the anti-terrorism legislation in Nigeria. The majority of the literature on counter-terrorism in Nigeria focuses more on the terror incidents and atrocities and the inadequate responses from the government.

Given that the study focuses on two states, for the sake of clarity this chapter will be divided into three parts. The first part will review the literature on Nigeria's TPA 2011, while the second part will review the literature on UK's TA 2000. The latter part of this chapter will be used to establish the significance of the research and to illustrate the original contribution of the research to knowledge.

2. NIGERIA

In 2001, the United Nations Security Council passed Resolution 1373, which obliged member states to make terrorism a serious crime under their domestic legislation. For about 10 years Nigeria did not make any concrete effort to give effect to that Resolution. Nigeria's National

[62] Trapped in the Cycle of Violence; Amnesty International Report on Nigeria 2012. Pg 9 http://www.amnesty.ca/sites/default/files/nigeriareport1november12.pdf accessed 1st August, 2013.
*Human Right Watch Reports shows that from 2009 to October 2012 Boko Haram has killed more than 1500 people in Nigeria. Human Right Watch Report October 2012 Pg 5
http://www.hrw.org/reports/2012/10/11/spiraling-violence-0 accessed 5th May 2013

Assembly merely squeezed in provisions relating to terrorism in the Economic & Financial Crimes Commission (EFCC) Establishment Act 2004.[63] As a result of this, the EFCC Act was criticised for being incomprehensive and inadequate to address the ramifications of terrorism contemplated by UNSCR 1373.[64]

The concern over Nigeria's vulnerability to terrorism assumed a worrisome international dimension in December 2009 when one of its citizens, Abdulmutallab, who had been trained in Yemen, attempted to detonate an explosive device hidden in his underwear while on board Northwest Airlines Flight 253 (carrying 279 passengers and 11 crew members) en route to Detroit's Metropolitan Airport in the US.[65] This resulted in the blacklisting of Nigeria by classifying it as a 'Country of Interest' on the US Terror Watch list.[66] As a result of pressure from the international community, especially the United States, combined with an increase in terrorist activities in the country, the Nigerian government enacted the Terrorism (Prevention) Act 2011. It can be argued that in a bid to respond quickly and decisively to terrorist attacks, the Nigerian government enacted an 'ill considered' or 'panic legislation' resulting in a law that is ineffective, merely symbolic, or poses a potential threat to human rights. Critics/ scholars in Nigeria are of the view that that the 2011 Act was "hurriedly" enacted by the National Assembly without due considerations to its effects on human rights.

As expected, the 2011 Act provided the legal framework for the prohibition, prevention, penalty and combating acts of terrorism in the country. However, since the enactment of the Act in 2011 and its amendment in 2013, there have been arguments both in favour and against the Act.

For instance, arguing in support of the TPA 2011, Professor Oyebode described it as a veritable watershed in law-making in Nigeria:

> "*Terrorism is one such reality of our time and Nigeria seems to be rising to the threat. The anti-terrorism legislation recently enacted is very much a step in the right direction. Despite its somewhat convoluted drafting, its stands a good chance of bringing terrorists to its heel and ensure that the people live in peace and freedom, without let or hindrance.*"[67]

[63] Isaac Terwase Sampson, Freedom C. Onuoha, 'Forcing the Horse to Drink or Making it Realise its Thirst'? Understanding the Enactment of Anti-Terrorism Legislation ' [2011] Perspective on Terrorism, Vol 5,Issues 3-4 Pg 38 http://terrorismanalysts.com/pt/index.php/pot/article/view/154/305 accessed 15th May 2013
[64] ibid
[65] Ibid Pg 39
[66] Ibid Pg 41
[67] Ibid Pg 12

On the other hand, Ekundayo questioned the soundness of the Act in dealing with terrorism in the country. According to her, there are several inadequacies therein.[68] She argues that the Nigerian lawmakers failed to include in the Act provisions for the protection of the fundamental human rights of terrorist suspects and the fundamental principle of law that a person is innocent until declared guilty by a competent court of law.[69] Ekundayo also argued that there were inadequate provisions on the supervisory functions of the judiciary over the activities of law enforcement agencies in relation to investigation and prosecution of terrorists, as well as the exclusive power granted the Federal High Court to handle terrorism cases.[70]

While some of Ekundayo criticisms are legitimate, it is difficult to comprehend how a piece of legislation such as the Terrorism (Prevention) Act would cover both terrorism matters and provide for human rights protection at the same time. Perhaps Ekundayo is unaware that provisions relating to human rights in Nigeria are already provided for under the Constitution 1999. The question should have been whether the 2011 Act is consistent with the provisions of the Constitution.

Other literature have emerged that criticises the Act. Saheed referred to the Act as a "41-dose panacea which has yielded no meaningful effect."[71] According to him, Nigeria as a country is devoid of ideal democracy, rule of law, social justice, and good governance, thus making the Act ineffective.[72] Saheed also condemned s.30 of the TPA 2011 which gives the Attorney General of the Federation power to institute criminal proceedings or to delegate this power to any agency to institute criminal proceeding against any person under the Act.[73]

Although Saheed made a valid point with regards to rule of law not being respected in Nigeria, the main flaw with his criticism is that it sees democracy and social justice as key elements that must exist for a "coherent" anti-legislation to be in place. The question is, what about countries like Saudi Arabia, China, UAE, and Bhutan that operate a different system of government other than democracy? Does that suggest their anti-terror law is not coherent? Saheed's assessment of s.30 of the Act is also questionable. The powers given to the A.G under s.30 to institute

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[68] Vera Ekundayo, 'Nigerian Terrorism Act: A right step forward', Punch Newspaper January 24, 2012 http://www.punchng.com/opinion/nigerian-terrorism-act-a-right-step-forward/ accessed 9TH August 2013

[69] Ibid

[70] ibid

[71] Saheed M. Toyin, '[Opinion] Is The Terrorism Act A Toothless Bulldog? (Information Nigeria, 28th Dec 2012) http://www.informationng.com/2012/12/is-the-terrorism-act-a-toothless-bulldog-part-i.html accessed 9th August 2013

[72] Ibid

[73] ibid

criminal proceedings against any person under the Act or delegate such power is not misplaced or out of order. This can be likened to the function of the Crown Prosecution Service in the U.K. The goal is to eliminate frivolous prosecutions in courts.

Many Nigerians have accused the government of being inconsistent and ineffectual in its response to terrorism. In Ogbezor's view, rather than perhaps strengthen its anti-terrorism laws, the Nigerian government has focused more on the Joint Military Task Force, which unnecessarily infringes human freedoms.[74] Similarly, Omede argues that "military-oriented" counter-terrorism strategy will not bring an end to terrorism in Nigeria. Rather it has only intensified the violence and erosion of human rights values.[75] Sabella in his paper stressed that counter-terrorism is a complex and multifaceted subject that encompasses a host of different strategies for dealing with violent extremism.[76] To this end, he advised that Nigeria as a nation needs to refashion its national security policies and objectives to meet the demands of modern day security challenges.[77] One way of doing this is perhaps to enact further legislative measures in preventing terrorism.[78]

While the writer agrees with Sabella that Nigeria needs to re-evaluate its counter-terrorism polices, Ogbezor's view about strengthening the Terrorism Act seem to suggest that the solution to terrorism in Nigeria lies within the law. This is a "lego-centric" fallacy. There is nothing that suggests that the strengthening of the law will automatically bring an end to terrorism in the Country. The most the law can do is to provide the legal frameworks for dealing with terrorism in the country.

With regards to Omede's criticism on the use of the military, it is difficult to fault the deployment of soldiers to tackle *Boko Haram* when people are been attacked on a daily basis.

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[74] Ernest Ogbezor, An Assessment of Preparedness and Response to Terrorism In Northern Nigeria (Ford Foundation International Fellowship Progress, 2011) Pg 2

[75] A.J Omede, Nigeria; Analysing the Security Challenges of the Goodluck Jonathan Administration.(Canadian Research and Development Centre of Science & Culture, Vol 7, No 5, 2011) pg 98

[76] Quirine Eijkman & Bart Schuurman, *'Preventing Counter-terrorism and Non-discrimination in the European Union; A call for systematic Evaluation*' (Int. Centre for Counter-terrorism-The Hague, June 2011) Pg 2

[77] Sabella O Abidde, 'Redefining Nigeria's National Security' *Nigeria Village Square*, April 2008 Pg 1-2

[78] Arguing from a socio-legal perspective, Unuegbu observed that the scheme for prosecuting offenders under the current anti-terror law in Nigeria is flawed and needs serious overhaul. At the moment, prosecutions under the law take place only at the federal high courts, which are notoriously tardy and already overburdened with huge number of cases thereby making the prosecution of terrorist suspect slow
Carl Unegbu, 'Terrorism Undeterred: Nigeria's Boko Haram Failure' (April 2012) World Policy Journal http://www.worldpolicy.org/blog/2012/04/17/terrorism-undeterred-nigerias-boko-haram-failure accessed 6th Feb, 2014

Counter-terrorism in real practice demands some executive actions of which sending out soldiers is chief amongst this. All over the world, countries have responded directly to terrorism by sending troops to protect lives and properties. However, what is important is for the soldiers to abide by their rules of engagement and respect human rights of individuals and suspected terrorists.

Previous analyses and assessments of the Nigerian TPA 2011 (as amendment) has focused mainly on the government's inadequate response to terrorist attacks by *Boko Haram* and the general disregard for human rights in Nigeria. As a result, the five key provisions of the TPA 2011 under review in this study have not been thoroughly analysed or assessed in Nigeria. This is a sharp contrast to previous analysis and assessment under the UK's TA 2000 that was found to be more extensive.

Acquiring a universally acceptable definition of terrorism in international law remains a problem. Interestingly, most definition of terrorism including that of Nigeria extends outside the country.[79] As argued by Eikman and Schuueman, this might be due to the international character of contemporary terrorism.[80] Nonetheless, the importance of the definition of terrorism in a clear and unequivocal term cannot be overemphasised. This is because the definition provided by the Act shows the public actions that constitutes terrorism. Inevitably, how we define terrorism influences how we respond to it. Unfortunately, little academic discourse on the definition of terrorism is available in Nigeria. Legal commentators like Prof. Oyebode and Adeshina (SAN) have attempted to raise some discrepancies under the definition of terrorism in Nigeria. Oyebode argues that in defining terrorism, the TPA 2011 captures a "dragnet of sundry acts" as terrorism offences.[81] However this appraisal cannot be considered as a thorough or detailed analysis or assessment of the definition under the Act (a detailed analysis of this comes up in the next chapter). The writer makes clear that the objective of this thesis is not to analyse and assess the definition with a view to provide a better or more comprehensive definition, but rather to explore whether the definition under the 2011 Act is clear and unambiguous. In order words, does the TPA 2011 adequately define who a terrorist is in Nigeria? And if no, what are the effects of a vague and over- broad definition of terrorism? As Kalliopi, U.N Special Representative on Human Rights puts it:

"vague language has paved the way for the criminalisation of certain types of human

[79] Eikman and Schuueman, 2011,op. cit. pg 4
[80] ibid
[81] Oyebode, 'Legal Responses to the Boko Haram Challenge' Pg 6

right activity. In some States, this has resulted in the use of security legislation to prosecute defenders who criticise the government or who have taken peaceful actions in favour of democratisation, minority rights and self-determination."[82]

Scholars and human rights advocates have also raised concerns over the power of arrest under the TPA 2011 (as amended). The JTF far from conducting intelligence-driven operations that will lead to the arrest of the terrorists, have instead been accused of arresting innocent civilians and committing other human rights violation.[83] According to Hussein, the JTF often cordon off areas and carry out house-to-house searches for *Boko Haram* members and at times shooting innocent young men in their homes. Hussein makes reference to the 9th of July 2011 incident at the Kaleri Ngomari Area of Maiduguri where 25 innocent Nigerians were shot dead by the JTF, women and children beaten, homes burnt and many other reported missing.[84] According to him, the method adopted by the security forces was "counter-productive."[85] Amnesty International (A.I) and Human Right Watch (HRW) also report several similar incidents. Amnesty International in its 2012, 2013,[86] and 2014/15[87] annual reports on Nigeria portrays a gloomy picture of events in the country. Nigeria's human rights situation deteriorated within this period with *Boko Haram* and the Special Military Task Force (JTF) responsible for hundreds of unlawful killings, arbitrary arrests and unlawful detentions, extortion and intimidation.[88] People live in a climate of fear and insecurity, vulnerable to attacks from *Boko Haram* and on the other hand facing human rights violations at the hands of security forces.[89] In a more detailed study on the activities of the Nigerian Military against *Boko Haram*, A.I stated that the Military have extra-judicially executed more than 1,200 Nigerians and have arbitrarily arrested at least 20,000 innocent civilians, mostly young men.[90]This number of arrests increased significantly between 2012 and 2013 following the declaration of a state of emergency in Adamawa, Borno and Yobe states.[91] Justice Initiative argues that the arrest and

[82] Kalliopi Kanfo, UN Doc A/58/380 18TH September 2003. S.11
[83] H. Solomon, 'Counter-Terrorism in Nigeria Responding to Boko Haram' op cit 2012 Pg 6-11
[84] ibid
[85] Ibid
[86] Amnesty International; 'Annual Report 2012, Nigeria' http://www.amnesty.org/en/region/nigeria/report-2012 accessed 5th August 2013
[87] Amnesty International :'Annual Report 2014/15, Nigeria' https://www.amnesty.org/en/countries/africa/nigeria/report-nigeria/ accessed 25th July, 2015
**Amnesty particularly noted the justice system which remained ineffective with two thirds of all prison inmates still awaiting trial.
[89] ibid
[90] Amnesty International, 'Nigeria; Stars on their Shoulder's, Bloods on their hands, war crimes committed by the Nigerian Military' (2 June, 2015) Index: AFR 44/1657/2015 Pg 4 https://www.amnesty.org/en/documents/afr44/1657/2015/en/ accessed 26th August 2015
[91] Ibid Pg 5

detention practices in Nigeria are made worse with the absence of institutional control and patterns of abuse.[92] According to the group, 'the Nigerian Police and other security agencies enjoy a stunning degree of impunity.'[93]The government fails to exercise due diligence in investigating or ensuring accountability for police abuse. Furthermore the Police do not have a transparent or effective mechanism of internal control. For instance, the group cited the case of the head of the Special Anti-Robbery Squad (SARS) of Enugu State Police Command who boasted in December 2008 to a researcher from the group that he ordered the extrajudicial executions of only those persons whom he knew to be guilty.[94] Ekundayo alleges that the TPA 2011 gives sweeping powers to law enforcement agencies to arrest on reasonable suspicion.[95] In her words, she says "the act gives the Police powers to more or less do as they please in the course of enforcing the provisions of the Act."[96] Similarly, Brandler asserts that enormous powers are given to the Police under the TPA 2011 instead of the Court which makes it look like 'an extension of State powers'.[97] She argues further that there is no detailed information available from the Nigerian government on the number of *Boko Haram* suspects that are arrested, detained and put on trial. Through personal research, she reveals that the number of suspects arrested and brought before a Court have "been few and far between."[98] Apart from few high profile cases, most *Boko Haram* suspects are not charged.[99] Yet, a lot of arrests are made almost on a daily basis.

The Nigerian government and the Military have denied these allegations of human rights abuses.[100] The government argued that the arrest and pre-charge detention of terrorist suspects are one of the preventive counter-terrorism measures available to state to thwart terror attacks. There is no denying the fact that the government responses such as the deployment of soldiers to restore peace and security are genuine reactions to threats posed by *Boko Haram*, nevertheless the manner which they are carried-out could arguably be considered

[92] Justice Initiative, Criminal Force Torture, Abuse, and Extrajudicial Killings by the Nigeria Police Force (New York, 2010) http://www.opensocietyfoundations.org/sites/default/files/criminal-force-20100519.pdf accessed 20th Sept, 2013
[93] Ibid Pg 22
[94] ibid
[95] Ekundayo, 2012, Op. cit
[96] ibid
[97] Jessica Brandler, '*Feeding the Hand that Bites; Lessons from Counter-terrorism Dynamics In Nigeria'* (CEU Et Collection, 2012) Pg 25
[98] Ibid 30
[99] ibid
[100] Soni Daniel, 'Nigeria Terrorism: Army denies allegations of human rights abuse' *Vanguard Newspaper (*3 July, 2014) http://allafrica.com/stories/201407030634.html accessed 23th July 2015

disproportionate and unnecessary. Following on from this, it becomes important to analyse and assess the 'power of arrest' under the Act to establish whether it unnecessarily infringes human rights provisions in Nigeria, especially in practice.

The pre-charge detention period of terror suspects in Nigeria is another controversial aspect of the TPA 2011 (as amended) that has generated condemnation from lawyers, scholars, and human rights advocates. These condemnations are based upon the prolonged pre-charge period provided by the Act. This disapproval is further heightened by the slow judicial system in Nigeria. Amnesty International (AI) observed that the justice system in Nigeria remains ineffective with two thirds of all prison inmates still awaiting trial.[101] The use of torture to extract information from *Boko Haram* detainees also remains widespread.[102] Human Right Watch also alleged that *Boko Haram* suspects have been held for months and even years without charge or trial. Some of the detainees have often been denied the right to communicate with their family and lawyers.[103] A.I cited the example of one *Sa'adatu Umar* who was arrested in Bauchi and detained with her three children, all aged below six. She was not charged with any crime and was unlawfully detained for several months, reportedly because her husband was a suspected *Boko Haram* member.[104] This method of arrest and detention raises the questions about the right to liberty and security, freedom from arbitrary detention and the right to fair trial. Questions which this research will attempt to answer are; does the Act permit the detention of a terrorist suspect for that long a period without charge? Does the Act permit the arrest and detention of family members of suspected terrorist? What is the legitimacy of the 180days detention period under the TPA 2011 with reference to Nigeria's domestic, regional and international law? And, what remedies are available for detained terror suspects?

The internet and social media platforms provides different means through which people are being radicalised or encouraged into committing terrorist acts.[105] The former CIA Director, Porter Gross, warns that 'Africa is a rich sea bed for terrorist recruitment.' He specifically

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[101] ibid
[102] ibid
[103] Human Right Watch, Spiraling Violence; Boko Haram Attacks and Security Force Abuses in Nigeria' Oct 2012 Pg 71 http://www.hrw.org/sites/default/files/reports/nigeria1012webwcover.pdf accessed 20th August, 2013
[104] Amnesty Report 2015 op. cit
**Luckily for her, a Court on Oct 17 ordered the police to release her and her children and to pay 1 million naira damages.
[105] 'Concepts of Terrorism; Analysis of the rise, decline, trends and risk' (Transnational Terrorism, Security and Rule of Law, December, 2008) Pg 93
http://www.transnationalterrorism.eu/tekst/publications/WP3%20Del%205.pdf Accessed 20th Sept, 2013

singled out Nigeria with about 65 Million Muslims as a nation of concern.[106] In a similar development, a United Nations Report reveals that West Africa is becoming more popular as an intermediate destination in the trans-shipment of drugs from South America to Europe and elsewhere, and that terrorist group are using funds raised in this process to encourage terrorism.[107] Analysts also argue that one quarter of the 400 foreign fighters captured in Iraq by America are from sub-Sahara Africa notably from Nigeria, Niger and Mali.[108] To address this concern, the Nigerian government made encouragement of terrorism, especially on the internet, an offence under the Terrorism (Prevention) (Amendment) Act 2013. However, Scholars like Soji have argued that fundamental liberties such as freedom of speech and the press, or the right to privacy may be infringed upon under this provision.[109] Similarly, Onuoha and Terwase claim that the provision of encouragement of terrorism under the Act could be exploited by those in power to persecute opponents, dissents, critics, and activists.[110] For instance, speaking out publicly in support of *Sharia law* could also be interpreted by the security agencies to mean being sympathetic to the objectives of *Boko Haram* and may result in arrest and detention. They argued further that Nigeria's political and legal history, especially the effect of prolonged years of military rule which was characterised by repression and clamp down on the press could be factor why there are concerns about the offence of encouragement of terrorism.[111] While Onuoha and Terwase's concerns about the provision of the Act on encouragement are understandable, the writer disagrees with their argument that Nigeria's prolonged military rule could have an impact on the implementation of the Act in practice. This argument is flawed on the ground that Nigeria has had a democratic government since 1999 without a coup. In fact, the history of Nigeria shows that the Country has not always been under Military dictatorship.[112] Previous military rule in Nigeria cannot be an excuse for the Terrorism Act's non-compliance with Nigeria's domestic, regional, and international human rights

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[106] Soji AKomolafe, 'U.S. says Africa turmoil hurts war on terrorism' *Reuters* Feb 16, 2005 http://www.ephrem.org/dehai_news_archive/2005/feb05/0251.html accessed 10th August 2013
* Also supporting this, David Cook argues that the pattern of Boko Haram's attack and threat focus more and more on U.S interest in the region (an example of this is the Bombing of the U.N building in Abuja).
'Boko Haram; A prognosis' (James A. Baker III, Institute For Public Policy, Rice University, Dec 16, 2011) http://bakerinstitute.org/publications/REL-pub-CookBokoHaram-121611.pdf accessed 10th August 2013
[107] United Nations, "UN official warns terrorism and organized crime increasingly linked in Africa", 30 July 2010. http://www.un.org/apps/news/story.asp?NewsID=35497#.UhN-5NIU_y8 accessed 20th August 2013
[108] Soji komolafe, 'Nigeria, the United States and the War on Terrorism: the Stakes and the Stance.' In eds Edward V. Linden, *Focus on Terrorism* (Nova Publishers, 2007) Pg 199-201
[109] Ibid Pg 89-90
[110] ibid
[111] Onuoha , Terwase, 2011, op. cit.
[112] Nigeria had a civilian rule from 1960 to 1966 and from 1979 to 1983.

norms. Recent events in Nigeria where the Police and the Department for State Security have used the Act as reference to seize and destroy Newspaper publications on the activities of the Military against *Boko Haram*,[113] and the detention of two managers of the *Daily Trust Newspaper*,[114] justifies the concerns raised by scholars and human rights proponents. Consequently, it is has become important to subject Nigeria's provision on encouragement of terrorism under the Act to scrutiny to determine whether it is constitutionally justifiable and internally coherent in addressing the challenges posed by the internet and social media in encouraging terrorism. The following questions will be addressed: does the TPA 2011 cover statements that are likely to be understood by some or all members of the public as encouragement or inducement to them to commit terrorism? How does one infer that the public has been encouraged by a statement in Nigeria? What if the person who made the statements does not intend it to directly or indirectly encourage terrorism? What defence is available in the event of such under the Act? Assuming the Act fails to provide answers to these questions, how then does the State charge/prosecute a person who engages in encouragement of terrorism (directly or indirectly)? This research will attempt to provide answers to these questions.

The proscription of terrorist organisations informs the public both at home and abroad about organisations that are banned or outlawed in the country. It also diminishes the powers of terrorist organisations by denying them sponsorship, support or sanctuary.[115] It is therefore no surprise that *Boko Haram* and its splinter, *Ansaru*, have been proscribed both in the Nigeria, the U.S and the U.K under their various laws. Two main arguments were raised by the U.S for designating *Boko Haram* as a foreign terrorist organisation. The first is that it engages in terrorist activity as defined under the United States Code[116] and secondly, it threatens the peace of the U.S.[117] One might ask how does *Boko Haram* threaten the peace of the U.S? Nees explained that *Boko Haram* has explicitly threatened the U.S and its citizens with violence for

[113] Obidike Jerry, 'Outrage trails military clampdown on newspapers' *The Sun News Online* June 7, 2014 http://sunnewsonline.com/new/outrage-trails-military-clampdown-newspapers/ accessed 24 Dec, 2014

[114] Simibo Eniola, 'Army Quizzes Daily Trust Managers Over Unfavourable Report' *ThisDay Live* 22nd August 2014 http://www.thisdaylive.com/articles/army-quizzes-daily-trust-managers-over-unfavourable-report/187012/ accessed 24th Dec, 2014

[115] Don John Omale, *Terrorism and Counter Terrorism in Nigeria: Theoretical Paradigms and Lessons for Public Policy* (Canadian Social Science, Vol 9, No.3 2013) Pg 96-103 http://www.questia.com/library/1P3-3031838541/terrorism-and-counter-terrorism-in-nigeria-theoretical accessed 20th Sept 2013

[116] S. 2657 (d) [2004]

[117] April Nees, 'Boko Haram; A Textbook Cases for Designation as Terrorist Organisation and its Terroristic Threat to Int. Religious Freedom' (May 2013) Journal of Law & Religion, Rutgers School of law. Pg 449 http://lawandreligion.com/sites/lawandreligion.com/files/2013%20Vol.%2014%20Nees.pdf accessed 20th Sept 2013

aiding Nigeria in promoting religious freedom and promulgating the Terrorism (Prevention) Act 2011.[118]More directly, it was discovered through investigation that a member of *Boko Haram* was a Facebook friend to the famous Nigerian underwear Bomber, Umar Adulmuttallab who unsuccessfully attempted to blow up a plane in Detroit with 300 people on board. Nees argues that this singular act demonstrates that *Boko Haram* poses a threat to the U.S. Similarly, the UK Home Secretary in her defence of the proscription of *Boko Haram* and *Ansaru* under the Terrorism Act 2000 argued the groups were motivated by an anti-Nigerian government and anti-western agenda and is broadly aligned with Al-Qaeda. She argues further that the proscription is compatible with the European Convention of Human rights.

While the writer agrees that proscription of terrorist organisations is a key tool in diminishing the activities of terrorist groups, this thesis is interested in finding out whether the power to proscribe under the Act unnecessarily infringes the right to freedom of assembly and association in Nigeria? In other words, is proscription under the Act compatible with Nigeria's domestic, regional and international human rights obligations? If not, how can Nigeria strike a balance without infringing human rights? What safeguards/remedy are available under the Act to a group or organisation that it has been wrongly proscribed?

3. **UNITED KINGDOM**

United Kingdom is widely regarded as a global promoter of democracy, the rule of law, and human rights. This is evident in its strong political institutions and its adherence to the rule of law. Therefore certain behaviours and acts are expected of it especially with regards to upholding human rights values. However, with respect to counter-terrorism it is not certain whether its counter-terrorism legislation is fully consistent with its domestic and international human rights obligations.

The U.K has battled with home grown terrorism for decades and also faces terrorist threats from international terrorist organisations like Al-Qaeda.[119] As Brandon notes, the U.K has tremendous experience in dealing with the impact terrorism can have on a society.[120] The

[118] Ibid Pg 511

[119] An example of this was the July 5 2005 London Bombings by four members of Al-Qaeda in which 56 people were killed and around 700 people injured.
Available at -The Report of the Official Account of the Bombings in London on 7th of July 2005
http://www.official-documents.gov.uk/document/hc0506/hc10/1087/1087.pdf accessed 12th August, 2013

[120] Ben Brandon, 'Terrorism, Human Rights and the Rule of Law: 120 Years of the UK's Legal Response to Terrorism' [2004] Criminal Law Review, Pg 981

government developed the "Contest strategy" that pursues, prevents, prepares and protects the UK against terrorist attacks. The U.K has also enacted a series of anti-terrorism laws against terrorism. Legal measures adopted under the Terrorism Act 2000, for example, include the power to arrest based on reasonable suspicion and the pre-charge detention of terror suspects.

According to Walker, there is a long history of laws responding to terrorism which have been utilised in the United Kingdom.[121] Thus, U.K terrorism laws 'have been amongst the most extensively and fiercely debated of a devised in the past decade.' Most of the controversies that have arisen from debates over the UK terrorism laws involves the human rights they infringe or endanger.[122] As Saul pointed out, the problem of terrorism touches on many areas of international law. Thus, there are literature on the topic much of which is repetitive and focuses on national extradition law, national human rights and civil liberties.[123] The primary focus of this thesis is to determine whether the UK Terrorism Act unnecessarily infringes on human rights, both in theory and in practice.

The definition of terrorism remains problematic in international law. Levitt compared the search for a universally acceptable definition of terrorism as the ''search for the holy grail.''[124] This is because terrorism means different things to different people. It could mean a message of fear designed to intimidate opponents, or a message of inspiration for sympathisers, or a message aimed at aimed at converting non-committed bystanders.[125] Walker in an extensive study on the UK's Terrorism Act 2000 examined issues relating to definition of terrorism, arrest, detention, proscription, encouragement of terrorism. According to him, in any attempt to define terrorism, three key denominators must be present. This includes the purpose (which according to him in most cases are for political ends), the targets, and the method.[126] Walker notes that under the U.K definition of terrorism, wider scope is given to the word "violence." He goes on to identify some flaws in the definition of terrorism under the Terrorism Act 2000. According to him the inclusion of the word 'religious' in the definition of terrorism poses a problem as this could lead to personal disputes involving family disputes, clan disputes.[127]

[121] Clive Walker, *Clamping Dow on Terrorism in the United Kingdom* (J. Int Criminal Justice,1 Nov 2006) Pg 1137
[122] ibid
[123] Ben Saul, *Defining Terrorism In International Law* (Oxford University Press, 2010) Pg 5-6
[124] Geoffrey Levitt, 'Is Terrorism Worth Defining? [1986] 13 Ohio Northern University Law Review 97 pg 97
[125] Alex Schmid, 'Terrorism and Human Rights: A Perspective from the United Nations' (17 Terrorism and Political Violence, 2005) Pg 26
[126] Clive Walker, *Blackstone's Guide to the Anti-Terrorism Legislation* (3rd Edition, Oxford University Press, 2014) Pg 8-9
[127] Ibid Pg 9

Furthermore, Walker notes that the Act reflected 'racial cause'. This is basically to give re-assurance to minorities interests under the Act. He concludes that the Act is overbroad in its definition of terrorism and instead needs to focus on the key mischief of terrorism which is danger to political democracy.[128] Staniforth strongly agrees with Walker that the definition of terrorism under the TA 2000 was given a wider scope, for example, it covers acts which themselves are not violent an example of this is disrupting with computer system.[129] This view by Walker that the purpose of terrorism in most cases is for political ends is arguable. Some Authors have suggested that the motive behind terrorism could also be psychological[130] or "irrational" behaviour amongst other motives/ends.[131]It is important to make clear that the aim of this research is not to determine the causal theories behind terrorism but to analyse and assess key provisions of the UK Terrorism Act 2000. Saul disagrees with Walker's assertion that three denominators must be present in any attempt to define terrorism. According to him, there is no medium of law to distinguish between a privately motivated violence and a politically motivated violence.[132]Saul argued further that not all attacks, serious violence, hostage takings or bombings are motivated for political ends. Some are done for personal or pecuniary reasons, thus the UK TA's position on terrorism this way makes it overbroad. He argues further that proof of motive(s) behind the act is usually not required as an element of the offences.[133] Saul notes that under the Terrorism Act 2000, a mere intimidation of the population or compulsion of a government is not enough, there has to be a severe impact for terrorism to be implied.[134]

It has been suggested that for the law to properly and legally address terrorism it must be defined neutrally. This is because it does not matter what ideology, philosophy or religious ideal is being promoted or whether the act occurred during peace time or war time as long as there is violence, acts that cause death, serious damage to property, grave bodily harm, or for the purpose of coercing or intimidating some specific groups or the government or for a

[128] Ibid Pg 10
[129] Andrew Staniforth*, Blackstone's Counter-terrorism handbook* (Oxford Uni Press, 3rd Edition 2013) Pg 109
[130] Jeffery Ian Ross, *Structural Causes of Opposition Political Terrorism; Towards A Causal Mode* (1993) Journal of Peace Research Vol 30, No 3 Pg 317
[131] Richard English, *Terrorism; How to Respond; Why do People Resort to Terror*,(Oxford Uni Press, 2009) Pg 3
[132] Ben Saul, op cit 2010 Pg 30-38
[133] Ibid Pg 38
*Saul argues further that to increase certainty of the definition of terrorism, the element of what constitute ''serious violence'' could be qualified by enumerating prohibited violent acts or it could remain as an open-ended 'catch-all' category that would ensure that offenders do not evade liability by committing unanticipated offences. Ibid Pg 60
[134] ibid

perceived political, military or philosophical benefit without any justification or excuse then it is terrorism. This neutral position recommended by Blakesley shows that the definition of terrorism under the Terrorism Act 2000 is not neutral after all because there are some qualifications to it. For example, the Act uses qualifications such as 'serious damages to property', 'great bodily harm' for 'political or philosophical benefit.' It is against this background that this research will look at the definition of terrorism under the TA 2000 to determine whether it is indeed overbroad or imprecise, amongst other things?

The power of arrest under the TA 2000 has been described as the most controversial provision of the Terrorism Act 2000.[135] S. 41 (1) which gives Police the power to arrest a person whom he reasonably suspects to commit an offence without a warrant. Several concerns have been raised over the power of arrest under the Terrorism Act 2000. According to Beckman the power given to the Police under S. 41 of the Terrorism Act 2000 are broad and could lead to governmental abuses beyond the need to protect against imminent act of terrorism.[136] It is alleged that the Terrorism Act is being used to arrest some segment of the UK society such as Muslims and foreign nationals from certain countries which is against international non-discrimination standards.[137] This is however debateable. Proponents of the power of arrest have argued that since the Police are the gate keepers to the criminal justice system, mistakes made by them could sometimes be amplified but the concern by most critics is based on ensuring that the integrity and admissible of evidence by the police are based on credible facts.[138] Wilkinson asserts that the power given to the Police under the Act is to enable them to effectively gather information and to disrupt dangerous activities.[139] The power of arrest under the Terrorism Act 2000 is by no means exclusive. S.24 of the Police and Criminal Evidence Act 1984 also empowers the Police to make arrest based on reasonable suspicion. Code A of PACE provides that reasonable grounds for suspicion can be inferred from objective facts, information or intelligence. The question then is, can the power of arrest under PACE be applied the same way as S.41 of TA 2000? Under the Terrorism Act, anyone arrested on reasonable suspicion of being a terrorist under S.41 is subject to a special regime of Police Powers and procedures prescribed in Part V and Sch 8 of the Act, instead of the regime Under PACE which applies to

[135] James Beckman, *Comparative Legal Approach to Homeland Security and Anti-terrorism* (Ashgate Publishing Coy, 2007) Pg 55
[136] Ibid Pg 65-66
[137] ibid
[138] Clive Walker & Keir Starner, '*Miscarriage of Justice; A Review of Justice In Error'* (Blackstone Press Book, 1999) Pg 5
[139] Paul Wilkinson, *Terrorism versus Democracy: The Liberal State Response* (Frank Cass, 2000). Pg 105

other categories of offence. Arrest under S. 41 Terrorism Act 2000 differs from normal arrest powers in that no specific offence need be in mind of the arresting officer. Even though the arresting officer needs to state that an arrest is being imposed and the grounds for the arrest, the officer is not required to give a detailed reason for the arrest. The ECrtHR in *Fox, Campbell and Hartley v The United Kingdom* [140] held that though the Police may arrest based on reasonable suspicion, it is for the court to determine whether the ground considered by the arresting officer is relevant to the arrest. The Court in this case also stated that "suspicion justifying terrorist arrests cannot always be judged according to the same standards as are applied in dealing with conventional crime."[141] A similar decision was reached in *Brogan* and *O'Hara's* case.[142] Walker asserts that a terrorist suspect arrested under PACE cannot be re-arrested under S 41 of the TA 2000, unless further offences are disclosed.[143]

The justification for S.41 of the Act has created some disagreements amongst scholars. Walker argues that the power of arrest under the Act gives the Police wide discretion to carry out investigation.[144] He stated further that terrorism demands an 'anticipatory police intervention' and to facilitate the carrying out of searches.[145] Anderson on the other hand criticises S.41 of the Act as "notably wide."[146] This is because the arresting officer needs no specific offence in mind. This is even more so that the reasonable suspicion which the arrest is based need not be of the same level as those that are necessary to justify a conviction or even bring of a charge.[147] Walker however argues that allowing the Police to give detail reasons for the arrest made under the Act could "disclose police methods or reveal the identities of informers.[148] The decision of the court in *Sher v United Kingdom*[149] is worth looking at here. In this case, three Pakistanis on student visas were arrested on the basis that they were reasonably suspected of being involved in the commission, preparation or instigation of acts of terrorism, contrary to s.41 of the 2000

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[140] 1988 Ser. A, No. 145-B, 11 EHRR 117, ECHR 1990 (12244/86)

[141] Ibid Para 32

[142] ECHR 2001-X 37555/97

[143] C. Walker, *Blackstone's Guide to the Anti-Terrorism Legislation* (2nd Edition, Oxford University Press, 2014) Pg 133

[144] Walker, Blackstone Guide, 2009.

*In *Ex Parte Lynch* [1980] NI 126 at Pg 128 The Court gave backing to power of arrest under the Act by stating that although the Police still have to state grounds for an arrest, they are not required to give detailed reasons.

[145] C. Walker, BlackStone Guide, Pg 134

[146] Owen Boycott, 'Terrorism laws 'messy and applied excessively' warns legal reviewer; David Anderson, independent lawyer for parliament, urges re-balance of Britain's security and liberty needs' *The Guardian* 27th June 2012 http://www.theguardian.com/uk/2012/jun/27/terrorism-laws-excessive-reviewer-anderson accessed 20th August, 2013

[147] *O'Hara v. the United Kingdom* 2001, Application No. 37555/97, paragraphs 13-15

[148] C. Walker, BlackStone Guide, Pg 136

[149](Application 5201/11)- [2015] All ER (D) 177

Act. The accused contended in particular that their rights under arts 5(2), 4 and 6(1) had been breached because they had not been provided with sufficient information at the time of arrest or detention as to the nature of the allegations against them; and because of the closed procedure permitted in hearing applications for warrants of further detention. They also complained about the execution and scope of the search warrants on them. The court in this case held that the requirement of fairness under art.5(4) did not impose a uniform, unvarying standard and would depend on the type of deprivation in question. The Court held further that Article 5(1)(c) expressly permitted deprivation based on reasonable suspicion of the commission of an offence. Terrorist crime fell into a special category, because of the attendant risk of loss of life and human suffering, the police were required to act with the utmost urgency in following up all information including information from secret sources. Further, it was recognised that the police may frequently have to make an arrest based on information the source of which could not be revealed to the suspect without putting the source in jeopardy. It followed that Art.5(1)(c) of the ECHR was not to be applied in such a manner as to put disproportionate difficulties in the way of the police in taking effective measures to protect the right to life and the right to bodily security of members of the public.[150] Accordingly, Art.5(4) could not require the disclosure of confidential information or preclude closed hearings.[151]Going by this decision, a person can be arrested on suspicion of being a terrorist without any substantive extant evidence, and be detained in custody. Several arguments has been raised against the provision of arrest under the Act. Concerns have also been raised by several Human Rights Organisations about the low threshold required by Officers before they stop someone or make an arrest under the Act. Consequently, this study aims to demonstrate the extent to which the power of arrest under the Act negatively affects the right to liberty and security and at the same determines the legitimacy and coherence of S.41 with human rights provisions in the UK. An analysis and assessment of the power of arrest under the UK Terrorism Act will be done in the later chapters.

As earlier explained, after a terrorist is arrested, what comes next is detention pending when he/she is charged. The question that often comes to mind with pre-charge detention is that for how long can a terror suspect be detained in the UK before charge? Firstly, it must be noted that the period of pre-charge detention of terror suspect in the UK has been inconstant overtime, going from up from seven to fourteen days and then to 28 days then to fourteen days.

[150] Ibid
[151] ibid

Presently, an accused can be detained for up to 48 hours if a 'review officer does not authorise the continued detention'.[152] This can be judicially extended for an additional period of seven days to up to 14 days.[153] There is also a similar power of detention under S.53 and Sch.7 of the TA 2000 which gives the Police or customs officer at a port or border powers to stop and question a person in order to determine whether that person is involved in terrorism. The Police or Custom officer may require proof, identities, proof, and the disclosure of documents and may detain the person for up to nine (9) hours. The Police/Custom officer in detaining an accused under Sch.7 does not require reasonable suspicion of committing a terrorist act or any specific offence. In *Miranda v Secretary of State for Home Dept*,[154] the applicant was detained by Police officer for nine hours at Heathrow Airport on 18 August 2013, purportedly under paragraph 2(1) of Schedule 7 to the Terrorism Act 2000. Mr Miranda brought an application to determine whether paragraph 2(1) of Schedule 7 to the Terrorism Act 2000 gives the Police powers to stop and question a person at a port or border area for the purpose of determining whether he appears to be "concerned in the commission, preparation or instigation of acts of terrorism." Secondly, whether, if it did, the use of the power was nevertheless disproportionate to any legitimate aim. The third is whether upon its true construction paragraph 2(1) power was repugnant to the right of freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights and Fundamental Freedoms. The Divisional Court in this case decided that the power was exercised for a purpose permitted by the statute and that its use was not a disproportionate interference with articles 5, 8 or 10 of the Convention and that the use of the power was compatible with article 10 of the Convention. The Appeal Court dismissed the appellant appeal on the ground that the arrest was exercised for a lawful purpose and within the scope of Schedule 7.

In Blum's opinion, pre-charge detention in the United Kingdom is used to increase the time for investigating a terror suspect before charging him to suspect.[155] This view is supported by Harrod who argues that one of the three most significant powers under the Terrorism Act 2000

[152] S. 41(4) Terrorism Act 2000

[153] S.57 Protection of Freedom Act 2012
The Police and Criminal Evidence Act (PACE) 1984 gives the police a power to detain those suspected of an offence under the general criminal law for up to 36 hours before charges are brought.

[154] [2016] EWCA Civ 6

[155] Stephanie Blum, 'Preventive Detention in the War on Terror: A Comparison of How the United States, Britain, and Israel Detain and Incapacitate Terrorist Suspects' (Oct, 2008) Journal Of the Naval Postgraduate School Centre for Defence and Security, Vol IV no.3 http://www.hsaj.org/?fullarticle=4.3.1 accessed 20th Sept, 2013

is pre-charge detention.[156] The others include powers of random stop and search by the Police and control orders. He posits that pre-charge detention is an essential counter-terrorism tool. This is because the Police do not have the luxury of waiting for crimes to be committed before making arrests and detaining a terror suspects. Pre-charge detention gives the Police time to collect evidence to prosecute terror suspects and also deny suspects opportunity to leave the country.[157] The UK Government have also argued that due to the extra-ordinary nature and character of terrorist threat, counter-terrorism measure like pre-charge detention is a necessity power given to intelligent agencies in other to get evidence from suspects. Let us take the 21st of July 2005 Attack as an example. A total of 38,00 exhibits, 80,000 CCTV videos, 1400 finger prints and about 160 crime scenes were generated in the course of investigation,[158]and it might be impossible to analyse or sift these data in a few days.

The main concern of critics of the pre-charge detention regime under the Act is that people that are not connected to terrorist acts might also be unlawfully detained. According to "Liberty" although there are existing safeguards against prolonged detention under the Act, nonetheless under paragraph 32 of Schedule 8, the Judge is only required to be satisfied that 'there are reasonable grounds to believe that further detention is necessary to obtain relevant evidence;' and that the police investigation is being conducted 'diligently and expeditiously.'[159] Liberty notes further that under paragraphs 33 and 34, neither the detained suspect nor his or her lawyers are entitled to see all the evidence that the police and prosecution may put before the judge in support of their application for continued detention. Liberty contends that the judicial scrutiny in the extension of pre-charge detention is not proper judicial scrutiny as it falls well short of a full adversarial hearing because under the relevant provisions of the Terrorism Act 2000 detention can be extended in the absence of the detainee or on the basis of material not available to them.[160] Amnesty International also criticised the 14 days pre-charge detention regime under the TA 2000 as 'too long.'[161] Amnesty observed that prolonged periods of pre-charge detention create an avenue for coercive conditions or abusive practices that may be used to force detainees to make involuntary statements and confessions. A.I argued that the sooner

[156] Mattew Harrod, *Rethinking the War on Terrorism* (Int. Terrorism, Security Management, 2013)
[157] ibid
[158] Clive Walker, Blackstone's Guide 2009 Op Cit pg 161
[159] Justice; Pre-charge detention in terrorism cases. http://www.justice.org.uk/pages/pre-charge-detention-in-terrorism-cases.html accessed 20th Sept 2013.
[160] ibid
[161] Amnesty International, United Kingdom Submission to the Joint Committee on draft detention of Terrorist Suspect Eur/45004/2011 Pg 4 http://www.amnesty.org/en/library/asset/EUR45/004/2011/en/891bd44f-826e-42bf-9d36-460b2f4207f6/eur450042011en.pdf accessed 20th Sept, 2013

a terror suspect passes into the hands of a custodial authority which is functionally and institutionally separate from the police, the better. Consequently, this research will attempt to find out whether the 14 days pre-charge detention under the TA 2000 unnecessarily infringes a detainees' right to liberty? Also, the pre-charge detention regime under the Act will be assessed with reference to the HRA, the ECHR, and ICCPR to find out whether the Act is consistent with these statutes.

Other important measures adopted under the UK's TA 2000 that requires discussion is proscription and encouragement of terrorism. S.1 Terrorism Act 2006 make it an offence for a person to make statements that are likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism. The statement may take many format including words, sounds, images[162] or through electronic service.[163] The offence of encouragement of terrorism in the UK covers "indirect encouragement of terrorism" by "glorification." This outlaws other forms of expression on the ground that the offence could be committed, irrespective of the intent of the author; so far some members of the public may 'reasonably be expected to infer from that what is being glorified as a conduct that should be emulated.' The publication of a statement is the core *actus reus* under S 1(2)(a of the TA 2006, while the *mens rea* for encouragement is that the publisher must either intend members of the public to be directly or indirectly encouraged by the statement to commit, prepare or instigate an act of terrorism.[164] The provision on encouragement of terrorism under the Act has raised many controversies. A Report by the Eminent Jurists on Terrorism, Counter-terrorism and Human Rights have identified the opposition and criticisms of counter-terrorism measures such as proscription and encouragement of terrorism on the fact that they are being used to restrict basic freedom of speech and expression as well as freedom of association and assembly. Although international law standard on freedom of speech/expression recognises that there can be a lawful and valid limitation on these rights especially statements and expressions which can incite terrorism.[165] The participants during the U.K hearing on this Panel Report raised concerns over the breadth and ambiguity of the offence of encouragement of terrorism by glorification. There are fears that this could create a risk of arbitrary and indiscriminate

[162] S.20 (6) TA 2006
[163] S.20 (4) TA 2006
[164] S.1(2)(b) TA 2006
[165] Assessing Damage, Urging Action; Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights (An initiative of the International Commission of Jurists, 2009) Pg 127-131 http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/16_02_09_ejp_report.pdf accessed 20th Sept 2013

application which is further exacerbated by the fact that it applies to past acts and acts occurring in other countries outside the U.K.[166] Government representatives told the panel that targeting a particular community was not the intention of the Act. The justification by the government lies in the fact that it has a right to protect lives and prevent people from encouraging or glorifying terrorism. The Court in *Handyside v UK* held that it would be a violation of Art 10 of the ECHR if the restriction on expression does not fall within the exceptions provided under Art 10 (2).[167] The Court in this case noted that

> "Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every person: Freedom of expression applies not only to "information" or "ideas" that are favourably received ... but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there can be no "democratic society." This means ... that every "formality," "condition," "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued."[168]

It becomes important to examine whether the requirement of the law as per Art 10 (2) HRA 1998/ECHR, as held in *Handyside*, are followed in theory and practice when placed side by side with S.1 TA 2006? In other words, is the provision of the Act on encouragement of terrorism consistent with the right of individuals to freedom of expression or does it disproportionately infringes this right? This question will be given serious analysis and consideration in the research with reference to domestic and international law such as the HRA 1998, ECHR, and the ICCPR.

With regards to proscription, three major reasons were given by the government as to why proscription is important. Firstly proscription discourages people from engaging in terrorist activity. Secondly, it is a quick means of tackling some of the lower-level for support for terrorist organisation. Thirdly, proscription is a powerful signal of the rejection by the government and by extension the society of such organisations.[169] Nonetheless, critics of the proscription under the Act argue that there is lack of clarity when it comes to determining criteria which the Home Secretary would decide whether or not to use her discretion to proscribe an organisation.[170] Horne and Douse argues that while proscription remains a key

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[166] ibid
[167] [1976] ECHR 5 Para 49
[168] Ibid Para 49
[169] Clive Walker, Blackstone's Guide 2009 Op Cit Pg 53
[170] Alexander Horne & Diana Douse, The Terrorism Act 2000 Proscribed Organisation Standard Note SN/HA/00815 7th January 2013 Pg 5

feature of the U.K's counter-terrorism armoury, with the ability to disrupt harmful organisation and change their behaviour, it also portends a departure from the criminal law paradigm.[171] They contested that proscription represents the criminalization of association rather than culpable conduct. Horne and Douse also question why the powers to criminalize an organisation should be placed into the hands of the Executive.[172] They warned that, even though this has attracted less attention than other measures such as arrest and detention, proscription remains an aspect of the counter-terrorism strategy that has significant constitutional implications.[173] Citing Clayton & Tomlinson, they argue further that proscription is the most stringent restriction on the right of freedom of association.

The question is does proscription have any effect in stopping people from joining terrorist organisation? And what practical negative effect does proscription have of human rights? In a recent BBC programme, it was argued that what a ban comes down to is a situation where government tries to make it harder for a group to organise openly. Anyone found to be a member of a proscribe organisation could face up to 10 years in jail. Furthermore, if the police identify any financial assets linked to a proscribed organisation, they will be seized - and its website will be shut down. In that programme, Omar Bakri (the founder of *Al-Mujajiroun*, a proscribed organisation) argued that a ban will only increase the popularity of his group and as a result increase its membership. He argued further that proscription would only force them to go underground. Supporting Bakri's argument, Inayat Buroglawala (of the Muslim Council of Britain) says the government use of proscription under the Terrorism Act to ban groups shows that democracy is a charade. In his words: "democracy is actually upholding those values of pluralism, that we can tolerate people whose views are so outlandish and repulsive, provided they do not step over the line and break the law." On the other hand, the Joint Terrorism Analysis Centre (JATC) maintained that a group can be banned not only for acts of terrorism-but also for glorifying it. The JATC countered the argument made by *Al-Muhajiroun (*now proscribed*)* because it fall into the category of group that glorifies terrorism and has a track record of celebrating acts of violence including describing the 9/11 hijackers as the "magnificent 19."[174] Besides the fact the proscription prevent those who plan, support, or commit terrorist acts it offers an alternative to deportation especially where there are concerns

[171] Ibid Pg 16
[172] Ibd Pg 17
[173] ibid
[174] Dominic Casciani, Analysis: Does banning terror groups work? 12 January 2010 BBC http://news.bbc.co.uk/1/hi/uk/8454479.stm accessed 20 Sept 2013

of torture. For instance, in *Chahal v UK*, the applicant settled illegally in the United Kingdom in 1971 but was granted indefinite leave to remain in 1974. During a visit to Punjab in 1984, he was detained and tortured. On his return to Britain, he became a prominent activist in favor of an independent Sikh homeland, Khalistan, but was subject to a deportation order in 1990. The European Court of Human Rights concluded that there was a risk of torture if he were to be deported and that it would therefore be a breach of the Convention to send him back to India. [175] However, critics argue that the Government might be exposed to pressure to target organisations that it might not regard as terrorist or to take action against individuals whom it would not ordinarily regard as terrorists.[176] Proscription could be used as a weapon for healthy trade relations and diplomacy between foreign governments and the UK. According to Jarvis and Legrand, politics plays a major factor in the proscription of terror organisations in the UK.[177] They argue that the decision to add an organisation to the proscription list may reflect domestic political biases unrelated to terrorism as well as external pressure from other countries.[178] Jarvis and Legrand argue further that proscription could be used to criminalise movements seeking self-determination abroad and it criminalises individuals for their status rather than their actions.[179] Legal scholars have also expressed concerns that proscription may alienate some communities from democratic process thereby making them more likely to resort to violence.[180] In Shapiro's view, proscription creates a 'politicized' process driven too frequently by unrelated foreign policy interests which could a negative impact on democracy.[181] Others have argued that once a proscription order has been made, there is no requirement that it be reviewed or renewed from time to time.[182] The other alternative is to appeal to the Proscribed Organisation Appeal Commission and a right of further appeal to the Court of Appeal. Accordingly, this research aims to find out whether proscription under the

[175] App no 22414/93, 1996-V

[176] The Legislation Against Terrorism; A consultation Paper Presented to Parliament by the Secretary of State for the Home Department and the Secretary of State for Northern Ireland by Command of Her Majesty December 1998 Cm 4178 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/265689/4178.pdf accessed 18th June, 2017

[177] Lee Jarvis, Tim Legrand, 'Enemies of the State: Proscription Powers and their Use in the United Kingdom', British Politics 9 [2014] pg 450-471.

[178] ibid

[179] ibid

[180] John Finn, 'Electorial regimes and the proscription of anti-democratic parties' Terrorism and Political Violence, Vol 12 (2012) Pg 57-60

[181] Julie Shapiro, 'Politicisation of the designation of Foreign Terrorist Organisations, the Effects on separation of Powers' The Cardozo Public Law Policy & Ethics Journal (2007) pg 547

[182] Alun Jones, Rupert Bowers, Hugo D. Lodge, '*The Terrorism Act 2006*' (Oxford University Press, 2006) Para 40

Terrorism Act 2000 unnecessarily infringes the right to freedom of association and assembly under the HRA 1998, ECHR and the ICCPR.

3. Illustrating Originality

This research presents an objective legal analysis and assessment of the Nigerian and UK legal responses to terrorism under the Terrorism Act of both countries.

Firstly, the study has the potential to advance knowledge and understanding on terrorism and the law in Nigeria through a detailed analysis of the nature and the impact of the TPA 2011 (as amended) on counter-terrorism and human rights. Recently, researchers have shown an increased interest in Nigeria's counter-terrorism law and practice especially in relation to human rights freedoms. But as at the submission of this thesis, only few writers have been able to draw a structured research that analyses or assess the provisions of the Nigerian TPA 2011 to determine its constitutionality and coherence with human rights provisions in Nigeria. The literature review on Nigeria shows that very few writers have attempted to establish a deeper contextual meaning of the provisions of the Act or provide an in-depth assessment of how these rules are applied in practice. Similarly, studies have tended to focus on the Act's failure to comply with the Constitution 1999, however to date, none has undertaken a study of the TPA 2011 (as amended) by reference to Nigeria's regional or international obligations, for example, under the African Charter and the ICCPR. Thus there is a gap in the market which the research intends to address.

The research questions that were raised in this thesis also demonstrate its originality. Instead of focusing on the practical effectiveness (success) or otherwise of the Act, the writer chose to address questions such as; is the Terrorism (Prevention) Act 2011 comprehensive enough to provide a coherent legal code relevant to terrorism in Nigeria? What challenges to the constitutionality of these provisions can be made on both human rights and other legal grounds? And what possible lessons can be drawn from another common law jurisdiction, in this case the U.K? These questions were developed by the writer to effectively evaluate the "soundness" of the Terrorism Act in addressing terrorism in Nigeria and to gain a deeper level of understanding of the impact and effect of the TPA 2011.

The most significant contribution of the research to knowledge is comparing the Nigerian Terrorism (Prevention) Act 2011 with the Terrorism Act of another common law jurisdiction, and the methodologies adopted. The thesis presents a comparative analysis of Nigeria and UK

legal responses to terrorism. The writer is not aware of any study that attempts to compare the Nigerian Terrorism (Prevention) Act 2011 with another common law jurisdiction. It could have be convenient to analyse and assess the TPA 2011 exclusively without comparing it with another State's anti-terrorism Act, but instead the writer chose to compare the Act with another similar legislation to find out what Nigeria can learn from it to improve its terrorism law. The research adopts a comparative methodology that juxtaposes the Nigerian and the UK's anti-terrorism Acts. The combination of the black-letter, the socio-legal approach, and the comparative approach gives the writer an opportunity to undertake a critical, questioning attitude to the Nigerian Terrorism Act with a view to uncovering flaws and inadequacies under the Act. In so doing, the research transcends the doctrinal analysis of the legal texts into an empirical comprehension of how they are applied in practice, as well as their similarities and differences. This led to fresh insights and a deeper understanding of issues on counter-terrorism and human rights that are of central concern in Nigeria and the UK. Findings in the research will surpass national boundaries.

Besides analysing and assessing counter-terrorism from Nigeria's view point, the research will help understand the thought processes of another State (in this case, the UK). The writer strongly believes that this thesis will encourage further comparisons of the Terrorism Act with other jurisdictions, especially in Africa. This will inevitably lead to further questions about the fairness, justice, and constitutionality of other laws in Nigeria.

At present, Nigeria is still searching for a "proper" response to terrorism that is consistent with international human rights standards. The research therefore attempts to create ideas that will result in a more credible and constitutionally justifiable response to political violence in Nigeria. This results in a number of proposals and recommendations for law and policy reforms in Nigeria. These reforms and policy prescriptions may not only have legal effects but also social and administrative consequences in Nigeria. However, it is unlikely that these reforms or an amendment to the Terrorism Act alone will address Nigeria's human rights challenges. Hence a new and practical solution to Nigeria's counter-terrorism and human rights complaints will be suggested and put forward to the Nigerian government. The writer's idea of the creation of a Commission or a body that will serve as an ombudsman over Nigeria's counter-terrorism activities is based not solely on the findings from the research, but also from the writer's previous legal practice in Nigeria. The proposed "Commission," if established, presents a practicable remedy to the incessant human rights abuses by the Police and the Soldiers under the guise of fighting terrorism. The Nigerian government particularly the Legislature should

find this idea and other recommendations proffered useful when making changes to counter-terrorism law and practices in Nigeria.

Lastly, it is hoped that the research will help contribute to the emerging literature on terrorism in Nigeria by giving a better understanding of the provisions of the Act and how terrorist suspects should be treated if regional, and international obligations are to be respected. Legal practitioners, Judges, and Scholars in Nigeria will find this study useful.

7 Conclusion

This chapter positions the thesis within previous studies that addresses Nigeria and the UK's legal responses to terrorism. It is often said that research arises when there is a problem to be solved. A consistent theme that emerged from the literature review, especially on Nigeria, is that the measures adopted by the State to counter-terrorism under the 2011 Act (as amended) appear to be inconsistent with acceptable human rights standards. The common conclusion is that the TPA 2011 (as amended) needs to be reviewed. However, before coming to a judgement on Nigeria and the UK legislative reaction to terrorism, it is important to first of all analyse and assess the Terrorism Acts of both States to determine the extent of their coherence or inconsistencies with human rights provisions in their countries.

CHAPTER 3

A CRITICAL ANALYSIS OF THE NIGERIAN TERRORISM (PREVENTION) ACT 2011 (AS AMENDED)

1. Introduction

Prior to June 2011, the Nigerian National Assembly simply squeezed provisions relating to terrorism under Section 15 of the Economic and Financial Crimes Commission Establishment Act 2004. The government at that point in time considered it unnecessary to enact a single legislation on terrorism. But after a series of terrorist attacks which started in 2009, it became clear that Section 15 of the EFCC Act was inadequate in addressing terrorism in Nigeria.[183] The Nigerian government passed into law the Terrorism (Prevention) Act in June, 2011. The Act provided the requisite legal framework for the prevention, prohibition and combating of acts of terrorism, and prescribes penalties for violation of its provisions. The Act contains 41 sections, arranged into Eight Parts and a Schedule, listing relevant statutes. Part I of the Act defines acts of terrorism and related offences; Part II contains provisions relating to terrorist funds and property; Part III contains provisions on mutual assistance and extradition while Part IV is on information sharing on criminal matters; Parts V focuses on investigation; Part VI deals with prosecution; Part VII focuses on charities and lastly, Part VIII contains miscellaneous provisions.

In order to further strengthen the Act, the Nigerian government in 2013 enacted the Terrorism (Prevention) (Amendment) Act. This 2013 Act amends and deletes some previous provisions under the TPA 2011. The 2013 Act also makes provision for the encouragement of terrorism and strengthens terrorist financing offences.

The primary purpose of this chapter is to analyse key provisions under the Nigerian Terrorism (Prevention) Act 2011 (as amended). Without a proper understanding of the legal meanings of provisions under the Act, further assessments or conclusions made in this study will be built

[183] Section 15 (1)-(3) EFCC Act provides that 'any person who collects by any means, directly or indirectly, any money with the intent that the money shall be used for any act of terrorism or makes funds, financial assets, or economic assistance available for use of any of any other person to commits a terrorist act commits an offence.'
Section 15(2) of the EFCC Act goes further to stipulate that: '*any person who commits or attempts to commit a terrorist act or participates or facilitates the commission of a terrorist act is liable on conviction to imprisonment for life.*"

upon a defective understanding of the Act. The (black-letter) analysis here will establish the legal meaning of rules and principles used under the Act. In other words, this chapter will explain in details the formal/technical terms and pure legal principles used under the TPA 2011. At this stage, the focus is on the words and terms used under the Act (in the books) as opposed to the law in action.

As earlier explained, in analysing the TPA 2011(as amended), five crucial aspects of the legislation will be examined. These are the definition of terrorism, arrest, detention, proscription and encouragement of terrorism.

2.1 A Critical Analysis of the Definition of Terrorism

As stated in the introductory chapter, the justification for choosing the definition of terrorism as the first issue to be analysed is because of the implications it has on the scope of counter-terrorism. The definition of terrorism serves as a platform for investigative powers to the Police. Without a proper understanding of the exact meaning of terms in the definition of terrorism under the Act it would be difficult to critically analyse other provisions of the Act.
Nigeria's definition of terrorism is provided under Section 1 of TPA 2011. Some changes to the definition of terrorism were made as per the Terrorism (Prevention) (Amendment) Act 2013. It is important to take note of these key changes by the Terrorism (Prevention) (Amendment) Act 2013 that inserts a new subsection "(1)" and renumbers the existing subsection (1)-(3) as subsections (2)-(4) accordingly.[184] The following sub-sections will analyse the definition of terrorism.

2.1.I *Acts of terrorism*

Section 1(3)(a) of the TPA 2011 (as amended) defines an "act of terrorism" in Nigeria to mean an act which is "*deliberately done with malice, aforethought and which may seriously harm a country or an international organisation."*

Going by this opening paragraph, the requisite *mens rea* for an act to be regarded as an act of terrorism in Nigeria is that it must be done deliberately with "malice" and "aforethought." The Supreme (Court in *Bakare & Ors v Ado Ibrahim* defined 'malice' as a conscious, wicked and mischievous motive to cause harm.[185] The term to be "*aforethought"* in ordinary English

[184] S.1(2)(a)-(h)Terrorism (Prevention) (Amendment) Act 2013
[185] [1973] 6 S.C. 205

parlance suggests the act must be 'premeditated.' The use of the phrase '*malice afore thought'* in the opening statement of the definition suggests that the definition intends to adopt a 'formal and legalistic language' in its definition of terrorism.

The key word in the opening paragraph of the definition above is "*seriously*."[186] The TPA 2011 demands a "serious" level of harm to a country or an international organisation. The question that needs to be asked is what the Act means by "seriously." What is the yardstick for determining what is serious and what is not? Does it mean that a minor or trivial harm against a country or an international organisation will not be considered as an act of terrorism?

Unfortunately, the Act fails to provide answers to these questions. Nonetheless, going by the wordings of the Act, not all harm done to a country or international organisation would constitute terrorism. The harm must be "serious", that is, it must be 'significant,'[187] 'grievous' or 'severe'[188] for it to constitute an act of terrorism. Also, the Act fails to explain what an "*international organisation*" is? Would an organisation from another African country fall under this term? Again the Act does not provide an answer to this question. An international organisation could mean an organisation that operates outside Nigeria. The use of the word *'country'* in the opening paragraph unnecessarily extends the breath of the definition of terrorism under the Act. This gives the Act a broad scope in its application to include "acts of terrorism" committed beyond the shores of Nigeria. The writer of the view that the inclusion of "a country" by the Nigerian law makers" demonstrates a flawed understanding of the notion of terrorism. The absence of a widely accepted definition of terrorism in international law has opened the term up to several definitions and interpretations by States. What is seen as terrorism differs amongst states. For example, while the State of Israel sees the Palestine resistance an act of terrorism, other States like Russia considers it as a legitimate armed struggle. Other problems that could arise from extending the definition of terrorism outside country is the difference in the 'language' used, meaning of 'terms'/'phrases' and disparity in punishments for terrorism offences amongst States.

Furthermore, Section 1(3)(b)(i) of the Act provides that an act of terrorism include:

"*acts intended or can reasonably be regarded as having been intended to—"…unduly compel a government or an international organisation from performing or abstain*

[186] According to the Legal Dictionary, 'seriously' means in 'crucial' 'severe' 'fatal' 'dreadful' 'momentous' 'intense' 'important' amongst other meanings http://legaldictionary.thefreedictionary.com/serious accessed 7th Oct 2013

[187] *Lawlor v People*, 74 111. 231,

[188] *Union Muts. L. Ins. Co v. Wilkinson*, 13 Wall. 230, 20 L . Ed. 617

from performing any act.''

The above section reiterates "intention" (*mens rea*) as a principal requirement for an act to be regarded as terrorism. The key words here are *'unduly'* and *'compel*.' The use of these phrases broadens the scope of the definition. For example, how do we determine if an act is undue or not? Would a protest or demonstration against government policy or salary increase by labour unions not regarded as being "unduly"? The Act does not give clarifications for these terms. Thankfully, the Supreme Court in *Dominic Ifegbuze v Livinus Mbadugha* held the phrase "*unduly"* to mean 'excessive or extremely.'[189] The Court in *Okojie Tiefere v A.G Edo State* held that "to *compel"* simply means 'to bring pressure upon or coerce or demand to command or force.'[190] Going by these decisions, any acts which coerces or brings pressure on a government or an international organisation to do or abstain from doing an act is terrorism.

Alternatively, the TPA 2011 states that any act which "*seriously intimidates a population*" is terrorism. [191] As earlier stated, the qualification for what would amount to "s*erious*" under the Act is not clear. According to S. 366 of the Criminal Code Act, to "*intimidate*" means to "threaten another person [entity] with injury to his person, reputation, or property, or to the person, reputation, or property of any one in whom he is interested.''[192]

Alternatively, any act which *"seriously destabilize or destroy the fundamental political, constitutional, economic or social structures of a country or an international organization*' is terrorism under the Act. [193]

Again the key word here is '*seriously*.' The question thus arises whether these include acts of violent demonstrations, protests marches, and strikes intended to force a State Governor, Senator or President out of office would be regarded as an act of terrorism? In the writer's view, this paragraph could be used charge demonstrators in Nigeria for acts of terrorism instead of being charged under ordinary criminal law. The inclusion of the phrase *"of a country*" in the above paragraph means that the Act captures the destabilization or destruction of the fundamental political, constitutional, economic or social structure that take place outside

[189] S.C 68/1982 at 115
[190] [2009] NWLR at 114
Similar decisions were reached in *Radicli v ilutohins*, 95 U.S 213,24 l.d ed 409, and *Peyser v New York,* 70 N.Y 497 where the Court defined the phrase "to compel'' as having to "to constrain someone to do what his free will would refuse."
[191] S.1(3)(b)(ii) Ibid
[192] Cap 39 2004
[193] Section 1(3)(b)(iii)

Nigeria. This unnecessarily amplifies the meaning if terrorism under the Act. Several reasons might be adduced for the 'destabilization of the political, constitutional, economic or social structures' of a country or an international organization' which might not necessarily be terrorism. In the writer's view, extending the definition of terrorism to include acts done outside the state has the potential of reducing the definition to a mere diplomatic tool amongst States.

Again, the Act states that "*any act which otherwise influence a government or international organization by intimidation or coercion is terrorism.* '[194]

The key words in the above section is "*influence… by intimidation or coercion.*" The Act offers no meaning to these terms. The Court of Appeal in *Kiladejo v Ondo Traditional Council* held the phrase "*influence*" to mean "to bring pressure upon or to prevail upon or to cajole."[195] However, the Terrorism Act demands that the act which influences a government or an international organisation must be by *intimidation* or *coercion*. As earlier explained, to intimidate means to "threaten with injury to person, reputation, or property,'' This suggests that any act which brings pressure upon a government or an international organisation by threats to injury to a person or property is terrorism. It remains unclear how the term to '*influence*' would be applied or interpreted in practice. For instance, would the "pressure" by the U.S government (the FBI) to the tech giant, Apple, to create a "backdoor" to unlocking IPhones, particularly the phone used by one of the San Bernardino shooter be interpreted as to terrorism on the part of the U.S under the TPA 2011?

Again, any act which "*involves or causes, as the case may be— an attack upon a person's life which may cause serious bodily harm or death'* is terrorism under the TPA 2011.[196] This section raises the question whether an attack upon a person's life that does not cause "serious" bodily harm or death be also considered as an act of terrorism under the Act? The provision of this section is imprecise. It does not clearly distinguish an act of terrorism from ordinary criminal offence for example murder, battery or manslaughter. A person who makes an attempt upon another person's life resulting to serious bodily harm or death could simply be charged for attempted murder, murder or even manslaughter.

[194] S.1(3)(b)(iv) ibid
[195] [2001] 12 NWLR 1134
[196] S.1(3)(c)(i) ibid

'*Kidnapping of a person'*[197] and '*hostage taking'* is also considered as an act of terrorism under the Act. The Act provides that *"any person who knowing- seizes, detains or attempt to seize or detain*[198] *or threatens to kill, injure or continue to detain another person in order to compel a third party to do or abstain from doing any act,*[199]*or gives explicit or implicit condition for the release of the person held hostage commits an offence under the Act."*[200] "Third party" under this section means a State, an international organisation, a natural person or group of person.[201]

Although this section clearly distinguish "kidnapping" and "hostage taking" under the Act to mean "kidnapping with the intention of compelling a State, an international organisation, or a group of person. The inclusion of '*a natural person'* in the meaning of "*third party*" under the above section is rather confusing. For example, would kidnapping rich and wealthy individuals in the society in order to get ransom be regarded as an act of terrorism? In the writer's opinion, if the definition is only intended to cover acts of terrorism, then the inclusion of "*a natural person or a group of person*" needs to be removed from the meaning to "*third party*."

Equally, "*Any person to intentionally- murder, kidnap or commit other attacks on the person or liberty of an internationally protected person commits an offence under the Act*."[202]

The key word in the above provision is *"intention.*" The Terrorism Act does not define or clarify who an internationally protected is, however this can be found in Art.1 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons 1973. An "internationally protected person" under this Convention refers explicitly to "a Head of State, including any member of a collegial body performing the functions of a Head of State under the constitution of the State concerned, a Head of Government or a Minister for Foreign Affairs, whenever any such person is in a foreign State, as well as members of his family who accompany him; or any representative or official of a State or any official or other agent of an international organization of an intergovernmental character…"[203]

[197] S.1(3)(c)(ii) ibid
[198] S.15(1) (a)Terrorism (Prevention) (Amendment) Act 2013
[199] S 15 (1) (b) ibid
[200] S.15(1) (c)ibid
[201] S.15(2) Ibid
[202] S.3(a) ibid
[203] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, 1035 U.N.T.S. 167, 13 I.L.M. 41, entered into force Feb. 20, 1977. http://www1.umn.edu/humanrts/instree/inprotectedpersons.html accessed 8th Oct, 2013.

Additionally, 'any person who intentionally carries out a violent attack on the official premises, private accommodation or means of transport of an internationally protected person in a manner likely to endanger his person or liberty,[204] or threatens to commit any such attack' commits an offence under the Act.[205]

Again, the "*destruction of a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss"* is terrorism under the Act.[206]

The above provision is nebulous. The Act is not clear as to what would be regarded as major or minor economic loss. The question is, would it constitute an act of terrorism if the destruction is minor? The Act suggests that the destruction of a public infrastructure, transport system or public or private property in whatever mode that is 'likely' (that is reasonably prospect or expected)[207] to endanger human life or brings a 'major' loss to economy would amount to terrorism.

An act of terrorism under the TPA 2011 can also include the 'seizure of an aircraft, ship or any other means of public or goods transport or diversion or use of such means of transportation for the purpose of influencing a government or an international organisation by intimidation or coercion.'[208]

Also, the manufacture, possession, acquisition, supply, transport or use of weapons, explosives or of nuclear, biological or chemical weapons as well as research into, and development of these weapons without lawful authority amounts to an act of terrorism.[209] Unlike preceding provisions, this section is clear. It will not be regarded as an act of terrorism where acts listed in this section is done with a lawful authority or a valid licence.

[204] S.3 (b) Terrorism (Prevention) Act 2011 as amended
[205] S.3(c)ibid
[206] S.1(3)(c)(iii) TPA 2011 (as amended)
[207] In *Wallis v Bristol Water Plc* [2009] EWHC 3432 the Court held that "likely", in the context of a danger to public health, meant "a real risk, a risk that should not be ignored" and "a real possibility"
*In *Dunning v Board of Governors of the United Liverpool Hospitals* [1973] 2 All ER 454 Lord Denning MR said: "I think that we should construe 'likely to' as meaning 'may' or 'may well be made' dependent on the outcome of the discovery". In that case James LJ construed 'likely' as meaning a 'reasonable prospect'"
[208] S.1(3)(c)(iv) Terrorism (Prevention) Act 2011 (as amended)
[209] S.1(3)(c)(v) ibid

Additionally, the "*release of dangerous substance, causing fire, explosion or floods"*[210] or the "*interference with the supply of water, power or any natural resources, the effect of which is to endanger human life"*[211] is terrorism under the Act.

The key word in the above provision is *'to endanger human life.'* Clearly, the commission of the acts listed above would not constitute a terrorism offence under the TPA 2011 as long as the effect is not to endanger human lives.

It is important to note that the Act recognises 'any act or omission done in or outside Nigeria which constitute an offence within the scope of a counter terrorism Protocols or Convention duly ratified by Nigeria.'[212]

The position of the Nigerian law under Section 12 (1) of the Constitution 1999 is that "*no treaty between the federation and other country shall have the force of law except to the extent to which any such treaty has been enacted into the law by the National Assembly*". This position was affirmed in *Abacha v Fawehinmi*[213] where their Lordships, considering section 12 (1)10, of the Constitution held as follows:

> "*It is therefore manifest that no matter how beneficial to the country or the citizenry, an international treaty to which Nigeria has become a signatory may be, it remains unenforceable, if it is not enacted into the law of the country by the National Assembly.*"[214]

The Supreme Court ruling in this case clearly says that the recognition of Treaties and Conventions (including those that outlaw terrorism outside Nigeria) are not enforceable in Nigeria even if it is duly ratified. Accordingly, ratification does not by itself alone give a treaty the status of a law in Nigeria; an Act of the National Assembly is required to give it effect locally.

Finally, the Act is instructive that the disruption of services done pursuant to a protest which does not result in harm would not constitute a terrorist act. In a way, this proviso draws a line on the need to preserve the constitutional rights of citizens to assemble and protest.[215]

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[210] S.1(3)(c)(vi) ibid
[211] S.1(3)(c)(vii) ibid
[212] S.1(3)(d) ibid
[213] [2001] WRN vol. 51, 29
[214] Ibid Pg 165-166
[215] S.1(3) TPA 2011 (as amended)

It is noteworthy to mention that the Act recognises international terrorism and how to declare a person as an international terrorist. A person or group may be declared as an international terrorist if the person or group is a member of an international terrorist group recognised under the Act or listed in 'any resolution of the United Nations Security Council or instrument of African Union and Economic Community of West African States as a person involved in terrorist act,'[216] or "*considered to be a terrorist by a competent authority of a foreign state*."[217]

Going by this provision, the Act would recognise resolutions and international instrument from United Nations Security Council, the African Union (AU) and regional bodies like the Economic Community of West African States (ECOWAS). However, the Supreme Court decision in *Abacha v Fawehinmi*[218] merely makes these resolutions and international instruments "persuasive" and not "binding" on the Country, unless it they are enacted into the law by the National Assembly.

The inclusion of the phrase "*considered by a competent authority of a foreign state*" as act terrorist under the Act is ambiguous. Would the late Nelson Mandela be regarded as a terrorist just because the Botha regime at that time considers him as one? Would those who fought against the regime of Saddam Hussein in Libya be regarded as terrorist just because the government of Gaddafi call them "terrorists?" Which of the parties in Egypt unrest would be considered a terrorist? Is it the Islamic Brotherhood led by the ousted President Morsi or the protesters? The Act does not offer an explanation as per the meaning of "*a competent authority of a foreign state*." Similarly, would those who come to power through a *coup detat* like General Al Sisi in Egypt who declared the Islamic Brotherhood member as terrorist be considered as a competent authority of a foreign State? The TPA 2011 does not take into account differences in State's interpretation of a terrorist group. For example, the Russian government believes that those fighting against the Assad regime are terrorists, while the U.S is of the opinion the *Assad* regime is the terrorist. This leaves the definition wide open to several interpretations.

Additionally, S.40 Terrorism (Prevention) Act 2011 (as amended) provides that a "terrorist act" means an act which constitutes an offence according to the following agreement which is listed in "Appendix 1" of this paper.

[216] S.9(1)(b) ibid
[217] S.9(4)(c)
[218] [2001] WRN vol. 51, 29

2.1.II *Targets*

Going by the definition of terrorism under the TPA 2011(as amended), the targets of an 'act of terrorism' includes a government or an international organisation,[219] population of a country,[220] a person's life,[221] the fundamental political, constitutional, economic or social structures of a country or an international organisation[222], a transport system, an infrastructural facility including an information system, a fixed platform on the continental shelf, a public or private property.[223]

2.1.III *Motives*

The motives for committing an act of terrorism under the Terrorism (Prevention) Act 2011 are to '*unduly compel*' a government or international organisation,[224] to '*seriously intimidate'* a population,[225] *seriously destabilize or destroy* a country or an international organisation,[226] and to '*influence'* a government or an international organisation by intimidation or coercion.[227] In addition to that, other motives for committing an act of terrorism are to *cause major economic loss or to endanger human lives,[228] cause serious bodily harm* or *death,*[229] or to '*compel*' a third party to do or abstain from doing any act.[230]

Following this analysis of the definition of terrorism, the next provision of the Act that will be analysed in the power of arrest.

2.2 Power of Arrest

To arrest means to take a person into legal custody either under a valid warrant or on reasonable suspicion that a person has committed an offence.[231]

[219] S.1(3)(a) TPA 2011(as amended)
[220] S.1(3)(b)(ii) ibid
[221] S.1(3)(c)(i) ibid
[222] S.1(3)(b)(iii) ibid
[223] S.1(3)(c)(iii) ibid
[224] S.1(3)(b)(i) ibid
[225] S1(3)(b)(ii) ibid
[226] 1(3)(b)(iii) ibid
[227] S.1(3)(b)(iv) ibid
[228] S. 1(2)(c)(iii) ibid
[229] S.1(3)(c)(i) ibid
[230] S.11(1)(b) ibid
[231] *Oyo State v Olagunju* [1988] 2 NWLR, pp 122

S.25(1)(e)TPA 2011 (as amended) gives an officer of any law enforcement or security agency the power to arrest '*any person whom he reasonably suspects of having committed or likely to commit an offence under the Act.'*[232]

From the above provision, the legal standard to arrest under the Act is based on '*reasonable suspicion'* that an offence under the act is committed or is about to be committed. The key word is "*reasonable suspicion."* Reasonable suspicion to arrest' means that the officer has sufficient knowledge to believe that criminal activity is at hand.[233] To possess reasonable suspicion, an officer must be able to cite specific articulable facts to warrant the intrusion.[234] The term "*reasonable suspicion"* has generated much controversy under the Nigerian legal system. In *Chukwurah v C.O.P*[235] the Court held that 'reasonable suspicion' to arrest and detain a suspect must be exercised with discretion and that discretion must be objective and judicious. To justify arrest and detention on 'reasonable suspicion', the prosecution must adduce evidence on the grounds of such arrest and the test must be an objective one.[236] The Court stated further that objectivity here means that there must be a substantial standard or parameter to reasonably suspect a person to enable the Police to exercise their power to arrest as provided by law.[237]

In a similar ruling, a Benin High Court presided by Justice Esther Edgin ruled that "*reasonable suspicion*" to arrest and detain a suspect must be exercised with discretion and that discretion must be objective.[238] The Police in this case cited *''reasonable suspicion*" of committing an offence as a basis for the arrest of the accused, but the court found this to be false as he was

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[232] S.1(A)(5)(c) Terrorism (Prevention)(Amendment) Act 2013 also gives law enforcement agencies powers to investigate, arrest and provide evidence for the prosecution of offenders under the Act or any other law on terrorism in Nigeria.

[233]In the U.S case of *Terry v. Ohio* [1968] 392 U.S. 1, 27 Reasonable suspicion" was defined as an ''information which is sufficient to cause a reasonable law enforcement officer, taking into account his or her training and experience, to reasonably believe that the person to be detained is, was, or is about to be, involved in criminal activity. The officer must be able to articulate more than an "inchoate and particularized suspicion or 'hunch' of criminal activity."

[234] ibid

* *Fox v. United Kingdom* [1990] 13 E.H.R.R. 157 reasonable suspicion' presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as 'reasonable' will however depend upon all the circumstances"

*In *Hughes v Dempsey* 17 WAL.R. 81, the Court held that: "Reasonable suspicion means that there must be something more than imagination or conjecture. It must be the suspicion of a reasonable man warranted by facts from which inference can be drawn, but it is something which falls short of legal proof. "

[235] [1965] NNLR 21 at Pg 21

[236] ibid

[237] ibid

[238] 'Benin Court Orders Inspector-General of Police to Pay N5m to Rev. David Ugolor For Rights Violation' *Sahara Reporters* September 14, 2012 http://saharareporters.com/news-page/benin-court-orders-inspector-general-police-pay-n5m-rev-david-ugolor-rights-violation accessed 14th May 2013

arrested up for his activism in revenue transparency and bringing reforms to bear on the Nigerian Oil and Gas industry.[239]

The Court took a different opinion from the above in *Dokubo-Asari v. Federal Republic of Nigeria*[240] where the appellant was arrested and put under detention upon "*reasonable suspicion"* of having committed a felony. The court held that;

> "*A person's liberty, as in this case, can also be curtailed in order to prevent him from committing further offence(s). It is my belief that every person accused of a felony can hide under the canopy of Section 35 of the Constitution to escape lawful arrest and detention then an escape route to freedom is readily and richly made available to persons suspected to have committed serious crimes and that will not augur well for the peace, progress, prosperity and tranquillity of the society'*.[241]

It is clear that the decision in *Asari's case* was due to the concern for security agencies to be able to exercise their duties of arrest effectively. If properly applied, the power to arrest based on reasonable suspicion gives the Police some form of discretion to detect, apprehend, and prevent an act of terrorism.[242] If a Police officer believes that a person has committed or is committing a crime, he should be able to make an arrest. This argument is supported by S. 35(7)(a) Constitution of the Federal Republic of Nigeria which gives the Police power to arrest or detain upon 'reasonable suspicion' of having committed a criminal offence.

Nevertheless, arrest based on "*reasonable suspicion*" under the Act has been criticised by some scholars. According to Udogwu, the Police could hide under "*reasonable suspicion*" to make arbitrary arrests without a clear articulation of the facts that inform the decision to arrest.[243] He argues further that this will give the Police an "open ground" for deprivation of the right to liberty and security. But while Udogwu's fears are understandable, there are precautions

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[239] PWYP Nigeria, 'Nigeria calls for the immediate release of Rev. David Ugolor', 3 Aug 2012 http://www.publishwhatyoupay.org/resources/pwyp-nigeria-calls-immediate-release-rev-david-ugolor accessed 10th October 2013

[240] *Alhaji Mujahid Dokubo-Asari V. Federal Republic of Nigeria* S.C. 208/2006 8th day of June 2007 http://www.nigerialaw.org/Alhaji%20Mujahid%20DokuboAsari%20v%20Federal%20Republic%20of%20Nigeria.htm accessed 15th May 2013

[241] ibid

[242] A juxtaposition of S. 25(1)(e) Terrorism (Prevention) Act 2011 and the Police Act Cap P. 19 LFN 2004 shows that the Nigerian law gives the police discretion to determine the method to use in detecting and or preventing crime. Section 24 Police Act provides; 'The Police shall be employed for the prevention and detection of crime, the apprehension of offenders, the preservation of law and order, the protection of life and property and the due enforcement of all laws and regulations with which they are directly charged'. Consequently, section 4, Police Act expressly gives a Police officer powers to prevent the commission of an offence and apprehension of offenders.

[243] Emmanuel Ike Udogwu, *Strategies for Political Stability and Peaceful Coexistence* (Africa World Press, 2005) Pg 193

against these under the law in Nigeria. For instance, the Constitution requires an arresting officer to inform an accused of charges at the time of arrest and to take the accused to a police station for processing within a reasonable amount of time.[244] The law also requires the police to provide suspects with the opportunity to engage counsel and post bail (depending on the offence).[245] In addition, as stated earlier, the Courts have held that "*reasonable suspicion*" to arrest and detain a suspect must be exercised with discretion and that discretion must be objective, judicial and judicious. But the question is, are these Constitutional guarantees obeyed by the Police in Nigeria? Does the Police allow suspects to engage the services of counsel after arrest? And more importantly, is the power to arrest based on *reasonable suspicion* exercised objectively and judiciously by the Police/JFT in counter-terrorism activities in Nigeria? In order to answer these and other related questions, there is a need for a socio-legal· assessment of the power of arrest under the Act in Nigeria. This assessment will be done in a later chapter of the research.

2.3 Pre-charge detention

The next stage after the arrest of a terror suspect is detention pending formal charge. Under the Nigerian Terrorism (Prevention) (Amendment) Act 2013, the power for the pre-charge detention of a terror suspect is governed by Sections 25 (1)(e) and S.27(1).

S. 25(1)(e) provides that:

> "*where in a case of verifiable urgency, or a life is threatened, or to prevent the commission of an offence provided under this Act, and an application to the court or to a Judge in Chambers to obtain a warrant would cause delay that may be prejudicial to the maintenance of public safety or order, an officer of any law enforcement or security agency may,…-arrest and detain any person whom the officer reasonably suspects to have committed or likely to commit an offence under this Act.'*

According to S. 25 of the Act, the legal standard for the detention of a terror suspect is based on "*reasonable suspicion*" to have committed or likely to commit an offence under this Act.' An analysis of the term "*reasonable suspicion*" has earlier been done under the power of arrest.

Before an accused can be detained based on s.25(1)((e) certain requirements must be met. Firstly, it must be a case of "*verifiable urgency*" where a person's '*life must is threatened* or

[244]Section 35 (3) CFRN 1999
[245] ibid

'to prevent a person from committing of an offence under the Act,' or where applying to a Judge for "*warrant*" may be detrimental to safety of the public safety or order.

Going by the above provision, S. 25(1)(e) can only be applied in 'urgent' cases. The Act does not provide a meaning as to what is "*urgent*" or how this can be "verified." It is left for the Court to decide what is urgent and how this should be verified. In the writer's view, this statement is irrelevant as it adds nothing to the section. It is common knowledge that terrorism cases are always 'urgent' and cannot wait for judicial approval.

Furthermore, S. 27(1) TPA 2011 (as amended) provides that:

> "*the court may, pursuant to an exparte application grant an order for the detention of a suspect under the Act for a period not exceeding 90days subject to renewal for a similar period until the conclusion of the investigation and prosecution of the matter that led to the arrest and detention is dispensed with.*"[246]

Going by the above, a terrorist suspect in Nigeria can be detained by the Court based on an '*exparte application'* for a period not exceeding 90days. This 90 days pre-charge detention period is subject to renewal for an additional 90 days, therefore making it legal for an accused to be detained for a combined total period "180 days" until the conclusion of the case. However, the Act does not say what happens after the 180 days if investigation in the matter is not concluded with.

An '*ex parte application'* means only one side needs to apply for the pre-charge detention of the suspect.[247] In most cases it is the prosecution that makes the application. *Ex parte* judicial proceedings are usually reserved for urgent matters where requiring notice would subject one party to irreparable harm.[248] A court order from an '*ex parte hearing'* is swiftly followed by a full hearing between the interested parties to the dispute.

In *Leedo Presidential Motel Ltd v. Bank of the North*,[249] the Supreme Court held that before an '*exparte application'* can be made, it has to fulfil two conditions. Firstly, the nature of the application must be in a way that the interest of the adverse party will not be affected. Secondly,

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[246] Prior to its amendment by the Terrorism (Prevention) (Amendment) Act 2013, the initial period for the detention of a terror suspect under the TPA 2011 is based on the nature of the application i.e a period not exceeding 2months based on an expert application and a period not exceeding 30days based on an *exparte* application.

[247] Free Legal Dictionary, available on http://legal-dictionary.thefreedictionary.com/Ex+parte+application accessed 16th May 2013

[248] ibid

[249] [1998] 7 SCNJ 328 at 353

the application must be made in a timely manner. In any of these situations, a court may rightly exercise its discretion by granting a motion *ex-parte*.[250]

In the writer's view, and going by the Nigerian Supreme Court decision in *Leedo,* it would be difficult to see how the interest of the other party would not be adversely affected by detaining him/her for 90 days. Unless, it is for another reason not expressly stated in the Act, but if the purpose of S.27 is to prevent a suspected terrorist from committing acts of terrorism or to enable the detained suspect to appear before a full hearing or to allow the Police gather evidence, then the 90 days period is "excessive." It is unthinkable how a Court of Justice would detain an accused for 90 days based on the allegation by one party without listening to the other. Perhaps, the Nigerian law makers were unaware of the principle of *audi alterem paterm (*listen to the other side" or "let the other side be heard as well." It also seems that the law makers did not take into account the right to fair hearing, liberty and security and right to be tried within a reasonable time.

Furthermore, Section 28 (1) TPA 2011(as amended) permits the detention of a terror suspect by security agencies for a period of 24 hours without access to any other person (including his lawyer) other than the suspect's medical doctor. In addition to that, Section 28(4) provides that;

> '*where a person arrested under the Act is granted bail by a Court within the 90 days detention period stipulated by the Act, the person may on the approval of the head of the relevant law enforcement agency be placed under a house arrest and shall-be monitored by its officers,*[251] *have no access to phones or communication gadgets,*[252] *and speak only to his counsel until the conclusion of the investigation.*[253]

In an attempt to tackle terrorism, the Nigerian law-maker failed to take into account some important constitutional questions. For example, a careful examination of the Act shows that it does not make provision for the detention of under-age terrorist suspects. What happens if an under-age *Boko Haram* suspect is arrested? What remedy is available to the detained terror suspect? The Act does not provide any judicial remedy that could be available for the detained suspect.

The Act provides that all prosecutions must take place at the Federal High Court. This is contrary to the child justice provision of the Child Right Act (applicable in the Federal Capital

[250] ibid
[251] S.28(4)(a) Terrorism (Prevention)(Amendment) Act 2013
[252] S.28(b) ibid
[253] S.28(c) ibid

Territory) 2003[254] which provides that children under the age of 18 must be tried only in the family court.

Observably, the application of S.25 and 27 of the TPA 2011 in practice has been fraught with many human rights abuse and complaints. Amnesty International and Human Rights Watch argue that these provisions makes it possible to "lawfully" detain terrorist suspects indefinitely with widespread torture and inhuman degrading treatments. Other writers have also argued that pre-charge detention regime under the TPA 2011 is a blueprint for torture of *Boko Haram* detainees whilst under custody. In order to get a clearer picture of how the provision of the Act on the pre-charge detention is applied and enforced in Nigeria, a socio-legal assessment of this provision will be required. This socio-legal assessment will be done in later chapter of the research.

2.4 Encouragement of terrorism

Websites controlled or operated by terrorist groups have multiplied dramatically over the past decade.[255] The Nigerian terror group *Boko Haram* have also embraced the internet as a means of encouraging terrorism in Nigeria. According to Blanquart, there has been an increase in the use of the internet by *Boko Haram* to inform, indoctrinate and radicalise individuals.[256]

Encouragement of terrorism in Nigeria can be inferred from S.5 (1) - (2) of Terrorism (Prevention) (Amendment) Act 2013. Section 5(1) reads:

> *"Any person who knowingly, in any manner, directly or indirectly, solicits or renders support-(a) for the commission of an act of terrorism, or (b) to a terrorist group, commits an offence under this Act.."*[257]

[254] S.18

[255] Barbara Mantel, 'Terrorism and the Internet; Should Web Sites that Promote Terrorism Be Shut Down? Ibid Pg 130

[256] Gabrielle Blanquart, 'Boko Haram: Terrorist Organization, Freedom Fighters or Religious Fanatics? An Analysis of Boko Haram within Nigeria, an Australian Perspective and the Need for Counter Terrorism Responses that Involves prescribing them as a Terrorist Organization.' (2012) Edith Cowan University Research OnlinePg 32 http://ro.ecu.edu.au/cgi/viewcontent.cgi?article=1019&context=act&sei-redir=1&referer=http%3A%2F%2Fwww.google.co.uk%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3DUnited%2BStates%2Bproscribes%2Bboko%2Bharam%26source%3Dweb%26cd%3D9%26ved%3D0CE4QFjAI%26url%3Dhttp%253A%252F%252Fro.ecu.edu.au%252Fcgi%252Fviewcontent.cgi%253Farticle%253D1019%2526context%253Dact%26ei%3DuE6uUYaqOoz40gXQ9oDgDQ%26usg%3DAFQjCNFjWF9V3tVEgHsRUs2iTiVrzx0UcA#search=%22United%20States%20proscribes%20boko%20haram%22 accessed 20 May 2013

[257] S.5(1)(a)&(b) TPAA 2013

The Act goes further to say that encouragement of terrorism includes;

(a) incitement to commit a terrorist act through the internet, or any electronic means or through the use of printed materials or through the dissemination of terrorist information;
(b) receipt or provision of material assistance, weapons including biological, chemical or nuclear weapons, explosives, training, transportation, false documentation or identification to terrorists or terrorist groups;
(c) receipt or provision of information or moral assistance, including invitation to adhere to a terrorist or terrorist group;
(d) entering or remaining in a country for the benefit of, or at the direction of or in association with a terrorist group; or
(e) the provision of, or making available, such financial or other related services prohibited under this Act or as may be prescribed by regulations made pursuant to this Act."[258]

The opening sentence in S.5 (1) TPAA 2013 above shows the Act's intention to capture direct and indirect encouragement of terrorism. However, the provision of S.5(1) is broad. It merely provides that a person who knowing directly or indirectly, solicits or renders support for the commission of an act of terrorism in any manner commits an offence without properly explaining what constitutes direct or indirect encouragement or support for terrorism. Section 5 (2) does attempt to remedy this defect, instead it merely provide a list of acts that are considered as encouragement of terrorism.

The main flaw with s.5 of the TPAA 2013 is that it fails to properly explain the category of statements which are likely to be understood by members of the public as inciting or encouraging terrorism (directly or indirectly). Another flaw under this provision is that it fails to clearly provide a yardstick for determining how a statement on the internet, electronic means or printed material, and those listed under S.5(2)(B) are likely to be understood as encouraging terrorism? The Act also fails to take into consideration circumstances and manner of the publication of the statement that would constitute encouragement of terrorism. Other questions which the Act fails to address includes; how does a person know if he has committed the offence of encouragement of terrorism under the Act? What defences are available to a person to prove that he did not intend the statement to directly or indirectly encourage terrorism? Unfortunately the law makers did not take these questions into consideration when enacting the Act.

[258] S.5(2)(a)-(e)

With about 40 million computers users in Nigeria,[259] and taking into account the impact this could have on freedom of expression, it is expected that the provision on encouragement of terrorism under the Act will be comprehensive. Unfortunately only one section of the TPAA 2013 was dedicated to encouragement of terrorism and the provision itself is inadequate. Bearing in mind these inadequacies, the question that comes to mind is, what standards or yardstick is used in Nigeria to determine whether or not a statement encourages terrorism? And more importantly, how is this provision applied in practice in Nigeria? In order to effectively answer these questions, a socio-legal assessment of the provision of the Act will be required.

2.5 **Proscription**

"Proscription" means to 'forbid by law.'[260] According to S.19(d)(i)-(ii) Terrorism (Prevention) (Amendment) Act 2013 a '*proscribed organisation*' is a group involved in terrorism and is prohibited by law from operating in Nigeria and declared to be a "proscribed organisation" under S.2 of the Act. It also includes a group which has been declared to be an international terrorist group under Section 9 of the Act.

Under S.2 (1) TPA 2011 (as amended) for a group or organisation to be proscribed '*two or more persons must associate for the purpose engaging in-*' *participating or collaborating in an act of terrorism*';[261] '*promoting, encouraging, or exhorting other to commit an act of terrorism'*;[262] or '*setting up or pursuing acts of terrorism.*'[263]

Since no meaning was given to the phrase "*participating,*" "*collaborating,*" "*promoting"* or "*exhorting*" under the Act, it is left for the Court to choose the most appropriate definition to these terms. However, in ordinary English parlance, to *"participate*" means to 'take active part,'[264] To "*collaborate*" means to 'to work together,'[265] while to "*promote*" means to 'help

[259] Emeka Thaddues Njoku, 'Globalization and Terrorism in Nigeria' (August 13, 2011) Foreign Policy Journal http://www.foreignpolicyjournal.com/2011/08/13/globalization-and-terrorism-in-nigeria/3/ accessed 20th May 2013

[260] Legal Dictionary http://legal-dictionary.thefreedictionary.com/proscription accessed 10th October 2013.

[261] S.2(1)(a) Terrorism (Prevention) Act 2011

[262] S.2(1)(b) ibid

[263] S.2 (1)(C)ibid

[264] Y. Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge, Cambridge University Press 2004) P. 152.

[265] Steve Dale, 'The Art off Collaboration (Collaborative Behaviours)' July 12, 2012 http://steve-dale.net/2012/07/12/the-art-of-collaboration-collaborative-behaviours/ accessed 12th October, 2013

forward' or 'support actively'.[266] To "*encourage"* means to 'give courage, confidence, advice, assist, urge, advice'.[267] To "*exhort*" means to 'urge or advice strongly or earnestly.'[268]

In addition to the fore-going, an application based on the elements listed above, is then made to a Judge in Chambers by the Attorney General, National Security Adviser or the Inspector General of Police on the approval of the President to declare any entity to be a proscribed organisation.[269] After that, a notice of the proscription has to be published in the official gazette, two national newspapers or any other place determined by the Judge.[270] Consequently, it becomes an offence for a person to belong or professes to belong to the proscribed organisation.[271]

Remarkably, the Act provides a defence for a person accused of being a member of a proscribed organisation. It is a defence for anyone charged to prove that the organisation had not been declared a proscribed organisation at the time the person charged became or began to profess to be a member of the organisation and that he has not taken part in the activities of the organisation at any time after it had been declared to be a proscribed organisation.[272]

It is instructive to note that under the Act, political parties are not regarded as proscribed organisation. S.2(3)(ii) provides that *'for the avoidance of doubts, political parties should not be regarded as proscribed organizations and nobody should be treated as such because of his or her political beliefs.*'[273] Meaning of the term "political parties" is not provided under the Act. According to Hawkesworth and Kogan, a political party is 'any political group, in possession of an official label and a formal organization that links centre to locality, that presents at elections, and is capable of placing through elections (free or non-free) candidates for public offices.'[274]

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[266] http://legal-dictionary.thefreedictionary.com/promote accessed 13th October 2013
[267] *Robinson v. United States* [9th Cir. Cal. 1959] 262 F.2d 645 at 649
[268] http://legal-dictionary.thefreedictionary.com/exhort accessed 13th October 2013
[269] S.2(1)(c) Terrorism (Prevention) Act 2011
[270] S.2(2)ibid
[271] S.2(3)(i) TPA 2011as amended, S.16(3) Terrorism (Prevention)(Amendment) Act 2013.
[272] S.2(4) TPA 2011as amended , S. 16(4) Terrorism (Prevention)(Amendment) Act 2013.
[273] S.2(3)(ii) ibid
[274] Joseph Lapalombara, Jeffrey Anderson, "Political Parties," in *Encyclopaedia of Government and Politics*, vol. 1, ed. Mary Hawkesworth and Maurice Kogan (Routledge, 2001) Pg 394.
*According to Lamidi and Bello, a political party is an organised group of people with a similar aims and opinion that seek to inform the policy by getting its candidate elected into public offices.
K.O Lamidi, M.L Bello, 'Party Politics and Future of Nigeria Democracy; An Examination of the Fourth Republic' (2012) European Scientific Journal, Vol 8, Pg 170 http://eujournal.org/index.php/esj/article/view/629/692 accessed 10th October, 2013.

Nonetheless, the Act is silent on pressure groups and non-political organizations who mobilize against the government or a government policy leading to riots, insurrection or destruction of government properties. Such groups or organisations could be regarded as a terrorist group under section 2 of the Act.

Furthermore, S. 9(5) provides that '*a reference in this Act to a proscribed organisation includes a reference to an international terrorist group, and, whenever applicable, to a suspected international terrorist.*'

It is unclear what the Act means by '*reference to an international group*' without including the international terrorist organisations in its list of proscribed organisation. This general statement leaves the Act wide open to outlaws all terrorist organisations anywhere without considering why they were outlawed. For example, the U.S and UK's Terrorism Acts provide a list of all the organisations (both domestic and international) that are proscribed and the reason why they were proscribed.

S.9 (4) gives the President power to declare a group to be an international terrorist group on the recommendation of the National Security Adviser or Inspector General of Police if the President "reasonably suspects" that it is involved in the commission, preparation or instigation of acts of international terrorism.

The President may also declare a group to be an international terrorist group if the group is listed as a group or entity involved in terrorist acts in any resolution of the United Nations Security Council or in any instrument of the African Union and Economic Community of West African States[275] or considered as a group or entity involved in terrorist acts by the competent authority of a foreign State.[276]

There are associated offences related to proscription under Sections 4(c), and 5(1)(b) Terrorism (Prevention) (Amendment) Act 2013.

Section 4(c) of the Act provides that "*any person who attends a meeting, which in his knowledge is to support a proscribed organization, or to further the objectives of a proscribed organization, commits an offence under this Act*." However, a person is exculpated from a

[275] S.9(4)(b)
[276] S.9(4)(c)

criminal charge under this section if he denies that he does not know that the meeting he attends is to support or further the objectives of a proscribed organisation

Section 5(1)(b) of the Act provides that 'a person who knowingly, in any manner, directly or indirectly, solicits or renders support to a terrorist group commits an offence under this Act'

It is worth mentioning that the Nigerian government's implementation of the provision of "proscription" of terrorist organisation has been slow. The Terrorism (Prevention) Act was enacted in June 2011 and since then, *Boko Haram* and its splinter, *Ansaru*, have carried out numerous attacks which have led to death of thousands of people and the destruction of properties. Yet, it took the Nigerian government more than two years before it proscribed both groups.[277] For two years the government turned a blind eye to Section 2 of the Act. One is forced to ask whether the Act is just a mere fulfilment of an international obligation or it is aimed at tacking terrorism headlong in Nigeria?

2.5.A ***List of Proscribed Organisation Under the TPA 2011 (as amended).***

Two terrorist groups namely *Boko Haram* otherwise known as (*Jamaatu Ahlis-Sunna Liddaawati Wal Jihad)* and *Ansaru* otherwise (*Jama'atu Ansarul Muslimina Fi Biladis Sudan)* have been formally proscribed under the Terrorism (Prevention) Act 2011.

The Order, which has been gazetted as the Terrorism (Prevention) (Proscription Order) Notice 2013, was approved by President Jonathan pursuant to s.2 of the Terrorism Prevention Act, 2011.[278]

Conclusion

This chapter undertook a doctrinal analysis of the Nigerian TPA 2011(as amended) using the black-letter approach to describe in detail the legal meaning of the terms used under the Act. This analysis raised several questions as well as some inadequacies under the Act. For instance in defining terrorism, phrases/wordings such as "unduly," "seriously," were used without a detailed explanation as to what they mean. Also, the definition does not clearly distinguish an act of terrorism from an ordinary criminal offence in Nigeria. The Act further created problems

[277] President Jonathan officially proscribed 'Boko Haram' and 'Ansaru' pursuant to S. 2 Terrorism (Prevention) Act 2011 *Vanguard Newspaper* 3rd June 2013. http://www.vanguardngr.com/2013/06/jonathan-clamps-down-on-terrorist-groups-proscribes-boko-haram-ansaru/ accessed 3rd July 2013

[278] Talatu Usman, Premium Times, 'Jonathan officially declares Boko Haram a terrorist organisation' June 4, 2013 http://premiumtimesng.com/news/137586-jonathan-officially-declares-boko-haram-a-terrorist-organisation.html accessed 1 July 2013

as per its application/scope by including acts done outside the country to include terrorism without a provision as to how this would be achieved in practice. The analysis appears to suggest that the definition of terrorism under the Act is ambiguous. However, these criticisms are limited in nature and in scope in exposing ambiguities within the law. In order to relate the definition of terrorism under the Act to what obtains in practice, a further examination (*socio-legal* appraisal) of the definition is necessary.

In analysing the provision of arrest and pre-charge detention under the Act, it was established that the legal standard for arrest and pre-charge detention of terror suspects is based on "*reasonable suspicion."* The analysis reveals that terror suspects in Nigeria can be detained pending charge, for up to 180 days. Nonetheless, several questions were raised. For instance, as required by the Courts, is "*reasonable suspicion*" to arrest and detain a terror suspect exercised with discretion in Nigeria? Does the Police and JTF exercise this "discretion" objectively and judiciously? What is the implication of the 90 days pre-charge detention of suspect on Nigeria's domestic, regional and international human right obligations? Is the 90/180 days pre-charge detention consistent with Nigeria's constitutional provisions on liberty and security and the right to fair trial? To answer these questions and other related queries, a further socio-legal assessment of "arrest" and "pre-charge detention" is necessary. This will be done in a later chapters of the research.

Extremists and radicals have taken advantage of the easy access to information technology to spread hate messages, radicalise young individuals, and to encourage terrorism. A comprehensive provision of encouragement of terrorism under the TPA 2011 was therefore expected to adequately address this. Unfortunately, the analysis reveals that the Act does not properly explain the category of statements which are likely to be understood by members of the public as inciting/supporting or encouraging terrorism. Several other lacunas were identified under the provision on encouragement of terrorism. This also will require further assessment. Perhaps this could be an important area which Nigeria Legislation can learn from the U.K Terrorism Act.

The legal requirement for proscribing a group or organisation in Nigeria is to participate, encourage, or exhort others to commit an act of terrorism. The Act also recognises international terrorist organisations are proscribed under the Act. Yet, only *Boko Haram* and *Ansaru,* both of whom are domestic terrorist organisations are proscribed under the Act. This raises question about the international scope of the provisions of the Act particularly S. 9(5) which says that

'*a reference in this Act to a proscribed organisation includes a reference to an international terrorist group..'* In analysing the provision on proscription, there were concerns that this could be used to proscribe non-violent groups. This is because of the broad powers given to the President under the Act. Consequently, an assessment of how Proscription is used in practice is necessary. This also will be done in a later chapter of the research.

Having analysed the crucial sections under the Nigerian TPA 2011 (as amended), a similar analysis of the U.K's Terrorism Act 2000 will be done in the next chapter. This is to establish legal principles and the meaning of technical terms used under the Act. Perhaps this analysis will reveal any short-comings or flaws under the UK Terrorism Act.

CHAPTER 4

A CRITICAL ANALYSIS OF THE UNITED KINGDOM'S TERRORISM ACT 2000

1. Introduction

The United Kingdom has witnessed more than three centuries of intermediate campaigns of terrorism in Ireland against its establishment with the British State by the Irish Republican Army (IRA).[279] The UK has also faced threats and attacks from international terrorist organisations. An example of this was the July 5 2005 London bombings by four members of Al-Qaeda in which 56 people were killed and around 700 people injured. This attack came a day after London was selected to host the 2012 summer Olympics.[280] One of the most significant legal measures adopted by the UK government is the enactment of the Terrorism Act 2000. The Terrorism Act 2000 replaced the PTA (Temporary Provision Act) 1984. The Terrorism Act 2000 amended other previous legislation on terrorism and provided a permanent code for responding to terrorism threats in the UK. The Act is divided into 8 parts and 16 Schedules.[281] The Terrorism Act 2006 created new offences including the offence of encouragement of terrorism, preparation of terrorist acts, dissemination of terrorist publications, and offences relating to making and use of radioactive materials. It also amended the definition of terrorism and increased the period for the detention of terrorist suspects to 28 days.[282] This has now been reduced to 14 days by the Protection of Freedom Act 2012.[283]

The aim of this chapter is to critically analyse key provisions of the UK's Terrorism Act 2000 and the Terrorism Act 2006. This analysis will explain in detail, the formal/technical terms and

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[279] C. Walker, *Blackstone's Guide to the Anti-Terrorism Legislation(*3rd Edition 2014) Pg 2

[280] The Report of the Official Account of the Bombings in London on 7th of July 2005 http://www.official-documents.gov.uk/document/hc0506/hc10/1087/1087.pdf accessed 6th May, 2013

[281] Also, influenced by the UN Security Council Resolution 1373, the UK adopted the CONTEST strategy in protecting its interest. "CONTEST" has four stands; Pursue-that is to stop terrorist attacks; Prevent- that is to stop people from becoming terrorists; Protect- that is to strengthen UK's protection against terrorist attack; and, Prepare- that is prepare to mitigate where it cannot be stopped.
CONTEST; The United Kingdom's Strategy for Countering Terrorism: Presented to Parliament by the Secretary for the Home Department by Command of Her Majesty July 2011 CM 8123 Pg 10-14 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97995/strategy-contest.pdf accessed 5th April of 2013

[282] Report On the Operation in 2010 of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006 by David Anderson, QC July 2011 Presented to Parliament Pursuant to Section 36 of Terrorism Act 2006. http://terrorismlegislationreviewer.independent.gov.uk/publications/terrorism-act-2000?view=Binary accessed 5th April, 2013.

[283] S.57 PFA 2013

pure legal principles used under the Terrorism Act 2000 and S.1 Terrorism Act 2006. In other words, the focus is on the word "in the law book", as opposed to the law in action.

As stated in the preceding chapter, an analysis under the UK TA 2000 will be limited to five key aspects of the legislation. These include the definition of terrorism, arrest, detention, proscription and encouragement of terrorism.

2.1 **A Critical Analysis of the Definition of terrorism**

Suffice it to say that there is no single definition of terrorism that commands full international approval.[284] According to David Anderson, "the problem of defining terrorism is a notoriously tricky one, made more complex by its intractable international dimension**.**"[285]

The definition of terrorism in the UK is provided for under S.1 Terrorism Act 2000.

Section 1(1)(a) Terrorism Act 2000 (as amended by Terrorism Act 2006) defines terrorism as including any "action" which falls under subsection (2).

Thus, S.1 (2) provides that any action which;-

'(*a) involves serious violence against a person'.*
(b) involves serious damage to property,
(c) endangers a person's life, other than that of the person committing the action,
(d) creates a serious risk to the health or safety of the public or a section of the public, or
(e) is designed to interfere with or seriously to disrupt an electronic system'

From the fore-going, the Act demands a '*serious*' level of violence against a person for an act to amount to terrorism. The Court of Appeal in *R v Atkinson* held that 'a significant risk had to be shown for an offence to be "serious." [286] A similar decision was reached in *R v Lang* where the Court also held that a "significant" risk had to be shown" for an offence to be regarded as "serious."[287] Going by these decisions, the violent act against a person and damages to property as per S1(2)(a) and (b) must be "*significant*" for it to amount to terrorism under the Act.[288]

[284] A Report by Lord Carlile of Berriew Q.C, Independent Reviewer of Terrorism Legislation March 2007 Pg 47 http://www.official-documents.gov.uk/document/cm70/7052/7052.pdf accessed 5th April, 2013.
[285] Anderson, 'Shielding the Compass: How to Fight Terrorism Without Defeating the Law' (June 13, 2013) Brick Court Chambers, London Pg 11
[286] [2006] All ER (D) 236 (Jan)
[287] [2005] All ER (D) 54 (Nov)
[288] ibid

Strictly speaking, the use of the phrase "*serious"* in qualifying a terrorist act is rather nebulous. It suggests that an offence has to be of a large scale for it to be regarded as terrorism. But in reality, this is not always the case. The inclusion of the phrase "*serious violence or damage*" to property as an act of terrorism amplifies the definition of terrorism under the Act. Does it mean that an act of violence against a person or minor damages to property is not regarded as terrorism under the Act? In the writer' opinion, the inclusion of these phrase adds nothing to the section.

Furthermore, any action that "endangers a person's life other than the person committing it is terrorism under the Act."[289]

The phrase "*serious*" was again used, as per S1(2)(d) and (e), to qualify "risk to the health or safety of the public or a section of the public" or interference an electronic system" before it can be seen as an act of terrorism. Again this provision is unclear. Does the Act mean that a minor risk to the health of the public or interference with an electronic system is not terrorism? The inclusion of "*serious"* to qualify these offences is unnecessary. For example, both serious and minor interference with an electronic system could have serious impact on the safety of the public, including an attempt to do same.

In addition to the foregoing, "terrorism" under the Act also requires the '*use or threat of action designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public."*[290]

The key words under this section are "*influence*" and (to a lesser extent) *"intimidate*." Going by the above provision, any threat of action that is not aimed at influencing the government or an international organisation or aimed at intimidating the public will not be regarded as terrorism.

In *Sanders and Another v Buckley*[291]the Court in explaining the term "to influence" held it to mean "not done with free will" or "to bring pressure upon*."* According to the Black's Law Dictionary, to "*intimidate*" means to "put in fear" or "to be placed in a position of being afraid."

[289] S.1(2)(c)
[290] S. 1(1) (b)
[291] [2006] All ER (D) 307 (Dec)

Also, terrorism under the Act means the *''use or threat made for the purpose of advancing a political, religious, racial or ideological cause.''*[292] This suggests that any action made with the aim of giving active support to political, religious, racial or ideological cause is terrorism. This section leaves the definition of terrorism under the Act wide open.

The former Independent Reviewer of the Terrorism Act, Anderson QC, queries whether the underlying purpose of terrorism should be for advancing a political, religious, racial or ideological cause. He argued that these conditions were irrelevant and unnecessary in the definition of terrorism.[293] In his words "…. *the ability to defend further up the field is justified, if at all, by the potentially lethal effects of terrorism rather than by the mental element behind it.*''[294] He argued further that if a terrorist incident like mass hostage-taking occurs, what matters is what the terrorist plan to do, and what is needed to stop an attack. According to him, whether the terrorist motives are personal, financial or political, or whether they seek to influence the government or to intimidate people whom they have not captured are questions which may be of significance to their ultimate sentence, but which scarcely seem to have much bearing on the availability of precursor offences, or the Terrorism Act arrest power.'

On the other hand, the non-inclusion of the "target and purpose (motive) requirement" under the definition of terrorism has its negative impacts. Anderson says that this could restrict the definition of terrorism thereby putting the Courts in a difficult situation currently experienced by the New York Court of Appeals. He stated that the NYCA is struggling to avoid attaching the terrorism label to a gang shooting targeted at Mexican-Americans in the Bronx.[295]

Lastly, Section 1(3) of the Act provides that the "*use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism.*"

It must be noted that "*action*" under the Act includes those done outside the United Kingdom.[296] This extends the definition of terrorism under the Act to all jurisdictions. Likewise, '*government*' under the Act means the government of the UK, of a part of the UK,

[292] S.1(1)(c)
[293] Anderson, 'Shielding the Compass' op cit Pg 14
[294] ibid Pg 14
[295] *The People v Edgar Morales*, No 186, 11 December 2012,
[296] S. 1(4) (a)
*Also s. 1(4)(b) provides that reference to 'any person' or 'property' is reference to any person or property wherever situated. This gives the Act universal application.

or of a country other than the UK.[297] The Court in *R v F*[298] held that "*government*" under the Terrorism Act 2000 is not limited to countries governed by democratic or representation principle, but also includes a tyranny, dictatorship, junta or those usurping power.[299] This ruling further expands the scope of the definition of terrorism under the Act. Going by this ruling, it could be argued that any individual that support the forces against the Assad regime in Syria is tantamount to committing acts of terrorism as per S. 1(1)(b) of the Act.

S.1(1)(b) of the Act have also been criticised on the basis that it requires proof that a terrorist acted for a political, racial, or religious motive. In his view, terrorism laws must have means of distinguishing terrorism from ordinary crime, but relying on political and religious motive is not necessary.[300]

As a final point, it is important to note that the definition of terrorism under the Act makes no reference to any exception for armed conflict, whether for international or non- international conflicts which are recognised as such within international law.[301] This issue was addressed by the Supreme Court in *R v Gul*.[302] In that case, the Supreme Court held that the definition of terrorism extends to military or quasi-military activity aimed at bringing down a foreign government, even where that is approved (official or unofficial) by the UK government and even when perpetrated by the victims of the oppression abroad.[303]

2.2 ***Arrest***

S. 41(1) of the Terrorism Act 2000 provides that a "*constable may arrest without warrant a person whom he reasonably suspects to be a terrorist.*"

A "terrorist" as per s.41 means a person "*who-(a)has committed an offence under any of sections 11, 12, 15 to 18, 54 and 56 to 63, or (b) is or has been concerned in the commission, preparation or instigation of acts of terrorism."*[304] This also includes *"a reference to a person*

[297] S.1(4) (d)
[298] [2007] ECWA Crim 243
[299] Ibid
[300] Kent Roach, 'The Case of Defining Terrorism with Restraint and Without Reference to Political or Religious Motives' ed in Andrew Lynch, Edwina McDonald & George William, *Law & Liberty in the War on Terror* (the Federation Press, 2007) Pg 287
[301] Clive Walker, Case Comment. *R V Gul*; Trial-terrorism-disseminating terrorist publication (Criminal Law Review 2012) Pg 648
[302] [2013] UKSC 64
[303] Ibid
[304] S.40 (1)(a)-(b) TA 2000

who has been, whether before or after the passing of this Act, concerned in the commission, preparation or instigation of acts of terrorism within the meaning given by section 40 (1)(b."[305]

The power to arrest given to the Police under the Act is based on 'reasonable suspicion.' The European Court of Human Right in *Fox, Campbell and Hartley v. United Kingdom* held that "*reasonable suspicion*" to arrest presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence."[306] However, the Court added that the 'reasonableness' of the suspicion justifying such arrests cannot always be judged according to the same standards as are applied in dealing with conventional crime.[307] The Court held that;

> "In view of the difficulties inherent in the investigation and prosecution of terrorist-type offences, ….the 'reasonableness' of the suspicion justifying such arrests cannot always be judged according to the same standards as are applied in dealing with conventional crime. Nevertheless, the exigencies of dealing with terrorist crime cannot justify stretching the notion of 'reasonableness' to the point where the essence of the safeguard secured by Article 5 (1) (c) is impaired…. "[308]

The court also made this explicitly clear in *Sher v U.K* that terrorist crime falls into a special category and because of the attendant risk of loss of life and human suffering, the police are obliged to act with utmost urgency in following up all information, including information from secret sources. Furthermore, the police may frequently have to arrest a suspected terrorist on the basis of information which is reliable but without having to disclose the source of the information leading to the arrest.[309]

This suggests that although the test for determining what amounts to 'reasonable suspicion' is an objective one, nonetheless, these may depend upon the circumstances.[310] This case suggests that the Courts will be willing to give an elastic interpretation to the meaning of "reasonable

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[305] S.40(2)
[306] 30 August 1990, Series A, No. 182, p. 16, Para. 32
[307] Ibid pp. 16-17, para. 32.
[308] Ibid para 32
[309] Application no 5201/11 Para 148
[310] The ECHR Held further that although "the Contracting States cannot be asked to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources of their identity", the Court must never the less "be enabled to ascertain whether the essence of the safeguard afforded by Article 5 (1)(c) has been secured"; this means that "the respondent Government have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence". Ibid., pp. 17-18, para. 34.

suspicion" as per arrests made under S.41 of the Terrorism Act 2000. Similar decisions were reached in *Brogan v UK*[311]and *Murray v UK.*[312]

As explained in a preceding chapter (literature review), strictly speaking arrest under S.41 differs from normal arrest powers in the sense that no specific offence need be in mind of the arresting officer. Even though the arresting officer needs to state that an arrest is being imposed and the grounds for the arrest, the officer is not required to give a detailed reason for the arrest.[313]

For the purpose of arresting a person under the Act, a constable may enter and search any premises where the person is or where the constable reasonably suspects him to be.[314] Furthermore, S.83 Terrorism Act 2000 permits a member of the Armed forces (Her Majesty's forces) on duty to arrest without warrant,[315] and detain for a period not more than 4hours,[316] any person he reasonably suspects of committing, has committed or is about to commit any offence under the Act. From the wording of this section, for a member of the armed forces to make an arrest under the Act, he must be on "*duty*,"[317] that is, the arrest must be related to the officer's work circumstances.[318] It is unclear if a member of the armed offices can still make an arrest if he is not duty?

It must however be noted that although power to arrest based on reasonable suspicion is an important power given to the Police in the fight against terrorism, it does not justify an indefinite detention of a suspected terrorist (*Magee v UK*).

[311] [1989] 11 EHRR 117
[312] [1996] 22 EHRR 29
[313] *Murray v UK,* supra para 61
[314] S.81 (2) Terrorism Act 2000
[315] S.83(1)(a) ibid
[316] S.83 (1)(b) Ibid
[317] The Court in *R (Stunt) v Mallet* [2001] EWCA Civ 265 and *Huddersfield Police Authority v Watson* [1947] KB 842 held that "'Duty' relates to a person's work circumstances."
(A look at meaning of an 'officer' under S. 90 (2) says 'a member of Her Majesty's Forces on duty')
[318] However, S. 83(2) provides that ' *a person making an arrest under this section complies with any rule of law requiring him to state the ground of arrest if he states that he is making the arrest as a member of Her Majesty's forces*'. Thus, this section gives member of the armed forces power to arrest a suspected terrorist by just stating that he is making the arrest as a member of Her Majesty's forces.

2.3 ***Pre-charge detention***

The next stage after the arrest of a terror suspect is detention pending when he/she is formally charged to Court (pre-charge detention).[319] This is contained under sections 40 and 41 of the T.A 2000 (as amended by S. 23 of Terrorism Act 2006).

S.41(3) reads;

> '*subject to subsection (4) to (7), a person detained under this section shall (unless detained under any other power) be released not later than the end of the period of 48 hours beginning- (a) with the time of his arrest under this section, or (b) if he was being detained under schedule 7 when he was arrested under this section with the time when his examination under that Schedule began*.'

This section permits the police to arrest and detain a terror suspect for up to 48 hours if a 'review officer does not authorise the continued detention'.[320] A review can only begin after forty-eight hours. The review officer must be at least superintendent or above.[321] The additional period of extension for seven days may be granted by a judicial authority up to 14 days[322] if satisfied that—

(a)'there are reasonable grounds for believing that the further detention of the person to whom the application relates is necessary' and

(b)'the investigation in connection with which the person is detained is being conducted diligently and expeditiously', or it is

(1A)(a) 'to obtain relevant evidence whether by questioning him or otherwise'

(b)'to preserve relevant evidence;' or

[319] According to Liberty, Pre-charge detention refers to the length of time an accused can be locked-up and questioned before facing a charge. During this time, the accused might never be told what he is accused of, or be able to challenge the evidence against him.
LIBERTY; 'An end to lengthy pre-charge detention and control orders?' 24th June 2010 https://www.liberty-human-rights.org.uk/media/press/2010/an-end-to-lengthy-pre-charge-detention-and-control-orders-.php accessed 2nd June 2013

[320] S. 41(4) Terrorism Act 2000

[321] S.23(2) Terrorism Act 2006

[322] S.57 Protection of Freedom Act 2012

(c)'pending the result of an examination or analysis of any relevant evidence or of anything the examination or analysis of which is to be or is being carried out with a view to obtaining relevant evidence'.[323]

The definition of a 'judicial authority' means a District Judge (Magistrate Court) in England, In Scotland (the Sheriff), and a County Judge in Northern Ireland.

Schedule 8 Part III of the Act provides no meaning to the term "reasonable grounds," "necessary," "diligently'' and "expeditiously" as it relates to grounds for extending detention. In *Redmon v U.S* [324] 'reasonable grounds' was held to mean the existence of facts and circumstances known to police officers (in this context a judicial authority) as would warrant a prudent and cautious man in believing that the person arrested is guilty of an offence. Relating this to Sch 8 means that a judicial authority may extend the period of detention based on the existence of facts and circumstances as would warrant a prudent and cautious man in believing that the person arrested is guilty of an offense and it is "compelling"[325] to do so.

Another requirement for the extension of the period for detention under Sch.8 is that an investigation in connection to the detained suspect is conducted "expeditiously" and "diligently'' that is, the investigation is "done with speed"[326] and "efficiently."[327]

Furthermore, the Secretary of State can extend the period of detention of terror suspects in UK under the emergency power for temporary extension and review of extensions by virtue of S. 58(1) of the Protection of Freedom Act 2012. However this can only be used under exceptional circumstances where Parliament is dissolved. S.38(1) Sch 8 Part 4 of the TA 2000 reads:

"(1)The Secretary of State may make a temporary extension order if—

(a)either—

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[323] C.11 Sch. 8 Part III S. Para 32 Terrorism Act as amended.

[324] C.A 355 F.2d 407*R,* The Court however cautions that the meaning of the term depends upon the Context and the Statute in which it is used.
In *R (on the application of Hooverspeed Ltd v Customs and Exercise Comrs*, [2002] 2 All ER 553 The Court held that this could in some circumstances mean information derived from by the Police by way of e.g "profiles or trends"

[325] The Court in *The Victor* [1865] 13 LT 21, held that it is impossible to give an exact and concise definition of the term "compelling",-for it will depend upon the circumstances of the case.
It connotes *Necessary*' means '*compelling, compelling, critical, crucial, demanded, essential, expedient, fundamental, imperative, important, incumbent,*

[326] Meaning of 'expeditiously' Free legal Dictionary

[327] The term "diligently" was held to mean "efficiently, industriously, continuously" in *West Faulker Associates v Newham London Borough Council* 71 BLR, CA *Hounslow London Borough Council v Twickenham Garden Development Ltd* [1971] Ch 233 at 269

(i)Parliament is dissolved, or

(ii)Parliament has met after a dissolution but the first Queen's Speech of the Parliament has not yet taken place, and

(b)the Secretary of State considers that it is necessary by reason of urgency to make such an order."

2.4 ***Encouragement of terrorism***

Extremist websites in the U.K have grown from 12 to over 4000 between 1998 and 2008.[328] This has further increased to several thousands in 2016. In fact, according to the Commissioner of London Metropolitan Police, more than 1,000 extremist websites are taken down every week in the UK.[329] In order to tackle this, the Terrorism Act 2006 creates a number of offences including encouragement of terrorism. This criminalizes both direct and indirect encouragement of terrorist acts. This gives the Government power to prosecute an individual for encouraging terrorism.

According to S. 1 Terrorism Act 2006, encouragement of terrorism applies to a

"*statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences".*

It also includes other inducements that could lead to committing, preparing or instigating acts of terrorism or Convention offences. Convention offences are offences listed under Schedule 1 of the Act.

Section 1(2) provides that, for a person to commit an offence of encouragement of terrorism, two requirements must be met. Firstly, a person must publish a statement, or cause another to publish a statement.[330] Secondly, at the time the person publishes it or causes it to be published— he "intends" members of the public to directly or indirectly encouraged or induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences;[331] or

[328] Clive Walker '*Blackstone Guide op cit* 2009 pg 63

[329] Caroline Mortimer, 'More than 1,000 Extremist Websites Taken down Every week, London Police Chief, Sir Bernard Hogan-Howe say' *Independen*t 17th Dec, 2015 http://www.independent.co.uk/news/uk/crime/more-than-1000-extremist-websites-taken-down-every-week-london-police-chief-sir-bernard-hogan-howe-a6776961.html accessed 20th Dec, 2015

[330] S. 1(2)(a) Terrorism Act 2006

[331] S. 1(2)(b) (i) ibid

is "reckless" as to whether members of the public will be directly or indirectly encouraged or induced by the statement to commit, prepare or instigate acts of terrorism.[332]

From the above provision, when publishing the statement or causing another to publish it, the defendant must "intend" members of the public to be encouraged to commit a terrorist offences. This offence can be committed "i*ntentionally*," that is, the defendant must have the necessary state of mind, or "*recklessly*."[333]

The necessary "intention" required for the offence is that the defendant must intend members of the public to be encouraged to commit, prepare or instigate acts of terrorism or Convention offences. The Court in *R v G*[334] held that a person acts "*recklessly*" when he is aware of a risk that it exists or will exist and in the circumstances known to him, and reasonable to takes the risk. Therefore the onus is on the state to show that the defendant is aware that his/her statement would encourage terrorism or Convention offences, in the circumstances known to him, and he took that risk.

Another element of the offence of encouragement of terrorism is "statements that are likely to be understood by some[335] or all of the members of the public.*''*[336]

S 1(4) Terrorism Act 2006 provides;

> "*for the purposes of this section the questions how a statement is likely to be understood and what members of the public could reasonably be expected to infer from it must be determined having regard both—(a)to the contents of the statement as a whole; and (b)to the circumstances and manner of its publication."*

It must be noted that a person could still be prosecuted even if no member of the public is encouraged or induced to commit acts of terrorism.[337] This statement could be under any format, 'including communication without words consisting of sounds or images or both'[338]

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[332] S.1(2)(b)(ii)ibid
[333] Correspondence to The Terrorism Act 2006 11th April 2006 https://www.gov.uk/government/publications/the-terrorism-act-2006 accessed 5th June 2013
[334] [2003] UKHL 50 The Court held that a "person acts "recklessly" in the circumstances (i) when he is aware of a risk that it exists or will exist (ii)a result when he is aware of a risk that will occur (iii) and in the circumstances known to him, reasonable to take the risk.
[335]meaning 'Being an unspecified number' 'Unknown or unspecified' The Legal Dictionary
[336] S.1(1) Terrorism Act 2006
[337] S.1(5)(a)(b)
[338] S. 20 (6) Terrorism Act 2006

S. 1(3) Terrorism Act 2006 explains further that statement likely to be understood by members of the public as 'indirectly encouraging' the commission[339] or preparation[340] of acts of terrorism or Convention offences includes;

> "*every statement which glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offence*"[341]and is '*a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.*"[342]

The wording of this section suggests that this is a statement which members of the public would *reasonably*, that is, 'rationally, appropriately, or ordinarily[343]' be expected to conclude as conduct that should be emulated under the existing circumstances.

This section has two limbs. Firstly, the audience must *reasonably* understand that they should emulate the conduct i.e. that they should act in a similar manner. Secondly, the concept of "*in existing circumstances*" means that it must be possible to emulate the conduct glorified in this day and age. This suggests that the glorification of distant historical events is unlikely to be caught.[344]

Clarke argues that the drafters of the Act intended indirect encouragement to "capture the expression of sentiments which do not amount to direct incitement to perpetrate acts of violence, but which are uttered with the intent that they should encourage others to commit terrorist acts."[345] As previously stated a person may be charged for encouraging terrorism even if no member of the public was actually induced to commit acts of terrorism by the statement.[346] However, it is a defence for an accused charged under this section to show that the statement

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[339] In *R v Miller* [1983] 2 A.C 161 the court made reference to "*commission*" to mean 'to cause to happen'. The 'act of perpetrating an offence' Legal Dictionary

[340] There is no precise definition for the terminology "preparation"- it is indicative of 'the state of having been made ready beforehand; readiness'

[341] S.1(3)(a) T.A 2006

[342] S.1(3)(b) ibid

[343] The term *"reasonable*" is a generic and relative one and applies to that which is appropriate for a particular situation or a question of fact. *Wershof v Metropolitan Police Comr* [1978] 3 All ER 540
In *Paxton v Courtnay* [1860] 2 F & F 131 per Keating J; cited with approval in *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd* [1916] 2 KB 296 at 298 per Horridge J. held the term reasonable to mean what a "honest, and right-minded men would adopt."
It connotes "rational, appropriate, ordinary or usual in the circumstances. "

[344] Correspondence The Terrorism Act 2006 Op Cit

[345] Letter from Charles Clarke, U.K. Home Secretary, to Rt. Hon David Davis MP and Mark Oaten MP, members of the House of Commons (July 15, 2005), http://www.parliament/lib/research/rp2005/rp05-066.pdf accessed 10th July 2013

[346] S.1(5)(a)(b) TA 2006

neither expressed his views nor had his endorsement and it was clear, in all circumstances of the statement publication that it did not express his view and did not have his endorsement.[347]

Section 2 of the Terrorism Act 2006 provides for associated offences to encouragement of terrorism. This section creates the offence of dissemination of terrorist publication.

Under S.2, it is an offence for a person to distribute or circulate a terrorist publication;[348] give, sells or lend such a publication;[349] offer such a publication for sale or loan;[350] provide a service to others that enables them to obtain, read, listen to or look at such a publication, or to acquire it by means of a gift, sale or loan;[351] transmit the contents of such a publication electronically;[352] or to have such a publication in his possession with a view to its becoming the subject of conducting falling to those earlier listed.[353] At the time of committing the offence, the defendant must "*intend*" an effect of his conduct to be a 'direct or indirect encouragement terrorism' or other inducement to commit, prepare or instigate acts of terrorism, or with the "intention" of assisting in the commission or preparation of such acts, or done "recklessly" with the intent of having effect both or any of the afore-mentioned.[354]

Going further, S.3 of the Terrorism Act 2006 makes provision for the application of encouragement of terrorism and the dissemination of terrorist publication to internet activity etc. This covers statements published or caused to be published with the provision of services provided electronically, or conducts under s 2(2) carried out with the provision or use of an electronic service. [355]

2.5 ***Proscription***

Section 3 Terrorism Act 2000 (as amended) provides for the proscription of a terrorist organisation. The Terrorism Act 2006 also expands the government's ability to proscribe a terrorist organisation that promotes or encourages terrorism as per section 21(5)(a).

[347] S.1(6) ibid
[348] S.2(2)(a) Terrorism Act 2006
[349] S.2(2)(b)
[350] S.2(2)(c)
[351] S.2(2)(d)
[352] S.2(2)(e)
[353] S.2(2)(d)
[354] S.2(1)(a)-(c)
[355] S.3(1)(a)-(b)

An organisation is proscribed if 'it is listed in Schedule 2'[356] of the Act' or 'operates under the same name as an organisation listed in that Schedule.'[357] Thus, it becomes a crime for any individual to belong to the organisation listed under the Schedule as per s.11.

Section 3(4) Terrorism Act 2000 gives the Secretary of State powers to proscribe an organisation if he believes it is concerned in terrorism.

The key word in the above provision is "*concerned*." Under S.3(5) 'an organisation is concerned in terrorism if it- (*a) commits or participate in acts of terrorism, (b) prepares for terrorism, (c) promotes or encourages terrorism, or (d) is otherwise concerned in terrorism.*'

The Court in *SSHD v Lord Alton of Liverpool*, held the term "concerned in terrorism" as meaning "current, active steps are required."[358]

A clear meaning of the term 'prepares for terrorism' can be found under S. 5 Terrorism Act 2006. Preparation of terrorist act under S. 5(1) means that that there must be an intention to commit acts of terrorism[359] or assist another person to commit such acts or engages in any conduct for giving effect to his intention.[360]

'*Promotes or encourages terrorism'* as per S.3.(5) includes 'the unlawful glorification of the commission or preparation (whether in the past, future or generally) of acts of terrorism'[361] or 'activities of the organisation carried out in a manner that ensures that the organisation is associated with statements containing such glorification.'[362] Glorification of conduct is unlawful if there are persons who may become aware of it who could reasonably be expected to infer that what is glorified is being glorified as conduct that should be emulated in existing circumstances.[363]

"Glorification" in this section includes 'any form of praise or celebration, and cognate expressions are to be construed accordingly'.[364] "statement" includes a communication without

[356] S.3(1)(a) T.A 2000
[357] S. 3(1)(b) ibid
[358] [2008] EWCA Civ 443, 31
[359] S.5(1)(a) Terrorism Act 2006
[360] S.5(1)(b) ibid
[361] S.5A(a) Terrorism Act 2000 as amended
[362] S.5A(B) Terrorism Act 2000 as amended
[363] S.5B Ibid
[364] S.5C ibid

words consisting sounds or images or both.[365] The Act provides that the glorification of any conduct is unlawful as per S.5A

Other factors which the Secretary of State will take into account when deciding whether or not to exercise discretion are the nature and scale of the organisation's activities; the specific threat that it poses to the UK; the specific threat it poses to British Nationals overseas; the extent of the organisation presence in the UK; and the need to support international partners in the fight against terrorism.[366]

It is however a defence, in the case of a private meeting, if a person can prove that he had no reasonable cause to believe that the address by the members of the proscribed organisation would support the proscribed organisation or advance its terrorist activities.[367] Meeting" here means a meeting of three or more persons, whether or not the public are admitted, and a meeting is "private" if the public are not admitted.[368] The defence in Section 12(4) is intended to permit the arrangement of 'genuinely benign' meetings.[369]

Once the order for proscription comes into force, it becomes a criminal offence for a person to belong or to invite support for the proscribed organisation.[370] It is also a crime to arrange a meeting or wear clothes or carry articles in the public which arouses reasonable suspicion that an individual is a member of a proscribed organisation.[371] "

Furthermore, S. 3 (6) Terrorism Act 2000 as amended by S. 22(2) (a)-(b) Terrorism Act 2006 ensures that proscribed organisations do not avoid proscription by simply changing their name.[372] Thus, if the Secretary of State believes that an organisation that is listed in Schedule 2 is operating under a name that is not specified in Schedule 2, or that an organisation is operating under a different name but is the same as a listed organisation, he can make an order

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[365] ibid
[366] 7(2) Explanatory Memorandum to the Terrorism Act 2000 (Proscribed Organisation) (Amendment Order) 2011 No 108
[367] S.12 (4) T.A 2000
[368] S.12(5)(a)-(b) TA 2000
[369] A '*genuinely benign*' meeting is interpreted as a meeting at which the terrorist activities of the group are not promoted or encouraged, for example, a meeting designed to encourage a designated group to engage in a peace process or facilitate delivery of humanitarian aid where this does not involve knowingly transferring assets to a designated organisation.
Home Office: Proscribed Terrorist Organisation Pg 2
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/472956/Proscription-update-20151030.pdf accessed 12th Dec, 2015
[370] S.12 (1)-(4) TA 2000
[371] S.13(a)-(b) TA 2000
[372] Home Office: Proscribed Terrorist Organisation Pg 2

to the effect that the name that does not appear in Schedule 2, is another name for the listed organisation.[373] Consequently, the organisation will be treated as the same as one listed as proscribed. In *R v Z*[374]the CA held that a person committed an offence contrary to s 11(1) of the 2000 Act if he belonged or professed to belong to the "real IRA." The Court explained that Section 3 of the 2000 Act provided for two mutually exclusive ways in which an organisation might be regarded as proscribed. What was meant by the term 'the Irish Republican Army' in Sch 2 fell on s 3(1)(a). Once the original IRA had begun to fracture into other organisations incorporating the name, the term 'the IRA' would most naturally apply to each and all of them.[375]

There are checks and balances under the provision on proscription under the Act. Section 4 of the Terrorism Act 2000 provides for an appeal to the Secretary to remove an organisation from the list of proscribed organisation. If the appeal to the Secretary fails, another appeal can be made to the Proscribed Organisation Appeal Committee (POAC) as per S. 5 T 2000. If this appeal is refused, the POAC judgement may be appealed to the Higher Courts in UK (for example, the Court of Appeal in England and Wales, the Court of Session in Scotland and the Court of Appeal in Northern Ireland) as per S. 6 TA 2000.

A list of proscribed organisation under the Act is attached as "Appendix I." It is noteworthy that*Ansarul Muslimina Fi Biladis Sudan (Vanguard for the protection of Muslims in Black Africa)* otherwise known as *"Ansaru*" and *Jama'atu Ahli Sunna Lidda Awati Wal Jihad* otherwise known as "*Boko Haram*," the two Islamist terrorist organisations based in Nigeria are amongst the international terrorist organisations proscribed under the Terrorism Act 2000.[376]

Conclusion

This chapter established that several qualifications were used in defining terrorism under the TA 2000. For instance the Act demands a "*serious*" level of violence against a person or property to amount to terrorism. Other terms used to qualify terrorism include 'action designed to 'influence'…or 'intimidate….' The inclusion of these terms makes the definition

[373] S. 3(6) (a) (b) T.A 2000
[374] [2005] 2 AC 645
[375] Ibid Para 66
[376] Proscribed Terrorist Organisation Home Office Sept 29, 2017 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/648405/Proscription_website.pdf accessed 12th October 2017

ambiguous, as it is not clear whether a minor damage to property will also be regarded as an act of terrorism. The UK Terrorism Act also suggests that the underlying purpose of terrorism are for political, religious, racial, and ideological cause. This conclusion is questionable. Interestingly, the definition of terrorism under the TA 2000 extends to acts done outside the UK.

One of the most significant findings under the analysis of the definition of terrorism is that the Act failed to provide whether acts that relate to armed conflicts or acts aimed at bringing down repressive regimes would be regarded as terrorism. This gap was however filled by the Supreme Court in *R v Gul* where the Court held that the definition extends to quasi-military activity and armed conflict aimed at bringing down a foreign government even if the perpetrators (actors) are oppressed by the government.

This chapter also established that the legal basis for an arrest on terrorism charges in the UK is based "on reasonable suspicion." The Court in *Fox, Campbell, and Heartley's* made it clear that the reasonable suspicion justifying arrest for terrorism offences cannot be judged as the same standards that are applied in conventional offences.[377] Having analysed the provision on arrest under the Act, this research is interested in finding out whether arrests of terror suspects in practice are based on "reasonable suspicion" and whether this power unnecessarily infringes human rights in the UK. This enquiry will require further assessment of the power of arrest. This will be done in a later chapter.

With regards to the pre-charge detention of terror suspect, it was established here that the TA 2000 allows for the pre-charge detention of a suspect for up to 14 days. The analysis of the pre-charge detention in the UK threw up further questions such as is 14 days pre-charge detention consistent with the right to freedom of liberty and security under the HRA 1998 and the ECHR? Is this consistent with the right to tried within a reasonable time? How does the UK fair when compared to other State's in the E.U? And more importantly do the Police obey this provision? These questions require further assessment into the pre-charge detention in the UK. This assessment will be done in a later chapter of the research.

The introduction of the offence of encouragement of terrorism under the TA 20006 opens up a new field of offences under the UK terrorism law. This covers statements that are likely to be understood by some or all members of the public to whom it is published as a direct or indirect

[377] 30 August 1990, Series A, No. 182, p. 16, Para. 32

encouragement of terrorism. Like other provisions of the Act, there are concerns that this could be used against dissent/opposition.

Having analysed the provisions of the definition of terrorism, power of arrest, pre-charge detention, proscription and encouragement of terrorism under the UK Terrorism Act 2000, several questions that require further answers were raised. Most of the questions and issues that arose from the analysis of the UK TA 2000 and the Nigerian TPA 2011 will require a further assessment of the Terrorism Act in action. This necessitates a transition from the doctrinal analysis of legal texts into an empirical understanding of how the Act is used in practice. This is because the critical analysis as done in this chapter and the previous chapter merely explains the "law in books," however an assessment of these provisions in practice will explain the "law in action." Having analysed key provisions under the Nigerian and the UK Terrorism Acts, the next chapter will be dedicated to a comparison between these provisions.

CHAPTER 5

A COMPARATIVE ANALYSIS OF THE NIGERIAN TERRORISM (PREVENTION) ACT 2011 (AS AMENDED) & THE UNITED KINGDOM'S TERRORISM ACT 2000

Following on from the critical analysis of key provisions under the Nigerian Terrorism (Prevention) Act 2011 (as amended) and the UK Terrorism Act 2000, this chapter takes the discussion forward by juxtaposing the Terrorism Acts of both States. This chapter compares and contrasts the definition of terrorism, power of arrest, pre-charge detention of terrorist, proscription and encouragement of terrorism under the Terrorism Acts of Nigeria and the U.K. The aim is to identify the similarities, differences, as well as strengths and weaknesses of the provisions of the Acts in both States.

This comparative discussion takes into account each nation's legal interpretation of the five key provisions under review. The result of this comparative evaluation will also be used to determine whether the legal measures adopted under the Act in each States are commensurate with the terror incidents and atrocities. There are many reasons why this comparative discussion is important. This has been discussed earlier in the introductory chapter. The most important reason is that the central aim of this thesis is to compare the Nigerian Terrorism (Prevention) Act 2011 in light of the experiences of the UK in dealing with terrorism. Inevitably, the comparison would enhance mutual understanding of the Terrorism Act of both states and would provide richer contextualisation of the issues in the study as well as lessons for Nigeria to improve her anti-terrorism legislation, vice-versa. .

Before going into the comparative analysis of the Acts, it is important to briefly highlight some terrorist incidents in Nigeria and the UK and compare each state response to address it. Since 2009 there has been an increase in violence and terror attacks by *Boko Haram* and '*Ansaru'*, resulting in the death of thousands of people in Nigeria.[378] It is difficult to give an exact figure on the number of casualties or terror incidents in Nigeria. Most of the information on terror incidents reported in Nigeria and indeed this research are gathered from journals, newspaper reports, press reports and archives. The absence of comprehensive reports could be attributed

[378] Yvonne Ndege, Azad Essa, 'The rise of Nigeria's Boko Haram; an in-depth look at the shadowy group as violence continues to wrack the West African country's northeast.' *Aljazeera* 30th Sept, 2013. http://www.aljazeera.com/news/africa/2013/09/201397155225146644.html accessed 7th Nov 2013.

to the fear of being attacked by *Boko Haram*, unsafe environments for journalists/reporters, and intimidation by the Police/JTF except for the monthly crime returns by the Police.[379]

The demands of *Boko Haram* and *Ansaru* suggest that terror attacks in Nigeria are "religiously" motivated. *Boko Haram* whose official Arabic name translates as "People Committed to the Propagation of the Prophet's Teachings and Jihad" – says it is fighting to overthrow Nigeria's government and establish an Islamic state.[380] On the other hand, the majority of the terror incidents in the UK were perpetrated by the IRA, a nationalist organisation devoted to the integration of Ireland as a complete and independent unit.[381] Consequently, most of terrorist attacks in the UK were "politically" motivated (though the IRA cannot be compared directly with *Boko Haram*). It must be noted that terrorists linked to or inspired by *Al-Qaida* also pose a significant threat to the UK.[382] An example is the 7th of July 2005 London bombings which killed 52 people and injured about 700 civilians[383] and the Pan AM Flight 103 heading from London to New York that exploded en route over Lockerbie, Scotland killing all the 259 passenger and crew, as well as 11 residents of Lockerbie. Two Libyans suspects were convicted in 2003 for the bombing.[384] Recently, a terror attack in Manchester left 19 people dead and about 50 others injured.[385]

Over the past thirty years, the U.K has adopted a multifaceted strategy in tackling terrorism in the country. One of these is the CONTEST Strategy whose goal is to reduce the risk of terrorism in the UK and its interests overseas.[386] The strategy is organised around four work streams,

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[379] Kemi Olowu, 'Everyday like 9/11;Terrorism Timeline in Nigeria' [2014] Journal of Law, Policy and globalisation, Vol 30, Pg 71 http://www.iiste.org/Journals/index.php/JLPG/article/viewFile/16338/16856 accessed 21st August 2015

[380] Afua Hirsch, 'Nigerian sect Boko Haram demands Islamic state' *The Guardian*, May 2013 http://www.guardian.co.uk/world/2013/may/09/boko-haram-nigeria-islamist-state accessed 12th May 2013

[381] Gary LaFree, The Global Terrorism Database: Accomplishments and Challenges. (2010) Perspectives on Terrorism Vol 4, No 1 http://www.terrorismanalysts.com/pt/index.php/pot/article/view/89/html accessed 13th Nov 2013

[382] Security Service M15, International Terrorism in the UK, https://www.mi5.gov.uk/home/the-threats/terrorism/international-terrorism/international-terrorism-and-the-uk.html accessed 12th Nov 2013

[383] Report of the Official Account of the Bombings in London on 7th July 2005 HC 1087 http://www.official-documents.gov.uk/document/hc0506/hc10/1087/1087.pdf accessed 13th Nov, 2013

[384] Amy Zalman, '1988; Pan AM Flight 103 Bombings over Lockerbie, Scotland' (About.com Terrorism Issues) http://terrorism.about.com/od/originshistory/p/PanAmBombing.htm accessed on 13th Nov 2013

[385] Chiara Palazzo, Emily Allen, 'Manchester Terror Attacks, Everything we Know So Far' *The Telegraph*, 26 May 2017 http://www.telegraph.co.uk/news/0/manchester-terror-attack-everything-know-far/ accessed July 18 2017

[386] CONTEST; The United Kingdom's Strategy for Countering Terrorism, CM 8123 Pg. 10 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97995/strategy-contest.pdf accessed 18th Nov, 2013.

namely; Pursue; Prevent; Protect; and Prepare.[387] Intelligence-led policing also plays a key role in tackling terrorism in the U.K. This is reflected in the expenditure on the intelligence community and the establishment of bodies such as the Joint Terrorism Analysis Centre (JTAC) within the Security Service.[388] In addition to that, there have been developments of regional offices by the security services, regionalisation of Police Special Branches, establishment of a Police International Counter Terror Unit (PICTU) within the Metropolitan Police and National Counter Terrorism Security Office (NaCTSO) within M15 and port policing.[389] The PICTU serves as an advisory and interpretative medium between the security service and the police on matters relating to terrorism.[390]

On the other hand, Nigeria does not have a holistic strategy like the UK that 'pursues', 'prevents', 'protects' or 'prepares' for terrorist attack. Terror victims are left at the mercy of the National Emergency Management Authority, Red Cross, Police, Air Force or the Military Joint Task Force JTF. The Nigerian government in June 2011 created the Joint Task Force (JTF) as a special military task force, with an aim to restore order in the northern region of Nigeria. Although the JTF have successfully arrested or killed a large number of terrorists in the country, members of the JTF have been accused of adding to the plight of terror victims. According to Amnesty International, Nigeria's security forces have repeatedly used firearms against people when there is no imminent threat of death or serious injury, and have intentionally used lethal force in circumstances other than when it was strictly necessary to protect life. As a result of these allegations, the counter-terrorism effort of the Nigerian

[387] The purpose of 'Pursue' is to stop terrorist attacks from happening. Consequently, this strategy involves detecting and investigating threats at the earliest possible stage and disrupting terrorist activity before it can endanger the public. The purpose of 'Prevent' is to stop people becoming terrorists or supporting terrorism. The strategy addresses radicalisation of all forms of terrorism, including far right extremism. The 'Protect' strategy under CONTEST aims to strengthen the UK's protection against terrorist attacks or an attack against its interests overseas. The strategy also involves reducing the UK's vulnerability to terrorist attacks by understanding where and how the country is vulnerable and reducing those vulnerabilities to an acceptable and a proportionate level. Lastly, the purpose of the 'Prepare' strategy under CONTEST is to mitigate the impact of a terrorist attack where it cannot be stopped. It also includes an effective and efficient response to save lives, reduce harm and aid recovery after an attack.

[388] Clive Walker, 'Intelligence and Anti-terrorism Legislation in the United Kingdom' *[*2005] Crime, Law and Social Change, Vol 44 Pg 387

[389] ibid

[390] ibid

government is being challenged by the National Human Rights Commission, Human rights organisations, international organisation and some western countries.[391]

It is important to note that the U.K has experienced far fewer terror incidents within the last seven years[392] in comparison with Nigeria. *Boko Haram* attacks have been more extensive, sophisticated and coordinated since 2009 to date.[393] For instance, between 2000 -2013 about 17 terrorist incidents were reported in the UK,[394] on the other hand there were more than 814 *Boko Haram* attacks between January 2011 and April 2016.[395] *Boko Haram* killed at least 2, 053 people in the first half of 2014 alone in an estimated 97 attacks.[396] Within this period, the worst "kidnapping incident" in Nigeria happened. 276 School girls were kidnapped from a Government Secondary School in *Chibok*, Borno State in April 2014. [397]To date, they are all yet to be rescued. It is believed that some of these School girls have been brainwashed by *Boko Haram* and are now killing for them.[398] The following month, 5th May, 2014 more than 300 civilians were killed by *Boko Haram* at Ngoru Ngala, in Borno State.[399] The following year,

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[391] For instance, the U.S government in May, 2013 withdrew military assistance to Nigeria citing various human rights violations by Nigerian security forces particularly the killing of over 180 innocent civilians and the destruction of hundreds of residences in Baga, Borno State during a clash with members of the Boko Haram.
US Withdraws Military Assistance To Nigeria Over Baga, Human Rights Violations, *The Nigerian Voice* May 2, 2013 http://www.thenigerianvoice.com/nvnews/112917/1/us-withdraws-military-assistance-to-nigeria-over-b.html accessed 18th Nov, 2013.

[392] CONTEST; The United Kingdom's Strategy for Countering Terrorism Annual Report March 2013 Pg 12 Cm 8583 http://www.official-documents.gov.uk/document/cm85/8583/8583.pdf accessed on 8th Nov, 2013. The Report also reveals that the Nigerian militant Islamist group, Boko Haram and it splinter Ansaru has conducted almost daily attack on Nigeria causing a large number of casualties. Ibid Pg 8

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[394] David Anderson QC, The Terrorism Act in 2012; Report of the Independent Reviewer On the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006, July 2013 https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2013/07/Report-on-the-Terrorism-Acts-in-2012-FINAL_WEB1.pdf accessed 1st Dec, 2013.

[395] Kevin Uhrmacher & Mary Beth Sheridan, 'The Brutal toll of Boko Haram's attacks on civilians' Washington Post 3 April 2016 https://www.washingtonpost.com/graphics/world/nigeria-boko-haram/ accessed 4th Aug 2016

[396] Human Right Watch, 'Nigeria; Boko Haram kills 2, 053 civilians in 6 months' July 15, 2014 https://www.hrw.org/news/2014/07/15/nigeria-boko-haram-kills-2053-civilians-6-months assessed 20th august 2015

[397] Aminu Abubakar, 'As many as 200 girls abducted by Boko Haram, Nigerian officials say' *CNN* April 16, 2014 http://edition.cnn.com/2014/04/15/world/africa/nigeria-girls-abducted/ accessed 23rd Dec, 2015

[398] Elaine O'Flynn, 'Brainwashed girls among the 200 kidnapped at Nigeria's Chibok school 'are now killing for Boko Haram and torturing the Islamist group's prisoners,' say witnesses' *The MailOnline*, 3rd July, 2015 http://www.dailymail.co.uk/news/article-3143582/Brainwashed-girls-200-kidnapped-Nigeria-s-Chibok-school-killing-Boko-Haram-torturing-Islamist-group-s-prisoners-says-Amnesty-International.html accessed Dec 23, 2015

[399] 'Hundreds killed in Boko Haram raid on unguarded Nigerian town; Soldiers based in Gamboru Ngala had been redeployed as part of effort to rescue schoolgirls kidnapped by Islamist group' *The Guardian* 8th May,

on the 7th January 2015, the deadliest attack by *Boko Haram* so far happened with about 2000 civilians massacred by *Boko Haram*.[400] Recently, more than 50 people were killed in a *Boko Haram* ambush on an oil exploration team on the 28th of July 2017,[401] and another suicide bomb attack by *Boko Haram* on the 17th of August 2017 on a market in Konduga resulted in the death of 16 people, with more than 80 others sustaining injuries.[402] Other several attacks have followed this incident, without an end in sight to these attacks. In fact, *Boko Haram* attacks occur almost on a weekly basis. Admittedly, the level of terror threats and attacks in Nigeria cannot be compared with UK. The UK have also experienced some terror attacks recently. These include the Manchester Arena Attack in 2017, the London Bridge Attack 2017, and the Westminster Attack in 2017. However the government has managed to address its own terrorism threats and attacks. In 2017 alone, more than seven terror attacks were foiled by the security services.[403] Perhaps, this could be due to the country's experience in preventing such attacks. Nigeria on the other hand is relatively new to terrorism, hence the country is struggling to cope with the challenges.

Both Nigeria and the United Kingdom have enacted legislation to tackle terrorism within their jurisdiction. The most significant of these laws in the UK is the Terrorism Act 2000. The Act repealed other temporary Acts and provided permanent legislation on terrorism in the U.K. Key provisions of the Terrorism Act 2000 include the "comprehensive" definition of terrorism, powers to detain terrorist suspects, proscription of terrorist organisations, arrest based on reasonable suspicion given to the Police, stop and search vehicles, provisions for offences associated with financing and support for terrorism, and penalties for terrorism offences.

After the 7th of July London bombings, the UK Parliament enacted the Terrorism Act 2006 to further strengthen its anti-terrorism law. The Act created new offences and amended existing

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2014 http://www.theguardian.com/world/2014/may/08/boko-haram-massacre-nigeria-gamboru-ngala accessed 20th Dec, 2015

[400] Monica Mark, 'Boko Haram's 'deadliest massacre': 2,000 feared dead in Nigeria' *The Guardian* Saturday 10th January 2015 http://www.theguardian.com/world/2015/jan/09/boko-haram-deadliest-massacre-baga-nigeria accessed 18th May, 2015

[401] Andy Lee, 'Boko Haram Attack on Nigeria Oil Team 'Killed More than 50' *The Telegraph* 28 July, 2017 http://www.telegraph.co.uk/news/2017/07/28/boko-haram-attack-nigeria-oil-team-killed-50/ accessed 19 sept, 2017

[402] Samson Toromade, 'Boko Haram; A Timeline of Terror Group Attacks in 2017' *The Pulse* 21st August, 2017 http://www.pulse.ng/news/local/a-timeline-of-boko-harams-attacks-in-2017-id7042490.html Accessed 9th Sept, 2017

[403] Taryn Tarrant Cornish, 'Police have foiled seven Terror Strikes Since West Minster Attacks, Sadiq Khan Reveals' *Express* Sept 25, 2017 http://www.express.co.uk/news/politics/858326/Sadiq-Khan-terror-attacks-police-London-Labour-conference-Donald-Trump-travel-ban accessed 6th Oct, 2017

ones. Some of the new offences created under the 2006 Act include encouragement of terrorism (directly or indirectly inciting or encouraging others to commit acts of terrorism), dissemination of terrorist publications (including its application to the internet), glorification of terrorism, convention.

More recently, the Protection of Freedom Act 2012 was enacted to also amend/strengthen existing legislations on terrorism in the UK. The Act safeguards civil liberties and reduces the burden of government intrusion into the lives of individuals.[404] Key features of the Act include the regulation of biometric date (destruction, retention and use of fingerprints), regulation of surveillance, powers of entry, reduction of the period for the pre-charge detention of a terror suspect, emergency power for temporary extension and review of extensions for the detention of a terror suspect, repeal and replacement of powers to stop and search persons and vehicles, safeguarding of vulnerable groups, and provisions on freedom of information and data protection. The proportionality of some of these laws in the UK has generated heated criticism from several human rights/international organisations who argued that some sections infringed on international law and humanitarian laws that protect human rights. This will be addressed in chapter 6 and 7 of the research. Notably, S. 36 Terrorism Act 2006 provides for an annual review of the operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006. This annual review by the independent reviewer is devoid of government interference, coupled with access to secret and sensitive national security information.[405] Perhaps this is an area which the Nigerian government can learn from the UK.

Nigeria's National Assembly in 2011 enacted the Terrorism (Prevention) Act 2011 and the Money Laundering (Prohibition) Act 2011 to address terrorism in the country. These statutes provide the requisite legal framework for the prevention, prohibition and combating of acts of terrorism and the financing of terrorism in the country.

Nigeria has also made significant efforts in improving its terrorism law by enacting the Terrorism (Prevention) (Amendment) Act 2013 and the Money Laundering (Prohibition) (Amendment) Act 2011 which amends the Terrorism (Prevention) Act 2011 and the Money Laundering (Prohibition) Act 2011 respectively. The TPAA 2013 amongst other things

[404] The Protection of Freedoms Bill gained royal assent on 1 May 2012, becoming the Protection of Freedoms Act 2012. https://www.gov.uk/government/publications/protection-of-freedoms-bill accessed 19th November, 2013

[405] Independent Reviewer of Terrorism Legislation; The Reviewers Role https://terrorismlegislationreviewer.independent.gov.uk/about-me/ accessed 19th November 2013.

prescribes the death penalty for all terrorism related offences under its section 1, makes the office the National Security Adviser the coordinating body for all security and enforcement agencies under the Act, increased the period for the pre-charge detention of terror suspect from 30 days to a period of up to 180 days, and increased power given to law enforcement agencies in carrying out their duties under the Act. Though the enactment of the Acts are laudable, and shows a significant indication that the Nigerian government is taking its anti-terrorism fight seriously, nevertheless there are concerns over the coherence of the provisions of the TPA 2011 with some human rights provisions in the country.

1. A COMPARISON BETWEEN NIGERIA AND UK'S TERRORISM ACTS

Having previously analysed Nigeria and the UK's Terrorism Acts in Chapters 3 and 4, this sub-section will compare and contrast the five key provisions under the Acts of both States.

2.1 **Definition of terrorism**

As provided under the Terrorism Act 2000, terrorism in the UK means the use or threat of either a serious violence against a person or property, endangering of a person's life, creating a serious risk to the health and safety of the public or any action which interferes with or seriously disrupts an electronic system.[406] In addition an act of terrorism include either the use or threat to use an action to "influence" the government or an international organisation or to intimidate the public or a section of the public for the purpose of either advancing a religious, racial, political or ideological cause.[407] The UK definition of terrorism extends to terrorist activities abroad and terrorist actions against foreign government.[408] Conversely, in Nigeria, the Terrorism (Prevention) Act 2011 defines terrorism as any act deliberately done with malice aforethought which "seriously" harms or damages a country or an international organisation,[409] or an act which "unduly" compels a government or an international organisation to do or abstain from doing an act,[410] or an act which "seriously" intimidate a population,[411] or "seriously" destabilize the political, constitutional, economic or social structure of a country or international organisation.[412] The Nigerian definition also includes either an attack upon a person's life which may cause "serious" bodily harm or death, kidnapping of a person/hostage

[406] S1(2) T.A 2000
[407] S.1(1) T.A 2000
[408] S.1(4) ibid
[409] S.1(3)TPA 2011 as amended
[410] S.1(3)(b)(i) ibid
[411] S.1(3)(b)(ii) ibid
[412] S.1(3)(b)(iii)ibid

taking, the destruction of public or private property, or the destruction of government or public transport system as acts of terrorism. In addition, the destruction of a fixed platform which endangers human lives or result in major economic loss, seizure of an aircraft or other means of transportation, unlawful manufacture of nuclear, chemical and biological weapons, the release of dangerous substances or causing fire, explosions or flood, the effect of which is to endanger human life, and interference with or distribution of the supply of water, power or any other fundamental natural resources to endanger human life are regarded as terrorism under Nigeria's TPA 2011 (as amended) .[413]

There are similarities in the definition of both states. Both the Nigerian and the UK definition demands a "*serious*" level of violence, harm, damages for an act to amount to terrorism. Equally, the definition of terrorism in both states recognises acts of terrorism done outside the country. The Nigerian definition explicitly makes provision for declaring a person or a group as a suspected international terrorist or an international terrorist group where the group is involved in terrorist acts in any resolution of the UN Security Council or any instrument of the African Union and ECOWAS or considered as such by a the competent authority of a foreign State.[414] In so doing, the Nigerian definition goes a step further by recognising not only international resolutions on terrorism but also regional and sub-regional resolutions under the auspices of the African Union (AU) and ECOWAS.

The "targets" and "motives" for committing acts of terrorism in Nigeria and the UK are also similar.

The "targets" of an act of terrorism, as suggested under the TPA 2011 and the TA 2000 are the government or an international organisation, the public or "a section of the public," a person, a public or private property, health or safety of the public, an electronic system (UK) and an infrastructural facility including an information system (Nigeria).

The inclusion of "……or a section of the public" is exclusive to the UK definition of terrorism. According to Lord Carlile, the inclusion of this may serve to protect minorities groups in the UK.[415]

[413] S.1(3)(c)(i-vii) ibid
[414] S.9(4) TPA 2011 as amended
[415] The Definition of Terrorism (CM 7052, London, 2007) Para 5 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228856/7052.pdf7 accessed 12/05/2016

The "motives" for committing acts of terrorism in both States are to "influence" the government or an international organisation (UK), or to 'unduly compel' a government or an international organisation or a third party to do abstain from doing any act (Nigeria) or to 'intimidate' the public or a section of the public (UK)/ to 'seriously intimidate' a population or seriously destabilize or destroy a country or an international organisation (Nigeria). In addition to these, the UK tend to link terrorist attacks and atrocities to political," "religious," "racial" or "ideological" cause. The public, a person, the government, or international organisations are the targets.

The inclusion of a "political," "religious," "racial" or "ideological cause" as motives for committing an act of terrorism is distinct to the UK definition of terrorism. Even though the demands of *Boko Haram* suggests that is their agenda is for a "religious" cause, the Nigerian definition does not include "religion," "racial," "ideological" or "political" cause as a motive for terrorism in the country.

The Nigerian definition also included other motives for committing acts of terrorism to include 'influencing' a government by way of 'intimidation' or 'coercion'; the destruction of a transport, communication fixed platform….. with the aim of "causing major economic loss or to endanger human lives."

On a comparative note, the writer found the definition of terrorism in Nigeria to be relatively more extensive (in breadth and scope) than that of the U.K even though the definition of terrorism in Nigeria has not given rise to litigation with regards to its meaning or validity. Accordingly, there are no judicial precedents to draw analysis from in Nigeria. The Courts in the UK on their part have expressly recognised the "broadness" of the definition of terrorism under the TA 2000. In a landmark judgement, the Supreme Court in *R v Gul*[416]held that the definition of terrorism under the UK TA 2000 is indeed too broad to encompass the ever changing nature of terrorism. The Court in this case also clarified the international reach of the definition of terrorism in the UK, as not limited to countries governed by democratic or representation principle, but also includes tyranny, dictatorship, junta or those usurping power.[417] The Court decision in this case clearly gave considerations for the UK's definition to cover political circumstances at any time or events.

[416] [2013] UK SC 64
[417] Ibid

The decision in *R v Gul* presents a significant difference in the definition of terrorism in the UK and Nigeria. While the Nigerian definition extends to suspected international terrorist or an international terrorist listed in any resolution of the UN Security Council or any instrument of the African Union and ECOWAS or considered as such by a the competent authority of a foreign State,[418] it is unclear whether the definition extends to armed struggle against oppressive regime or military juntas. On the other hand, the UK's definition through *R v F,* and *R v Gul*[419] clearly makes no exception for freedom fighters. Also the UK Terrorism Act creates a separate regime of powers under the Act that allows a person to be arrested and detained at ports, airports or border areas. Schedule 7 of the TA 2000 gives an examining officer at a port or in the border area the powers to question a person who is in the border area for the purpose of determining whether he is or has been concerned in the commission, preparation or instigation of acts of terrorism. In determining whether the exercise of this power (Under Sch 7) was lawful, the Court in *Miranda v UK* held that an examining officer may exercise this power "whether or not he has grounds for suspecting that a person is a terrorist."[420] Although the Court averred that the UK 'Parliament has set the bar for the exercise of the Schedule 7 power at quite a low level. Sch 7 of the Act gives the examining officer an opportunity to determine whether a traveller at a port may be concerned in the commission, preparation or instigation of an act of terrorism.'[421] It remains unclear if similar powers that allows the Police to question a person who is in the border area for the purpose of determining whether he is or has been concerned in the commission of terrorism offences applies at border post/ports in Nigeria.

Finally, although the definition of terrorism in Nigeria and the UK differs slightly in meaning and context, the targets and motives overlap in several areas.

2.2 ***Arrest***

The power of arrest under the Nigerian Terrorism (Prevention) Act 2011 is based on *'reasonable suspicion'* that an offence is committed or is about to be committed.[422] Similarly, S.41(1) of UK's Terrorism Act 2000 gives a Constable power to arrest without warrant a person whom he '*reasonably suspects'* to be a terrorist.

[418] S.9(4) TPA 2011 as amended
[419] [2014] AC 1260
[420][2016] EWCA Civ 6 Para 57
[421] Ibid Para 58
[422] S25(1)

From a theoretical standpoint, the legal basis for arrest in both States is "reasonable suspicion." Remarkably, the courts in both States have given a similar judgement regarding the meaning of the term "reasonable suspicion." The Nigerian Court in *Chukwurah v C.O.P*[423] held that 'reasonable suspicion' to arrest and detain a suspect must be exercised with discretion and that discretion must be objective, judicial and judicious. To justify arrest and detention on 'reasonable suspicion', the prosecution must adduce evidence on the grounds of such arrest and the test must be an objective one.[424] A similar decision was reached in *O'Hara v Chief Constable of the RUC* where the Court held that the component of what amounts to "*reasonableness*" to arrest a suspect for terrorism must be a "genuine suspicion" in the mind of the arrestor that the arrestee has been concerned in the acts of terrorism and there are objectively reasonable grounds for forming that suspicion.[425]Although, the court held further that the test to justify an arrest is also partly subjective, in that the arresting officer must have formed a genuine suspicion that the person being arrested was guilty of an offence.[426] Lord Hope of Craighead in this case expressly clarified that 'the application of the objective test does not require the court to look beyond what was in the mind of the arresting officer. It is the grounds which were in his mind at the time which must be found to be reasonable grounds for the suspicion which he has formed. "All that the objective test requires is that these grounds be examined objectively and that they be judged at the time when the power was exercised."[427]

The Courts in the UK have gone a step further to clarify that it is inconsequential if the suspicion turns out to be ill-founded does not in itself necessarily establish that the police officer's suspicion was unfounded. The Court in *Dryburgh v. Galt* expressly stated that

> "Suffice it to say that the fact that the information on which the police officer formed his suspicion turns out to be ill-founded does not in itself necessarily establish that the police officer's suspicion was unfounded. The circumstances known to the police officer at the time he formed his suspicion constitute the criterion, not the facts as subsequently ascertained. The circumstances may be either what the police officer has himself observed or the information which he has received"[428]

Furthermore, the European Court of Human Rights in *Fox, Campbell and Hartley v. United Kingdom*[429] have gone a step further to clarify that the 'reasonableness' of the suspicion

[423] [1965] NNLR 21 at Pg 21
[424] ibid
[425] [1997] A.C 286 pg 135
[426] ibid
[427] Ibid Para 136
[428] 1981 J.C. 69, 72
[429] [1990] ECHR 18, 12383/86

justifying such arrests for terrorism offences cannot always be judged according to the same standards as are applied in dealing with conventional crime. Nevertheless, the exigencies of dealing with terrorist crime cannot justify stretching the notion of "reasonableness" to the point where the essence of the safeguard secured by Article 5 (1)(c) is impaired.[430] The Court held further that what amounts to 'reasonable suspicion' may depend upon all the circumstances (the objective test and subjective test).[431]

Going by the decision in *Fox's* case, although arrest under the UK Terrorism Act is based on reasonable suspicion, the "Contracting States cannot be asked to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources of their identity." The ECrtHR have also held that for terrorism related arrest, the suspect might not be charged after an arrest.[432]

While the UK court have clarified the provision of the Act on arrest, there are no clear judicial rulings relating to terrorism arrests in Nigeria. The Nigerian Courts (Judiciary) seem unwillingly to provide further guidance on the interpretation of reasonable suspicion regarding terrorism arrests. It is unclear whether the Courts in Nigeria will be willing to give an elastic meaning to the meaning of "reasonable suspicion" in relation to terrorism arrests. It is also uncertain whether the arresting officer needs to have the necessary objective facts in all cases before making an arrest. We await precedents where the scope of this standard will be dealt with by the Nigerian Courts.

2.3 ***Pre-charge detention of terrorist suspects***

The period and method of detaining a terrorist suspect pending when he is charged to Court differs in both States. In the UK, the Police can detain a terrorist suspect for up to 48 hours.[433] An additional period of extension for 7 days may be granted by a judicial authority for up to 14 days[434] if satisfied that – there are reasonable grounds that the further detention is necessary; investigation to the crime which the person is detained is being conducted diligently and expeditiously; and, to obtain or preserve relevant evidence.

[430] Ibid Para 32
[431] Ibid Para 32
[432] *Brogan v UK Supra* 1251 Para 52
[433] S. 41(4) T.A 2000
[434] S. 57 Protection of Freedom Act 2012

On the other hand, a suspected terrorist in Nigeria can be detained pursuant to an *exparte* application granting the detention of the suspect for a period not exceeding 90days subject to renewal for a similar period. This means that a suspected terrorist can be lawfully detained for up 180 days pending when he is charged to court. In this case, the detention has to be ordered by the Court.[435]

The Nigerian TPA 2011 provides another basis for the detention of a terrorist pending charge under S 25(1). In this case, the Police have powers to detain a terror suspect where an application to the court (for an *exparte* order for detention) would cause delays and may be prejudicial to the maintenance of public safety or order. However the Act does not provide how long this form of pre-charge detention should last for. The writer presumes that it should last for as long as it is practicable to apply to the Court for detention of the suspect.

Besides the procedure for the detention of an accused, the most noticeable difference under the pre-charge detention regime in Nigeria and the UK is the period permitted under the Acts. While the maximum period a suspect can be detained for in the UK is 14 days (except for special circumstances),[436]the Nigerian TPA 2011 allows the pre-charge detention for a combined period of 180 days. From the above, it is obvious that the period of pre-charge detention in Nigeria far outweighs that of the UK.

Going by the TPA 2011, after an arrest is made, the Police in Nigeria are expected to make an *exparte* application for the initial detention of 90 days. However, it is unclear how long the Police will have to wait before making the application before the detention will be deemed illegal. S. 25 (1) simply says where an application to the court will cause delays. This is different form the UK regime where a Police sanctioned detention must not exceed 48 hours.

The Nigerian Terrorism Act does not set out who should make an application for *exparte* application for the detention of suspect, whereas the authorisation rules for the detention of a suspect under the UK terrorism Act are set out Pt III of Sch 8 of the Act and the process for further detention (after 48 hours) can only be made by the a Police officer of at least the rank of Superintendent or Crown Prosecutor in England.[437]

[435] S.27(1) TPA 2011 as amended
[436] S. 57 Protection of Freedom Act 2012
[437] S.23 TA 2006

Another difference in the detention regime under the Acts of both States is that while the pre-charge detention in Nigeria is subject to an application to the Court, the Police in UK can detain for 48 days hours without judicial authorisation. The Secretary of State is also given the power to introduce orders, at the request of the Director of Public Prosecutions (DPP), to extend pre-charge detention from 14 days to 28 days by virtue of section 58 of the PFA.[438] However, the Secretary of State can only exercise this power if Parliament is dissolved, or the Parliament has met after dissolution but the first Queen's Speech of the Parliament has not yet taken place. This power is only exercised in times of emergency.

The biggest concern under the detention regime in Nigeria is that the 90 days (or 180 days) pre-charge detention is based on an *exparte application* which means that only the prosecution/Police needs to apply and be present in court whilst the application is made.[439] This might arguably engage the right to be tried within a reasonable time and the right to fair hearing? Presently there are no precedents where the courts in Nigeria have directly addressed the legality of the *exparte application* for the pre-charge detention under the Act or the lawfulness or otherwise of the 180 days period of pre-charge detention permitted under the Act. The situation is different in the UK where there are a plethora of cases relating to terrorism detention. No specific arguments or recommendation will be made at this stage of the research, a socio-legal assessment (assessment in practice) of these provisions in Nigeria and UK, will be done in later chapters of the research.

2.4 ***Encouragement of Terrorism***

Under the UK's Terrorism Act 2006, a number of new offences were created including 'encouragement of terrorism.' This offence covers statements that are likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or the inducement to them to the commission, preparation or instigation of acts of terrorism or convention offences.[440] The TA 2006 clearly distinguished between direct and indirect encouragement of terrorism. The UK's T.A 2006, as per S.2, goes further to enumerate ways and means whereby terrorist publications could be disseminated to constitute an offence.

[438] TA 2000 Sch 8 Para 38
[439] Free Legal Dictionary, available on http://legal-dictionary.thefreedictionary.com/Ex+parte+application accessed 16th May 2013
[440] S.1 T. A 2006

The Act also makes provision for the application of the offence of encouragement of terrorism to internet activity.

On the other hand, the Nigeria TPAA 2013 does not have the same "holistic" provision on encouragement of terrorism. This is rather disappointing especially when much justification for committing acts of terrorism comes from the internet. Unlike the UK's T.A 2006, the Nigerian Terrorism Act fails to explain, in detail, the category of statements which are likely to be understood by members of the public as inciting terrorism or directly or indirectly encouraging terrorism; the yardstick for determining how a statement on the internet, electronic means or printed material is likely to be understood as encouraging/inciting terrorism; and measures to be taken by the law enforcements agencies such as giving notice to the effect of such breach. Restrictions on the right to freedom of expression require a degree of explicitness, especially with statements that encourage terrorism. Unfortunately the Nigerian Terrorism Act fails to cover these categories of statements that will encourage terrorism or behaviours that will encourage terrorism. This raises a big question about the coherence, consistence, and constitutionality of the Nigerian Act under its provision on encouragement of terrorism.

As a caveat, the writer is not trying to portray the provision of the UK on encouragement of terrorism as faultless. It is important to note that the scope of encouragement of terrorism in the UK is not easy to define in its entirety. Nevertheless, the Nigerian provision on encouragement of terrorism is in direct contrast to the UK provision. The only criterion mentioned under the S.5(1)(2)(c) of the Nigerian TPAA 2013 is "…..knowingly, in any manner, directly or indirectly renders support to encourage commission of a terrorist act through the internet, or any electronic means or through the use of printed materials or through the dissemination of terrorist information." Without doubt, this criterion is nebulous and will affect its scope and how this provision is implemented and applied especially in practice. On the other hand, S.1 of the Terrorism Act 2006 requires either specific intent or recklessness for the prosecution for the offence of encouraging terrorism. S.1 (4) TA 2000 expressly provide that for the purposes of how a statement is likely to be understood and what members of the public could reasonably be expected to infer from it must be determined having regard both— to the contents of the statement as a whole; and to the circumstances and manner of its publication. Section 1 (3) -(5) gave further clarifications and yardstick for the sort of statements or acts that will constitute encouragement of terrorism.

Another obvious difference in the provision on encouragement of terrorism in both States is that the UK provision is retroactive. S.(1)(3) TA 2006 "…. include every statement which—glorifies the commission or preparation whether in the past, in the future or generally."

It is universally acknowledged that the right to freedom of expression is a fundamental human right that is of greatest importance, hence the UK Terrorism Act makes it a defence for an accused charged with encouragement of terrorism to prove that the statement neither expressed his views nor had his endorsement (whether by virtue of section 3 or otherwise); and that it was clear, in all the circumstances of the statement's publication, that it did not express his views and (apart from the possibility of his having been given and failed to comply with a notice under subsection (3) of that section) did not have his endorsement. The Nigerian provision does not have these safeguards. Significantly, the Nigerian provision also fails to differentiate between direct and indirect encouragement of terrorism. S.1(3)(b) of the UK Terrorism Act 2006 clarifies that a statement indirectly encourages terrorism if it "is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances."

Due to the limited scope and interpretation of the provision of encouragement of terrorism in Nigeria, it does not come as a surprise then that the provision is being misinterpreted and abused by the security agencies. The Nigerian Police and the Department for State Security have taken advantage of the lacuna created by the provision on encouragement of terrorism and have used the Act as reference to seize and destroy Newspaper publications on the activities of the Military against *Boko Haram*,[441] and detain two managers at the *Daily Trust Newspaper*.[442] Since the main focus of this research is the Nigerian Terrorism Act, this comparative discussion on encouragement of terrorism clearly shows that the Nigerian TPAA 2013 is poorly drafted and will require an urgent amendment.

[441] Obidike Jerry, 'Outrage trails military clampdown on newspapers' *The Sun News Online* June 7, 2014 http://sunnewsonline.com/new/outrage-trails-military-clampdown-newspapers/ accessed 24 Dec, 2014

[442] Simibo Eniola, 'Army Quizzes Daily Trust Managers Over Unfavourable Report' *ThisDay Live* 22nd August 2014 http://www.thisdaylive.com/articles/army-quizzes-daily-trust-managers-over-unfavourable-report/187012/ accessed 24th Dec, 2014

2.5 ***Proscription***

The grounds for the proscription of a terrorist organisation in Nigeria and the UK are similar. What differs is the procedure for the proscription and de-proscription process.

In the UK, S.3(4) T.A 2000 gives the Secretary of State the power to proscribe an organisation if he/she believes it is concerned in terrorism.[443] In Nigeria, an application for the proscription of an organisation is made to a judge in chambers by the Attorney General, the National Security Adviser or the Inspector General of Police on the approval of the President on the grounds that two or more persons associate for the purpose of or an organisation 'participates' or 'collaborates' in an act of terrorism; 'promotes', 'encourages', or 'exhort' others to commit an act of terrorism; or 'set up' or 'pursue' acts of terrorism.[444]

Remarkably, both the Nigerian and the UK Terrorism Acts provides exactly the same defence (*verbatim*) for a person accused of being a member of a proscribed organisation. It is a defence for anyone charged in both States to prove that the organisation had not been declared a proscribed organisation at the time the person charged became or began to profess to be a member of the organisation and that he has not taken part in the activities of the organisation at any time after it had been declared to be a proscribed organisation.[445]

Theoretically speaking, Section 11 (2) of the UK TA 2000 and S. 2(4) of the Nigerian TPA 2011(as amended) would suggest that in order for the prosecution of a member of a proscribed organisation to succeed, the accused must participate in the activities of the organisation. The activities referred to in this section are enumerated under Sections 12[446] and 15 of UK's Terrorism Act 2000. But the question is, would being a member (membership) alone constitute an offence under the Acts of both state or can an accused be exculpated on the ground that he/she did not take part in any activities of the proscribed organisation?

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[443] An organisation is concerned in terrorism if it 'commits' or 'participates' in acts of terrorism; 'prepares' for terrorism; 'promotes' or 'encourages' terrorism.S.3(5) T.A 2000

[444] S.2(1)(a)-(c) TPA 2011

[445] S.2(4) TPA 2011 (as amended), S. 16(4) Terrorism (Prevention)(Amendment) Act 2013. UK S.11 (2) TA 2000

[446] S. 12 TA provides that a person commits an offence if— (a)he invites support for a proscribed organisation, and (b)the support is not, or is not restricted to, the provision of money or other property (within the meaning of section 15). (2)A person commits an offence if he arranges, manages or assists in arranging or managing a meeting which he knows is— (a) to support a proscribed organisation, (b) to further the activities of a proscribed organisation, or (c)to be addressed by a person who belongs or professes to belong to a proscribed organisation. (3)A person commits an offence if he addresses a meeting and the purpose of his address is to encourage support for a proscribed organisation or to further its activities.

This question was resolved by the UK court in *Sheldrake v DPP*.[447] The court held that the legislature has made it a crime for people to simply belong to terrorist organisations. The Court held further that 'not only do people by their mere membership give credence to the claims of the organisation. Criminalising membership serves a legitimate purpose by making it difficult for members of the organisation to demonstrate publicly in a manner that affronts law-abiding members of the public.' Moreover, not only do people by their mere membership give credence to the claims of the organisation but, in addition, members are a potential network of people who may be called on to act for the organisation at some time in the future, even if they have not yet done so. It follows that it is no defence for most members of the organisation to show that they have never taken an active part in the activities of the organisation. The crime is being a member, not being an active member.'

The Court held further that;

> "I take it to be clear, however, that a person can be convicted of professing to belong to a proscribed organisation, even if he is not a member or the prosecution cannot prove that he is."…… It follows that, in order to achieve a conviction under section 11(1), the Crown must lead evidence that satisfies the magistrate or jury beyond a reasonable doubt either that the defendant is a member of the proscribed organisation or that he professes - in the sense of claiming to other people and in a manner that is capable of belief – that he belongs to the organisation."[448] …It is important to notice that the burden of proving these facts lies entirely on the Crown.

Going by this ruling, it has become clear that in the UK, an accused can be liable for simply being a member, not just an active member. It however remains unclear if this is the same under the Nigerian law, as there are currently no precedents to draw analysis from.

Crucially, it is fair to say that the international scope of the UK definition of terrorism is reflected in the list of terrorists' organisations that are proscribed under the UK TA 2000. A cursory look at the organisations in the UK shows that majority of them are international terrorist organisations. On the other hand, although the Nigerian Act made a reference to proscribed organisation to include international terrorist groups and suspected international terrorist as listed in any resolution of the United Nations Security Council or in any instrument of the African Union and Economic Community of West African States, [449] however only *Boko*

[447] [2004] UKHL 43 Para 63-65
[448] Ibid Para 65
[449] S.9(1)(b)

Haram and *Ansaru* are officially proscribed under the Act.[450] It is unclear what the Act means by '*reference to an international group*' without including the international terrorist organisations or at least regional terrorist organisations like Al-shabab and Lord's Resistance Army in its list of proscribed organisation.

The de-proscription processes in both states are also similar. In Nigeria, the Attorney General upon the approval of the President may withdraw the order for the proscription of a group if he is satisfied that such proscribed organization has ceased to engage in an act of terrorism. Similarly, an application may be made to the Secretary of State for an order to remove an organisation from Schedule 2.[451] But while the Nigerian de-proscription process starts and ends with A.G upon the President's approval, there is an option for appeal in the United Kingdom to the Proscribed Organisations Appeal Commission.[452] If this fails, there is a further appeal option to the Court of Appeal in England and Wales, the Court of Session in Scotland, and the Court of Appeal in Northern Ireland.[453] It remains unclear if an appeal can be taken to the Court in Nigeria if the A.G refuses to de-proscribe an organisation.

2. **Conclusion**.

The brief comparison of terror incidents and atrocities in Nigeria and the UK at the beginning of this chapter clearly shows that terrorism threats in Nigeria outweigh that of the UK. Logically, it would be expected that the Nigeria Terrorism (Prevention) Act 2011(as amended) would be more comprehensive and thorough (both in principle and in interpretation) than the UK's Terrorism Act 2000. But on the basis of the comparative analysis done in this chapter, that is not the case. While the provisions of the Acts in both states overlap in several regards, there seems to be more clarity on the UK side. The UK TA 2000 appears to be more detailed in meaning and interpretations (such as the provision on encouragement of terrorism and proscription of terrorist organisations) and where the legislation fails to clear up the meaning of a provision, the Court have stepped up to fill the lacuna. On the other hand, the Nigerian Courts (Judiciary) seem unwilling to provide further guidance on the interpretation of the terrorism legislation. Or perhaps, the reason for the consideration of these provisions does not arise or come up during the trial of terrorist suspects in Nigeria. Whatever the case, there is a noticeable high degree in the level of judicial involvment and interpretation of the definition

[450] Terrorism (Prevention) (Proscription Order) Notice 2013
[451] S.4 TA 2000
[452] S.6 TA 2000
[453] Ibid

of terrorism, application of the power of terrorism arrests, period and procedure for the pre-charge of a terror suspect, provision and explanation of encouragement of terrorism, as well as the international range of proscription in the UK in comparison to Nigeria. This is evident in the number of cases that are available in the UK on issues discussed in this research. For instance, the UK Courts have expressly recognised the "broadness" of the definition of terrorism under the TA 2000 to include not only countries governed by democratic or representation principle, but also includes a tyranny, dictatorship, junta or those usurping power. The UK Court also clearly clarified that although the components of what amounts to "reasonableness" justifying an arrest is in part a subjective test, because the arresting officer must have formed a genuine suspicion in his own mind that the person has been concerned in acts of terrorism and in part an objective one, because there must also be reasonable grounds for the suspicion which he has formed, nonetheless the 'reasonableness' of the suspicion justifying such arrests for terrorism offences cannot always be judged according to the same standards as are applied in dealing with conventional crime.

Admittedly no two systems are the same, nonetheless the writer is of the view that a vibrant judicial involvement in the interpretation of provisions of the Nigerian terrorism Act would go a long way in guiding how the counter-terrorism measures under the Act is interpreted in practice and how these counter-terrorism measures evolve. This is even more so as enforcement actions and the interpretation of the provisions of the Act by the Nigerian security forces have become extensive due to high incidents of terrorist attacks by *Boko Haram*. The Writer observed that in reality, the application and interpretation of the Act runs deeper and is much more contested. The Nigerian TPA 2011 (as amended) has generated much controversy in practice, especially about the need to balance security with human rights. Critics and commentators of the terrorism Acts in both States have also argued that some of the provisions under review in this study do not comply with the State's human rights obligations. Accordingly, it is has become important to subject the Nigerian and UK Terrorism Acts to an appraisal in terms of how their provisions are applied in practice.

Consequently, the next two chapters will be dedicated to a socio-legal assessment of key provisions under the Nigerian and the UK terrorism Acts. These assessments will prepare the ground for a further as to whether the Terrorism legislations in both states are human right compliant and whether justifications based on human right for the measures adopted under the Acts exists.

CHAPTER 6

A SOCIO-LEGAL ASSESSMENT OF THE NIGERIAN TERRORISM (PREVENTION) ACT 2011 (AS AMENDED)

1. Introduction

Having critically analysed key provisions of the Nigerian and the UK Terrorism Acts and compared same, this chapter investigates and assesses how the provisions of the Nigerian TPA 2011 (as amended) are applied in principle and in practice. The previous analysis focused mainly on the technical and pure legal meaning of rules and principles under the Terrorism Acts of both States. Conversely, this chapter will assesses the Nigerian TPA 2011 (as amended) with a view to exposing discrepancies between "law in books" and "law in action." Rather than understanding the terrorism regime of Nigeria on "black and white," this chapter will provide the reader with a clear picture of how the Terrorism Act is applied. The outcome of this assessment will inevitably shape the sort of proposals and recommendations that will proffered at the end of this research.

The following sections of the TPA 2011 (as amended) will be assessed: the definition of terrorism; arrest; pre-charge detention; proscription; and encouragement of terrorism.

1.1 A Socio-legal Assessment of the Definition of terrorism in Nigeria

Many academics and analysts in Nigeria have been critical of the definition of terrorism under the TPA 2011 (as amended). These criticisms mostly rest on the wide scope of the definition of terrorism in Nigeria. According to Professor Oyebode, the Nigerian definition of terrorism under the TPA 2011 captures 'sundry acts' and creates a dragnet of offences thereby making it unnecessarily broad.[454] Oyebode argues that offences such as kidnapping or committing grievous bodily harm to a person could easily be categorised under ordinary criminal laws and should not be included in the definition of terrorism.[455]

Similarly Awon posits that the Terrorism Act was not far-reaching enough as to capture crimes that constitute acts of terrorism.[456] Awon however failed to give examples of "crimes that would

[454] Oyebode, 2012, op. cit Pg 9
[455] Ibid Pg 4
[456] Uchenwa Awon, 'Boko Haram: Presidency Opts For Martial Law Option' *leadership Newspaper A-Z.COM* (March 18 2013) http://www.nigeriaa2z.com/2012/05/13/boko-haram-presidency-opts-for-martial-law-option/ accessed 16th may 2013

constitute act of terrorism." Related to Oyebode's criticism, Adesina, a Senior Advocate of Nigeria, in a lecture titled "understanding anti-terror laws in Nigeria," criticised the definition of terrorism under the Act as a duplication of existing criminal offences in Nigeria.[457] He argued that most of the offences that are classified as terrorist acts under the TPA 2011 were already covered by the Criminal Code of the Federation(C.C), 2004 and the criminal laws of the States. For example, Adesina cited Arson-which is covered by Section 443 of the C.C, sending letters threatening to burn or destroy property – Sec. 461 of C.C, destroying or damaging an inhabited house or a vessel with explosions – Sec. 451 of C.C, attempts at extortion by threats – Sec. 407 of C.C, kidnapping – Sec. 364 of C.C and disturbing religious worship – Sec. 206 of the C.C. He concluded that the Act was incomprehensive in addressing terrorism in the country.[458]

Ngboawaji in explaining the policy behind the inclusion of some offences such as kidnapping and hostage taking as an 'act of terrorism' under the Terrorism (Prevention) Act 2011(as amended) was as a result of a high increase in kidnapping incidents in the Country. According to him, kidnapping has become a prominent tactic of terrorists for fund raising in Nigeria.[459] Terrorists use kidnapping for ransom as a means to sustain their activities and to enhance their global stature given the media publicity accorded to such kidnapping incidents. The spate of hostage taking in Nigeria has placed the country into the number four position in the global ranking in hostage taking.[460]

The question then is, are the 'terms' and 'wordings' used in defining terrorism under the Act precise? The Courts in Nigeria are yet to make any ruling or given a decision on this. Hence, there is no precedent in Nigeria where the writer can directly draw analogy or conclusion from. Nevertheless, a thorough look at the Act shows that the Nigerian definition adopted an all-encompassing approach. As earlier stated, offences that are present under Nigeria's Criminal Code/Penal Code were duplicated into the definition of terrorism under the Act without repealing or amending the provisions under the Penal Code or the Criminal Code. This

[457]Dele Adesina, SAN, 'Understanding Nigeria's Anti-terror Law' being a paper delivered at the 8Th All Nigerian Editors Conference *The Tide* Sept 12, 2014 http://www.thetidenewsonline.com/2012/10/03/understanding-anti-terror-laws-in-nigeria/ accessed 12th Dec 2014

[458] ibid

[459] Ngboawaji Daniel Nte, Kidnapping, Hostage Taking and National Security threat in Nigeria; A Synopsis (2011) Mustang Journal of business and ethics Pg 57 http://www.academia.edu/2001970/KIDNAPPING_HOSTAGE_TAKING_AND_NATIONAL_SECURITY_THREATS_IN_NIGERIA_A_SYNOPSIS accessed 25th May 2013

[460] Morenike Taire, 'Hostage taking: Nigeria ranks 4th in the world' *The Vanguard Newspaper* Nov 13, 2011 http://www.vanguardngr.com/2011/11/hostage-taking-nigeria-ranks-4th-in-the-world/ accessed 24th May 2013

situation could create confusion as to which of the laws would be applicable in the event of trial of an accused where the offence has the same or similar characteristics or elements *(mens rea* and *actus reus)* under the Criminal Code and the 2011 Act. An example is the inclusion of "*an attack upon a person's life which causes serious bodily harm or death"* as a terrorism offence under the Act.[461] The wording of this provision is imprecise. It does not clearly distinguish an act of terrorism from ordinary criminal offence for example murder, battery or manslaughter. A suspect who attacks a person causing him serious bodily harm or death in Nigeria could be charged simply for attempted murder, murder, manslaughter or for terrorism. Other example of acts which are defined as terrorism under the Act but which are present under ordinary Criminal Code/Penal Code with the same *actus reus* and *mens rea* include '*kidnapping of a person.*[462] The consequence of the duplication of offences under the Act is that the defendant could plead for a lighter punishment and get away with it instead being punished for a terrorism offence. This is because where the law has provided for a lighter punishment or penalty for the same offence, the accused must be given the benefit of the lighter punishment.

According to the former UN Special Rapporteur on Countering Terrorism, Martin Scheinin, the adoption of an overly broad definition of terrorism carries the potential for deliberate misuse of the term as well as unintended human right abuses.[463] He argued that a failure to restrict counter-terrorism laws to conducts that are truly "terrorist" in nature poses a risk where such laws or measure restrict the enjoyment of right and freedom and as result also offend the principle of necessity and proportionality.[464] Another risk that can result from an over-broad definition is that, it will leave much discretion to the Nigerian Police. As expected the broad definition of terrorism under Nigerian Terrorism Act on the one hand gives the security forces a broad scope to operate, but on the other hand it gives them a wide justification for abuse and misuse.

Despite the concern raised by Scheinin, most scholars would agree that the problem associated with the definition of terrorism is universal. This is because terrorism means different things to different people in different contexts. The absence of an acceptable definition of terrorism in

[461] S.1(3)(c)(i) TPA 2011
[462] S.1(3)(c)(ii) ibid
[463] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UNGA Human Rights Council Sixteenth session A/HRC/16/51 20th Dec, 2010 Pg12-14 http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-51.pdf Accessed 20th July, 2014
[464] Ibid

international law leaves the term open to different interpretation by the States. As a result, it might be impossible for a State to arrive at an exhaustive definition of terrorism that will be acceptable to all. The implication of this is that it might not be possible to assess the definition on strict grounds of human rights. With the apparent absence of a widely accepted yardstick or universally acceptable model for emulation in internationals law, the challenge for States, including Nigeria, is to define terrorism in clear and unequivocal terms so as not to infringe the principle of legality and proportionality.

2.2 A Socio-legal Assessment of Arrest and Pre-charge Detention in Nigeria

The legal basis for an arrest and the pre-charge detention under the TPA 2011 are the same. The Act gives an officer of any law enforcement agency the power to arrest and detain any person whom he *reasonably* suspects of having committed or likely to commit an offence. Since what follows an arrest is the pre-charge detention of the suspect, a joint assessment of both provisions will suffice.

The right to liberty and security under the Nigerian law is not absolute. There are circumstances where this right can be curtailed. However the manner which the Nigeria security forces make arrest and detain a terror suspect arguably does not fall within these exceptions. The Nigerian Military Joint Task forces in their attempt to tackle *Boko Haram* have adopted measures beyond their scope of arrest and detention under the Act. These measures/methods raise serious concerns for human rights. For instance in May 2013, a military patrol vehicle was attacked by *Boko Haram* which resulted in the death of a soldier. The JTF in "retaliation" burnt down over 2,000 houses resulting in the death of about 183 innocent civilians.[465] Reacting to this incident, Daniel Bekele, the Africa Director at Human Rights Watch, says "the Nigerian military has a duty to protect itself and the population from *Boko Haram* attacks, but the evidence indicates that it engaged more in destruction than in protection."[466]

In practice, the Nigerian police and the Military (JTF) generally do not adhere to the legal basis for making arrests and the pre-charge detention under the TPA 2011. Suspects are arbitrarily arrested and detained without being informed of the charges against them.[467] Terror suspects

[465] Human Rights Watch, 'Baga killings: Satellite images reveal Nigerian Government lied about casualties,' *African Spotlight* (1st May, 2013) http://www.africanspotlight.com/2013/05/01/baga-killings-satellite-images-reveal-nigerian-govt-lied-about-casualties/ accessed 7th Oct, 2013

[466] ibid

[467] Nigeria Human Rights Report; Arbitrary Arrest, Detention, and Exile 2010 http://www.ncbuy.com/reference/country/humanrights.html?code=ni&sec=1d accessed 9th Oct 2013

are also denied access to legal counsel, visitation from family members, and the opportunity to apply for bail.

Cases of arbitrary arrests, prolonged pre-charge detention and un-investigated extra judicial killings among others atrocities have dominated news headlines in Nigeria since *Boko Haram* attacks began in 2009. According to Agbigboa, since the beginning of *Boko Haram* attacks, the Military Joint Task Force (JTF) has resorted to dragnet arrests, intimidation of residents, house-to-house searches and indiscriminate arrest without suspicion of committing any offence. Sometimes young men who question the mode of operation of the soldiers are shot publicly, all in the name of counter-terrorism.[468] One of the most shocking mass executions by the Nigerian Military happened on the 14th of March, 2014 in *Maiduguri* where the soldiers killed at least 640 detainees who were recaptured in the aftermath of *Boko Haram* attack on the Military detention facility at Giwa Military Barracks.[469]None of those killed were armed.[470]

Although cases of "arbitrary arrest relating to terrorism" are rarely reported in law reports except the media, the case of *Sa'adatu Umar v Federal Republic of Nigeria*[471] is worth discussing here. In that case, Saadatu, an alleged wife of a *Boko Haram* member, was arrested and detained for months alongside her children, including a 10 months old in March 2011. The court held that her arrest was arbitrary and awarded her 1 million Naira as damages.

Another case that exemplifies the current practice of arbitrary arrests by the Police and JTF is the case of case *Alhaji Bukar Yaganami*. According to Amnesty International, Alhaji Yaganami, a Police Contractor, was arrested on the 19th of January 2013, in his home in Maiduguri by Soldiers (Operation Restore Order I), and was taken to Giwa Military Barracks.[472] His health deteriorated whilst in detention as he has hypertension and diabetes. Amnesty International wrote to the Commander of the JTF (Operation Restore Order I) on 10th of June, 2013 that Alhaji Yaganami be charged or released.[473] AI also copied the Chief of Defence Staff. His lawyer requested for a bail on the 18th of November, 2013, but was refused.

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[468] Daniel Agbiboa, 'The On-going campaign of Terror in Nigeria; Boko Haram versus the State' (2013) International Journal of Security and Development, 10th Oct 2013 Pg. 2-4

[469] Amnesty International, Nigeria: more than 1,500 killed in armed conflict in north-eastern Nigeria in early 2014, March 2014. Index: AFR 44/004/2014 Pg 12-19 file:///C:/Users/user/Downloads/afr440042014en.pdf accessed 20th Dec, 2015

[470] ibid

[471] (2012) ECW/CCJ/JUD/17/12

[472] 'Stars on their Shoulders, Blood on their Hands: War Crimes Committed by the Nigerian Military' Amnesty International 2015 Index: AFR 44/1657/2015 Pg 88 https://www.amnesty.org/en/documents/afr44/1657/2015/en/ accessed 20th Dec, 2015

[473] ibid

His lawyer thereafter filed a case in Court challenging his arrest and detention. The case was filed the Federal High Court of Nigeria, Maiduguri Judicial Division. Suit number: FHC/MG/CS/2/2014. Alhaji Yaganami escaped from from *Giwa Military Barrack*s when it was attacked by *Boko Haram* on the 14th of March, 2014 and all the detainees there were freed. He immediately reported himself at the DSS office in Maiduguri and was detained again. On 10 July 2014, a Judge of the Federal High Court ordered that Yaganami arrest and detention was illegal and unconstitutional and that he should be released on bail. The Judge also signed a warrant requesting the DSS to produce Yaganami at the FHC on the 11th of July, 2014. In a letter dated 25 July 2014 and sent to the DSS in Maiduguri, the solicitors to the Attorney General of the Federation and Minister of Justice stated they had no objection to his release but still he was not released. Instead he was handed over to the Military again. His family continued to challenge his detention in court. When the Military representative appeared in court, they denied any knowledge that he was in their custody. To date (Sept 2017), Yaganami's family is still seeking an enforcement of the court order. [474]

According to information available, these arbitrary arrests and illegal detentions by the Military appear to be widespread.[475] The chairman of the National Human Rights Commission (NHRC), Professor Chidi Odinkalu, observed that many people are on a daily basis "arbitrarily arrested and detained for months without charge"[476] Amnesty International (A.I) in its 2015 Report

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[474] Ibid

[475] International Criminal Court, 'The Office of the Prosecutor; Situation in Nigeria Article 5 Report' 5th August 2013 Pg 27-29 https://www.icc-cpi.int/iccdocs/PIDS/docs/SAS%20-%20NGA%20-%20Public%20version%20Article%205%20Report%20-%2005%20August%202013.PDF accessed 23rd, Nov 2015

*****The Police and Military in Nigeria are notorious for disobeying Court orders. Amnesty International in 2012 wrote a Report on cases where the Police have refused to release suspects despite Court order to that effect. These include the case of Ibrahim Umar and Ibrahim Mohammed. They were arrested on 26th of January 2013 and detained at the Special Anti-Robbery Squad (SARS) Headquarter commonly called "Abattoir." An Abuja High Court on 2nd August, 2012 declared his continued detention unconstitutional and an infringement of his fundamental right to freedom of liberty and security of person. The Police have refused to comply with the Court order and they accused are still held in detention. Another example is the case of Chika Ibeku. A Federal High Court in Port-Harcourt ruled in 2010 that his detention without charge or bail by the Police was unlawful. The Court gave the Police Authorities 24 hours to either charge Ibeku or release him. For almost two years the Police Authorities in Port Harcourt ignored this Court order and refused to release him. Amnesty International Public Statement: 'Nigeria; Police Must Comply With the Court Oder and Immediately Release a Detainee' AI Index: AFR 44/041/2012 6th September 2012 file:///C:/Users/user/Downloads/afr440412012en.pdf accessed 20th Dec, 2015

[476]Ruth Olurounbi, 'Nigeria and infringement on citizens' rights' 23 April 2014 http://www.tribune.com.ng/quicklinkss/features/item/3814-nigeria-and-infringement-of-citizens-rights/3814-nigeria-and-infringement-of-citizens-rights Accessed 20th August 2014

raised concerns that Nigerian security forces had committed grave human rights violations and acts which constituted war crimes and crimes against humanity under international law.[477] On their part, the JTF claims that they are making a breakthrough in the fight against terrorism in the country by killing some of the terrorists and have arrested sponsors of *Boko Haram* and close relatives of people linked to *Boko Haram*.[478] The government have also refuted these criticisms by arguing that dealing with the prevention of terrorism requires spontaneous and instantaneous measures and that the power to arrest on reasonable suspicion to commit a terrorist offence gives the police an opportunity to deal with terrorist attacks before they happen.[479]

In August 2014, 17 women and 13 children believed to be the mothers or wives of *Boko Haram* members were detained in Giwa Military Barracks.[480] A 16-year old girl was also detained at the same Barracks because her father is a member of *Boko Haram*.[481] The question is how does the arrest of close family relatives of a suspected terrorist amount to fighting terror?

Human Rights Watch also reports that many alleged *Boko Haram* suspects have been arrested and held for months and even years without charge or trial.[482] These detainees are denied the right to communicate with their family and lawyers and most have had no charges publicly brought against them**.**[483] The situation has now reached an alarming proportion with the mass arrests of innocent civilians totalling about 10,000 within 2013-2014 alone.[484] Information collected by Amnesty International reveals that majority of those arrested are held in Giwa Military Barracks, Mai Mailari Military Barracks, 23 Brigade Barracks, or Sector 4 Military Base."[485] As of 2012, over 200 terrorist suspect are believed to be detained in at *Giwa* Military Barracks; over 100 at *SARS Police Station in Abuja* (commonly known as Abattoir), over 100 more at *SSS office in Abuja*; and several others in smaller detention facilities around Nigeria.[486]

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[477] Amnesty International Report NIGERIA 2014/15 https://www.amnesty.org/en/countries/africa/nigeria/report-nigeria/ accessed 20th June 2015

[478] Fidelis Soriwei, 'JTF detains Shekau's in-laws' *Punch online* (July 16, 2013) http://www.punchng.com/news/jtf-detains-shekaus-in-laws/ accessed 7th May, 2015

[479] Daniel Agbigboa, 'Nigerian States Responses to Insurgency', in ed John Lahia, Tanya Lyons, Dr John Idris, '*African Frontier; Insurgency, Governance, and Peace Building in Pre-colonial states'* (Ashgate, 2015) Pg 118

[480] Amnesty International, 'Nigeria; Stars on their Shoulder', op cit 2012 pg 81

[481] ibid

[482] Spiralling Violence; Boko Haram Attacks and Security Force Abuses in Nigeria' Human Watch Report on Nigeria Oct 11 2012 http://www.hrw.org/node/110632/section/9#_ftn196 Accessed 21 July 2012

[483] ibid

[484] Amnesty International, 'Welcome to hell fire: Torture and other Ill-treatment in Nigeria' 2014 Index: AFR 44/011/2014 Pg 14 file:///C:/Users/user/Downloads/afr440112014en.pdf accessed 20th May, 2015

[485] Ibid Pg 40-44

[486] A.I; 'Nigeria Trapped in the Cycle of Violence' op cit 2012 pg 34

Only a handful of these detainees have faced trial.[487] One of the detainees is Mohammed Yari Abba, a 36 years old Medical Doctor and Consultant to the World Health Organisation (WHO) who was arrested on the 20th of October, 2012 in Yobe State at a Police check-point. Initially he was allowed to go home without his Car after the Police took his statement, but Abba went back to the Station when he realised he had left his wallet in the Car. At this point he was detained and accused of being a *Boko Haram* sympathiser. He was later transferred to the Military Detention Site in Yobe State. On 30th of April 2013, Abba's lawyer filed a case at the FHC Abuja on the basis that his detention was illegal and neither was he allowed access to his lawyer. As of March, 2015 Dr. Abba is still been detained by the Military.[488] Other detainees that were neither charged nor released include Modu Abubakar,[489] and Abu Bakr.[490] A.I stated that not only are these Military detention sites in violation of Nigeria's international human rights law and standards including the United Nations Standard Minimum Rules for the treatment of Prisoners but they are damaging to the physical and mental well-being of the detainees.[491]

In their 2016/2017 Report on Nigeria, A.I reports that the Nigerian security forces within these period have continued to commit serious human rights violations including extrajudicial executions, arbitrary arrests and detentions, ill-treatment and extrajudicial executions of people suspected of being Boko Haram fighters - acts which amounted to war crimes and possible crimes against humanity.[492] The police and military continues to commit torture and other ill-treatment of terror detainees in military detention sites.[493] Udegbe likened the present situation in Nigeria to Guantanamo Bay.[494]

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[487] ibid

[488] Amnesty International, 'Stars on their Shoulder-Bloods on their Hands' June 2015 op cit Pg 84-85

[489] Modu, a 23 year old student was arrested in June 2013 on the allegation that he allowed some people to stay overnight at his house. According to A.I to date Modu has neither been charged nor released by the Military. Ibid Pg 87

[490] Bakr a former Detainee at Giwa Barracks narrated his ordeal to A.I. He said he was forced to share a confined area (approximately 30-40 feet with 400 other detainees with no food and they were given water only once a day. There was no toilet and some detainees fell ill due to Cholera.
Amnesty International, 'Nigeria; Welcome to Hellfire' 2014 op cit pg 42-44

[491] Ibid pg 41

[492] Amnesty International Nigeria Report 2016/2017
https://www.amnesty.org/en/countries/africa/nigeria/report-nigeria/ accessed 12th, sept, 2017

[493] ibid

[494] Clement Udegbe, 'Does Nigeria need a Guantanamo Bay type detention camp? 4th April 2014
http://www.vanguardngr.com/2014/04/nigeria-need-guantanamo-bay-type-detention-camp/ accessed 20th August 2014

While there are constitutional safeguards against arbitrary arrests under the 1999 Constitution, the Nigerian Police/JTF violates these provisions with impunity (an assessment of the Act by reference to the Constitution will be carried out later). For instance in May 2012, a trader in *Bula Birin* recounted how he and scores of others were rounded up while selling their good in the market by the Military Joint Task force.[495]They were forced to enter one single armoured vehicle and taken to Special Anti-Robbery Squad Headquarters (SARS) in Maiduguri. They were detained for days and later released without charge. During the course of arrest, there was no point in time where they were informed of the reason of their arrest. In fact of the 160 that were arrested, a few died before they got to the Station. They died of exhaustion as there was no ventilation in the vehicle.[496] Several people who have been arrested in the North East of Nigeria have told similar experiences of being arrested and not informed at the time of their arrest of the reason for their arrest.[497]

The situation has now degenerated to a level whereby the Nigerian Police and the Military Joint Task Force storm an area and make indiscriminate arrests without "reasonable suspicion" of committing an offence. In a damning Report that chronicles serious human rights abuses in Nigeria, HRW reveals that in the aftermath of any *Boko Haram* attack, members of the JTF storm the affected communities without conducting intelligence-driven operations and make arbitrary arrests. In the course of doing that, members of the communities are beaten, houses, cars and shops are burned down, money stolen whilst houses are being searched and worst of all young men are shot dead in their homes in front of family members.[498] HRW has also documented the case of a woman raped by the soldiers during this arrest.[499]To further corroborate these allegations, a gruesome video showing arbitrary arrest and executions by the members of JTF was obtained by Aljazeera. A link is attached.[500] Heavy criticisms from local and international media followed the release of the video. However, to date (Sept 2017) nothing has been done to the officers implicated in the video. This has gradually become the practice in Nigeria whereby the government fails to address human right abuse committed by the security forces. It is therefore not a surprise to see that this method of arrest has become a

[495] Amnesty International; '*Nigeria Trapped in the Cycle of Violence'* 2012 Pg 25-28 http://www.globalr2p.org/media/files/amnesty_international_nigeria.pdf accessed 18th Jan, 2014
[496] ibid
[497] Ibid Pg 26-27
[498] Human Right Watch 'Spiralling Violence; Boko Haram attacks and Security forces Abuses in Nigeria' op cit 2012
[499] ibid
[500] Aljazeera Nigeria Killing; Aljazeera Obtains exclusive video https://www.youtube.com/watch?v=cYb0IFuggwU accessed 20th Dec, 2014.

regular routine for the JTF in their counter-terrorism operation. Brandler succinctly described the power of arrest under the Act as 'a licence to kill.'[501] Similarly, in her visit to Nigeria in 2014, the UN Human Rights Commissioner, Navi Pillay, told reporters that "many people I have met with during this visit openly acknowledged that human rights violations have been committed by the security forces."[502] The human rights abuse by the Police is further heightened by a practice where the Police increasingly wear plain clothes or uniforms without identification making it much harder for people to complain about individual officers.[503] Unfortunately, the Terrorism (Prevention) (Amendment) Act 2013 which amends/delete some sections of the 2011 Act further gives the Police power to use 'such force as may be reasonably necessary' to effect an arrest and detention of a suspect.[504] A critical look at the Act could show that it fails to explain what would amount to 'such force as may be necessary'? In the writer's opinion, it could arguably be used as a defence by the Police/JTF to further infringe on the right of individuals under the guise of effecting arrest. A more narrow power subject to judicial supervision would have been appropriate.

Nigeria undoubtedly has one of the longest pre-charge detention periods known. The TPA 2011 allows for up to 180 days pre-charge detention period.[505] The reality on the ground is that hundreds of terror suspects are held for several months and years without charge in Nigeria. This leaves detainees completely vulnerable to torture and abuse whilst in detention.[506] Some terror suspects are held in underground cells without adequate food, water or ventilation especially at Giwa Military Barracks.[507] Two former detainees at the Barracks narrated their experiences to Human Right Watch. During their incarceration, they were handcuffed and chained to the ground, this prevented them from moving. There were about eight suspects in a cell and there was no light. They were only released to eat or use the toilet once a day.[508]In fact, detainees die daily in this cells.[509] It is difficult to dissociate the prolonged pre-charge

[501] Jessica Brandler, 'Boko Haram Fighting Fire With Fire', *Think Africa Press*, July 2012 http://allafrica.com/stories/201207271205.html accessed August 27, 2015
[502] UN: 'Nigeria Forces Committing Human Right Abuses' *Aljazeera America.* March 14th 2014 http://america.aljazeera.com/articles/2014/3/14/human-rights-nigeriasecuritybokoharam.html accessed 8th Jan. 2015
[503] Nigeria; Amnesty International Report 2012 http://www.amnesty.org/en/region/nigeria/report-2012 accessed 8th January, 2014
[504] S.27(2)
[505] S.27(1) TPA 2011 as amended
[506] Human Right Watch 2012 Op cit pg 72
[507] Ibid Pg 72
[508] ibid
[509] Ibid Pg 74

detention under the Act from torture and inhuman degrading treatments. In the words of Amnesty International "intimidation, torture and extortion are entrenched practices under the Nigerian criminal justice system."[510] The Nigerian National Human Rights Commission (NHRC) has also raised an alarm that torture is now used as the official means of investigation of offences and most cases in court are prosecuted by the Police based on confessional statements obtained under torture.[511] These allegations were corroborated by the U.S Department of State Country Report.[512] The Report revealed the existence of unofficial detention sites including Sector Alpha (aka Guantanamo) in Yobe State, Giwa Barracks in Borno, Presidential lodge detention facility (aka the Guardroom) also in Yobe State, and the Special anti-robbery squad in Abuja (aka Abattoir). Terror suspects are detained indefinitely in these sites till they either make "confessional statements" that could be used against them in Court, or till their captors deems it fit to release them or until they are executed.[513] It is an irony that Soldiers/Police that are supposed to protect human rights are themselves major violators of human rights.

2.3 Encouragement of terrorism

The Nigerian government made encouragement to commit terror activities an offence under the Terrorism (Prevention) (Amendment) Act 2013. Understandably, this measure is for the protection of national security, public order and more importantly to deter people from making statements that encourage terrorism.

However in practice, Nigeria's security agencies have capitalised on S.5 (1) of the TPAA 2013 as an excuse for the arrest of journalists, human rights activists and pro-democracy movements citing encouragement of terrorism as a basis for the arrests. This situation is further compounded by the broad phrasing of S. 5 Terrorism (Prevention) (Amendment) Act 2013. This apparently gives the Police a wide margin of discretion to decide what statements, opinions, writings or expressions constitute encouragement of terrorism. Increased use of

[510] Amnesty International, 'killing at will; Extrajudicial Executions and other Unlawful Killings by the Police in Nigeria' 2009 Index AFR 44/038/2009 pg 18 http://www.amnesty.org/en/library/asset/AFR44/038/2009/en/f09b1c15-77b4-40aa-a608-b3b01bde0fc5/afr440382009en.pdf Accessed 20th Dec, 2014

[511] Ibid pg 18

[512] US Dept of State; Country Report on Human Rights Practices for 2011/ Nigeria http://www.state.gov/j/drl/rls/hrrpt/2011humanrightsreport/index.htm?dlid=186229#wrapper Accessed 23th Dec, 2014

[513] ibid

modern technology and communication inter-face by Nigerians makes the effect of the offence of encouragement of terrorism even greater.

Human Rights Watch reports how 30 members of a group known as the "Concerned Youth Alliance of Nigeria" were arrested following a letter they wrote, through the America Embassy in Abuja, to the President of the U.S. In their letter, they expressed their disappointment at the widespread fraud during the general elections, human rights violations by the police, and appealed to President to reconsider his visit to Nigeria.[514] Some of them were detained, tortured and abused for weeks.[515]

On the 6th of June 2014, the Nigerian Military and Police detained journalist and confiscated newspaper publications meant for the public. Publications from four leading newspapers – The Nation, Leadership, Daily Trust and The Punch –were completely destroyed.[516] This was because these newspapers were critical of the way the going was fighting terrorism and government felt irritated these by coverage. The Nigerian government through the Minister of Justice, Mohammed Bello Adoke, in defence of their action argued that the freedom of expression guaranteed by the Nigerian constitution has become a political weapon used to promote hatred. Hence, the government is constitutionally empowered to provide security and welfare to the people.[517] Since then government forces have clamped down on media house by government forces under the guise of protecting the State.[518] Again on 5 September 2016, Ahmed Salkida, a Nigerian journalist based in the United Arab Emirates, was declared wanted by the military and later arrested by the state security services upon his arrival in Nigeria. He was arrested and detained for publishing a report including a video about the Chibok school girls that were abducted *Boko Haram.* He was later released without charges.[519] Although it

[514] Human Rights Watch; Nigeria: Renewed crackdown on freedom of Expression Dec 2003 Vol. 15, No.19 (A) http://www.dawodu.com/nig1203.pdf accessed 25th July 2014S
[515] ibid
[516] Caro Rolando, 'Crackdown on Nigerian media suppresses critical reporting on Boko Haram' (18 June 2014) IFEX Global Network Defending and Promoting Free Expression, https://www.ifex.org/nigeria/2014/06/18/newspapers_confiscated/ Accessed 24 July 2014
[517] Lade Ajisefini, 'Nigerian Justice Minister: terrorism weighs heavily on Nigerian economy' *Business Africa* http://businessinafricapays.com/news-nigerian-government-speaks-of-terror-threat-to-economy/ accessed 5th January, 2014
[518] Chris Ogbondah, 'Striking a Balance on Press Freedom in Nigeria' *Fair Observer* 29th April 2013 http://www.fairobserver.com/article/striking-balance-press-freedom-nigeria-part-2 accessed 5th January 2013
[519] Amnesty International Report Nigeria 2016/2017 https://www.amnesty.org/en/countries/africa/nigeria/report-nigeria/ accessed 12th Sept 2017

is important to note that *Boko Haram* have also attacked media houses in Nigeria,[520]the focus of this paper is to assess the effects of the law in practice.

In its 2013 impunity Index, the "Committee to Protect Journalists" CPJ reveals that Nigeria is now one the "worst nations in the world for deadly, unpunished violence against the press."[521] The report reveals that 79% of the attacks on the press were committed by government security agencies, *Boko Haram* accounts for 16% while attack from other sources takes the rest of the index.[522] Olorunyomi[523] on his part argued that in about 265 murder cases documented in the last five years, 30% out of this number are journalist/reporters.[524] The President of Nigeria Guild of Editors, Femi Adesina, cautioned that if care is not taken, "Nigeria could slide back to the dark days."[525] The Nigerian Government have solely blame *Boko Haram* for this, turning away from the atrocities committed by the security agencies.[526] While the enactment of the offence of encouragement of terrorism in Nigeria a welcome development, there is a tendency of it been used by the security forces to impose unjustifiable limit on the freedom of expression. Without doubt, the intimidation, seizure of newspaper publications, arrest and killing of journalists under the guise of fighting terrorism threatens the right to freedom of expression and the press in Nigeria.

2.4 Proscription

Nigeria is home to a wide number of organisations including civil society groups, NGO's, political parties, trade unions, student unions, religious organisations, pressure groups, and

[520] On 27th April 2012 Boko Haram bombed Thisday Newspaper office in Abuja.
Emeka Madunagu, 'Why We Attacked Thisday' *Punch* Newspaper 27th April 2012
http://www.punchng.com/news/why-we-attacked-thisday-boko-haram-2/ Accessed 5th January, 2014.
Boko Haram also claimed responsibility for attacking two other newspapers outfit, TheSun and TheMoment in Kaduna and Abuja respectively. CPJ 'In Nigeria, Boko Haram threatens attacks on media' 24th Sept, 2012
http://www.cpj.org/2012/09/boko-haram-threatens-attacks-on-nigerian-news-outl.php accessed 5th January, 2014

[521] Peter Nkanga, 'Nigeria's Impunity ranking; the facts don't lie.' Impunity Index 2013
https://www.cpj.org/tags/impunity-index-2013 accessed 5th January, 2013.

[522] ibid

[523] Dapo Olorunyomi, 'Media Freedom and the Threat of Impunity In Nigeria' *Premium Times*, May 3 2013
http://premiumtimesng.com/opinion/132447-media-freedom-and-the-threat-of-impunity-in-nigeria-by-dapo-olorunyomi.html accessed 5th January 2014

[524] This include the unresolved murder of Channels TV reporter, Enenche Akogwu; the killing of Nathan Dabak and Sunday Gyang of the Christian Times in Jos; Zakariya Isa of NTA Maiduguri; and Bayo Ohu of the Guardian Newspapers in Lagos among others.

[525] David Dolan, Tim Cocks, 'Nigeria's Free-wheeling Media Fears Crackdown Over Boko Haram Battles' *Reuters* July 20, 2014 http://www.reuters.com/article/us-nigeria-press-idUSKBN0FP0LQ20140720 accessed 20th Dec, 2015

[526] ibid

even terrorist groups. As previously explained, the Terrorism (Prevention) (Amendment) Act 2013 gives the President power to 'proscribe' an organisation if the group is involved in terrorism and also gives the President power to declare a group to be an international terrorist group. This gives enormous powers to the executive to proscribe an organisation without any judicial oversight or input from the National Assembly. Usually, the decision to proscribe an organisation in Nigeria is taken by the Executive arm of the government. The Nigerian government have in the past outlawed groups that are not involved in terrorism mainly because they oppose their policies. For example, the National Association of Nigerian Students (NANS), the Academic Staff Union (ASUU), and the Movement for the Survival of Ogoni People (Mosop), were banned by the government between 1994 and 2008.[527] S.9 could easily be used by the Nigerian government to proscribe protest and non-violent actions. This comes with devastating consequences as the organization's bank accounts and assets are frozen or seized and travel bans are placed on members of the group.

Although the Act gives the President power to 'proscribe' an organisation and to declare a group as an international terrorist group if the group is listed as a group or entity involved in terrorist acts in any resolution of the United Nations Security Council or in any instrument of the African Union and Economic Community of West African States,[528]however to date, only *Boko Haram* and *Ansaru* have been officially proscribed and listed as proscribed organisations under the Act. The non-declaration of terrorist organisations like *Al-shabaab*, *Lord Resistance Army*, *Isil* and *Al-Qeada in the Islamic Maghreb* (*AQIM*) as terrorist groups under the Act by the Nigerian government in spite of their declaration as terrorist organisations by the regional bodies such as the Africa Union and United Nations shows the reluctance of the Nigerian government to fully apply provision of proscription. One wonders if proscription under the Act only applies to domestic terrorist organisations. Remarkably, *Boko Haram* and *Ansaru* are proscribed under the UK and U.S anti-terrorism laws.

2. Conclusion

The assessment of the Nigerian Terrorism Act in practice revealed several discrepancies between the law in the book and the law in the streets (law in action). Without doubts, this chapter has revealed that the provisions of the Terrorism Act are interpreted differently from

[527] George Kieh, '*Beyond State Failure and Collapse: Making the State Relevant in Africa'* (Lexington) 2000 Pg 163-165

[528] S.9(4)(b)

what the law demands by the state actors (Police and the Soldiers). The conclusion that can be drawn from this assessment is that the Nigerian government have in the last seven years responded to terrorism in a way that unnecessarily infringes on human rights in the country. This assessment also revealed that Nigeria is yet to find a proper response to terrorism that is in consistent with human rights norms.

In addition to the revelation that the Nigerian security forces generally do not adhere or follow the provisions of the Act, the assessment shows a lack of accountability for terrorist arrests, prolonged pre-charge detention, and even the extra-judicial killing of suspects. As demonstrated in the assessment, terror suspects in Nigeria are considered guilty even before arraignment or trial. Hence terror suspects are denied access to court without any judicial oversight and there is "secrecy" about the location of their detention. The writer also notes that there are no conscious policies in place by the government to check these atrocities. The absence of a comprehensive strategy in combating terrorism as well as punishment for human rights infringements committed by the Security forces demands urgent action. The Writer is of the opinion that the solution to these predicament lies in an independent body that will oversee the counter-terrorism activities in Nigeria.

The argument may be made however that these draconian measures adopted under the Act and in practice could be due to the nature of terrorist of terrorist attacks in Nigeria and are necessary in dealing with terrorism situation in the country. The writer's answer to the question is that while Nigeria has a positive obligation to protect its citizens against terrorism, it also has a positive obligation to investigate and punish those that infringe human rights, even whilst fighting terrorism. International law imposes on obligation on the State to investigate and prosecute alleged perpetration of crimes under international law as well as abuses of human rights. . In the words of Abdurrahman,

> "Terrorists are human beings, notwithstanding the repugnant aversion their actions provoke. The modern international human rights system is premised on the belief in a set of inalienable rights due to all human beings, simply by virtue of their being human beings. The uncontrolled war against terrorism has given governments across the world power to be repressive and dictators without regards to human rights provision. Unless the international community reacts strongly and decisively, this may as well sound a death knell for the credibility of the international human rights system.''[529]

[529] Abdurrahman Oba, The African Charter on Human and Peoples' Rights and ouster clauses under the military regimes in Nigeria: Before and after September 11 (2004) 4 African Human Rights Law Journal Pg 302 http://www.corteidh.or.cr/tablas/R21563.pdf accessed 6th January, 2013

The question that comes to mind is what are the constitutional safeguards available to terror suspects in Nigeria? Is the provision of the Terrorism (Prevention) Act 2011 consistent with Nigeria's domestic, regional and constitutional obligations? And more importantly, what challenges can be made to the constitutionality of the provisions of the TPA 2011 on human rights grounds and other legal grounds? These questions will require further assessment of the TPA 2011 by reference to Nigeria's domestic, regional and international human rights obligations under the Constitution 1999, the African Charter and the ICCPR. But before then, a similar assessment of the provision of the UK's Terrorism Act 2000 and 2006 will be done in the next chapter.

CHAPTER 7

A SOCIO-LEGAL ASSESSMENT OF THE UNITED KINGDOM'S TERRORISM ACT 2000 & SECTION 1 TERRORISM ACT 2006

1. Introduction

Having assessed the social effects and practical impact of the TPA 2011(as amended) on human rights freedoms in Nigeria, a similar assessment of the UK's Terrorism Act 2000 and s.1 of the Terrorism Act 2006 will be done in this chapter. The aim is to expose whether there are discrepancies between law in books (the Terrorism Act 2000) and the law in action. The assessment will also reveal the policy behind the legal measures adopted under the TA 2000 as well as the practical impact of the law in action. This assessment will assist the writer in determining the kind of proposals and recommendations that will be proffered later in the research.

The following provisions of the UK TA 2000 will be assessed; the definition of terrorism, arrest, pre-charge detention, proscription, and encouragement of terrorism

2.1 A Socio-legal Assessment of the Definition of Terrorism in the UK

Over the years, the definition of terrorism under the UK Terrorism Act 2000 has received a lot of criticism especially with regards to its application in practice. According to 'Liberty', the current definition of terrorism under the T.A 2000 is too broad, covering actions which fall short of the public's perception of terrorism.[530] Liberty raised concerns over the provisions of S.1(2)(b) which covers action "*involving serious damages to property*' and S.1(2)(e) which covers action '*designed seriously to interfere with or seriously to disrupt an electronic system.*" The group argued that, for example, if a person damages an uninhabited building, their action should not be considered that of a terrorist. The inclusion of this undermines the seriousness of the label of terrorism.[531] The group argued further that it would be appropriate if S.1(2)(b) and S.1(2)(e) covers damage to property or disruption of electronic system where this could endanger a person's life. Liberty is also of the view that damages to property or disruption of electronic system should not, in and of itself, constitute a terrorist act.[532]

[530] LIBERTY, Liberty's response to Lord Carlile's review of the definition of terrorism June 2006 pg 4 http://www.liberty-human-rights.org.uk/pdfs/policy06/response-to-carlile-review-of-terrorism-definition.pdf accessed 2nd June 2013

[531] Ibid pg 10

[532] Ibid pg 9

Similar to Liberty's concerns, "Article 19," a body involved in "Global Campaign for Freedom of Expression," criticised the definition as too broad.[533] The group argue that the Terrorism Act 2000 criminalises some actions that cannot be regarded as terrorism. According to the group, an action that creates 'serious risk or safety to the health of the public' should not always warrant a public order response instead of an anti-terrorism response. Article 19 cited the example of 'critical mass' bike rides, where for several years a groups of cyclists took to the streets in cities around the world with the so-called aim of "reclaiming the streets." Due to the number of participants involved, these rides seriously disrupt traffic and could pose 'serious risk to safety' of road users as well as the cyclist. Given that the aim of the rides is to "reclaim the streets ("*ideological*"), this could easily fall within the definition of terrorism under the Terrorism Act 2000.[534]

The concern about the emphasis on property damage in the definition of terrorism was also raised by the Independent Reviewer of the Act, Anderson. He argued that one might question why "an act intended to cause death or serious bodily injury" which the world understand as terrorism was not used to cover damage to property. Anderson claimed that countries like Canada and New Zealand only include property damage in their definition to terrorism when it is likely to result in serious harm or risk to person.[535] He however reasoned that this concern is of "little significance" as it is rare to encounter a plot which is solely aimed at damaging property without resulting in harm or risk to people.[536] The writer however disagrees with Anderson on his latter view. Terrorist have been known to destroy archaeological sites, historical monuments or holy sites without necessarily resulting in harm to people. For example, *ISIL* Fighters destroyed a 2000 year old "Arch of Triumph" in Palmyra, Syria. To the Islamic State fighter's, it symbolises the destruction of culture that does not represent their ideas.[537]

Other controversial features of the definition of terrorism as identified by Anderson (though he says they are not necessarily wrong) includes: the relatively low threshold of "*serious violence against a person*" which could be thought insufficient to defend the invocation of special

[533] Article 19 Global Campaign for Freedom of Expression London April, 2006. Submission to ICJ Panel of Jurist on Terrorism, Counter- Terrorism and Human Rights Index Number LAW/2006/0424 Pg 3
[534] ibid
[535] *Suresh v Canada* [2002] 1 SCR 3
[536] D. Anderson, 'Shielding the Compass' po cit Pg 13-14
[537] 'Islamic State destroys 2,000-year-old Arch of Triumph in Palmyra' *The Telegraph* 5th of Oct, 2015. http://www.telegraph.co.uk/news/worldnews/islamic-state/11911399/Islamic-State-destroys-2000-year-old-Arch-of-Triumph-in-Palmyra.html accessed 20th of Dec, 2015

powers designed to deal with a plot to kill civilians; the inclusion of "*serious damages to property*" as acts of terrorism without even requiring the likelihood that serious harm or risk to persons will result from the damages: the inclusion of the use of threat of action to "*influence"* the government as a terrorist act rather to "i*ntimidate*" the government; the non-application of the target test to actions or threats involving the use of firearms or explosives; and lastly, the non-inclusion in the Act of countries whose government are included or excluded from the application of the Act.[538]

Despite these criticisms, the Supreme Court in *R v Gul* recently upheld the definition of terrorism under the T.A 2000. The Court ruled that;

> *"*It is difficult to see how the natural, very wide, meaning of the definition can properly be cut down as it had been clearly deliberately drafted in wide terms to take into account various forms of terrorism."[539]

The Court based its submission on the fact that there is no universally accepted definition of terrorism in international law. As highlighted in the analysis of the TA 2000, the Supreme Court in this case also held that that the definition of terrorism extends to military or quasi-military activity aimed at bringing down a foreign government, even where that is approved (official or unofficial) by the UK government and even when perpetrated by the victims of the oppression abroad.[540] The effect of this decision in practice is that, for instance, the political violence against the previous government of Col. Gaddafi in Libya would be regarded as terrorism under the UK Terrorism Act. In Walker's view, it would be irrelevant whether the violence happened when Gaddafi was out of favour with the international community.[541] This S.C decision also raises question about the UK's tacit support for forces against the Assad Regime in Syria. Would this not amount terrorism on the part of the U.K and U.S? One also wonders whether the UK and US's invasion of Iraq and Afghanistan leading to the bringing of the Saddam government is not terrorism. The Supreme Court in *Gul* clarified that this would not be classed as terrorism. The Court held that;

> *"…* the use of force by Coalition forces is not terrorism. They do enjoy combat immunity, they are ordered there by our government and the American government, unless they commit crimes such as torture or war crimes …".[542]

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[538] Ibid pg 57-58
[539] UKSC 64 at [38], October 23, 2013.
[540] [2013] UKSC 64
[541] C. Walker, *Blackstone's Guide* 2014 op cit Pg 16
[542] *R v Gul* Supra Para 5

Anderson strongly disagreed with this decision of the Supreme Court in *R v Gul*. He argued that the Supreme Court "(as befits its function as a judicial rather than a policy-making body) did not express a view on whether the legislature should exclude such acts from a definition that it described as very far-reaching indeed."[543] He argued further that such acts do not constitute terrorism in the laws of some other Commonwealth and European Countries like Australia.[544] Reacting to Anderson's concerns, the Supreme Court in *R v Gul*, although as an *obiter dicta*, agrees that his suggestions "merit serious consideration" and that "any legislative narrowing of the definition of 'terrorism', with its concomitant reduction in the need for the exercise of discretion under section 117 of the 2000 Act, is to be welcomed provided that it is consistent with the public protection to which the legislation is directed."[545] The Supreme Court went further to acknowledge that the definition of terrorism under the Act was broad and its consequence include 'a grant of unusually wide discretions to all those concerned with the application of the counter-terrorism law, from Ministers exercising their power to impose executive orders to police officers deciding whom to arrest or to stop at a port and prosecutors deciding whom to charge.'[546] The SC rightly concludes that these could leave the citizens in the dark and risk undermining the rule of law.[547]

Going by the Supreme Court decision in *R v Gul*, the most significant effect of the broad definition of terrorism under the TA is the duties it imposes on the Police to criminalise, investigate, and prosecute those acts listed as acts of terrorism as terrorist offences. The consequence of these is a definition that is open to misuse and unduly wide application. If unchecked or controlled, this could lead to arbitrary arrests. Broad or vague definitions of terrorism also make it impossible to satisfy the clarity required by criminal law and gives the definition too much discretion in its application. Anderson argued further that this discretion even become wider when conducts ancillary only in the broadest sense to terrorism is criminalised for example, "acts preparatory to terrorism" used under Section 5 of the Terrorism Act 2006.[548] The broad definition of terrorism also has the potential of disproportionately

[543] David Anderson, 'The Terrorism Act in 2013: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006' [July 2014] Pg 26 https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2014/07/Independent-Review-of-Terrorism-Report-2014-print2.pdf accessed 18th Nov, 2015
[544] ibid
[545] [2013] UK SC 44, Para 33-34, 64
[546] Ibid Para 34
[547] Ibid Para 36
[548] David Anderson QC, Report on the Terrorism Act in 2012, Pg 54

interfering in the exercise of the right to freedom of expression, freedom of association and the right to assembly. An example of this was the detention of more than 600 people[549] during the Labour party Conference in 2005 even though none of them was suspected of terrorist links.[550]

In reality, there seems to be a huge degree of discretion within the UK terrorism Act. Section 117 (2) of the Act clearly stipulates that proceeding for terrorism offence cannot "not be instituted in England and Wales without the consent of the Director of Public Prosecutions, and shall not be instituted in Northern Ireland without the consent of the Director of Public Prosecutions for Northern Ireland." The implication of this provision is that even with the legal definition of terrorism under the Act, it still remains subjective.

The Supreme Court in *Gul* frowned at this. The Court stated that;

> "The Crown's reliance on prosecutorial discretion is intrinsically unattractive, as It amounts to saying that the legislature, whose primary duty is to make the law, and to do so in public, has in effect delegated to an appointee of the executive, albeit a respected and independent lawyer, the decision whether an activity should be treated as criminal for the purposes of prosecution. Such a statutory device, unless deployed very rarely indeed and only when there is no alternative, risks undermining the rule of law. It involves Parliament abdicating a significant part of its legislative function to an unelected DPP, or to the Attorney General, who, though he is accountable to Parliament, does not make open, democratically accountable decisions in the same way as Parliament. Further, such a device leaves citizens unclear as to whether or not their actions or projected actions are liable to be treated by the prosecution authorities as effectively innocent or criminal - in this case seriously criminal."[551]

Despite these fears and concerns, the Supreme Court stated that it "does not regard it as an appropriate reason for giving "terrorism" a wide meaning."[552] The Court stated further that, "unless the appellant's argument based on international law dictates a different conclusion, the definition of terrorism as in section 1 of the 2000 Act is indeed as wide as it appears to be."

On the basis of this assessment, the study concludes that it might impossible to assess the definition of terrorism in the UK on strict grounds of human rights. This is because deciding what amounts to terrorism is a highly contested subject without a universal consensus. Quoting the decision in *Al-Sirri v Secretary of State for the Home Department*,[553] the Supreme Court in *Gul* emphasized further that "there is as yet no internationally agreed definition of terrorism"

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[549] *They include anti-Iraq war protesters, anti-Blairite OAPs and conference delegates.

[550] News.scotman.com, 'Over 600 held under terror act at Labour conference' 03/10/2005 http://www.scotsman.com/news/uk/over-600-held-under-terror-act-at-labour-conference-1-1098792 accessed 4th July 2013

[551] Para 36

[552] Para 40

[553] 2013] 1 AC 745, para 37

and "no comprehensive international Convention binding Member States to take action against it."[554] More importantly, the Supreme Court put the problem relating to the definition of terrorism in the UK to rest by holding that the definition was deliberately drafted in wide terms to take into account various forms of terrorism and it that it would be wrong for any court to cut it down by implying some sort of restriction into the wide words used by the legislature.[555] The Court emphasised that "it is clear that it is very hard to define "terrorism"…….there are great difficulties in finding a satisfactory definition of "terrorism", and suspected that "none of us will succeed."[556]

2.2 Arrest

The power of arrest under section 41 of the Terrorism Act 2000 has been described as one of the most important powers available to the police in the fight against terrorism.[557]The Government argues that this power allows the Police to make 'preventive arrest' before the commission of a terrorist act as the Police have a duty to do so where it is necessary. Jack Straw (during the passage of the 2000 Terrorism Act) emphasized the value of arrest powers given to the Police under the Act with reference to the gas attack on the Japanese Underground.[558] Straw argued that if the security forces obtain information that an organisation was plotting an outrage in the United Kingdom, the security forces would need the powers to prevent the outrage from occurring.[559]

In spite of the justifications given by the government, the power of arrest under the Act has come under intense criticisms especially its application in practice. It is therefore no surprise that the courts have shown interest and has in a number of cases decided on the lawfulness of

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[554] Ibid Para 44
[555] Ibid Para 23
[556] *R v Gul* Supra Para 31
[557] 2005-06 HC 910 Pg 9 http://www.official-documents.gov.uk/document/cm69/6906/6906.pdf accessed 5th April, 2013.
[558] Ibid Pg 10
[559] Ibid
Similarly, Walker justifies the power given to the Police under S. 41. According to him, there are three reasons for the power of arrest without warrant under the Terrorism Act 2000. Firstly, this is to enable the Police to interrogate suspects to uncover admissible evidence, gather background intelligence information and to disrupt any terrorist plan. Secondly, this is to facilitate the carrying out of searches and thirdly, this enables the Police to deal decisively with problems posed by International terrorism. Furthermore, this would give the arresting officer wider discretion in carrying out an investigation.
Clive Walker, *BlackStone's Guide* 2014 Op cit Pg 158-159

arrest based on reasonable suspicion. Crucially, the Court in *Campbell and Hartley case*[560] have held that the 'reasonableness' of the suspicion justifying such arrests cannot always be judged according to the same standards as are applied in dealing with conventional crime.[561] S. 1 of Code A of the Revised Code of Practice for police Officers also stipulates that when Police are carrying out their functions, they have a due regard to eliminate unlawful discrimination, harassment, and victimization. The Court in *Magee and Ors v UK*[562] gave credence to this provision. The accused in this case were arrested based on "suspicion" of involvement in the murder of a Police officer in 2009. The High Court of Northern Ireland found that the first review by the County Court was wrong and that the Court should have allowed a review of the "lawfulness of their arrest." the High Court quashed the decision to extend their arrest and the applicants were released without charge (after 12 days). However, the ECrtHR in *Sher v UK* has expressly stated that the law (Art 5) does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. The Court held further that the police may frequently have to arrest a suspected terrorist on the basis of information which is reliable but which cannot, without putting in jeopardy the source of the information, be revealed to the suspect or produced in court and Contracting States cannot be asked to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources or their identity.[563]

But despite the Court decisions in *O'Hara* case, *Campbell and Hartley* case, *Brogan v UK* case, and *Sher's* case, critics argue that the wording of S. 41 makes it potentially wide in its application. According to Blick, arrest should be based on the commission, imminent or actual commission of the offence.[564] In the same way, Anderson argued that the power of arrest given to the Police empowers the arresting officer to arrest an individual with no specific offence in mind. [565] Although the Courts have held that the reasonable suspicion to arrest must be 'subjective and genuine,'[566] nevertheless in practice the Police seemingly enjoy a complete

[560] 30 August 1990, Series A, No. 182, p. 16, Para. 32
[561] Ibid pp. 16-17, para. 32.
[562] [2015] ECHR 26289/12, 29062/12 and 29891/12
[563] Supra Para 147-148
[564] Andrew Blick, Tufyal Choudhury & Stuart Weir 2006 Op cit Pg 47
[565]Owen Bowcott, 'Terrorism Law- messy and applied excessively warns legal reviewer; David Anderson, Independent Lawyer for Parliament, Urges re-balance of Britain's security and liberty needs'. *The Guardian* 27th June, 2012 http://www.guardian.co.uk/uk/2012/jun/27/terrorism-laws-excessive-reviewer-anderson accessed on 5th April, 2013.
[566] *O'Hara v Chief Constable of RUC* [1997] A.C 286 Pg 135

discretion in deciding against whom to use this arrest power. This is evident in the huge gap between number of those arrested and the number of convictions secured under the T.A 2000. Arun was of the opinion that the low conviction rate for those arrested simply points to the excessive and discriminatory use of arrest powers.[567] Anderson argued that every year, a significant number of people arrested under section 41 of Terrorism Act 2000 are charged with offences under the ordinary criminal law which ranges from conspiracy to murder to possession of dangerous weapon.[568] Anderson contends that this power may be lawfully used to arrest people that are not involved in terrorism."[569] For instance in 2012, only 43% of those arrested under S. 41 were eventually charged for terrorism related offences.[570]Anderson concludes that 'Britain needs to rebalance some aspect of its terrorism legislation in favour of liberty without harming its security needs as elements of it have been conceived and applied with excessive enthusiasm.'[571] Supporting this view, Walker points out that most arrestees are released without charge, suggesting that perhaps 'the criterion for "terrorism" is not a sufficiently stiff test for the deprivation of liberty or that intelligence-gathering and disruption rather than prosecution are the main purpose of arrest.'[572]Report shows that from September 11 2001 to 31st December 2004, 701 people were arrested under S. 41(1) and only 234 were charged with criminal offences.[573]

According to a Memorandum from the British Irish Watch (BIRW), an independent non-governmental organisation on human rights and conflicts, it appears that the Terrorism Act

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[567] Arun Kundnani, 'New Study Highlights Discrimination In Use of Anti-Terror laws' (2004) Institute if Race Relations, Available at http://www.irr.org.uk/news/new-study-highlights-discrimination-in-use-of-anti-terror-laws/ accessed 25th March, 2015

[568] Owen Bowcott, 'Terrorism laws 'messy and applied excessively' warns legal reviewer' op cit 2012

[569]The Terrorism Act in 2011 ; Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006 by David Anderson Q.C. Independent Reviewer of Terrorism Legislation
JUNE 2012 Pg 67
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228552/9780108511769.pdf
Accessed on 23th March 2015

[570]The Terrorism Acts In 2012; Report of the Independent Reviewer on the Operation of the Terrorism Acts 2000 and Part 1 of the Terrorism Act 2006 by David Anderson Q.C. Independent Reviewer of Terrorism Legislation
JULY 2013 Pg 78
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243472/9780108512629.pdf
Accessed 20th March, 2015

[571] ibid

[572] Clive Walker, The legal Definition of terrorism, Op Cit pg 1

[573] Hansard, HC Vol 431, Col. 1621W March 7, 2005

(especially on arrest) focuses heavily on the Muslims community.[574] This suggests 'the use of racial or religious profiling in the legislative arena.' This has created an atmosphere of racial mistrust and suspicion contributing to an increase in the number of alienated and angry people, playing straight into the hands of the terrorists.' This is reminiscent of the stigmatisation of the Irish community in Britain in the 70's and 80's.[575]

However, Anderson cautioned that anyone seeking to place weight on the figures for the "so-called terrorism-related arrests" needs to be aware that they have been made under ordinary PACE powers and in recent years the great majority of arrests that have been made resulted in the suspect being charged with offences unrelated to terrorism.[576]Anderson maintained that the problem is not with the power used to arrest under PACE, but the subjective basis on which the term "terrorism related" is used.[577]

It is important to note that since 2014 more people have been charged after arrest on terrorism related offences. In the year ending of 31st of March 2015 for instance, of the 299 arrests made, 85% of these were charged with terrorism offences.[578] This is the highest proportion of arrest and charge in record, even though there is an incongruity in the number of "stops and searches" and the number of arrests made within the same period. Out of the 411 stops and searches made in the year ending 31 March 2015, only 7% of these numbers were subsequently arrested.[579] The significant changes in the number of those arrested almost corresponding with the number of those charged was confirmed by Anderson. His 2014 Report reveals that 86% of those arrested on "terrorism-related offences" were charged with offences considered to be linked to

[574] House of Lords House of Commons Joint Committee on Human Rights The Council of Europe Convention on the Prevention of Terrorism First Report of Session 2006–07 Pg 22 http://www.statewatch.org/news/2007/jan/coe-conv-on-terr-jhrc-report.pdf accessed 23rd Dec, 2015

[575] Ibid

It is reported by the Government that there are up to 500 UK linked individuals that have to travelled to Syria and Iraq to join the terrorist

House of Lords House of Commons Joint Committee on Human Rights: Second Report of Session 2014–15 Pg 22 http://www.publications.parliament.uk/pa/jt201415/jtselect/jtrights/49/49.pdf accessed 22 Dec, 2015

[576] David Anderson QC, Report on the Terrorism Act in 2012, Pg 78-79

[577] David Anderson QC, Report on the Terrorism Act in 2013, pg 58

[578] Home Office: Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search, Great Britain, financial year ending 31 March 2015 Statistical Bulletin 04/15 September 2015 Pg 2-3 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/458710/police-powers-terrorism-1415.pdf accessed 23 Dec, 2015

[579] ibid

terrorism. This figure shows a substantial increase over the equivalent figure of 56% in 2013.[580] This suggests that individuals are involved in terrorism related offences more than ever before.

In spite of the high figures in the number of those arrested corresponding with those charged for terrorism related-offences, critics still maintain that the power of arrest under the Act poses a significant threat to liberty and security in the UK. In the view of Lord Bingham, there is a 'threat' in giving the Police power to arrest based on reasonable suspicion. He argues that 'suspicion, even if reasonably entertained, may prove to be misplaced, as a series of tragic miscarriage of justice has shown that even Police officers can be wrong.'[581]This conclusion is further heightened by government statistics and reports which suggest that S.41 is used by the Police in the U.K against certain ethnic and religious backgrounds.[582] Records show ethnic and racial disproportionality in the arrests made under the Terrorism Act. For example Blacks and Asian people are potentially likely to be stopped, searched and arrested even though they make up only 8.7% of the population.[583]

A study conducted in 2004 (although this is over 10 years ago, but still relevant) by the Institute of Race Relations statistics showed a huge gap in the number of arrest and the number of convictions under the Terrorism Act. The study criticised the media "fanfare" that heralds the Police arrest of terrorist suspects and only for the case to be quietly dropped few days, weeks, or months later for lack of evidence or thrown out by the Judge but not after damaging the reputation of the innocent individuals.[584] Examples of such arrest documented in the study include: the arrest of Lofti Raissi, his wife Sonia Raissi, and his brother Mohammed Raissi (all Algerians) in London in 2001 in connection with the World Trade Centre attack. Lofti spent five months in Prison before an extradition process to the U.S was rejected by the Court for lack of evidence; the arrest of British Muslim Sulaiman Zain-ul-abidin in London in October 2001 and subsequent charge for being a fund raiser for Islamic Jihad in the U.K (a proscribed organisation). Sulaiman was acquitted by an old Bailey jury the following year; the arrest of seven British and Turkish men in London and Cheshire in December 2002 on suspicion of

[580] David Anderson QC, Report on the Terrorism Act in 2014, Pg 36-37
[581] Tom Bingham, *The Rule of Law* (Penguin, 2011) Pg 73
[582] How Fair is Britain? An Assessment of How Well Public Authorities Protect Human Rights- Article 5 The Right to Liberty and Security (Equality and Human Rights Commission, 2012) Pg 171 http://www.equalityhumanrights.com/sites/default/files/documents/humanrights/ehrc_hrr_full_v1.pdf Accessed 20th March, 2015
[583] Ibid Pg 193
[584] Arun Kundnani, 'New Study Highlights Discrimination In Use of Anti-Terror laws' op cit 2004 Available at http://www.irr.org.uk/news/new-study-highlights-discrimination-in-use-of-anti-terror-laws/ accessed 25th March, 2015

raising funds for the DHKP-C (a Turkish political party). The trial collapsed after the defence counsel produced a letter by the Home Office which showed that the organisation was not proscribed under the T.A; Six British Muslim men were arrested in Darlington, Redcar, Middlesbrough, and Hartley on ''suspicion'' of raising funds for an Islamic terrorist group. All the charges were dropped after one year for lack of sufficient evidence; the arrest of Noureddine Mouleff and four others (all Algerians) in November 2003 and charges for possession of items in connection with terrorism. The Court however dismissed the charge after evidence showed that the device in their possession were just batteries and wires; the arrest of British Muslim Shazad Ashraf in London in June 2003 for allegedly being in possession of combat books and tactical planning material. The allegations were later withdrawn when the CPS failed to provide evidence; The arrest of four British Muslims in Dudley, Walsall and Luton in December 2003 who were subsequently charged with making of chemical and biological weapons amongst other allegations. The Police recovered some money in the course of their arrest. Only for the charges to be dropped four months after and the money returned; the arrest in 2004 of ten Iraqis and North Africans on the suspicion of their involvement in a plot to bomb Old Trafford football ground. The men were held and questioned for eight days only for them to be released without being charged. It later emerged that they were just Manchester United fans.[585]

Critics, academics, and observers of the UK's counter-terrorism measures attest to the discriminatory nature in arrests made under the Act. An in-depth study conducted by Tufyal and Helen across four cities (London, Leicester, Birmingham, and Glasgow) to explore the perceptions and experiences of the people about the UK's counter-terrorism measures shows that even though the U.K still faces real and serious threats from domestic and international terrorism, many individuals interviewed felt that the power of arrest makes it easier to arrest Muslims.[586] In fact some referred to the T.A 2000 as "being for Muslims and specifically targeted at them."[587] Others questioned the criteria used by the Police to identify a person as extremist.[588]

According to one interviewee:

"The police knocked on the door at 7 in the morning, they arrested my son. He was 15

[585] ibid
[586] Tufyal Choudhury, Helen Fenwick, 'The Impact of Counter-terrorism Measures on Muslim Communities,' (23 April 2013) The Equality and Human Rights Commission Research Report 72 Durham University Pg III http://dro.dur.ac.uk/10715/1/10715.pdf Accessed 20th March, 2015
[587] Ibid Pg 82
[588] ibid

and they took him away for 36 hours. We called the lawyer and everything. They let him go. They said they made a mistake. I was 36 hours crying and praying... they take all his stuff, they couldn't find anything.'' (Muslim, Female, Birmingham).[589]

Other interviewees reveal that a terrorism arrest is usually preceded by a raid on the property where suspects live, followed by a thorough search on the belongings in the house including those of neighbours. During this process the Police 'thrash' everything with terrified family members watching helplessly. This leaves a negative impact on family members of the suspect and this can be sometimes overwhelming. Most times the Police never find anything incriminating leaving the innocent suspects and their family members with a feeling of being branded. Neighbours, friends, and those related to those whom houses have been searched and arrested have a feeling of being the next target. The writer must not fail to add that some interviewees accept and recognise the fact that innocent people would inevitably be caught in this process.[590] Choudhury and Fenwick also argued that the decision to make an arrest rests solely with the Police, but unfortunately information on which the reasonable suspicion for an arrest is based is not the same as the admissible 'evidence' that can be put before the court.[591] Although the decision to charge a terror suspect to Court is done by the Crown Prosecution Service (CPS), they act based on evidence provided to them by the Police. In their conclusion, they reveal that Muslim participants in the focus group had greater knowledge and concerns on arrests under the Act than other non-Muslim focus group participants living in the same area. [592] In other words, arrests under the T.A 2000 were mostly targeted towards Muslims than non-Muslims in the focus area. This is in spite of the 2001 Census which showed that Muslims make up only 3% of the UK population.[593] Choudhury was of the view that failure of the UK government to address the discriminatory arrests was not only damaging to community police relations but also undermining the willingness of people to talk to the police.[594] This could also have a damaging disconnect between the State and communities and also raise the level of anxiety and vulnerability of the group where arrests are frequently made.

In a similar context, Awan argues that the manner with which the Police make arrests is not only alienating Muslims but has led to poor relationship between Muslims and the wider civic

[589] Ibid Pg 176
[590] ibid
[591] ibid 74
[592] Ibid Pg 84
[593] Ibid 6
[594] T. Choudhury, The Equality and Human Rights Commission Research Report Op cit 2013 Pg 12

society.[595] This has fuelled dissent amongst many Muslims communities who feel that they are being unfairly targeted and has also increase the tension between the Police and the local communities.[596] It must be noted that this scenario is not peculiar to the U.K alone. Similar lack of trust and suspicion exist in other countries for example the U.S where tension exists between the Muslim communities and the Police.[597]

While the power of arrest under S. 41 of the Act may be justified as a quick means of preventing terrorist attack, one of the very important counter-terrorism strategies under "Contest" is engagement with the local communities to discourage individuals from getting involved in terrorism.[598]However, a loss of perceived Police legitimacy and cooperation from the communities where people are frequently arrested and released without charge poses a significant set-back to the U.K counter-terrorism strategy. Besides, the perceived likelihood of a particular community to engage in acts of terrorism does not warrant generalised arrest under the guise of 'reasonable suspicion.'

Looking at it from another angle, data from the Prison Service shows that 87% of the terrorism related prisoners in the U.K in 2010 identified themselves as Muslims.[599] Perhaps, this might explain why the Police focus their counter-terrorism search-light on Muslim communities. The writer believes that this situation might not be "entirely" intentional on the part of the Police. As David Cameron rightly puts it, 'terrorist threats in the U.K are directly associated with Islamic extremism, but it is not synonymous with Islam as a peaceful religion.'[600] He argued further that Islam is a religion, observed peacefully and devoutly by over a billion people. Islamist extremism is a political ideology, supported by a minority.[601] In a similar observation, Pantazis and Pemberton stated that Islamic fanaticism has resulted in the Muslim community

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[595] Imran Awan, ' Paving the Way for Extremism; How Preventing the Symptoms Does not Cure the Disease of Terrorism (2011) Centre for the Study of Terrorism and Political Violence; Journal of Terrorism Research, Vol 2, Issue 3 http://ojs.st-andrews.ac.uk/index.php/jtr/article/view/224/239 Accessed 23rd March, 2015

[596] ibid

[597] Basia Spalek, Laura Mcdonald , 'Counter-terrorism: Police and Community Engagement in Britain and the U.S' (2012) Arches Quarterly, Vol5, Edition 9 Pg 23 http://www.thecordobafoundation.co.uk/attach/ARCHES_Vol5_Edition9.PDF#page=20 Accessed 23rd Marc, 2015

[598] Karl Roberts, 'Urgent Police Interview With Suspects of Terrorism Under PACE; Risks and Mitigation, In Melchor C. de Guzman, Aiedeo Mintie Das, Dilip K. Das (ed) '*The Evolution of Policing: Worldwide Innovations and Insights*' (Taylor and Francis, 2014) Pg 354

[599] T. Choudhury, The Equality and Human Rights Commission Research Report Op cit 2013 Pg III

[600] Full transcript | David Cameron | Speech on radicalisation and Islamic extremism | Munich | 5 February 2011; The Prime Minister says that the "doctrine of state multiculturalism" has failed. 5th Feb, 2011 http://www.newstatesman.com/blogs/the-staggers/2011/02/terrorism-islam-ideology Accessed 23rd March, 2015

[601] Ibid

replacing the Irish as the principal suspects for terrorism atrocities the UK.[602] The challenge before the Police is how to identify and deal with these extremists without focusing on the Muslim communities or directly encroaching on individual rights. The core argument in the research is that arrest must not be used randomly and without adequate justification especially against minority groups.

The writer notes that there has been a significant change in the number of minorities arrested for terrorism offences since 2013. For instance, according to statistics provided by the Independent Reviewer, 40 suspects were arrested in 2013. Of this figure, 27% were whites, 18% were blacks, 41% were Asians, and 6% from other nationalities. Of this same figure, 49% of whites were charged, 15% of blacks charged, 33% Asians were charged, and 4% of other nationalities were charged.[603] These figures seem to suggest that the government is doing something about criticism relating to arrest under S.41. As Parpworth stated, though the threshold for establishing reasonable suspicion is a necessarily low one, it would be contrary to the public interest if police officers investigating the commission of a criminal offence were required to establish a prima facie case against an accused before that person could be arrested. If such were the case, the law would have set the bar too high.[604]

2.3 Pre-charge detention

Several justifications have been given by the UK government for the 14 days pre-charge detention under the Act. The government argues that "the threat from international terrorism is now completely different, particularly in the magnitude of the potential harm and indiscriminate nature of their targets."[605] This means that in some complex cases "evidence gathering effectively begins post arrest," thereby justifying the long pre-charge detention period.[606] This period also gives the government the time to obtain necessary evidence by questioning the accused or otherwise and to preserve relevant evidence. In addition to that, the

[602] Christiana Pantazis, Simon Pemberton, 'Frameworks of Resistance'; Challenging The UK's Security Agenda', in, Elizabeth Stanley, Jude McCulloch,*(ed) State Crime and Resistance* (Routledge, 2013) Pg 122
[603] David Anderson Q.C, the Terrorism Act in 2013; Report of the Independent Reviewer on the Operation of the Terrorism ACt 2000 and the Terrorism Act 2006 July 2014 Pg 60-61 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/335310/IndependentReviewTerrorismReport2014.pdf accessed 26th March 2015
[604] These include finding interpreters, the need to decrypt computer files, the time needed for examination and analysis, time to obtain and analyse data from mobile phones, the need to allow observance of religious rites by the detainees, and solicitor's consultations with suspects. Neil Parpworth, 2009 Op cit
[605] House of Lords House of Commons Joint Committee on Human Rights Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Third Report of Session 2005–06 pg 30-32 http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/75/75i.pdf accessed 23 Dec, 2015
[606] Ibid

government argued that the international nature of modern day terrorism requires enquiries to be undertaken in different countries. There is also the problem of false identities from suspects, need to employ interpreters, time to decrypt evidence obtains from computers hard drives/phones and the time to analyse this, the need to obtain and analyse communication data from services providers, the need to allow time for religious observance of detainees, the need to make safe a location or premises where hazardous substances are found, and the delay in filing process on the part on the detainees solicitors.[607]

Despite the justifications from the government, concerns have been raised over the 14 days pre-charge detention period under the Act. According to Banakar, the 14 days pre-charged detention period in the U.K is 'excessive and draconian in character and can lead to a gradual erosion of the foundation of the western democratic system.'[608] Similarly, Amnesty International (AI) criticised the 14 days pre-charge detention period under the Act as "too long a period to detain individuals without charging them."[609] Amnesty argues that from its monitoring of the right of fair trial over several years, prolonged periods of pre-charge detention can create an avenue for coercive or abusive practices which may force detainees to make involuntary statements, such as confession. Amnesty argued further that the likelihood of taking advantage of a detained person for the purpose of compelling him to confess to incriminate himself or testify against another person increases with the length of time people are held in custody.[610]A.I's Director in the UK, Kate Allen, maintained that people have a right to be charged promptly or to be released. According to her, "it is shocking that the law in the UK is moving further and further away from this basic principle."[611] She posited that the idea that countering terrorism requires removing or eroding basic guarantees of individual liberty and physical safety is a discredited one and the government should reject it once and for all.[612] In fact, during the debate to extend the pre-charge detention of suspect in the UK, the Police accepted in their oral evidence that the facilities available to them are not suitable for a period

[607] ibid
[608] Reza Banakar, 'Poetic Injustice; A Case Study of the UK and anti-terrorism Legislation' (2008) Retfaerd; the Nordic Journal of law and Justice Pg 69-70
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1323380 accessed 5th April, 2013.
[609] Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills; Memorandum By Amnesty International (DTS6) http://www.parliament.uk/documents/joint-committees/detention-terrorists-suspects-bills/Writtenevidenceweb.pdf Pg 3.
[610] Ibid Pg 4
[611] Report On the Visit to the United kingdom carried out by the European Committee For the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 6, Dec 2007, Date of Report 1 Oct 2008, CPT/Inf (2008) 27.
[612] ibid

beyond 14 days and recommends that any pre-charge detention beyond this should be in prison.[613]

In the opinion of the writer, although the justifications given by the government seem "reasonable," other countries in Europe facing similar threats of terrorism have fewer days pre-charge detention regimes under their Terrorism Acts and have managed to resolve their terrorism cases within a few days. A comparison of the length of pre-charge detention in the UK with other E.U countries shows that in France it is for a period of 48 hours, [614]but no longer than 144 hours (6 days)[615] in Germany pre-charge detention may extend only up to 48 hours at which point a criminal charge must be entered,[616] in Spain it is for period of 13days[617] subject to an extension for a period of *8days*,[618] and in Australia it is for a maximum period of 14days.[619] In fact the U.S, the global front-runner in the fight against terrorism, has two days as its pre-charge detention period. [620]

The question that comes to mind is how are the other EU countries facing the same terrorism challenges able to manage a shorter pre-charge detention period? What makes the U.K situation different? Or is the nature of terrorism threats faced by the U.K different from other EU countries?

The government of the U.K have not given a clear and convincing reason as to why her pre-charge detention should be one of the longest in Europe. As Liberty rightly argued, no two legal systems are exactly the same and comparisons are not always simple. But this does not

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[613] House of Lords House of Commons Joint Committee on Human Rights Counter 2005–06 Op cit PP 32-33

[614] 'The Company We Keep: Comparative Law & Practice Regarding The Detention of Terrorist Suspects' (A Project of the Human Rights Institute, Columbia Law School; International Law and the Constitution Initiative, Fordham Law School; and the National Litigation Project, Yale Law School, June 2009) pg 1-19

[615] Articles 421-1, *et seq. of the French Penal Code* (as amended in Law of 22 July 1996)
*After this period the detainee must be criminally charged.

[616] Art. 112-130 Law of Criminal Procedure (StPO); Immigration Bill 2003; German Constitution *Grundgesetz* law

[617] *Criminal Code of Procedure,* Art. 520 bis (1) (Spain)

[618] Organic Law 15/2003 of 25 November 2003, *Reforming the Code of Criminal Procedure*

[619] Australian Crim. Code S. 105
*Furthermore, the maximum period for the pre-charge detention of a suspect in the US is 48hours; In Australia it is 24 hours (Although the law permit preventive detention for up to 14days); In South Africa the maximum period for pre-charge detention is 48hours; In Italy it is for a maximum period of 4days; In Denmark It is 3days; In Norway it is 3days; In Russia, 5days; and for Turkey it is for a maximum period of 7days and 12 hours. Jago Russell, 'Terrorism Pre-charge Detention Comparative Law Study' (Charge or Release Liberty, Nov 2007) Pg 10-12 http://www.statewatch.org/news/2007/nov/liberty-report-pre-charge-detention-comparative-law-study.pdf accessed 10th October, 2013.

[620] LIBERTY, Terrorism Pre-Charge Detention Comparative Study June 2010 Pg 4

mean that the UK should shut its eyes to overseas experiences.[621] Critics of the U.K's 14 days detention period argues that many European countries have successfully managed their pre-charged detention period of less than a week. The shortness of the pre-charge detention period in Spain (5days) did not impact the successful investigation that led to the conviction of the suspects arrested in Spain for the attacks of March 2004.[622] Penas and Rodriguez were of the view that the current 14 days period in the U.K has taken legislative reaction to counter terrorism too far.[623]

Interestingly, a 2011 statistic shows that of the 54 that were detained only three people were detained for longer than six days, each between 10 and 12days. [624] Similarly in 2013, of all the terror suspects arrested and detained, 13 suspects were held for less than a day, 16 suspects were held for 48 hours, 38 suspects were held for less than a week, while two suspects were held for less than eight days.[625] This statistic suggests that the U.K can do without the 14days pre-charge detention for a shorter pre-charged detention period. The figure released by the Independent Reviewer showed that on the occasion where the 14day period was used, it has not always led to convictions of the suspects. The House of Commons Committee on counter-terrorism (during the debate for a longer pre-charge detention period) underscored the point that the 14 days pre-charge detention is rarely used and does not get the point of even extending it for a longer period.[626] Although, the 14 pre-charge detention period is subject to judicial review, it still has the potential of creating conditions conductive for torture and ill-treatment of detainees.[627] A White Paper Report suggested that if France despite its experience with terrorism can manage six days pre-charge detention period, then there is no justification for the 14day period in the UK.[628] The Paper concludes that the 14 period in the UK is flawed as matter of law and policy.[629] In the writer's opinion, caution must be exercised when comparing the

[621] Ibid Pg 4
[622] Leandro Martinez Penas, Manuel Rodriguez, Evolution of the British Law On Terrorism; From Ulster to Global Terrorism 1970-2010, In Aniceto Masferrer (*ed*) '*Post 9/11 and the State of Permanent Legal Emergency*' (Springer, 2012) Pg 220
[623] Ibid
[624] David Anderson, The Terrorism Act In 2011 Pg 71
[625] David Anderson Q.C, the Terrorism Act in 2013 Op cit Pg 58
[626] House of Lords, House of Common, Joint Committee on Human Rights Thirtieth Report of the Session 2007-08 HC 007 pg 3
[627] Human Right Watch, in the Name of Security 2012 http://www.hrw.org/ar/node/108447/section/11#_ftn215 accessed 26th March, 2015.
[628] The Company We Keep; Comparative Law and Practice Regarding the Detention of Terrorism Suspects A white Paper of the Working Group on the Detention Without Trial ;A Project of the Human Rights Institute, Columbia Law School; International Law and the Constitution Initiative, Fordham Law School; and the National Litigation Project, Yale Law School June(2009) Pg 10-19
[629] ibid

pre-charge detention period in the U.K with other European countries. For example, though France has a six days pre-charge detention of suspects, the U.K pre-charge detention process is less cumbersome than that of France. Terrorist suspects in France have a severely limited access to a counsel and may be interrogated at will within the 6 days pre-charge detention period and at the end of this period, the accused is brought before a Magistrate and represented by a counsel.[630] At this stage the examining Magistrate decides whether to remand the accused in a pre-trial detention based on the case file including the prosecutor's preliminary findings (*réquisitoire introductive*). In some cases weeks, months, or years may go by before the examining Magistrate concludes the investigation and for the prosecution to draw up an official indictment (*requisitoire définitif*) and the case is passed to a trial Judge. This is different from the U.K procedure where an accused can have access to a counsel immediately after arrest and trial begins as soon as the accused is charged.[631]

The Conclusion of the White Paper Report earlier mentioned could perhaps be premised on the significant effect a 14 days detention could have on the mental and physical well-being of those detained. Records have shown that some detainees have manifested high symptoms of anxiety, depression, and post-traumatic stress disorder after release, and suicide attempts.[632] In fact the government pays a lot in form of legal compensation and damages to innocent detainees. Baroness Neville Jones, a previous Minister of State Home Office, stated that about 15Million Pounds was awarded by the Court as compensation either in court or out of court settlements following claims of unlawful detention as well as other legal compensations cost between 2008 and 2010 alone.[633] Critics of the U.K pre-charge policy have argued strongly that it is reminiscent of the Executive power that dominated Northern Ireland in the 1970's. However, as Morgan advised, the remedy for prolonged pre-charge detention in the UK lies in the Parliament.[634] Only the Parliament can overturn the statute by revision or amendment.

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[630] Human Right watch, UK: Counter the Threat or Counterproductive? Commentary on Proposed Counterterrorism Measures Oct 2007 Pg 18 http://www.hrw.org/legacy/backgrounder/eca/uk1007/uk1007web.pdf accessed 26th March, 2015

[631] ibid

[632] Art. 5 Human Rights Review 2012Op cit Pg 212

[633] U.K Parliament, Questions asked by Lord Hylton 29 Nov 2010 : Column WA410 http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/101129w0001.htm accessed 2nd April, 2015

[634] Kenneth Morgan, Politics of Pre-trial Detention in the U.K Since 2000, In Marion Bove, Fabrice Mourlon, (ed), '*Pre-trial Detention in the 20th and 21st Century, Common Law and Civil Law System*', (Cambridge, 2014) Pg 22

2.4 Encouragement of Terrorism

Freedom of expression upholds the rights of all to express their views and opinions freely. It also guarantees the right to seek, receive, and impart information and ideas without fear or interference. Freedom of expression is a right that reinforces all other rights and allows them to flourish. This is because the ability to express one's ideas, hold opinions, and impact information is important for the accomplishment of other rights and also crucial in the healthy development of the society. Information and ideas help to inform political debate and are essential to public accountability and transparency in government.[635] Nevertheless, since much justifications to commit terror activities comes from the internet, mass media, and religious teachings, the UK government made encouragement/incitement to commit terror activities an offence under the TA 2000.

Like other provisions of the Terrorism Act under review in this research, the offence of encouragement of terrorism has equally come under criticisms by scholars, lawyer, and academics. Their major concern is the negative effects/impact this could have on freedom of expression.

According to Report by a Panel of Jurist, the breadth and the ambiguity of the offence of encouragement of terrorism under the 2006 Act creates a risk of arbitrary and discriminatory application.[636] This is further exacerbated by the fact that it covers past statements and terror acts committed in other countries. The panel expressed serious concerns that certain statements made by Muslims to a Muslim audience could be regarded as encouraging terrorism, and similar statements made to other religious might will not be held on the same standards.[637] Likewise, there are concerns that a perfectly 'lawful statement' might be criminalised under the offence of encouragement of terrorism. More worrisome is the fact that within this current climate, statements that seek to initiate debate around issues on suicide bombers, Jihad, insulting or offensive statements by Muslim leaders critical of western ways of life in Mosques could be termed as encouraging terrorism.[638] "Liberty" also argues that a person's passionate expression might be interpreted as "recklessness" under Section 1 of the Act. The group cited

[635] General Comment No.8; Right to Liberty and Security of Persons 1982 UN DOC HRI/GEN/1 Rev 9 (Vol1) 2008 Accessed 12th October 2014
[636] Report Of the Panel of Eminent Jurist on Counter-terrorism and Human Rights Op Cit 2009 pg 130
[637] ibid
[638] ARTICLE 19, The Impact of UK Anti-terror Law on Freedom of Expression (Submission to ICJ Panel of Eminent Jurists on Terrorism, Counter-Terrorism and Human Rights London April 2006) Pg 7 http://www.article19.org/data/files/pdfs/analysis/terrorism-submission-to-icj-panel.pdf Accessed 10 Nov, 2014

the example of the Mayor of London, Ken Livingstone, who invited Yusuf Al-Qaradawi to speak in the UK. His speech was interpreted by some section of the press as encouraging terrorism. The Sun referred to him as "a ranting Islamic rabble-rouser who supports suicide bombings by children and brutal punishment of gays." "Liberty" was of the view that when speech offences are linked to terrorism, then there should be a tighter definition to what constitutes terrorism than that contained under the Terrorism Act 2000.[639] According to the group, the offence of encouragement of terrorism is fundamentally flawed.[640] "Liberty" pointed out that the offence criminalises people not only for what they intend but also for 'reckless' speech. Although recklessness can be a legitimate element in offences involving action (for example, if I assault someone and they die as a consequence, it is reasonable to consider the recklessness of my action) but same is not true of speech, where there is no link between words and others interpretation of them.[641] Similar concerns were expressed by the Muslim Council of Britain. According to Mr Ballali;

> "*Would saying that you understand the frustration of a Palestinian would-be suicide bomber, who has seen his father being killed, had his house demolished and is regularly subjected to humiliating searches at a check point on his way to work, be encouragement of terrorism? Are the Iraqis who believe that their country has been illegally invaded by a foreign force, terrorists? With this in mind, a law abiding citizen would be stuck in a dilemma regarding the above and asking him/herself, is it an offence to say what I am thinking or is it my civil right to express my views in a free society?"*[642]

Similarly, Walker argues that the offence of encouragement of terrorism runs the danger of penalising people for their views or their "stupid curiosity" to the point that the conviction of a person might not be seen as a "legitimate ascription to criminality."[643] He questions the failure of the law-makers to understand that offensive speech is the hallmark of free speech.[644] Blick, Tufyal, and Staurt also contend that that there are raft of criminal laws which covers direct and indirect encouragement of terrorism and there was no need to create this new offence under the Terrorism Act.[645] In the same way, Ekaratne criticised the offence of encouragement of

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[639] Liberty; Press Release-'New Terrorism power will make Britain less safe' 13th April, 2006 https://www.liberty-human-rights.org.uk/media/press/2006/new-terrorism-act-powers-will-make-britain-less-safe.php accessed 5th April, 2013.

[640] Liberty's Response to Lord Carlile's Report Pg 13 http://www.liberty-human-rights.org.uk/pdfs/policy06/response-to-carlile-review-of-terrorism-definition.pdf accessed 10th July 2013

[641] ibid

[642] Joint Committee on Human Rights First Report of Session 2006–07 Pg 14-15

[643] Clive Walker, 'Clamping Down on Terrorism in the United Kingdom' [2006] J Int Crim Justice 1146

[644] ibid

[645] Andrew Blick, Tufyal Choudhury & Stuart Weir 2006 Op cit pg 53

terrorism as "unnecessary" and that narrower offences linked to specific crimes can protect against terrorism.[646]He argued that Section 1(2) Terrorism Act 2006 covers a broad range of generalized statements and the scope of the provision is extremely broad and vague in its definition, leaving it to the discretion of Judges and Prosecutors to interpret. He argued further that the use vague terms which include "*praise"* and "*celebration*" are problematic as it covers expression that need not be criminalised, the existence of which may lead to the unwarranted scrutiny into expressions that should be protected in a democratic society, however repulsive it may be. In his conclusion Ekaratne suggested that the offence of glorification of terrorism should be targeted to statements that provide practical information or incite specific crimes as this would create a balance in safeguarding both life and liberty.[647]

In his assessment of the offence of encouragement of terrorism, Hunt claims that some of the "conducts" defined as constituting "dissemination" of terrorist publication are capable of attracting criminal liability as long as the dissemination is to influence those to whom it is published to commit an offence under the Act.[648] He however added that "much of these are likely to be considered as too remote from the impugned material to constitute "encouragement in and of itself" and therefore it is unlikely to have been caught applying traditional principles of incitement law."[649] Hunt argued that the mere possession of such impugned material, even with a view to using it to incite others, would not be behaviour caught by the *actus reus* of common law or statutory incitement offences. He maintains that it is "difficult to discern what the government's view was of the exact scope or the nature of the concept indirect encouragement or whether it was "thought about in a systematic way."[650]

On the positive side, Hunt stated that the 'prosecution' would still have to prove that a defendant's statement is likely to be understood as a direct or indirect encouragement either to engage in one of the forms of behaviour set out in s.1 of the Terrorism Act 2000 along with the relevant terrorist motives, or alternatively to commit a specific "Convention offence."[651] He argued that this requirement of "specificity" would even be greater in proving the commission of Convention offence because the prosecution must prove that the statement was likely to be

[646] Chehani Ekaratne, R'edundant Restriction; the UK's Offense of Glorifying Terrorism' (2010) Harvard Human Rights Journal 1 Vol.23 Pg 205
[647] Ibid pg 208-221
[648] Adrian Hunt, 'Criminal prohibitions on direct and indirect encouragement of terrorism' [2007] Crim.L.R Pg 446
[649] ibid
[650] Pg 448
[651] Ibid 447-448

understood by those it was published as encouragement to them to (directly or indirectly) engage in specific behaviour constituting the *actus reus* of a specific Convention offence, along with the requisite *mens rea* of that offence.[652] Hunt acknowledged the objection on indirect encouragement of terrorism as per its vagueness and uncertainty in the human right sense.[653] Citing the HRC, he argued that terms such as "glorification", "praise", and "celebration" are too vague to form part of a criminal offence which can be committed by speaking.[654]He questions what sorts of statements or publications are capable of 'being an encouragement of terrorism in that sense, even though they would not constitute encouragement for the purposes of common law incitement. [655] The breadth of the offence of encouragement of terrorism under the T.A makes it difficult to predict with certainty, the actions that would constitute such offences. The case of Roshonara Choudhry presents a practical example of this difficulty. Roshonara, a 21-year-old student, stabbed the MP for East Ham twice in the stomach, in May, 2010. According to her she wanted to be a martyr and revenge for Iraq because the UK voted for the war in Iraq.[656] During her sentence, a group of Islamist protesters from the public gallery in the Court room at the Old Bailey shouted "British go to hell' and "Curse the judge." Some of her supporters outside the court carried placards and were shouting "Timms go to hell", "Islam will rule the World", "British government watch your back Salaudis coming back."[657] Would these rants and the carrying of placards by her supporters' not encourage terrorism as they made these statements in support/to glorify of the stabbing of the MP? As far as the writer is concerned these words were not different from the words by Saleem, Muhid and Javed who were jailed for 4 years for their chants that "democracy is hypocrisy", "UK you will pay", "with your blood" and "7/7 on its way" during a demonstration held in central London to protest about the re-publication in a number of countries of cartoons depicting the prophet Mohammed which had originally been published in Denmark.[658]

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[652] ibid
[653] Ibid 449
[654] ibid
[655] Ibid 450
[656] Woman Jailed for life for Attack on MP, Stephen Timms" BBC 2010 http://www.bbc.co.uk/news/uk-england-london-11682732 Accessed 20 January 2017
Case Number T20107212 2010-11-03
[657] Michael Seamark, "Curse the Judge, shouts fanatics as the Muslim girl who knifed MP smiles as she gets life" Mail Online 05/11/2010 http://www.dailymail.co.uk/news/article-1326208/Roshonara-Choudhry-knifed-MP-Stephen-Timms-smiles-gets-life.html#ixzz4bi2YhF26 accessed 12/03/2017
[658] *R v Saleem R v Muhid R v Javed* [2007] All ER (D) 462 (Oct)

2.5 Proscription

The objectives of proscription as explained by Lord Carlile are to deter international terrorism organisations from coming to the UK, to disrupt the ability of any organisation to operate in the UK, to support foreign governments in disrupting terrorist organisation activity and to send a strong signal to the world that the UK rejects such organisation and their claims to legitimacy.[659]Carlile argued further that proscribing terrorist organisations protects the public from terrorism including sympathises of the organisation that the organisation is banned and it is a crime to join such organisations. It also gives the government the power to deal with organisations which shows early signs of involvement in terrorism.[660] He argued that the power to proscribe an organisation "is at best a fairly blunt instrument, especially when compared with the menace that can emerge from the internet."[661]

Nevertheless, critics have questioned the inclusion of terrorist organisations that have no presence in the UK or pose an immediate or remote threat to the UK. Sofia and Cain are of the opinion that proscription of terrorist organisation under the Act is merely a tool of diplomacy, as majority of the organisation proscribed are based overseas and most of them do not pose apparent threat to the UK's national security.[662] They argued that the Home Secretary may just proscribe a group just in furtherance of the need to support other members of the International community in the global fight against terrorism.[663] This criticism raises some question about the huge number of foreign terrorist organisations under the Act. If this the aim of proscription under the Act is merely to support foreign governments in disrupting terrorist organisations in their territory, then this reduces proscription to an official badge of disapproval by the government and a political tool in the hands of government which can be used against dissents.

There are concerns that the State can also use this power to restrict and criminalise opposition groups including organisation with peaceful motives. In the words of Lord Avebury, 'an organisation or group that supports an armed opposition group, including those fighting

[659] Lord Carlile, Report on the Operation of The Terrorism Act 2009 and of Part 1 of the Terrorism Act 2006 by July 2010 Presented to the Parliament Pursuant to Section 36 of Terrorism Act 2006 Pg 14 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243589/9780108509278.pdf accessed 20th May 2013
[660] ibid
[661] Ibid Pg 16
[662] Sofia Marques da Silva & Cian C. Murphy, Proscription of organisation in UK Counter-terrorism Law, in Cameron, (ed) Legal Aspects of EU sanction (Intersentia, 2012) Pg 1
[663] Ibid Pg 10

repressive regimes, could ipso facto be proscribed as a terrorist organisation.[664] Likewise, Lord Rea condemned the inclusion of PKK under the list of proscribed organisation when it has maintained a cease fire for two and half years in spite of continued attacks from the Turkish army. While the proscription of violent, extremists and terrorists' organisation might be unavoidable, caution must be exercised against using it as a diplomatic tool in the hands of the government to show support to the international community in the global fight against terrorism. Otherwise, as Anderson right points out, this would merely render it as a "cheap and straightforward way of achieving foreign policy objectives."[665]

According to David Anderson, it is difficult to obtain de-proscription because of its cumbersome nature, lengthy legal proceedings, and expensive cost running into hundreds of thousands of pounds.[666] Anderson expressed reservations over what he termed "extra-ordinary wide discretion of the home Secretary in the de-proscription process."[667] There are 70 proscribed organisations in the U.K in addition to 14 proscribed organisations in relation to Northern Ireland.[668] Out of this figure only one has been de-proscribed since 2000. This goes to show the cumbersomeness of the de-proscription process. Supporting this argument, the House of Commons Home Affairs Committee, stated the de-proscription process in the U.K needs urgent review.[669] The Chairperson of the Committee cited the case of The Liberation Tigers of Tamil Ealem which is banned in the U.K despite not appearing to be banned anymore in Sri Lanka where it is based or anywhere else. The committee was of the view that most proscriptions in the U.K were at the behest of foreign governments. On the other hand, the Committee stated that the difficulty in the de-proscription process could send a signal to other

[664] "UK Terrorism Act: 21 new proscribed organisations" Terrorism Act 2000, House of Lords Debate 2001 http://www.statewatch.org/news/2001/oct/01proscribed.htm accessed 21 August 2015

[665] D David, The Terrorism Acts in 2011 Pg 49

[666] David Anderson Q.C, Independent Reviewer of the Anti-terrorism Legislation; Deproscription-Courage Required Feb 18, 2014 https://terrorismlegislationreviewer.independent.gov.uk/deproscription-courage-required/ accessed 27th March, 2015

[667] David Anderson Q.C, The Terrorism Act in 2012, Report of the Independent Reviewer on the Operations of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006 June 2012 pg 40 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228552/9780108511769.pdf Accessed 25th March, 2015

[668] Home Office Proscribed Terrorist Organisation https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417888/Proscription-20150327.pdf accessed 26th March, 2015

[669] House of Commons Home Affairs Committee Roots of violent radicalisation Nineteenth Report of Session 2010–12 January 2012 HC 1446 Pg 33 http://www.publications.parliament.uk/pa/cm201012/cmselect/cmhaff/1446/1446.pdf accessed 27th March, 2015

groups or organisations for them to move away from support of terrorism.[670] Critics argue that proscription appears to be a readily available tool for the government in combating terrorism and it is often dependent on intelligence that is not released to this organisation. Additionally, a broad scope exists for the Home Secretary to exercise proscription. These goals are both symbolic and strategic. The Home Secretary may take an action to proscribe a group in furtherance of the need to support an international organisation or member of the international community in the global fight against terrorism. This reduces the whole proscription process into a tool of diplomacy. The Home Secretary might also be reluctant to de-proscribe a group in order not to offend its allies or country and on foreign policy grounds. Based on the fore-going, the determination as to whether or not to proscribe a group could only be seen to turn political rather than legal considerations.

Between Year 2000 and 2010, the Home Secretary received ten applications for de-proscription they were all refused.[671] One particular theme that can be drawn from this is that once a group is proscribed, that almost signifies the "death" of it. In the words of Gearty, 'once an organisation is banned, it would take almost an eccentric courage on the part of a mainstream political leader to take risk inherent in making a de-proscription order.'[672]

Sofia and Murphy were of the view that it would be a fallacy to equate a failure by the administrative review process to delist an organisation to which the conclusion that such process is incapable of providing a fair outcome. However in principle, there is nothing to show that the POAC are also ready to delist a group.[673] Supporting the Home Affairs Committee on the huge cost involved in the de-proscription process, Sofia and Murphy argued that the issue of cost is further exacerbated by the fact that an attempt to raise funds for the legal action is unlawful and could be regarded as an offence under the Terrorism Act. In fact immediately after proscription of a group its asset and funds is frozen.[674] Another concern is the system of closed material which allows for the use of secret evidence.[675] The POAC may hold a closed door proceeding to consider evidence which the Home Secretary might be unwillingly to disclose to the applicants. Even though a special advocate by the applicant is present whilst this evidence is given, he is not allowed to disclose the evidence to the applicant. This closed

[670] Ibid Pg 34
[671] Ibid Pg 13
[672] C. Gearty, *Civil Liberties (*Oxford University Press, 2007) Pg 158
[673] Sofia Marques Da Silva & Cian C. Murphy Pg 15
[674] Ibid Pg 16
[675] Ibid

door proceeding has been criticised to be against the right to a fair trial. The government is however quick to defend this by arguing that disclosing this to applicants will reveal its intelligence gathering techniques.

Furthermore, the cost involved in bringing an appeal to the Proscribed Organisation Appeal Commission or Court of Appeal is another negative factor. This could deter some potential applicant from pursuing an appeal to the POAC. This because the "proscribed" organisation might not be able to raise funds for legal action as it is may constitute an offence under the Terrorism Act 2000.

Conclusion

Having assessed the social effects and practical impacts of the measures under the TA 2000, this chapter reveals some discrepancies in the law in books from the law in action. Firstly, the problem associated with the definition of terrorism is universal and it is not limited to the U.K's definition. As the Supreme Court said in *R v F*, the definition of terrorism under the Act was 'indeed intended to be very wide.' The only conclusion the writer could reach is that maybe the breadth of the definition is a deliberate policy, rather than oversight, to cover the ever changing nature of terrorism. Until there is a universally acceptable definition of terrorism in international law, States will continue to interpret it the way it suits their needs.

Judging from Anderson's assessment, S.41 is open to abuse by the Police. Likewise, the assessment here suggests that the power of arrest under the Act is selectively used in practice, especially against the Muslim Communities. Although, compared to Nigeria, abuse of the power of arrest in the UK did not lead to excessive human right infringements like "prolonged" pre-charge, detention, torture and other inhuman degrading treatment currently experienced by terror suspects in Nigeria.

An assessment of the 14 days pre-charge detention period under the TA 2000 shows that this is rarely used in practice. A comparison of the UK's pre-charge detention period with some other countries also shows that the UK has one of the longest pre-charge detention periods in the EU region.

As we have seen, the majority of the terrorist organisations proscribed under the UK TA 20000 are foreign terrorist organisations. This apparently suggests that proscription is a tool used in furtherance of the need to support other members of the International community in the global fight against terrorism in the UK. In the writer's view, the major problem with proscription of foreign terrorist organisation is that a group proscribed in one country, could suddenly find

themselves in the list of proscribed organisation from different countries. This global sense of isolation could discourage some groups (that are no longer involved in terrorism) from seeking de-proscriptions as this would see the organisation fighting de-proscription on different fronts.

Having seen the effects of the UK TA 2000 in practice, the next chapter will compare the practical application of the provision of the terrorism Act in Nigeria and UK.

CHAPTER 8

A COMPARATIVE SOCIO-LEGAL ASSESSMENT OF THE NIGERIAN TERRORISM (PREVENTION) ACT 2011 & THE UK TERRORISM ACT 2000/2006

Following on from the socio-legal assessment of the Nigerian Terrorism (Prevention) Act 2011 (as amended) and UK's Terrorism Act 2000, this chapter takes the discussion forward by comparing the application of the provisions of the Terrorism Acts in both States. The aim of this chapter is to identify the similarities and differences in the practical usage and application of the provisions of the Terrorism Acts by the legal actors in both States. This comparative discussion is based on the socio-legal investigations and findings done in the two previous chapters. This chapter will also be used to prepare the ground for a further assessment of the Terrorism Acts of Nigeria and UK by reference to the countries domestic, regional and constitutional obligations under the 1999 Constitution/Human Rights Act 1998, the African Charter/ECHR, and the ICCPR respectively.

In Chapters Six and Seven of this research, it was concluded that the controversy surrounding the definition of terrorism in international law remains unresolved and that it will be almost impossible to assess the definition of terrorism on strict grounds of human rights. Without a universal definition of terrorism, States would continue to create broad, overreaching definitions of terrorism that inadvertently criminalise some acts outside the realm of terrorism as terrorist offences. Consequently, the comparative discussion in this chapter will be limited to arrest, pre-charge detention, proscription, and encouragement of terrorism in Nigeria and U.K

8.1 A Comparative Socio-legal Assessment of Terrorism Arrests in Nigeria and UK

The Nigerian and UK terrorism Acts both require reasonable suspicion as the legal basis for making an arrest for terrorism offences. However there are fundamental differences on how the power of arrest is applied and used in practice in both countries.

The general overview of the socio-legal assessment of the Terrorism (Prevention) Act 2011 suggests that the Nigerian government favours a "sledge-hammer approach" to fighting terrorism rather than follow due process of the law or the provisions of the Act. This is clearly reflected in the manner the security agencies make arrests. The security forces generally do not follow the procedure prescribed by the law (TPA 2011). Rather than arrests on reasonable suspicion, the Nigerian security forces engage in indiscriminate arrests, house-to-house

searches, intimidation of residents, shooting sporadically in the air to assert their presence, and mass arbitrary arrests of relatives of suspected *Boko Haram* members including children. Over the past eight years (since 2009), this has become the practice in Nigeria. While the study admits that the right to liberty and security is not absolute, the method of arrest in Nigeria reveals a pattern of inadequate criminal investigation by the security forces and a total disregard for due process. The Nigerian security forces in effecting terrorism arrests display little value or respect for the human rights of the suspects and the rule of law. Without doubt, the methods employed by the Soldiers in effecting arrest in Nigeria are clearly not proportionate to the objectives they seek to achieve. The writer is of the view that the examples given in chapter 6 are indications of what could be taking place on a wider scale and on a more regular basis in areas affected by *Boko Haram*. Hundreds, if not thousands, of Nigerians have become victims of enforced disappearance or have been extra-judicially executed in military detention sites without condemnation by the government officials. Presently, the power of arrest under the Nigerian Terrorism Act symbolises a "licence to act with impunity" "licence to kill" or a "licence to arrest without question." This is because the authorities have rarely prosecuted any member of the Police/Military implicated in abuses. To date, the Nigerian government is yet to open any credible investigations into allegations of heavy-handed, excessive use of force, and human rights violations by the security forces despite credible evidence that are happening. This arguably makes the Nigerian government complicit in the atrocities committed by the security forces.

From a comparative standpoint, the writer finds that (to a large extent) the application of the terrorism Act in U.K follows due process of the law. The method and patterns of arrest for terrorism offences in the UK show a stark contrast from the current practice in Nigeria. Despite the UK Court ruling in *Fox, Campbell and Hartley*[676] that the 'reasonableness' of the suspicion justifying such arrests cannot always be judged according to the same standards in dealing with conventional crime, arrests in the UK for terrorism offences are generally consistent with the provision of the Act. Unlike Nigeria, the Police in the UK do not engage in the "mass arrest" of innocent civilians (suspects), widespread house-to-house search/hunt for terror suspects, or engage in the burning down of houses, the destruction of properties, or involve in the extra-judicial execution of terror suspects.

[676] Supra Para 32

Another notable difference in the UK approach to terrorism arrest is the level of judicial involvement after a terrorist is arrested. The Nigerian judiciary are generally reluctant and not enthusiastic in holding the Executive/Police accountable for their actions. Unlike Nigeria, terrorists arrested in the UK are either charged or released after investigations are concluded. Terror suspects in the UK are not held beyond the period provided by the law. Furthermore, there exists a level of accountability and a comprehensive record of terror suspects arrested by the Police in the UK. In addition to the comprehensive record of arrest by the Police, the Independent Reviewer of the Terrorism Act in the UK also reviews and submits the operation of the Terrorism Acts including a detailed statistics on arrests to the Parliament to inform public and political debate. This standard of accountability on the part of the security agencies combined with the annual review by an independent watch dog is practically non-existent in Nigeria. The total number of terror suspects arrested by the security forces is not officially available in Nigeria. Likewise, there are no official data by any government agency in Nigeria that records or reports the number of terror attacks committed by *Boko Haram*, the number of arrests made, statistics on civilian casualties or the number of terrorists killed every year. The absence of an official data on Nigeria's counter-terrorism activities is clearly reflected in this study. The research has drawn considerable information and statistics on terrorism in Nigeria from open sources mostly newspaper reports. This is primarily due to the security risks involved in acquiring such data in the north-eastern part of Nigeria. Nonetheless, the writer has attempted to complement these secondary sources with some internationally recognised reports. In order to address the absence of an official statistics/data, the writer will put forward a recommendation for the establishment of the office of the "independent" reviewer of the Terrorism Act or an independent body that will oversee terrorism related activities in Nigeria.

It is important to note that arrests made under the UK's Terrorism Act 20000 are not without some criticisms. The socio-legal assessment of arrests in the UK (done in chapter 7) suggests that terrorism arrests in the UK are concentrated on a particular religious sect and particular ethnic group (Muslims and Black/Asian communities). On the opposite, arrests in Nigeria are indiscriminate, arbitrary and widespread. Every person in Nigeria-old or young, male or female is a potential *Boko Haram* suspect in the eyes of the security forces irrespective of his tribal or religious affiliation. Admittedly, the security forces in Nigeria work under much more dangerous conditions in comparison to the level of terrorist attacks experienced in UK. Nonetheless this should not be an excuse for making arbitrary arrests or engaging in cruel and

inhumane and degrading treatments of suspects. Even a *Boko Haram* suspected terrorist deserves to be brought to justice in accordance with the right to fair trial and rule of law.

8.2 **A Comparative Socio-legal Assessment of Pre-charge Detention in Nigeria and UK**

As seen in chapters 6 and 7, the pre-charge detention regime in Nigeria and UK differ in practice. The pre-charge detention regime in Nigeria appears to be determined by the Executive (security agencies). On the opposite, the pre-charge detention regime in the UK is generally determined by the Police at the initial stage (48 hours) and then further detention is determined by the Judiciary (Courts).

On a comparative note, while the pre-charge detention of terror suspects in UK are as provided by the TA 2000, the Nigerian pre-charge detention regime does not follow the provisions of the Act. The Nigerian security forces are the accuser, the prosecutor and the judge (all at same time) and can detain a terror suspect for years without judicial approval contrary to the provisions of the terrorism Act. This is in contrast to the practice in the UK where the maximum period which terror suspects can be detained pending charge is 14 days and this has to be judicially authorised. The Nigerian security forces enjoy a stunning degree of impunity in their counter-terrorism actions to the point that they sometimes flout Court judgements that order the release of detainees. The case of Alhaji Yaganami discussed in Chapter 6 is good example of this.

Besides the vague application of the Terrorism Act and the systemic violations of human rights by Nigeria security forces, another notable difference in the detention regimes of both countries is the remedies that are available to terror detainees. In spite of the legal safeguards that are available against unlawful and prolonged detention of suspects in the country, challenging pre-charge detention in Nigeria are usually met with a brick wall and often resisted by the security agencies. As revealed in the socio-legal assessment of arrest in Nigeria, not all suspects that are arrested are produced before the Court after 90 days (or 180 days) as instructed by the Terrorism Act. The situation is further compounded with congestion of cases in the Federal High Courts. The TPA 2011 (as amended) gives the Federal High Court, exclusive jurisdiction to hear terrorism cases. It could take weeks, months, or even a year before the Court can adjudicate on a case. Unfortunately, Nigerian Judges have shown less enthusiasm toward the constitutionality or otherwise of the 90/180 pre-charge detention under the Act. The situation is different in the UK. There are number of cases where the UK Courts/EctHR have dealt with the 14 days pre-charge under the UK Terrorism Act. It is almost certain that an accused in the UK will have his/her time in court within the period stipulated under the Act. To address this

concern, the writer will recommend the creation of "Terrorism courts" in Nigeria to speed up the adjudication of terrorism cases.

While it seems that the pre-charge detention regime in the UK is one of the longest within the EU region, the Nigerian pre-charge detention regime is arguably one of the longest in the world. This is because terror detainees are charged at mercy of the detaining authorities without a specific period in mind. It is not a surprise that the pre-charge detention regime in Nigeria is likened to Guantanamo by lawyers and human rights advocates in Nigeria. Although this is contrary to the provision of the TPA 2011 and incompatible with the Constitution of Nigeria, this practice is favoured by the Nigerian security agencies.

In the writer's view, the justifications given by the UK government for the 14 days pre-charge detention of suspects are 'arguably' tenable and justified. This includes *inter-alia* time to gather intelligence, time to find interpreters, time to uncover admissible evidence that will be used in Court, the complexity of investigating terrorism cases, and the time to conducts searches and analyse encrypted data on electronic devices. It is difficult to see how Nigeria's pre-charge detention practices can fit into any of these justifications. Without doubt, the current practice of indefinite detention of terror suspects in Nigeria opens the door for more serious infringements such as torture, inhumane degrading treatment, and the extra-judicial execution of suspects. Remarkably, the UK does not torture or engage in the inhumane degrading treatment of terror suspects.

8.4 **A Comparative Socio-legal Assessment of Encouragement on Terrorism in Nigeria and UK**

There is a fundamental difference in how the scope of encouragement of terrorism is defined in Nigeria and the UK. Inevitably, this difference is reflected in the enforcement of this offence in both countries. In comparison with the UK, the Nigerian provision on encouragement of terrorism is vague and nebulous. The security agencies in Nigeria often take advantage of the failure of the Act to properly explain the category of statements which are likely to be understood by members of the public as inciting or encouraging terrorism (directly or indirectly) to stifle freedom of speech and press in the country. This flexibility enables the authorities to selectively arrest and prosecute dissenting views as terrorism cases or act of criminality. This lacuna also makes it easy to for free speech and religious censorship. The offence of encouragement of terrorism has become a 'readily available defence' against perceived political opponent and expressions critical of the state. The arrest of Nmandi Kanu and his supporters for terrorism charges for calling for the cessation of Biafra from Nigeria

presents a good example.[677] Generally speaking, encouragement of terrorism is used as an excuse to arrest and silence any language of dissent and those considered as a threat to the tranquillity of the existing political and economic order.

In contrast, the application of the offence of terrorism in practice in the UK 'tries' to balance the content of expression with the medium used and the intention of the speaker. The UK regime requires specific intent or recklessness for the prosecution of the offence of encouragement of terrorism. There is also delineation between direct and indirect encouragement of terrorism in the UK. Although it is important to add that what would be considered as indirect encouragement of terrorism is not easy to understand, this problem is further compounded by the fact that indirect encouragement of terrorism permits criminalising expressions that pose only an abstract and remote risk of violence. However what stands out in the UK use of encouragement of terrorism is that the prosecution will still need to prove that the statement was likely to be understood by those it was published as encouragement to them to (directly or indirectly) engage in specific behaviour constituting the *actus reus* of a specific Convention offence, along with the requisite *mens rea* of that offence. It is unclear whether the prosecution in Nigeria will need to prove that the statement was likely to be understood by those it was published as encouragement to them to (directly or indirectly) engage acts of terrorism. The courts in Nigeria are yet to interpret or give their opinion on the offence of encouragement of terrorism or establish what would amount to direct or indirect encouragement of terrorism. As will be established in the next chapter, the level of judicial scrutiny towards the offence of encouragement of terrorism in the UK and by ECrtHR is feasibly absent in Nigeria. Going by the socio-legal assessment of the offence in Nigeria, no consideration is given to the "context of expression" or "the content of expression" before an arrest for encouragement of terrorism is made. The Nigerian security forces generally do not first of all establish whether not a statement or expression is within the remit of legitimate expression. It is argued here that culpability should be reserved for those expressions where the speaker intends to encourage terrorism.

The main concern regarding the offence of encouragement of terrorism in both countries is its threat to the right to freedom of expression regardless of whether such expression will actually encourage terrorism. The likelihood of abuse or misuse is however higher in Nigeria.

[677] Itunu Ojobaro,'Police unleash terror on Biafra Agitators in Enugu, arrest 25' http://whirlwindnews.com/news/4115-Police-unleash-terror-on-Biafran-agitators-in-Enugu-arrest-25- accessed 12th feb, 2017

In the light of these inadequacies, the conclusion of this thesis is that the Nigerian law on encouragement of terrorism is poorly drafted and broadly implemented. Hence there is an urgent need for Nigeria to amend its provisions on encouragement on terrorism or enact a new provision to address encouragement of terrorism.

8.5 **A Comparative Socio-legal Assessment of Proscription in Nigeria and UK**

The main difference in the proscription regime of Nigeria and the UK is the failure of Nigeria to recognise regional and international terrorist groups under its list of proscribed organisations. The TPA2011 clearly recognises groups involved in terrorist acts in any resolution of the United Nations Security Council or in any instrument of the African Union and Economic Community of West African States,[678] unfortunately only *Boko Haram* and *Ansaru* have been officially proscribed and listed as proscribed organisations under the Act. This is different from the UK proscription regime where both domestic, regional, and international terrorist groups are proscribed. This begs the question why the Nigerian law makers extend the definition of terrorism to include a person or group as an international terrorist if the person or group is a member of an international terrorist group recognised under the Act or listed in 'any resolution of the United Nations Security Council or instrument of African Union and Economic Community of West African States as a person involved in terrorist act,'[679] or "considered to be a terrorist by a competent authority of a foreign state."[680] Or is international terrorism is not a threat to Nigeria?

Conversely, a related point arises from the fact that the proscription regime in the UK today is arguably subjective and contentious. Attaching a terrorism label to an organisation appears to be political rather than judicial. This is because most of the terrorist organisations proscribed in the UK pose no direct threat to the country. It is hard not to agree with the criticism that proscription in the UK is mainly a diplomatic tool to show support to other countries fighting terrorism.

[678] S.9(4)(b)
[679] S.9(1)(b) ibid
[680] S.9(4)(c)

8.6 Conclusion

Overall there are fundamental differences in how the Terrorism Acts are used/applied in practice in both countries. The comparative discussion clearly shows that the application of the provision of the Act in Nigeria is largely determined by the authorities as against the clearly defined provision of the Act. The situation in the UK is largely as provided by the Act. The general disregard for the provisions of the Terrorism Act and the rule of law in Nigeria has resulted in devastating consequences for the fulfilment of human rights in the country. A conclusion that can be drawn from the comparison in the application legal measures under the Act in both counties is that counter-terrorism tools that do not comply with human rights are most likely not be effective and counter-productive.

Having juxtaposed the application in practice of the provision of the terrorism Act in Nigeria and UK, the question that will be asked is what are the human rights safeguards available to terror suspects in both countries? The research will be incomplete without determining whether the provisions of the Act in both countries are consistent with their domestic, regional and constitutional obligations? And what challenges can be made to the constitutionality of the provisions of the Act on human rights grounds?

In discussing the constitutional and human rights safeguards available to terror suspects in the Nigeria and the UK, a further assessment of Nigeria's TPA 2011 and the UK's TA 2000 by reference to their domestic, regional and international human rights obligations is necessary. This is to first of all determine whether the Terrorism Acts of Nigeria and the UK are consistent with their domestic, regional, and international human rights obligations, more importantly explore the remedies that are available to a terrorist suspects under these statutes.

CHAPTER 9

AN ASSESSMENT OF THE TPA 2011 (AS AMENDED) BY REFERENCE TO NIGERIA'S DOMESTIC, REGIONAL & INTERNATIONAL CONSTITUTIONAL OBLIGATIONS

1. Introduction

As we have seen from the preceding chapters that in countering terrorism States often adopt measures that unnecessarily infringe human rights, especially in practice. This thesis will be incomplete without a detailed assessment of Nigeria's TPA 2011 (as amended) by reference to the country's domestic, regional, and constitutional obligations. The aim is to assess whether the provisions of the TPA 2011 (as amended) are consistent with Nigeria's domestic, regional and constitutional obligations under the Constitution 1999, the African Charter on Human and People's Right (ACHPR), and the International Covenant on Civil and Political Rights (ICCPR). In so doing, questions relating to the constitutionality of the provisions of the TPA 2011 on human rights grounds by reference to these statutes will be addressed.

The assessment here will be done by juxtaposing the definition of terrorism, the power of arrest, the pre-charge detention of terror suspects, the encouragement of terrorism and the proscription of terrorist organisations under the TPA 2011 side by side with similar provisions under the Constitution, the African Charter, and the ICCPR. Inevitably, the assessment will focus on the human rights that could be affected by these legal measures under the Act. For sake of clarity, the assessment will be divided into two sub-headings. First, there will be an exploration of Nigeria's obligations under the Constitution FRN 1999, the African Charter, and the ICCPR. This will be followed by an assessment of the TPA 2011 by reference to the Constitution FRN 1999, the ACHPR and the ICCPR**.**

2. An exploration of Nigeria's obligations under the Constitution 1999, the African Charter on Human and People's Right and the ICCPR.

The Constitution of the Federal Republic of Nigeria 1999 is the final and supreme law in Nigeria. This is clearly spelt out under its supremacy clause which provides that *"this Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria."*[681]Section 1(3) of the Constitution

[681] S. 1 CFRN 1999

clarifies that "if any law is inconsistent with the provisions of the Constitution, the constitution shall prevail, and that law shall to the extent of the inconsistency be void."
This position was reiterated by Justice Kabiri Whyte in *Musa v Hamza*,[682] where his Lordship held that:

> "*The Constitution is a document containing the fons et origo (i.e. the source and origin) of the laws and rights of its people. It is in a sense what in Kelsenian terminology may be regarded as the grundnorm of the State. The Constitution is therefore aptly described as the supreme law of the land. This is because it is a law, which does not depend upon any other for its validity.*"

Similar decisions were reached in *Adigun v A.G Oyo State*[683] and *Labiyi v Anreti*[684] where the Courts upheld the supremacy of the Constitution 1999 over every other law in the country. Chapter 4 of the Constitution 1999 (ss. 33 - 46) guarantees the fundamental human rights of every person in Nigeria. Any law that fails to recognise these rights, by virtue of Section 1(3) of the Constitution, will be null and void and of no effect. However, it is important to note that these rights, with the exception of freedom from torture and inhumane degrading treatment, slavery or servitude and forced or compulsory labour,[685]are subject to limitations. Some of these limitations/restrictions will be discussed in the second section of this chapter.

Despite the supremacy of the Constitution, Nigeria has explicitly accepted human rights obligations through regional and international human rights treaties which it has ratified. These treaties are "legally" binding on Nigeria, imposing obligations to respect, protect and fulfil human rights. Following the establishment of the Organisation of African Unity (OAU), now African Union (AU), on 25th of May 1963 in Addis Ababa, Ethiopia, it became necessary for a regional African instrument for the protection of human rights. In 1979, the United Nations General Assembly (UNGA) adopted Resolution 34/171 on regional arrangements for the promotion and protection of human rights including developing regions like Africa.[686] As a result of this, the ACHPR was adopted in June 1981 and came into force on 21st October 1986. The Act is alternatively referred to as the "Banjul Charter." The African Charter was enacted

[682] [1982] 2 NCLR 229 at 250
[683] [1987] 4 SC 272 at 344
[684] [1992] 8NWLR at 139
[685] S.34(1) CFRN 1999
[686] Roland Adjovi, 'Understanding the African Charter on Human and Peoples' Rights; How does the African Charter interact with or enrich the international law project? *Think Press Africa* 5th November, 2012 http://thinkafricapress.com/international-law-africa/african-charter-human-peoples-rights Accessed 5th January, 2014.

to protect the human rights and freedom of the people living in African. This is similar to other regional provisions on human rights like the European Convention on Human Rights.

Nigeria became a signatory to the African Charter on 31st August 1982 and ratified the Charter on the 22nd June, 1983.[687] Following the requirement of S. 12(1) of the Constitution which provides that "*no treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly*." The National Assembly incorporated the African Charter into the domestic law of Nigeria through the African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act 2 of 1983 and is now contained in Cap 10, Laws of the Federation of Nigeria, 1990.[688] As a result of this, the African Charter is now part of the laws of Nigeria and the Courts must uphold it.[689] This position was upheld by the Supreme Court in *Sani Abacha v Gani Fawehinmi*[690] where the Court held that

> "*the provisions of the African Charter on Human and Peoples' Rights shall, subject as there under provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria*."[691]

For the avoidance of doubt, the Supreme Court held that where there is a conflict between the Charter and any domestic law, with exception to the Constitution, the Charter should prevail.[692]In other words, only the Constitution shall supersede the African Charter.

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[687] African Commission on Human and Peoples' Rights; Ratification Table: African Charter on Human and Peoples' Rights http://www.achpr.org/instruments/achpr/ratification/ accessed 5th January, 2014

[688] African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Chapter A9 (Chapter 10 LFN 1990) (No 2 of 1983) Laws of the Federation of Nigeria 1990

[689] The Supreme Court in *Ogugu v The State* held that 'the enforcement of provisions of the African Charter like all other laws falls within the judicial powers of the courts as provided by the Constitution and all other laws relating thereto by the several High Courts depending on the circumstances of each and in accordance with the rules, practice and procedure of such courts'. [1994] 9 NWLR pt 366

[690] S.C. 45/1997

[691] ibid

[692] Ibid "*No doubt Cap. 10 is a statue with international flavour. Being so, therefore, I would think that if there is a conflict between it and another statue, its provisions will prevail over those of that other statue for the reason that it is presumed that the legislature does not intend to breach an international obligation. To this extent I agree with their Lordships of the Court below that the Charter possesses "a greater vigour and strength" than any other domestic statue. But that is not to say that the Charter is superior to the Constitution…*''

The Supreme Court however noted that the rights and obligations contained in the Charter are not new to Nigeria as most of these rights and obligations are already enshrined in our Constitution.[693]

Art 1 of the African Charter provides that "*parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.*"

Going by Art 1, Nigeria been a party to the Charter and having incorporated the Charter into law domestically is bound it.

Nigeria is also a party to a number of international human rights treaties which binds her to respect and ensure the human rights of all individuals within its territory. For the purposes of this study, the assessment will be limited to the ICCPR.

After the horrors of the World War II, it became necessary to translate the Universal Declaration into a hard legal form of an international treaty.[694] The United Nation General Assembly reaffirmed the necessity of complementing the UDHR with traditional civil and political rights. Accordingly, the International Covenant on Civil and Political Rights was adopted by the United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966. It entered into force on 23 March 1976.[695] The ICCPR in its preamble considers the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms. The ICCPR comprises most of the traditional human rights as they are known from historic documents such as the First Ten Amendments to the Constitution of the United States (1789/1791) and the French Déclaration des droits de l'homme et du citoyen (1789).[696]

Nigeria acceded to the ICCPR on October 1993 but it is yet to ratify the first Optional Protocol (on establishing an individual complaints mechanism) and the Second Optional Protocol (on abolition of the death penalty).[697] Even though Nigeria is yet to incorporate the ICCPR into its

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[693] ibid
[694] Christian Tomuschat, International Covenant on Civil and Political Rights New York, 16 December 1966 (Audiovisual Library of Int Law http://legal.un.org/avl/ha/iccpr/iccpr.html Accessed 8th January, 2014
[695] ibid
[696] ibid
[697] The ICCPR Participant, Signature, Accession, Succession, Ratification https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&lang=en Accessed 8th January 2014

domestic law, as a State party to the Covenant, it is obliged to guarantee the protection of rights under the ICCPR which includes right to life, right to liberty and security of person, freedom of association and assembly.

Explicitly, Art 2(2) ICCPR provides that:

> "*where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*'

Going by Art 2(2) ICCPR above, Nigeria, being a State Party to the Covenant is obliged to take necessary steps, in line with its Constitution, to makes laws that will protect human rights as recognised under the ICCPR.

Having highlighted the implication of the Constitution FRN 1999, the ACHPR, and the ICCPR on Nigeria's domestic, regional and international obligation, the rest of the chapter will juxtapose the definition of terrorism, the arrest and detention of a terror suspect, the proscription of terrorist organisation, and the encouragement of terrorism under the TPA 2011 by reference to these statutes. This will be done by paying particular attention to the rights that are much more relevant to these five provisions, for example, the right of liberty and security, freedom of assembly, association and freedom of expression.

3. An assessment of the key provisions of the TPA 2011(as amended) by reference to Nigeria's Constitution 1999, the ACHPR and the ICCPR

3.1 Definition of terrorism

In previous chapters that analyse and assess the definition of terrorism under the TPA 2011 (chapter 3 & 6), the writer raised many questions especially relating to the precision and certainty of the Act in the criminalisation of certain offences as acts of terrorism. These questions will now be addressed by juxtaposing the definition of terrorism under the Act with related provisions under the Constitution, the African Charter on Human and People's Rights, and under the ICCPR. As a reminder, the writer also emphasized in Chapter 3 that the definition of terrorism in Nigeria extends to acts and omissions done outside the country.[698] This provide a basis for comparing the Act with related provisions under the African Charter and ICCPR.

[698] S.1(3)(d) TPA 2011 as amended.

Firstly, it is important to note that the Nigerian Constitution 1999 does not expressly define terrorism. However s.45(1) of the Constitution empowers the Nigerian National Assembly to make laws in the "*interest of defence or public safety or for the purpose of protecting the rights and freedom or other persons.*" The National Assembly in exercising this constitutional duty enacted the Terrorism (Prevention) Act 2011 which provided *inter alia* the definition of terrorism in Nigeria.

The constitutional prerequisite for any law enacted under S.45(1)(a)-(b) of the Constitution is that it must be "*reasonably justifiable*." The Constitution does not give a meaning to the phrase "reasonably justifiable." However, the Court in *State v. Ivory Trumpet*[699] held that the test for reasonable justifiability depends on historical circumstances as well as a factual mischief which required the enactment of the law. The Court held further that the test for determining this is an objective one which requires the state to show that there is grave risk of harm to a large section of the state/community, and that the risk of harm is imminent demanding grave urgency.[700] Clearly, Nigeria's national security and the safety of its citizens were at risk in 2011 when the Act was enacted. Consequently, the "reasonable justifiability" test by the authority that made the TPA 2011 was fulfilled. This settles question about the constitutionality or otherwise of enacting the TPA 2011.

In addition to that, S. 45(1) of the Constitution expressly provides that the right to privacy, freedom of thoughts, freedom of expression, freedom of association and assembly, and 'freedom of movement' can be restricted under '*such law that is reasonably justifiable'* in the interests of defence and public safety.' Generally speaking, going by S.45(1) of the Constitution, since the Terrorism (Prevention) Act 2011 is a law that was enacted in the 'interest of defence and public safety*'* to tackle terrorism, the restrictions of these rights against any person who commits acts of terrorism under the TPA 2011 will be constitutional in Nigeria.

A juxtaposition of S.9 TPA 2011(as amended) which recognises resolutions and international instruments from the United Nations Security Council, the African Union (AU) and resolutions from other regional bodies like the Economic Community of West African States (ECOWAS) with S.19 of the Constitution shows consistency in both statutes.

Section 19 of the Constitution provides:

[699] (1984) 5 NCLR 736 at 750- 751
[700] ibid

'The foreign policy objectives shall be promotion and protection of the national interest; promotion of African integration and support for African unity; promotion of international co-operation for the consolidation of universal peace and mutual respect among all nations and elimination of discrimination in all its manifestations; respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication.'

It is important to note that while S.19 of the Constitution provides a legal basis for the international scope of the TPA 2011(as amended), it does not settle the question of differences in the meaning of what States define as terrorism.

As at the submission of this thesis in 2017, the 'wordings' and 'terms' used in defining terrorism under the Act have not been challenged in Court or posed a problem to the Courts in Nigeria. Hence, there is no case law (judicial decision) from which the writer can directly draw reference. However, there are a plethora of cases where the courts have settled the issue of the interpretation of statutes in Nigeria. For example, the Supreme Court in *Africa Newspaper of Nigeria v Federal Republic of Nigeria*[701] held that where the words used in a statute are direct, straight forward and unambiguous, the construction of those words must be based on the ordinary plain meaning of the words. The Supreme Court in *AG Abia State v. AG Federation*[702] warned that the Courts "cannot embark on an unguarded voyage of discovery" in interpreting statutes, as texts of the law must be adhered to, except where the strict construction would lead absurdity. Also, the Supreme Court in *A.G Federation v Atiku Abubakar*[703]held that where the words used in a Statute are ambiguous, the courts have a discretion to choose the meaning which they consider most appropriate having regard to the context and other surrounding circumstances.

The implication of these judgments by the Supreme Court is that where a problem regarding terms/phrases used in the definition of terrorism under the TPA 2011 arises, the Court must adopt the ordinary plain meaning of the words used in the Act, and where the word used is ambiguous, the courts have a discretion to choose the meaning which they consider most appropriate.

[701] [1985] 2 NWLR Pt. 137 at 165
[702] [2006] 16 NWLR Pt. 1005 265
[703] (2007) 10 N.W.L.R. Pt. 104 @ 171-172

Having assessed the definition of terrorism under the TPA 2011 by reference to Nigeria's constitution and case law, the definition will now be assessed by reference to the African Charter on Human and People's rights (ACHPR).

The ACHPR does not define terrorism. The definition of terrorism in Africa is provided for by the African Union Convention on the Prevention and Combating of Terrorism (Algiers Convention).[704] Nonetheless, Art 23 of the ACHPR mandates States Parties to adopt legitimate measures aimed at preventing and combating terrorist acts in accordance with the provisions of this Convention and their respective national legislation. Without doubt, one of this measures will include the definition of terrorism, since there can be no law on terrorism without it first of all defining acts that will constitute terrorism. Hence, it will be safe to conclude that Art 23 of the ACHPR provides the legality for enacting the terrorism Act in Nigeria, including the definition of terrorism. However, it remains unclear whether the definition of terrorism under the TPA 2011 (as amended) is consistent or inconsistent with any provision of the ACHPR. This is because the Nigerian Courts (Judiciary) has made no reference to the ACHPR or even the Algiers Convention in any of the Nigerian terrorism cases decided to date.

At the international level, the ICCPR does define terrorism. The ICCPR is a Covenant of the UN General Assembly agreed to by member states to respect and uphold the rights of all individuals. However, the U.N General Assembly in its Resolution A/RES/63/185 Para 18 of Dec 2008 called on States to ensure that their counter-terrorism laws are accessible, formulated with precision, non-discrimination, and non-retroactive.[705] The Resolution also urged States to ensure full compliance with their international human rights obligations as well as adequate human rights guarantees in their national law.[706] Elements of this resolution are consistent with Art 15 of the ICCPR which provides that "*no one shall be held guilty of any criminal offence*

[704] The Organisation of African Union Convention on the Prevention and Combating of Terrorism 1999. This Convention was adopted on the 14 June 1999 in Algiers and came into force on the 6th Dec, 2002
Under Art 1(3)(a)-(b) "terrorist Act" means: (***a***) *any act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to: (i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or (iii) create general insurrection in a State. (**b**) any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in paragraph (a) (i) to(iii).*
[705] UN General Assembly Resolution A/RES/63/185 Para 18 Dec 2008
[706] Ibid Para 20

on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."

The question is does Nigeria's definition of terrorism, as provided by the TPA 2011, comply with the requirements of accessibility, precision, non-discrimination, and non-retroactivity as required by the ICCPR?

The answer to this question can either be in the affirmative or negative. With regards to "accessibility" and "non-discrimination," the 2011 Act (as amended) is easily accessible and non-discriminatory. The definition of terrorism in Nigeria does not discriminate on the ground of race, colour, sex, language, religion or social origin. This is also consistent with Art 4(1) ICCPR which provides that 'in time of public emergency, States Parties may take measures strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.'

With regards to "precision", critics like Prof. Oyebode have argued that the definition of terrorism under the Act is unnecessarily broad.[707] The writer agrees that the Nigerian definition adopts an all-encompassing approach. As previously discussed, offences that are present under Nigeria's Criminal Code/Penal Code were incorporated into the definition of terrorism under the Act without repealing or amending the provisions under the PC and CC. On that basis, it will be safe to conclude that the Act is not precise is defining who a terrorist is in Nigeria, thereby failing to meet the requirement of 'precision' under the UN resolution A/RES/63/185 of 2008 and incompatible with the Art 15 ICCPR. However, it is important to note that the broad definition given to terrorism is not peculiar to Nigeria, acquiring a universally accepted definition of terrorism remains a problem in international law. This situation could be attributed to the ever changing nature of terrorism. Until there is a universally acceptable definition of terrorism in international law, States like Nigeria will continue to define the term to accommodate offences it considers as terrorism.

3.2 ***Arrest***

Nigeria's TPA 2011(as amended) gives an officer of any law enforcement or security agency the power to arrest and detain any person whom he *reasonably* suspects of having committed

[707] Akin Oyebode, op cit 2012 Pg 6

or likely to commit an offence.[708] This has generated heated controversy in Nigeria especially when placed side by side with S. 35(1) of the Constitution 1999 which guarantees the right to liberty and security of person. Critics of the power of arrest have argued that '*arrest based on reasonable suspicion*' allows the police free rein to arrest whomsoever they wish to arrest and in most cases without having good reasons for the arrest.[709]

The Constitution FRN 1999 guarantees the right to personal liberty. Section 35 provides that every person shall be entitled to his personal liberty and no person shall be deprived of such liberty. This section comes with several exceptions. One of the exceptions under S.35(c) is "*for the purpose of bringing an accused before a court upon reasonable suspicion of having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence."*

The Court in Nigeria upheld the exceptions under S.35 of the Constitution in *Onyirioha v. Inspector-General of Police.*[710] The Court ruled that:

> "*It is now settled beyond peradventure that a Nigerian citizen is entitled to his God's given natural right free from incarceration as guaranteed under S.35 of the Constitution, except in accordance with the laws of the land for the prevention of a criminal offence."*

Going by the exception under S. 35 (c) of the Constitution and the decision of the Court in *Onyirioha's* (cited above), the power to arrest based *on 'reasonable suspicion of having committed or likely to commit an offence'* as provided under the TPA 2011 is consistent with the Constitution.

Furthermore, the Police are constitutionally empowered to make the arrest as per section 214(1) Constitution 1999. S.214(2)(b) provides that the members of the Nigeria Police shall have such powers and duties as maybe conferred upon them by law. One of such laws is the Police Act 1990 which gives the Police powers for the prevention and detection of crime and the *"arrest*" of offenders.

Also, Section 45(2) of the Constitution provides that:

> "*An act of the National Assembly shall not be invalidated by reason only that it provides for the taking, during periods of emergency, of measures that derogate*

[708] S.25(1)(e) TPA 2011
[709] 'Wide Ranging Security Powers in Anti-Terrorism Law Raises Concern for Human Rights' (2012) Policy and Legal Advocacy Centre http://www.placng.org/new/main_story.php?sn=16 assessed 23rd Nov, 2013
[710] [2009] 3 N.W.L.R. PT. 1128 342 at 375

from 'right to life' and 'personal liberty' but no such measures shall be taken in pursuance of any such act during any period of emergency save to the extent that those measures are reasonably justifiable for the purpose of dealing with the situation that exists during that period of emergency."

This suggests that during periods of emergency, the Constitution allows for the derogation from the right to personal liberty but only where it is reasonably justifiable for addressing existing situations within the period of the emergency. As a safeguard against abuse, the Constitution provides that any person who is arrested shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his choice.[711] In addition to that, any person who is arrested or detained shall be informed in writing within twenty-four hours and in a language which he understands of the facts and grounds of his arrest or detention.[712]

At the regional level, Art.6 of the ACHPR permits an arrest for reasons laid down by the law. Article 6 of the Charter goes on to state that no one may be arbitrarily arrested or detained. The African Commission on Human Rights, a body officially charged with the interpretation of the ACHPR, in *Amnesty International v Sudan*[713] stated that Art.6 must be interpreted in such a way to permit arrest only in the exercise of powers granted to the security forces in a democratic society.

Based on the foregoing, since the power of arrest under the TPA 2011 (as amended) is based on a reason laid down by law, that is, '*reasonable suspicion to have committed or likely to commit an offence under the Act,'* it is safe to conclude that the power of arrest under the Act is compatible with the African Charter. However, the Charter forbids arbitrary arrest as currently being practiced by the Police and Soldiers in Nigeria. It is not enough for a law to permit an arrest; the law must comply with the acceptable standards.[714]One of the standards is for the Police to inform the accused of the reason for his arrest. The African Commission on Human Rights in *Huri laws v Nigeria*[715]held that failure of the Police to 'promptly' inform a person arrested of the reason of his arrest violated the right to fair trial. In that case, the accused persons were arrested and detained without informing them of the charges against them neither were they charged.[716] Relating this to arrest of terrorists in Nigeria, it is obvious that while S.6

[711] S. 35(2) CFRN 1999
[712] S.35(3) CFRN 1999
[713] Communication 48/90
[714] ibid
[715] *Huri laws v Nigeria* No. 225/98
[716] ibid

of the African Charter is consistent with the power of Arrest under the Act, the Nigerian Police/JTF have on several occasions violated the human rights guarantees under the African Charter. Arrests in Nigeria, especially those made under the TPA 2011, are done arbitrarily and indiscriminately. Also, the Police in Nigeria generally do not inform a suspect of the reasons for their arrest. This is inconsistent with Art 4, 5, and 7 of the African Charter which guarantees the right to life and the integrity of his person, prohibition of torture, right to the respect of the dignity inherent in a human being particularly cruel inhuman or degrading punishment and other ill-treatment, and the right to fair trial respectively.

Under Art 9 of the ICCPR arrest can only be made on *"such grounds and in accordance with such procedure as are established by law*." This in effect means that the deprivation of the right to liberty such as arrest of terror suspects must be carried out in accordance with an established law. The UN Human Right Committee, a body of independent experts that monitors implementation of the ICCPR by its State parties, in *McLawrence v Jamaica*[717] held that the legality of arrest is violated if an individual is arrested or detained on grounds which are not clearly established in domestic legislation.

Going by Art 9 of the ICCPR and the decision in *McLawrence,* it can be argued that since the power to arrest a terror suspect in Nigeria is clearly established under the TPA 2011, arrest under the Act is consistent with the ICCPR.

With regards to meaning of the word "*arbitrary arrest*," the UN Human Right Committee explained that "arbitrariness" is not to be equated with "against the law" but must be interpreted more broadly to include the elements of appropriateness, injustice, lack of predictability and due process of the law.'[718]

Rights that are available to anyone arrested and detained under the ICCPR include the right to be informed, at the time of arrest, of the reasons for his arrest,[719] and the right to be brought 'promptly' before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.[720] In *Campbell v Jamaica*,[721] the UN Human Right Committee held that Art. 9(2) of the Covenant was violated where the accused was arrested and detained and was not informed of the reason behind his arrest until

[717] U.N. Doc. A/52/40, Vol. II, Annex VI, sect. V, at 225 (Sep.21, 1997)
[718] *Mukong v Cameroon*, Communication no 458/1991
[719] Art.9(2) ICCPR
[720] Art 9(3) ICCPR
[721] Communication Number: 248/1987

after seven days. A similar decision was reached by the UN Human Right Committee in *Leehong v Jamaica*.[722]

Other rights available to an accused person under the ICCPR are as contained in Art 14(2). It provides that 'everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law' and 'in the determination of any criminal charge be entitled to- be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; adequate time and facilities for the preparation of his defence; to be tried without undue delay; to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; free assistance of an interpreter if he cannot understand or speak the language used in court; not to be compelled to testify against himself or to confess guilt.'[723]

Relating this to Nigeria, as previously discussed, terrorist suspects are arrested without informing them of the reason for the arrest. Following the arrest of a terror suspect, the Police/JTF allegedly use different means of torture including intimidation, coercion and use of electric baton in order to compel terror suspects to make incriminating statements against themselves.[724] These are contrary to Articles 7 and 14 of the ICCPR which provides that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment' and that 'in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.' Art. 14(2) goes further to state that "everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.'' More importantly, Art.9(5) expressly provides that 'anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.'

[722] Communication No. 613/1995
[723] Art.14(3)(a)-(g)
[724] Amnesty International; Stop Torture 5th May 2014 http://www.amnesty.org.au/hrs/comments/20599/ accessed 21 July 2014
*ScanNews Terrorism: Suspect accuses SSS of torturing him during interrogation; May 20th 2014 http://scannewsnigeria.com/news/terrorism-suspect-accuses-sss-of-torturing-him-during-interrogation/ accessed 21 July 2014

3.3 Pre-charge Detention of Terror Suspects

The provision of the Constitution relating to the pre-charge detention of a suspect is clear. Section 35(1)(c) of the Constitution expressly provides that the right to liberty can be restricted "*in accordance with a procedure permitted by law for the purpose of bringing a suspect before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence.*"

Going by S.35 above, one of the bases for the pre-charge detention of a suspect under the Constitution is "*reasonable suspicion his having committed a criminal offence.*" In the same way, detention under the TPA 2011 (as amended) is based on '*reasonable suspicion*' to have committed or likely to commit an offence.' This undoubtedly shows that the power to detain a suspect based on 'reasonable suspicion' to have committed or likely to commit an offence' under the TPA 2011 is in agreement with the Constitution.

Supporting this position, the Court in *Ekwenugo v Federal Republic of Nigeria* held that 'if there is a reasonable suspicion that a suspect has committed an offence his right to liberty may be suspended temporarily.[725]' The Courts in Nigeria have held that "reasonable suspicion" to arrest and detain a suspect must be exercised with discretion and that discretion must be objective, judicial, and judicious.[726] The prosecution must also adduce evidence on the grounds of such arrest/detention and the test must be an objective one.[727]

Nevertheless, S.35(4) of the Constitution provides that any person detained for the purpose of bringing him before a Court, or upon reasonable suspicion of having committed an offence, or for the purpose of preventing his committing a criminal offence must be brought before a court within a "*reasonable time"* and if he is not tried within a period of "*two months*" from the date of his arrest or detention '*in the case of a person who is in custody or is not entitled to bail*; [728] or "three months" from the date of his arrest or detention in the case of a person who has been released on bail, he shall (without prejudice to any further proceedings that may be brought

[725] [2001] 6 NWLR Pt 708 at 171
[726] *Chukwurah v C.O.P* [1965] NNLR Pg 21
[727] ibid
[728] S.35(4)(a) CFRN 1999

against him)[729]-be released unconditionally or on the condition that is reasonably necessary that he appears for trial at a later date.[730]

The Constitution clarifies the expression "a reasonable time" under 35(5)(a)-(b) to mean *'one day- where there is a court of competent jurisdiction within a radius of 40 kilometre; Or in any other case two days or a longer period as may be considered by the court to be reasonable'*.[731]

This in effect means that pre-charge detention of a terror suspect under the Nigerian Constitution could be for 'one day' where a court is within 40 meters radius, or for 'two days in other cases,' or for 'a longer period' which the Court considers reasonable. The proviso "*as may be considered by the Court to be reasonable*" leaves the determination of "reasonability" and "legality" of period of pre-charge detention of a terror suspect for the Court/Judge to decide.

Going by S.35(4) of the Constitution, the maximum period for which an accused may be detained before he/she is charged to court under the *Constitution* is "two months." By mathematical calculation, the highest total number of days within two months in any calendar year is 62 days. This suggests that a pre-charge detention period that exceeds 62 days (such as the power to detain to for 90/180 days as per the TPA 2011) in Nigeria is illegal/illegitimate and "unconstitutional." The Constitution goes further to say that where a suspect who is in custody is not brought to Court within 2 months, or 3 months, in the case of a suspect that has been granted bail, he must be released unconditionally or on the condition that is reasonably necessary that he appears for trial at a later date (although this is without prejudice to any further proceedings that may be brought against him.)

Furthermore, the Constitution provides safeguards for suspects held in custody pending charge. Any person who is detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his choice.[732] Also, any person who is arrested or detained shall be informed in writing within twenty-four hours and in a language which he understands of the facts and grounds of his arrest or detention.[733] This provides for the right against self-incrimination for the person arrested.

[729] S.35(4)(a) ibid
[730] ibid
[731] S.35(5)(b)
[732] S. 35(2) CFRN 1999
[733] S.35(3) CFRN 1999

Juxtaposing the position of the Constitution on the period of pre-charge detention with the provision of TPA 2011(as amended) shows a disagreement. While the Constitution says that the maximum period which a suspect can be detained without charge is 2 months after which they must be released, the TPA 2011 allows for a total period of period of 180days (pursuant to an *exparte* application to the Court for a pre-charge detention period of 90days subject to a renewal for another 90days).[734]

In *Ariori & Ors .v. Elemo & Ors*[735]Obaseki Justice Supreme Court (as he then was) in explaining "reasonable time," described it as "the period of time which in the search for justice, does not wear out the parties and their witnesses and which is required to ensure that justice is not only done but appears to reasonable person to be done." In the writer's view, detaining an accused for 90 days, or worse still 180 days, would certainly frustrate the accused and does not appear reasonable.

Also, the Supreme Court in *Dominic Onuorah Ifezue v Livinus Mbadugha* held that reasonable time" must be left at the discretion of the court.*"*[736] Equally, the Court in *Durwin v Benek* warned that 'exercising a judicial discretion properly in matters relating to detention ought to be founded on facts and circumstances presented to the court from which a conclusion governed by the law will have to be drawn.'[737]

However, in *Asari Dokubo v Federal Republic of Nigeria*,[738] the Supreme Court held that the pre-detention of the accused for up to a year on charges of taking arms against the State was consistent with S. 35 of the Constitution. Katsina Alu JSC in that case said

> "*It is my belief as well that if every person accused of a felony can hide under the canopy of section 35 of the Constitution to escape lawful detention then an escape route to freedom is easily and richly made available to persons suspected to have committed serious crimes and that will not augur well for the peace, progress, prosperity and tranquillity of the society*"

The Court held further that,

> "*where national security is threatened or there is the real likelihood of it being threatened, human rights or the individual right of those responsible take second place. Human rights or individual rights must be suspended until national security can*

[734] S.27(1) TPA 2011
[735] [1983]1 SCNLR
[736] S.C. 68/1982
[737] [2000] NWLR Pt 689 at 76
[738] [2007] 30 WRN 1 at 38

be protected or well taken care of"[739]

The decision in *Asari Dokubo* raises questions about the role of the Judiciary in interpreting the law. Although it follows S.35 (5)(b) of the Constitution which gives the Courts power to determine whether or not the period of detention is 'reasonable.' The decision in *Asari's* case, for example, suggests that once approved by the Court, a pre-charge detention for up to a year can be lawful. The imprecise wording of S. 35(5)(b) "*as may be considered by the court to be reasonable"* makes leaves the pre-charge detention period open and uncertain. It leaves the period of pre-charge detent at the mercy of the Court/Judge.

As we have seen, the Constitution says that where a suspect that is detained is not tried within a period of two months, the pre-charge detention becomes illegal and the detainee must be must be released unconditionally.[740] This same Constitution as per Section 35(5)(b) also provides that the Court may consider a period that exceeds 2months (or even more) as reasonable. The latter constitutes a draw back in safeguarding the 2months earlier prescribed by the Constitution. The writer is of the view that this section should be reviewed as it poses a grave danger to liberty and security of detainees under the Constitution.

Drawing a conclusion from the fore-going, a pre-charge detention period in Nigeria which exceeds 2 months is "unconstitutional" and as such unnecessarily infringes on the right to personal liberty of the suspect, except the Court says otherwise.[741] It is clear that where there is a conflict in the period of pre-charge detention of suspects under the Act and the Constitution, the Constitution will prevail by virtue of Section 1(1).[742]

At the regional level, Art 6 of the African Charter on Human and People's Rights (ACHPR) guarantees the right to liberty and security of person. Art 6 provides that;

> "*Every individual shall the right to liberty and the right to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained*."

Art 6 above suggests that the right to liberty under the ACHPR can be restricted based on reasons laid down by any law. Also, Art 27(2) of which can be regarded as the general

[739] ibid
[740] S.35(4)(b)
[741] S.35(4)(a)
[742] "If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void."

limitation clause provides that "*the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.*"

Going by Art 27 of the ACHPR, the State can restricts/limit rights and freedoms under the Charter where it concerns the rights of others, collective security and common interest. Certainly, counter-terrorism cases would fall under the "*collective security."* Since the pre-charge detention of a suspect under the Act is based on reasonable suspicion of having committed or likely to commit a terror offence, it would be safe to conclude that the "pre-charge detention" of a terror suspect under the TPA 2011 is compatible with Art 6 and 27 of the ACHPR.

However, the African Charter goes on to provide that where the right to liberty and security of a person is restricted, that is where a person has been detained, the *"individual shall the right to have his cause heard.*'[743] Furthermore, the ACHPR clarifies that the right to be heard shall also include the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; the right to be presumed innocent until proved guilty by a competent court or tribunal; the right to defence, including the right to be defended by counsel of his choice; and the right to be tried within a reasonable time by an impartial court or tribunal.[744]

The African Commission on Human and Peoples' Rights in its 'Resolution on the Right to Recourse and Fair Trial' did not give an explanation for what would amount to reasonable time. The resolution merely stipulates that that persons arrested or detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or be released.[745]

Similarly, the African Court of Human Rights has failed to give a clarification of the law on what amounts to 'reasonable time.'[746] Considering the number of cases brought before it, one

[743] Art 7(1) African Charter
[744] Art 7(1)(a)-(d) Ibid
[745] Para 2c http://www.achpr.org/sessions/11th/resolutions/4/ Accessed 25th July 2014
[746] Robert Barnidge, 'The African Commission on Human and Peoples' Rights and the Inter-American Commission on Human Rights: Addressing the right to an impartial hearing on detention and trial within a reasonable time and the presumption of innocence' (2004) African Human Rights Law Journal, 4 Pg 113 http://www.academia.edu/430215/The_African_Commission_on_Human_and_Peoples_Rights_and_the_Inter_American_Commission_on_Human_Rights_Addressing_the_Right_to_an_Impartial_Hearing_on_Detention_and_Trial_Within_a_Reasonable_Time_and_the_Presumption_of_Innocence accessed 7th January 2014

would have expected the Commission or the African Court on Human rights to have provided in clear terms what amounts to the term '*reasonable time*.'

Thankfully the African Commission on Human Rights has in a number of cases attempted to elaborate on Art 6 and Art 7(1)(d).

In *Huri-laws v Nigeria*,[747] the Commission found that detaining two applicants for five months and two months respectively without being charged violated their right to be tried with a reasonable time by an independent court.[748] The Commission stressed that the indefinite or extended detention without charge or trial is a violation of the right to liberty and security.[749]

Also in *Alhassan Abubakar v Ghana*,[750] the accused was arrested for allegedly cooperating with political dissidents and detained without charge or trial for 'seven years' until his escape from a prison hospital on 19th February 1992. The Commission held that even though the accused was arrested 'in the interest of national security,' his detention without charge for seven years was a clear violation of his right to be tried within a "reasonable time" as stipulated under the Charter.

Similarly in *International Pen and Others v. Nigeria*[751] the Commission found a decree which allows the government to hold suspects for up to three months without charge as a violation of the right to be tried within a reasonable time. Likewise, in *Law Office of Ghazi Suleiman v. Sudan*,[752] the Commission found Sudan in violation of Art 7(1) of the African Charter for detaining the appellants without charge for close to four months. The suspects had earlier been arrested for offences relating to destabilizing the constitutional system, inciting people to war or engaging in the war against the State, inciting opposition against the Government and abetting criminal or terrorist organisation under the law of Sudan.

In the writer's view, though the pre-charge detention of a terror suspect for 90 days under S.27 (1) TPA 2011 would be compatible with ACHPR by virtue of Art. 6 and Art 27 of the Charter, the rulings of the African Commission on Human Rights suggests that the practice in Nigeria whereby the Police/JFT would detain terror suspects "without charge" for months and even

[747] Communication No. 225/98 (2000)
[748] ACHPR 2000 a, Para 5, 7, 10
[749] Communication 62/92, 68/92, and 78/92, *Constitutional Right v Nigeria*, 13th Activity Report 1999-2000 failure to bring a charge within 2years was held to be in breach of At 7(1)(d)
[750] Communication No. 103/93 (1996)
[751] Communications Nos. 137/94, 139/94, 154/96 and 161/97 (1998)
[752] Communication Nos. 222/98 and 229/99 (2003)

years undeniably contravenes the right to be tried within a 'reasonable time' as envisaged under Art 7 of the Charter. It is hoped that the Commission will in the nearest future give its opinion on the 90/180 pre-charge detention period allowed under the Act.

The provision of the ICCPR relating to arrest goes hand in hand with detention. Art 9 of the ICCPR provides that "*no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law*." This means that an accused can be arrested and detained based on the provision of the law, but not arbitrary laws.

The UN Human Right Committee in *Mukong v Cameroon* in explaining the term 'arbitrariness' under Art 9(1) stated that 'the term is not to be equated with being against the law, but must be interpreted more broadly to include element of appropriateness, injustice, and predictability.'[753]

Art.9(3) goes on to provide that *"anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release*."

Although Art.9(3) guarantees the right to be brought 'promptly' before a judge or officer authorised by law to exercise judicial duties within a 'reasonable time', the Covenant does not give a meaning as the term 'reasonable time.'

The UN Human Rights Committee[754] has noted that the word "promptly'' under Art. 9 "must not exceed a few days." The Human Rights Committee found in the case of *Freemantle v Jamaica*[755] that a detention incommunicado for four days without being brought before a judge violates Art.9(3) ICCPR. On the other hand, the UN Human Right Committee in *Kone v Senegal* found that what would constitute "reasonable time must be assessed on a case-by-case basis."[756]

Art.9(4) further provides that '*anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful*'. This suggests that where an accused is arrested and detained and he is not charged to court, such an

[753] Communication No. 458/1991
[754] General Comment N0.8 Right to Liberty and Security of Person (Art.9) (30 June, 1982)
[755] Communication No 625/95 Un Doc/CCPR/68/D/625 [28 April 2000]
[756] Communications NO 386/89 Para 8

accused has the right to take proceedings to the court to decide the lawfulness of his detention and order his release where the detention is not lawful.

In *Van Alphen v. The Netherlands*[757] the UN Human Rights Committee stated that detention which may be initially legal may become arbitrary if it unduly prolonged and not subject to periodic review. The Committee clarified further that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances.[758] On the basis of *Van Alphen*, the arrest of a terror suspect in Nigeria which is initially legal would become arbitrary where the detention is unduly prolonged or where the detention not subjected to a review by the courts.

Furthermore, the UN HRC in its General Comment No.8 concerning Art 9 of the Covenant[759] stated that 'Paragraph 3 of Art 9 requires that in criminal cases any person arrested or detained has to be brought "promptly" before a judge or other officer authorized by law to exercise judicial power. More precise time limits are fixed by law in most States parties and, in the view of the Committee, delays must not exceed a few days.' The Committee made clarifications on "preventive detention" used for reasons of public security, for example, for counter-terrorism purposes. It stated that this – "must be controlled by these same provisions, that is, it must not be arbitrary, and must be based on grounds and procedures established by law, information of the reasons must be given, and court control of the detention must be available, as well as compensation in the case of a breach. And if, in addition, criminal charges are brought in such cases, the full protection of article 9 (2) and (3), as well as article 14, must also be granted.[760] It is important to note that the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.[761]

Art 4 of the ICCPR also allows for a temporary derogation of the right to liberty 'in times of public emergency which threatens the life of a nation' and 'to the extent strictly required by the exigencies of the situation.' This means that the derogation must comply with the principle of proportionality and must exist in times of public emergency. But the ICCPR does not allow

[757] No.305/1988, UN Doc. A/45/40, Vol. 2, Annex IX, Sect. M, Para. 5.8
[758] Ibid
[759] Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 8 (1994). http://www1.umn.edu/humanrts/gencomm/hrcom8.htm Accessed on 28th July 2014
[760] ibid
[761] Human Rights Committee, General Comment 15, The position of aliens under the Covenant (Twenty-seventh session, 1986) http://www1.umn.edu/humanrts/gencomm/hrcom15.htm Accessed 28th July 2014

for derogation from the right to life, freedom from torture cruel inhuman degrading treatment, slavery or servitude, imprisonment on the ground of inability to fulfil contractual obligation, no punishment without the law and freedom of conscience, thought and religion even in times of public emergencies such as terrorist attacks.

On the basis of the fore-going analysis, especially when compared with Art.9 of the ICCPR, the pre-charge detention of a terror suspect under S.27(1) TPA 2011(as amended) would be incompatible with the ICCPR. However, with regards to the 90/180 days period, the decision of the HRC in *Kone v Senegal* leaves it matter for the Court to decide on a case by case basis. It is the belief of the writer that with the number of arrest and prolonged pre-charge detention of terrorist suspects in Nigeria, hopefully soon there will be jurisprudence to draw analysis from as per S.27(1) as it relates to Art 9 of the ICCPR.

3.4 Encouragement of terrorism

Section 38 of the Nigerian Constitution guarantees every person the right to freedom of thoughts, conscience and religion, including freedom to propagate and manifest his religion or belief in worship, teaching, practice, and observance.

S.39 (1) of the Constitution provides that "*every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference."* This right can be exercised either orally, in writing as well as through the electronic media. However this right is qualified by State interests.

S. 45(1)(a)&(b) of the Constitution provides that "*nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health; Or for the purpose of protecting the rights and freedom or other persons.*"

Fundamentally, Section 45 constitutionally empowers the state to make law(s) that restricts the right to freedom of expression in the interest of defence, public safety, public order, public morality, public health, or for the purpose of protecting the right and freedom of others. The requirement of such law(s) is that it must be '*reasonably justifiable*.'

In determining whether a law is "*reasonably justifiable,"* the Nigerian Supreme Court in *Olawoyin v A.G Northern Nigeria* held that before a law or a restriction upon a fundamental human right may be considered justifiable, it must be necessary and must not be excessive or

out of proportion to the object which it sought to achieve.[762] Also, the term "reasonably justifiable law" came up in *Chike Obi v Director of Public Prosecution.*[763] In this case, the Court held that its role was not to rubber stamp laws made by the legislature or the executive, but the Court must be the arbiter whether or not any particular law is reasonably justifiable. The court through this decision highlighted the position of the principle of separation of powers.

From the above analysis, it can be established that the Nigerian Constitution supports "*any law*" that restricts expressions, opinions, or statements in the '*interest of public defence*' or '*public safety*' including for counter-terrorism purposes.

Looking at Sections 38, 39 and especially 45(a)(b) of the Constitution side by side with S.5 (1)(2)(a) TPAA 2013 which criminalises encouragement of terrorism, it is clear that the Police are constitutionally empowered to prevent anyone from expressing himself/herself in the 'interest of the defence of the State' or for 'public order and morality,' however this must be reasonably justifiable (that is, necessary and not excessive). Thus, the offence of encouragement of terrorism under the Act is consistent with the Constitution.

According to Welch, one of the most disputed areas in contemporary human rights law is freedom of expression.[764] This was why the negotiators of the ACHPR drafted the provision on freedom of expression in a general term and not in precise terms.[765]

Art. 9 of the ACHPR provide that "*every individual shall have the right to receive information. Every individual shall also have the right to express and disseminate his opinion within the law*."[766]

This suggests that the individual's right to receive information can be considered as a function of the exercise of the freedom to express and disseminate ideas. However, freedom of expression under Art.9 must be done 'within the law.' The ACHPR gives no clarifications for what acts would fall within the law. Since no qualification was given to this, it would mean that the exercise of the right must comply with the requirement of the law, whatever they are.

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[762] (1961) 2 SCNLR 5

[763] [1961]1 All Nigerian Law Report (All NLR) at 182.

[764] C.E Welch, 'The African Charter and Freedom of Expression in Africa' (1998) 4 Buffalo Human Right Law Review Pg 103

[765] Fatsah Ouguergouz, *the African Charter on Human and Peoples Rights; A Comprehensive Agenda for Human Dignity and Sustainable Democracy In Africa* (Martinus Nijhoff Publishers, 2003) Pg 161

[766] Art.9 (1)-(2)

Just like the Constitution, freedom of expression under the ACHPR is a qualified right. Art 27(1) provides that '*the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.*' This implies that rights under the Charter including the right to freedom of expression must be exercised with due regards to the rights of others, collective security, morality and common interest.

Recognising the importance of freedom of expression, the African Commission on Human Rights in *Constitutional Rights Projects, Civil Libeties Orgainsations, and Media Rights Agenda v Nigeria*[767] stated that 'the right to freedom of expression is a fundamental individual right which is the cornerstone of democracy and a means of ensuring the respect for all human rights and freedom.'

Concerned by the incessant harassment, threats, and intimidation of media practitioners, undue political interference with the media, and the adoption of repressive laws or amendment to existing legislation that limit freedom of expression, the African Commission adopted the 'Resolution on the Situation of Freedom of Expression in Africa' at its 40th Ordinary Session, held in Banjul, The Gambia, from 15 - 29 November 2006. This Resolution called on member States to take all necessary measures in order to uphold their obligations under the African Charter on Human and Peoples' Rights and other international instruments, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights providing for the right to freedom of expression.[768]

Furthermore, the African Commission in *Law Offices of Ghazi Sulieman v Sudan (II),* [769] held that restraint on the right of expression must not go beyond the limits necessary for that purpose and must be consistent with the States obligation under the African Charter. Citing the Inter American Court, the ACHR held further that when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to 'receive' information and ideas.[770]

Clearly encouragement of terrorism is an offence under the Nigerian Terrorism Act and the TPAA 2013 is a 'reasonably justifiable law' which aims to protect the rights of other.'

[767] Communication 141/94, 141 95 13th Activity Report 1999-2000 pg 36
[768] http://www.achpr.org/sessions/40th/resolutions/99/ accessed 27th July 2014
[769] Communication 105/93 [2003] AHRLR 144
[770] Ibid Para 50

Thus, since Art 27(1) of the ACHPR provides that the rights and freedoms of each individual shall be exercised with due regard to the rights of others and collective security, it is safe to infer that S.5(2)(a) of the Nigerian TPAA 2013 which criminalises encouragement of terrorism in any manner will be consistent with the ACHPR.

Going by the above conclusion, any person who knowingly, in any manner, directly or indirectly, solicit or encourage the commission of a terrorist act commits an offence under S.5(2)(a) of the Nigerian TPAA 2013 and also infringes Art. 9 and Art. 27 of the ACHPR.

The right to freedom of expression under the ICCPR is similar to that of the ACHPR. Article 19 (1) ICCPR provides that '*everyone shall have the right to hold opinions without interference'*.

Art. 19(2) provides;

> "*everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."*

According to the UN Human Rights Committee,[771] this right includes expressions and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20.[772] It includes political discourse,[773] commentary on one's own[774] and on public affairs,[775] canvassing,[776] discussion of human rights,[777] journalism,[778] cultural and artistic expression,[779]teaching,[780] and religious discourse.[781]It may also include commercial advertising. The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of Art. 19, paragraph 3 and Art 20.[782] Furthermore, Art 19(2) protects all forms of expression and the means of their dissemination. Such forms

[771] Human Rights Committee 102nd session Geneva, 11-29 July 2011 General comment No. 34 CCPR/C/GC/34 http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf Accessed 10 July 2014
[772] communications Nos. 359/1989 and 385/1989
[773] *Mika Miha v. Equatorial Guinea* Communication No. 414/1990, U.N. Doc. CCPR/C/51/D/414/1990 (1994).
[774] communication No. 1189/2003, *Fernando v. Sri Lanka*, Views adopted on 31 March 2005
[775] communication No. 1157/2003, *Coleman v. Australia*
[776] Concluding observations on Japan (CCPR/C/JPN/CO/5)
[777] communication No. 1022/2001, *Velichkin v. Belarus*, Views adopted on 20 October 2005
[778] communication No. 1334/2004, *Mavlonov and Sa'di v. Uzbekistan*
[779] Communication No. 926/2000, *Shin v. Republic of Korea*, Views adopted on 16 March 2004.
[780] communication No. 736/97, *Ross v. Canada*, Views adopted on 18 October 2000
[781] ibid
[782] ibid

include spoken, written and sign language and such non-verbal expression as images and objects of Art.[783]Means of expression include books, newspapers,[784] pamphlets,[785] posters, banners,[786] dress and legal submissions.[787] They include all forms of audio-visual as well as electronic and internet-based modes of expression.

However, freedom of expression under the ICCPR is subject to some restrictions. Art 19(3) provides that the:

> " *exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals."*

As noted above, the main requirement for restricting of freedom expression is that it must be '*provided by law'* meaning that there must be a legal basis for the restriction. The limitation to this right must also be 'necessary,' meaning that the restriction must conform to the principle of proportionality.[788] "Proportionality" means that restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated and proportionate. [789]

Other requirements for the restriction of the right of freedom of expression under the ICCPR is that 'the law must be for the protection of the right/reputation of others, or for the protection of national security/public order of the State or for the protection of the health/morals of others.' It is important to note that the term "reputation of others" is excluded from the Nigerian Constitution and the ACHPR. According to the UN HRC General Comments No 34, the term "*rights*" includes human rights as recognized in the Covenant and more generally in international human rights law.[790] The term "*others*" relates to other persons individually or as members of a community.[791]

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[783] Communication No. 926/2000, *Shin v. Republic of Korea* ibid
[784] communication No. 1341/2005, *Zundel v. Canada*, Views adopted on 20 March 2007
[785] communication No. 1009/2001, *Shchetoko et al. v. Belarus*
[786] communication No. 412/1990, *Kivenmaa v. Finland*
[787] communication No. 1189/2003, *Fernando v. Sri Lanka*
[788] Communication No. 1022/2001, *Velichkin v. Belarus*, Views adopted on 20 October 2005.
[789] Committees General Comment No.22, official Records of the General Assembly, Forty Eighth Session, Supplement No.40(A/48/40) Annex VI
[790] Para 28
[791] Ibid, communication No. 736/97, *Ross v. Canada*, Views adopted on 18 October 2000.

The HRC further re-echoed these in *Robert Faurisson v. France*,[792] where it stated that any restriction on the right to freedom of expression must cumulatively meet the following conditions: it must be provided by law, it must address one of the aims set out in paragraph 3 (a) and (b) of article 19, and must be necessary to achieve a legitimate purpose. This was also restated in *Womah Mukong v. Cameroon*.[793][794]

In *Vladimir Petrovich Laptsevich v. Belarus*,[795] the UN HRC gave further clarifications that 'even if the sanctions imposed on the freedom of expression were permitted under domestic law, the State party must show that they were necessary for one of the legitimate aims set out in article 19, paragraph 3.[796]

In *Tae Hoon Park v. Republic of Korea,*[797] the author was convicted of 'siding with an enemy-benefiting organization' a crime under Korean National Security Law for expressing support and sympathy for the opinions of a student organisation and taking part in their peaceful demonstrations, while in the USA. The State party maintained that the author's conviction had been necessary to protect national security and was provided for by law. However, the UN HR Committee noted that it had failed to specify the precise nature of the threat to national security, referring merely to the 'general situation in the country' and 'the threat posed by "North Korean communists." Such a vague justification could not suffice to render the restriction a necessary or proportionate restriction. Therefore, the author's right to freedom of expression had been violated.

[792] Communication No. 550/1993 , Para 9.4

[793] Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (1994)

[794] With regards specifically to the offence of encouragement of terrorism, the Human Rights Committee stated that States parties should ensure that counter-terrorism measures are compatible with paragraph3. Offences as "encouragement of terrorism" as well as offences of "praising", "glorifying", or "justifying" terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression.[794] Furthermore, restrictions based on national security and public order must be necessary for a legitimate purpose. Communication No. 359, 385/89, *Ballantyne , Davidson and McIntyre v. Canada*
The committee observed that the concept of "morals" derives from many social, philosophical and religious traditions; consequently, limitations for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition". Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination Committee General Comment No. 22

[795] Communication No. 780/1997, U.N. Doc. CCPR/C/68/D/780/1997 (2000)

[796] Ibid Para 8.3

[797] Communication No. 628/1995, U.N. Doc CCPR C/64/D/628/1995 [1998]

The UN HRC in General Comment No 34, Art 19 freedoms of opinion and expression stated that freedom of expression is integral to the enjoyment of the rights to freedom of assembly and association.[798] Consequently, restrictions on this right must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated and they must conform to the strict tests of necessity and proportionality.[799]Furthermore the committee stated that although freedom of thought was not listed among those rights that may not be derogated Article 4, paragraph 2 of the Covenant, there are elements that in the Committee's opinion cannot be made subject to lawful derogation under article 4"-Freedom of opinion is one of such element, since it can never become necessary to derogate from it during a state of emergency.[800]

Based on the above analyses, it is safe to conclude that S.5 (1)(2)(a) TPAA 2013 will be consistent with Art 19(3) of the ICCPR, especially using 'national security' as a yardstick for criminalising direct and indirect encouragement of terrorism. However going by the decision in *Tae Hoon Park v Republic of Korea*,[801] the State must state precisely the nature of threat posed that warrants the restriction of freedom of expression and this must comply with strict tests of necessity and proportionality.

Relating this to Nigeria, the videos and publications by *Boko Haram* which encourage killing of non-Muslims, security forces, innocent civilians as well as their extremist teachings clearly shows the precise nature of the threats posed that warrants restricting freedom of expression under the TPAA 2013.[802] This clearly fulfils the requirement set by the UN HRC in General Comment No 34 as well as Art 19(3) of the ICCPR. However, the confiscation of newspaper publications meant for the public and the arrest of journalists by the Nigerian security forces on the grounds of being critical of the government policies[803] does not appear to be proportionate or necessary to achieve a legitimate purpose as required by the ICCPR.

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[798] Human Rights Committee 102nd session Geneva, 11-29 July 2011 General comment No. 34 Article 19: Freedoms of opinion and expression Para 2.
[799] Ibid Para 22
[800] Ibid Para 5
[801] Communication No. 628/1995, U.N. Doc CCPR C/64/D/628/1995 [1998]
[802] Aaron James, 'Boko Haram Releases Video of Christian Killings' Premier Christian Radio 23/12/2014 https://www.premierchristianradio.com/News/World/Boko-Haram-releases-video-of-Christian-killings Accessed 14 July, 2017
[803] Caro Rolando, 'Crackdown on Nigerian media suppresses critical reporting on Boko Haram' (18 June 2014) IFEX Global Network Defending and Promoting Free Expression, https://www.ifex.org/nigeria/2014/06/18/newspapers_confiscated/ Accessed 24 July 2014

In chapters 3, 6, and 8 of this thesis, the writer submits that the provision of the Nigerian TPAA 2013 on encouragement of terrorism is vague. In addressing "vague and broad" laws that restricts freedom of expression like S.5(1)(2)(a) of the Act, the UN HRC notes that for the purpose of restricting freedom of expression "a law must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.[804]In the same vein, Principle 1.1(a) of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information provides that "*any restriction on expression or information must be prescribed by law. The law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful.*"[805]Looking at these by reference to the TPAA 2013, although the Act is easily accessible, it Act fails to properly explain the category of statements which are likely to be understood by members of the public as encouraging terrorism or under S.5(2)(B). The writer submits that for provision of the Act on the offence of encouragement of terrorism to be consistent with ICCPR (as explained by Human Rights Committee General Comment No. 34), there is an urgent need to review Section 5 of the TPAA 2013 to properly explain statements which are likely to be understood by members of the public as directly or indirectly encouraging terrorism and a yardstick for determining this.

3.5 ***Proscription***

The Nigerian Constitution guarantees the right to "peaceful assembly" and freedom of association.

S.40 provides that "*every person shall be entitled to assembly freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interest*."

The Constitution does not expressly provide for 'proscription' of an organisation. However, like other rights under the Constitution, the right to assemble freely and associate with other

[804] Human Rights Committee General Comment No. 34, note 4, Para 25
[805] Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39 (1996)

persons is subject to limitations. Section 45(1)(a)-(b) allows for the limitation of this right 'in the interest of defence, public safety, public order, public morality or public health; or for the purpose of protecting the rights and freedom or other persons.

By qualification, the Constitution implicitly provides for the 'proscription of terrorist organisation' by limiting the right to assembly and freedom of association in the interest of defence and public safety. More explicitly, Section 2(3)(I) TPA 2011(as amended) makes it a crime in Nigeria to belong to a proscribed organisation. It provides that 'a person who belong or professes to belong to a proscribed organisation commit an offence under this Act and shall on conviction be liable to an imprisonment of 20 years'.

As earlier explained, in determining a law that is 'reasonably justifiable' as per S. 45(1)(a)-(b) of the Constitution, the Court in *State v Ivory Trumpet*[806] stated that the test for this is an objective one, requiring the state to show that there is a grave risk of harm to a large section of the State and that the risk is imminent demanding urgent action.

The Nigerian government have often cited '*defence and public safety*' especially the rise in terror attacks by '*Boko Haram*' and its splinter -'*Ansaru*' for the enactment of the TPA 2011 and subsequent banning of groups that engages in terrorism under the Terrorism (Prevention) (Amendment) Act 2013.[807] Following the decision in *Trumpet*'s case,[808] *Boko Haram* terror attacks and killings clearly shows that there is a grave risk of harm to a large section of the State and that the risk is imminent demanding urgent action thereby fulfilling the "reasonably justifiable" test.

Based on the fore-going, it is safe to conclude that since the Terrorism (Prevention) (Amendment) Act 2013 which proscribes '*Boko Haram'* is in the interest of defence, public safety and for the purpose of protecting the rights of others, it will be compatible with the Constitution of Nigeria 1999.

There are a plethora of Court decisions relating to the right to freedom of association in Nigeria. Unfortunately, none of them is terrorism related. In *All Nigeria's People Party v IGP*[809] the Court held that the right to assembly, rally and demonstrate especially on matters that of public

[806] [1984] 5 NCLR at 750
[807] Davidson Iriekpen and Muhammad Bello, 'Jonathan Proscribes Boko Haram, Ansaru, Declares them Terrorist Groups' *Thisday Newspaper* 5th June 2013 http://www.thisdaylive.com/articles/jonathan-proscribes-boko-haram-ansaru-declares-them-terrorist-groups/149455/ Accessed 30 June 2014
[808] [1984] 5 NCLR at 750
[809] [2007] 18 NWLR (Pt.1066) 457 C.A. 2 3

concern are rights which are in the interest of the public and that which the individual should possess without impediment as long as no wrongful act is done. The Court of Appeal (CA) in this case,[810] held further that 'certainly in a democracy, it is the right of citizens to conduct "peaceful assembly, processions, rallies or demonstrations" without seeking and obtaining permission from anybody. 'It is a right guaranteed by the 1999 Constitution and any law that attempts to curtail such right are null and void and of no consequence.'

The Court decision in this case suggests that every person in Nigeria has the right to freedom of assembly so far the assembly or association is for a peaceful purpose. This in effect makes the proscription of terrorist groups under the Act consistent with the Constitution.

The African Charter on Human and Peoples' Rights also recognises the right to freedom of association and the right to assembly freely under Art 10 and 11.

Art. 10(1) provides that '*every individual shall have the right to free association provided that he abides by the law.*'

The ACHPR is silent on the forms of associations that are allowed under the Charter. The African Commission have explained that examples could be political parties, medical association, bar association, workers/trade union, student union or the coming together of a group of people to pursue their common purpose.[811] This suggests that any person can join any association but what the person does must be within the law.

Art.11 provides that '*every individual shall have the right to assemble freely with others.*'

The African Commission emphasised the close relationship between the right to freedom of association and the right to assembly.[812] Malcolm and Evans argue that although both freedom of association and freedom of assembly are of paramount importance to a person effective participation and contribution to the society neither has generated much African Charter Jurisprudence.[813]

The ACHPR does not expressly provide for the proscription of terrorists organisation. However, the right to freedom of association and the right to assembly freely are not absolute

[810] [2008] 12 WRN 65
[811] Communications 137/94, 139/94, 154/96
[812] *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) v Nigeria,* Communications 137/94, 139/94, 154/96
[813] Malcolm Evans, Rachel Murray, *The African Charter on Human and Peoples Right; The System in Practice, 1986-2006 (*2nd Edition, Cambridge University Press*,* 2008) pg 226

rights under the Charter. Art 10(2) goes further to provide that the right to free association is 'subject to the obligation of solidarity provided for in Article 29.'

Some of the duties imposed on the individual under Art 29(3) and (5) is '*a duty not to compromise the security of the State whose national or resident he is*' and a duty '*to preserve and strengthen the national independence and the territorial integrity of his country and to contribute to his defence in accordance with the law.*'

This implies that the right to freedom of association is subject to a duty not to compromise the national security of the state and a duty to strengthen the national independence and territorial integrity of the State in accordance to the provision of the law.

Also, the second paragraph of Art. 11 provides that '*the exercise of this right shall be subject only to necessary restriction provided by the law, in particular those enacted in the interest of national security, the safety, health, ethics and right and freedom of others'*.

The African Commission on Human Rights affirmed that the restriction on the exercise of the freedom of association has to be in conformity with the essence of the right as guaranteed by national constitutions and international standards.[814]

Thus looking at Articles 10 and 11 of the Charter, it will be safe to conclude that a member state can make laws to proscribe a terrorist organisation on the grounds of national security, safety, and for the protection of the freedom of others. However, such laws must be "*necessary*" that is, the restriction must conform to the principle of proportionality.[815] Also, In *Lawyers for Human Rights v Swaziland*, the African Commission held that the Kings proclamation outlawing political parties and other similar structure seriously undermines the right of Swaziland people to participate in the government of their country thus violated Art 13 of the Charter.[816]

In *International Pen and Others v. Nigeria, African Commission on Human and Peoples' Rights*[817], the Commission found the trial and conviction of the accused for belonging to the

[814] Resolution on the Right to Freedom of Association of 1992 and Civil Liberties Organisation (*in N.B.A v Nigeria* para 14-15.
[815] In *Dawuda Jawara v The Gambia,* the African Commission on Human Rights held that the ban on political parties is a violation of the complainants right to freedom of association guaranteed under Art.10(1) of the Charter. Communication 147/95 and 149/96,
[816] Communication 251/2002
[817] Communication Nos. 137/94, 139/94, 154/96 and 161/97 (1998). Para 108

Movement for the Survival of Ogoni People (MOSOP) as a violation of Art.10(1) of the African Charter.

Furthermore, the African Commission on Human Rights gave more clarifications on freedom of association in its Resolution on the Right to Freedom of Association that stated that any law or provision which would limit freedom of expression must be consistent with State's obligations under Charter.[818]

Based on the above assessment, it is safe to conclude that banning of a group or an organisation that associate for the purpose of engaging or collaborating, or exhorting, or promoting other to commit an act of terrorism as per S. 2(1) TPA 2011 does not infringe on the individual right to freedom of association and assembly under the ACHPR, since Art. 11of the Charter expressly provides that the State can impose "necessary restrictions" as provided by the law, particularly those enacted in the interest of national security.

The ICCPR also guarantees the right of peaceful assembly and the right to freedom of association.

Art. 21 provide that '*the right of peaceful assembly shall be recognized*.'

Art. 22 stipulate that '*everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interest*.'

Freedom of association and the right to peaceful assembly are not absolute rights under the ICCPR. Both of them are qualified by Para 2 Art 2I and Art. 22(2).

Art 22(2) provides:

> "*No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right*."

This means that the restrictions on right of assembly and association must not only be in conformity with the law but must also be 'necessary' for that purpose (proportionate).

[818] Eleventh Ordinary Session, 9th March 1992 http://www.achpr.org/sessions/11th/resolutions/5/ Accessed 30th July 2014

The UN Human Rights Committee in *M.A. v. Italy*[819]upheld the conviction of accused for involvement in reorganization the dissolved fascist party which were justifiably prohibited by Italian law having regard to the limitations and restrictions applicable under Article 22 (2) of the Covenant. Also in *J. B. et al. v. Canada*,[820] the UN Human Rights Committee held that the Alberta Public Service Employee Relations Act of 1977 which prohibits the Alberta Union of Provincial Employees, Canada from going on strike to be compatible with Art.22 of the ICCPR. From the fore-going, it is safe to conclude that the proscription of terrorist groups under S.2 TPA 2011 is compatible with Articles 21 and 22 of the ICCPR because they are 'necessary,' 'proportionate,' 'prescribed' by law and for the purposes of 'national security.'

4. Conclusion

One of the findings from the assessment of the TPA 2011 (as amended) by reference to Nigeria's domestic, regional, and international obligation established is that the Nigerian Constitution 1999 is the final and supreme law in Nigeria and any law that is inconsistent with the CFRN will be void to the point of its inconsistency. This chapter also reveals that the ACHPR having been domesticated into law is now part of the laws of Nigeria and the Courts are bound by it.

A juxtaposition of the power of arrest under the TPA 2011 with the Constitution FRN, the ACHPR, and the ICCPR shows no conflict or contradiction with these statutes. However the application of the power of arrest under the Act by the Nigerian security agents has created several inconsistencies under the Constitution FRN, the ACHPR, and the ICCPR. In the writer's opinion, the power of arrest under the TPA 2011 is 'lawful,' it is only used arbitrarily by the Nigerian Police/Soldiers.

On the pre-charge detention of terror suspects, the Constitution FRN, the ACHPR, and the ICCPR all have provisos limiting the right to liberty and security thereby making the "pre-charge detention" of a terror suspect under the TPA 2011 consistent with the three statutes. However, there appears to be a contradiction with the 90/180 days pre-charge detention "period" prescribed by the Act when juxtaposed with period acceptable under the CFRN, ACHPR, and the ICCPR. While the Constitution allows for the pre-charge detention period not exceeding 2 months, the UN Human Rights Committee noted that the word anyone arrested

[819] Communication No. 117/1981, U.N. Doc. CCPR/C/OP/2 at 31 (1984)
[820] Communication No. 118/1982, U.N. Doc. Supp. No. 40 (A/41/40) at 151 (198

must be charged "promptly'' and the pre-charge detention must not exceed a few days. Interestingly, judicial decisions by the Courts in Nigeria and decisions of the Human Rights Committee suggests that what would amount to reasonable time must be decided by the Court on a case by case basis. The implication of this is that, although the 90 days pre-charge detention period (subject to renewal for another 90 days) permitted under the TPA 2011 is inconsistent with the provisions of the Constitution and the ICCPR, this is a matter for the for the Court to decide, on a case by case basis.

Unfortunately, unlike the Constitution and the ICCPR, the ACHPR on its part fails to give a precise period for the pre-charge detention of suspects. Nonetheless, if the decision in *International Pen and Others v. Nigeria* is anything to go by, it will be safe to conclude that the period permitted under the Act is inconsistent with the right to liberty and security under the ACHPR.

Notably The CFRN, the ACHPR and the ICCPR all have sections that limit the right to freedom of expression, particularly in the interest of defence, collective security, and national security, and for the protection of reputation of others. This makes encouragement of terrorism under the TPA 2011(as amended) consistent with the Constitution, the ACHPR and the ICCPR. However, their requirement for the legality of law that limits the right to freedom of expression differs. While the Constitution provides that any law limiting freedom of expression must be reasonably justifiable, the African Commission in the case of *Ghazi Sulieman* demands that a restraint on the right of expression must not go beyond the limits necessary for that purpose and must be consistent with the States obligation under the African Charter. The requirement of the ICCPR is that the restrictions/limitations on freedom of expression must be provided by law and must be necessary. The HRC have explained further that the law must be formulated with sufficient precision to enable an individual regulate his or her misconduct. Generally speaking, the couching of the provision of encouragement of terrorism under S.5 TPAA 2013 is not precise. It will be recalled that the writer highlighted this as an area that requires urgent review and amendment. The writer is of the view that although the encouragement of terrorism under the Act is consistent with the Constitution, the African and the ICCPR, the ways and manners which the Police apply these in practice in Nigeria is questionable. The writer's also notes from the assessment that the ICCPR (the Human Right Committee) are generally more exacting than the ACHPR and the African Commission's decisions.

Generally speaking, the assessment of the Act by reference to Nigeria's Constitution, the African Charter and the ICCPR shows that most of the legal measures adopted against terrorism under the Act are consistent with the Nigeria' obligations under these statutes. The problem is that they are flouted and misused in practice by those in power. It can be argued that the TPA 2011 is not primarily the problem, but the application of the counter-terrorism measures under the TPA in practice. For example the indiscriminate/arbitrary arrest of terror suspects, prolonged pre-charge detention of suspected terrorists beyond the time permitted by law, and the imprecise phrasing of definition of terrorism and encouragement of terrorism under the Act. This is unacceptable and cannot continue especially when it goes against Nigeria's domestic, regional, and international constitutional obligation. The growing concern in Nigeria is how do we stop or at least reduce the human rights infringements committed by government forces under the name of fighting terrorism? In the writers view, what Nigeria needs to make her counter-terrorism actions human right compliant is a practical strategy that checks the excesses of government agencies like the Police/Military. This strategy and other recommendations/proposals will be put forward in the later chapters of this thesis. But before then an assessment of the UK's existing legal measures in preventing terrorism by reference to its domestic, regional, and international constitutional obligations will equally be discussed in the next chapter.

CHAPTER 10

AN ASSESSMENT OF THE TERRORISM ACT 2000 BY REFERENCE TO THE UNITED KINDGOM'S DOMESTIC, REGIONAL, AND INTERNATIONAL CONSTITUTIONAL OBLIGATIONS

1. Introduction

In the preceding chapter, the writer analysed and assessed Nigeria's existing legal measures in preventing terrorism by reference to its domestic, regional, and international constitutional obligations. In the same way, this chapter will undertake a similar analysis and assessment of the UK's legal measures in preventing terrorism under the Terrorism Acts 2000/2006 by reference to the Human Rights Act 1998, the European Convention on Human Right (ECHR) and the International Covenant on Civil and Political Right (ICCPR). The aim is to determine whether the Terrorism Acts 2000/2006 unnecessarily infringe human rights provisions under any of these statutes, and what challenges can be made to the constitutionality of the Act on both human rights and other legal `grounds? In addition, this chapter will explore legal measures adopted under the UK Terrorism Act which Nigeria can learn from.

The assessment has become imperative because measures adopted by the State to counter-terrorism have themselves often posed serious challenges and sometimes devastating consequences to human rights and the rule of law. These measures also threaten the primary kernel of the international human rights framework and perhaps represent one of the most serious challenges ever posed to the integrity of international human rights after the Second World War.[821] In juxtaposing the UK's TA 2000 by reference to the Human Rights Act 1998, ECHR and the ICCPR, five key provisions of the Act will be considered. These are the definition of terrorism, arrest, pre-charge detention, proscription, and encouragement of terrorism.

This chapter is divided into two main sub-sections. The first part discusses the UK's domestic, regional and international obligations under the Human Rights Act 1998, the ECHR, and the ICCPR while the second part assesses the UK's anti-terror measures under the Terrorism Act of 2000 and 2006 by reference to the Human Rights Act, the ECHR and the ICCPR.

[821] Assessing Damage, Urging Action, Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism, and Human Rights (2009) An Initiative of International Commission of Jurist, Geneva Pg V http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/16_02_09_ejp_report.pdf Accessed 14th October, 2014

2. An exploration of the United Kingdom's domestic, regional, & international obligations under the Human Rights Act 1998, the ECHR, and the ICCPR

States have a positive obligation to protect its citizens from terror attacks and human rights violations. The government of United Kingdom has fulfilled this obligation by enacting several anti-terrorism statutes that criminalizes acts of terror.[822]The UK does not have a single written Constitution that spells out its citizens' rights. Much of what can be regarded as the UK's Constitution can be found in Statutes, Acts of Parliament, Court judgements, Treaties, protocols, Covenants, and European Union (EU) law. Nonetheless, the UK Parliament enacted the Human Rights Act 1998, which incorporates the European Convention of Human Rights (ECHR) into domestic law. The Act came into force on 2nd October 2000. This is the closest the UK has to what looks like a Constitution aside from the Bill of Rights 1689. The Human Rights Act 1998 gives further effect to the rights and freedoms guaranteed under the ECHR.

S.3 (1) HRA stipulates that; "*so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights*."[823] This section of the HRA 1998 imposes an obligation on the Courts in the UK to read and give effect to primary and secondary legislation in a manner that that is compatible with the convention rights- so far as it possible to do so.

Furthermore, S.2 of the HRA provides that a court or tribunal determining a question which has arisen in connection with a Convention right must take into account a judgment, decision, declaration or advisory opinion of the European Court of Human Rights, opinion of the Commission given in a report adopted under Article 31 of the Convention, decision of the Commission in connection with Article 26 or 27(2) of the Convention, or the decision of the Committee of Ministers taken under Article 46 of the Convention so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.[824] Interestingly, the UK courts have departed from judgements of the ECrtHR on a number of occasions.[825]

[822] Terrorism Act 2000, Anti-terrorism Crime and Security Act 2001, Terrorism Act 2006, Protection of Freedom Act 2012 etc
[823] HRA 1998
[824] S. 2(1)(a)-(d)
[825]*Regina v. Secretary of State for the Home Department (Appellant)ex parte Limbuela (FC) (Respondent*) [2005] UKHL 56; *EM (Lebanon) v Secretary of State for Home Department* [2008] UKHL 64; *R v Spears* [2002] UKHL 31;

The Supreme Court in *Manchester City Council v Pinnock*,[826] as per Lord Neuberger held that: "*the Court is not bound to follow every decision of the European Court of Human Rights. Not only will it be impracticable to do so, but it would sometimes be inappropriate, as would destroy the ability to the Court to engage in the constructive dialogue with the ECrtHR.*"

Similarly, the Supreme Court in *R v Horncastle & Ors*[827] refused to follow the decision of the ECrtHR in *Al-Khawaja and Tahery v UK*[828] concerning the use of hearsay material in criminal cases on the basis that the Court failed to appreciate the English Court procedure.

Section 4 of the Human Rights Act provides that if a higher court (such as the High Court, Court of Appeal or Supreme Court) considers that a provision in an Act of Parliament is incompatible with human rights, it can make a declaration of incompatibility. And if a court finds the UK legislation to be incompatible with human rights, it does not affect the validity of the legislation. It is up to Parliament to decide whether or not to amend the relevant legislation. No judicial authority has the right to nullify an Act of Parliament or to treat it as void or unconstitutional because it violates the HRA/ECHR.

Thus, the UK's obligation under the Human Rights Act is that all statutes are to be interpreted as far as possible compatible with the Convention rights. This in effect means that that they must develop a common law compatible with the Convention rights, taking account of Strasbourg case law.[829] Secondly, with the enactment of the HRA it has become unlawful for a public authority to act in a way which is incompatible with a Convention right. This alone has changed the face of the UK law as more concrete protection is available to offenders' for example, terrorist suspects, asylum-seekers and gays. But as earlier stated, the Parliament is not subject to any legal obligation to respond to a declaration of incompatibility under the HRA. But despite its achievements, the HRA has attracted many criticisms. Critics describe the HRA as "a barmy law which the undeserving have used to gain perks and pay-outs," "a charter for the chancers that makes mockery of Justice," "a wretched Act" and a "villains charter."[830]

Lord Mence in *Doherty v Birmingham City Council* said *'S.2 of the HRA requires the Court to take into account decisions of the ECrtHR not to necessarily follow them.' [*2008] UK HL 57

[826] [2010] UKSC 45 Para 46

[827] [2009] UKSC 14

[828] [2009] 49 EHRR 1

[829] Ministry of Justice, Human Right Act 1998 https://www.justice.gov.uk/human-rights accessed 8th October, 2014

[830] Hugh Tomlinson QC, 'Human Rights Act; The Ugly, the Bad and the Good,' Matrix Chambers (2000) Griffin Buildings Gray's Inn London WC1R 5LN
http://www.adminlaw.org.uk/docs/SC%202010%20by%20Hugh%20Tomlinson.pdf Accessed 20th Sept 2014

Others have argued that the government have not offered a convincing reason for its continuation.[831]

Prior to the enactment and coming into force of the HRA 1998, the Courts in the UK often relied on the European Convention of Human Rights for provisions relating to the protection of human rights and fundamental freedoms. The European Convention on Human Rights is a treaty signed in 1950 by the then members of the Council of Europe. The Council of Europe prepared the ECHR for two main reasons. The first was to prevent the repetition of the horrors of the Second World War. The second was to protect States from Communist subversion.[832] The ECHR was signed by twelve States on 4 November 1950. The UK was one of the first members of the Council of Europe to ratify the Convention when it passed through Parliament in 1951. The Convention entered into force on 3rd September 1953. However, it is important to note that it was not until 1966 that the UK granted what is known as "individual petition," that is the right of individuals to petition the European Commission of Human Rights in respect of alleged breaches of their Convention rights by the UK government.

Art 1 of the Convention imposes a positive and negative obligation on the Contracting Parties to the convention. It provides that '*the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention.'* What this means in effect is that Contracting Parties are under an obligation not to infringe the rights protected in the Convention and to apply the Convention rights within its jurisdiction. Some of the rights and freedoms protected under the Convention include the right to life, prohibition of torture, right to liberty and security, freedom of expression, freedom of thought, conscience and religion, freedom of assembly and association amongst others. The EcrHr in *X & Y v Netherlands*[833] held that the State has a general duty to protect human rights including putting into place a proper legal framework for criminalising certain acts that violates human rights. Similarly, the EcrHR in *Osman v UK*[834] held that 'the States obligation with respect to Article 2(1) of the Convention extends beyond its primary duty to secure the right to life by putting in place effective criminal law to deter the commission of criminal offence but may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from criminal act from

[831] ibid
[832] Bernadette Rainey, Elizabeth Wicks, and Clare Ovey, *The European Convention on Human Rights* (Oxford 6th edn, 2014) Pg 3
[833] Application no, 8978/80 March 1985 Para 24-30
[834] Case no 87/1997/871/1083 28TH OCT, 1998 Para 115.

another individual. The substantive guarantee in the Convention has been supplemented by the addition of further rights by the First, Fourth, Sixth, Seventh, Twelfth, Thirteenth Protocols to the Convention. These Protocols are binding upon those states that have ratified them.[835] As earlier stated, the enactment of the HRA 1998 has increased the power of the Courts in the UK to provide a remedy for the breach of the Convention. It is however important to note that even though the European Court's jurisprudence has a considerable effect upon the national law of the contracting parties as per the protection of human rights, the UK retains its Parliament's sovereignty. Thus, the declaration of incompatibility of a Statue with the Convention right by a Court of competent jurisdiction does not affect the validity of the law. Furthermore,

It should be noted that the domestic law on human rights in the UK is primarily the HRA 1998. It incorporates into UK law the ECHR. So substantively the law on the right to liberty i.e. Article 5 of the ECHR at regional, European level will be the same as the domestic law of the UK. Procedurally, the application of the ECHR law to UK law may be slightly different. For example, section 2 of the HRA 1998 does not oblige the UK courts to take the law at European level into account – only 'to have regard to' it. In practice the UK courts do take it account, but technically it's only persuasive, not binding. And there is the issue of the relevance of ECHR law to existing UK domestic law. Which takes priority, if at all? The weight attached to each – one might be a decision of the ECtHR, another might be a decision of the UK Supreme Court – is a matter for the court. That said, the applicant may 'appeal' from the UK Supreme Court to the ECtHR, where of course the UK domestic law does not apply. The court will only consider its own law.

The United Kingdom is also a signatory to the ICCPR which was adopted by the United Nations General Assembly in 1966 in reaction to the violation of human rights during the Second World War. The UK signed and ratified the Covenant on 16th September 1968 and 20th May 1976 respectively.[836] The UK is yet to ratify the First Optional Protocol which gives an individual the right to make a complaint to the UN Human Rights Committee on the violation of their rights under the Covenant. However, as a

[835] David Harris, Michael O'Boyle, Edward Bates, and Carla Buckley, *Law of the European Convention on Human Rights* (Oxford 3rd edn, 2014) Pg 3

[836] United Nation Treaty Collection UNTC
International Covenant on Civil and Political Rights New York, 16 December 1966
https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtdsg_no=iv-4&lang=en Accessed 10TH August 2014

State party to the Covenant, the UK is obliged under Art 2 (1)[837] to guarantee the protection of rights under ICCPR.[838]

Furthermore, Art.2 (2)-(3) of the ICCPR obliges State Parties to adopt legislative, judicial, administrative, educative, and other appropriate measures in order to fulfil their legal obligations under the Covenant. According to the UN Human Rights Committee, it is important to raise levels of awareness about the Covenant not only among public officials and State agents but also among the population at large.[839]

Having highlighted the implication and significance of the UK's constitutional obligations under the HRA 1998, the ECHR, and the ICCPR, the next part will examine the rights that could be affected by the arrest and detention of terrorist suspects, proscription of terrorist organisation, and encouragement of terrorism. The assessment will be done by paying particular attention to the following rights; liberty and security, assembly, association, and freedom of expression.

3. An assessment of key provisions under the TA 2000 & 2006 by reference to the HRA 1998, the ECHR, and the ICCPR

3.1 Definition of terrorism

In assessing the definition of terrorism under the TA 2000 by reference to the HRA 1998, the ECHR and the ICCPR, the writer is interested in finding out whether the definition of terrorism is consistent with the provisions of these statutes.

Firstly, it should be noted that the Human Rights Act does not define terrorism. The definition of terrorism in the UK is as contained under the S.1 of the T.A 2000. However, the Human Rights Acts expressly provides that so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights. This suggests that in interpreting the provisions of the T.A 2000, including the definition of terrorism, it must be read in such a way to be compatible with the Convention

[837] Art 2 (1) reads "*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*."

[838] The UK has no plans to incorporate the Convention into its domestic legislation. Human Rights Committee Relies To the List of Issues (CCPR/C/GBR/Q/6)
To be Taken Up In Consideration of the Sixth Periodic Report Of The Government of the United Kingdom of Great Britain and Northern Ireland (CCPR/C/GBR/6 [13 June 2008]

[839] Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004). Para 7

Rights (ECHR). Failure to do this does not affect the validity, continuing operation or enforcement of any incompatible primary or subordinate legislation[840]

Furthermore, S.4 of the HRA provides that if a court finds the provisions of primary legislation, for example the Terrorism Act, incompatible with the HRA, it can only make a declaration of compatibility. This declaration of incompatibility does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given and is not binding on the parties to the proceedings in which it is made.[841] It is left to the Parliament to change it. Several reasons could be adduced behind S.4(6) of the HRA. Chief among these are that it is necessary for preserving the sovereignty of the Parliament and for the prevention of abuse from Judges. This is understandable, as no nation will want to leave it sovereignty in the hands of external forces.

Furthermore, Art. 7 of the HRA clearly provides that "*no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."* This in effect means that no-one can be found guilty of a crime that was not a crime under the law at the time it was committed.

Going by the above analysis, the definition of terrorism under the TA 2000 will be compatible with the HRA as long it is read and given effect in a way which is compatible with the ECHR.

The European Convention of Human Rights (ECHR) does not provide a definition for terrorism either. The definition of terrorism within the European Union (EU) is as provided by the European Council Framework Decision Combating Terrorism[842] It is worth noting that the

[840] S.3(2)(b) and (c) HRA 1998
[841] S.4(6)(a)-(b) HRA 1998
[842] Art 1 (1) of the Framework Decision directs each Member State to take necessary measures that will ensure that the intentional acts such as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of: seriously intimidating a population, or unduly compelling a government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation, shall be deemed to be terrorist offences."
Under Art 1(a)-(i) – this include; (a)attacks upon a person's life which may cause death;(b) attacks upon the physical integrity of a person;(c) kidnapping or hostage taking;(d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;(e) seizure of aircraft, ships or other means of public or goods transport;(f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;(g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger

definition of terrorism under the TA 2000 captures acts that are regarded as terrorism under the EU Framework. It is important to make clear that the aim of this thesis is not to compare the definition of terrorism under the TA 2000 with the definition provided by the European Council Framework Decision Combating Terrorism but rather it is to determine whether the definition provided by the Terrorism Act is consistent with provision(s) of the ECHR.

Art 7 (1) of the ECHR provides that before any person can be held for a criminal offence on account of any act or omission under the HRA, such offence must constitute a criminal offence under national or international law at the time when it was committed. This simply means that before the State can hold anyone liable for a crime, the offence must be expressly provided for under its national law or international law. Since the definition of terrorism is expressly provided under the Terrorism Act 2000, it becomes legal to arrest anyone that commits an offence within the scope of its definition of terrorism. Based on this analysis, it will be right to say that definition of terrorism under the T.A 2000 satisfies the requirement the legality under the ECHR.

Another fundamental requirement of national or international penal law is that it must be accessible and precise. The question is; is the definition of terrorism under the TA 2000 precise?

In interpreting statutes, the Court in *A v Secretary for Home Department*[843] held that where fundamental human rights is directly an issue, the Court must be prepared to take a strict view of proportionality and justification in interpreting the law.

The Supreme Court in *R v Gul* put to rest the issue of "broadness and ambiguity" of the definition of terrorism under the Act. Citing the case of *R v F*,[844] the Supreme Court admitted that the definition under the Act is wide but that 'it was 'indeed intended to be very wide.'[845] The Court held that unless it is established that the natural meaning of the legislation conflicts with the European Convention on Human Rights or any international obligation, the Court will

human life;(h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;(i) threatening to commit any of the acts listed in (a) to (h).
Council Framework Decision of 13 June 2002 on combating terrorism Official Journal L 164 , 22/06/2002 P. 0003 – 0007 http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32002F0475&from=EN Accessed Sept 2014

[843] [2005] 2 AC 68
[844] [2000]QB 960, Para 27-28
[845] [2013]UKSC 64 Para 38

interpret the meaning of the definition of terrorism in its statutory legal and practical context.[846] In the writers view, this judgement raises some questions about the principle of legality in criminal law under *Nuella poena Sine lehe Certa* (there is no punishment without a definite law). The S.C emphasized that there was no rule in international law that requires it to read down S. 1 of the 2000 Act.[847] The rationale behind this decision is because of the 'protean nature' of terrorism. Having a broad definition of terrorism gives the State ability to accommodate the ever changing nature of the offence.

Equally, the ICCPR does not define terrorism. Nevertheless, Art 2(2) of the Covenant which provides that;

> "*Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant*."

Since terrorism directly affects the enjoyment of the rights under the ICCPR, going by Art.2 of the Covenant, States are arguably authorized to enact terrorism law in order to guarantees the rights under the Covenant. The main requirement of such a law apart from being in accordance with the provisions of the Covenant is that it must be "necessary" (necessity). As earlier stated, in international law the doctrine of necessity requires that the law must respond to a pressing social need and must be proportionate to the aim pursued. There must be a rational link between the law and the objective it seeks to limit. The IRA terrorist attacks and other terrorist attacks in the UK justify the enactment of the T.A 2000 thereby fulfilling the doctrine of necessity required of it.

Having fulfilled the doctrine of necessity, the next question will be to find out whether the definition of terrorism under the Act is in agreement with Art.15 of the ICCPR. Art 15 ICCPR provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.[848] The U.N gave further amplifications to Art.15 in its Resolution A/RES/63/185 2008 that all states must ensure that their laws criminalising acts of terrorism

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[846] ibid

[847] Ibid Para 45

[848] Art 15(2) further provides that "*Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations*."

are accessible, formulated with precision, non-discriminatory, non-retroactive and in accordance with international law, including human rights law.[849]

Juxtaposing the definition of terrorism under the TA 2000 with Art 15 of the ICCPR and the yardstick specified by the UN Resolution A/RES/63/185 2008, the writer found that the definition of terrorism under the Act does not discriminate on the ground of race, colour, sex, language, religion or social origin and it does not apply retroactively therefore making it consistent with the ICCPR.

With regards to precision, the UN HRC has not given a ruling or its opinion on the definition of terrorism in the U.K. Nevertheless in its 3176th and 3177th sessions, the UN Human Rights Committee expressed concerns about the wide definition of terrorism under the Canadian Anti-terrorism Act.[850] The Committee criticised the Act for conferring a broad mandate and powers on the Canadian Security Intelligence Service (CSIS) to act domestically and abroad, thus potentially resulting in mass surveillance and targeting activities that are protected under the Covenant without sufficient and clear legal safeguards. The UN HRC further clarifies that any measures adopted by member states to counter-terrorism must comply with their obligation under international law, in particular human rights and humanitarian law.[851] Going by the decision of the UN HRC on the Canadian definition of terrorism, a wide definition of terrorism without sufficient and clear legal safeguards would be incompatible with Art 15 of the ICCPR.

According to Bates, international law obliges States to prevent terrorism but fails to define the concept itself.[852] States are left alone to define terrorism in their domestic anti-terrorism laws. This has created a lot of problems for states in criminalising some acts as terrorist offences. Much of this has been discussed under the analysis and assessment of the definition of terrorism in previous chapters of the research. The decision of the Supreme Court in *R v Gul* put to rest questions regarding the preciseness of the definition of terrorism in the U.K**.** Nonetheless, the writer is of the view that whatever definition given by the state must be consistent with the state's domestic, regional and international constitutional obligations and must also conform to human rights provisions and international law. Equally, rules of interpretation plays a fundamental role in the administration of justice, as they govern the primary activity of the

[849] A/RES/63/185 Para 18 2008

[850] Concluding observations on the sixth periodic report of Canada at its 3176th and 3177th meetings (CCPR/C/SR.3176 and CCPR/C/SR.3177), held on 7 and 8 July 2015

[851] General Comment no. 29, on states emergency, adopted on 12 July, 2001.

[852] Elizabeth Bates, *Terrorism and International law; A Report of the IBA Task Force on Terrorism* (Oxford 2012,) Pg. 1

judge and the construction of the law, and ultimately help determine the result.[853] Consequently, the role of domestic courts in the application and interpretation of international law needs to be done in such a way that the human rights of suspects are not put in jeopardy whilst defining terrorism.

3.2 **Arrest**

The T.A 2000 gives the Police powers to arrest based on 'reasonable suspicion.'[854] This allows the police to act quickly in countering terrorist threat. However critics have argued that this power leaves too much discretion to the arresting officer. The question is does the power of arrest under the Act engage any provision under the HRA, ECHR, or the ICCPR, especially the right to liberty and security of persons?

Art 5 of the ECHR guarantees the right to liberty and security. Article 5 (1) provides that; "*everyone has the right to liberty and security of person. No one shall be deprived of his liberty….''* However this right is not absolute and is subject to six limitations.

Art 5 (1) goes further to provide that the right to liberty and security could be limited "*in accordance with a procedure prescribed by law- based on reasonable suspicion of having committed an offence*."[855]

The fundamental principle underlying the obligation to act in accordance with a procedure prescribed by law is legal certainty[856] that is, the law interfering with rights must be sufficiently precise to enable an individual to regulate his conduct.[857] Any interference with a right prescribed by law requires that the law justifies the interference by providing a discerning legal basis for the interference,[858] the law must be adequately accessible, and must be formulated in a way which is sufficiently foreseeable.[859]

Since the ECHR permits an accused to be arrested based on "reasonable suspicion" under a procedure prescribed by law, it is safe to conclude that an arrest under the 2000 Act is consistent

[853] Helmut Philipp Aust, Alejandro Rodiles, Peter Staubach, 'Unity or uniformity? Domestic courts and treaty interpretation' (2014) Leiden Journal of International Law L.J.I.L. 75
[854] S.41(1) T.A 2000
[855] Art 5(I)(c)
[856] Richard Clayton, 'The Human Rights Act six years on: where are we now?(2007) European Human Rights Law Review 11
[857] Lord Clyde in *De Freitas v Ministry of Agriculture* [1999] 1 A.C. 69 para 112
[858] *R (On the Application of Munjaz) v Merseyside Care NHS Trust*, [2006] 2 A.C. 148
[859] *Sunday Times v United Kingdom*, N° 6538/74, Judgement of 26 April 1979, para. 49.

with the power of arrest under the ECHR because the power of arrest given to the police under the TA 2000 is expressly prescribed by the law.

The European Court of HR in *in Fox, Campbell and Hartley v U.K*[860] clarified the reasonableness of the suspicion justifying terrorism arrest cannot always be judged according to the same standards as are applied in dealing with Conventional crimes.' The Court however held that the exigencies of dealing with terrorism crimes cannot justify stretching the notion of "reasonableness" to the point where the essence of the safeguard secured by Art 5(1)(c) is impaired. The Court observed that:

> "*Terrorism crime falls into a special category, because of its attendant risk to life and human suffering, the Police are obliged to act with outmost urgency in following up all information, including information from secret sources. The Police may frequently have to arrest suspected terrorists on the basis of the information which is reliable but which cannot be revealed to the suspect or produced in open Court to support a charge."*[861]

The Court ruling in the above case suggests that with regards to counter-terrorism, an arresting officer does not *senso stricto* have to reveal to the suspect or the Court the information used in making an arrest. Nonetheless, the court warned that care must be taken as not to abuse the "reasonableness" under Art 5(1)(c). The Court based its decision on the ground that the Convention should not be applied in such a manner as to put "disproportionate difficulties" in the way of the Police officer of the Contracting State in taking necessary measures to counter-terrorism.[862] And although the Contracting Party cannot be asked to establish the reasonableness of suspicion for an arrest, the Court must be enabled to know whether the essence of the safeguards under Art 5(1)(c) has been impaired. This could be done by the respondent government simply furnishing the Court some fact or information capable of satisfying the Court that the accused was reasonably suspected of committing the alleged offence. The Court added that this is more necessary where the domestic law does not require reasonable suspicion.[863]

In addition, the ECrtHR in Court in *Winterp v Netherlands*[864]held that ascertaining the lawfulness of an arrest is a matter for the national Court to determine whether the law has been complied with in making the arrest.

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[860] 30TH August 1990, 12244/86
[861] Ibid Para 32
[862] Ibid Para 34
[863] ibid
[864] [1979] A 33, 2 ECHR 387

From the above assessment, it is clear that the ECHR permits the lawful arrest of a terror suspect based on reasonable suspicion of having committed an offence, however Art 5 (3) provides that the accused must be brought '*promptly*' before a judge or other officer authorised by law to exercise judicial power[865] and tried within a 'reasonable time.' The ECHR does not give a meaning to the word 'promptly.' Art. 5(4) also provides that 'everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided *speedily* by a court and his release ordered if the detention is not lawful. The right to be brought promptly before a judge or a judicial authority will be discussed in details under pre-detention below.

The ICCPR of which the UK is a state party also guarantees the right of liberty and security of persons. Art 9 provides that 'everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.'

Art 9(3) also provides further that "*anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release*."

As stated previously, the UK is not party to the Optional Protocol I, thus the UN Human Right Committee has not had the opportunity to give a ruling upon the UK's compliance with its obligations under the ICCPR with respect to individual applications.

The UN HRC have in a number of occasions argued that determining the lawfulness of an arrest under the Covenant must be assessed on a case by case analysis.[866] Much of these has been discussed in the previous chapter. The UN HRC provided some guidance in assessing whether Art 9 has been complied with. These are that it must be appropriate, just, predictable (proportionate) and necessary.[867] If the law fails any of these tests, the HRC will deem it 'unnecessary' and 'unreasonable' and not fit for the purposes of Art 9(1). The wording of Art 9 clearly demands that once the procedure for an arrest is expressly established by the domestic

[865] The words "a judicial or other authority" mean a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence. UN General Assembly Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment A/RES/43/173 76th plenary meeting 9 December 1988 http://www.un.org/documents/ga/res/43/a43r173.htm accessed 20th October 2014

[866] *Mukong v Cameroon*, Communication No.458/1991, UN Doc.CCPR/C/51/D/4581991 Para 9; *A v Australia*, UN Doc.CCPR/C/59/D/560/1993

[867] *Hugo Van Alphine v Netherlands* Communication No. 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (1990).

law, it becomes lawful. Consequently, it is safe to conclude that power of arrest based on reasonable suspicion under the TA 2000 is consistent with the power of arrest as envisaged under the ICCPR. Although as stated by the HRC, the law must not be inappropriate, unjust, must be proportionate and necessary.

As expected, the ICCPR provides safeguards to prevent abuse. Anyone arrested under the Covenant must be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.[868] Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.[869] Furthermore, all persons deprived of their liberty (arrested) shall be treated with humanity and with respect for the inherent dignity of human persons.[870]

It is important to note that the ICCPR allows State parties to derogate from their obligation under the Covenant In times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.[871]Similar to the Art 15 of the ECHR, the derogation here must be proportionate to the terror threat. The first requirement for derogation under the ICCPR is that it must be officially proclaimed by the derogating State. Measures taken during this period of derogation must be such that are strictly required by the exigencies of the situation and they must be consistent with the State's other international obligations.[872] The derogation must not discriminate on the grounds of race, colour, sex, language, religion or social origin.

The UN Human Rights Committee stated that the derogation under the Covenant must be on an 'exceptional and temporary nature.' [873] The Committee explained that the requirement of 'proclaiming a state of emergency' is for the maintenance of the principle of legality and rule of law when they are most needed.[874]Derogation under the ICCPR does not include the right to life, torture, slavery or servitude, imprisonment from failure to fulfil a contractual obligation, and retroactive punishment.[875]

[868] Art 9(2) ICCPR
[869] Art 9(5)ICCPR
[870] Art 10 (1) ICCPR
[871] Art 4(1)
[872] ibid
[873] Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001)
[874] Para 2 Ibid
[875] Art 4(1)

3.3 **Pre-charge detention**

The right to personal liberty has been described as the "the most elementary and important of all common law rights."[876] On the other hand, prolonged-detention of suspect without charge or trial is one of the more draconian measures a state can adopt in counter-terrorism.[877]

As established under the power of arrest in the preceding sub-section, Art. 5 of the ECHR guarantees the right to liberty and security is subject to limitations. The limitations on the right to liberty and security under the ECHR include 'the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence.'[878]

This clearly shows that the ECHR permits the lawful detention of a terror suspects under its limitation section of Article 5. Nevertheless, Article 5(1) requires that the deprivation of liberty must be in accordance with a procedure prescribed by law. As a safeguard against abuse, Article 5(2) also provides that a person detained must be informed "promptly" of his reason for his arrest and any charges against him. While Art 5(3) stipulates that every person detained must be brought *promptly* before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a *reasonable time* or to release pending trial.

The ECHR so far has not given a precise definition of the word "promptly" in terms of a specific limit of time which the defendant must be brought before a judge. The ECrtHR in *Brogan v UK*[879] was of the opinion that ordinarily this period should not be longer than four days or where the accused had to be hospitalized, five days. However the Court added that promptness must be assessed in each case according to it special features and the significance to be attached to those features can never be taken to the point of impairing the very essence

[876] Fullagar J in *Trobridge v Hardy* [1958] 94 CLR 147, 152
[877] Daniel Moeckli, *Human Rights & Non-discrimination in the 'war on terror'* (Oxford Uni Press, 2008) Pg 3
[878] Art 5(1)(a)-(f) Other include the lawful detention of a person after conviction by a competent court; the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; and, the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country
[879] Application no 11209/84 1987

of the right guaranteed by Art5(3).[880] The EcrtHR reached a similar decision in *Wemhoff v Germany.*[881] The Court in this case held that the issue of "promptness must be assessed according to each case." Although the EcrtHR in *Brogan v UK*[882] held that detaining the suspects for more than four days 6 hours did not satisfy the requirement of "promptness" under Art.5 Para 3. The Court explained that because of the difference in the meaning of the word "promptly" in English and French-the Court must interpret them in a way that reconciles the meaning of the term as far as possible with the aim and objective of the Treaty.[883] The UK government in this case argued that because to the nature and extent of terrorist threat in the country, the pre-charge detention was an indispensable part of an effort to counter-terrorism. Other reasons adduced by the Government includes the difficulty in obtaining evidence in terrorism cases, time to undertake scientific examination, time to correlate evidence from other detainees, and to liaise with other security forces.[884] This argument was dismissed by the Court on the basis that attaching sufficient importance to the special nature of terrorist offences to justify lengthy period of detention would be an unacceptably broad interpretation of the meaning of the word 'promptly.'[885]The Court remarked that 'judicial control of interference by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Art 5(3) which is intended to minimize the risk of arbitrariness. [886] The overall intention of the ECHR on liberty and security is to ensure that the detention after arrest of a suspect lasts as only as necessary.

The decision of the EcrtHR in *Sher and Others v. United Kingdom*[887]is also worth mentioning here. The Court in this case dismissed the applicant's claim that their detention for 13 days was illegal as "fundamentally flawed." The claimant in this case were brought twice before a court with warrants for their further detention granted. The Court explained that the decisions of the City of Westminster Magistrates' Court to issue warrants of further detention was lawful because adequate information was provided to the applicants about the reasons for their continued detention.[888] The applicant also challenged the procedure for hearing applications for warrants of further detention the 2000 Act as incompatible with section 5 (4) and 6 (1) of

[880] Ibid para 62
[881] [1968]1 ECHR 55 Para 10
[882] [1988] Application No 11209/84 Para 57
[883] Para 59 ibid
[884] Para 56 ibid
[885] Ibid Para 34
[886] 11 EHRR 117 1988
[887] ECHR 330 (2015)
[888] Ibid Para 80-82

the Convention because although it allowed for a closed procedure, there was no system of special advocates in place. The Court ruled that the hearing of the case from 15 April was entirely open and that the closed hearing procedure was compatible with the Convention. The Court in this case cited *Ward v Police Service of Northern Ireland*,[889] where the House of Lords upheld the decision of the judge to exclude the appellant and his solicitor from a hearing on an application to extend a warrant of detention for about ten minutes to consider closed information. The ECrtHR in *Sher* emphasised that the requirement of procedural fairness under Article 5 (4) of the ECHR 'does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. As a general rule, an Article 5 (4) procedure must have a judicial character but it is not always necessary that the procedure be attended by the same guarantees as those required under Article 6 for criminal or civil litigation.[890] The Court stated that a key question for a court reviewing the legality of detention is whether a reasonable suspicion exists? It will be for the authorities to present evidence to the court demonstrating grounds for such a reasonable suspicion.[891] However, the Court specifically explained that that Article 5 (4) could not be used to prevent the use of a closed hearing or to place disproportionate difficulties in the way of police authorities in taking effective measures to counter terrorism.[892]

Going by the decisions of the European Court of Human Rights in *Sher v United Kingdom*, the pre-charge detention of a terror suspect for 14 days as provided by the TA 2000 will be consistent with the ECHR provided that the Police/detaining authorities disclose the nature of the allegations against the accused, provide the opportunity to lead evidence to refute them, and ensure that adequate information is provided to the accused about the reasons for their continued detention.

The assessment of the pre-charge detention of terror suspects under the TA 2000 by reference to the ECHR will be incomplete without discussing the implication of Art 15 of the ECHR. Art 15 of the ECHR allows the state to derogate from its obligations under the Convention in time of war or other public emergency threatening the life of the nation provided that such measures are not inconsistent with its other obligations under international law. The requirement of such derogation is that the measures taken must be to the extent strictly required by the exigencies

[889] [2007] UKHL 50
[890] Para 147
[891] Ibid Para 149
[892] Para 149-150

of the situation. The consequence of this is that an accused can be detained for up to or more than 14 days, if it can be proven to the Court that it was strictly required by the exigencies of the situation. For example, the UK government availed itself from the six days pre-charge detention of the appellant in *Brannigan and Mcbride v United Kingdom*[893] using Art 15.

The Court in this case held that:

> "*It is the responsibility of each Contracting Party to determine whether it is been threatened by an emergency. And if so, how far is it ready to go in attempting to overcome the emergency, by reason of their direct and continuous contact with this pressing need, of the moment, the national authority are in principle in a better position than the international judge to decide on both on the presence of such an emergency and on the nature and scope of derogation necessary to avert it*.'[894]

Furthermore, the Court stated that it gives a wide and unlimited margin of appreciation to national authorities in determining the nature and scope of derogation necessary to avert a public emergency. However, it is for the Court to decide and rule whether the State had gone beyond the extent strictly required by the exigencies of the crisis.[895] In this case, the Court held that the UK government had not exceeded their margin of appreciation in considering the derogation.

The EcrtHR reached a different decision in *A & Others v United Kingdom.*[896]The Court in this case found that the derogating measures were disproportionate in that they discriminated unjustifiably between nationals and non-nationals. It follows there has been a violation of Art. 5 (1) in respect of the first, third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh applicants.[897]

The requirement of pre-charge detention under Art 9(3) ICCPR is that anyone arrested or detained on a criminal charge shall be brought "promptly" before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial "within a reasonable time" or to release. This provision overlaps with Art 14(3)(c) ICCPR which provides that in the determination of any criminal charge against him, everyone shall the right to be tried without undue delay.

[893] Application no 14553/89, Ser A 258-B [1994]
[894] Para 43 Ibid
[895] ibid
[896] [2009] ECHR Application no. 3455/05) Para 190
[897] Ibid 190

According to the UN HRC:

> "*paragraph 3 of Article 9 ICCPR requires that in criminal cases any person arrested or detained has to be brought "promptly" before a judge or other officer authorized by law to exercise judicial power. More precise time-limits are fixed by law in most States parties and, in the view of the Committee, delays must not exceed a few days*."[898]

This UN HRC's decision was stressed in *Freemantle v Jamaica*,[899] where the HRC held that detaining a suspect for four days without having access to counsel violates Art 9(3).The Committee however cautioned that what constitutes reasonable time under Art 9 must be assessed and depends on a case by case basis. [900] For guidance purposes, the Human Rights Committee in *A.W Mukong v Cameroon* explained that 'remand in custody pursuant to a lawful arrest must not only be lawful but reasonable and necessary in all the circumstances.'[901] It is for the state party to show that remand in custody pursuant to a lawful arrest is "lawful", "reasonable," and "necessary." [902]The Committee also stated that where pre-charge detention is used for reasons of public security it must not be arbitrary, must be established by law, and the Court control of the detention must be available.[903]The inability of the detainees to be promptly charged for whatever reason violates Art 9 ICCPR.

Art 9(4) provides for a safeguard similar to the doctrine of *Habeas Corpus* that anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. Art 10 (1) of the ICCPR also provides that all detainees must be treated with humanity and with respect for their dignity.

Thus, a careful examination and assessment of the period of pre-charge detention under the Act by reference to the above suggests that 14days pre-charge detention is not compatible with Art 9 of the ICCPR. However, what would amount to "reasonable" and "necessary" is for the Court to decide. The rationale behind bringing an accused to court within a reasonable time is to assess the lawfulness of the detention and to determine whether the accused be released or kept in detention pending the duration of the case. In order to check the consistency of international

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[898] Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 8 (1994). Para 2

[899] [2002] UN DOC CCPR/C/68/D 625/1995

[900] *Kone v Senegal*, Communication No. 386/1989, U.N. Doc. CCPR/C/52/D/386/1989 (1994)

[901] Communication no 458/1991 Pg 181 Para 9.8

[902] *H. Van Alphen v Netherlands,* Communication 305/1998

[903] *Ibid Para 4*

law in the detention of a suspect under international law, the U.N in its resolution created the Body of Principles for the Protection of All Persons Under any form of Detention or Imprisonment. This principle re-echoes human rights guarantees for a detained person under the HRA, the ECHR and the ICCPR.[904]

3.4 Encouragement of Terrorism

The Human Right Act 1998 and the ECHR do not provide for the offence of encouragement of terrorism. However, analogy can be drawn from the limitations on freedom of expression to cover the offence of encouragement of terrorism. One of the grounds for the restriction on freedom of expression is in the interest of national security and prevention of crime.

Article 10(1) of the ECHR guarantees everyone the right to freedom of expression. The section reads "everyone has the right to freedom of expression. This right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." The phrase "*beyond frontiers"* simply means that the right extends beyond the state's jurisdiction or border of the state. This right is however qualified by the state interest under Art 10(2) HRA/ECHR. It provides:

> "*The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties* ***as are prescribed by law*** *and are* ***necessary in a democratic society****, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary*."

As previously explained under the analysis of the right to liberty, to be prescribed by law, the law must be adequately accessible so that an individual would have an indication of how the law limits their right and must be formulated with sufficient precision so that the individuals can regulate their conduct.[905] It must also be tested for '*necessity.*' This means that the law must respond to a pressing social need and must be proportionate to the aim pursued.[906]

Commenting on this, the EctHR in *Özgür Gündem v. Turkey* held that 'the effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals. In

[904] UN General Assembly Resolution 43/173 (9th Dec, 1988)
[905] *Sunday Times v UK,* [1979] 2 EHRR 245No 6538/74 Para 49
[906] ibid

determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is called for throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities.'[907]

In addition to that, in determining the term '*prescribed by law*', the EcrHR imposes a sufficient element of control over the relevant decision makers so as to avoid the exercise of arbitrary action.[908] The Court in *Handyside v UK* held that the word "*necessary*" meant that there must be a 'pressing social need for the interference.[909] The Court stated further that because of the importance of this right, the necessity for restricting them must be convincing.[910] However, member states have some margin of discretion in assessing the existence of such need.[911] It should be noted that the concept of 'margin of appreciation' was developed the ECrtHR, as such it only applies to the ECHR.

Based on the above analysis, the offence of encouragement of terrorism under the T.A 2006 is consistent with Art 10(2) of the ECHR on the basis that it is prescribed by law (the Terrorism Act 2000) and the restriction on freedom of expression is in the interest of national security and prevention of crime. The UK government also fulfils the requirement of been '*necessary in a democratic society'* as required under Art 10(2) based on terror attacks in the country inspired by jihadist teachings, extremist speeches, online jihadi forum, and hate speech websites. For example, hundreds of young Muslims including Britons have been encouraged to join Isil and have travelled to Syria and Iraq to join and fight for the terror group.[912]

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[907] (Application no. 23144/93) 19TH March 2000

[908] *Malone v. The United Kingdom*, judgment of ECHR 2-Aug-1984 (Application no. 8691/79)

[909] (5493/72) [1976] ECHR 5 (7 Dec 1976)

[910] *Autronic AG v. Switzerland*, 22 May 1990, Series A No. 178, 61*, Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

[911] ibid

[912] 'Three missing London School girls travelling to Syria to join ISIL,' *The Telegraph*, 20th Feb, 2015 http://www.telegraph.co.uk/news/uknews/crime/11424884/Three-missing-British-schoolgirls-travel-to-Syria.html accessed 12th August 2015

As discussed in the previous chapter, the ICCPR as well guarantees freedom of speech under Art 19(2).[913]Like most other rights in international law, this right is subject to certain restrictions. The restrictions permitted for freedom of expression under the ICCPR are "*such as are provided by law and are necessary for the respect of the rights or reputations of others; For the protection of national security or of public order (ordre public), or of public health or morals*.'[914]

The notion of "*prescription by law"* and "*necessity"* has been clarified under the right to liberty. This suggests for the State to justify limitation/restrictions on freedom of expression, it must first of all provide a law to that effect and the law must meet the test of necessity (strictly required by the exigencies of the situation) and proportionality, that is, the impact of the limitation must be proportionate to the objective. The ECrtHR in *Surek v Turkey*[915] clarified that national security concerns may in principle justify restrictions on the media, however these restrictions must not sweep too broadly.[916]

Other restrictions permitted for freedom of expression under Art 19(2) of the ICCPR is that the law must be for the protection of the right/reputation of others, or for the protection of national security or public order of the State or for the protection of the health/morals of others. In fact the UN in its Resolution urged its members to enact laws against expressions that encourage terrorism.[917]

Going by the above assessment, it would be safe to conclude that the provision on encouragement of terrorism under the UK TA 2006 is consistent with the ICCPR on the grounds of 'protection of national security' as per Art 19(2).

Having clarified the legality of encouragement under the TA 2006 by reference to the ECHR and the ICCPR, the main requirements of a law restricting freedom of expression under Article 10 of the ECHR and the Article 19 of the ICCPR is that the law must be adequately accessible for people to regulate their conduct and formulated with sufficient precision. The question that

[913] It reads: "*Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice*."

[914] Art. 19(3)(a)-(b)

[915] No.4 (application no. 24762/94) Para 36

[916] The ECrtHR in this case found a violation of Art. 10 on the grounds of disproportionate criminal penalties imposed in a case where a Journalist compared politicians in Turkey with Kurdistan separatists.

[917] UN Security Council Resolution 1624

needs to be asked is whether the provisions of encouragement of terrorism under the Act formulated with sufficient precision?

A detailed look at the wording of S.1 of the Terrorism Act 2006 shows that there are three requirements that must be met at for a person to commit this offence. Firstly, the accused must publish or cause another to publish a statement. Secondly, the statement that is published must be likely to be understood by some or all the members of the public to whom it is published as a direct or indirect encouragement to them to commit, prepare, or instigate an act of terrorism or a Convention offences. And lastly, the accused must at least be reckless as to whether a member of the society will be directly or indirectly induced by the statement to commit a terrorist offence.[918] S.1 (4) explained the questions how a statement is likely to be understood and what members of the public could reasonably be expected to infer from it must be determined having regard both—to the contents of the statement as a whole; and to the circumstances and manner of its publication. S. 2(4) goes further to explain what amounts to an indirect encouragement of terrorism.

Juxtaposing S.1 of the UK's TA 2006 with the prerequisite that a law restricting expression must be formulated with sufficient precision, applied only for those purposes for which they were prescribed, and must conform to the strict test of necessity and proportionality,[919] to a large extent shows that the TA 2006 presented guidance as to how a statement or expression can amount to encouragement of terrorism. While it can be argued that S.1 of the TA 2006 is lengthy, the writer is of the opinion that it provides guidance to the public as per what sorts of expressions would encourage terrorism, a yardstick for determining statements that are likely to be understood by as a direct or indirect encouragement,[920] what would include direct or indirect encouragement of terrorism,[921] as well as clarifications on how a statement is likely to be understood and what members of the public could reasonably be expected to infer as encouraging the terrorism.[922] The writer also of the view that the length of the provision of the Act on encouragement of terrorism is so that individual have a proper indication of how the law limits his or her conduct and the individual can regulate his conduct. Moreover, S.1 TA 2006 does not in any way invalidate the right to freedom of expression under the ECHR and

[918] Correspondence Terrorism Act 2006 11 April 2006 https://www.gov.uk/government/publications/the-terrorism-act-2006 Accessed 12th Oct, 2014
[919] HRC General Comments No 34, Human Right committee 102nd Session Geneva , 11-29 July 2011
[920] S.1 (1)-(2) TA 2006
[921] S.1(3) TA 2006
[922] S.1(4) TA 2006

the ICCPR. If a State decides to limits freedom of expression on the basis of national security under the ICCPR, the HRC requires the State party to specify the precise nature of the threat alleged by the person's expression and how the restriction dissipate the threat.[923] Nonetheless, because encouragement of terrorism under the T.A 2000 covers acts done in the past, it could engage non-retroactive principle under Art.7 of the ECHR and of the 15 ICCPR.

3.5 Proscription

Art 11(1) ECHR provides that "*everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests*."

In addition, the Court in *Wilson, National Union of Journalists and Others v. the United Kingdom*[924]observed that though the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, there may in addition be positive obligations on the state to secure the effective enjoyment of these rights.

The right to freedom of association and assembly under the ECHR is subject to some restrictions.

Art 11 (2) permits restrictions on the exercise of these rights other than "such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

This in effect means that restrictions on assembly and association must meet three criteria. Firstly, the State must show that the restriction is *'prescribed by law'*, that is, it must be adequately accessible and must be formulated with sufficient precision. Second it must be *'necessary'* meaning it is must fulfil the test of necessity and proportionality, and lastly it must be in the interest of national security or public safety- for prevention of crime, protection of health, morals, and freedom of others.

[923] *Park v Republic of Korea* Communication 574/1994, UN Doc CCPR/C/64/D/574/1994 (1999)
[924] [Applications nos. 30668/96, 30671/96 and 30678/96] 2 July 2002 Para 41

Interestingly, Art 11(2) allows the member of Armed forces and the Police powers to carry out the imposition of *lawful restrictions* on these rights. By lawful restrictions, this suggests that unless there is a clear evidence of violence or imminent break down of law and order, or risk to health of others during a peaceful protest or assembly, the Police may not restrict these rights.

In a terrorism related case that expressed the opinion of the Court on the right to freedom of assembly, the ECrtHR in *Makhmudo v Russia*[925]stressed that the state must not only safeguard the right to freedom assembly but must also refrain from applying unreasonable indirect restriction upon the right.[926] The Court in this case also reaffirmed that in assessing evidence and compliance with Convention receding, it is guided by the principle of '*Affirmanti Non Neganti, Incumbit Probatio'* meaning the burden of proof lies upon he who affirms, not upon he who denies. Thus, the onus is on the State authority or government to provide satisfactory explanation on the restrictions, failure of which the Court may draw inference of breach of the Convention right.[927]

The ICCPR also guarantees the right to assembly and association. Art 21 of the ICCPR closely mirrors the provisions of Art 11 of the ECHR.

Art. 21 provide that "*the right of peaceful assembly shall be recognized*." Art. 22 stipulate that "*everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interest*."

Freedom of association and the right to peaceful assembly are not absolute rights under the ICCPR. Both of them are qualified by Para 2 Art 2I and Art. 22(2).

Art 22(2) provides:

> "*No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the*

[925](Application no. 35082/04) 26 July 2007 Para 64

[926] The Court explained further that in carrying out its scrutiny of the impugned interference, it (ECrtHR) must ascertain whether the respondent State has exercised its discretion reasonably, carefully, and in good faith. It must look at the interference complained of as a whole and determine whether the interference was proportionate to the legitimate aim pursued, and also whether the reasons adduced by the national authority to justify the restrictions are relevant and sufficient. In so doing, the court must be satisfied that the national au8thorites applied standards that are conformity with the principles embodied under Art11 and their action is based on an acceptable assessment of the relevant facts.

[927] Ibid Para 68

armed forces and of the police in their exercise of this right."

Looking at Art 21 and 22, one can argue the restrictions provided gives the state power to proscribe an organisation involved in terrorism '*in the interest of national security or public safety, public order*" However, these must be prescribed by law and in conformity with the law and necessary in a democratic society.

The ECHR and ICCPR does not expressly provide for the proscription of terrorist organisation. However, proscription of terrorist organisations can be inferred from the restrictions and limitations on the right to freedom of association and the right to peaceful assembly under Art.11 of ECHR and Arts. 21 and 22 ICCPR (especially in the interests of national security, public safety, or for the prevention of disorder or crime). As earlier explained in the previous chapter, key features of the law that restricts assembly and association under Art 22. of the ICCPR and likewise under Art.11 of the ECHR are that it must be prescribed by law, it must be necessary in a democratic society for the furtherance of some interests, including the protection of public safety and national security. Looking at this within the context of the current examination, S. 3(4) of the TA 2000 provides that an organisation is proscribed under the Act if it is concerned in terrorism.[928] To be concerned in terrorism the group must commit or participates in acts of terrorism, prepare act or in acts of terrorism, promote or encourage acts of terrorism.[929] "Generally" one would assume that the protection of national interest includes protection from terrorist threats and acts of terrorism. It is safe to deduce from this argument that the proscription of terrorism groups under the Act is consistent with the ECHR and ICCPR. Nonetheless, the European Court of Human Rights in *Kadi Al Barakat Int. Foundation v Council Commission*[930] held that reasons justifying the proscription of an organisation must be given to the group or organisation, failure to do so infringe the group's right to defence. A similar decision was reached by the Court of Appeal in *A & Ors v HM Treasury*[931] where the Court also held that reasons justifying proscription and listing of an individual in the consolidated list must be provided.

It is however important to note that while the proscription of violent, extremists and terrorists' organisation might be unavoidable, caution must be exercised when restricting the right to freedom of assembly and association in order to ensure that the restrictions are not over-broad

[928] S.3(4)T.A 2000
[929] S.3(5) Ibid
[930] [2008] C-402/05
[931] [2008] ECWA CIV 1187

to limit the activities of opposition or groups that are opposed to government policies. Proscription should not be used as a diplomatic tool in the hands of the government to show support to the international community in the global fight against terrorism. Otherwise, as Anderson rightly points out, this would merely render it as a "cheap and straightforward way of achieving foreign policy objectives."[932]

Conclusion

Having assessed the TA 2000 by reference to the ECHR and the ICCPR, it is important to reiterate that the domestic law on human rights in the UK is primarily the Human Rights Act 1998 which primarily incorporates into UK law the ECHR. This is why the analysis and assessment of the TA 2000 is focussed on the ECHR and ICCPR. Accordingly substantively the law on the right to liberty and security, freedom of expression, and the right to assembly and association under the ECHR at regional (European level) will be the same as the domestic law of the UK (HRA 1998).

Going by the assessment of the TA 2000 in this chapter, it is clear that both domestic, regional and international human rights recognise that human rights are not absolute as some rights can be restricted in the interest of national security, public safety, or for the prevention of disorder or crime.

The assessment revealed that the ECHR and the ICCPR are by implication in agreement with the legal basis for making an arrest under the Act, thereby making the power of arrest consistent with the three statutes. Although the majority of the judicial decisions examined suggests that determining the lawfulness of an arrest under the Act is a matter for the court to decide and this must be done on a case by case basis. Surprisingly, the ECHR and the ICCPR gave no precise length for the period of pre-charge detention of terror suspects. The ECrtHR in *Sher v UK* justified a special regime of pre-charge detention for terrorism offences based on the special nature of terrorism offences. Nonetheless, the Court held that adequate information must be provided to the applicants about the reasons for their continued detention and this must be judicially authorised. A consistent theme in the decisions of the ECrtHR and the HRC is that, it must be done promptly and within a reasonable time. But then again, what will amount to a "reasonable time" is a matter for the court to decide and not the executive. This Judgement by

[932] David Anderson, The Terrorism Acts in 2011 op cit Pg 49

the regional and international body leaves the lawfulness of a period of pre-charge detention open for the courts to decide.

Generally speaking, the ECHR and the ICCPR all permit the restriction of human rights and freedoms in the interest of national security and for the protection for the right of others. These limitations/restrictions give backing to most of the legal measures adopted against terrorism under the Act. However, the restrictions must be necessary/proportionate.

In conclusion, borrowing the words of Bhagwati, human rights involve translating international ideas and objectives into rules.[933] These rules require clarity in formulation untypical of ideological discourse which can only be done by a strong and independent judiciary which is in tune with the ideology of human rights. Even though restrictions under the ECHR are open to judicial review, the writer is of the opinion that the judiciary must brace itself up to adopt a creative and a purposive approach in the interpretation of fundamental rights embodied under the statutes with a view to advancing human rights jurisprudence. The States must also develop counter-terrorism policies that are consistent with the protection of human rights on the domestic, regional, and international levels.

[933] P.N Bhagwati, 'Fundamental Rights In their Economic Social and Cultural Context ', in Ed, Developing Human Rights Jurisprudence; The Domestic Application of International Human Rights Norm' Judicial Clloquim in Harare (1989) London Common Wealth Secretariat, Pg 80

CHAPTER 11

PROPOSALS AND RECOMMENDATIONS FOR LAW AND POLICY REFORMS IN NIGERIA AND UNITED KINGDOM

1. Introduction

The main theme that emerges from this research is that several counter-terrorism measures adopted by Nigeria and the UK under their Terrorism Acts, in practice disproportionately infringe human rights. Nigerians have in the last seven years (1999–to 2017) witnessed gruesome attacks from *Boko Haram* terrorists and the government forces alike. Notably, the government security forces have been responsible for several serious human rights violations that could constitute war crimes in international law. While domestic, regional, and international human rights frameworks recognise that human rights can be limited in times of emergencies, it does not give the States a *carte blanche* for human rights violations. These limitations must be prescribed by law, pursue a legitimate aim, and must be proportionate and necessary to achieve that aim. Consequently, there is an urgent need for a proper balance between legitimate security interests and the protection of fundamental human rights in both countries, especially in Nigeria. The question on the mind of many Nigerians is; how do we make Nigeria's counter-terrorism law and in practice human rights complaints?

Having analysed, assessed, and compared the Nigerian and UK's legal responses to terrorism, the thesis has identified several lessons that Nigeria can learn from the UK to make her counter-terrorism approach more compatible with acceptable human rights standards. Accordingly, this chapter will be used to highlight those lessons that Nigeria could learn from the UK, and *vice-versa*. In addition to that, this chapter will be used to put forward a number of proposals and recommendations for possible law and policy reforms in Nigeria and the UK.

2. LESSONS LEARNED BY NIGERIA FROM UK'S RESPONSE TO TERRORISM

The following are the lessons that Nigeria can learn from the UK experience in dealing with terrorism as identified in this research;

2.1 The "CONTEST" strategy

Since the emergence of *Boko Haram* in 2009, Nigeria is yet to have a comprehensive strategy to tackle terrorism in the country. The absence of an effectual national security system

contributes to Nigeria's vulnerability to terrorism.[934] The writer admits that no State can completely prevent terrorist incidents from happening, nevertheless the UK's "CONTEST strategy" for counter-terrorism presents a fine and workable model for a country like Nigeria to emulate. Although not completely fool proof, the CONTEST Strategy has achieved remarkable result overtime. The aim of CONTEST is to reduce the risk to the UK and its interest overseas from terrorist attacks.[935] The Strategy is organised around four work streams; Pursue, Prevent, Protect and Prepare.[936] Each of these strands has its key functions. The purpose of 'Pursue' is to stop terror attacks in the UK and its interest abroad. This is achieved by detecting and investigating terror threats at the earliest stage and also disrupting terrorist activities before it can endanger the general public. The purpose of 'Prevent' which is the second strand under CONTEST is to address the radicalisation of all forms of terrorism. This strategy is achieved by working with a wide range of sectors in the Country including charities, faith, education, internet, health and other sectors where there is risk of radicalization. The purpose of 'Protect' is to strengthen the UK' protection and reduce its vulnerability against a terrorist attack. This is measured by an annual national risk assessment which assesses the threat faced and the country's vulnerabilities to an attack. Key objectives of 'Protect' is to strengthen the UK security, reduce the vulnerability of transport networks, increase the resilience of the UK's infrastructure, and improve protective security for crowded places. Lastly, the aim of 'Prepare' is to mitigate the impact of a terrorist attack where the attack cannot be stopped. This involves an effective and efficient response which will save lives, reduce harm and aid recovery. This strategy also involves building a generic capability to respond and recover from a wide range of terrorist emergencies, improve preparedness for the highest risk impact in the national risk assessment, an improved ability of the emergency service to work together during a terror attack and an enhanced information and communication sharing system during an attack.[937] Without doubt, the CONTEST Strategy paints a comprehensive approach to counter-terrorism which the Nigerian authorities can emulate.

[934] Freedom C. Onuoha, 'Nigeria's Vulnerability to Terrorism; The Imperative of a Counter-Religious Extremism and Terrorism (CONREST) Strategy' (Feb 2011) Peace and Conflict Monitor Pg 1
[935] CONTEST; The United Kingdom's Strategy For Counter-Terrorism July 2011 HM Government https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97994/contest-summary.pdf Accessed 28th Dec, 2014
[936] Ibid Pg 6
[937] Ibid Pg 6-15

2.2 Detailed provision on the offence of encouragement of terrorism

S.1 of the UK's Terrorism Act 2006 pictures an "all-inclusive" provision on the encouragement of terrorism which Nigeria can learn from. It is imperative that the provision on encouragement of terrorism is written in a clear and precise language because of its potential in engaging the right to freedom of expression and freedom of thoughts, conscience, and religion.[938] Unfortunately, S.5(1)(2)(a) of Nigeria's Terrorism(Prevention (Amendment) Act 2013 on encouragement of terrorism is vague and couched in imprecise terms. As previously elucidated, this section fails to explain properly the categories of statements which are likely to be understood by members of the public as directly or indirectly encouraging or inciting terrorism and a yardstick for determining how the statements or material on the internet or any printed material will support, encourage, or incite terrorism. On the other hand, a cursory look at Section 1 of UK's T.A 2006 shows that it does not only provide for the offence of encouraging of terrorism, S. 1(2) goes further to explain ways through which a person can commit the offence of encouragement of terrorism.[939] The UK TA 2006 clearly explains how a statement is likely to be understood and what members of the public could reasonably be expected to infer from it must be determined having regards to the contents of the statements as a whole, and the circumstances and manner of its publications.'[940] Furthermore, S. 1(3) goes further to explain statements that are likely to be understood by members of the public as indirectly encouraging acts of terrorism or Convention offences to include statements which 'glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences[941] and statements from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.'[942] The Nigerian TPAA 2013 does not make these clear delineations, thereby making the provision on the encouragement on terrorism vague. Remarkably, S.1 of the UK's TA 2006 provides defences against encouragement of terrorism. The Act provides that a defence for a person under this section to 'show that the statement neither expressed his views nor had his endorsement' [943] and 'that it was clear in all the

[938] S.38 & 39 CFRN 1999

[940] S.1(4)(a) and (b) Ibid
[941] S.1(3)(a) T.A 2006
[942] S.1(3)(B) T.A 2006
[943] S.1(6)(a) ibid

circumstances of the statement's publication that it did not express his view and (apart from the possibility of his having been given and failed to comply with a notice under subsection (3) of that section) did not have his endorsement.'[944] These are important provisions that Nigeria can imitate under the TPA 2011 (as amended) to make it fit for purpose. Although, it is important to add that the S.1 of the UK Terrorism 2006 is not perfect, nonetheless its flaws can be ignored compared to the serious negative effects the current section on encouragement of terrorism in Nigeria can have on freedom of expression.

2.3 Appointment of an independent reviewer of the Terrorism Act

The role of the Independent Reviewer of the Terrorism Act in the UK is of extreme importance in assessing the internal coherence, constitutionality and consistency of the Terrorism Act. This role has become inevitable and long overdue in a country like Nigeria with so many reports of human rights violations by government forces. For 35 years, the UK has appointed an Independent Reviewer to assess its Terrorism Act and make recommendations for reforms.[945] The Independent Reviewer's Role is to inform the public and political debate on the anti-terrorism law through regular reports prepared for the Home Secretary and then laid before Parliament and the general public.[946] This role is important because of its complete independence from government coupled with access to sensitive and secretive national security information.[947] An annual review of the operation of the UK's Terrorism Act 2000 and 2006 is required by S. 36 of the 2006 Act. The section stipulates that the person appointed by the Secretary of State must from time to time, carry out a review on the provisions of the Terrorism Act and report his views at least once in twelve months. The review which is usually published July of every year covers the definition of terrorism, proscribed organisations, arrest and detention, stop and searches, and terrorist offence amongst others.[948] Other functions of the independent reviewer are to consider whether the applicable rules have been complied with especially with the detention of terrorist suspects, reviewing and reporting annually to the

[944] S.1(6)(b) ibid
[945] The Terrorism Acts in 2014: Terrorism Act in 2014 Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006 by David Anderson QC September 2015 Page 3 https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2015/09/Terrorism-Acts-Report-2015-Print-version.pdf accessed 20th August 2015
[946] Independent Reviewer of Anti-Terrorism Legislation ; The Reviewer 's Role https://terrorismlegislationreviewer.independent.gov.uk/about-me/ Accessed 6th January 2015
[947] ibid
[948] Ibid

Treasury on the terrorist asset-freeze.[949] The Independent Reviewer is regularly briefed by intelligence bodies such as the M15 and the Joint Terrorism Assessment Centre whose assessment of threat he can use to inform his thinking and reports.[950]

The job of the Independent Reviewer involves travelling to all parts of the country visiting Police counter-terrorism units, detention facilities, seaports and rail port terminals. The Independent Reviewer has regular interaction with lawyers, academic bodies, security forces, and prosecutors. Furthermore, the reviewer observes police patrols, talks to detainees, and hears directly from civil society organisations. The Independent Reviewer is on social media encouraging public engagement and also gives interviews on TV and radio.[951] The Independent Reviewer serves as an "ombudsman" over the government counter-terrorism activities through regular scrutiny of the operation of the UK's counter-terrorism laws and reports their findings and recommendations to the Home Secretary and the Parliament. Creating the office of an Independent Reviewer in Nigeria, with powers similar to that of the UK's Independent reviewer would go a long way in checking the activities of the Police and JTF and minimise human rights violations by the State.

2.4 Proscription of terrorist organisations outside the country

The procedure for proscribing a terrorist organisation in Nigeria is concluded when a notice of the proscription is published in the official gazette, two national newspapers or any other place determined by the Judge.[952] Even though the TPA 2011 (as amended) covers terrorist organisations listed to be a regional and international terrorist organisation, it is clearly significant that at present only two terrorist organisations have been formally proscribed under the Terrorism (Prevention) Act 2011 and has been gazetted as the Terrorism (Prevention) (Proscription Order) Notice 2013. These are *Boko Haram* and its splinter group '*Ansaru*'.[953] This makes a mockery of the international reach of proscription of terrorist organization under the Act. Nigeria needs to at least include in its official gazette, terrorist organisations within the African Sub-region like *Al-Shabaab, Al Qaida in North Africa, and the Lord's Resistance*

[949] David Anderson, *The independent Review of Terrorism Laws* (Public Law; Sweet and Maxwell July 2014) Pg 409
[950] Ibid 411
[951] Ibid Pg 411
[952] S. 2(2) TPA 2011 as amended.
[953] Federal Republic of Nigeria Official Gazette Notice no 91 Terrorism (Prevention) (Proscription Order) Notice 2013 Vol 100 http://www.cenbank.org/Out/2013/FPRD/TERRORISM%20%28PREVENTION%29%20%28PROSCRIPTION%20ORDER%29%20NOTICE,%202013.pdf Accessed 4th January 2015

Army in its proscription list. Schedule 2 of the UK Terrorism Act 2000 gives a comprehensive list of terrorist groups within and outside which is proscribed by the Act.[954] A similar list also exists under the U.S Department of State list of Foreign Terrorist Organisations.[955] This would clearly show the public as well as the international community that these terror groups are also outlawed in Nigeria.

2.5 Respect for the rule of law and Intelligence-led counter-terrorism policy

Events in Nigeria have shown that the indiscriminate arrest, prolonged pre-charge detention, torture, and even the killing of terror suspects has not in any way reduced the activities of *Boko Haram*. If anything at all, it is counter-productive and has further increased terrorism in the Country. In 2015, the U.S Senate Intelligence Committee released a Report on Central Intelligence Agency (CIA) Torture programmes. The Report which took about three years to complete established that torture methods such as waterboarding, shackling of suspects in painful positions, and other torture methods did not in any way help to locate Osama Bin Laden neither did it help to thwart terrorist plots, but instead were counter-productive.[956] This report suggests that modern and effective ways to counter-terrorism is through intelligence gathering and not torture or abuse of terror suspects. If we are to learn anything from this, it is that there is no amount of torture of suspects that can solve the issue of terrorism, particularly in Nigeria. Nigeria needs to stop the practice whereby the Police/Soldiers torture and abuse of terrorist suspect in unofficial military detention sites. Procedural safeguards such as arrest based on reasonable suspicion, presumption of innocence, right to counsel, and the right to be tried with a reasonable time which are the hallmarks of modern day criminal jurisprudence must be obeyed.[957]More importantly, Nigeria's approach to tackling *Boko Haram* needs be driven by intelligence-led counter-terrorism as currently practiced by the UK's Security Service (M15). The M15 work with other security agencies both at home and abroad to keep pace with the threats from international terrorism.[958] The "Protect strategy" under the CONTEST is built around this approach. Nigeria can emulate this by collaborating more with foreign intelligence agencies like the UK's M15, the International Criminal Police Organization (INTERPOL), the

[954] The Proscribed Organisation (Name Change) Order 2009, Sch 2 Terrorism Act 2009
[955] U.S Dept. of State; Foreign Terrorist Organisation Bureau For Counter-terrorism http://www.state.gov/j/ct/rls/other/des/123085.htm Accessed 4th January, 2015
[956] Senate Torture Report and the CIA Reply –FOIA https://www.aclu.org/national-security/senate-torture-report-and-cia-reply-foia Accessed 4th January 2015
[957] Akin Oyebode, 'Legal Responses to the Boko Haram' op cit 2011 Pg 11
[958] M15 Security Service; Terrorism https://www.mi5.gov.uk/terrorism accessed 14 Aug 2017

Central Intelligence Agency (CIA), Federal Bureau of Investigation (FBI), and European Union Police Organisation (EUROPOL) on new methods of intelligence gathering.

Having highlighted the lessons that Nigeria can learn from the UK experience in dealing with terrorism, the next section will be used to put forward proposals and recommendations for law and policy reforms in Nigeria.

3. PROPOSALS & RECOMMENDATIONS FOR LAW & POLICY REFORMS IN NIGERIA

As revealed in this study, several legal measures adopted by Nigeria against terrorism severely curtail fundamental rights recognised under the Nigerian Constitution, the ACHPR and the ICCPR. The following proposals and recommendations will greatly assist Nigeria in making Nigeria's terrorism law and practices fit for purpose and more importantly, human rights compliant.

3.1 Downward review of the 90 days pre-charge detention period

The socio-legal assessment of Nigeria's pre-charge detention of terror suspects has shown that the 90/180 days pre-charge allowed under TPA 2011 has not in any way reduced terrorism in the country. As it currently stands, Nigeria has no justification to continue its 'excessive' 90days pre-charge detention period (subject to renewal for another 90days) under its Terrorism Act. While the government's objective of maintaining national security is understandable, the 90 days (180days) goes against the principle of necessity and proportionality. As an alternative, the writer does not recommend the 14 days of the UK TA but recommends the "four days" pre-charge detention being practiced in Sweden. The Swedish system of pre-charge detention presents a good model for Nigeria to emulate. Though the pre-charge detention of a terror suspect is not expressly provided for under the Swedish anti-terrorism legislation,[959] Chapter 24 of the Swedish Code of Judicial Procedure (SCJP) stipulates "four days" as the maximum period of time which suspects (including terrorist suspects) can be detained for.[960] The Swedish Code is enacted in such a way that torture and abuse of detainees is completely reduced. The SCJP stipulates that the Court shall hold a hearing on the issue of detention without delay and

[959] Act on Criminal Responsibility for Public Provocation, Recruitment and Training concerning Terrorist Offences and other Particularly Serious Crime (2010:299)
[960] Section 13 Swedish Code of Judicial Procedure

this must not exceed four days and when the application for the detention of the suspect is presented in court, the arrested person shall attend the detention hearing.[961]

Section 15 of the Swedish Code provides that the detention hearing of a suspect must continue without recess. The Court must not postpone the hearing unless there are exceptional circumstances to do so and the postponement must never exceed 4 days unless it is requested by the suspect. If the Court does not order the detention, the Court shall immediately rescind the arrest and the suspect must be released immediately.[962] If the court orders the detention, the Court must prescribe a time within which prosecution of the case shall be initiated.[963]

Furthermore, if a prosecution is not instituted within two weeks, the court shall hold a new hearing on the issue of detention at intervals of not more than two weeks, as long as the suspect is detained and until the prosecution is initiated. At these hearings, the court shall ensure that the inquiry is being pursued as speedily as possible.[964]

Sweden's pre-charge detention arrangement represents a consistent model with human rights safeguards available throughout the course of the detention. If Nigeria can emulate this model, the violation of terrorist detainee's right by the Police and the JTF will be reduced, if not completely eliminated. Judging from the human rights abuse committed by the Nigerian Police/JTF, "4 days" or at most a week is enough time for the Nigerian Police to get whatever information/evidence from a terror suspect before he/she is charged.

3.2 Independence of the judiciary and the creation of terrorism courts

In the opinion of the writer, the problem with Nigeria is not the law itself, most times where the laws are enacted, they are not implemented as stated. The rule of law, separation of powers and more importantly the independence of the judiciary are key components in a democracy. Unfortunately in Nigeria, these key components have only sunk in theoretically but not completely in practical terms when compared with other advanced countries.[965] As the third branch of government, the function of the judiciary is to interpret the law and administer justice. But at present, the Executive in Nigeria exercises too much control over the other arms of government including the legislature and the judiciary. For instance, the Executive decides who

[961] Section 13 and 14
[962] Section 16
[963] Section 18
[964] ibid
[965] Osita Eze, 'Human Rights in Africa; Some Selected Problems' (1984) Nigerian Institute of International Affairs, Pg 12

gets appointed as a Judge into the Federal High Court, Court of Appeal and the Supreme Court. The Executive also decides the allocation of funds to the legislature and the judiciary. The Nigerian Justice system remains under-resourced, resulting in slow court processes.[966] In addition to that, the Police in Nigeria frequently disobey court orders.[967] For the Courts to remain just and adjudicate effectively, there must zero influences over it from the other arms of government especially cases relating to terrorism offences. The Nigerian government as a matter of urgency needs to stop the practice whereby court orders are disobeyed by the Police and the JTF. Any officer that ignores a court order should be charged for contempt of court forthwith. Through this, rule of law will be protected.

Presently, the TPA 2011 (as amended) gives the Federal High Court located in any part of the country exclusive jurisdiction to hear terrorism related cases.[968] One of the weaknesses of the judiciary in Nigeria is the slow adjudication process of the courts due to congestion of cases. The Federal High Court in Nigeria is congested with cases, appeals, and election petitions and as such it might take a long while for terrorism cases to be quickly dealt with. Justice Musdapher, A former Chief Justice of Nigeria, revealed that there are more than 110,000 cases pending in the Federal High Court/High Court in Nigeria.[969] He observed that because of the congestion in courts, it takes between 15 to 20 years to litigate a case from the High Court to the Supreme Court in Nigeria.[970] This is unacceptable. As an alternative, the writer recommends the creation of specially designated courts for terrorism cases. Just as we have the Rent Tribunal Courts that deals with landlord-tenant cases, Customary Courts that deals with customary matters, Election Petition Tribunals that deal with electoral matters, Nigeria needs a "Terrorism and Other Related Matters Court" to deal with terrorism cases. This would relieve the pressure off the already congested courts in Nigeria. This will also assist in facilitating access to the criminal justice system by bringing terrorist to Court within a reasonable time.

[966] Amnesty International Annual Report 2012 Nigeria Pg 5
[967] Ibid Pg 2
[968] S.32 TPAA 2013
[969] *Daily Independent*; 'Lethargy and Delayed Justice In Nigeria Courts' http://dailyindependentnig.com/2012/06/lethargy-and-delayed-justice-in-nigerian-courts/ accessed 12th January 2015
[970] Bartholomew Madueke, 'Oguntade Other condemn Congestions in Court' *Vanguard* Oct 04, 2013 http://www.vanguardngr.com/2013/10/oguntade-others-condemn-congestion-courts/ Accessed 12th January 2015

3.2 Establishment of the "Nigerian Terrorism & Other Related Matters Commission"

Although the afore-mentioned proposals and recommendations have the potential to significantly assist Nigeria in making her counter-terrorism measures human rights compliant, realistically speaking, it is unlikely that these reforms alone will stop Nigeria from committing serious human right violations in principle and in practice. As Ekundayo rightly stated, 'no matter how well drafted a law is, it will only amount to a "paper tiger" if mechanism are not put in place to enforce or implement it.'[971]In other words, the law without an effective enforcement arrangement in place amounts to word on papers, nothing else. Until "concrete" measures are put in place, it is difficult to guarantee that Nigeria would not continue to execute, torture, arrest or detain terrorists unnecessarily. The writer strongly believes that what Nigeria needs at this moment is a practical strategy that checks the excesses of the government agencies like the Police and the Military. The writer hereby proposes the creation of a body known as "*The Nigerian Terrorism & Other Related Matters Commission*." This proposal is predicated on the writer's diagnosis and understanding of the events in the country. This Commission will serve mainly as an independent ombudsman against unnecessary human right infringements by government agencies with powers to impose sanctions and prosecute whoever is found guilty of human rights abuse. The proposed Commission is the panacea to Nigeria's human rights conundrum as far as counter-terrorism is concerned.

However in order for this body to perform its duties effectively, the National Assembly needs to vest it with powers to deal with terrorism related complaints such as terrorism arrests, continued pre-charge detention of terror suspects, proscription of an organisation, and other terrorism related human rights violations. The Commission should without prejudice to the authority of the Courts in Nigeria, have the powers to: visit and inspect prisons and other detention facilities where terrorist suspects are held in Nigeria; recommend or order the immediate release of a terrorist suspect held anywhere in Nigeria; recommend the dismissal and institute criminal proceedings against any officer of the Nigerian Police Force, Nigerian Army and the Security Services that is found to have tortured or abused or executed a terrorist suspect whilst in detention; order the immediate charge and prosecution of a terrorist detainee; order the closure of a detention site/facilities and have terrorist suspects transferred to another

[971] V. Ekundayo, 2012, op cit

prison; investigate the circumstances leading to the death of terrorist detainees and make recommendations to the government for either the prosecution of the officer involved in the killing or recommend a dismissal or demotion.

In addition to the above mentioned powers, all the security agencies in Nigeria including the Police, the Army, the Air-force, the Navy and the State Security Service should be mandated to submit a quarterly report of their counter-terrorism activities to the Commission. This report should include, *inter-alia,* a comprehensive list of terrorist suspects arrested, the number of suspects charged to court, list of terrorist(s) killed in shoot-outs with security agencies, and a list of civilian casualties. This quarterly report should also include the date the suspects are arrested, place/location of detention, and the name(s) and telephone number of the counsel, representative or relatives the terror suspect.

Having highlighted the lessons that Nigeria can learn from the UK, as well as proposals and recommendations for possible law reforms in Nigeria, the next section discusses lessons that the UK can learn from Nigeria.

4. LESSONS LEARNED BY THE UK FROM THE NIGERIAN RESPONSE TO TERRORISM

An observer of Nigeria's approach to terrorism might wonder what the country could possibly have to offer the U.K in terms of counter-terrorism lessons, having been subjected to criticisms and accusations from several human rights organisations for serious human rights violations, including the extra-judicial execution of terror suspects. This is the idea behind a comparative research, to gain insights from other jurisdiction. The following are lessons that the UK can learn from Nigeria:-

4.1 Counter-radicalisation programme

Although not linked to the analysis and assessment in this thesis, one area which the UK can perhaps learn from Nigeria is its "de-radicalisation programmes" on TV and radio. These TV and radio commercials, short plays, and jingles are aimed at sensitizing and educating the people on the negative effects of terrorism. It might sound insignificant but these T.V/radio programmes and commercials have helped in discouraging young Nigerians from joining *Boko Haram*. In fact, at least 22 female "would-be-suicide bombers" and 47 erstwhile *Boko Haram* members have voluntary embraced the government de-radicalisation programme and were

rehabilitated and reformed.[972] The writer is yet to see advert/commercial/jingles on BBC or ITV aimed at discouraging young individuals from joining terrorist groups in the UK. Even though this recommendation is already rooted under the "CONTEST strategy- Prevent," the relentless approach of the Nigerian government through the mass media aimed at discouraging people from being radicalised is quite commendable and worthy of emulation.

Having highlighted the lesson that the UK can learn from Nigeria, the next section will be used to put forward proposals and recommendations for law and policy reforms in UK.

5. PROPOSALS AND RECOMMENDATIONS FOR UK'S LAW REFORMS

The following proposals and recommendations will help to position the UK's counter-terrorism measures under the T.A 2000 in line with internationally acceptable standards, as against the Nigerian standards. As clearly seen above, the UK has little to learn from the Nigerian experience in dealing with terrorism.

5.1 Policy that discourages selective arrest

A strategy that prevents the selective arrest of ethnic minorities in the U.K and Muslims needs to be put in place. This might involve collaboration with Mosques and ethnic communities in the UK, especially in the arrest process. This would diffuse the tension that exists between the law enforcement agencies and these communities. These two bodies are critical in whatever de-radicalisation programme the U.K would like to adopt.

5.2 Expiration of the proscription of a terrorist organisation after 2 Years

The writer recommends that the period for the proscription of terrorist organisations in the UK should expire after 2 years subject to renewal by the Parliament. This would remove the bureaucratic bottleneck and the cost of de-proscription in the U.K. In addition to that, the 'closed material/evidence procedures' used by the POAC which involves materials which the Home Secretary considers sensitive to be made public should be reviewed to allow suspects know the case against his group and what evidence was used against them. This would also exculpate the government against the criticisms against fair trial during the de-proscription process.

[972] Isiaka Wakili, 'FG Rehabilitates 22 female would-be bombers' *Daily Trust July* 1, 2015 http://www.dailytrust.com.ng/daily/index.php/news-menu/news/58760-fg-rehabilitates-22-female-would-be-bombers accessed 4th Oct, 2015

6 Conclusion

This chapter has identified lessons that Nigeria can learn from the U.K's counter-terrorism approach and vice-versa. The lessons learned resulted in proposals and recommendations for law and policy reforms in Nigeria. From the onset the Writer made it clear that the primary focus of the research was to compare and explore the responses of Nigeria against terrorism under its Terrorism Act with the UK, with a view to improving the Nigerian law. The writer adopted a realistic approach in the recommendations and proposals proffered based on the findings from this research and a practical diagnosis of the nature of terrorism and counter-terrorism in Nigeria and the UK. In view of the fact that an amendment to the law alone will not address the terrorism challenges faced by Nigeria, concrete proposals and recommendations for law and policy reforms were put forward for Nigeria to adopt. Although the research restricts itself to issues bothering on definition of terrorism, arrest, detention, proscription and encouragement of terrorism, nonetheless the proposals and recommendations put forward in this chapter covered wide ranging issues that will not only have legal consequences but also social and administrative impacts. These recommendations will help position the TPA 2011 (as amended) in line with Nigeria's domestic, regional and international human right obligations. More importantly, this chapter was used to recommend a workable solution to Nigeria's counter-terrorism problems with proposal for the establishment of the "Nigeria Terrorism and other Related Matters Commission." Without doubt, if established, the Commission has ability to adequately address human right infringements relating to the counter-terrorism in Nigeria. Unfortunately there are not much lessons that the UK can learn from Nigeria. However the relentless nature of Nigeria's counter-radicalisation programmes is noteworthy.

CHAPTER 12

CONCLUSION

This thesis is a comparative analysis and assessment of Nigeria and the United Kingdom's legal response to terrorism. The writer critically analysed, assessed, and compared key provisions under the Nigerian TPA 2011 (as amendment) with the United Kingdom's Terrorism Act 2000 and S.1 of the Terrorism Act 2006 with the primary aim of finding out whether the Terrorism Acts unnecessarily infringe human rights provisions in both countries. In so doing, the thesis compared the Terrorism Act of both states with their domestic, regional, and international human rights provisions. Whilst recognising differences in the challenges and nature of the terrorist threats faced by the UK and Nigeria as well as differences in both states' response to terrorism, the study also set out to identify lessons which Nigeria could learn from the UK's experience in dealing with terrorism, *vice-versa*.

It became necessary to question the constitutionality and legality of Nigeria's counter-terrorism actions due to the allegations of serious human rights violations by the security forces. These include the razing of homes in communities suspected of harboring *Boko Haram*, arbitrary arrests, prolonged detention of terror suspects, extra-judicial killings and torture. This development has led to an increased interest and a rise in the number of studies that address Nigeria's counter-terrorism practices and their impact on human rights. This is evident in recent yearly reports by Amnesty International and Human Rights Watch amongst other studies. Unfortunately, only a few study have been able to directly analyse or assess key provisions under the Nigerian TPA 2011 (as amended) to determine their coherence and compatibility with human rights provisions in the country. More importantly, limited studies exist that compares the Nigerian Terrorism Act with similar law of another common law jurisdiction. This thesis therefore attempts to fill-in that gap.

Although the writer admits that the state has a positive obligation to secure human lives and property, the study found that Nigeria's response to *Boko Haram* attacks undoubtedly goes beyond the need to provide security and cannot be said to be a legitimate response to terrorism. Rather than address the terror attacks by *Boko Haram*, the Nigerian security forces have committed similar and even worse atrocities. A careful examination of the UK's response to terrorism in general revealed that the country has managed to strike a balance in their fight against terrorism and the protection of human rights. The study found that the UK's TA 2000

have been extensively challenged and criticised on various constitutional and human rights grounds. This is evidenced by the several judicial decisions that has provoked debates and arguments from scholars and human rights organisations. It is obvious from this study that the Nigerian TPA 2011 (as amended) remains largely unchallenged by the Courts or by scholars resulting in little or no judicial decision or studies that challenge the legality of the Terrorism Act. The Nigerian government seemingly preferred the heavy-handed security response that has not yielded any meaningful result. For over eight years, Nigeria has adopted a sledgehammer approach to fighting terrorism which has arguably been an abysmal failure.

Returning to the main question posed at the beginning of this study which is to assess the effects of the Terrorism Acts of Nigeria and UK on human rights in both countries? The study found that several inadequacies and inconsistencies with human rights exist under the Terrorism Acts of both countries, especially Nigeria. This conclusion is based on the fact that some of Nigeria's response to terrorism under the TPA 2011(as amended) and in practice seriously interferes with human rights provisions in the country.

Beginning with the definition of terrorism in both States. Firstly, the study acknowledged that although there is no internationally agreed definition of terrorism. Nonetheless, the analysis and assessment of the definition of terrorism under the Nigerian and the UK's Terrorism Acts revealed that both definition lacks precision. The Terrorism Acts of both countries included not only actions that are widely regarded as terrorism but goes further to include acts such as "serious" damage to "public or private property," damage that is likely to result in major economic loss and the destruction of government or public transport system as acts of terrorism. Several qualifications were also used to explain what would amount to terrorism in both states such as "unduly," "seriously" *inter-alia*. However acts that will be regarded as "serious" or "unduly" remains unclear under Nigerian TPA 2011. The study also found that definition of terrorism in both states include acts of terrorism done elsewhere. Additionally, the definition of terrorism in Nigeria recognises not only international resolutions on terrorism but also regional and sub-regional resolutions under the auspices of the African Union (AU) and the Economic Community of West African States (ECOWAS) as well as acts considered to be a terrorism by a competent authority of a foreign state. The Nigerian Supreme Court[973] however made it clear that international instruments and regional/sub-regional resolutions are merely

[973] *Abacha v Fawehinmi* [2001] WRN vol. 51, 29

"persuasive" and not "binding" on the Country, unless it they are enacted into the law by the National Assembly.

This study established that there are significant differences in how the definition of terrorism in both states are interpreted and applied in practice. The UK Court in *R v F*[974]clarified the international reach of the definition of terrorism under the TA 2000 to include those in a legitimate armed struggle or armed conflict against oppressive and dictatorial regime and military or quasi-military activity aimed at bringing down a foreign government. Contrary to expectation, the scope and international reach of the definition of terrorism under the Nigerian TPA 2011 remains unclear. The Nigerian Courts are yet to give any ruling on the definition of terrorism under the Act. Additionally, elements of the definition of terrorism under the Nigeria's TPA 2011 appears to be a duplication of the offences under the country's Criminal Code such as threatening to burn or destroy property as per S. 461 of the C.C and destroying or damaging an inhabited house or a vessel with explosions as per S.451 of C.C. An implication of this is that an accused can easily be charged with terrorism offences instead of being charged with ordinary criminal offence for example murder, battery or manslaughter. This carries the potential for unintended human rights abuses and even the deliberate misuse of the term.

On arrest, the study found that the grounds for making arrest in both states are similar. This is based on *'reasonable suspicion'* that an offence is committed or is about to be committed. The Courts in both States have reached similar decisions in *Chukwurah v C.O.P* [975] and *O'Hara v Chief Constable of the RUC*[976] that what would amount to "*reasonableness*" to arrest a suspect for terrorism must be a "genuine suspicion" in the mind of the arrestor that the arrestee has been concerned in the acts of terrorism and there are objectively reasonable grounds for forming that suspicion. However, the EcrtHR[977] has gone a step further to clarify that the 'reasonableness' of the suspicion justifying such arrests for terrorism offences cannot always be judged according to the same standards as are applied in dealing with conventional crime. Returning the question whether the power of arrest under the Terrorism Acts of Nigeria and UK is consistent with human rights provisions in the States? This study found that both Nigeria and the UK's domestic, regional, and international law permits the restriction to the right to liberty and security as part of the States' responsibility to protect individuals within their

[974] [2007] ECWA Crim 243
[975] [1965] NNLR 21 at Pg 21
[976] [1997] A.C 286 pg 135
[977] *Fox, Campbell and Hartley v. United Kingdom* [1990] ECHR 18, 12383/86

jurisdiction. However these limitations must themselves comply with human rights. Clearly these limitations does not include arbitrary arrests of innocent civilians or deliberate acts of violence against civilians. This study found that the power of arrest under the Terrorism Acts of both states are legitimate and consistent with human rights provisions, however the application of this power differs in both state. Rather than arrest on reasonable suspicion, it seems that the security forces in Nigeria generally do not follow the procedure prescribed by the law (TPA 2011), rule of law or due process. Instead they engage in indiscriminate arrests, house-to-house searches, intimidation of residents, and mass arrests of relatives of suspected *Boko Haram* members including children. The writer argued that the methods of arrest by the Nigerian security agencies are generally not compatible with human rights provisions and standards under the Nigerian Constitution, the ACHPR and under the ICCPR. On a comparative note, the enforcement of the provisions of arrest in UK were found to be applied generally as prescribed by the law. Findings from this study also revealed that the Police in the UK do not engage in indiscriminate arrests of suspects, torture of terror detainees, intimidation of residents, or engage in the mass arbitrary arrests of relatives of terror suspects. Nonetheless the study suggests that terror arrest in the UK appears to be concentrated on Muslim and Asian communities.

This comparative study also established that there is a difference in the pre-charge detention regime in Nigeria and the UK. While the Nigerian TPA 2011 (as amended) allows the pre-charge detention of terror suspects for up to 180 days, the maximum period a terror suspect can be detained pending charge in the UK is 14 days. This study therefore set out to determine whether the 180 days and the 14 days pre-charge detention period under the Terrorism Acts of both States are consistent with human rights provisions. A juxtaposition of the pre-charge detention period allowed under the Nigerian TPA 2011 with the country's domestic, regional, and international obligations under the Constitution 1999, the ACHPR and the ICCPR showed that the 180 days pre-charge detention period permitted under the Act is inconsistent with the right to liberty and security and the right be tried within a reasonable time. However, the UN Human Rights Committee has held[978] that what would constitute "reasonable time" to be tried must be assessed on a case-by-case basis. The European Court of Human Rights in deciding the legality of the 14 days pre-charge detention under the UK's TA 2000 held that the pre-charge detention of a terror suspect will be consistent with the ECHR provided that the

[978] *Kone v Senegal* Communication No. 458/1991

police/detaining authorities disclose the nature of the allegations against the accused, give the accused an opportunity to lead evidence to refute them, and ensure that adequate information is provided to the accused about the reasons for their continued detention.[979]

Besides the difference in the pre-charge detention period of Nigeria and UK, the manner which this provisions of the Terrorism Act are applied in practice differs in both states. This study has shown that both terror suspects and innocent civilians in Nigeria are detained for as long as the Police or Military authorities wish. The study also found that terror suspects in Nigeria are denied access to their lawyers and family members, abused, tortured, de-humanised, and often extra-judicially executed. On a comparative note this study found that terror suspects in the UK are not denied access to their lawyers or held beyond the period provided by the Terrorism Act or tortured. This study also revealed that the process of arrest and the pre-charge detention of terror suspects in the UK are done in line with the rule of law and as stipulated by the Act, with the courts actively involved throughout the process. From the moment an arrest is made in UK, the courts are involved in deciding whether there is a need for extension of the pre-charge detention period, up to when judgement is given for or against the accused with human rights safeguards maintained throughout this process. This is not to say that the UK pre-charge detention regime is faultless. The 14 days pre-charge detention period allowed under the TA 2000 has been heavily criticised as too high when compared to some other countries within the EU region. On the other hand, the courts in Nigeria are generally not involved in the pre-charge detention of terror suspects in the country. The security forces in Nigeria are the accuser and the judge, all at the same time. The writer notes that the Nigerian Judiciary have over the past eight years been reluctant to interfere with terrorism investigation, arrests, and prolonged detention of suspects. Likewise the Executive arm of government appear unwilling to prosecute members of the Police or the Military JTF that have been implicated in human rights violations including the excessive use of force, torture, arson, and the extra-judicial killing of terror suspects. The arrest and the pre-charge detention regime in Nigeria clearly does not represent a good practice of how terror suspects should be treated if international human rights are to be respected. Even though there are clear safeguards against the unnecessary interference with the right to liberty and security in both states, these safeguards/rights are generally ignored with impunity in Nigeria.

[979] *Sher v UK* [2015] ECHR 5201/11

The general requirements of any law (both at the domestic level and under international law) that would restrict freedom of expression are that they must be prescribed by law, in pursuit of a legitimate purpose, and they must be necessary and proportionate. As demonstrated in this thesis, both the Nigerian and the UK Terrorism Acts fulfils these requirements going by the terror attacks experienced in both countries as a result of individuals being encouraged to commit acts of terrorism. Encouragement of terrorism has become a strategy used by terrorist organisations to further support their cause and to call for violent action. However a careful examination of the Nigerian Terrorism Act revealed that what would amount to encouragement of terrorism and the public's understanding of this is vague. Many human rights organisations in Nigeria have pointed out that this portends a grave danger to freedom of expression in the country. There are fears that the TPA 2011(as amended) could be used to stifle dissent, opponents, and freedom of speech in the country. Presently, it is difficult to define the scope of direct and indirect encouragement of terrorism under the Nigerian TPA 2011 or a yardstick for determining how a statement is likely to be understood as encouraging terrorism. On the other hand, the UK TA 2006 provided some guidance between direct and indirect encouragement of terrorism. Section 2 of the UK's TA 2006 goes further to enumerate ways and means which terrorist publications could be disseminated to constitute an offence. S.1(4) of the Act expressly provides that for the purposes of how a statement is likely to be understood and what members of the public could reasonably be expected to infer from it must be determined having regard both—to the contents of the statement as a whole; and to the circumstances and manner of its publication. Furthermore, S.1 of the Terrorism Act 2006 requires either specific intent or recklessness for the prosecution for the offence of encouraging terrorism. Although this thesis makes clear that what would amount to encouragement of terrorism in UK is not easy to define in its entirety, nonetheless the clear explanations provided under the UK'S TA 2006 are absent under the Nigerian Terrorism Act. As it currently stand, the provision of the Nigerian Terrorism Act on encouragement of terrorism threatens the right to freedom of expression and does not satisfy the principle of legal certainty and clarity of the law. This study concludes that the provision of the Nigerian TPAA 2013 on encouragement of terrorism under need to be reviewed urgently.

On proscription, both the Nigerian and the UK Terrorism Acts provide similar grounds for proscribing terrorist organisations within and outside their jurisdiction. This study however revealed the differences in the procedure for proscribing terrorist organisations and the de-proscription process in both countries. While the international scope of the UK's TA 2000 was

reflected in its list of proscribed organisations with the banning of both domestic and international terrorist organisations, the Nigerian Terrorism Act which made a reference to international terrorist groups and terrorist listed in any resolution of the UN Security Council or in any instrument of the African Union and ECOWAS[980] have only banned *Boko Haram* and *Ansaru*. It remains unclear what the Nigerian Terrorism Act means by '*reference to an international group*' without proscribing any terrorist organisations outside of the country?

In assessing whether the Nigerian Terrorism Act comply with the country's regional and international human rights obligations, the study found that although the definition of terrorism, the power of arrest and the proscription of terrorist organisations were generally consistent with the country's human right obligations under the Constitution 1999, the ACHPR, and the ICCPR, however some actions of the security forces and the 180 days allowed under the TPA 2011 were found to be inconsistent with Nigeria's human rights obligation under the CFRN 1999 and established principles of human rights under the ACHPR and the ICCPR.

Similarly, in assessing whether the UK TA 2000 comply with the country's regional and international human rights obligations, the study found that the definition of terrorism, the power of arrest, the pre-charge detention of terror suspects, the proscription of terrorist organisations as well as encouragement of terrorism were generally consistent with UK human right obligations under the HRA/ECHR and the ICCPR. However, it should be noted that because encouragement of terrorism under the T.A 2006 covers acts done even in the past, it could engage non-retroactive principle under Art.7 of the ECHR and of the 15 ICCPR.

Following the comparative juxtaposition of the Nigerian and UK legal responses to terrorism, this thesis put forward several recommendations and proposals for law and policy reforms in Nigeria. These proposals and recommendations were a result of the findings and lessons learnt from the UK's experience in dealing with terrorism. Chief amongst this is the "CONTEST Strategy" that prepares, prevent, pursues, protects the UK against terror attacks. Presently Nigeria does not have a holistic strategy for dealing with terrorism. The CONTEST strategy represents an ideal model for countering terrorism in Nigeria. Other lessons learned from the U.K include; the review of the provision of encouragement on terrorism to reflect a law that properly categorises statements that are likely to be understood by members of the public as directly or indirectly encouraging terrorism; the appointment of an independent reviewer to

[980] S.9(1)(b)

review the Terrorism Act every year; and the inclusion of regional and international terrorists organisations in its list of proscribed organisations.

Other proposals and recommendations put forward include the greater respect for rule of law and human rights of terrorist suspects, the independence of the Judiciary and the creation of Terrorism Courts to address the congestion of cases presently experienced in Nigerian Courts. The writer however understands that enacting and reviewing the law is one thing in Nigeria, implementing the law or reforms is quite another. In many instances the major problem is not the absence of the laws, but rather the absence of an effective enforcement mechanism. The Nigerian security agencies that are supposed to protect lives and properties and enforce human rights values in the countries are themselves the main culprits of their breaches. In order to address the human rights violations by the security forces, the writer recommends the establishment of the "Nigerian Terrorism & other Related Matters Commission." The proposed Terrorism Commission would present a practical solution to the allegations of serious human rights violations by the security forces and also has the potential of positioning Nigeria's counter-terrorism practices in line with internationally accepted standards.

More than ever before, the opportunities now exist for Nigeria to review key provisions under its Terrorism Act to make it fit for purpose. It is hoped that this thesis would prompt a reform that will subject the Terrorism (Prevention) Act 2011 to an amendment as well as render Nigeria's counter-terrorism policies and practices to the adversarial review and scrutiny of its own institutions. The National Assembly must rise up to its responsibility and make changes that reflect the recommendations and proposal put forward in this research. The Legislators will find recommendations this thesis useful when making changes to the current Act and policy.

A CALL FOR REALISM

The writer is of the view that although the proposals and recommendations put forward in this study are important in providing a sound legal code relevant to terrorism in Nigeria, it might not be possible for these proposals to be implemented straight away. It might take a few years before these proposals and recommendations can be fully realised. This is because upholding and protecting human rights does not come for free. States spend huge resources in protecting human rights. In 2014 alone, the defence sector took over 968.127 billion Naira accounting for

20% of Nigeria's total budget sum of 4.962 billion Naira.[981]In a climate of global financial crisis coupled with dwindling crude oil prices, finance might be a problem in implementing some of the recommendations proposed. Hence there is a need to call for pragmatism. The question is how? There is a need for Nigeria to prioritize which of the recommendations or policy prescriptions it urgently needs and is able to afford at this moment. Realistically, it might require a 1 to 2 years plan. But whatever the government of Nigeria decides to adopt first, this must be combined with establishment of the "Terrorism Commission" in order to achieve a counter-terrorism strategy that is human rights compliant. This is because the "most internally coherent" and "most consistent" human right legislation or policy can be enacted or adopted, but without an effective enforcement mechanism in place, it will only amount to a farce.

[981] Bassey Udo,'Jonathan signs 2014 budget as defence takes 20%' *Premium Times* 24th May, 2014 http://www.premiumtimesng.com/business/161390-jonathan-signs-nigerias-2014-budget-defence-gets-20-per-cent.html assessed 3rd October, 2015

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APPENDIXES

APPENDIX I

LIST OF PROSCRIBED ORGANISATION UNDER THE UK'S TERRORISM ACT 2000

71 international terrorist organisations are proscribed under the Terrorism Act 2000.[982] These include;

17 November Revolutionary Organisation (N17) - Proscribed March 2001
Abdallah Azzam Brigades, including the Ziyad al-Jarrah Battalions (AAB) - Proscribed June 2014.
Abu Nidal Organisation (ANO) - Proscribed March 2001
Abu Sayyaf Group (ASG) - Proscribed March 2001
Ajnad Misr (Soldiers of Egypt) - Proscribed November 2014
Al-Gama'at al-Islamiya (GI) - Proscribed March 2001
Al Ghurabaa - Proscribed July 2006 Al Ghurabaa
Al Ittihad Al Islamia (AIAI) - Proscribed October 2005
Al Murabitun - Proscribed April 2014
Al Qa'ida (AQ) - Proscribed March 2001
Al Shabaab - Proscribed March 2010
Ansar Al Islam (AI) - Proscribed October 2005
Ansar al-Sharia-Benghazi (AAS-B) - Proscribed November 2014
Ansar Al Sharia-Tunisia (AAS-T) - Proscribed April 2014
Ansar Al Sunna (AS) - Proscribed October 2005
Ansar Bayt al-Maqdis (ABM) - Proscribed April 2014
Ansarul Muslimina Fi Biladis Sudan (Vanguard for the protection of Muslims in Black Africa) (**Ansaru**) - Proscribed November 2012
(Ansaru is an Islamist terrorist organisation based in Nigeria.)
Armed Islamic Group (Groupe Islamique Armée) (GIA) - Proscribed March 2001

[982] Home Office: Proscribed Terrorist Organisation https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417888/Proscription-20150327.pdf accesed 3rd August 2015

Asbat Al-Ansar ('League of Partisans' or 'Band of Helpers') - Proscribed November 2002 Sometimes going by the aliases of 'The Abu Muhjin' group/faction or the 'Jama'at Nour',

Babbar Khalsa (BK) - Proscribed March 2001

Basque Homeland and Liberty (Euskadi ta Askatasuna) (ETA) - Proscribed March 2001

Baluchistan Liberation Army (BLA) - Proscribed July 2006

Boko Haram (Jama'atu Ahli Sunna Lidda Awati Wal Jihad) (BH) - Proscribed July 2013 Boko Haram

Egyptian Islamic Jihad (E IJ) - Proscribed March 2001

Global Islamic Media Front (GIMF) including GIMF Banlga Team also known as Ansarullah Bangla Team (ABT) and Ansar-al Islam – Proscribed July 2016

Groupe Islamique Combattant Marocain (GICM) - Proscribed October 2005

Hamas Izz al-Din al-Qassem Brigades - Proscribed March 2001

Harakat-Ul-Jihad-Ul-Islami (HUJI) - Proscribed October

Harakat-Ul-Jihad-Ul-Islami (Bangladesh) (HUJI-B) - Proscribed October 2005

Harakat-Ul-Mujahideen/Alami (HuM/A) and Jundallah - Proscribed October 2005

Harakat Mujahideen (HM) - Proscribed March 2001 HM, previously known as Harakat Ul Ansar (HuA)

Haqqani Network (HQN) - Proscribed March 2015

Hizballah Military Wing – Hizballah's External Security Organisation was proscribed March 2001and in 2008 the proscription was extended to Hizballah's Military apparatus including the Jihad Council

Hezb-E Islami Gulbuddin (HIG) - Proscribed October 2005

Imarat Kavkaz (IK) (also known as the Caucasus Emirate) - Proscribed December 2013

Indian Mujahideen (IM) - Proscribed July 2012 IM

International Sikh Youth Federation (ISYF) - Proscribed March 2001

Islamic Army of Aden (IAA) - Proscribed March 2001

Islamic Jihad Union (IJU) - Proscribed July 2005

Islamic Movement of Uzbekistan (IMU) - Proscribed November 2002

Islamic State of Iraq and the Levant (ISIL) also known as Dawlat al-'Iraq al-Islamiyya, Islamic State of Iraq (ISI), Islamic State of Iraq and Syria (ISIS) and Dawlat al Islamiya fi Iraq wa al Sham (DAISh) and the Islamic State in Iraq and Sham - Proscribed June 2014

Jaish e Mohammed (JeM) and splinter group Khuddam Ul-Islam (Kul) – JeM proscribed March 2001

Jamaah Anshorut Daulah - Proscribed July 2016

Jamaat ul-Ahrar (JuA) - Proscribed March 2015

Jammat-ul Mujahideen Bangladesh (JMB) - Proscribed July 2007

Jaysh al Khalifatu Islamiya (JKI) which translates as the Army of the Islamic Caliphate – proscribed November 2014

Jeemah Islamiyah (JI) - Proscribed November 2002

Jamaat Ul-Furquan (JuF) - Proscribed October 2005

Jund al-Aqsa (JAA) which translates as "Soldiers of al-Aqsa" - Proscribed January 2015

Jund al Khalifa-Algeria (JaK-A) which translates as Soldiers of the Caliphate - Proscribed January 2015

Kateeba al-Kawthar (KaK) also known as 'Ajnad al-sham' and 'Junud ar-Rahman al Muhajireen'- Proscribed June 2014

Partiya Karkeren Kurdistani (PKK) which translates as the Kurdistan Worker's Party - Proscribed March 2001. The PKK changed its name to KADEK and then to Kongra Gele Kurdistan, although the PKK acronym is still used by parts of the movement.

Lashkar e Tayyaba (LT) - Proscribed March 2001

Liberation Tigers of Tamil Eelam (LTTE) - Proscribed March 2001

Libyan Islamic Fighting Group (LIFG) - Proscribed October 2005

Minbar Ansar Deen (also known as Ansar al-Sharia UK) - Proscribed July 2013

Mujahidin Indonesia Timur (MIT) which translates as Mujahideen of Eastern Indonesia - Proscribed July 2016

National Action - Proscribed December 2016

Palestinian Islamic Jihad - Shaqaqi (PIJ) - Proscribed March 2001 PIJ

Popular Front for the Liberation of Palestine-General Command (PFLP-GC) - Proscribed June 2014

Revolutionary Peoples' Liberation Party - Front (Devrimci Halk Kurtulus Partisi - Cephesi) (DHKP-C) - Proscribed March 2001

Salafist Group for Call and Combat (Groupe Salafiste pour la Predication et le Combat) (GSPC) - Proscribed March 2001

Saved Sect or Saviour Sect - Proscribed July 2006

Sipah-e Sahaba Pakistan (SSP) (Aka Millat-e Islami Pakistan (MIP) - Proscribed March 2001

Tehrik Nefaz-e Shari'at Muhammadi (TNSM) - Proscribed July 2007

Tehrik-e Taliban Pakistan (TTP) - Proscribed January 2011

Teyre Azadiye Kurdistan (TAK) - Proscribed July 2006

Turkiye Halk Kurtulus Partisi-Cephesi (THKP-C) - Proscribed June 2014