# The Use of Force in Counterterrorism Policing in Africa under International Law

by

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**Declaration**

I, the undersigned, hereby declare that this thesis, which I submit for the degree Doctor Legum (LLD) in the Faculty of Law at the University of Pretoria, is my own original work and has not previously in its entirety, or in part, been submitted to any other university for a degree.

Signature: _____

Alero Itohan Fenemigho

Date: _____

**Dedication**

To God, for His love.

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## Acronyms and Abbreviations

| | |
|---|---|
| ABM | *Ansar Bayt al-Maqdis* |
| ACHR | American Convention on Human Rights |
| ACHPR | African Commission on Human and Peoples' Rights |
| ACJA | Administration of Criminal Justice Act |
| ACSRT | African Centre for Study and Research on Terrorism |
| AEC | African Economic Community |
| AFRIPOL | African Mechanism for Police Cooperation |
| AHRLR | African Human Rights Law Report |
| AMISOM | African Union Mission in Somalia |
| APCOF | African Policing Civilian Oversight Forum |
| APSA | African Peace and Security Architecture |
| Art | Article |
| ASEAN | Association of Southeast Asian Nations |
| ASF | African Standby Force |
| ATPU | Anti-Terrorism Police Unit |
| AU | African Union |
| AUC | African Union Commission |
| BBC | British Broadcasting Corporation |
| BCIJ | Bureau central d'investigation judiciaire |
| CADSP | Common African Defence and Security Policy |
| CEN-SAD | Community of Sahel-Saharan States |
| CEWS | Continental Early Warning System |
| CHR | Centre for Human Rights |
| CISSA | Committee on Intelligence and Security Services |
| COH | Conduct of Hostilities |

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|---|---|
| COMESA | Common Market for Eastern and Southern Africa |
| CSF | Central Security Forces |
| CVE | Countering Violent Extremism |
| DPH | Direct Participation in Hostilities |
| DRC | Democratic Republic of the Congo |
| EAC | East African Community |
| EASFCOM | East African Standby Force Coordination Mechanism |
| ECCAS | Economic Community of Central African States |
| ECDPM | European Centre for Development Policy Management |
| ECHR | European Convention on Human Rights |
| ECtHR | European Court of Human Rights |
| ECOWAS | Economic Community of West African States |
| EU | European Union |
| FIDH | International Federation for Human Rights |
| FTFs | Foreign Terrorist Fighters |
| GCTS | Global Counterterrorism Strategy |
| GSU | General Service Unit |
| IAC | International Armed Conflict |
| IACmHR | Inter-American Commission on Human Rights |
| IACtHR | Inter-American Court of Human Rights |
| ICAO | International Civil Aviation Organization |
| ICC | International Criminal Court |
| ICCPR | International Covenant on Civil and Political Rights |
| ICU | Islamic Courts Union |
| ICJ | International Court of Justice |
| ICTY | International Criminal Tribunal for the former Yugoslavia |

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|---|---|
| ICRC | International Committee of the Red Cross |
| IED | Improvised Explosive Device |
| IGAD | Intergovernmental Authority on Development |
| IGCLR | International Conference on the Great Lakes Region |
| IHL | International Humanitarian Law |
| IHRL | International Human Rights Law |
| ILC | International Law Commission |
| IMN | Islamic Movement of Nigeria |
| IS | Islamic State |
| ISS | Institute for Security Studies |
| ISWAP | Islamic State West African Province |
| KDF | Kenyan Defence Forces |
| KNCHR | Kenyan National Commission on Human Rights |
| LCBC | Lake Chad Basin Commission |
| LE | Law Enforcement |
| LOAC | Law of Armed Conflict |
| LOLE | Law of Law Enforcement |
| MEND | Movement for the Emancipation of the Niger Delta |
| MN | Margin Number |
| MNJTF | Multinational Joint Task Force |
| MOU | Memorandum of Understanding |
| MUHURI | Muslims for Human Rights |
| NACTEST | National Counterterrorism Strategy (Nigeria) |
| NARC | North African Regional Capability |
| NATO | North Atlantic Treaty Organization |
| NCTC | National Counter Terrorism Centre (Kenya) |

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|---|---|
| NDPVF | Niger Delta Peoples' Volunteer Force |
| NGOs | Non-Governmental Organisations |
| NHRC | National Human Rights Commission (Nigeria) |
| NIAC | Non-International Armed Conflict |
| NIS | National Intelligence Service (Kenya) |
| NOPRIN | Network on Police Reform in Nigeria |
| NPF | Nigerian Police Force |
| NSA | National Security Agency (Egypt) |
| NSCDC | Nigerian Security and Civil Defence Corps |
| NSCVE | National Strategy to Counter Violent Extremism (Kenya) |
| OAU | Organization of African Unity |
| OHCHR | Office of the High Commissioner for Human Rights |
| OIC | Organisation of Islamic Cooperation |
| ONSA | Office of the National Security Adviser (Nigeria) |
| Para | Paragraph |
| PCVE | Nigerian Policy Framework and National Action Plan for Preventing and Countering Extremism |
| PoW | Panel of the Wise |
| PKK | Kurdistan Workers' Party |
| PSC | Peace and Security Council |
| PVE | Preventing Violent Extremism |
| RECs | Regional Economic Communities |
| Res | Resolution |
| RMs | Regional Mechanisms for Conflict Prevention, Management, and Resolution |
| RULAC | Rule of Law in Armed Conflict |
| SADC | Southern African Development Community |

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|---|---|
| SARS | Special Anti-Robbery Squad |
| SLDF | Sabaot Land Defence Forces |
| STL | Special Tribunal for Lebanon |
| TCCs | Troop Contributing Countries |
| TIMEP | Tahrir Institute for Middle East Policy |
| UDHR | Universal Declaration of Human Rights |
| UMA | Arab Maghreb Union |
| UN | United Nations |
| UNCHR | United Nations Commission on Human Rights |
| UNDP | United Nations Development Programme |
| UNGA | United Nations General Assembly |
| UNHRC | United Nations Human Rights Council |
| UNODC | United Nations Office on Drugs and Crime |
| UNSC | United Nations Security Council |
| UNTS | United Nations Treaty Series |
| VCLT | Vienna Convention on the Law of Treaties |
| VOA | Voice of America |

## Abstract

Terrorism is a major threat to peace and security in Africa. In law enforcement responses to terrorism, affected states often employ excessive force. In addition to violating international law and standards, research suggests that excessive force is itself a driver of violence, pushing the victims and their families into the arms of terrorist groups. This potentially perpetuates terrorist violence in a continent vulnerable to violent extremism and to whom terrorism now presents the principal threat to peace and security.

This thesis considers what legal, institutional, and policy interventions relevant African regional institutions can make to ensure that the use of force in counterterrorism policing on the continent is brought into line with the international standards. In doing so, it examines and clarifies the regulation of the use of force in counterterrorism policing under international law- highlighting the difference in the law enforcement and the conduct of hostilities rules for the use of force and their scopes of application, and also addressing the issue of the interplay between both sets of rules. In seeking to identify trends in the use of force during counterterrorism operations on the African continent, it uses Egypt, Kenya, and Nigeria as illustrative case studies. In addition, it assesses the legal and policy response of the African regional system to the use of excessive force during counterterrorism policing, focusing principally on the roles of relevant counterterrorism and human rights institutions.

The thesis finds that while there have been some positive strides towards greater respect for international norms, the current response by the institutions evidences material gaps and significant inadequacies. The thesis then proposes a two-pronged framework for a comprehensive regional response to the use of excessive force during counterterrorism policing in Africa, based on the clarification of the applicable rules to states; as well as on further roles and actions that regional institutions need urgently to take. Such roles include the design of scenario training programmes for law enforcement (which should be based on the clarified rules), the creation of a dedicated special mechanism for the promotion and protection of human rights while countering terrorism in Africa (in the form of an independent expert), and the establishment of human rights-compliant use of force during counterterrorism policing as an African Union institutional policy.

**Keywords:** terrorism; counterterrorism; counterterrorism policing; human rights and counterterrorism; use of force in counterterrorism; use of force by law enforcement; use of

force in conduct of hostilities; African Union counterterrorism architecture; African Union human rights system.

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# Chapter 1: General Introduction

## 1.1. Background

Terrorism is 'an old and global phenomenon'.[1] However, after the 11 September 2001 (9/11) attacks in the United States of America (United States), it rose to the forefront of the international security agenda.[2] The attacks also heralded a new wave of terrorist activity around the world, including in Africa, as a result of a rise in violent extremism.[3] The problem of terrorism has only grown, and currently the United Nations (UN) Security Council regards 'terrorism in all forms and manifestations' as 'one of the most serious threats to international peace and security'.[4]

Terrorism is a major problem on the African continent, with many African states battling the scourge to some degree. Indeed, terrorism, supported by an increase in violent extremism, has been said to be 'assuming unprecedented scales of expansion and intensity' on the continent, now spreading into areas previously (relatively) free from such violence.[5] This expansion of terrorism in the continent was recognised by the African Union (AU) Peace and Security Council (PSC) in its 2020 report on the state of peace and security in Africa, declaring that terrorism and violent extremism had 'assumed an unprecedented scale of expansion and intensity within the [c]ontinent,' and that it is now 'the primary enemy and threat to the [c]ontinent and its people and economy'.[6] In 2020, Africa was also referred to as the latest

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1 United Nations Human Rights Council (UNHRC) 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism on the Human Rights Challenge of States of Emergency in the Context of Fighting Terrorism' (1 March 2018) UN Doc A/HRC/37/52, para 2.

2 Ben Saul, *Defining Terrorism in International Law* (Oxford University Press 2006) 6.

3 See Centre for Strategic and International Studies, 'Turning Point: A New Comprehensive Strategy for Countering Violent Extremism' (November 2016), available at <https://csis-ilab.github.io/cve/report/Turning_Point.pdf> accessed 4 October 2021, 2. There is no universally accepted definition of 'violent extremism'. See Jason-Leigh Striegher, 'Violent-Extremism: An Examination of a Definitional Dilemma' The Proceedings of [the] 8th Australian Security and Intelligence Conference, held from 30 November – 2 December 2015, Edith Cowan University Joondalup Campus, Perth, Western Australia 75, 75, 76, < http://ro.ecu.edu.au/cgi/viewcontent.cgi?article=1046&context=asi> accessed 25 August 2018. However, it has been defined by Striegher as 'an ideology that accepts the use of violence for the pursuit of goals that are generally social, racial, religious and/or political in nature'. See ibid 79.

4 See UN Security Council (UNSC) Resolution (Res) 2462 (28 March 2019) UN Doc S/RES/2462, preambular para 2; UNSC, 'Statement by the President of the Security Council' (12 January 2021) UN Doc S/PRST/2021/1, para 3.

5 See United Nations (UN), 'Security Council Issues Presidential Statement Calling for Greater Efforts to Help Africa Fight Terrorism, as Delegates Denounce "Insufficient" Current Approaches' (11 March 2020) UN Doc SC/14140 <https://www.un.org/press/en/2020/sc14140.doc.htm> accessed 11 May 2020.

6 See Assembly of the African Union (AU Assembly), 'Report of the Peace and Security Council on its Activities and the State of Peace and Security in Africa from the Period from February 2019 to February 2020' (9-10 February 2020) Addis Ababa, Ethiopia, Assembly/AU/5(XXXIII), para 4.

frontline in the global effort to counter terrorism and violent extremism,[7] with the threat of terrorism on the continent noted to be 'spreading and destabilizing entire regions'.[8] The 'unprecedented expansion of terrorism and violent extremism' currently faced by the continent has also been noted as 'seriously undermining the efforts to silence the guns' in Africa.[9]

There is currently an exponential increase in the prevalence of terror attacks in Africa along with a significant rise in the number of affected African states.[10] These phenomena result from the proliferation of terrorist organisations on the continent.[11] For instance, it has been noted that between 2009 and 2015, terrorist attacks on the continent increased by 200%, with

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7 UN, 'More Must Be Done to Expand African Counter-Terrorism Networks, Unify Global South against Extremist Threats, Secretary-General Tells Regional High-Level Conference' Press Release, (10 July 2019) UN Doc SG/SM/19660 <https://www.un.org/press/en/2019/sgsm19660.doc.htm> accessed 5 October 2020.

8 ibid. Indeed, half of the 20 states most impacted by terrorism, as listed in the 2020 Global Terrorism Index, are African. The states and their position on the list are Nigeria (3rd), Somalia (6th), Democratic Republic of the Congo (9th), Mali (11th), Burkina Faso (12th), Cameroon (13th), Egypt (14th), Mozambique (15th), Libya (16th), and Central African Republic (17th). Kenya, one of the three states used as a case study in this thesis (the other two are Egypt and Nigeria), is the 23rd most impacted state. See Institute for Economies and Peace, 'Global Terrorism Index 2020: Measuring the Impact of Terrorism' Sydney (November 2020) 8 <https://www.visionofhumanity.org/wp-content/uploads/2020/11/GTI-2020-web-2.pdf> accessed 19 August 2021.

9 See AU Assembly, 'Fifth Report of the Peace and Security Council of the African Union on the Implementation of the African Union Master Roadmap of Practical Steps to Silence the Guns in Africa by the Year 2020, For the Period February 2019 to February 2020' (9-10 February 2020) Addis Ababa, Ethiopia, Assembly/AU/6(XXXIII), para 40. It is noted that at the 50th Anniversary of the Organization of African Unity (OAU)/AU in 2013, the AU Assembly declared 'their determination to achieve the goal of a conflict-free Africa', also pledging 'not to bequeath the burden of conflicts to the next generations of Africans and to end all wars in Africa by 2020'. See AU, '50th Anniversary Solemn Declaration' (adopted by the 21st Ordinary Session of the Assembly of Heads of State and Government of the AU, at Addis Ababa, Ethiopia, 26 May 2013) available at <https://au.int/sites/default/files/documents/36205-doc-50th_anniversary_solemn_declaration_en.pdf> accessed 3 October 2021, para E. In 2015, the pledge 'to end all wars in Africa by 2020' was reiterated in 'Agenda 2063: The Africa We Want'. See AU, 'Agenda 2063: The Africa We Want' available at <https://au.int/sites/default/files/documents/36204-doc-agenda2063_popular_version_en.pdf> accessed 3 October 2021, para 72(j). Under Aspiration 4 of the agenda which provides for a 'peaceful and secure Africa', it is stated that '[m]echanisms for peaceful prevention and resolution of conflicts will be functional at all levels. As a first step, dialogue-centred conflict prevention and resolution will be actively promoted in such a way that by 2020 all guns will be silent'. See AU 'Agenda 2063' (n 9) para 32. 'Silencing the Guns by 2020' is one of the fifteen flagship projects of Agenda 2063. See AU, 'Flagship Projects of Agenda 2063' <https://au.int/agenda2063/flagship-projects> accessed 3 October 2021. In 2016, following the 2013 Solemn Declaration, the PSC developed the AU Master Roadmap of Practical Steps for Silencing the Guns in Africa by the Year 2020 (Lusaka Master Roadmap 2016). See 'African Union Master Roadmap of Practical Steps for Silencing the Guns in Africa by the Year 2020 (Lusaka Master Roadmap 2016)' available at <https://au.int/sites/default/files/documents/37996-doc-au_roadmap_silencing_guns_2020.pdf.en_.pdf> accessed 3 October 2021. In December 2020, the implementation of the Lusaka Master Roadmap was extended for another 10 years, until 2030. See AU Assembly, 'Decision of the 14th Extraordinary Session of the Assembly of the African Union on Silencing the Guns in Africa' (6 December 2020) Ext/Assembly/AU/Dec.1(XIV) para 19(i). See also, AU Assembly, 'Johannesburg Declaration on Silencing the Guns in Africa- "Silencing the Guns: Creating Conducive Conditions for Africa's Development"' (adopted by the 14th Extra Ordinary Session of the AU Assembly of Heads of State and Government of the African Union, 6 December 2020) Ext/Assembly/AU/Dec.1(XIV), para 17.

10 Ruchita Beri, 'Rise of Terrorism in Africa' (*IDSA Comment*, 13 April 2017) <https://idsa.in/idsacomments/rise-of-terrorism-in-africa_rberi_130417> accessed 10 July 2020.

11 ibid.

resultant fatalities increasing by as much as 750%.[12] A plethora of terrorist organisations now operate on the continent, including *Boko Haram*;[13] *al-Shabaab*;[14] *Jama'at Nusrat al-Islam wal Muslimeen*,[15] and which is operational in states in the Sahel region including Mali (predominantly), Burkina Faso, and Niger;[16] the Lord's Resistance Army, based originally in Uganda but now also operational in the Central African Republic; the Allied Democratic Forces, operational in Uganda and the Democratic Republic of the Congo (DRC);[17] Islamic State West Africa Province (ISWAP), operational in Nigeria, Chad, Niger, Cameroon, Mali and Burkina Faso;[18] Islamic State Central African Province, which is operational in DRC and Mozambique;[19] the Islamic State Sinai Province or *Wilayat Sinai*, operational in Egypt;[20] and *Ansaroul Islam*, which is operational in Burkina Faso (and said to be its 'first home-grown militant Islamic group').[21] This is by no means an exhaustive list.

Predictably, African states affected by terrorism have reacted by employing a range of counterterrorism measures, including action by law enforcement and other security agencies/forces in reaction to, and with a view to preventing, terrorism. Such action of course encompasses a significant use of force with a view to repressing terrorist acts. Counterterrorism in African states takes place both within and outside the context of an armed conflict, depending on whether the actions of the terrorists and the state's forcible reaction can be classified under international law as an armed conflict.

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12 'Numbers Show Dramatic Rise of Terrorist Attacks in Africa Over Past Six Years, IHS Says' (*Business Wire*, 27 June 2016) <https://www.businesswire.com/news/home/20160627005638/en/Numbers-Show-Dramatic-Rise-Terrorist-Attacks-Africa> accessed 4 October 2021. See also Beri (n 10).

13 The proper name of the group is *Jama'atul Ahlus Sunnah Lidda'awati wal Jihad* which translates into 'People Committed to the Propagation of the Prophet's Teachings and Jihad'. However, it is generally referred to as Boko Haram which means 'western education is forbidden'.

14 The full name of the group is *Harakat al-Shabaab al-Mujahideen* which translates into 'Mujahideen Youth Movement", but it is generally referred to as *al-Shabaab* which means 'the Youth'.

15 Meaning 'Group for Support of Islam and Muslims'. It was formed from a merger of four groups i.e., Sahara's branch of *al-Qaeda* in the Islamic Maghreb, *Ansar al-Din*, *al Murabitoon*, and the Macina Liberation Front (or *Katibat Macina*). See Tom Connolly, 'Jama'at Nasr al-Islam wal Muslimin: A Merger of al-Qaeda Affiliates' (*Foreign Brief*, 25 April 2020), <https://foreignbrief.com/africa/jamaat-nasr-al-islam-wal-muslimin-a-merger-of-al-qaeda-affiliates/> accessed 4 October 2021.

16 See further, ibid.

17 Bernard Busuulwa, 'Worrying Reports of Terrorist Groups Gaining Financial Muscle in Uganda' (*The East Africa*, 22 September 2018) <https://www.theeastafrican.co.ke/business/Terrorist-groups-gaining-financial-muscle-in-Uganda-/2560-4772922-9ngrv7/index.html> accessed 4 October 2021.

18 Jacob Zenn, 'ISIS in Africa: The Caliphate's Next Frontier' (*Newlines Institute for Strategy and Policy*, 26 May 2020) <https://newlinesinstitute.org/isis/isis-in-africa-the-caliphates-next-frontier/> accessed 3 October 2021. It is noted that Islamic State Greater Sahara is now incorporated into ISWAP. See ibid.

19 ibid.

20 ibid.

21 Pauline Le Roux, 'Ansaroul Islam: The Rise and Decline of a Militant Islamist Group in the Sahel' (*Africa Center for Strategic Studies*, 29 July 2019) <https://africacenter.org/spotlight/ansaroul-islam-the-rise-and-decline-of-a-militant-islamist-group-in-the-sahel/> accessed 10 July 2020.

International law has traditionally considered terrorism as a criminal phenomenon to be dealt with by each state using its law enforcement or policing system, regulated under the international law of law enforcement (LOLE).[22] The exception to this is when acts that would ordinarily be viewed as terrorist in nature occur within the context of an armed conflict, in which case the law of armed conflict (LOAC), also referred to as international humanitarian law (IHL)), also applies. Thus, the deployment by states of their law enforcement bodies[23] to prevent and combat the crime of terrorism is at the heart of counterterrorism policing. However, this traditional view that counterterrorism policing should be done within the law enforcement paradigm was contested quite prominently after the 9/11 attacks.[24] With the feeling that the nature of the threat of terrorism had transformed to the extent that it rendered the extant law enforcement paradigm inadequate,[25] there was a concerted push by states and others for tougher measures,[26] leading to the adoption by many states of a revised law enforcement paradigm with 'fewer human rights protections', and/or the adoption of the armed conflict paradigm as the framework for counterterrorism actions.[27]

In response to the 9/11 attacks, the UN Security Council (UNSC) rallied all states into a global fight against terrorism through its Resolution 1373,[28] which mandated and required all states to take strong action against terrorism.[29] This resolution, despite its far-reaching provisions,

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22 On the notion of an 'international law of law enforcement', see Stuart Casey-Maslen (ed), *Weapons under International Human Rights Law* (Cambridge University Press 2014) xvi–xvii.

23 It is to be noted that the term 'law enforcement' is not limited to the police. The commentary to Article 1 of the 1979 Code of Conduct for Law Enforcement Officials (adopted by General Assembly Resolution 34/169 of 17 December 1979) states as follows:

> (a) the term "law enforcement officials" includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention. (b) In countries where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, the definition of law enforcement shall be regarded as including officers of such services.

See also 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990) note 1, which reiterates this.

24 See Yuval Shany, 'Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights* Law (Oxford University Press 2011) 13, 17; Larissa van der Henrik and Nico Schrijver, 'The Fragmented International Legal Response to Terror' in Larissa van der Henrik and Nico Schrijver (eds) *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the* Challenges (Cambridge University Press 2012) 1, 20-21; Manfred Nowak and Anne Charbord, 'Key Trends in the Fight against Terrorism and Key Aspects of International Human Rights Law' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counterterrorism* (Edward Elgar Publishing 2018) 12, 25.

25 Shany (n 24) 16, 17.

26 Nowak and Charbord, 'Key Trends' (n 24) 25.

27 Shany (n 24) 17.

28 UNSC Resolution (Res) 1373 (28 September 2001) UN Doc S/RES/1373.

29 Resolution 1373 imposed some binding obligations upon states, for example, necessitating that they take given steps against terrorism financing (see operative para 1 of the resolution); refrain from supporting,

was conspicuously silent about human rights concerns while countering terrorism.[30] Although the UNSC later stated unequivocally (in 2003) that states' measures against terrorism must comply with their human rights obligations,[31] many states in reaction to Resolution 1373

providing safe haven to, or harbouring terrorists (see operative paras 2(a) and (c)); to bring perpetrators or supporters of terrorist acts to account, while also establishing terrorism as a serious crime in their national laws with commensurate punishments attached (see operative para 2(e)); and to implement effective border controls to minimise movement of terrorists (see operative para 2 (g) of the resolution). The resolution also called on all states to, at the earliest moment, become parties to the existing international terrorism treaties. ibid, operative para 3(d).

30 Human Rights Watch, 'In the Name of Security: Counterterrorism Laws Worldwide since September 11' (2012) 13, available at <https://www.hrw.org/sites/default/files/reports/global0612ForUpload_1.pdf> accessed 14 October 2021. See also UN Commission on Human Rights (UNCHR) 'Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Robert K. Goldman' (7 February 2005) UN Doc E/CN.4/2005/103 para 6.

31 See UN Res 1456 (20 January 2003), UN Doc S/RES/1456, Annex, operative para 6. This has been reiterated in subsequent resolutions, for example in UN Res 1624 (14 September 2005) UN Doc S/RES/1624, operative para 4; UN Res 2170 (15 August 2014) UN Doc S/RES/2170, preambular para 8; UN Res 2178 (24 September 2014) UN Doc S/RES/2178, preambular para 7; and UN Res 2396 (21 December 2017) UN Doc S/RES/2396, preambular para 7. The UN Global Counterterrorism Strategy adopted by the General Assembly also prioritises adherence to human rights standards while countering terrorism in its Pillar IV which deals with 'measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism'. See UNGA Res 60/288 (20 September 2006) UN Doc A/RES/60/288, Annex Plan of Action, section IV. However, it is noted that despite the foregoing, the efforts of the UN in including human rights in the fight against terrorism has been summed up thus:

> The UN enshrined the protection of human rights in counter-terrorism efforts in Pillar IV of the GCTS, but in practice, human rights in the context of the UN's counter-terrorism work is most often minimized to a generic line in a resolution, reduced to a few questions on a country visit survey, comprised of a small staff sprinkled throughout the Secretariat and Security Council bodies, securitized in the PVE [Prevention of Violent Extremism] agenda and under-funded in its programming.

See International Federation for Human Rights (FIDH), 'The United Nations Counterterrorism Complex: Bureaucracy, Political Influence and Civil Liberties' (2017), 7. Ben Emerson, the previous Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, noted in his final report in 2017 thus:

> Nonetheless, the absence of a systematic and substantial human rights element in the Security Council's implementation machinery and the relative weight placed on human rights as against counter-terrorism and security policy are issues that raise real concern … When all the threads are drawn together, there is simply insufficient emphasis on human rights protection in the United Nations counter-terrorism acquis.

UNHRC 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism' (21 February 2017) UN Doc A/HRC/34/61, 63. Fionnuala Ni Aoláin (the current Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism) and Martin Scheinin (the first Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism) also note that '[s]ince the passage of UNSCR [UN Res] 1373 in 2001, the role of human rights in the architecture of counter-terrorism has been limited and highly contested'. Fionnuala Ni Aoláin and Martin Scheinin 'Centralizing Human Rights in the Global Counter-Terrorism Strategy' (*Just Security*, 16 March 2018) <https://www.justsecurity.org/53583/centralizing-human-rights-global-counter-terrorism-strategy/> accessed 24 June 2018. Ni Aoláin, writing on UN Res 2396 (2017) dealing with the issue of returning Foreign Terrorist Fighters (FTFs) notes the measures demanded from States with regard to 'border security, information-sharing and criminal justice', as having potentially serious human rights implications. She further notes that while the Resolution incorporates language urging states to carry out these obligations in accordance with international law or human rights, such language seems merely 'superfluous' or a token, as there are no concrete provisions in the resolution to ensure that that there is a follow through on that. She compares that with the specificity that went into detailing the obligations of states and setting up means for ensuring compliance with them. See Fionnuala Ni Aoláin 'The UN Security Council, Global Watch Lists, Biometrics, and the Threat to the Rule of Law' (*Just Security*, 17 January 2018)

adopted counterterrorism measures contrary to established human rights standards,[32] such as adopting legislation or policy through executive fiat that ascribed extraordinary powers to law enforcement agencies, in a bid to combat terrorism.[33] Other such measures include the condoning or tacit approval of the use of illegitimate and/or illegal tactics against suspected terrorists, for example, torture and other forms of ill-treatment, as well as enforced disappearances, which are all, of course, serious violations of human rights law.[34]

In Africa, counterterrorism operations carried out by law enforcement officials in affected states are widely characterised by the use of excessive force. For instance, there are persistent, credible reports of extrajudicial killings and/or the use of torture and other forms of ill-treatment during counterterrorism in Kenya.[35] There are similar reports on such violations in

<https://www.justsecurity.org/51075/security-council-global-watch-lists-biometrics/> accessed 25 June 2018. It is important to note that some guidance for states in ensuring that their response to FTFs comply with their obligations under international law, has now been provided by the UN. See UN Counter-terrorism Implementation Task Force- Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, 'Guidance to States on Human Rights-Compliant Responses to the Threat Posed by Foreign Fighters' (2018) <https://www.un.org/sc/ctc/wp-content/uploads/2018/08/Human-Rights-Responses-to-Foreign-Fighters-eb-final.pdf> accessed 29 September 2018. Aoláin however notes that the human rights guidance 'continue to function at the margins of state activity and are in pressing need of adoption, validation and use in practice'. See Fionnuala Aoláin, 'Ensuring a Human Rights-Compliant Approach to the Challenge of Foreign Terrorist Fighters' (*Just Security*, 7 November 2018) <https://www.justsecurity.org/61376/ensuring-human-rights-compliant-approach-challenge-foreign-fighters/> accessed 10 February 2019.

32 Human Rights Watch, 'In the Name of Security' (n 30) 4. See also UNCHR 'Report of Independent Expert' (n 30) para 6 and 7. According to Robert Goldman, the former UN Human Rights Commission's Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism, the 'omission may have given currency to the notion that the price of winning the global struggle against terrorism might require sacrificing fundamental rights and freedoms'. See UNCHR 'Report of Independent Expert' (n 30) para 6.

33 Human Rights Watch, 'In the Name of Security' (n 30), 4-6.

34 ibid, 5-6.

35 See for example Kenyan National Commission on Human Rights (KNCHR), '"The Error of Fighting Terror with Terror": Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism' (September 2015) available at <http://www.knchr.org/Portals/0/CivilAndPoliticalReports/Final%20Disappearances%20report%20pdf.pdf> accessed 29 October 2018; Human Rights Watch, 'Deaths and Disappearances: Abuses in Counterterrorism Operations in Nairobi and in Northeastern Kenya' (2016) available at <https://www.hrw.org/sites/default/files/report_pdf/kenya0716web_1.pdf> accessed 29 October 2018.

Burkina Faso,[36] Cameroon,[37] Egypt,[38] Mali,[39] Mozambique,[40] Niger,[41] Nigeria,[42] Tunisia,[43] and Uganda.[44] Such use of excessive force as part of counterterrorism policing measures is a serious violation of states' obligations under international law to promote and protect human rights within their jurisdictions. Moreover, research also suggests that the use of excessive force is

36 See Laura Angela Bagnetto, 'Questions Remain Over Extrajudicial Killings against Fulani in Burkina Faso' (*RFI*, 21 May 2020) <https://www.rfi.fr/en/africa/20200521-questions-remain-over-extrajudicial-killings-against-fulani-in-burkina-faso-africa> accessed 2 October 2021; Ricci Shyrock, 'Burkina Faso Plagued by Terror Attacks, Rights Allegations' (*VOA*, 7 February 2019) <https://www.voanews.com/a/burkina-faso-plagued-by-terror-attacks-and-human-rights-allegations/4777150.html> accessed 2 October 2021.

37 Amnesty International, 'Cameroon: Amnesty Report Reveals War Crimes in Fight Against Boko Haram, Including Horrific Use of Torture' (20 July 2017) <https://www.amnesty.org/en/latest/news/2017/07/cameroon-amnesty-report-reveals-war-crimes-in-fight-against-boko-haram-including-horrific-use-of-torture/> accessed 2 October 2021.

38 See for example, Saferworld, 'We need to talk about Egypt: How Brutal 'Counter-terrorism' is Failing Egypt and its Allies' <https://static1.squarespace.com/static/58921b4b6b8f5bd75e20af7e/t/59e475ee49fc2ba4f9849375/1508144641442/SaferWorld_v1_Egypt_pdf-v1.pdf> accessed 24 September 2018. See also, Human Rights Watch, '"Security Forces Dealt with Them": Suspicious Killings and Extrajudicial Executions by Egyptian Security Forces' (2021) <https://www.hrw.org/news/2021/09/07/egypt-shootouts-disguise-apparent-extrajudicial-executions> accessed 8 September 2021.

39 See Human Rights Watch, 'Mali: Unchecked Abuses in Military Operations' (8 September 2017) <https://www.hrw.org/news/2017/09/08/mali-unchecked-abuses-military-operations> accessed 2 October 2021.

40 See Amnesty International, 'Mozambique: Civilians Killed as War Crimes Committed by Armed Group, Government Forces, and Private Military Contractors- New Report' (2 March 2021) <https://www.amnesty.org/en/latest/news/2021/03/mozambique-civilians-killed-as-war-crimes-committed-by-armed-group-government-forces-and-private-military-contractors-new-report/> accessed 2 October 2021.

41 See Will Brown, 'Key Western Ally Accused of Dozens of Killings, as over 100 men Go Missing in Niger' (*The Telegraph*, 1 June 2020) <https://www.telegraph.co.uk/global-health/terror-and-security/key-western-ally-accused-dozens-killings-100-men-go-missing/> accessed 2 October 2021; Silja Frohlich, 'Niger: Fear of Terror – and the Military' (*DW*, 10 September 2021) <https://www.dw.com/en/niger-fear-of-terror-and-the-military/a-54947989> accessed 2 October 2021.

42 See for example, Amnesty International, 'Nigeria: Deaths of Hundreds of Boko Haram Suspects in Custody Requires Investigation' (15 October 2013) <https://www.amnesty.org/en/latest/news/2013/10/nigeria-deaths-hundreds-boko-haram-suspects-custody-requires-investigation/> accessed 3 September 2020; Amnesty International, 'Nigeria: Military Razes Villages as Boko Haram Attacks Escalate' (14 February 2020) <https://www.amnesty.org/en/latest/news/2020/02/nigeria-military-razes-villages-as-boko-haram-attacks-escalate/> accessed 3 September 2020.

43 See Amnesty International, 'Tunisia: Abuses in the Name of Security Threatening Reforms' (10 February 2017) <https://www.amnesty.org/en/latest/press-release/2017/02/tunisia-abuses-in-the-name-of-security-threatening-reforms/> accessed 2 October 2021.

44 See Human Rights Watch, 'Open Secret: Illegal Detention and Torture by the Joint Anti-terrorism Task Force in Uganda' (8 April 2009) <https://www.hrw.org/report/2009/04/08/open-secret/illegal-detention-and-torture-joint-anti-terrorism-task-force-uganda> accessed 2 October 2021; and generally, Emmanuel Okurut, 'Accountability for Acts of Torture by Counter Terrorism Law Enforcement Officials in Uganda' (December 2017) 4 University of Botswana Law Journal 3.

potentially counterproductive as it can encourage recruitment into extremist groups,[45] and thus potentially perpetuate terrorist violence in the affected society.[46]

Africa possesses a 'unique' vulnerability with regards to the problem of violent extremism, 'shaped by persistent underdevelopment and incomplete peacebuilding and state-building in key regions'.[47] Given the prevailing circumstances, it is noted that there is a genuine possibility of further escalation of violent extremism on the continent, beyond what has been recently experienced.[48] An assessment of regional action at the AU level with regard to the problematic use of excessive force in counterterrorism policing thus becomes important, as the objectives of the AU include promoting peace and security on the continent,[49] and the promotion and protection of human and peoples' rights in Africa.[50] As part of their human rights obligations, states have a duty to protect their populations against acts of terrorism,[51] while also ensuring that whatever measures taken in this regard accord with human rights standards.[52] While states are primarily responsible for implementing human rights, regional human rights systems - in this instance, the African human rights system - play a significant role in ensuring compliance with human rights obligations at the domestic level, along with the global system,[53] and in this

45 For example, in 2017, the United Nations Development Programme (UNDP) released a report on a study conducted among former recruits to terrorist groups in Africa, done with the aim of increasing knowledge of the drivers and incentives of violent extremism on the continent, and the study found among other things, '[s]tate security-actor conduct' to be a 'prominent accelerator of recruitment', with 71% of respondents noting '"government action", usually a traumatic event involving state security forces', as being the final reason for choosing to join violent extremist groups. See United Nations Development Programme (UNDP), 'Journey to Extremism in Africa: Drivers, Incentives and Tipping Points for Recruitment' (2017) 5, 73, 92. Such event includes the 'killing of a family member or friend', or the 'arrest of a family member or friend.' See ibid 5 and 73. Similarly, Ngari and Reva note evidence from Nigeria and Egypt showing that there exists 'a strong link between abuse sustained at the hands of security services and recruitment into violent extremist organisations'. See Allan Ngari and Denys Reva, 'How Ethnic and Religious Discrimination Drive Violent Extremism' (September 2017) 4 Institute of Security Studies (ISS) Africa in the World Report 9-10.

46 See Manfred Nowak and Anne Charbord, 'Introduction' in Nowak and Charbord, *Using Human Rights* (n 24) 1, 3-4.

47 UNDP (n 45) 6.

48 ibid.

49 Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3, art 3(f).

50 ibid, art 3(h).

51 Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Human Rights, Terrorism and Counter-Terrorism' Fact Sheet No 32, 8 – 9. This human rights imperative on states to provide protection against terrorism is reflected in art 3(1)(a) of the Protocol to the OAU Convention on the Prevention and Combating of Terrorism (adopted 8 July 2004, entered into force 26 February 2014) where states undertake to 'take all necessary measures to protect the fundamental human rights of their populations against all acts of terrorism'.

52 OHCHR (n 51) 9. This is also reflected in the Protocol to the OAU Convention, in art 3(1)(k) where states undertook to prohibit torture and other inhumane and degrading treatment which do not accord with the principles of international law. See generally Frans Viljoen, *International Human Rights Law in Africa* (2nd edn, Oxford University Press 2012) 281.

53 See generally Viljoen (n 52) 9-10.

instance particularly, support the process of pursuing a balanced approach between countering terrorism and protecting human rights. Furthermore, it is clearly in the collective interest of all African states that the spread of violent extremism on the continent is contained,[54] including through the maintenance of human rights standards while countering terrorism, and the African regional human rights system has a particular role to guide the regional counterterrorism approach.

### 1.2. Problem Statement

The AU has what has been called a 'fairly progressive' counterterrorism architecture,[55] composed of instruments including the Organization of African Unity (OAU) Convention on the Prevention and Combating of Terrorism,[56] the 2002 Plan of Action on the Prevention and Combating of Terrorism in Africa,[57] the 2004 Protocol to the OAU Convention,[58] and the 2011 African Model Anti-terrorism Law;[59] as well as institutions such as the AU Peace and Security Council, the African Union Commission (AUC- encompassing the African Centre for Study and Research on Terrorism (ACSRT)), and the Regional Economic Communities/Regional Mechanisms for Conflict Prevention (RECs/RMs). While the thread of a general obligation by states to comply with the principles of international law, including human rights law, runs through the instruments creating this framework,[60] it is noteworthy that the African

54 After noting the threat that terrorism poses to the African continent, the PSC further remarked that, '[i]n this regard, terrorism requires a robust, systematic and comprehensive response by the [AU] working in close collaboration with all the stakeholders within the [c]ontinent'. See AU Assembly, 'Report of the Peace and Security Council' (n 6) para 4. It is noted that the 2004 AU Solemn Declaration on a Common African Defence and Security Policy (CADSP) identifies terrorism to be one of the common security threats to the continent. See AU Solemn Declaration on a Common African Defence and Security Policy (CADSP) (adopted by the Heads of State and Government of Member States of the African Union, in Sirte, Libya, on 24 February 2004) operative paras 8(ii)(f) and 9(d). The Policy notes that '[c]ommon [s]ecurity [t]hreats may be deemed to pose a danger to the common defence and security interests of the continent, …, when such threats confront all, some, or one of the countries or regions of the continent'. CADSP (n 54) operative para 7. Earlier, it is noted in the Policy that the defence and security of each African state is 'inextricably' and 'inseparably linked' to that of other states of the continent, and that of the 'continent as a whole'. ibid, operative paras 5 and 6.

55 Simon Allison, 'Good Talk, Not Enough Action: The AU's Counter-terrorism Architecture, and Why It Matters' (2015) Institute for Security Studies Policy Brief 66, 1. See also ibid, 5.

56 Organization of African Unity (OAU) Convention on the Prevention and Combating of Terrorism (adopted 14 July 1999, entered into force 6 December 2002) 2219 UNTS 179. The African Union replaced the OAU in July 2002.

57 AU, Plan of Action of the African Union High-level Inter-governmental Meeting on the Prevention and Combating of Terrorism in Africa (AU Plan of Action), (2002) Mtg/HLIG/Conv.Terror/Plan.(I).

58 Protocol to the OAU Convention on the Prevention and Combating of Terrorism (adopted 8 July 2004, entered into force 26 February 2014).

59 African Model Anti-terrorism Law (Model Law), Final Draft as endorsed by the 17th Ordinary Session of the Assembly of the African Union, Malabo, 30 June – 1 July 2011.

60 See for example art 22(1) of the OAU Convention; preambular para 7 of the Model Anti-terrorism Law; art 51 of the Model Anti-terrorism Law; and art 3(1)(k) of the Protocol to the OAU Convention.

Commission on Human and Peoples' Rights (ACHPR), the principal human rights institution in the African regional system,[61] has been accorded no formal role in this architecture.[62]

On the part of the counterterrorism institutions, some action has been taken towards ensuring human rights protection during counterterrorism, such as by highlighting the necessity of compliance by states with human rights norms while countering terrorism;[63] and undertaking training and capacity building of law enforcement in the prevention and combating of terrorist activities,[64] including trainings advocating adherence to human rights norms.[65] These notwithstanding, a strong response is lacking to the problem of the use of excessive force

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61 ACHPR, 'Addressing Human Rights Issues in Conflict Situations: Towards a Systematic and Effective Role for the African Commission on Human and Peoples' Rights' (2019) 33, para 64. There are three main human rights institutions in the African human rights system- the African Court of Human and Peoples' Rights, the ACHPR, and the African Committee of Experts on the Rights and Welfare of the Child- of which the ACHPR is most prominent. See Viljoen (n 52) 169. The focus in this thesis is on the ACHPR because while the other two institutions are also important, in the case of the African Court for example, its role in responding to the use of excessive force during counterterrorism in Africa would be quite limited to clarifying applicable standards while deciding cases which allege violations of human rights norms regulating the use of force while countering terrorism, and ordering remedies. The African Committee for the Rights of a Child on its part focuses only on the rights of children, hence not quite relevant when dealing with the issue of the use of excessive force in counterterrorism policing except when it directly intersects with children's rights and welfare.

62 See Viljoen (n 52) 281.

63 See for example, AU Peace and Security Council (AU PSC), 'Communique' (249th Meeting, Addis Ababa, Ethiopia, 22 November 2010) PSC/PR/COMM.(CCXLVIX) para 11; AU PSC, 'Communique' (455th Meeting at the Level of the Heads of State and Government, Nairobi, Kenya, 2 September 2014) PSC/AHG/COMM.(CDLV) para 28; AU PSC, 'Report of the Chairperson of the Commission on Terrorism and Violent Extremism' (455th Meeting, Nairobi, Kenya, 2 September 2014) PSC/AHG/2(CDLV), para 82.

64 See for example, AU, 'Press Release 11/2014: Training Course on 'Operational Intelligence Analysis' (17 December 2014) <http://caert.org.dz/Press-releases/Press%20release%2011.pdf> accessed 22 September 2018; AU, 'Press Release No 05/2015: Organisation of the 5th Training Course on Operational Intelligence Analysis at the African Centre for the Study and Research on Terrorism' <http://caert.org.dz/Press-releases/Press%20release%208%20Dec%2015.pdf> accessed 22 September 2018; African Centre for the Study and Research on Terrorism (ACSRT), 'Webinar on Counterterrorism and Judicial Cooperation (Interplay of Intelligence, Evidence, and Prosecution)' <https://caert.org.dz/webinar-on-counter-terrorism-and-judicial-cooperation-interplay-of-intelligence-evidence-and-prosecution/>, accessed 16 April 2021.

65 Forums organised by the ACSRT in this regard include two workshops on 'Implementing Internationally Accepted Good Practices for Investigating and Prosecuting Terrorism Cases: The Use of Undercover Operations and the Protection of Sensitive Information', organised in conjunction with the US Department of Justice, as noted in ACSRT, '2nd UNCCT International Conference on Engaging Partners for Capacity Building: United Nations' Collaboration with Counter terrorism Centres, Brussels, Belgium' (July – December 2014) ACSRT/CAERT Newsletter, 22 <http://caert.org.dz/Publications/Newsletter/ACSRT%20Newsletter-Jul-Dec-2014.pdf> accessed 5 October 2018. See also ACSRT, 'NATO-African Union Joint Advanced Training Course on 'Counter Terrorism Capacity Building Through Training and Education' <https://caert.org.dz/nato-african-union-joint-advanced-training-course-on-counter-terrorism-capacity-building-through-training-and-education/>, accessed 15 February 2021; ACSRT, 'Regional Webinar for Southern African Development Community States Members on Human Rights and the Rule of Law in the Prevention and Countering of Terrorism, Violent Extremism and Transnational Organized Crime (PCT and TOC)' <https://caert.org.dz/regional-webinar-for-southern-african-development-community-states-members-on-human-rights-and-rule-of-law-in-the-prevention-and-countering-of-terrorism-violent-extremism-and-transnational-organized/> accessed 16 April 2021.

during counterterrorism policing on the continent, and the impact of the action undertaken thus far is unclear.

The ACHPR has also taken steps in a bid to strike a balance between the need of states to effectively counter terrorism and their obligations to respect human rights law. For example, in 2005, the Commission passed Resolution 88, on the Protection of Human Rights and the Rule of Law in the Fight Against Terrorism.[66] In 2015, the ACHPR also adopted the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa (Principles and Guidelines),[67] which contains a particular section outlining the general law enforcement rules governing the use of lethal and non-lethal force.[68] In May 2017, the ACHPR followed up by passing Resolution 368 regarding the implementation of the Principles and Guidelines,[69] wherein it, among other recommendations, calls on states to adhere to and implement the Principles and Guidelines in line with their obligations under the African Charter on Human and Peoples' Rights.[70] However, the effect of these resolutions is yet to be felt.

While, as can be seen from the above, the regional institutions have taken some positive steps towards ensuring that the use of force during counterterrorism policing in Africa accord with human rights norms, the comprehensiveness and the effectiveness of this action are lacking. The fact that the use of excessive force in counterterrorism policing by African states is a violation of international standards already makes it an important concern. The potentially counterproductive nature of such use of excessive force, coupled with the vulnerability of states on the continent to violent extremism, makes it doubly imperative for the issue to be addressed. It is thus a matter of regional concern and priority, which should be tackled as part of an AU 'robust, systematic and comprehensive response' to terrorism.[71]

The problem this thesis addresses is the lack of comprehensive action within the African regional system towards the use of excessive force during counterterrorism policing on the

66 ACHPR, '88 Resolution on the Protection of Human Rights and the Rule of Law in the Fight Against Terrorism' (adopted at the 37th Ordinary Session of the ACHPR held from 21 November to 5 December 2005, Banjul, The Gambia) <http://www.achpr.org/sessions/38th/resolutions/88/> 20 September 2018.

67 (Adopted during the ACHPR's 56th Ordinary Session in Banjul, Gambia, 21 April to 7 May 2015).

68 See Principles and Guidelines, Part 2, para B.

69 ACHPR, '368 Resolution on Implementation of the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa' (22 May 2017) ACHPR/Res. 368 (LX) 2017, <http://www.achpr.org/sessions/60th/resolutions/368/> accessed 20 September 2018.

70 ibid, operative para 1.

71 See AU Assembly, 'Report of the Peace and Security Council on its Activities' (n 6), para 4, where it is noted that 'terrorism requires a robust, systematic and comprehensive response by the African Union working in close collaboration with all the stakeholders within the [c]ontinent'.

continent, with a view to seeking legal, institutional and policy interventions that will result in positive changes. In exploring the incidence of the use of force in counterterrorism policing in Africa, the thesis draws particularly from the experiences in recent years in Egypt, Kenya, and Nigeria, using the three states as illustrative case studies. This thesis argues that despite some positive strides, there are still material gaps and significant inadequacies with the current response by the regional institutions to the use of excessive force in counterterrorism policing operations on the continent, with regard to the elaboration of applicable norms during counterterrorism policing and the steps taken by the relevant institutions. A two-pronged framework for a comprehensive regional response is proposed, based on the clarification of the applicable rules, as well as on the further roles and actions that regional institutions such as the PSC, the AUC, the ACHPR, and the AU Assembly of Heads of State and Government need urgently to take. While it is acknowledged that the existence of such a clear and robust framework will not guarantee swift incorporation of the necessary human rights standards into domestic practice in Africa, it will be a good move towards ensuring that it occurs in time.

### 1.3. Objective of the Study

The central objective of this thesis is to identify interventions within the African regional system that could be effective in reducing the use of excessive force in counterterrorism policing on the continent, towards the creation of a framework for a comprehensive response in that regard.

### 1.4. Significance of the Study

The focus of the thesis is on the use of excessive force during counterterrorism policing, which is a contemporary issue, a violation of states' international obligations, and - as research suggests - a driver of terrorist violence in itself. As the phenomenon of terrorism is currently expanding into new frontiers in Africa, the use by law enforcement of excessive force during counterterrorism is a problem that needs to be urgently tackled from a regional standpoint (as well as nationally and globally), with action needed to ensure states' compliance with their human rights obligations while countering terrorism, as well as a potential reduction of terrorist violence on the continent.

### 1.5. Research Questions

The main question this thesis answers is: what legal, institutional, and policy interventions can the relevant African regional institutions make to ensure that the use of force in counterterrorism policing on the continent is brought into line with the international standards?

In answering the above question, the following sub-questions are considered:

a) What are the international legal standards for the use of force in counterterrorism, including the distinction between the law enforcement and the armed conflict paradigm?
b) What are the trends in the use of force in counterterrorism policing in Africa, focusing especially on the experiences in Egypt, Kenya, and Nigeria?
c) To what extent has the African regional institutions responded to the level of force used during counterterrorism policing in Africa?
d) How should the African regional institutions properly respond to the level of force used in counterterrorism policing on the continent?

### 1.6. Literature Review

The need for the protection of human rights while countering terrorism, even in Africa, has generated a lot of interest in literature. There have been a considerable number of writings and reports detailing the need for counterterrorism measures that accord with human rights law, inclusive of the rejection of the use of excessive or indiscriminate force in counterterrorism since it has become itself, a driver of violent extremism on the continent.[72] However, not as much attention has been paid to the role and capability of the AU counterterrorism and human rights regimes in ensuring this.

Some authors have written generally on the role of the AU institutions in ensuring states' compliance with human rights norms in the context of counterterrorism. These include Ewi and Aning, who, while writing on the AU counterterrorism architecture in 2006, noted that the

[72] See for example UNDP (n 45) 73; Ngari and Reva (n 45) 9-10; Raeesah Cassim Cachalia, Uyo Salifu and Irene Ndung'u, 'The Dynamics of Youth Radicalisation in Africa: Reviewing the Current Evidence' (August 2016) Institute for Security Studies Paper 296, 7: Anton du Plessis and Simon Allison (*Institute for Security Studies*, 22 March 2017), 'Africa Cannot Afford to Get Counterterrorism Wrong Again' <https://issafrica.org/iss-today/africa-cant-get-counter-terrorism-wrong-again> accessed 5 October 2018; Simon Allison (*Institute for Security Studies*, 12 June 2017), 'Dear Theresa May, A Counter-terrorism Lesson for Africa' <https://issafrica.org/iss-today/dear-theresa-may-a-counter-terrorism-lesson-from-africa> accessed 5 October 2018; Anneli Botha, 'Radicalisation in Kenya: Recruitment to Al-Shabaab and the Mombasa Republican Council' (September 2014) Institute for Security Studies Paper 265, 20, 24.

then-existing capacity of the AU to handle issues of human rights violations resulting from counterterrorism measures taken by states was 'inadequate'.[73] They ascribed this to the AU having not taken steps in that direction yet, and an absence of coordination between the AUC and the ACHPR.[74] They also noted the substantial role the latter could play in the fight against terrorism with particular regard to the protection of human rights in the counterterrorism measures taken by states, although the Commission had not been formally included in the counterterrorism architecture.[75] In 2013, Ewi also wrote on the measures taken within the African regional institutions to ensure the protection of human rights by states during counterterrorism, and he noted that '[t]he AU counterterrorism human rights regimes still ha[d] gaps', especially regarding accountability of states for violations of human rights while countering terrorism.[76] The author also pointed out that neither the current counterterrorism regime nor the human rights regime was strictly enforced,[77] with the AU unable to monitor effectively states' compliance with their obligations to protect human rights while countering terrorism.[78]

Also, Kane, writing in 2012, noted that in spite of the existence of a 'relatively clear legal framework', there was no significant progress by the African human rights protection mechanisms in ensuring the effective protection of human rights by African states while countering terrorism.[79] He further claimed that the reactions of these mechanisms in this regard have been 'extremely timorous or even indifferent',[80] averring that this raised the need for a new approach, one which should entail better monitoring of states' counterterrorism actions, and which would allow for 'more frequent interventions' by human rights protection mechanisms at the regional and sub-regional levels.[81] Focusing mainly on the ACHPR, Kane recommended measures towards this 'new approach', such as a review of mandates of some of the ACHPR's special mechanisms to enable them deal with 'some of the practical aspects' of

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73 Martin Ewi and Kwesi Aning 'Assessing the Role of the African Union in Preventing and Combating Terrorism in Africa' (2006) 15(3) African Security Review 32, 42.
74 ibid.
75 ibid.
76 Martin Ewi 'The Role of Regional Organizations in Promoting Cooperation on Counter-terrorism Matters', in Van der Henrik and Schrijver (n 24) 128, 171.
77 ibid.
78 ibid. See also Martin A Ewi and Anton du Plessis, 'Criminal Justice Responses to Terrorism in Africa: The Role of the African Union and Sub-regional Organizations' in Ana Maria Salinas de Frias *et al* (eds), *Counter-terrorism: International Law and Practice* (Oxford University Press 2012) 990, 1015.
79 Ibrahima Kane, 'Reconciling the Protection of Human Rights and the Fight Against Terrorism in Africa' in Salinas de Frias *et al* (eds) (n 78) 838, 839.
80 ibid 840.
81 ibid.

states' counterterrorism measures;[82] and constructive dialogue and cooperation between key continental players such as between the ACHPR, the African Court of Human and Peoples' Rights, sub-regional courts; as well as the ACHPR with political organs of the AU, the RECs, and members of the civil society.[83] Kane had also recommended the adoption by the ACHPR of 'Guidelines and Principles on the protection of human rights in the framework of the fight against terrorism in Africa'.[84]

The writings by the above authors, however, are quite old now, with some of the observations and recommendations made appearing dated, such as the Principles and Guidelines (whose development was advocated for by Kane), which now exist. Also, these scholars do not consider recent developments within the AU counterterrorism and human rights architecture relevant to ensuring states' compliance with human rights norms during counterterrorism operations. Furthermore- and of great importance- these works do not speak particularly to the critical issue of the use of excessive force during counterterrorism, the subject of this thesis, as they only consider the issue of human rights and counterterrorism in Africa from a general perspective.

Building upon the existing literature, this thesis focuses on the use of excessive force by African states during counterterrorism operations, specifically when undertaken by law enforcement officials, and considering principally the legal, institutional, and policy interventions that relevant African regional institutions can make to ensure that the use of force in counterterrorism policing on the continent is brought into line with the international standards. It begins by clarifying the rules applicable to such operations under international law, discussing the law enforcement (LE) and conduct of hostilities (COH) rules for the use of force, and noting when each is applicable. In this regard, it particularly highlights the issue of the geographical scope of application of the conduct of hostilities rules in a non-international armed conflict (NIAC), endorsing the view that the application of COH rules should be limited to the conflict zone i.e., areas where hostilities are occurring, as supported by the court's statement in *Prosecutor v Tadić*.[85] This is good law as it better protects the general population in areas outside the conflict zone as well as better reflecting the reality in many NIACs where hostilities are limited to specific regions of the state in question. In addition, the thesis addresses

82 See ibid 863-864, 871.
83 ibid 867-869, 871.
84 ibid 871.
85 *Prosecutor v Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72 (2 October 1995) paras 68 and 69.

the question of the interplay of LE and COH rules in a NIAC, discussing how to differentiate between situations of law enforcement and those of conduct of hostilities. This distinction is critical considering that counterterrorism policing does occur, in some states, within the context of a complex security situation or environment, for example a state opposing a terror group in a NIAC while also faced with repressing other terrorist threats or a criminal organisation with alleged links to the terror group. Then, using Egypt, Kenya, and Nigeria, as illustrative case studies, it identifies trends in the use of force in counterterrorism policing on the African continent. The thesis afterwards moves to an assessment of the response of the African regional system - specifically, the AU counterterrorism and human rights institutions - to the use of excessive force during counterterrorism operations by states, in light of recent developments and opportunities in that regard.

In the two-pronged framework proposed for a comprehensive regional response, clarification of the applicable rules in the use of force in counterterrorism policing is combined with institutional development, including the design of scenario-training based programmes for law enforcement, the creation of a dedicated special mechanism for the promotion and protection of human rights while countering terrorism in Africa (in the form of an independent expert), as well as the establishment of human rights-compliant use of force during counterterrorism policing as an AU institutional policy. This is the key contribution to knowledge this thesis makes.

### 1.7. Methodology

This thesis results from in-depth review and analysis of the relevant laws, policy positions, applied research, and associated literature on counterterrorism and compliance with human rights. The methods of analysis applied in this thesis are doctrinal, comparative (including through use of the case studies mentioned above), and qualitative.

The doctrinal method is used to set out the legal framework for the thesis, for example, the framework relating to the international legal standards for the use of force in counterterrorism, and also for expounding upon the AU counterterrorism and human rights regimes as laid down in the relevant instruments. Comparative methods are used mainly to highlight distinctions between the law enforcement and conduct of hostilities rules for the use of force in counterterrorism, and to establish trends in the use of force in counterterrorism policing in Africa, particularly concerning the states selected as case studies.

The case study method is used in exploring the context of and understanding the situation of the use of force in counterterrorism policing in Africa. Egypt, Kenya, and Nigeria were selected as the cases under focus in this thesis. A number of factors informed the selection of these states. For one, the states currently rank very highly among those most impacted by terrorism in the world.[86] Also, relative to other highly ranked African states, they constitute some of the most influential states on the continent, including in their various sub-regions.[87] In addition, these three states are particularly apt for an assessment of the problem of the use of excessive force in counterterrorism policing in Africa, as they all have a well-documented history of very high levels of use of force in counterterrorism.[88]

All of the selected states have quite sizeable populations, with Nigeria having the largest population on the continent (of about 213 million),[89] Egypt the 3rd largest population (about 105 million),[90] and Kenya, the 7th largest population (about 55 million).[91] The religious make-up of the Nigerian state can generally be described as consisting of a mainly Muslim North and a mainly Christian South.[92] Egypt on its part has a predominantly Muslim population, with

86 The Global Terrorism Index 2017 ranked Nigeria the 3rd state most impacted by terrorism in the world, Egypt, 11th, and Kenya, 22nd. This put Nigeria as the most impacted state in Africa in 2017, Egypt in 4th place, and Kenya as the 11th most impacted state on the continent. See Institute for Economies and Peace, 'Global Terrorism Index 2017: Measuring and Understanding the Impact of Terrorism' 2 <http://visionofhumanity.org/app/uploads/2017/11/Global-Terrorism-Index-2017.pdf> accessed 28 August 2018. In the 2020 version of the Index, Nigeria still ranks 3rd most impacted in the world, but Egypt is currently in 14th place, and Kenya, 23rd. For 2020, Nigeria was in 1st place in Africa, Egypt in 7th, and Kenya, 11th. This leaves Nigeria still 1st place in Africa, but Egypt is now 7th most impacted, and Kenya, 11th. See Institute for Economies and Peace, 'Global Terrorism Index 2020' (n 8) 8.

87 See Jackie Cilliers *et al*, 'Power and Influence in Africa: Algeria, Egypt, Ethiopia, Nigeria and South Africa' (March 2015) Institute of Security Studies (ISS) African Futures Paper 14, 1, 2, which names Egypt and Nigeria as part of the 'Big Five Powerhouses' on the continent. Nigeria and Egypt currently have the first and second largest economies in Africa. Kenya on its part, is has the 6th largest economy on the continent, and the largest in Eastern Africa. See Statista, 'African Countries with the Highest Gross Domestic Product (GDP) in 2021' https://www.statista.com/statistics/1120999/gdp-of-african-countries-by-country/, accessed 24 September 2021.

88 See for example, Human Rights Watch, 'Egypt. Events of 2019' <https://www.hrw.org/world-report/2020/country-chapters/egypt>; 'Kenya: Killings, Disappearances by Anti-Terror Police' (18 August 2014) <https://www.hrw.org/news/2014/08/18/kenya-killings-disappearances-anti-terror-police>; Human Rights Watch, 'Spiraling Violence: Boko Haram Attacks and Security Force Abuses in Nigeria' (11 October 2012) <https://www.hrw.org/report/2012/10/11/spiraling-violence/boko-haram-attacks-and-security-force-abuses-nigeria>; all accessed 8 July 2020.

89 Worldometer. 'Nigeria Population' <https://www.worldometers.info/world-population/nigeria-population/> accessed 26 September 2021.

90 Worldometer, 'Egypt Population' <https://www.worldometers.info/world-population/egypt-population/> accessed 24 September 2021.

91 Worldometer, 'Kenya Population' <https://www.worldometers.info/world-population/kenya-population/> accessed 26 September 2021.

92 See generally, Haldun Çancı and Opeyemi Adedoyin Odukoya, 'Ethnic and Religious Crises in Nigeria: A Specific Analysis upon Identities (1999-2013)', (2016) 16(1) African Journal on Conflict Resolution 87, 95.

Islam also being the state religion.[93] In the case of Kenya, it is a majority Christian state with 85.5% of the population as Christians, and 11% as Muslims.[94]

In the three states, the primary terrorist threat arises from an extremist religious (Islamist) group- in the case of Egypt, *Wilayat Sinai*; Kenya, *al-Shabaab*; and Nigeria, *Boko Haram* (here referring to the two main factions which the group split into in 2016 i.e., *Jama'atu Ahlis Sunna Lidda'awati Wal-Jihad* (JAS- still often called *Boko Haram*) and ISWAP).[95] In all three instances, the conflict with the groups currently qualify as NIACs,[96] although in the case of Kenya, it is mostly an extraterritorial NIAC against *al-Shabaab* in Somalia.[97] In contrast to the other two states, the main terrorist threat faced by Kenya stems from a group originating and based primarily in another state i.e., Somalia. However, Kenya also faces threats from indigenous terrorist organisations. In the case of Egypt, in addition to *Wilayat Sinai* which is mainly operational in North Sinai, there are other terrorist groups active in Egypt but which the state is not involved in a NIAC with. Concerning Nigeria, while the major terrorist threat therein comes from *Boko Haram* and the state is involved in parallel NIACs with the two main factions (JAS/*Boko Haram* and ISWAP), there are also armed bandits, criminal gangs with alleged links to *Boko Haram*.[98]

Overall, the three selected states constitute prominent examples of states with significant terrorist threats. Being only three out of over 50 states in Africa, it would be difficult to generalise the findings from the selected states to the entire continent as other African states also impacted by terrorism may have a different contextual background. However, these three states are only illustrative case studies, and present a good starting point for examining the issue of the use of excessive force during counterterrorism policing in Africa.

In addition to the above methods, the thesis applies qualitative analysis in describing and assessing initiatives the relevant African mechanisms have taken, either to articulate the human

93 See art 2 of the Constitution of the Arab Republic of Egypt, 2014.
94 Kenya National Bureau of Statistic, '2019 Kenya Population and Housing Census- Volume IV: Distribution of Population by Socio-Economic Characteristics', (Kenya National Bureau of Statistics, December 2019), 12.
95 See the discussion in Chapter 4 on the case studies.
96 See ibid.
97 As noted in Chapter 4, the NIAC between Kenya and *al-Shabaab* may have extended onto certain areas of Kenyan territory i.e., around the Boni Forest, close to the border with Somalia. See ibid.
98 See the discussion in Chapter 4 on the case studies.

rights norms relevant to counterterrorism policing or to achieve greater compliance with those norms.

The thesis relies on both primary and secondary sources, which include international instruments, relevant national legislation, policy documents of relevant AU institutions, case law, books, journal articles, reports by non-governmental organisations (NGOs) and civil society groups, newspaper reports, and online sources, among others.

### 1.8. Clarification of Key Terminology

**Terrorism: '**Terror', terrorism's root word, is derived from '*terrere'*, the Latin word for 'to frighten'.[99] The notion of terrorism is traced back to the French Revolution, said to be a term coined to refer to the intentional use of a machinery of terror by the revolutionary government headed by Maximilien Robespierre between 1793–1794, as a means of societal control and consolidation of power.[100] From its usage as a term to refer to the use by a state of terror, terrorism expanded about a century later to include reference to activities of non-state actors, beginning with the anti-state activities of anarchists in France and Russia.[101] Terrorism became the term used to condemn what was perceived as an illegitimate use of fear or violence,[102] and it was usually used against the 'other side'[103] – the side one did not happen to agree with.[104] Terrorism was for a very long time used as a means of political stigmatisation before it became a term of significance in legal discourse.[105]

At present, there is no agreement on a universal definition of (international) terrorism, at least not one that is accepted by all states.[106] The disagreement is exemplified by the current impasse on the proposed definition of terrorist acts in the draft Comprehensive Convention against

99 Reuven Young, 'Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and its Influence on Definitions in Domestic Legislation' (2006) 29 (1) Boston College International and Comparative Law Review 27.

100 See Anna Oehmichen, *Terrorism and Anti-Terror Legislation: The Terrorised Legislator?* (Intersentia 2009) 55; Saul, *Defining Terrorism* (n 2) 1; UNCHR (Sub-Commission), 'Report by Special Rapporteur Kallopi K Koufa 2001/31' UN Doc E/CN.4/Sub.2/2001/31, para.

101 See Young (n 99) 28; Saul, *Defining Terrorism* (n 2) 1- 2; UNCHR (Sub-Commission) (n 100) para 38.

102 See UNCHR (Sub-Commission) (n 100) para 25.

103 Young (n 99) 27.

104 See generally, Saul, *Defining Terrorism* (n 2) 3 – 4.

105 See Young (n 99) 27 and 30. See also Christian Walter, 'Defining Terrorism in National and International Law' in Christian Walter *et al* (eds), *Terrorism as a Challenge for National and International law: Security versus Liberty?* (Springer 2004) 23, 24.

106 See Alex P Schmid, 'The Definition of Terrorism' in Alex P Schmid (ed), *The Routledge Handbook on Terrorism Research* (Routledge 2011) 39.

International Terrorism (Draft UN Convention). Article 2(1) of the Draft UN Convention provides thus:

> Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:
>
> (a) Death or serious bodily injury to any person; or
>
> (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or
>
> (c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss,
>
> when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.[107]

While the above may seem relatively clear, there are major sticking points with this definition which hamper the conclusion of negotiations of the Convention and that have served, thus far, to preclude its adoption. These revolve around the exclusion from the ambit of the Convention of certain actors and activities that may, on the surface, carry all the markings of the acts described under article 2(1). The activities originally sought to be excluded under the Draft Convention were those conducted by armed forces (as defined under IHL) during armed conflicts,[108] and the activities of State military forces more broadly.[109] However, this approach did not go down well with all states,[110] with some arguing also for the exclusion of acts

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107 See the present text of the Draft UN Convention as set out in UNGA 'Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996' 16th Session (8 to 12 April 2013) UN Doc A/68/37 (hereafter, 'Ad Hoc Committee Report), Annex I.

108 Art 3(2) (formerly art 18 (2)) of the text circulated by the Coordinator of the Draft Convention in 2002 for discussion (A/57/37, Annex IV), as reproduced in Ad Hoc Committee Report (n 107), Annex II, 18. This would help to preserve the force of IHL rules, as it prevents the criminalisation of acts of violence which are not prohibited under the rules of IHL.

109 Art 3(3) (formerly art 18 (3)) of the text circulated by the Coordinator of the Draft Convention in 2002 for discussion (A/57/37, Annex IV), as reproduced in Ad Hoc Committee Report (n 107), Annex II, 18.

110 The exclusion of the activities of state military forces during peacetime as proposed under the Draft UN Convention is subject to such activities being already governed by other rules of international law, such as international human rights law, international criminal law, and the law of state responsibility. This is unacceptable to some states who seen no reason for such exemption in favour of state forces as against non-state actors and would only allow such exemption if the acts in question are in conformity with such other rules of international law. (See text of art 3(3) (formerly art 18(3)) as proposed by the members of the Organization of the Islamic Conference (now Organisation of Islamic Cooperation (OIC) (A/57/37, Annex IV); reproduced in Ad Hoc Committee Report (n 107), Annex II, 19.) This leads into the wider question of the state terrorism (encompassing both direct, as in regime terror, and state-sponsored terrorism) and its exclusion from the scope of the Draft UN Convention, as raised by some states, with others arguing that the Convention is only intended as an instrument of law enforcement against terrorist acts by individuals, in line with the approach in other international terrorism instruments, hence there being no place for the idea of state terrorism in it. See Ad Hoc Committee Report (n 107), Annex III, paras 23–24, 29.

committed in furtherance of national liberation and self-determination;[111] and the expansion of the exclusion of activities of armed forces during armed conflicts, to that of 'parties during an armed conflict',[112] as well as a demand that armed conflicts be stated to include situations of foreign occupation.[113] All these disputes have created a deadlock in negotiations, with no end presently in sight.

It is useful, at this juncture, to draw a distinction between terrorism during peacetime, and terrorism during situations of armed conflict. An armed conflict situation is anomalous, with different rules regulating the use of violence. During an armed conflict, certain violent acts are permissible under IHL.[114] For instance, under IHL, attacks on military objectives, which include persons taking active part in the conduct of hostilities, and military installations, are not prohibited, subject to the use of lawful means and methods of war.[115] However, acts of violence directed towards civilians, civilian objects, and persons not or no longer taking an active part in hostilities, are generally prohibited.[116] IHL also specifically prohibits certain acts of terrorism.[117] In all these instances, the prohibition of the use of terrorising violence against

111 See Ad Hoc Committee Report (n 107), Annex III, para 23.

112 See text of art 3(2) (formerly art 18(2)) as proposed by the members of the Organization of the Islamic Conference (OIC) (A/57/37, Annex IV); reproduced in Ad Hoc Committee Report (n 107), Annex II, 19. This contention over exclusion of activities of 'armed forces' as against those of 'parties,' turns on the fact that 'armed forces' has a specific meaning under IHL and is seen by some states as overly restrictive. To them, the use of 'parties' is preferable as it widens the categories of actors (particularly, non-state actors) in armed conflicts whose activities would be exempt from the purview of the Draft UN Convention. However, there is the argument that with 'parties' having no clearly defined meaning under IHL, it could result in an over-broad exclusion of activities from the purview of the Convention. See generally, Ad Hoc Committee Report (n 107), Annex III, para 26.

113 It is noted that under IHL, situations of foreign occupation are already classified as armed conflicts-international armed conflicts. See para 2 of common art 2 to the Geneva Conventions of 1949 (Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Geneva Convention relative to the Treatment of Prisoners of War (Geneva Convention III) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287). See also Ad Hoc Committee Report (n 107), Annex III, para 26.

114 International Committee of the Red Cross (ICRC) 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' Report of the 31st International Conference of the Red Cross and Red Crescent, 28 November – 1 December 2011, Geneva, Switzerland, Doc EN 31IC/11/5.1.2, 48.

115 See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, art 35(1).

116 See for example Additional Protocol I, arts 51 and 52.

117 See Additional Protocol I, art 51(2), and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (Additional Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, art 13(2), which provide that 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited'; Additional Protocol II, art 4(2)(d) which also specifically prohibits the commission of 'acts

civilians by IHL means that many acts which would be seen as terrorist when committed during peacetime, are also prohibited under IHL when they occur within the context of an armed conflict.[118] On the other hand, certain acts of violence, unlawful and possibly 'terrorist' in peacetime, are not prohibited in the conduct of hostilities under IHL. This, for example, would mean that while attacks on members of a state military force outside of an armed conflict situation could amount to terrorism, an attack on such forces by legitimate forces of another warring party in an armed conflict would not, as this is not prohibited under IHL (indeed, it is specifically required).[119] The notion of terrorism in peacetime and terrorism in the context of an armed conflict therefore vary because of the different rules applicable, on the use of violence.[120]

Despite the problem with reaching a common definition of terrorism, states have, since the 1960s, adopted a series of treaties on the international plane targeted at specific peacetime manifestation of terrorist acts. An advantage of this sectoral approach in reaction to terrorist activity was that it sidestepped the need for a single definition of terrorism.[121] A total of 19 legal instruments have so far been adopted by states,[122] either prohibiting a particular terrorist

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of terrorism' against persons not taking active part in the conduct of hostilities; and Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, art 33(1) which prohibits the use of 'collective punishments and likewise all measures of intimidation or of terrorism' against persons in the hands of an adverse party.

118 ICRC (n 114) 49.

119 See Additional Protocol I, art 48, which states that: 'the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives *and accordingly shall direct their operations only against military objectives*.' (Emphasis added)

120 Saul, *Defining Terrorism* (n 2) 294.

121 See Andrea Giola, 'The UN Conventions on the Prevention and Suppression of International Terrorism,' in Giuseppe Nesi (ed), *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight against Terrorism* (Ashgate 2006) 9–10; Ben Saul 'Terrorism as a Transnational Crime' (2014) The University of Sydney, Sydney Law School Legal Studies Research Paper No. 14/06, 1, 4 <http://ssrn.com/abstract=2386462> accessed 29 April 2018.

122 These instruments which comprise of conventions and protocols, include the Convention on Offences and Certain Other Acts Committed on Board Aircraft (adopted on 14 September 1963, entered into force 4 December 1969) 704 UNTS 219; Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (adopted 23 September 1971, entered into force 26 January 1973) 974 UNTS 177; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977) 1035 UNTS 168; International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205; Convention on the Physical Protection of Nuclear Material (adopted 26 October 1979, entered into force 8 February 1987) 1456 UNTS 101; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 221; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 304; Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 24 February 1988, entered into force 6 August 1989) 1589 UNTS

activity of concern at the time of adoption, or with the aim of preventing terrorists from procuring resources.[123]

Notwithstanding the above, there have been some definitions of terrorism at the international level. For example, the UN General Assembly's 1994 Declaration on Measures to Eliminate International Terrorism[124] defines terrorism as '[c]riminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes'.[125] The 1999 International Convention for the Suppression of the Financing of Terrorism[126] – within the context of criminalising terrorism financing- also gives a generic definition of terrorist acts in its article 2(1)(b) thus:

> [any] act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.[127]

The UNSC has also provided a 'description' of terrorist acts in its Resolution 1566 of 2004,[128] three years after its landmark Resolution 1373 which laid upon states many obligations

473; Convention on the Marking of Plastic Explosives for the Purpose of Detection (adopted 1 March 1991, entered into force 21 June 1998) 2122 UNTS 359; International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 256; International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 229; International Convention for the Suppression of Acts of Nuclear Terrorism (adopted 13 April 2005, entered into force 7 July 2007) 2445 UNTS 89; Protocol to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf (adopted 14 October 2005, entered into force 28 July 2010; Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (adopted 14 October 2005, entered into force 28 July 2010); Amendments to the Convention on the Physical Protection of Nuclear Material (adopted 8 July 2005, entered into force 8 May 2016) IAEA Doc GOV/INF/2005/10-GC(49)/INF/6; Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (adopted 10 September 2010, entered into force 1 July 2018) ICAO Doc 9960; Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 10 September 2010, entered into force 1 January 2018) ICAO Doc 9959; 2014 Protocol to Amend the Convention on Offences and Certain Acts Committed on Board Aircraft (adopted 4 April 2014, entered into force 1 January 2020) ICAO Doc 10034. See United Nations Office of Counterterrorism, 'International Legal Instruments' <https://www.un.org/counterterrorism/international-legal-instruments> accessed 16 June 2021.

123 Young (n 99) 47.

124 Annex to UNGA Res 49/60 (9 December 1994) UN Doc A/RES/49/60.

125 ibid, operative para 3.

126 (Adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 229.

127 Yoram Dinstein finds this definition 'most useful and relevant' and 'certainly the clearest'. Yoram Dinstein, *Non-International Armed Conflicts in International Law*, (2nd edn, Cambridge University Press 2021) 226, para 637.

128 The statement of the Brazilian representative to the Security Council after the vote on the resolution is noteworthy. He noted that operative para 3 of the resolution which contains the description of terrorism, 'reflected compromise language that contained a clear political message', and that '[i]t was not an attempt to define the concept of terrorism'. See United Nations Press Release- Security Council, 'Security Council Acts Unanimously to Adopt Resolution Strongly Condemning Terrorism as One of the Most Serious Threats to Peace' UN Doc SC/8214, 8 October 2004, <https://www.un.org/press/en/2004/sc8214.doc.htm> accessed 2 June 2018. Hence, the content of operative para 3 of Res 1566 may not, properly speaking, be taken as a

regarding counterterrorism, but which did not define 'terrorism'.[129] Resolution 1566, after calling 'upon [s]tates to cooperate fully in the fight against terrorism' in its operative paragraph 2, 'recalls'[130] in operative paragraph 3 that:

> …criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism…[131]

definition of terrorism by the Security Council. See Young (n 99) 45; and Robert Cryer *et al*, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge 2014) 337. However, Young writing in 2006, noted that the description of terrorist acts would probably become recognised as a definition by the Council factually, if not officially. See Young (n 99) 45. This has rather happened. See para 164(c) of the Report of the High-level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' UN Doc A/59/565 (2 December 2004); Young (n 99) 41-42; generally, Keiran Hardy and George Williams, 'What is "Terrorism"? Assessing Domestic Legal Definitions' (2011) 77 UCLA Journal of International Law and Foreign Affairs, 77, 92-95; Wondwossen D Kassa, 'Rethinking the No Definition Consensus and the Would Have Been Binding Assumption Pertaining to Security Council Resolution 1373' (2015) 17 Flinders Law Journal, 127, 135-138; Ben Saul 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism' (2011) 24 Leiden Journal of International Law, 677, 685–86.

129 See Nicholas Rostow, 'Before and After: The Changed UN Response to Terrorism after September 2001' (2002) 35(3) Cornell International Law Journal, 475, 484; Young (n 99) 44; Eric Rosand, 'Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism' (2003) 97 American Journal of International Law, 333, 339-340; Saul, *Defining Terrorism* (n 2) 48-49. But see Kassa, who disagrees, and argues that a close reading of Res 1373 reveals that it tacitly endorses the definition given in the Suppression of Financing Convention. For evidence of this, he points to the obligations the resolution imposes on states regarding the financing of terrorist activities under para 1 (obligations which he notes are very similar to obligations under the Convention), and its call for states to become parties to the Convention under para 3(d), as indicating that the Council considered terrorist acts under para 1, and the rest of the resolution, to have the same meaning as under the Convention. This he argues, is the only way states would be able to comply with obligations under para 1 of Res 1373 and the Convention at the same time. He also points towards subsequent practice of the Council, including para 3 of Res 1566, where the influence of the definition in art 2(1)(b) of the Convention is visible. He sees that as the explicit endorsement by the Council, of the Convention's definition. See generally, Kassa (n 128) 140-147. It is the considered view here that although Kassa makes some interesting points, his argument quite revolves around conjecture. A definition of terrorism or terrorist acts for the purpose of the resolution is too important to be subject to a 'between the lines' inference. See Kassa (n 128) 153. It may well be that the underlying thought in the drafting of Res 1373 was that the definition in the Suppression of Financing Convention was preferred. However, the resolution does not proclaim that.

130 The word 'recalls' as used by the Council is taken as an indication of a reference to a pre-existing conception of terrorism in the mindset of the Council by Kassa, which he argues leads back to the definition under the Suppression of Financing Convention. See Kassa (n 128) 146. Young, though, claims that it is unclear whence the definition is being recalled. See Young (n 99) 46.

131 See UNSC Res 1566 (8 October 2004) UN Doc S/RES/1566, operative para 3.

This description of terrorism by the Council in Resolution 1566 was not stated in mandatory terms and hence is not binding on states, although it provides useful guidance on the implementation by states of their obligations under Resolution 1373.[132]

Although disagreement on a universal definition of terrorism persists under international law, some definitions exist at the regional level borne from regional initiatives in the regulation of terrorism. Various regional instruments contain definitions of terrorism.[133] However, the content of these definitions vary greatly, also exemplifying the differences in the understanding of the term and its value-laden nature.[134] For example, the Arab Convention on the Suppression of Terrorism defines terrorism as acts or threats of violence which occur in pursuance of a criminal agenda with the aim of sowing panic among people by harming them or endangering their lives, liberty, or security; or seeking to damage the environment or property, occupy or seize such property, or endanger natural resources.[135] On its part, the definition in the OAU Convention on the Prevention and Combating of Terrorism - examined in greater detail later in this thesis[136] - refers, among others, to acts which damage 'environmental and cultural heritage', and also includes the intent to cause 'general insurrection' as a specific intent for terrorism.[137] The European Union (EU) Directive on Combating Terrorism's definition

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132 See Hardy and Williams (n 128) 93; Saul 'Radical Hague' (n 128) 685. The description of terrorism in Resolution 1566 was incorporated by the UN High-level Panel on Threats, Challenges and Change in its recommended definition of terrorism thus:

> … any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.

See Report of the High-level Panel on Threats, Challenges and Change (n 128) para 164(d).

133 See for example the definitions in the Arab Convention on the Suppression of Terrorism (by the League of Arab States) (adopted 22 April 1998, entered into force 7 May 1999), art 1(2); OAU Convention on the Prevention and Combating of Terrorism, art 1(3); the European Union Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [2017] OJ L88/6 (EU Directive), art 3. On the contrary, some regional instruments do not give a general definition of terrorism. This is the case for instance, with the Inter-American Convention on Terrorism which contains no definition of terrorism but refers to terrorist offences established under a number of international counterterrorism treaties. See Inter-American Convention against Terrorism (adopted 3 June 2002, entered into force 6 July 2003), AG/RES. 1840 (XXXII-O/02), art 2(1). A similar approach was also taken in the Association of South-East Asian States (ASEAN) Convention on Counter Terrorism (adopted on 13 January 2007, entered into force 27 May 2011). See the ASEAN Convention, art 2(1) thereof.

134 See generally Saul 'Radical Hague' (n 128) 695-96.

135 See Arab Convention, art 1(2).

136 See Chapter 5, text to note 60.

137 See OAU Convention, arts 1(3)(a) and 1(3)(a)(iii).

includes the intent of 'seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or international organisation'.[138]

Despite the above, and the acknowledgement by most scholars that there is not yet agreement on a universal definition of terrorism by the international community,[139] there is a contrary view that such a definition does exist, a view that was held prominently by Antonio Cassese.[140] In arguing that there exists an international crime of international terrorism in customary international law, Cassese states that a 'rule of customary international law on the objective and subjective elements of the international crime of terrorism in time of peace has evolved'.[141] This view was adopted by the Appeals Chamber of the Special Tribunal for Lebanon (STL), in its *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (*Interlocutory Decision*)[142] in the *Prosecutor v. Ayyash et al*[143] case. The Appeals Chamber[144] held that 'a customary rule of international law regarding the international crime of terrorism, at least in time of peace, had indeed emerged'.[145] This rule, the Chamber states, results from a 'number of treaties, UN resolutions, and the legislative and judicial practice of States' which show the 'formation of a general *opinio juris* in the international community, accompanied by a practice consistent with such opinion'.[146] According to the Chamber:

> This customary rule requires the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of a public danger) or directly or indirectly coerce a national or international authority to take some action, or refrain from taking it; (iii) when the act involves a transnational element. [147]

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138 See EU Directive, art 3(2)(c). Also, unlike the EU Directive, the Arab and OAU Conventions exclude actions in self-determination or liberation struggles from terrorism (see Arab Convention, art 2(a), and OAU Convention, art 3(1)). However, the exclusion in the Arab Convention does not cover 'any act prejudicing the territorial integrity of any Arab State'. See Arab Convention, art 2(a).

139 See Steven Arrigg Koh 'Marbury Moments' (2015) 54 *Columbia Journal of Transnational Law* 117, 147-48.

140 See Antonio Cassese 'The Multifaceted Criminal Notion of Terrorism in International Law' (2006) 4 Journal of International Criminal Justice 933, 933; Antonio Cassese *et al*, *Cassese's International Criminal Law* (3rd edn, Oxford University Press 2013) 146.

141 Cassese *et al*, *International Criminal Law* (n 140) 148. See also Cassese 'Multifaceted Notion' (n 140) 935.

142 STL-11-01/I (16 February 2011).

143 STL-11-01/I.

144 It is interesting to note that, in addition to being the President of the STL at that time, Cassese presided over the hearing of this case and was also its judge rapporteur. He delivered the decision.

145 See *Prosecutor v. Ayyash et al, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* STL-11-01/I (16 February 2011) para 85.

146 ibid.

147 ibid. See also, ibid 111.

The Chamber goes on to note that the requirement of a transnational element does not affect the definition of terrorism per se, but only denotes the character of the act as either domestic or international.[148]

This decision by the Appeals Chamber of the Special Tribunal for Lebanon[149] has proved controversial.[150] On the one hand, some scholars welcomed the Chamber's decision. Scharf noted the STL was the first tribunal to have 'authoritatively confirmed a general definition of terrorism under international law'.[151] Cohen describes the decision as 'path-breaking'[152] and 'seminal',[153] noting that the Appeals Chamber was right in holding that a universal definition of terrorism exists under international law.[154] Ventura stated that the decision was 'a bold attempt to tackle one of international law's most ongoing controversies',[155] referring to the Chamber's decision on the existence of a definition of terrorism under customary international law as its 'most groundbreaking finding'.[156]

On the other hand, the decision by the Appeals Chambers has been criticised by some other scholars. Saul rejects the notion that there exists a definition of terrorism under international

148 See ibid 89. It is noted that traditionally, international law distinguishes between acts of international terrorism i.e., acts that affect international relations or interests, and acts of domestic terrorism, i.e., acts thought to only affect purely domestic interests. Terrorist acts that would affect international interests would be for example, acts where the perpetrators and victims are of different nationalities, or which occur within the territory of different states. International law is said to concern itself with international terrorism, leaving states to regulate acts of domestic terrorism. See Robert Kolb, 'The Exercise of Criminal Jurisdiction over International Terrorists' in Andrea Bianchi (ed), *Enforcing International Norms against Terrorism* (Hart Publishing 2004) 227, 242. However, this distinction is not so clear-cut, and arguably, may be said to have now eroded altogether. This matter is considered at greater length later in the thesis. See Chapter 5, text to note 37.

149 This decision has found judicial approval in a case before the United Kingdom Court of Appeal, *R v Mohammed Gul* [2012] EWCA Crim 280 (CA). See generally Thomas Weatherall 'The Status of the Prohibition of Terrorism in International Law: Recent Developments' (2015) 46 Georgetown Journal of International Law 589, 605-606.

150 See generally, Koh (n 139) 150.

151 Michael P Scharf, *Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism and Modes of Participation* (*ASIL INSIGHTS (American Society of International Law, Washington, DC)* 4 March 2011) <https://www.asil.org/insights/volume/15/issue/6/special-tribunal-lebanon-issues-landmark-ruling-definition-terrorism-and> accessed 23 April 2018.

152 Aviv Cohen 'Prosecuting Terrorists at the International Criminal Court: Reevaluating an Unused Legal Tool to Combat Terrorism' (2012) 20 Michigan State International Law Review 219, 220.

153 ibid 230.

154 ibid 230-31, 256.

155 According to Ventura, 'only time will tell whether the decision will enter international law's hall of fame joining the likes of *Nicaragua, Tadić* and *Akayesu*'. See Manuel J Ventura 'Terrorism according to the STL's Interlocutory Decision on the Applicable Law: A Defining Moment or a Moment of Defining' (2011) 9 Journal of International Criminal Justice 1021, 1042.

156 ibid 1025-26.

law, noting that the Chamber's decision is, in fact, not supported by state practice.[157] He points inter alia to the deadlock in negotiations over the Draft UN Convention which has spanned over a decade, the variety in the definition of terrorism under regional treaties, and fundamental differences in the conception of terrorism in national legislation, as demonstrating the fact that there is no such agreement on the definition of terrorism as claimed by the Chamber.[158] Ambos notes that although the elements of terrorism as distilled by the Chamber roughly have a firm basis in international law, the imprecision as to their content confirms that the details of the definition of terrorism are still disputed.[159]

It is here agreed that there is, as yet, no agreement to be found on a universal definition of terrorism anywhere under international law. The deadlock over the Draft UN Convention which stalls its completion, and the variety in the content of definitions of terrorism at the national and regional levels, indeed show that states have quite different views on what terrorism is. While it may be possible to extrapolate a common basic understanding of 'terrorism', it is a great overreach to assume agreement on the details. The likely sentiment behind the Appeals Chamber's decision is noted – they perhaps wanted to move the law along in an age where there is a heightened sense of a global threat of terrorism.[160] While admirable, the resulting decision by the STL does not hold up under scrutiny.

In August 2020, the Trial Chamber of the STL rendered its judgment on the merits of the *Ayyash* case,[161] and therein, the view of the Appeals Chamber as to the definition of terrorism was rejected, with the Trial Chamber stating that it was 'not convinced' and 'does not accept on the analysis [*sic*] in the Appeals Chamber's decision', that a customary law definition of terrorism exists.[162] Judge Janet Nosworthy, in her Separate Opinion, suggests that while a customary law

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157 Ben Saul 'Civilizing the Exception: Universally Defining Terrorism' in Antonio Masferrer (ed), *Post-9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* (Springer 2012) 79, 80.

158 See generally ibid 80- 86. See also Kirsch and Oehmichen who note that 'although there is a global consensus that terrorism is a threat to society, legal concepts as to how terrorism can be defined still differ to a large extent'. See Stephan Kirsch and Anna Oehmichen 'Judges Gone Astray: The Fabrication of Terrorism as an International Crime by the Special Tribunal for Lebanon' 1 Durham Law Review Online 1, 19 <https://www.academia.edu/11365795/Judges_gones_astray_The_fabrication_of_terrorism_as_an_international_crime_by_the_Special_Tribunal_for_Lebanon> accessed 2 May 2018.

159 Kai Ambos, 'Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?' (2011) 24 Leiden Journal of International Law 655, 675.

160 Jurdi notes that '[T]he STL did not "find" a crystallised definition for terrorism but likely engaged in a lot of creativity in order to push the law forward'. See Nidal Nabil Jurdi 'The Crime of Terrorism in Lebanese and International Law' in Amal Alamuddin *et al* (eds) *The Special Tribunal for Lebanon: Law and Practice* (Oxford University Press 2014) 87, quoted in Koh (n 139) 151, note 177.

161 *Prosecutor v. Ayyash et al*, Judgment (Trial Chamber) STL-11-01/T/TC (18 August 2020).

162 See ibid paras 6192 and 6193.

definition of an international crime of terrorism 'was in the making, or nascent' in 2005, it had neither crystallised in 2005, nor at the time of the Appeals Chamber decision in 2011.[163] To the present author, this holding by the Trial Chamber seems to be a just recognition of the continued division among states on the issue of the definition of terrorism.

The continued lack of a universal definition of terrorism under international law has quite serious implications for the global fight against terrorism. Continued calls for action by states against terrorism, without there being a singular understanding of the term, leaves states to decide for themselves what terrorism is.[164] This has consequences for human rights protection as there is the potential for intentional abuse of the term through overly broad definitions.[165] This, according to Martin Scheinin, the first UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, 'results in the unintentional international legitimisation of conduct undertaken by oppressive regimes, through delivering the message that the international community wants strong action against "terrorism" however defined'.[166]

As noted above, there is a definition of terrorism in the OAU Convention. However, the fact that African states have agreed by treaty on a definition of terrorism does not mean that the definitions of terrorism under their national laws are in conformity with it.[167] In fact, some states have such overbroad definitions of terrorism in their national laws that they are wide enough to be used as tools to silence political dissidents and even human rights defenders.[168] Because of this, this thesis will not rely strictly on any one definition of terrorism. The focus of the thesis is on the policing of terrorism howsoever defined under the national law of the state in question, albeit seen through the lens of international law.

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163 See ibid, Separate Opinion of Judge Janet Nosworthy 2338, paras 124 and 127.

164 UNCHR 'Report of The Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism' (2005) UN Doc E/CN.4/2006/98, para 27.

165 ibid. See also Sudha Setty, 'What's in a Name: How Nations Define Terrorism Ten Years After 9/11' (2011) 33(1) University of Pennsylvania Journal of International Law 1, 8; Saul *Defining Terrorism* (n 2) 50-51; and generally, Kassa (n 128) 131-35.

166 UNCHR 'Report of Special Rapporteur (2005)' (n 164) para 27. Scheinin also notes that the lack of a single and comprehensive definition of terrorism impacts on the ability of states to judge their level of compliance with their obligations as it relates to counterterrorism; leads to difficulties in cooperation between states on counterterrorism in extradition and also, mutual legal assistance; and may result in gaps in protection as some acts or manifestations of terrorism may thus not be addressed. See ibid para 26.

167 On this issue, see further Chapter 5, text to note 78.

168 See for example, the definition of terrorism in art 2 of the Egyptian Anti-Terror Law, Law No 94 of 2015.

## 1.10. Scope of the Study

This thesis deals primarily with the subject of the use of force in counterterrorism policing in Africa. It focuses on action within the African regional system (particularly the AU counterterrorism architecture and the AU human rights system) relating to the problematic use of excessive force in counterterrorism policing on the continent; and proposes a comprehensive framework to respond to the problem.

## 1.11. Limitations of the Study

A limitation of the thesis is that it relies mostly on the experiences of three selected states – namely, Egypt, Kenya, and Nigeria – for its analysis on the practice of the use of force in counterterrorism policing in Africa. The findings resulting from an in-depth study of these three states may not be entirely generalisable to all other African states particularly those with a different contextual background. However, the focus on these states is only illustrative and other examples are given, as necessary.

In addition, a potential limitation of the thesis is its reliance on already collected data found for example, in reports from NGOs and civil society groups, and news publications, for instances of the practice of the use of force in counterterrorism policing in African states. Hence, the information cited and analysed in this thesis is second-hand i.e., information gathered and reported by other authors such as from interviews with victims, their relatives, and witnesses, and not information directly obtained by the present author.

The information used in this thesis is believed to be correct as of 18 October 2021.

## 1.12. Outline of the Thesis

The thesis consists of six chapters. The present chapter (Chapter 1) is the general introduction. Chapter 2 examines the use of force in counterterrorism policing under international law. It defines the term ‘counterterrorism policing’, before delving into the international legal framework for the use of force in counterterrorism policing where it examines the LE rules for the use of force. It then discusses the COH rules for the use of force, before highlighting the differences between the LE and COH rules and their implications for counterterrorism policing operations.

Chapter 3 builds upon the preceding chapter by considering the interplay between the LE and COH rules on the use of force. In focusing on the problem of distinguishing between situations

of law enforcement and those of conduct of hostilities, it appraises the main conclusions of the International Committee of Red Cross (ICRC)'s expert meeting in 2012 on the interplay between the two paradigms for the use of force in situations of armed conflict. The chapter also discusses the related issue of the interrelationship between IHL and international human rights law during armed conflicts, with a focus on the use of force in the conduct of hostilities.

Chapter 4 explores the legal framework for, and the practice of, the use of force in counterterrorism policing in Africa, based on the experiences in Egypt, Kenya, and Nigeria. It offers a comparative analysis of the experiences in the three states, in a bid to identify broader trends in the use of force in counterterrorism policing on the continent.

Chapter 5 deals with the African regional system and the use of force in counterterrorism policing in Africa. It discusses specifically the role and response of the African Union counterterrorism architecture as well as the African human rights system in ensuring human-rights complaint use of force in counterterrorism policing in Africa. It then proposes a framework for a comprehensive regional response to the use of excessive force during counterterrorism policing in Africa.

Chapter 6, the final chapter, summarises the findings of the thesis, states its recommendations, and concludes it.

# Chapter 2: Use of Force in Counterterrorism Policing under International Law

## 2.1. Introduction

In response to threats or attacks of terrorism, states consistently adopt a host of measures, including the deployment of their policing and security apparatus against the menace. The legality of the use of force by such state agents in combating terrorism is the focus of this chapter.

The chapter will consider issues related to the international legal standards for the use of force in counterterrorism. It will examine the term 'counterterrorism policing' which is used in this thesis and discuss the international legal framework for the use of force in such policing. It will also consider the rules on the use of force in conduct of hostilities, applicable in situations which qualify as armed conflicts, including during counterterrorism operations. Furthermore, it will highlight the distinction between the law enforcement and conduct of hostilities' rules for the use of force, and the implications of the distinction for the lawful use of force in counterterrorism operations. All these will go towards a comprehensive description of the international legal framework for the use of force against which counterterrorism policing by African states will be assessed.

## 2.2. Understanding 'Counterterrorism Policing'

The term 'counterterrorism' can largely be described as the measures or actions taken to prevent or in reaction to terrorism, however defined. In line with this, for example, the Rwandan Law on Counter Terrorism defines 'counter terrorism' as 'any act related to the curbing, prevention or stopping terrorist acts, as well as acts related to reducing the scale of destruction of property emanating from such acts of terrorism'.[1] Likewise, the United States Department of Defense's *Dictionary of Military and Associated Terms* has described counterterrorism as '[a]ctivities and operations taken to neutralize terrorists and their organizations and networks in order to render them incapable of using violence to instill fear and coerce governments or societies to achieve their goals'.[2]

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1 See Rwandan Law No 45/2008 of 09/09/2008 on Counter Terrorism, art 5.

2 United States Department of Defense, *Dictionary of Military and Associated Terms* (As of August 2021- the latest version at the time of writing) 52.

Counterterrorism encompasses a gamut of measures from increased security measures and the enactment of legislation to prevention of terrorist financing, action by law enforcement and other security forces, and criminal prosecution.[3] The term 'counterterrorism policing' is used in this thesis to signify the deployment by the state of its law enforcement bodies and systems to repress and prevent terrorism. This usage of the term 'counterterrorism policing' is a specific element of the broader concept of policing.

According to Wright, 'policing' is an 'essentially contested concept',[4] with it having a polymorphic nature, i.e. encompassing a myriad of tasks and activities between which there is no necessary overlap.[5] 'Policing', to him, bears multiple meanings that vary according to context, and is a term which is used in numerous ways.[6] He asserts that no particular function of policing can be singled out as encapsulating its essence.[7] All this, he argues, makes policing better understood from the standpoint of its modes of practice rather than its functions.[8] In this regard, Wright outlines four modes of policing practice, 'each of which is policing seen from a different perspective', to wit: peacekeeping, crime investigation, risk management, and promotion of community justice.[9]

Bowling *et al*, on their part, see 'policing' as 'an aspect of social control which occurs universally, in all social situations in which there is the potential for conflict, deviance, or disorder'.[10] To them, policing is targeted at the preservation of social order, and it involves the 'operation of surveillance, coupled with the threat of sanctions for deviance- either immediately or by initiating penal processes'.[11] Acknowledging that policing covers a wide range of tasks, they note that the common factor of the tasks is that they arise in emergency situations, rather than being part of a particular social function such as the control of crime or maintenance of law and order.[12]

However, 'policing' is commonly understood in terms of its law enforcement function, i.e., crime prevention and the maintenance of law and order in society. As Osse noted, 'policing' is

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3 See Todd Sandler, 'Terrorism and Counterterrorism: An Overview" (2015) Oxford Economic Papers, 1, 13.
4 Alan Wright, *Policing: An Introduction to Concepts and Practice* (Willan Publishing, 2002) 37-38.
5 ibid 36-37.
6 ibid 31-33.
7 ibid 38.
8 See ibid xiii, 25, and 38.
9 ibid xiii.
10 Benjamin Bowling *et al*, *The Politics of the Police* (5th edn, Oxford University Press 2019) 8.
11 ibid 4-5.
12 ibid 7.

particularly 'referred to as the process of "ensuring compliance with the law" in all its respects'.[13] This is the narrow sense in which the term is taken in this thesis.

The state or public police is only one of the many agencies or bodies that may be engaged in policing activities.[14] While the public police may be the state organization with a general policing mandate, other state agencies, such as the military, may also be granted policing roles. In addition, there are private policing firms; and citizens involved in policing, for example, as volunteers within the public police, within schemes in association with the police, or independently, as in some vigilante groups.[15] Hence, it is important to separate 'policing' from the institution of the public police. Whatever the body authorised to engage in policing activities, however, some powers are common to them, especially those concerned with the crime prevention and other law enforcement functions. Although the extent of the powers may vary, these policing powers include the power of arrest, the power of detention, as well as the power to use necessary force in achieving legitimate objectives.[16]

The above is also relevant to counterterrorism policing. The law enforcement systems that may be deployed by a state in preventing and combating terrorism are inclusive of the public police and other relevant state agencies. In the next section, we turn to a discussion of the international legal framework regulating the use of force by the law enforcement systems in their counterterrorism policing operations.

### 2.3. International Legal Framework for the Use of Force in Counterterrorism Policing

Under extant international law, the use of force in counterterrorism policing, like 'regular' policing, is regulated by the law enforcement rules (LE rules) for the use of force. The LE rules for the use of force are in fact the default standards for assessing the legality of any use of force by law enforcement officials, including during counterterrorism operations.[17] Only in the exceptional situation of an armed conflict may any given use of force by state agents then fall

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13 Anneke Osse, *Understanding Police: A Resource for Human Rights Activists* (Amnesty International Nederland 2012) 42. See also RI Mawby, 'Models of Policing' in Tim Newburn (ed), *Handbook of Policing*, (2nd edn, Willan Publishing 2008) 17, where the author notes that policing is 'a term we might apply to the process of preventing and detecting crime and maintaining order'.

14 Wright (n 4) xiii. See also Mawby (n 13), 17; and Bowling *et al* (n 10) 5-6.

15 See generally, Bowling *et al* (n 10) 5-6. As noted by the authors, policing could also be done through technology, for example with CCTV cameras, or built into streets/buildings architecture and furniture. See ibid 5.

16 Stuart Casey-Maslen and Sean Connolly, *Police Use of Force under International Law* (Cambridge University Press 2017) 1.

17 See ibid 266-267.

to be judged under the rules of international humanitarian law (IHL) pertaining to the conduct of hostilities.[18]

It is noted that the idea that the use of force in counterterrorism policing was regulated under the law enforcement model was questioned after the events of 9/11 in the United States, whereby some states argued that the law enforcement model which was traditionally applied to counterterrorism had become inadequate in the face of the newly transformed terrorist threat.[19] As noted previously,[20] stronger measures were advocated for and adopted in the form of a revised law enforcement model which had limited human rights constraints, and/or an armed conflict model towards counterterrorism.[21] For instance, in the case of the use of force, there was the use of torture or ill-treatment by some states against terrorist suspects, such as the use by the United States of coercive interrogation techniques.[22] In the context of the global 'war on terror' declared in the aftermath of 9/11, the notion of the absolute and non-derogable prohibition of the use of torture was contested even by democratic states, noted to be the first occurrence of such since the formation of the United Nations (UN).[23]

However, the idea of a new revised or new model applicable in the use of force in counterterrorism policing has been quite dispelled by clear recognition of the necessity to uphold human rights norms in the fight against terrorism at both global and regional levels.[24]

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18 ibid 267.

19 See Manfred Nowak and Anne Charbord, 'Key Trends in the Fight against Terrorism and Key Aspects of International Human Rights Law' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counterterrorism*, (Edward Elgar Publishing 2018), 12, 25; Yuval Shany, 'Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror' in O. Ben-Naftali (ed), *International Humanitarian Law and International Human Rights* Law (Oxford University Press 2011) 13, 17.

20 See Chapter 1, text to note 26.

21 Shany (n 19), 17.

22 See ibid 18-19. It is noted that such policy has been reversed in the United States. However, according to Nowak, the global damage done to the notion of the prohibition of torture as a peremptory norm of international law will take several years to fix. See United Nations Human Rights Council (UNHRC) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak' UN Doc A/HRC/13/39/Add.5, (5 February 2010), para 45.

23 See Nowak and Charbord, 'Key Trends' (n 19) 51-52; UNHRC 'Report of the Special Rapporteur (2010)' (n 22) paras 43-45.

24 See, for example, UN Res 1456 (20 January 2003), UN Doc S/RES/1456, Annex, operative para 6; UN General Assembly Resolution 60/288 (20 September 2006) UN Doc A/RES/60/288, Annex Plan of Action, Pillar IV; the Protocol to the Organization of African Unity (OAU) Convention on the Prevention and Combating of Terrorism (2004), arts 3(1)(k) and 3(2); the African Commission on Human and Peoples' Rights (ACHPR), 'Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa' (adopted during the ACHPR's 56th Ordinary Session in Banjul, Gambia, April 21 to May 7, 2015); the ACHPR, 'General Comment No. 3 on the African Charter on Human and Peoples' Rights : The Right to Life (Article 4)' (adopted during the 57th Ordinary Session of the African Commission on Human and Peoples' Rights held from 4 to 18 November 2015 in Banjul, The Gambia), para 3; the Council of Europe, 'Guidelines on Human Rights and the Fight against Terrorism' (adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers' Deputies); the Inter-American Convention against

The law enforcement model for the use of force has also been explicitly promoted as the applicable rules for counterterrorism policing. This, for example, is the case in the African Commission on Human and Peoples' Rights (ACHPR) Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, which notes the same international standards for the use of force (lethal and non-lethal force) by law enforcement as those applicable during counterterrorism in Africa.[25] The Council of Europe's Guidelines on Human Rights and the Fight against Terrorism, and the Inter-American Commission on Human Rights (IACHR) Report on Counter-Terrorism and Human Rights similarly note the same international standards for the use of lethal force by law enforcement as applicable to the fight against terrorism.[26] It is to the LE rules for the use of force that we now turn.

In general, the international law of law enforcement (LOLE) rules are said to be mainly derived from a combination of international human rights law (IHRL), particularly the provisions on the right to life, right to liberty, right to humane treatment, and the right to peaceful assembly; customary international law rules drawn mostly from criminal justice standards; and general principles of law, in this case referring to fundamental principles of criminal law widely recognised in domestic legal systems across the world.[27] The bulk of the rules of LOLE dealing

Terrorism, AG/RES. 1840 (XXXII-O/02), (adopted at the second plenary session held on 3 June 2002) preambular para 8 and art 15.

25 See ACHPR, 'Principles and Guidelines' (n 24) 17, para B. For example, in para B, it is noted that '[s]tate authorities may not use force unless doing so is strictly necessary and done only to the extent required for the performance of their duty'. Regarding lethal force, it notes that the use of such should be regarded as an extreme measure, and it goes on to list the circumstances whereby such use would be lawful. These provisions in the Principles and Guidelines are clearly drawn from art 3 of the 1979 Code of Conduct for Law Enforcement Officials (hereafter, 'Code of Conduct') (adopted by UN General Assembly Res 34/169 of 17 December 1979), as well as arts 5(a)-(b) and 9 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (hereafter, 'Basic Principles') (adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990); and these articles are listed in the explanatory note to para B.

26 Council of Europe, 'Guidelines' (n 24) para VI(2) notes that '[m]easures taken to fight terrorism must be planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force and, within this framework, the use of arms by the security forces must be strictly proportionate to the aim of protecting persons against unlawful violence or to the necessity of carrying out a lawful arrest'. On its part, the Inter-American Commission on Human Rights, 'Report on Counter-Terrorism and Human Rights' (22 October 2002) OEA/Ser.L/V/II.116, Doc.5 rev. 1 corr, available at <http://www.cidh.org/terrorism/eng/toc.htm> accessed 18 October 2021, para 87, states that:

> in situations where a state's population is threatened by violence, the state has the right and obligation to protect the population against such threats and in so doing may use lethal force in certain situations. This includes, for example, the use of lethal force by law enforcement officials where strictly unavoidable to protect themselves or other persons from imminent threat of death or serious injury, or to otherwise maintain law and order where strictly necessary and proportionate.

See also, IACHR, 'Report on Counter-Terrorism and Human Rights' (n 26), note 250, which reproduces the entirety of Principle 9 of the UN Basic Principles, which deals with the use of firearms (lethal force).

27 See Stuart Casey-Maslen (ed), *Weapons under International Human Rights Law* (Cambridge University Press 2014) xvi–xvii, and Casey-Maslen and Connolly (n 16) 6.

with the use of force in law enforcement are elaborated in two instruments adopted under the auspices of the UN –the 1979 Code of Conduct for Law Enforcement Officials (Code of Conduct), and the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Basic Principles).[28]

The Code of Conduct defines 'law enforcement officials' to include all officers of the law exercising police powers- also covering members of the military or state security forces where they exercise such powers.[29] In its Article 3, the Code of Conduct sets out the international standards for the use of force by law enforcement officials, stipulating that '[l]aw enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.' This article is elaborated on in the accompanying official commentary.[30] The Basic Principles build upon this standard in the Code of Conduct, giving more flesh to its content while also setting out benchmarks for accountability and review.[31] Although soft-law documents and hence not legally binding per se, the principles contained in the Code of Conduct and the Basic Principles have come to be regarded as 'authoritative statements of international law'.[32] While acknowledging that some provisions in the Code of Conduct and the Basic Principles were 'clearly guidelines rather than legal dictates', then UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Killings, Philip Alston, noted that certain provisions of those instruments – inclusive of the key provisions on the use of force – 'are rigorous applications of legal rules that States have otherwise assumed under customary or conventional international law'.[33] Hence, the rules laid out in those provisions on the use of force, according to Alston, reflect 'binding international law'.[34]

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28 See Casey-Maslen and Connolly (n 16), 79-80; and United Nations Office on Drugs and Crime (UNODC), *Resource Book on the Use of Force and Firearms in Law Enforcement* (United Nations, 2017) 7.

29 See Code of Conduct, paras (a) and (b) of the commentary to art 1. This is also reiterated in note 1 of the Basic Principles.

30 See commentary to art 3 of the Code of Conduct, paras (a) – (c).

31 See UN General Assembly (UNGA), 'Report of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Killings' (30 August 2011) UN Doc A/66/330 para 38; and UNODC (n 28) 7.

32 UNGA, 'Report of the Special Rapporteur (2011)' (n 31) para 36.

33 UNGA, 'Report of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Killings: Extrajudicial, Summary or Arbitrary Executions' (5 September 2006) UN Doc A/61/311 para 35.

34 ibid. In line with this view, the Code of Conduct and Basic Principles have been cited authoritatively by regional courts/bodies. See for example, *Benzer and Others v Turkey*, European Court of Human Rights (ECtHR) Former Second Section, Judgement (12 November 2013) (rendered final on 24 March 2014), para 90; and *Cruz Sanchez and Others v Peru*, Inter-American Court of Human Rights (IACtHR), Judgment (Preliminary Objections, Merits, Reparation, and Costs) (17 April 2015) para 264; and *Kazingachire and others v Zimbabwe*, ACHPR Communication 295/04 (12 October 2013) paras 110-114, and 117 thereof. Both instruments are also mentioned with approval in the UN Human Rights Committee 'General Comment No 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life' (30 October 2018) UN Doc CCPR/C/GC/36, para 13. See generally, Casey-Maslen and Connolly (n 16) 80;

Before delving into the substance of the international standards that make up the LE rules for the use of force, it is necessary to clarify the concept of 'force'. Osse defines 'lawful force' as 'any physical force by police [or other law enforcement officials], ranging from open-handed techniques to the use of firearms, to compel persons to act or prevent them from acting, in order to achieve a lawful policing objective'.[35] For its part, the International Committee of the Red Cross (ICRC) has described force, for the purposes of law enforcement action, thusly:

> … force is generally understood as any physical constraint imposed on a person in order to obtain compliance with a (lawful) order. The range is very wide, including simply touching a person, the use of means of constraint such as handcuffing, of more violent means such as hitting a person or of technical means such as tear gas or electro-shock weapons (commonly known as tasers), and ultimately the use of firearms.[36]

The UN Office on Drugs and Crime (UNODC) has described the 'use of force' as:

> .. the use of physical means that may harm a person or cause damage to property. Physical means include the use of hands and body by law enforcement officials; the use of any instruments, weapons or equipment, such as batons; chemical irritants such as pepper spray; restraints such as handcuffs; dogs; and firearms. The actual use of force has the potential to inflict harm, cause (serious) injury, and may be lethal in some instances.[37]

From the foregoing, it can be gleaned that 'force' in the context of law enforcement action refers to physical means or constraints that could be used by officials in the course of their duties, to ensure compliance with orders. The range of physical means available in this regard is quite wide and diverse, and can include restraints, batons, electroshock weapons, chemical irritants, and firearms, among others.

The use or threat of the use of force has been stated to be a constant 'inherent in the notion of law enforcement' over the ages and across diverse societies.[38] The ability to use some degree of force is a necessity for law enforcement officials as long as all their orders will not readily be complied with. The necessity of such force has been described as 'an essential part of the policing function';[39] required not just to ensure the ability of the officials to perform their legal

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and Stuart Casey-Maslen, Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council, Geneva Academy In-Brief No.6 (Geneva, November 2016) 5-6. See also UNODC (n 28), 7.

35 See Osse (n 13) 125.

36 International Committee for the Red Cross (ICRC), *To Serve and To Protect: Human Rights and Humanitarian Law for Police and Security Forces* (2nd edn, ICRC 2014) 247.

37 UNODC (n 28) 1.

38 Casey-Maslen and Connolly (n 16) 2.

39 See David A May and James E Headley, *Reasonable Use of Force by Police: Seizures, Firearms, and High-Speed Chases* (Peter Lang Publishing Inc, 2008), 4.

duties, but also to ensure their protection and safety, as well as that of the general public.[40] However, the use of force in law enforcement action is regulated by law, and whether or not such use of force is unlawful or excessive is assessed according to the LE rules for the use of force.

There are two core principles which regulate the use of force under LOLE. These are the principles of necessity and proportionality.[41] A third principle, the principle of precaution, is also essential, but its application begins upstream to any use of force.[42] In addition to these, specific rules govern the use of firearms, and further rules restrict the use of force during interrogation and detention. All these are examined hereunder.

### 2.3.1 The Principle of Necessity

The principle of necessity is the first to be considered when assessing use of force under LOLE. By this principle, and as stated in Article 3 of the Code of Conduct, any use of force for the purposes of law enforcement must be necessary in the circumstances.[43] The principle has been stated to consist of three elements.[44] The first element is the duty to use non-violent means wherever possible, which can be said to flow from the exceptionality of any use of force by law enforcement.[45] If such use of force is to be exceptional and thus a last resort, then non-violent means, such as persuasion, negotiation or mediation, must of necessity be explored first where possible.[46] This is expressed in Principle 4 of the Basic Principles.[47]

The second element is the duty to use force only for a legitimate law enforcement purpose, which can be seen in Article 3 of the Code of Conduct where it is provided that use of force by law enforcement officials shall be 'to the extent required for the performance of their duty'.[48] Hence there must be a legitimate objective being pursued before any use of force can be judged

40 See generally, UNGA, 'Report of the Special Rapporteur (2011)' (n 31) para 15.
41 See Casey-Maslen and Connolly (n 16) 82.
42 It is noted that apart from these three principles mentioned, others such as the principles of legality, accountability, and non-discrimination, are important. See for an explanation of these: Osse (n 13) 127-129; UNODC (n 28) 16-20; and ICRC '*To Serve and To Protect'* (n 36) 248, 250. However, the principles of necessity and proportionality are the primary rules that determine when a particular use of force is lawful, with others like legality and accountability, underpinning them. See Casey-Maslen and Connolly (n 16) 94. The principle of precaution on its part operates 'as a precursor to the principles of necessity and proportionality'. See Casey-Maslen and Connolly (n 16) 95; and Casey-Maslen, *Use of Force* (n 34) 9.
43 See Code of Conduct, art 3.
44 See Casey-Maslen and Connolly (n 16) 82.
45 See commentary to art 3 of the Code of Conduct, para (a), which notes that the article 'emphasizes that the use of force by law enforcement officials should be exceptional'.
46 Casey-Maslen, *Use of Force* (n 34) 6-7. See also UNODC (n 28) 16.
47 See Basic Principles, Principle 4.
48 See further, commentary to art 3 of the Code of Conduct, para (a).

necessary.[49] A corollary of this is that once the objective pursued has been achieved or when it apparently can no longer be achieved, further use of force becomes unnecessary and thus must cease.[50]

The third element is the duty to use only the minimum necessary force that is reasonable in the prevailing circumstances, which means that when it becomes imperative to use some degree of force in pursuit of a legitimate law enforcement objective, nothing beyond the least level of force 'reasonably necessary' in the given circumstance must be used.[51] This leads to the conclusion that, where reasonably possible, every effort should be made to arrest violent suspects, rather than kill them.[52] Using more than the minimum necessary force would be deemed excessive and thus a violation of international standards.[53]

### 2.3.2. The Principle of Proportionality

This principle as applicable in the context of LOLE, 'sets a maximum on the force that might be used to achieve a specific legitimate objective'.[54] The principle of proportionality is considered only when the principle of necessity is already adhered to i.e. the use of force in the particular circumstances is necessary, with the minimum force reasonably necessary to achieve the legitimate objective in view, used.[55] 'Proportionality' sets a limit to the force that may be used by weighing the harm that may result from a certain type or level of force to an individual and any bystanders, against the threat posed by that individual or the seriousness of the offence allegedly committed or contemplated (the legitimate law enforcement objective pursued).[56] If

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49 See UN Human Rights Council (UNHRC), 'Report of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Killings, Christof Heyns' (1 April 2014) UN Doc A/HRC/26/36, para 59.

50 UNODC (n 28) 17.

51 Although art 3 of the Code of Conduct uses the phrase 'strictly necessary', paragraph (a) of the commentary to the article clarifies the standard as 'reasonably necessary under the circumstances'. See commentary to art 3 of the Code of Conduct, paragraph (a); and UNGA 'Report of the Special Rapporteur (2011)' (n 31) para 37.

52 See NS Rodley, 'Integrity of Person' in Daniel Moeckli *et al* (eds), *International Human Rights Law* (3rd edn, Oxford University Press 2018) 177, where the author notes *Guerrero v Colombia*¸ (UNHRC) (31 March 1982) UN Doc CCPR/C/15/D/45/1979) a case that came before the UN Human Rights Committee, in which state agents shot dead suspected members of a guerrilla organisation alleged to have kidnapped an ambassador when they could have arrested them, as an example of a violation of the principle of necessity. See also Casey-Maslen and Connolly (n 16) 86.

53 UNODC (28) 17.

54 UNHRC, 'Report of the Special Rapporteur (2014)' (n 49) para 66.

55 Casey-Maslen and Connolly (n 16) 93. See Report of the Special Rapporteur (2006) (n 31), para 44, which states that: '… proportionality is a requirement additional to necessity. The principle of necessity will, thus, never justify the use of disproportionate force'.

56 See UNODC (n 27) 17 – 18. See also UNGA, 'Report of the Special Rapporteur (2006)' (n 33) para 41.

the harm caused is greater than the significance of the objective pursued, any use of such force, although necessary, will be disproportionate and thus unlawful.[57]

This principle is contained in paragraph (b) of the commentary to Article 3 of the Code of Conduct, which notes that the use of force which is disproportionate to the legitimate objective to be achieved, is not authorised. The principle is also expressed in Principle 5(a) of the Basic Principles.[58] This for example, would mean that while the use of a firearm may be the minimum necessary force required in the circumstances to apprehend a suspected unarmed shoplifter who is clearly escaping, use of such force would not be proportionate and would thus be unlawful.[59]

### 2.3.3. The Principle of Precaution

The principle of precaution refers to the proper planning of law enforcement operations in order to minimise the recourse to force. This principle, which was principally developed by human rights case law,[60] was first pronounced by the Grand Chamber of the European Court of Human Rights in its 1995 judgment in the case of *McCann and others v United Kingdom*.[61]

In *McCann*, the circumstances under consideration were a counterterrorist operation, where soldiers had used lethal force against suspects in a mistaken but honest belief, emanating from information they had received earlier, that the suspects were about to detonate an explosive device. The actions of the soldiers were held not to violate the right to life. However, the planning of the counterterrorist operation was queried by the Court and found to be lacking the requisite precautionary element. In finding a violation of the right to life as a result, the Court stated that:

> [T]he Court must carefully scrutinise … not only whether the force use by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force.[62]

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57 ICRC '*To Serve and To Protect'* (n 36) 249. See also UNHRC 'Report of the Special Rapporteur (2014)' (n 49) para 66.
58 See Basic Principles, Principle 5(a).
59 See Casey-Maslen and Connolly (n 16) 93; UNODC (n 28) 18.
60 See generally Gloria Gaggioli, *Expert Meeting- The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms, Report* (ICRC, 2013), (hereafter, 'ICRC Use of Force Report') 9, note 35. See also Stuart Casey-Maslen with Steven Haines, *Hague Law Interpreted: The Conduct of Hostilities under the Law of Armed Conflict* (Hart Publishing 2018) 91.
61 *McCann and others v United Kingdom*, ECtHR, Grand Chamber, Judgment (27 September 1995).
62 ibid para 194.

All these can, to some extent, be linked to Principle 5(b) of the Basic Principles which states that '[w]henever the lawful use of force and firearms is unavoidable, law enforcement officials shall minimize damage and injury, and respect and preserve human life'. The principle of precaution may thus be appreciated as an 'upstream' application of this operational duty, as it impels prior preparation and planning for contingencies that would require the use of force, which will no doubt help to minimise injury and respect life as contemplated in Principle 5(b).[63]

Also relevant to the principle of precaution, the European Court of Human Rights has held that the obligation on the state 'to take preventive operational measures' against risks to life must not be read in a manner as to force on the state 'an impossible or disproportionate burden', 'bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources'.[64] According to the Court, to prove a violation of that obligation, it must be shown 'that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk'.[65] This is important to counterterrorism operations by states. In *Tagayeva v Russia*, a case concerning the response by the Russian security forces to the siege of a school in Beslan, North Ossetia, by armed Chechen separatists, the court in its decision noted that:

> The Court reiterates that in the preparation of responses to unlawful and dangerous acts in highly volatile circumstances, competent law-enforcement services such as the police must be afforded a degree of discretion in taking operational decisions. Such decisions are almost always complicated, and the police, who have access to information and intelligence not available to the general public, will usually be in the best position to make them…. This is especially so in respect of counter-terrorist activity, where the authorities often face organised and highly secretive networks, whose members are prepared to inflict maximum damage to civilians, even at the cost of their own lives. In the face of an urgent need to avert serious adverse consequences, whether the authorities choose to use a passive approach of ensuring security of the potential targets or more active intervention to disrupt

63 See UNHRC, 'Report of the Special Rapporteur (2014)' (n 49) para 63.

64 See *Osman v United Kingdom*, ECtHR, Grand Chamber, Judgment, (28 October 1998) para 115-116. See also *Finogenov and Others v Russia*, ECtHR, First Section, Judgment (20 December 2011) (rendered final 4 June 2012) para 209, where the court noted that: '[a] duty to take specific measures arises only if the authorities knew or ought to have known at the time of the existence of a real and immediate risk to life and if the authorities retained a certain degree of control over the situation'.

65 *Osman* (n 64) para 116. See also *Tagayeva and Others v. Russia*, ECtHR, First Section Judgment, (13 April 2017) (rendered final 18 July 2017) para 489; and *Finogenov* (n 64) para 209.

the menace, is a question of tactical choice. However, such measures should be able, when judged reasonably, to prevent or minimise the known risk.[66]

### 2.3.4. The Use of Firearms

As mentioned above, there are specific rules relating to the use of firearms,[67] which, according to Rodley, embody the principles of necessity and proportionality.[68] Because of the high lethal

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66 *Tagayeva* (n 65) para 492. See ibid, para 481, where the court had also stated that:

> As an introduction to the examination of the complaints brought under Article 2 of the [ECHR which deals with the right to life], the Court confirms that it is acutely conscious of the difficulties faced by modern States in the fight against terrorism and the dangers of hindsight analysis… The Russian authorities, in particular, have been confronted in the past few decades with the separatist movements in the North Caucasus – a major threat to national security and public safety. As the body tasked with supervision of the human rights obligations under the Convention, the Court would need to differentiate between the political choices made in the course of fighting terrorism, that remain by their nature outside of such supervision, and other, more operational aspects of the authorities' actions that have a direct bearing on the protected rights. The absolute necessity test formulated in Article 2 is bound to be applied with different degrees of scrutiny, depending on whether and to what extent the authorities were in control of the situation and other relevant constraints inherent in operative decision-making in this sensitive sphere.

In this regard, see also *Finogenov and others v Russia*, another case concerning the response to terrorist activity (in this instance, the siege of a theatre in Moscow) by the Russian authorities, and which was referred to in *Tagayeva* (see *Tagayeva* (n 65) paras 481 and 563). In *Finogenov* (n 64) para 211, the court noted that it 'may occasionally depart from that rigorous standard of "absolute necessity" [in art 2 of the ECHR] …, its application may be simply impossible where certain aspects of the situation lie far beyond the Court's expertise and where the authorities had to act under tremendous time pressure and where their control of the situation was minimal'. In *Finogenov* (n 64) paras 213 and 214, the court held that:

> Although hostage taking has, sadly, been a widespread phenomenon in recent years, the magnitude of the crisis of 23-26 October 2002 exceeded everything known before and made that situation truly exceptional. The lives of several hundred hostages were at stake, the terrorists were heavily armed, well-trained and devoted to their cause and, with regard to the military aspect of the storming, no specific preliminary measures could have been taken. The hostage-taking came as a surprise for the authorities…, so the military preparations for the storming had to be made very quickly and in full secrecy. It should be noted that the authorities were not in control of the situation inside the building. In such a situation the Court accepts that difficult and agonising decisions had to be made by the domestic authorities. It is prepared to grant them a margin of appreciation, at least in so far as the military and technical aspects of the situation are concerned, even if now, with hindsight, some of the decisions taken by the authorities may appear open to doubt.
>
> In contrast, the subsequent phases of the operation may require a closer scrutiny by the Court; this is especially true in respect of such phases where no serious time constraints existed and the authorities were in control of the situation.

Commenting on *Finogenov*, Casey-Maslen and Connolly note that the decision by the court to grant a margin of appreciation to the state based on the circumstances of the case, while not completely unreasonable, is debatable under international law, as 'the notion of a margin of appreciation could be considered inconsistent with 1990 Basic Principle 8 whereby: 'Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles'. See Casey-Maslen and Connolly (n 16) 285 and 87, footnote 33.

67 A firearm has been defined in art 3(a) of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime thus:

> 'Firearm' shall mean any portable barrelled weapon that expels, is designed to expel or may be readily converted to expel a shot, bullet or projectile by the action of an explosive, excluding antique firearms or their replicas.

68 Nigel Rodley with Matt Pollard, *The Treatment of Prisoners under International Law*, (3rd edn, Oxford University Press 2009) 499.

potential of firearms, stricter rules have been created to regulate their use.[69] The general rule is set out in Paragraph (c) of the commentary to Article 3 of the Code of Conduct thus:

> The use of firearms is considered an extreme measure. Every effort should be made to exclude the use of firearms, especially against children. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender.

The Basic Principles expand upon this, where in Principle 9, four objectives are set out for which firearms may be used 'when less extreme means are insufficient'. The objectives are: in defence (of self or others) against the imminent threat of death or serious injury; in preventing a particularly serious crime involving a grave threat to life; in arresting an individual who presents 'such a danger' of perpetrating a particularly serious crime involving grave threat to life and who is resisting arrest; and in preventing the escape of an individual presenting a danger of perpetrating a particularly serious crime involving a grave threat life.[70]

The four objectives above only relate to where a firearm is used with the intention of stopping the suspect only (potentially lethal use), and not to kill (intentionally lethal use).[71] There is a further, even stricter rule governing the intentional lethal use of firearms, as shall be discussed hereunder. It is important to note that per these international standards, firearms should never be used for the protection of property only,[72] and whether shooting to stop or shooting to kill, warning must be given of intention to discharge the firearm, by the law enforcement official who is to identify himself as such, though only where this is reasonably appropriate in the circumstances.[73]

Only in one of the four objectives outlined above concerning a situation where the intention is to stop the suspect, is the notion of imminence (before the use of firearms) attached. This is the case where firearms are used in defence against 'imminent threat of death or serious injury'.[74] Imminence has been construed as 'a matter of seconds, not hours'.[75] For the remaining three

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69 See ICRC, *To Serve and To Protect* (n 36) 256.
70 See Basic Principles, Principle 9.
71 See UNHRC, 'Report of the Special Rapporteur (2014)' (n 49) 70.
72 See Casey-Maslen and Connolly (n 16) 97.
73 See Basic Principles, Principle 10.
74 See Basic Principles, Principle 9. This 'threat of death or serious injury' does not need to arise from a firearm; it could be any other weapon such as a knife, any item used as a weapon such as a car attempting to run down an individual, or even a chokehold. It would all depend on the given circumstances. However, it has been noted that generally, 'serious injury should be construed narrowly to mean potentially fatal injuries.' See Casey-Maslen and Connolly (n 16) 98.
75 See UNHRC, 'Report of the Special Rapporteur (2014)' (n 49) para 59. On this, Casey-Maslen and Connolly note that '[i]t may well be the case that imminence under LOLE should be construed as being limited to a

objectives outlined above which relate to a 'grave threat to life', the threat does not need to be imminent.[76] Any implication otherwise such as in the UN Human Rights Committee General Comment No. 36,[77] and the ACHPR's General Comment No. 3,[78] defeats the clear text of Principle 9 from which it is plain that the notion of imminence attaches only to the first objective.[79] However, circumstances that would fit the objectives where imminence is not a requirement for the use of firearms are very limited. Such circumstances include arresting escaping serial killers, or more relevant to the context of this thesis, suspected terrorists.[80] In 1997, the now defunct European Commission on Human Rights found lawful under Article 2(2)(b) of the European Convention on Human Rights, [81] the shooting of a suspected terrorist bomber who was escaping from police custody.[82] Similarly, a former UN Special Rapporteur on Torture in his 2005 report noted that firearms may be used to enable the arrest of a suspected

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second or even a split second'. See Casey-Maslen and Connolly (n 16) 98. The UN Human Rights Guidance on Less-Lethal Weapons in Law Enforcement (New York and Geneva, 2020- hereafter 'UN Guidance on Less-lethal Weapons'), Part 9, 'Definitions: Imminent Threat', defines 'imminent threat' as '[a] threat that is reasonably expected to arise within a split second, or at most within a matter of several seconds'.

76 See further Casey-Maslen and Connolly (n 16) 98, 121-122. See also UNODC (n 28) 21, where it is stated that 'firearms should not be used to effect an arrest or prevent an escape, or to disperse or control a crowd, unless the individuals targeted by such use of force pose an *imminent or continuous* threat of death or serious injury'. (Emphasis added). Similarly, Amnesty International takes the position, concerning the use of firearms, that '[t]he mere fact a person flees from arrest or escapes from custody does not justify the use of a firearm, unless this person presents an ongoing grave threat to the life of another person that can be realized at any time'. See Amnesty International, *Use of Force: Guidelines for Implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (Amnesty International Dutch Section, Police and Human Rights Programme, August 2015) 31, Guideline No. 2(c).

77 See UN Human Rights Committee 'General Comment No 36 on the Right to Life' (n 34) para 12, which states:

> [t]he use of potentially lethal force for law enforcement purposes is an extreme measure, which should be resorted to only when strictly necessary in order to protect life or prevent serious injury from an imminent threat. It cannot be used, for example, in order to prevent the escape from custody of a suspected criminal or a convict who does not pose a serious and imminent threat to the lives or bodily integrity of others.

78 See ACHPR, 'General Comment No 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)' (adopted during the 57th Ordinary Session of the African Commission on Human and Peoples' Rights held from 4 to 18 November 2015 in Banjul, The Gambia) para 27, which states that '[f]orce may be used in law enforcement only in order to stop an imminent threat'. See also *Kazingachire* (n 34) para 117-120. This can be contrasted with the Pan-African Parliament Model Police Law for Africa (adopted in 2019), which recognises that firearms may also be used in the face of a grave and proximate threat- although limited to preventing the commission of a serious crime present such threat. See Pan-African Parliament Model Police Law for Africa, Schedule 2, paras 5(e)(ii), 8(e), and 9(g)(xiv)(6)(b). Section 2 of the Model Police Law defines 'grave threat' to mean 'a real, proximate and serious threat, though it is not necessarily imminent'.

79 See Casey-Maslen and Connolly (n 16) 98, and 121.

80 ibid 98-99, and 122.

81 Art 2(2)(b) of the European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953, 213 UNTS 222) reads as follows: 'Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than necessary: (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained…'.

82 *MD v Turkey*, European Commission on Human Rights, Decision, (30 June 1997). See also, Casey-Maslen and Connolly (n 16) 123.

terrorist where less extreme means fail.[83] However, the former Special Rapporteur also noted that firearms may be used to arrest a suspected murderer.[84] It is submitted that without some element of seriality which would create some ongoing or continuous threat, this would be overstretching the slim category of circumstances where firearms may be used without an imminent threat being faced.[85]

Moving on to the intentional lethal use of firearms i.e., shooting with the deliberate intention to kill, Principle 9 of the Basic Principles provides that this 'may only be made when strictly unavoidable in order to protect life'. This has been referred to as 'the "protect life" principle – a life may be taken intentionally only to save another life' – by Christof Heyns, as UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.[86] The need to protect life is the only legitimate objective for which the intentional lethal use of firearms will be deemed proportionate.[87] Hence, for example, such usage of firearms may lawfully be used to halt a terrorist bombing attack, including a suicide bomber, or to prevent the killing of a hostage.[88] The rule would also apply to any individual about to kill another or others and where shooting to stop would not prevent this. The notion of imminence is essential here.[89] The threat to life must be a matter of, at the very most, seconds, as earlier explained,[90] and there must also be no reasonable alternative in the circumstance to the intentional lethal use of firearms in other to

83 UN Human Commission on Human Rights, 'Torture and Other Cruel, Inhuman or Degrading Treatment, Report of the Special Rapporteur on the Question of Torture, Manfred Nowak' (23 December 2005) UN Doc E/CN.4/2006/6, note 2.

84 See ibid.

85 An ongoing threat has been described as that 'posed by suspects in respect of whom there is a high probability of immediate harm to specified or unspecified individuals'. UNGA, 'Report of the Special Rapporteur (2011' (n 31) para 60. Such suspects are 'obviously highly dangerous and the danger could be realized at any moment. This may be the case with serial killers, someone on an unfocused revenge spree, some members of violent gangs or those who are fleeing from acts of terrorism'. See ibid.

86 See UNHRC, 'Report of the Special Rapporteur (2014)' (n 49) para 70. See also Casey-Maslen and Connolly (n 16) 126.

87 UNHRC, 'Report of the Special Rapporteur (2014)' (n 49) para 72. See also UNGA 'Report of the Special Rapporteur (2006)' (n 33) para 44.

88 Casey-Maslen and Connolly (n 16) 126.

89 See para 12 of the UN Human Rights Committee 'General Comment No 36 on the Right to Life' (n 34) which notes that '[t]he intentional taking of life by any means is permissible only if it is strictly necessary in order to protect life from an imminent threat'.

90 See text to note 75 above.

remove that threat.[91] This rule, as expounded in Principle 9 concerning firearms, arguably extends to other lethal weapons such as bombs, drones, missiles, and landmines.[92]

Basic Principle 2 notes that law enforcement should be armed with a wide array of weapons and ammunition so as to 'allow for a differentiated use of force and firearms'.[93] In discussing the principle of proportionality, the Inter-American Court of Human Rights noted that there was a requirement for the use of differentiated and progressive force by law enforcement.[94] In light of this, a few words need to be said about less-lethal weapons.[95]

Less-lethal weapons have been defined as 'weapons designed or intended for use on individuals or groups of individuals and which, in the course of expected or reasonably foreseen use, have a lower risk of causing death or serious injury than firearms'.[96] The availability of these weapons, which range from batons to chemical irritants, electroshock weapons, water cannons, and acoustic weapons, among others; allow for differentiated and graduated use of force by law enforcement, and less recourse to the use of firearms.[97] While they would 'reduce the risk of injury to members of the public, including those suspected of criminal conduct',[98] there is still risk of injury and of death associated with their usage hence a need for protocols regarding their development and use.[99] A guidance document in this regard, which 'supplements and

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91 See para 27 of ACHPR 'General Comment No 3 on the Right to Life' (n 78). See also UN Human Rights Council, 'Report of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Killings, Philip Alston: A Study of Targeted Killings', (28 May 2010) UN Doc A/HRC/14/24/Add.6, para 32.

92 See Report of the Special Rapporteur (2014) (n 40), para 71, and Casey-Maslen and Connolly (n 16) 128, citing the ECtHR decision in *Alkin v Turkey*, ECtHR, Second Section, Judgment (13 October 2009) para 30, concerning landmines.

93 The principle also notes that law enforcement should be given 'self-defensive equipment' so as to reduce the need for weapons usage. See Basic Principles, Principle 2.

94 *Nadege Dorzema and Others v Dominican Republic* IACtHR, Judgment (Merits, Reparations, and Costs) (24 October 2012) para 85 (iii). In line with this view, it has been stated that '[w]here non-violent means prove ineffective or without promise of achieving the intended result, necessity requires that the level of force used should be escalated as gradually as possible'. See UNHRC, 'Report of the Special Rapporteur (2014)' (n 49) para 61. It is however noted that this view is contested in some quarters. See generally, Casey-Maslen and Connolly (n 16) 89-91.

95 The term 'non-lethal weapons' was used before (see for example Principles 2 and 3 of the Basic Principles which use the term 'non-lethal incapacitating weapons), but this has been widely discarded as it is now recognised that the use of any weapon can prove fatal in certain circumstances. See Report of the Special Rapporteur (2014) (n 40) paras 101 and 104; Casey-Maslen and Connolly (n 16) 100; and UN Guidance on Less-lethal Weapons (n 75) Part 9, 'Definitions: Less-Lethal Weapons', note 7.

96 See UN Guidance on Less-lethal Weapons (n 75) Part 9, 'Definitions: Less-Lethal Weapons'. However, it must be noted that conventional firearms may be used to discharge less-lethal ammunition, e.g., rubber bullets. Hence, when firearms are used in that sense, they could be considered as less-lethal weapons. See ibid.

97 See UNHRC, 'Report of the Special Rapporteur (2014)' (n 49) para 102.

98 See UN Guidance on Less-lethal Weapons (n 75) para 1.1.

99 See Principles 3 of the Basic Principles; UNHRC, 'Report of the Special Rapporteur (2014)' (n 49) para 102; UN Guidance on Less-lethal Weapons (n 75) para 1.2; UN Human Rights Council, '25/38- The Promotion and Protection of Human Rights in the Context of Peaceful Protests' (11 April) UN Doc

complements' the rules in the Code of Conduct and the Basic Principles, has been developed by the Office of the UN High Commissioner for Human Rights.[100] The purpose of the document, termed the UN Human Rights Guidance on Less-lethal Weapons in Law Enforcement, is 'to provide direction on the lawful and responsible design, production, transfer, procurement, testing, training, deployment and use of less-lethal weapons and related equipment'.[101]

Lastly on the issue of the use of firearms, it should be noted that Basic Principle 11(c) recommends a prohibition on 'the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk'.[102]

### 2.3.5. The Use of Force During Interrogation and Detention

Concerning the use of force during interrogation, it is contrary to international norms to use force or the threat thereof in order to elicit information or a confession from a suspect or a witness.[103] Such tactics would not only be in violation of human rights, such as the right to humane treatment and dignity of person, to freedom from torture and other cruel, inhuman or degrading treatment, and to a fair trial, etc; but also call the reliability of the evidence into question.[104] They have also been noted to be ineffective.[105] In particular, the use of torture and other forms of ill-treatment in interrogating a suspect, even in the face of a looming terrorist attack, is always prohibited and hence never justified.[106]

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A/HRC/RES/25/38, para 14; UN Human Rights Council, '38/11- The Promotion and Protection of Human Rights in the Context of Peaceful Protests' (29 June 2018) UN Doc A/HRC/38/L.16 (draft resolution, adopted without a vote as orally revised on 6 July 2018) para 15.

100 See UN Guidance on Less-lethal Weapons (n 75) para 1.4.

101 See ibid, para 1.3.

102 See Basic Principles, Principle 11(c).

103 See generally UNODC (n 28) 130.

104 See generally ibid 131-132. Principle 21(2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA Res 43/173, Annex, UN Doc A/RES/43/173 (9 December 1988), notes that 'no detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgement'. See also para 9(c)of the Guidelines on the Conditions of Arrest, Police Custody and Pre-trial Detention in Africa (the Luanda Guidelines).

105 See UNODC (n 28) 131 and 132; UNGA, 'Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment' (5 August 2016) UN Doc A/71/298 para 17.

106 UNODC (n 28) 131. The international law prohibition of the use of torture and other forms of ill-treatment is absolute and non-derogable, and also forms part of customary international law. The prohibition of torture is also a peremptory norm of international law (*jus cogens*). See UNGA, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (20 July 2017) UN Doc A/72/178, para 17. In distinguishing between torture and cruel, inhuman or degrading treatment, the Special Rapporteur notes that 'while the notion of cruel, inhuman or degrading treatment or punishment includes essentially any unlawful infliction of pain and suffering by [s]tate agents, the aggravated threshold of torture is always reached when, additionally, severe pain or suffering is intentionally and purposefully inflicted on a powerless person'. UNGA, 'Report of Special Rapporteur (2017)' (n 106) para 33. 'Powerlessness' in this

The use of force against someone held in detention or custody is also subject to the principles of necessity and proportionality.[107] Basic Principle 15 notes that force shall not be used by law enforcement officials in custodial settings save 'when strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened'.[108] Particularly, the use of firearms is prohibited, except in self-defence, against an imminent threat of death or serious injury to others, or when strictly necessary to prevent the escape of a detainee who poses an ongoing threat to life as under Principle 9.[109]

The provisions of the UN Standard Minimum Rules for the Treatment of Prisoners (as revised in 2015 and known as the Nelson Mandela Rules)[110] are also relevant in this regard. Rule 82(1) notes that prison staff must not use force against prisoners 'except in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations'. Any such force used must be as strictly necessary, and immediately reported to the prison director.[111] Rule 1 also states clearly that prisoners must never be made subject to torture or other forms of ill-treatment.

Disciplinary measures used in prisons must thus not amount to torture or other ill treatment.[112] Corporal punishment is prohibited,[113] and restraints may not be used as a means of disciplining or punishing prisoners.[114] Regarding the use of restraints on prisoners, chains, irons, and other 'inherently degrading or painful' instruments of restraints are generally prohibited.[115] Furthermore, restraints are only to be used when authorised by law; and only during transfers, as a precaution against escape, or when ordered by the prison director, where other control

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regard, is said to mean 'that someone is overpowered, in other words, has come under the direct physical or equivalent control of the perpetrator and has lost the capacity to resist or escape the infliction of pain or suffering'. UNGA, 'Report of Special Rapporteur (2017)' (n 106) para 31.

107 See Amnesty International, *Use of Force* (n 76) Guideline No 8; Casey-Maslen and Connolly (n 16) 233-234. See also *Bouyid v Belgium*, ECtHR, Grand Chamber, Judgment (28 September 2015) para 88.

108 See Basic Principles, Principle 15.

109 See ibid Principle16.

110 UNGA, UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (UNGA Res 70/175, Annex, adopted on 17 December 2015) UN Doc A/RES/70/175. These rules do not only cover convicted criminals. Part I of the rules, which regulates the general management of prisons, is said to be 'applicable to all categories of prisoners, criminal or civil, untried or convicted, including prisoners subject to "security measures" or corrective measures ordered by the judge'. See ibid Preliminary observation 3(1). Hence, the term 'prisoner' as used in the rules covers a broad range of detainees.

111 ibid Rule 82(1). Staff of prisons are to be specially trained in restraining aggressive prisoners. See ibid, Rule 82(2).

112 ibid Rule 43(1)

113 ibid Rule 43(1)(d).

114 ibid Rule 43(2). See *Tali v Estonia*, ECtHR, First Section, Judgment (13 February 2014) (rendered final 13 May 2014) para 81.

115 Nelson Mandela Rules, Rule 47(1).

techniques are ineffective in restraining a prisoner from inflicting injury to self or others, or causing property damage.[116] When restraints are authorised for use, they should be resorted to only when lesser control techniques would be ineffective in the circumstance. The chosen method of restraint must be the least intrusive necessary and reasonably available; and should only be imposed as long as it remains necessary in the prevailing circumstances.[117] Training in control techniques must also be provided to prison staff to remove the need for restraints or make them less intrusive.[118]

### 2.4. Conduct of Hostilities Rules for the Use of Force

The rules governing the use of force in the conduct of hostilities are, in general, considerably more permissive than those governing the use of force in law enforcement. As mentioned above,[119] the LE rules for the use of force are the default standards for judging the legality of the use of force by law enforcement during counterterrorism operations. However, during armed conflict situations the IHL rules on the conduct of hostilities also come into play. It should be noted that IHRL remains applicable during armed conflicts.[120] The interrelationship between LE rules and the conduct of hostilities (COH) rules for the use of force as a result of the concurrent application of IHRL and IHL during the conduct of hostilities will be explored in the next chapter.

IHL is the primary body of international law regulating the conduct of belligerent parties in an armed conflict. Modern IHL is regarded as a 'carefully thought out balance' between two opposing principles - the principle of military necessity and the principle of humanity,[121] i.e. a compromise between the recognised necessities of military action during warfare (military necessity) and humanitarian considerations (humanity).[122] The principles of military necessity and humanity are together seen as the foundational principles upon which IHL is built, with the negotiated balance between them expressed and reflected in all IHL rules.[123]

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116 ibid Rule 47(2).
117 ibid Rule 48(1).
118 ibid Rule 49.
119 See text to note 17 above.
120 See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Reports para 25; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ 136, 105-106.
121 Michael N Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (4 May 2010) 50(4) Virginia Journal of International Law 795, 798.
122 See ibid and Nobuo Hayashi, 'Requirements of Military Necessity in International Humanitarian Law and International Criminal Law' (2010) 28 Boston University International Law Journal 39, 47.
123 Schmitt, 'Military Necessity' (n 121) 796. See also Hayashi, (n 122) 45.

There are, historically, two streams or branches of IHL i.e., Geneva Law and Hague Law, the branches taking their names from the cities which hosted the conferences where most of their initial content was developed.[124] Geneva Law deals primarily with the protection of persons who are in the power of a party to the conflict i.e., civilians, and persons *hors de combat* such as detainees, the injured and the sick. Hague Law on the other hand, regulates the conduct of hostilities or the fighting between the parties.[125] Relevant to the current discussion are the rules which constitute Hague Law, as they provide for the rules of combat between the belligerent parties, and hence regulate the use of force in the context of an armed conflict.

The term 'hostilities' has been defined as 'the (collective) resort by the parties to the conflict to means and methods of injuring the enemy'.[126] The rules and principles regulating the conduct of hostilities in an armed conflict can mainly be found in the 1907 Hague Regulations,[127] Additional Protocols I and II to the Geneva Convention of 1949,[128] and customary law.[129] These make up the conduct of hostilities (COH) rules for the use of force, and which are applicable only during armed conflict situations, inclusive of counterterrorism operations in such contexts.

Since the COH rules apply only during armed conflicts, it is important to be able to identify when a situation of armed conflict exists. In *Prosecutor v Tadić*, Decision on Jurisdiction,[130] the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) held that 'an armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or

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124 See ICRC, 'What is IHL?' (18 September 2015) <https://www.icrc.org/en/document/what-ihl> (accessed 21 May 2019); Casey-Maslen with Haines (n 60), 6. See generally, Casey-Maslen with Haines (n 60) 6-10.

125 See ICRC, 'What is IHL?' (n 124) and Casey-Maslen with Haines (n 60), 6. See also, generally, Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019), 26-28, margin numbers (MNs) 3.28-3.33.

126 Nils Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (Geneva, ICRC 2009), (hereafter 'ICRC DPH Guidance') 43.

127 Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910).

128 See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (Additional Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

129 See for example the customary IHL rules identified by the ICRC, in J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (ICRC/Cambridge University Press 2005) (hereafter, 'ICRC Study of Customary IHL').

130 *Prosecutor v Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber) IT-94-1-AR72 (2 October 1995).

between such groups within a State'.[131] This corresponds to the two types of armed conflicts recognised under international law: international armed conflicts (IACs) and non-international armed conflicts (NIACs). IACs are inter-state conflicts,[132] while NIACs are conflicts between a state and an armed group, or between two or more armed groups.

The intensity of violence required to trigger an armed conflict, and allow it to be labelled as such, varies between an IAC and NIAC. For an IAC, the prominent view is that any inter-state violence suffices, [133] although this is contested.[134] This is not so in the case of a NIAC. For a NIAC to be held to exist, a threshold of intensity of violence and a level of organisation of the armed group must be met.[135] This is what separates a NIAC from other 'situations of internal disturbances'[136] such as riots, acts of banditry, terrorist activities, and other sporadic acts of

131 ibid para 70.

132 See generally Common Article 2 to the Geneva Conventions of 1949, i.e. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31 (Geneva Convention I); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85 (Geneva Convention II); Geneva Convention relative to the Treatment of Prisoners of War, 75 UNTS 135 (Geneva Convention III); and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (Geneva Convention IV). Situations of struggles against colonial domination, alien occupation and racist regimes, in the exercise of the right to self-determination, also qualify as IACs. This is provided for in Article 1(4), Additional Protocol I.

133 See ICRC, '2016 Commentary on the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field' (Geneva, 12 August 1949) para 236; and Sassòli (n 125) 170, MN 6.07. A reasoning behind this view is said to be preventing gaps in the protection granted by IHL. See ICRC '2016 Commentary' (n 133), 239-243. See also Sassòli (125) 170, MN 6.07.

134 See Casey-Maslen with Haines (n 60) 36. See also GD Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2nd edn, Cambridge University Press 2016) 161-162; Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, Cambridge University Press 2012) 11; International Law Association, 'Final Report on the Meaning of Armed Conflict in International Law' The Hague Conference (2010), available at <https://www.rulac.org/assets/downloads/ILA_report_armed_conflict_2010.pdf> accessed 14 October 2021. Some situations suggested to fall below the threshold for an IAC include minor or frontier skirmishes, and other such isolated and/or sporadic violence between states. See Dinstein, *War* (n 134) 11; and generally, Casey-Maslen with Haines (n 60), 31-36. The ICRC in 2015 also seemed to accept some 'fairly low' threshold of violence, for triggering the existence of an IAC. See ICRC, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, Report for the 32nd International Conference of the Red Cross and Red Crescent, Geneva, October 2015 (hereafter, 'ICRC 2015 Challenges Report') 8.

135 In *Tadić*, Decision on Jurisdiction, the Appeals Chamber noted that a NIAC was a 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'. See *Tadić*, Decision on Jurisdiction (n 130) para 70. In applying this statement by the Appeals Chamber, 'protracted' was clarified by the Trial Chamber of the ICTY to mean 'intensity' rather than duration as suggested by the plain meaning of 'protracted'. See *Prosecutor v Tadić*, Opinion and Judgment (Trial Chamber) IT-94-1-T (7 May 1997) para 562; and Casey-Maslen with Haines (n 60) 57. It is noted that Additional Protocol II establishes additional requirements for its application to NIACs. These include that the conflict must have a state as one of the parties, the armed group must be under a responsible command, and hold some territory that would enable it to undertake sustained military operations and implement the provisions of the Protocol. See Article 1(1) Additional Protocol II. This does not however affect the definition of a NIAC regulated by Common Article 3 to the Geneva Conventions of 1949.

136 See Additional Protocol II, art 1(2).

violence. By this threshold, there must be intense combat[137] between a state and an 'organised'[138] armed group, or between two such groups. Key here is the notion of combat or conduct of hostilities between two parties organised militarily for that purpose.[139] Where the element of combat between the state and an armed group, or between two armed groups, is not present, there is no NIAC in existence, and thus the COH rules for the use of force do not come into play.

This last point is particularly relevant in view of terrorist and counterterrorist activities. The conflict that emanates from such situations would not qualify as a NIAC in any given situation unless it can be shown that the armed forces of the state in question are engaged in combat with a group, even if the group is tagged as terrorist,[140] and that the group is sufficiently organised for that purpose. Thus, though there might be widespread targeting of people through suicide bombings or use of improvised explosive devices (IEDs), or through shootings, by an armed group, and the state in response sends in forces to dispel the security threat, this situation would not qualify as an armed conflict unless it can be shown that there is 'intense' combat between the state forces and the armed group (which must meet the standard for 'organisation').[141] If both conditions are not met, the situation falls within the realm of law enforcement, and is subject to LOLE.

Where these conditions are met, however, and IHL applies, the scope of application of the COH rules for the use of force needs to be ascertained. In the case of an IAC, COH rules are applicable to the conduct of hostilities wherever it occurs between the parties, as the

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137 Factors that determine whether a security situation in a state has reached the requisite level of intensity of violence for a NIAC include the length of such violence, its spread over the state's territory, weaponry used, involvement of the state's armed forces, and involvement of external bodies for example the UN Security Council. See generally *Prosecutor v Haradinaj et al*, Judgment (Trial Chamber) IT-04-84-T (3 April 2008) para 49 and *Prosecutor v Boškoski and Tarčulovski,* Judgment (Appeals Chamber) IT-04-82-A (19 May 2010) para 22.

138 In *Prosecutor v Boškoski and Tarčulovski,* Judgment (Trial Chamber) IT-04-82-T (10 July 2008) paras 199-203, the Trial Chamber of the ICTY grouped into five categories, determinant factors of the level of organisation of an armed group. The categories include: 'factors signalling the presence of a command structure'; 'factors indicating that the group could carry out operations in an organized manner'; 'factors indicating a level of logistics'; 'factors relevant to determining whether an armed group possessed a level of discipline and the ability to implement the basic obligations of Common Article 3'; and 'factors indicating that the armed group [is] able to speak with one voice'.

139 See *Haradinaj et al* (n 137) para 60 which notes that 'an armed conflict can exist only between parties that are sufficiently organized to confront each other with military means'.

140 It is important to note that such designation of a group as terrorist has no bearing under IHL. The motivation of an armed group is immaterial. For it to qualify as a party to a NIAC, it just needs to fulfil the requirement of 'sufficient organisation' and then be engaged in intense combat with a state.

141 See Casey-Maslen with Haines (n 60) 66-67. See also, Ben Saul, 'Terrorism and International Humanitarian Law', in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (2nd ed, Edward Elgar Publishing 2020) 192, 195.

geographical scope of an IAC is not limited.[142] On the other hand, in the case of a NIAC, the geographical scope is generally limited to the territory of a state where there is the occurrence of hostilities.[143] Further, although the point is not generally accepted, the present author supports the view that COH rules only apply to those parts of the state's territory where hostilities are actually taking place.[144] In the case of an extraterritorial NIAC, the view supported in this thesis is the view that the geographical scope of the armed conflict should extend beyond the territory of the state on which hostilities are occurring, onto that of the third state who is a party to the conflict either by supporting the territorial state or conducting hostilities in the territorial state without consent.[145] However, as long as hostilities do not occur on the territory of the third state, only Geneva Law would be applicable therein.

The restricted applicability of COH rules (Hague Law) in an armed conflict can be gleaned from the statement of the ICTY Appeals Chamber in the seminal case of *Prosecutor v Tadić*, Decision on Jurisdiction,[146] wherein the court noted the difference between the scope of applicability of the rules regulating conduct of hostilities (i.e., Hague Law) and those related to the protection of those in the power of a party to the conflict or the enemy (i.e., Geneva Law). The Court held as follows:

> Although the Geneva Conventions are silent as to the geographical scope of international "armed conflicts," the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities. *Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited.* Others, particularly those relating to the protection of prisoners of war and civilians, are not so limited. …
>
> The geographical and temporal frame of reference for internal armed conflicts is similarly broad. This conception is reflected in the fact that beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking part) in the hostilities. This indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat

142 Casey-Maslen with Haines (n 60) 49-50. See also Sassòli (125) 187-188, MN 6.46.

143 See Common Article 3 to the Geneva Conventions of 1949, which reads thus: '[i]n the case of armed conflict not of an international character *occurring in the territory of one of the High Contracting Parties*…' (emphasis mine). See also *Prosecutor v Rutaganda*, Judgment and Sentence (Trial Chamber) ICTR-96-3-T (6 December 1999) paras 102-103, where the court notes the geographical scope of IHL relating to NIACs as 'the territory of the [s]tate where the hostilities are occurring'. See further, Casey-Maslen with Haines (n 55) 68; and Noam Lubell and Nathan Derejko, 'A Global Battlefield? Drones and the Geographical Scope of Armed Conflict' (2013) 11 Journal of International Criminal Justice 65, 69-70.

144 For support of this view, see Casey-Maslen with Haines (n 60) 83. For arguments against this position, see Cordula Droege, 'Elective Affinities? Human Rights and Humanitarian Law' (September 2008) 90 (871) International Review of the Red Cross 501, 535; and ICRC Use of Force Report (n 60) 18.

145 See Sassòli (n 125) 188, MN 6.48. For a contrary view, see Casey-Maslen with Haines (n 60) 69-70.

146 *Tadić*, Decision on Jurisdiction (n 130).

> operations. Similarly, certain language in Protocol II to the Geneva Conventions… also suggests a broad scope.[147]

The present author believes that the above paragraphs of the ICTY's decision have the effect of limiting the geographical scope of the application of COH rules to the 'actual theatre of combat operations' or the conflict zone, the area in the state where hostilities are actually occurring between the belligerent parties.[148] This is in contradistinction to the rules of Geneva law, which deal with issues such as the protection of detainees (e.g. prisoners of war) and civilians, and which the ICTY held to apply throughout the territory of the state.

Concerning the above paragraphs from *Prosecutor v Tadić*, Decision on Jurisdiction,[149] the ICRC maintains that the main issue before the court was not a conclusive delimitation of the geographical scope of the COH rules for the use of force. Rather, the ICRC asserts, the court was only demonstrating the scope of application of IHL rules on the protection of persons in the power of the enemy as covering the entire territory of the parties to the conflict even if there are no hostilities in some parts.[150] The ICRC also implies that the thrust of the paragraphs is towards IACs.[151] It is submitted that this is not persuasive. The relevant paragraphs of the decision by the court highlighted above, speak quite clearly towards both sets of rules: the rules governing protection of people in the power of a party and the rules governing the conduct of hostilities. Also, a joint reading of both paragraphs reveals that the ICTY reached the same conclusion as to the scope of application of COH rules with regards to IACs and NIACs. Formerly peaceful areas of the territory of a state in a NIAC would then only fall to be regulated under the COH rules for the use of force when hostilities spread there, the test of such spread of hostilities being the same as required for the determination of the existence of a NIAC i.e. intense combat, and sufficient organisation of the armed group(s) involved.[152] Containing the battlefield and the scope of applicability of COH rules, better protects the general population

147 ibid paras 68-69 (emphasis added).
148 See Casey-Maslen with Haines (n 60) 83. See also ICRC Use of Force Report (n 60), 17-18; and Nils Melzer and Gloria Gaggioli Gasteyger, 'Conceptual Distinction and Overlaps between Law Enforcement and the Conduct of Hostilities' in Terry D Gill and Dieter Fleck (eds), *Handbook of International Law of Military Operations* (2nd ed, Oxford University Press 2015) 81, footnote 85, where it is noted that the paragraphs of the ICTY's judgment can be used to support such an argument.
149 *Tadić*, Decision on Jurisdiction (n 130) paras 68 and 69.
150 ICRC Use of Force Report (n 60) 18.
151 The ICRC argues that '[m]oreover, the sentence italicized in the quotation [as in excerpt above] dealt with international rather than non-international armed conflicts'. ibid.
152 See Casey-Maslen with Haines (n 60) 86.

in 'peaceful areas' from the effects of the largely more permissive IHL rules regarding the use of force,[153] unless and until it is clear that the zone of hostilities has factually expanded.[154]

Droege, while acknowledging that the above-mentioned paragraphs of the *Tadić* decision could be said to have restricted the scope of application of the rules concerning the conduct of hostilities (Hague Law), notes that such approach was not confirmed in later cases.[155] She cites *Prosecutor v Kunarac et al*[156] in support, noting that the Appeals Chamber in that case only regarded as necessary for the application of IHL, the existence of an armed conflict and a nexus of the alleged act to the conflict.[157] Once these two conditions are present, it would be, according to Droege, contrary to the object and purpose of IHL to discard the application of certain IHL rules i.e. Hague Law, and would result in a split in IHL whereby all its rules are not always applicable.[158] In this regard, the present author submits that firstly, the court in *Kunarac* had no need to either refer to or discuss the geographical scope of the COH rules for

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153 The more permissive nature of the COH rules for the use of force is shown in section 2.5. below.

154 Lubell and Derejko also note the geographical limitation of the spread of hostilities in most NIACs. In their view, the application of IHL should be generally limited to those areas of a state engulfed in hostilities, as a broad extension of the applicability of IHL to the entire territory of the state would be unnecessary and also open IHL to abuse. However, a nexus (i.e., close relation) between an act (or omission) and the existing hostilities, is sufficient to extend the application of IHL beyond the zone of hostilities. See Lubell and Derejko (n 143) 70-71, 75-76. For a similar view, see David Kretzmer *et al*, '"Thou Shall Not Kill": The Use of Lethal Force in Non-international Armed Conflicts' (2014) 47(2) Israel Law Review 191, 220-222. The present author submits that the authors (Lubell and Derejko) are right in noting that it is problematic to extend the application of IHL beyond the zone of hostilities in a state. However, they fail to distinguish between the scope of application of Geneva law and Hague law, using the necessity of the application of aspects of Geneva law (such as detention/internment, and the protection of persons not taking part in hostilities) to demonstrate the need to extend the application of IHL, in certain instances, beyond the 'battlefield'. (Lubell and Derejko (n 143) 74-75.) Also, in the view of the present author, using the nexus requirement to justify an extension of IHL away from the zone of hostilities is not a persuasive argument in view of the COH rules, as the question of the protection of the general population in those areas from the more permissive rules on the use of force, still remains.

155 See Droege (n 144) 535.

156 *Prosecutor v Kunarac et al*, Judgment (Appeals Chamber) IT-96-23 & IT-96-23/1-A (12 June 2002) paras 55–60.

157 See ibid para 55, where the court held that '[t]here are two general conditions for the applicability of Article 3 of the [ICTY] Statute: first, there must be an armed conflict; second, the acts of the accused must be closely related to the armed conflict'. In para 57, the court also held as follows:

> [t]here is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the warring states or, in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there, and continue to apply until a general conclusion of peace or, in the case of internal armed conflicts, until a peaceful settlement is achieved. A violation of the laws or customs of war may therefore occur at a time when and in a place where no fighting is actually taking place. As indicated by the Trial Chamber, the requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporally and geographically remote from the actual fighting. It would be sufficient, for instance, for the purpose of this requirement, that the alleged crimes were closely related to hostilities occurring in other parts of the territories controlled by the parties to the conflict.

158 See Droege (n 144) 535.

the use of force. The appellants in the case were all only charged with violations of Geneva law (crimes against humanity of torture, rape, and enslavement; as well as torture, rape, and outrages upon personal dignity as violations of the laws and customs of war; committed against civilians not taking part in hostilities), and hence, the scope of the COH rules was not in contention.[159] Secondly, while the approach outlined in *Tadić* has not been confirmed in later cases, it has also not been rejected. There may just have been no appropriate instance demanding further discussion of that point. In *Kunarac*, for example, the court only spoke of the scope of IHL in general terms, and made no reference at all to the distinction earlier made in *Tadić* between the scope of Geneva and Hague law, even though the authority the court cited for its position on the geographical scope of IHL was the same *Tadić* judgment.[160] Thirdly, it is submitted that IHRL and thus the LE rules for the use of force, in addition to domestic criminal law, continue to apply in areas outside the vicinity or zone of hostilities. These not only suffice to handle such circumstances, but also provide greater protection for the general population in those areas. Lastly, a split in the scope of application of IHL rules is not, in itself, an issue. The question that matters is whether it is necessary for the rules on the conduct of hostilities to be applicable territory-wide, regardless of the actual spread of hostilities. To the mind of the present author, the answer is no.

The present author believes that this viewpoint of the geographical scope of the COH rules and the standard for the expansion of the zone of hostilities or 'conflict zone' better reflects the reality of many NIACs, where fighting is limited to certain parts of the state in question. For example, with respect to the *Boko Haram* insurgency in Nigeria, actual hostilities are mainly limited to parts of three states in the country's north-eastern region, out of a total of 36 states. While this conflict has already lasted for about eight years (since 2013),[161] a large majority of the Nigerian population have remained physically removed from hostilities. The idea of a limited conflict zone and thus limited applicability of certain IHL rules is supported by the approach of the ICRC to the classification of the situation in Syria in 2012. The ICRC had, originally, only found that a NIAC existed in three areas of Syria, namely the cities of Homs and Hama, and the province of Idlib. However, later, the ICRC revised its finding as a result

159 See *Prosecutor v Kunarac et al*, Judgment (Trial Chamber) IT-96-23-T & IT-96-23/1-T (22 February 2001) paras 4-11, for the charges against the accused persons.

160 See *Kunarac*, Appeal Judgment (n 156), para 57 and footnote 46.

161 The Office of the Prosecutor of the International Criminal Court (ICC) has determined that the situation in Nigeria reached the threshold of a NIAC by at least May 2013. See Office of the Prosecutor, International Criminal Court (2013), 'Report on Preliminary Examinations Activities 2013', November 2013, paragraph 218, <https://www.icc-cpi.int/OTP%20Reports/otp-report-2013.aspx> accessed 9 July 2020.

of the spread of hostilities to several other areas (although not the entire territory of the state), declaring that there was now a NIAC in Syria in general.[162] While it is acknowledged that the geographical markers of the conflict zone may not be easily defined and may indeed be flexible,[163] the present author believes that this is not enough reason to jettison the idea of a geographically limited application of the COH rules for the use of force.

Dinstein, in the latest edition of his book on NIACs in international law, notes the geographical scope of the IHL applicable to NIACs as potentially being the entire territory of the state on which hostilities are occurring, regardless of the existence of 'oases of calm untouched by the violence whirring around them'.[164] He supports this position with the already addressed holding of the ICTY in *Kunarac*,[165] as well as a statement of the Trial Chamber of the International Criminal Tribunal for Rwanda (ICTR) in *Prosecutor v Semanza* which states that the scope of applicability of Common Article 3 and Additional Protocol II, 'extends throughout the territory of the State where the hostilities are taking place without limitation to the 'war front' or to the 'narrow geographical context of the actual theatre of combat operations'.[166]

Dinstein however asserts that even in 'country-wide NIACs', it is essential to prevent the government from using the armed conflict situation as an excuse to freely deploy lethal force against persons 'engaged in below-the-threshold violence far from the 'war front''.[167] To him, this would be even more necessary when the NIAC is 'actually confined to a single region' in the territorial state 'rather than engulfing the entire country', such as the case in Sinai, Egypt, or Eastern Ukraine.[168] He then mentions *Khatsiyeva et al v Russia*,[169] a case before the ECtHR,

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162 See Stephanie Nebehay, 'Exclusive: Red Cross Ruling Raises Questions of Syrian War Crimes' (*Reuters*, 14 July 2012) <https://www.reuters.com/article/us-syria-crisis-icrc/exclusive-red-cross-ruling-raises-questions-of-syrian-war-crimes-idUSBRE86D09H20120714> accessed 11 October 2019; and Stephanie Nebehay, 'Some Syrian Violence Amounts to Civil War', (*Reuters*, 8 May 2012) <https://www.reuters.com/article/us-syria-redcross/some-syria-violence-amounts-to-civil-war-red-cross-idUSBRE8470RD20120508> accessed 11 October 2019. See also, generally, Lubell and Derejko (n 143) 72-73.

163 Lubell and Derejko (n 143) 73-74.

164 Yoram Dinstein, *Non-International Armed Conflicts in International Law* (2nd edn, Cambridge University Press 2021) 269, para 760.

165 See *Kunarac*, Appeal Judgment (n 156) para 57; and text to note 159 above.

166 *Prosecutor v Semanza*, Judgment and Sentence (Trial Chamber) ICTR-97-20-T (15 May 2003) para 367. See Dinstein, *NIAC* (n 164) 269, para 760.

167 Dinstein, *NIAC* (n 164) 270, para 761. On a related note, Dinstein has stated concerning the coexistence of the law of NIAC (LONIAC) and human rights law that: '[c]o-existence of LONIAC and human rights can easily be perceived in different geographic regions. While human rights law may yield to [the law of NIAC] where hostilities are in progress, it may remain dominant in distant localities in which no fighting is taking place'. See ibid 296, para 849.

168 ibid 270, para 761.

169 *Khatsiyeva et al v Russia*, ECtHR, 5th Section, Judgment (17 January 2008) (rendered final on 7 July 2008).

where the court held that the fact that exceptional measures were necessary in Chechnya against the insurgency therein, could not by itself justify the use by state agents of lethal force against unarmed civilians (who had been mistaken for members of an illegal armed group and alleged to have been armed) in the neighbouring Republic of Ingushetia.[170] According to Dinstein, '[t]he need to distinguish between the actual conflict zone and more remote areas – especially in a vast country like Russia – speaks for itself'.[171] But he also notes that 'the factual background plainly shows that it is not easy to erect notional fences between the hub of hostilities in a NIAC and outlying areas that are also swept by violence'.[172]

Concerning Dinstein's position on the geographical scope of IHL in NIACs, the present author notes that an analysis of the *Semanza* case reveals the existence of similar issues as already pointed out concerning *Kunarac*.[173] For one, the charges against the accused in *Semanza* also concerned violations of Geneva Law i.e., genocide (including direct and public incitement, and complicity in commission), crimes against humanity (murder, extermination, persecution, and rape), and serious violations of Common Article 3 and Additional Protocol II to the Geneva Conventions of 1949 (violence to life, health and physical or mental well-being of persons, particularly murder as well as cruel treatment such as rape, torture, mutilation, or any form of corporal punishment; and outrages upon personal dignity of women, including humiliating and degrading treatment, rape, sexual abuse, and other forms of indecent assault), committed against civilians not taking part in hostilities.[174] Thus, the scope of applicability of the COH rules for the use of force was also not in contention before the court. Likewise, in *Semanza*, the *Tadić* decision was one of the authorities cited by the court for its statement regarding the geographical scope of applicability of Common Article 3 and Additional Protocol II,[175] but with no reference to the distinction made by the court in *Tadić* between the scope of Geneva vis-a-vis Hague Law. Hence, it would seem that again, a court – in this case the ICTR – has only referred to the scope of applicability of certain IHL provisions in general terms, likely

170 See ibid para 134; and Dinstein, *NIAC* (n 164) 270, para 762.
171 Dinstein, *NIAC* (n 164) 270, para 762.
172 ibid.
173 See text to note 159 above.
174 See *Semanza* (n 166) paras 9-14 for the charges brought against the accused person, and para 515.
175 See ibid, note 616.

influenced by the facts of the case before it which concerned charges of serious violations of Geneva Law.[176]

Dinstein though, recognises one of the pitfalls of a very wide scope of application of the COH rules for the use of force, i.e., the potential exploitation of the situation by governments of territorial states to freely use lethal force in more peaceful regions.[177] This, it is here argued, further makes the case for a geographically limited scope of application for the COH rules for the use of force. Even while Dinstein rightly notes the difficulty in drawing lines between 'peaceful' and 'non-peaceful' areas of a state,[178] as argued above, such difficulty in determining the geographical markers of the conflict zone is not enough to reject the idea of limiting the geographical scope of the COH rules for the use of force.[179]

It is important to note that for a use of force to fall to be judged under the COH rules, not only must it occur in an armed conflict situation —and in the case of a NIAC, as argued in this thesis, occur in the part of the territory of the state where hostilities are being conducted — the

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176 This would also seem to be the case in *Prosecutor v Akayesu*, Judgment (Trial Chamber) ICTR-96-4-T (2 September 1998), which Dinstein had also cited as an authority in addition to *Semanza*. See Dinstein, *NIAC* (n 164) 270, note 1253. In paras 635 and 636 of *Akayesu* (n 176), the ICTR stated as follows:

> There is no clear provision on applicability *ratione loci* either in Common Article 3 or Additional Protocol II. However, in this respect Additional Protocol II seems slightly clearer, in so far as it provides that the Protocol shall be applied "to all persons affected by an armed conflict as defined in Article 1". The commentary thereon specifies that this applicability is irrespective of the exact location of the affected person in the territory of the State engaged in the conflict. The question of applicability *ratione loci* in non-international armed conflicts, when only Common Article 3 is of relevance should be approached the same way, i.e. the article must be applied in the whole territory of the State engaged in the conflict**.** *This approach was followed by the Appeals Chamber in its decision on jurisdiction in Tadić, wherein it was held that "the rules contained in [common] Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations".*
>
> Thus the mere fact that Rwanda was engaged in an armed conflict meeting the threshold requirements of Common Article 3 and Additional Protocol II means that these instruments would apply over the whole territory hence encompassing massacres which occurred away from the war front'. From this follows that it is not possible to apply rules in one part of the country (i.e. Common Article 3) and other rules in other parts of the country (i.e. Common Article 3 and Additional Protocol II).

(Emphasis added). An analysis of this statement reveals that herein, the ICTR was speaking of the general applicability of the provisions of Common Article 3 and Additional Protocol II, even in the court's reference to the *Tadić* decision, and not speaking in terms of the specific applicability of the rules related to conduct of hostilities (Hague Law) as against those for the protection of persons in the power of a party to the conflict (Geneva Law) as the court in Tadić had done. Also, in *Akayesu*, the charges before the court against the accused were for genocide (including complicity in commission, and direct and public incitement), crimes against humanity (extermination, murder, torture, rape, and other inhumane acts), and serious violations of Common Article 3 and Additional Protocol II to the Geneva Conventions (murder; cruel treatment; and outrages upon personal dignity, in particular rape, degrading and humiliating treatment and indecent assault) committed against civilians not taking an active part in hostilities- all breaches of Geneva Law. See *Akayesu* (n 176) paras 6 (which sets out the indictment), and 175.

177 Dinstein, *NIAC* (n 164) 270, para 761. See for a similar view, Lubell and Derejko (n 143) 71.

178 Dinstein, *NIAC* (n 164) 270, para 762.

179 See text to note 163.

use of force must also be in connection with or bear a nexus to the conflict at hand.[180] What this means is that it must be closely related or linked to the occurring hostilities, i.e. 'committed in the course of or as part of the hostilities'.[181] IHL does not apply to acts which bear no nexus to an armed conflict, even when those acts occur during an armed conflict situation.[182] This would mean that actions such as murder or a terrorist attack perpetrated for private reasons, would not be regulated by the COH rules for the use of force except there is proof of a nexus to an ongoing conflict.[183] These would be law enforcement situations, governed under LOLE.

Moving into the substance of the COH rules for the use of force, there are two fundamental principles therein: distinction and proportionality in attack. Related to these principles is the principle of precautions in attack. The principles of proportionality and precautions under IHL are conceived quite differently from their counterparts under LOLE. The differences will be made apparent, when all three principles mentioned are discussed hereunder.

### 2.4.1. The Principle of Distinction

This is arguably the most important principle in IHL: that a distinction must be made at all times between, on the one hand, legitimate military objectives, which is inclusive of combatant members of state armed forces and members of organised armed groups, and, on the other, civilians, the civilian population in general, and civilian objects. Only military objectives may be subject to attack.[184]

A civilian, in the case of IACs, is defined as a person who does not fall into the category of combatants.[185] Generally, combatants are persons who are members of the armed forces of a party to a conflict, with the exception of medical and religious personnel who are non-combatants, and civilians participating in a *levée en masse* who are to be accorded prisoner of

180 Casey-Maslen with Haines (n 60) 76.
181 See *Tadić*, Trial Judgment (n 135) para 573. In this case, the court also noted that for an offence to be counted as a violation of IHL rules, it must be convinced that the alleged acts bore a close link to the hostilities. ibid.
182 Sassòli (n 125) 201, MN 6.80.
183 ibid. See also Saul (n 141) 196.
184 See art 48 of Additional Protocol I. See art 13(1) of Additional Protocol II for a similar provision relating to NIACs. This principle was articulated for the first time in the preamble to the Saint Petersburg Declaration of 1868 to the effect that: 'the only legitimate object which States should endeavour to accomplish during war is to weaken the forces of the enemy'. See Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868, preambular para 2. See also ICRC Study of Customary IHL (n 129), Rule 1 ('The Principle of Distinction between Civilians and Combatants') 3.
185 Persons who fall into the combatant category are delineated under art 4 A (1), (2), (3) and (6) of Geneva Convention III and art 43 of Additional Protocol I. See generally, art 50(1) of Additional Protocol I.

war status.[186] In the case of a NIAC, the task of defining civilians is complicated by the question of how to categorize members of armed groups. More will be said on this below. Civilian objects are defined as objects which do not constitute military objectives, which are in turn defined as objects which effectively contribute to military action and whose destruction or capture results in a specific military advantage.[187] The civilian population and civilian objects are never to be made the object of attack.[188] Civilians only lose their protection from attack if and 'for such time as' they participate directly in hostilities.[189] In the same vein, civilian objects lose their protection from attack for such time as they are used for military purposes.[190]

The principle of distinction under COH rules is very relevant to the difference in the conception of terrorism during peacetime, and terrorism during situations of armed conflict. As earlier discussed in Chapter 1,[191] while violence against military objectives, such as state military forces in an armed conflict, is not prohibited under IHL, such acts against military forces when they occur in peacetime are unlawful and could amount to terrorist acts. However, in both peacetime and armed conflicts, violence against civilians is generally unlawful. In addition, IHL specifically prohibits the use of violence, 'the primary purpose of which is to spread terror among the civilian population'.[192] Thus, while certain acts of violence which would be deemed as terrorist attacks during peacetime are not prohibited under IHL rules for the conduct of hostilities,[193] others, such as attacks on civilians, are also prohibited when they occur during an armed conflict.

Moving on to the concept of direct participation in hostilities by civilians, which leads to the loss of protection from attack under COH rules, this concept was left unexplained in the treaties, and its interpretation is controversial. The 1987 Commentary to Additional Protocol I to the Geneva Conventions of 1949 throws some light on the issue, defining direct participation as 'acts of war which by their nature or purpose are likely to cause actual harm to the personnel

186 See art 43(2) of Additional Protocol I. Participants in a *levée en masse* are defined as ''[i]nhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units'. See art 4(6) of Geneva Convention III.
187 See Additional Protocol I, art 52(1) and (2).
188 See Additional Protocol I, arts 51 (2) and 52(1). See also art 13(2) of Additional Protocol II.
189 See Additional Protocol I, art 51 (3). See also art 13(3) of Additional Protocol II.
190 See Casey-Maslen with Haines (n 60) 106.
191 See Chapter 1, text to note 119.
192 See Additional Protocol I, art 51(2), and Additional Protocol II, art 13(2).
193 See for example, art 19(2) of the International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 256, which excludes from the purview of the Convention, the activities of armed forces (as understood under IHL) during an armed conflict and which are regulated by IHL rules.

and equipment of the enemy armed forces'.[194] It also notes that direct participation 'implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place'.[195] In 2009, the ICRC published its Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (ICRC DPH Guidance), the result of a process undertaken in an attempt to bring clarity to this key concept, 'with a view to strengthening the implementation of the principle of distinction'.[196] Therein, three cumulative criteria that would qualify an act by a civilian as 'direct participation in hostilities' were identified. They are as follows:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).[197]

In relation to direct causation, it was noted in the DPH Guidance that actions by individuals towards the general war effort such as design of weaponry and military equipment, or war-sustaining activities such as financing and political propaganda, do not amount to their direct participation in hostilities except when those activities go beyond general capacity-building or capacity maintenance, and are targeted towards specific operations devised to result in the requisite threshold of harm.[198] With regard to belligerent nexus, it is noted that this is narrower than the general nexus required to trigger the applicability of IHL.[199] Belligerent nexus refers to a connection between the act by the civilian in question and the conduct of hostilities between the belligerent parties, as opposed to a connection to the armed conflict in general.[200] Hence, armed violence such as acts of terrorism, committed by a civilian, will not amount to

194 Yves Sandoz *et al* (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (International Committee of the Red Cross (ICRC)/Martins Nijhoff 1987), (hereafter 'ICRC Commentary on the 1977 Additional Protocols') 619, para 1944. This statement in the Commentary was applied by the ICTR in *Rutaganda* (n 143) para 100.
195 ICRC Commentary on the 1977 Additional Protocols (n 194) 516, para 1679.
196 See generally ICRC DPH Guidance (n 126), 5 (foreword).
197 ibid 16. See further ibid 46-64.
198 ibid 51-53. According to the ICRC in the DPH Guidance, 'direct causation should be understood as meaning that the harm in question must be brought about in one causal step'. ibid 53.
199 See ibid footnote 147. See also Lubell and Derejko (n 143) 84-85.
200 ICRC DPH Guidance (n 126) footnote 147.

participation in hostilities as long as the acts were not intended to aid a party to the conflict over another.[201]

The ICRC also attempted to delineate the duration of direct participation of hostilities, noting that '[m]easures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act'.[202] While the conclusions reached by the ICRC on these matters are not without criticism,[203] they provide further clarification to the question of direct participation in hostilities by civilians,[204] and also stimulate valuable discussion on the topic.[205]

One of the more controversial issues arising from the Interpretive Guidance is the ICRC's notion of a 'continuous combat function' in relation to organised armed groups. This 'continuous combat function':

> … distinguishes members of the organised fighting forces of a non-State party from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-combat functions.[206]

The ICRC developed this notion in a response to the problem of categorization of members of organised armed groups, particularly the question if they were civilians who merely lost protection for such a time as they directly participated in hostilities, or if by reason of their membership of an armed group, they lose their civilian immunity and thus are targetable at any time. While it is generally accepted that members of state armed forces in a NIAC are not civilians (though they are also not combatants in the international legal sense of the term, as

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201 See generally, ibid 59.

202 ibid 65.

203 See for example, Michael N Schmitt, 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' (2010) 42(679) International Law and Politics 679; Michael N Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' (5 May 2010) 1 Harvard National Security Law Journal 5, 24-39; Kenneth Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC Direct Participation in Hostilities Interpretive Guidance' (2010) 42 New York University J of Intl L & Politics 641, 657-662; S Bosch, 'The International Humanitarian Law Notion of Direct Participation in Hostilities - A Review of the ICRC Interpretive Guide and Subsequent Debate' (2014) 17(3) PER/PELJ Potchefstroom 999, 999-1041; Casey-Maslen with Haines (n 60) 138-146.

204 Solis (n 134) 218.

205 See UNHRC, 'Report of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Killings, Philip Alston: Addendum- Study on Targeted Killings' (28 May 2010) A/HRC/14/24/Add.6, para 62, which notes that the Interpretative Guidance 'provides a useful starting point for discussion'.

206 ICRC DPH Guidance (n 126), 33-34.

there is no combatant status in NIACs), there is no consensus on the categorization of members of armed groups, even their strictly military personnel.[207]

The take-off point for the notion of a continuous combat function as outlined by the ICRC is that, while there is no explicit treaty definition of a civilian in a NIAC,[208] under extant IHL rules, it can be read from provisions such as those prohibiting attacks on civilians, that there must be some status other than that of civilian, for the principle of distinction to be of any effect.[209] The ICRC has interpreted this to mean that a civilian is a person other than a member of state armed forces or a member of an organised armed group.[210] The ICRC however has a circumscribed meaning of membership of an organised armed group. Members of organised armed groups, according to the ICRC, are the armed forces of the non-state party to the NIAC: i.e. their military wing.[211] The ICRC ties the notion of membership of an organised armed group to a 'continuous combat function', i.e. persons 'whose continuous function it is to take a direct part in hostilities'.[212] Such function is to be determined on a factual basis, and from the moment such person begins this 'continuous combat function' until disengagement from the armed group, the person ceases to be a civilian and thus can be targeted at any time.[213]

The creation of this continuous combat function category, which the ICRC notes as an attempt to remove the operational disadvantage faced by state armed forces in NIACs, and to ensure the respect for the protection for civilians,[214] is a contentious matter and has been the subject of criticism.[215] Despite the criticisms of the notion, among which is the question of its practical

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207 In this regard, the ICRC notes that there is unclear state practice on the matter of the categorization of members of armed groups in NIACs. See ICRC Study of Customary IHL (n 129), Rule 5 ('Definition of Civilians') 19.

208 The ICRC notes that a proposed definition of a civilian as '… anyone who is not a member of the armed forces or of an organised armed group'- amended from an earlier draft that read 'any person who is not a member of armed forces is considered to be a civilian'- had been adopted by consensus and inserted in the draft of Additional Protocol II. The definition was later removed in a bid to simplify the text of the Protocol. See ibid.

209 See generally, ICRC DPH Guidance (n 126), 27-30. See also Lubell, *Extraterritorial Use of Force Against Non-State Actors*, (Oxford University Press 2010), 147-148; and Sassòli (n 125) 358-359, MN 8.316.

210 ICRC DPH Guidance (n 126), 27 and 36.

211 ibid 32.

212 ibid 36. See also ibid 33.

213 ibid 72-73.

214 ibid 72.

215 See for example, Watkin (n 203) 641-695; Lubell (n 209) 147-155; Casey-Maslen with Haines (n 60) 163; and generally, Bosch (n 203), 1032-1036. See also, UN Human Rights Council, Report of the Detailed Findings of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory', 18 March 2019, UN Doc A/HRC/40/CRP.2, paras 104-105, where the Commission of Inquiry noted the criticism of the continuous combat function and decided not to adopt that position (while not commenting on its recognition or its lawfulness under IHL), after noting that the notion neither appears in IHL treaties nor is it settled as custom.

application in the field,[216] the present author accepts the idea of permanent fighters being regarded as forming the armed forces of non-state parties to a NIAC, as a logical deduction from relevant treaty provisions in light of the principle of distinction.[217] However, this is an issue that clearly needs further discussion and engagement.[218] As Watkin notes, the question of the categorization of members of armed groups has been a 'longstanding complex problem'.[219]

Under the COH rules for the use of force, attacks on military objectives of the other party to the conflict are not unlawful. Combatants, or in the case of NIACs, members of the armed forces and of organised armed groups, can arguably be attacked at any time, with the intentional use of lethal force.[220] However, any use of lethal force or acts of violence against civilians who are not participating directly in hostilities would be unlawful.

Under the COH rules, there is no duty to capture rather than kill enemy fighters.[221] This is despite what may be implied from Chapter IX of the ICRC's DPH Guidance.[222] Therein, the ICRC recommends that: 'the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to

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216 See for example, Lubell (n 209) 150.

217 See Alejandro Escorihuela. 'Humanitarian Law and Human Rights Law: The Politics of Distinction' (2011) 19(2) Michigan State Journal of International Law, 299, 342.

218 See Lubell (n 209) 155.

219 Watkin (n 203), 645. The author also notes that this is 'an area of law which is admittedly fraught with both historical baggage and significant controversy'. See ibid 644-645.

220 This is subject to the requirements for the applicability of the COH rules for the use of force as discussed above. See text to note 180 above.

221 See Jens David Ohlin, 'The Duty to Capture' (2013) 97 Minnesota Law Review 1268, 1270, where the author states that under IHL, 'there simply is no *codified* duty to attempt the capture of enemy combatants'; but noting that 'IHL does include a duty to respect *surrender*'. (Emphases in the original). See also Beth Van Schaack, 'The Killing of Osama Bin Laden and Anwar Al-Aulaqi: Uncharted Legal Territory' in (2011)14 Yearbook of International Humanitarian Law 255, 292, also cited in Ohlin (n 221) 270 at footnote 11, where the author noted that: '[a]s a matter of established IHL doctrine, there is no express duty to capture privileged combatants in IACs in lieu of killing them in the absence of an unambiguous offer of unconditional surrender'. But see, for arguments claiming the existence of restraints on the use of lethal force resulting in a 'duty to capture' rule under IHL and based on the prohibition under Additional Protocol I, of inflicting superfluous injury or unnecessary suffering, Ryan Goodman, 'The Power to Kill or Capture Enemy Combatants' (2013) 24 European Journal of International Law 819, 819; Ryan Goodman, 'The Power to Kill or Capture Enemy Combatants: A Rejoinder to Michael N. Schmitt', (2013) 24 European Journal of International Law, 863; and Ryan Goodman, 'The Laws of War in the Age of Terror' (2018-2019) 28 Journal of Transnational Law and Policy 1, 10-11. For responses to Goodman's arguments, see Michael N Schmitt, 'Wound, Capture, or Kill: A Reply to Ryan Goodman's 'The Power to Kill or Capture Enemy Combatants' 24(3) European Journal of International Law 855, 855; Geoffrey S Corn *et al*, 'Belligerent Targeting and the Invalidity of a Least Harmful Means Rules' (2013) 89 International Law Studies 536, 538-540; and Jens David Ohlin, 'Recapturing the Concept of Necessity' (8 March 2013), Cornell Legal Studies Research Paper No. 13-90, available at <https://ssrn.com/abstract=2230486> accessed 30 September 2021.

222 Chapter IX is titled 'Restraints on the Use of Force in Direct Attack'. See ICRC DPH Guidance (n 126) 77-82.

accomplish a legitimate military purpose in the prevailing circumstances'.[223] Such a norm is not supported under extant IHL rules.[224]

### 2.4.2. The Principle of Proportionality

The principle of proportionality as mentioned above, is conceived differently under the COH rules for the use of force. Unlike under the LE rules where proportionality demands that the threat constituted by a person be weighed against the harm that may result to him or bystanders before a use of force will be deemed lawful, under the COH set of rules, proportionality goes towards protecting civilians and civilian objects in the surroundings from the effects of an attack on a legitimate military objective, for example, an enemy fighter.[225] However, this protection only comes where the attack 'may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof which would be excessive in relation to the concrete and military advantage anticipated'.[226]

Under the principle of proportionality in the COH rules, the likely incidental civilian loss is balanced against the anticipated military advantage before the attack is carried out.[227] Where the projected incidental loss would be 'excessive' when compared to the expected advantage, an attack would be unlawful in the circumstances.[228] However, a challenge in the enforcement of this principle lies in the imprecision of the term 'excessive', in relation to judging what would be the permissible amount of civilian loss as against anticipated military advantage.[229]

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223 See ibid 77. The ICRC further notes that 'it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force'. ibid, 82. See for a similar notion, para 34 of the ACHPR's General Comment on the Right to Life where it is noted that where military necessity does not require the use of lethal force, a lawful target should be captured, as 'the respect for the right to life can be best ensured by pursuing this option'. See ACHPR 'General Comment No 3 on the Right to Life' (n 78) para 34.

224 See Casey-Maslen with Haines (n 60) 161; and Schmitt, 'Interpretive Guidance' (n 203) 39-43. The chief argument against the ICRC's recommendation in Chapter IX of its DPH Guidance is that extant rules of IHL are seen to already express the principle of military necessity, with the principle not a positive requirement to be further factored into the application of the current rules. See Schmitt, 'Interpretive Guidance' (n 203) 40-41; and UNGA, 'Report of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Killings' (13 September 2013) UN Doc A/68/382, para 78.

225 See ICRC Use of Force Report (n 60) 8.

226 See art 51(5)(b) of the 1977 Additional Protocol I. The principle of proportionality is of customary nature and applies equally in both IACs and NIACs. See ICRC Study of Customary IHL (n 129) Rule 14 ('Proportionality in Attack') 46.

227 See Casey-Maslen with Haines (n 60)16.

228 This is another point of divergence with proportionality as conceived under the LE rules for the use of force. Under LE rules, care must be taken to avoid all injuries or deaths to bystanders. On the contrary, under the COH rules, only excessive civilian loss is unlawful. See ICRC Use of Force Report (n 60) 9.

229 See generally, Casey-Maslen with Haines (n 60) 16-17.

### 2.4.3. The Principle of Precautions in Attack

The precautionary principle under the COH rules for the use of force requires parties to an armed conflict to take feasible measures to minimise incidental civilian harm or loss during attacks.[230] The primary role of precautions in IHL is to minimise the resultant harm to civilians from the use of force during armed conflicts.

The rules in this regard are expressed in Article 57 of Additional Protocol I.[231] Article 57(1) states the general rule as follows:'[i]In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects'.[232] This is followed, in other paragraphs of Article 57, by particular precautionary measures that must be taken in attack, including ascertaining by all feasible means that the intended target is indeed a military objective;[233] taking feasible precautions to ensure the selection of means and methods of attack that would minimise the risk of incidental civilian harm;[234] giving, unless not permitted by the circumstances, 'effective advance warning' to the civilian population where an attack is likely to affect them;[235] and selecting military objectives with the least risk of civilian harm, where such choice is possible towards a similar military advantage.[236]

It is noted, however, that the standard of 'feasibility' required in the precautions to be taken to minimise harm to civilians is quite low and thus weak, it being 'considerably lower than "all necessary measures", and one that is even substantively lower than "all possible measures"'.[237] This contrasts with the precautionary principle under LE rules which requires that every possible measure be taken, not only to minimise injury or damage, but the recourse to the use of force in the first instance.[238]

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230 See ibid 197, where it is noted that 'the rules of distinction and proportionality in attack are directly underpinned by the duty on the attacker to take certain 'precautions'.

231 According to the ICRC, this rule has attained customary status in relation to all types of armed conflicts, and is thus also applicable to NIACs, even though absent from Additional Protocol II. See ICRC Study of Customary IHL (n 129), Rule 15 ('Principle of Precautions in Attack') 51-52.

232 See Additional Protocol I, art 57.

233 ibid art 57(2)(a)(i)

234 ibid art 57(2)(a)(ii)

235 ibid art 57(2)(c)

236 ibid art 57(3)

237 Casey-Maslen with Haines (n 60) 199.

238 See UNHRC, 'Report of the Special Rapporteur (2014)' (n 49) para 63.

### 2.4.4. Rules Governing the Use of Weapons in the Conduct of Hostilities

Under IHL, '[t]he term "means of combat" or "means of warfare" generally refers to the weapons being used, while the expression "methods of combat" [or "methods of warfare"] generally refers to the way in which such weapons are used'.[239] Per IHL rules, the permissible means and methods of warfare are circumscribed. Article 35(1) of Additional Protocol I states the rule thus: '[i]n any armed conflict, the right of the parties to the conflict to choose methods or means of warfare is not unlimited'.[240]

As part of the restrictions on the means and methods of warfare, there is a prohibition on the use of weapons which are by nature indiscriminate i.e. those which cannot differentiate civilians and/or civilian objects, from military objectives.[241] Weapons that fall into this category include poison and biological weapons.[242] In addition, there is also a general prohibition on the use of weapons which are of a nature to cause unnecessary suffering or superfluous injury to combatants (or, in the case of NIACs, members of armed forces and organised armed groups).[243] This is similar to the restriction on the use of firearms and ammunition which cause unwarranted injuries under the LE rules for the use of force.[244] Unnecessary suffering has been defined as 'harm greater than that unavoidable to achieve legitimate military objectives'.[245] To this effect, Article 35(2) of Additional Protocol I states that: '[i]t is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering'.[246] Weapons prohibited as

239 ICRC Commentary on the 1977 Additional Protocols (n 194), para 1957.

240 See also art 22 Regulations concerning the Laws and Customs of War on Land, annexed to Hague Convention (II) with Respect to the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900), which states that '[t]he right of belligerents to adopt means of injuring the enemy is not unlimited'.

241 See art 51(4)(b) and (c) Additional Protocol I, which prohibits attacks using means and methods of warfare which either cannot be aimed towards a specific military objective, or whose effects cannot be limited to military objectives are required under the Protocol. The prohibition against inherently indiscriminate weapons is of customary nature and thus applicable under both IACs and NIACs. See ICRC Study of Customary IHL (n 129) Rule 71 ('Weapons That Are by Nature Indiscriminate') 244.

242 See Casey-Maslen with Haines (n 60) 22.

243 See Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29, 1868 [hereinafter St. Petersburg Declaration], which notes that 'the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable', would exceed the only legitimate aim of a conflict which is to 'weaken the military forces of the enemy'. See St. Petersburg Declaration.

244 See Basic Principles, Principle 11(c).

245 *The Legality of the Threat or Use of Nuclear Weapons* (n 120) para 78.

246 See also art 23(e) Regulations concerning the Laws and Customs of War on Land, annexed to Hague Convention (II) with Respect to the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900). This rule is of customary nature, and it applies to both IACs and NIACs. See ICRC Study of Customary IHL (n 129) Rule 70 ('Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering') 237.

causing superfluous injury include expanding bullets (but which are lawful for use in law enforcement under LOLE as they are 'less likely to break upon impact and tend to remain in the body of the targeted person', hence creating less risk for bystanders);[247] explosive bullets; and asphyxiating or deleterious gases.[248] In relation to the prohibition of asphyxiating or deleterious gases, riot control agents are forbidden from use as a method of warfare.[249] However, riot control agents are potentially lawful for use in law enforcement under LOLE.[250]

### 2.5. Distinctions between the Law Enforcement and Conduct of Hostilities Rules for the Use of Force and the Implications for Counterterrorism Operations

The above discussion of the LE and COH rules for the use of force reveals substantial differences between them, as there are significantly different restraints on the use of force under the two sets of rules.

In general, under the LE rules, force must be used exceptionally, and only to the extent required to achieve a legitimate objective. Only the minimum necessary force should be used, and every effort must be made to effect an arrest where possible. Any force used must be proportionate to the objective pursued, with the potential harm to bystanders and the suspect factored into the assessment. Law enforcement operations must also be planned in such a way as to minimise the need for resort to force. With regard to lethal force, potentially lethal force (i.e., shooting to stop) may not be used, except as a defence against an imminent or ongoing threat to life. Intentional lethal force (i.e., shooting to kill), on its part, must only be used where there is no reasonable alternative for removing an imminent threat to life, including by shooting to stop. Also, under the LE rules, there is the obligation for law enforcement officials to use differentiated and graduated force. This would require provision by the state of a range of weapons for use, inclusive of less-lethal weapons, and defensive equipment.[251] In addition, although not discussed earlier, under IHRL and applicable under LOLE rules, there is the

247 See Melzer and Gasteyger (n 148), 88-89.
248 See ICRC Commentary on the 1977 Additional Protocols (n 195) para 1419.
249 See Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Chemical Weapons Convention), (adopted 13 January 1993, entered into force 29 April 1997), 1974 UNTS 45, art 1(5). See also ICRC Study of Customary IHL (n 129), Rule 75 ('Riot Control Agents') 263.
250 This is permitted under arts 2(9)(d) and 6(1) of the Chemical Weapons Convention.
251 See generally, the discussion under section 2.3. relating to the international legal framework for the use of force in counterterrorism policing.

obligation for an investigation into every death or injury resulting from the use of force and firearms.[252]

On the other hand, under the COH rules, intentionally lethal force may be used, at any time, against legitimate targets, with no obligation to use less than lethal force, or to effect an arrest instead. Under the COH rules, proportionality of a use of force is assessed in terms of the risk of incidental civilian harm, prohibiting incidental harm in excess of the anticipated military advantage of an attack. In terms of precaution, care is to be taken to at least minimize incidental civilian harm.

Concerning the duty to investigate under COH rules, this arises in instances such as cases of grave breaches of the Geneva Conventions of 1949 (in relation to IACs);[253] allegations of war crimes;[254] and also, as a corollary to the duty to supress all other violations of IHL.[255] Regarding the duty to investigate and death in the conduct of hostilities, the Minnesota Protocol on the Investigation of Potentially Unlawful Death notes that whenever there seem to be resultant casualties from an attack, there should be a post-operation assessment carried out to ascertain the facts.[256] Where following that, there is reasonable suspicion of the commission of a war crime, there must be an investigation by the state. In the case of a suspicion or an allegation that a death resulted from a violation of IHL rules not amounting to a war crime, and for which there is no specific duty under IHL to investigate i.e., conduct an official inquiry, some further inquiry is needed, at a minimum; and 'where evidence of unlawful conduct is identified, a full investigation should be conducted'.[257]

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252 See Basic Principles, Principles 6 and 22. The 2016 Minnesota Protocol on the Investigation of Potentially Unlawful Death is relevant here. See Office of the United Nations High Commissioner for Human Rights (OHCHR), The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016) (New York/Geneva) 2017 para 2(a).

253 See Geneva Convention I, art 49: Geneva Convention II, art 50; Geneva Convention III, art 129; Geneva Convention IV, art 146; and Additional Protocol I, art 85.

254 See ICRC Study of Customary IHL (n 129) Rule 158 ('Prosecution of War Crimes') 607.

255 See Geneva Convention I, art 49(3): Geneva Convention II, art 50(3); Geneva Convention III, art 129(3); Geneva Convention IV, art 146(3); and Additional Protocol I, art 86. Some other instances where the duty to investigate may arise under COH rules include deaths or injury of prisoners of war and civilian internees in certain circumstances (see Geneva Convention III, art 121 and Geneva Convention IV, art 131); and the duty of commanders to prevent and suppress breaches of IHL (see Additional Protocol I, art 87; and ICRC Study of Customary IHL (n 129) Rule 153 ('Command Responsibility for Failure to Prevent, Repress or Report War Crimes') 558). See generally, Gloria Gaggioli, 'A Legal Approach to Investigations Of Arbitrary Deprivations of Life in Armed Conflicts: The Need For a Dynamic Understanding of the Interplay between IHL And HRL' (2017) 36 Questions of International Law 27, 29-32.

256 OHCHR, Minnesota Protocol (n 252) para 21.

257 ibid.

From the above discussion, it can be gleaned that the COH rules for the use of force are, by and large, considerably more permissive than the LOLE rules. It must be noted, however, that in a limited number of instances, the LE rules are more permissive. For example, expanding bullets and riot control agents are prohibited from being used as methods of warfare under the COH rules, but are potentially lawful under the LE rules.[258]

The differences between the LE and COH rules for the use of force have implications for the use of force in counterterrorism. As earlier discussed,[259] unless actions by terrorist groups reach a standard of intense combat with state forces, in addition to such groups reaching the requisite standard of organisation, the security situation at hand cannot qualify as a NIAC. Thus, any action towards the terrorist group or their members fall within the realm of law enforcement and must comply with the LE rules for the use of force, for a state to be in compliance with its obligations under international law. This would also be the case where although the security situation in the state qualifies as an armed conflict, the act being responded to by state forces has no nexus to or is not directly related to the conflict. This is because IHL does not apply to acts which have no nexus to ongoing hostilities.[260] Hence, for instance, acts of terrorism carried out during armed conflicts but which are not connected to ongoing hostilities, fall within law enforcement situations and must be responded to using LE rules for the use of force.[261] Also, as the present author argues, acts by terrorist groups or their members in a NIAC, which bear the necessary nexus to an armed conflict but occur in an area where there is no ongoing hostilities i.e. outside the conflict zone, do not fall within the scope of application of COH rules and should thus be seen as a situation of law enforcement, subject to LE rules for the use of force. Thus, in accordance with the LE rules, law enforcement officials (which is inclusive of the military when they exercise policing or law enforcement powers) must in such instances seek to arrest and use the minimum necessary force; and use firearms (lethal force) only in extreme cases, among other requirements under LOLE. They must also comply with the standards for the use of force in detention and custodial settings upon arrest of a suspect.

The implications of the differences between the LE and the COH rules for the use of force in counterterrorism can be further appreciated through the incident on 21 September 2013, of the

258 See Melzer and Gasteyger (n 148), 87-88.
259 See text to note 140 above.
260 See text to note 180 above.
261 This would also be the case where an act of terrorism committed by a civilian e.g., an armed attack on other civilians, has no belligerent nexus to the armed conflict, and thus does not qualify as direct participation in hostilities. This would thus be a law enforcement situation, subject to LOLE.

attack at Westgate shopping mall, in Nairobi, Kenya. On that day, gunmen bearing assault rifles and grenades, attacked the mall and held it, leading to a siege. *Al-Shabaab* would claim responsibility for the attack, stating it was retribution for the actions of the Kenyan military forces in Somalia.[262] It is noted that *al-Shabaab* has been engaged in an extraterritorial NIAC with Kenya in Somalia since 2011- a conflict which may now have extended onto Kenyan territory, particularly the areas around the Boni Forest which is near the Kenya-Somalia border, as a result of a security operation being undertaken there by security forces against al-Shabaab militants since 2015 (Operation *Amani Boni*).[263]

In response to the attack at the mall, the Kenyan security forces were deployed, first the police, and then the military who eventually took control of the counterterrorism operation. The shopping centre was besieged for three days, resulting in a total of 67 fatalities and over 175 injured persons. The Kenyan security forces reportedly used tear gas, rocket-propelled grenades, and mortar shells against the attackers.[264] The legality of the use of these weapons would depend on whether the incident is considered to be governed by the LE rules or the COH rules for the use of force. While there was an armed conflict between Kenyan and the al-Shabaab group, and the incident in question bears a nexus to the armed conflict occurring in Somalia, the incident occurred on Kenyan territory, and not in an area of Somalia where hostilities in the NIAC were being conducted.[265] Therefore, in the opinion of the present author, this was a law enforcement operation, and the legality of the use of force should be assessed under the LE rules in that regard.[266]

Hence, for example, the use of tear gas, a riot control agent, would not be unlawful. Also, the legality of the use of such heavy artillery such as rocket-propelled grenades, and mortar shells would need to be judged with regard to the LOLE standards of necessity and proportionality.[267] Likewise, the planning of the counterterrorism operation would also need to be assessed in accordance with the LOLE principle of precaution, whether care had been taken to minimise recourse to force, or to minimise damage resulting from a potential use of force. If, however, this above situation is assessed as falling within conduct of hostilities of the armed conflict in

262 See the account of the attack in Casey-Maslen and Connolly (n 16) 292-293.
263 On this point, see Chapter 4 below, section 4.3.1.
264 See generally, Casey-Maslen and Connolly (n 16) 292-294.
265 As noted above, the conflict between Kenya and Somalia may currently have extended onto Kenyan territory, but that would only be since 2015 while the Westgate mall attack occurred in 2013. Also, the Westgate shopping mall is situated in Nairobi, and not within the areas under Operation *Amani Boni*.
266 See also, Casey-Maslen with Haines (n 60) 88.
267 See generally, Casey-Maslen and Connolly (n 16) 293-294.

Somalia, then the use of tear gas would be unlawful as a result, while the more permissive COH standards of proportionality and precaution would instead be available.[268]

It is necessary to address the question whether during counterterrorism policing, there is or should be any room for a more permissive use of force than ordinarily allowed under the LE rules for the use of force, for example, allowing a more expansive interpretation of what is 'necessary' or 'proportionate' in the face of a terrorist threat such as the siege of the Westgate mall discussed above, and a routine street patrol, both of which are law enforcement operations. This question can be linked to the idea of a revised or new model for the use of force during counterterrorism policing promoted in the aftermath of the 9/11 attacks, which as noted earlier, has been dispelled by the explicit recognition of the necessity of human rights safeguards while countering terrorism, as well as the applicability of the LE rules for the use of force during counterterrorism.[269] However, it is still important to address whether the 'feared inadequacy' of the LE rules for the use of force for counterterrorism is justified.

It is submitted here that a proper appreciation of the extant rules for the use of force shows that they already grant considerable latitude for the use of force – even lethal force – against a suspected terrorist. It is recalled that Basic Principle 9 even while limiting the use of intentional lethal force (i.e., using force with the intention to kill) to situations where it is 'strictly unavoidable in order to protect life'; allows for the use of potentially lethal force to avert imminent death or serious injury, as well as against a grave threat to life.[270] This provision, it is submitted, covers possible reactions to a broad range of terrorist threats including threats from suspected suicide bombers, hostage-takers, and terrorist shooters.[271] Law enforcement officers already have broad room to act in those circumstances, and thus it is here argued that 'new' rules for the use of force specific to counterterrorism policing are not necessary. The adoption of such more permissive rules may not only prove dangerous for the society in general due to resulting collateral damage, but it may lead to going down a slippery slope whereby

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268 Casey-Maslen with Haines (n 60) 87.

269 See text to notes 24 and 25 above.

270 See Basic Principles, Principle 9 which states that:

> [l]aw enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

As noted earlier, this rule arguably extends to the use of other lethal weapons. See text to note 92 above.

271 See generally, text to note 80 above.

such rules become used even in 'normal' times.[272] Basic Principle 8 clearly states that '[e]xceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles'.[273] Likewise, the ACHPR has noted that while '[o]rganised crime and terrorism can pose significant threats to the enjoyment of the right to life and require a robust State response', such response should be 'one that at all times takes into account the requirements of international human rights law'.[274] These only support the view that the LE rules for the use of force are comprehensive enough for counterterrorism policing operations.

### 2.6. Concluding Remarks

In this chapter, the term 'counterterrorism policing' as used in this thesis was examined in some detail. Also, the international legal framework for the use of force in counterterrorism policing, i.e., the law enforcement (LE) rules for the use of force, was examined. In addition, the conduct of hostilities (COH) rules for the use of force, applicable to counterterrorism operations during armed conflicts, were considered. The differences between the LE and the COH rules for the use of force were then highlighted, and the primary implications of these differences for the use of force in counterterrorism operations by state agents, duly outlined.

Generally, the chapter lays out the legal framework for the use of force in counterterrorism policing under international law, against which the use of force by African states would be assessed. It has shown that the regular LE rules for the use of force apply in all counterterrorism operations, except there is the existence of an armed conflict in which instance the largely more permissive COH rules become applicable, subject to certain prerequisites discussed above. The next chapter will expand on the legal framework for the use of force in counterterrorism policing, by addressing the question of the interplay between the LE and COH rules for the use of force during conduct of hostilities in armed conflicts. This will help to further clarify the legal framework applicable during counterterrorism operations.

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272 See for example Council of Europe Parliamentary Assembly, 'Human Rights and the Fight against Terrorism' Res 1840 (2011) (text adopted by the Assembly on 6 October 2011 (35th Sitting)) where it is noted in para 4 that: '[t]here is a danger that temporary measures to combat terrorism, even if considered necessary at the time of their introduction, become permanent even when circumstances have changed'.

273 See Basic Principles, Principle 8.

274 ACHPR, 'General Comment No 3 on the Right to Life' (n 78) para 2. The ACHPR has also stated that '[d]erogation from the right to life is not permissible in time of emergency, including a situation of armed conflict, or in response to threats such as terrorism'. See ibid para 7.

# Chapter 3: The Interplay between Law Enforcement and Conduct of Hostilities Rules for the Use of Force

## 3.1. Introduction

As discussed in the previous chapter, the legal assessment of any use of force in counterterrorism depends on whether the act is one of law enforcement or is in the conduct of hostilities. When the counterterrorism operation concerns a law enforcement situation, the law enforcement (LE) and thus human rights rules for the use of force, are applicable. Only during an armed conflict may the conduct of hostilities (COH) rules for the use of force under international humanitarian law (IHL) become applicable. Law enforcement situations remain in existence in the course of an armed conflict; for example, murders or armed bank robberies may still be committed, driven by motives not related to the ongoing conflict.[1] Because IHL (and thus COH rules on the use of force) only applies to acts which are directly related to an armed conflict,[2] other, unrelated acts of violence remain situations that are governed under the LE rules for the use of force. Terrorist acts may also be carried out during armed conflict situations, but without the required nexus to the armed conflict their repression is governed by the rules of international law of law enforcement (LOLE).[3]

While it is quite clear that the law of law enforcement continues to apply during armed conflicts, it can be difficult to differentiate law enforcement situations from those of conduct of hostilities.[4] Because of this challenge, the International Committee for the Red Cross (ICRC) organised an expert meeting in 2012 to discuss the interplay between the COH and LE rules for the use of force, in a bid to bring some clarity to the issue of distinguishing between

1 See Stuart Casey-Maslen, 'Legality of Use of Armed Unmanned Systems in Law Enforcement', in Stuart Casey-Maslen *et al* (ed), *Drones and Other Unmanned Weapons Systems Under International Law* (Brill 2018) 46, 57.

2 See *Prosecutor v Tadić*, Judgment (Trial Chamber) IT-94-1-T (7 May 1997) para 573. See also Stuart Casey-Maslen with Steven Haines, *Hague Law Interpreted: The Conduct of Hostilities under the Law of Armed Conflict* (Hart Publishing 2018) 88-89, and generally, Chapter 2, text to note 180. Generally, to trigger the applicability of IHL rules, an act must be directly related (bear a nexus) to an armed conflict. However, the requirement of 'belligerent nexus' leading to civilian loss of protection from attack as a result of direct participation in hostilities, is construed narrower. To meet the requirement of 'belligerent nexus', the act in question must not only be directly related to the conflict, but it also 'must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another'. See Nils Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (Geneva, ICRC 2009), (hereafter, 'ICRC DPH Guidance') 58, and footnote 147. See generally, Chapter 2, text to note 199.

3 Casey-Maslen (n 1) 57.

4 ibid.

situations of law enforcement and conduct of hostilities.[5] This chapter discusses the main conclusions from the report of the meeting, with a view to setting out the overall criteria/factors for determining which situation it is in any given circumstance. This will help to clarify some situations related to states' use of force in counterterrorism where it might be unclear what situation is at hand, i.e., between law enforcement and conduct of hostilities, and thus which rules for the use of force should apply.

This chapter will also address a related issue, which is the relevance of human rights to the use of force during the conduct of hostilities. International human rights law (IHRL) is generally applicable during armed conflicts, including to the conduct of hostilities.[6] This chapter will therefore discuss the interplay between IHRL and the COH rules for the use of force.

### 3.2. Differentiating Situations of Law Enforcement from Conduct of Hostilities

As noted above, the existence of an armed conflict does not mean that every use of force by the state falls to be regulated under the COH rules for the use of force. The ICRC, in its Use of Force Report, duly notes the lack of clarity under international law as to which situations during armed conflicts are regulated by LE or COH rules for the use of force.[7] It confirmed that the difficulty in distinguishing the two situations also exists in practice, for example where riots or other civilian unrest breaks out during a non-international armed conflict (NIAC). There may perhaps also be an intermingling of both situations, such as when members of organised armed groups 'hide' among the protesters.[8] Another difficult case noted by the ICRC is the use of

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5 See generally Gloria Gaggioli, Expert Meeting- The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms, Report (Geneva, ICRC, 2013), (hereafter ICRC Use of Force Report).

6 See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Reports, para 25; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ 136, 105-106.

7 See ICRC Use of Force Report (n 5) 1. This report provides an account of the discussion during the expert meeting convened by the ICRC on the interplay between the LE and COH rules on the use of force during armed conflicts.

8 ibid. A situation where members of organised armed groups hide among protesters could qualify as a case of the use of human shields, which is prohibited under IHL. In this regard, art 51(7) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, provides that: '[t]he presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations'. See also article 23(1) of the Geneva Convention relative to the Treatment of Prisoners of War, 75 UNTS 135 (Geneva Convention III), regarding prisoners of war; and art 28 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (Geneva Convention IV), regarding protected civilians. This prohibition against the use of human shields also applies in NIACs. See J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, (ICRC/Cambridge University Press, 2005) (hereafter, 'ICRC Study of Customary IHL') Rule 97 ('Human Shields') 337.

force by a state against members of an armed group, given that insurgent action by armed groups is criminal under domestic law, and action against them could thus possibly be considered as both conduct of hostilities under international law and the maintenance of law and order under domestic law.[9] In this regard, Sassòli notes that in international armed conflicts (IACs), there is a clear distinction between the use of force by armed forces of a state against those of another ('combatants against combatants'), and law enforcement action by the state's police against civilians. However, there is no such clear difference in the use of force against insurgents in NIACs.[10] In NIACs, the insurgents commit domestic crimes by taking up arms against the state, which ordinarily should fall under the purview of law enforcement (i.e., maintenance of law and order), but the qualification of the security situation as an armed conflict triggers the application of IHL. This is unlike in IACs where the armed forces of a state have combatant immunity against prosecution for direct participation in a conflict and may only be put on trial for an alleged violation of IHL.[11] Hence, in a sense, action by state forces against insurgents in NIACs can also be seen to constitute some form of "law enforcement", to the extent that it is aimed at restoring law and order.[12]

Since there are significant differences between the LE and the COH rules restricting the lawful use of force (as discussed in the previous chapter), clarity on when either is applicable to a certain situation is essential. This is because selecting one over the other has a potentially vital impact on the consequences that may result from an operation (and their legality).[13] The expert meeting organised by the ICRC focused on the situation in NIACs,[14] and the targeting of

9 ICRC Use of Force Report (n 5) 1.

10 Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (hereafter, Sassòli 'IHL') (Edward Elgar Publishing 2019) 604, margin number (MN) 10.266.

11 This combatant immunity from prosecution for acts that may be criminal under domestic law but which are lawful under IHL, is borne out of the right of combatants to participate directly in hostilities. See art 43(2) of Additional Protocol I to the Geneva Conventions. In addition to their immunity from prosecution, they are also entitled prisoner of war status when captured by the enemy. See art 44(1), Additional Protocol I. See also, generally, David Kretzmer *et al*, '"Thou Shall Not Kill": The Use of Lethal Force in Non-international Armed Conflicts' (2014) 47(2) Israel Law Review 191, 209.

12 See Nils Melzer and Gloria Gaggioli Gasteyger, 'Conceptual Distinction and Overlaps between Law Enforcement and the Conduct of Hostilities', in Terry D Gill and Dieter Fleck (eds), *Handbook of International Law of Military Operations* (2nd ed, Oxford University Press 2015) 63, 65, where the authors note that '[i]n principle, the functional understanding of law enforcement would even include military operations conducted for the suppression of a rebellion or insurgency in non-international armed conflict, or of armed resistance against belligerent occupation'.

13 ICRC Use of Force Report (n 5) 1-2.

14 During situations of belligerent occupation, the occupying power is mandated to maintain public order and safety, hence a law enforcement obligation governed by IHRL, while acting at the same time against armed resistance to the occupation to which COH rules are applicable. This thus raises issues akin to a NIAC situation between a state and an armed group. See Cordula Droege, 'Elective Affinities? Human Rights and Humanitarian Law' (September 2008) 90 (871) International Review of the Red Cross 501, 537-538. The extraterritorial application of IHRL to situations of occupation is generally accepted because of exercise of

individuals therein, from the perspective of states, since, in the view of the ICRC, in contradistinction to IHL, IHRL '*de iure* binds only [s]tates'.[15]

The experts (22 in total) invited by the ICRC were presented with five illustrative case studies, for which they had to decide the applicable rules for the use of force (i.e., between the LE and COH rules). Their views are summarised in the report published by the ICRC.[16] The case studies and the views of the experts regarding them, are considered in the next section,[17] with a commentary on the conclusions from the Report following thereafter.

### 3.2.1. ICRC Use of Force Report: Case Studies

The five case studies presented to the experts along with the ensuing debates/discussions, and some concluding observations in the ICRC Use of Force Report are presented below.

#### 3.2.1.1. Case Study 1: The Use of Force against Legitimate Targets (Isolated Sleeping Fighter Example)

This case study concerns the use of force by government forces against a fighter (defined to mean a person 'whose continuous function is to take a direct part in hostilities')[18] in an

a state's jurisdiction abroad through effective territorial control. See further, note 94 below. The interplay between the LE and COH rules for the use of force with regard to situations of occupation has been discussed in Tristan Ferraro (ed), ICRC Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory (ICRC, March 2012) 109-144. Since this thesis focuses on the use of force by state agents on their own territory during counterterrorism, the interplay between the LE and COH rules for the use of force in occupied territories is outside its scope, and will not be discussed further

15 ICRC Use of Force Report (n 5) 2. IHRL is principally addressed to states, and it is a contentious matter whether non-state actors also have binding obligations under IHRL. There is now growing acceptance that non-state actors such as organised non-state armed groups, may be bound by some IHRL obligations in certain circumstances. For organised armed groups, obligations under IHRL are often implied when the groups have *de facto* authority as a result of control and the exercise of governmental function over territory. However, the question of the specific norms which would bind the armed groups remain unsettled, such as whether positive or only "negative" IHRL norms (to refrain from certain conduct) may be binding on them. See generally Sassòli 'IHL' (n 10) 430-432, MNs 9.23-9.24.

16 See generally, ICRC Use of Force Report (n 5) 3.

17 It is noted that some additional case studies relating to the interplay between the LE and COH rules for the use of force in NIACs, regarding the use of force in extraterritorial NIACs and the use of force by non-state armed groups against state forces, have been developed elsewhere. See Gloria Gaggioli, 'The Use of Force in Armed Conflicts: Conduct of Hostilities, Law Enforcement, and Self-defence' in Christopher M. Ford and Winston S. Williams, *Complex Battlespaces: The Law of Armed Conflict and the Dynamics of Modern Warfare* (Oxford University Press 2019) 61. However, because the focus in this thesis is the use of force by states on their territory during counterterrorism, they shall not be considered.

18 As discussed in Chapter 2, the continuous combat function is a notion developed by the ICRC in response to the challenge of the categorization of members of armed groups in NIACs i.e., whether they were civilians who could only be targeted during their direct participation in hostilities, or whether they lost their civilian immunity as a result of their membership of the groups and were targetable at any time under IHL. With the continuous combat function, the ICRC limits the idea of membership in armed groups which leads to a loss of civilian immunity, to those persons who form part of the military wing of the group and whose continuous function therein is the direct participation in hostilities. Only these persons, according to the ICRC, are targetable at any time. However, it is noted that this 'continuous combat function' is solely a creation of the

organised armed group, asleep together with family members at his home, in an area that is under the control of government forces. The experts were asked to identify the applicable regime, between the COH and LE rules, and also asked if the location of the target i.e., whether in the conflict zone (meaning the area in which where active hostilities are occurring); or the intensity of violence and degree/level of governmental control over the area the fighter was found in, should be determining factors in that regard.[19]

The majority view as to the applicable regime, noted to have been so by a small margin, was that it fell to be governed by COH rules, as IHL prevailed as the *lex specialis* (special law)[20] in situations of armed conflict. Some experts were noted to have regarded the status or function of the target as the deciding factor. Hence, lawfully, such a fighter could be attacked at any time, so long as the proportionality principle and the principle of precautions in attack were complied with.[21]

A contrary minority opinion expressed by some other experts was that the situation fell under LE rules, as IHRL should be applicable as the *lex specialis* in this situation taking into consideration the factual context. According to this view, while the fighter may be a legitimate target under IHL, the fact both of his isolation, and that he was not conducting hostilities at that moment, were seen as making capture feasible, hence tilting the scale in favour of LE rules. Also, the location of the target (i.e., whether in the conflict zone or not), the level of violence and governmental control over the area and circumstances of the operation, were seen as relevant factors to be taken into consideration. Thus, the presence of governmental control and low intensity of violence would be additional factors in favour of the application of LE rules.[22] The use of the status of the target as the key determinant of the applicable law in the context of NIACs was rejected by these experts, as in their view, there was no combatant status in NIACs and no definition of a fighter in the context of a NIAC under IHL.[23] Some other experts, while

ICRC as it does not exist under any IHL treaty, and it has been the subject of criticism. See generally, Chapter 2, text to note 206 and the accompanying text.

19 See generally, ICRC Use of Force Report (n 5) 13.

20 The *lex specialis* principle, and its use in the articulation of the interrelationship between IHL and IHRL will be discussed in some detail in section 3.3. below. Suffice for now to say that the principle means that in situations where a special and general rule are both applicable, the special rule prevails against the general one.

21 ICRC Use of Force Report (n 5) 19-20.

22 ibid 20.

23 See generally, ibid 20-21. The experts' note of the lack of definition of a fighter under NIAC is a reference to the problem with the categorization of members of organised armed groups in NIACs, which led to the ICRC's creation of its contested notion of a 'continuous combat function' of fighters in armed groups. See note 18 above.

also reaching a conclusion in favour of LE rules, went on a slightly different path. To them, LE rules applied by default in a NIAC, with COH rules only applying as an exception, and in the circumstances painted in the case study, LE rules continued to apply since there was governmental control of the area and provided that the violence was at a low intensity.[24] Yet another minority opinion supporting the application of LE rules to the case study was based on an application of the rule most favourable to the individual in the circumstances.[25]

In reaching a conclusion in favour of LE rules, some experts relied on decisions from human rights bodies concerning similar circumstances as in the case study under discussion, such as the case law from the European Court of Human Rights (ECtHR), where LE rules had been applied to the use of force against legitimate targets. In *Gül v Turkey*,[26] one of such cases before the ECtHR, the court, using LE rules, condemned the use of force by state agents against a member of the PKK (Kurdistan Workers' Party) who was in his home and who had not attacked them. In another, *Oğur v Turkey*,[27] the court also using LE rules, condemned the use of force against the victim who was thought to be a member of the PKK, and in circumstances where the state agents did not come under attack. In *Hamiyet Kaplan v Turkey*,[28] yet another case before the court, some PKK members were killed during a raid which turned into a confrontation with state forces. Despite the fact that there had been an armed confrontation between the members of PKK and Turkish forces, the court held that the victims' right to life had been violated because of lack of proper precautions (as the state forces had no less-lethal weapons for use), and also because of a lack of an effective investigation after the incident occurred.[29]

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24 ICRC Use of Force Report (n 5) 21.
25 ibid 21-22.
26 *Gül v Turkey*, ECtHR, Fourth Section, Judgment (14 December 2000).
27 *Oğur v Turkey*, ECtHR, Grand Chamber, Judgment (20 May 1999).
28 *Hamiyet Kaplan v Turkey*, ECtHR, Second Section, Judgment (13 September 2005).
29 As part of the background information to this case study as presented to the experts, were three examples in which human rights institutions had applied LE rules to the use of force against legitimate targets. The first example is *Guerrero v Colombia*, (UNHRC) (31 March 1982) UN Doc CCPR/C/15/D/45/1979) where the use of disproportionate force against suspected members of a guerrilla organisation, was condemned by the UN Human Rights Committee using LE rules for the use of force. In the second example, concerning the Occupied Palestinian Territories, the Human Rights Committee in its 2003 had stated that '[b]efore resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted'. See UNHRC, Concluding Observations: Israel, (21 August 2003) UN Doc CCPR/CO/78/ISR, para 15. The decision of the Israeli Supreme Court regarding the same context was also noted, where the court had held that 'if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed'. *The Public Committee against Torture in Israel v The Government of Israel*, High Court of Justice of Israel, HCJ 769/02 (14 December 2006) para 40. The third example constitutes of cases decided by the European Court of Human Rights (ECtHR) relating to the armed conflict between Turkey and the Kurdistan Workers' Party (PKK), where the

This use of case law from human rights bodies was criticized by experts who preferred the use of COH rules, noting that 'judge-made law' ought not to be considered. Also, it was noted that the judgments of the ECtHR were not directly relevant, seeing as the court generally ignored the existence of NIACs, partly resulting from states' denial of their existence on their territories, and thus did not refer to the relevant IHL rules and their interplay with IHRL.[30] However, it is important to note at this point, that while that may have been the approach of the ECtHR in the past, in the 2013 case of *Benzer v Turkey*,[31] the court explicitly acknowledged the application of IHL to a situation in Turkey arguably qualifying as a NIAC, despite the consistent denial of the state in that regard.

On the ICRC Use of Force Report and the use of force against legitimate targets, generally, it was noted that a great majority of experts (consisting of those in favour of the application of both LE and COH rules) did not consider the conflict zone as a relevant factor 'from a purely legal point of view', the thought being that it is 'too subjective, too open to debate and misinterpretation or disagreement'.[32] The level of violence and governmental control were, on their own part, found to be 'too context-dependent'.[33]

Unlike the above view of the majority of experts concerning the relevance of the conflict zone factor, the present author believes that from a legal point of view, flowing from the holding of the court in *Prosecutor v Tadić*,[34] the conflict zone should be regarded as a determinative criterion in distinguishing between situations of law enforcement and conduct of hostilities. This is because, as noted in *Tadić*, the geographical scope of the IHL rules regulating the conduct of hostilities rules is bound up with the 'actual theatre of combat operations' i.e., the conflict zone.[35] Hence, as argued already in the previous Chapter,[36] outside of the conflict zone in a NIAC, the COH rules for the use of force should not come into play at all. Having set out the relevance of the conflict zone factor, the present author believes that within such zone, the status or conduct of the individual to be targeted under IHL then becomes legally determinative

court condemned the use of force against members or suspected members of the PKK for violation of LE rules for the use of force. The cases include *Gül* (n 26), *Oğur* (n 27), and *Hamiyet Kaplan* (n 28). It was noted in the ICRC Use of Force report that the fact that Turkey denies the existence of a NIAC on its territory may have influenced the court's decisions. See generally, ICRC Use of Force Report (n 5) 14-16.

30 ibid 22.

31 *Benzer v Turkey*, ECtHR, Former Second Section, Judgment (12 November 2013).

32 See ICRC Use of Force Report (n 5) 22.

33 ibid.

34 *Prosecutor v Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber) IT-94-1-AR72 (2 October 1995).

35 See ibid paras 68-69.

36 See Chapter 2, text to note 144 and the accompanying text.

to the question of the classification of a situation as one of conduct of hostilities. However, even where COH rules are applicable, the concurrent application of IHRL and IHL to the conduct of hostilities may require a reduced use of force against legitimate targets, based on relevant factual considerations such as the intensity of violence in the area, and governmental control of the area and circumstances of a specific operation. This would imply, for example, the use of graduated force, or attempting to arrest/capture the target where practicable.

This approach is similar to the idea of a reduced use of force in certain circumstances in the conduct of hostilities advocated for by the ICRC in Chapter IX of its Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law.[37] As already noted in Chapter 2,[38] therein the ICRC recommends that 'the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances'.[39] The ICRC bases its idea of the constraints on the use of force in conduct of hostilities on the IHL principles of military necessity and humanity, an approach that has been criticised.[40] The present author argues that such constraints on the use of force may instead be founded in the concurrent application of IHRL and IHL. All these will be expounded on below.[41]

#### 3.2.1.2. Case Study 2: Riots

This case study concerns the use of force in a situation of civilian unrest such as a riot or demonstration, where fighters have taken advantage of the situation to hide among civilians and attack government forces. The ongoing riot had itself turned violent, with civilians throwing rocks at government forces even though it had started out peacefully. There was also the contention that the riot had been incited by the fighters so they could use the opportunity to conduct an attack while hiding among the crowd. The experts were again called upon to decide the applicable set of rules for the use of force in this scenario. The experts were also to consider whether the location of the riot i.e., within or outside the conflict zone would influence their

37 ICRC DPH Guidance (n 2).
38 See Chapter 2, text to note 223.
39 ICRC DPH Guidance (n 2) 77.
40 See for example, Michael N Schmitt, The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis, (5 May 2010) 1 Harvard National Security Law Journal 5, 40-41.
41 See sections 3.2.2 and 3.3 below.

answer, and whether LE rules should be applicable to the entire situation if the government retained control over the area, with the intensity of violence therein, low.[42]

A vast majority of the experts are reported to have advocated the use of a parallel approach in this scenario i.e. the use of the LE rules towards the civilians, since participating in a riot does not amount to direct participation in hostilities,[43] but the use of the COH rules against the fighters.[44] Some experts however advocated for the application of a single set of rules to the situation as a matter of practicality, for example, the application of LE rules as long as there was governmental control and low violence. Others did not deem those factors decisive. None of the experts regarded the location of the riots as affecting their answer.[45]

The parallel approach advocated by the experts was recently adopted by the UN Commission of Inquiry on the protests in the Occupied Palestinian Territory.[46] The situation under investigation was a series of civilian protests which took place against the backdrop of an armed conflict, at the separation fence between Gaza and Israel from 30 March to 31 December 2018. The protests sometimes turned violent, with protesters throwing stones, flying incendiary kites and balloons into Israeli territory, and cutting up the wire of the separation fence. The Israeli Security Forces responded to the protesters with live ammunition, resulting in many deaths and injuries. In analysing the law applicable in the circumstances, the Commission noted the concurrent application of IHL and IHRL, and their rules for the use of force (COH and LE rules, respectively), in armed conflict situations.[47] In relation to their interplay in the context of demonstrations, the Commission adopted the parallel approach discussed above.[48]

On the whole, the Commission only found one incident where a civilian could be said to have been directly participating in hostilities;[49] and another in which there could have been an

42 ICRC Use of Force Report (n 5) 23.
43 The ICRC DPH Guidance notes three cumulative criteria or requirements that would qualify an act by a civilian as direct participation in hostilities, i.e., threshold of harm, direct causation, and belligerent nexus. See ICRC DPH Guidance (n 2) 16. See further, ibid 46-64.
44 ICRC Use of Force Report (n 5) 24. However, the practical challenges to using a parallel approach were noted. ibid 26.
45 ibid 27.
46 See generally, UN Human Rights Council, 'Report of the Detailed Findings of the Independent International Commission of inquiry on the Protests in the Occupied Palestinian Territory' (18 March 2019) UN Doc A/HRC/40/CRP.2
47 ibid paras 80-83.
48 ibid paras 108-110.
49 This incident involved a man shooting a rifle towards the Israeli forces. See, ibid para 467. The Israeli forces responded with guns and tanks for about 40 minutes, resulting in 21 deaths. The Commission expressed concern over this response to the shooting and the resultant number of deaths, calling for investigation into compliance with the IHL principles of proportionality and precautions in attack. ibid para 697.

imminent threat to life or of serious injury to the Israeli forces (justifying the use of firearms under LE rules).[50] Following this, the Commission concluded that in all other cases, the use of live ammunition against the protesters was unlawful, in violation of LE rules for the use of force.[51] The Commission also found that although some of the dead were members of Palestinian organised armed groups, the use of lethal force against them on the basis of status as members of armed groups and not on their conduct, was unlawful. This is in line with a dismissal of the notion of a continuous combat function of members of armed groups,[52] treating them instead as civilians who lose their protection only during direct participation in hostilities.[53]

The present author agrees with the parallel approach advocated for above, so long as the incident occurs within the conflict zone. This is because, as argued, the conflict zone determines the scope of application of the COH rules for the use of force. Regarding the use of force against the fighters in the case study, as already stated above, it is believed that the application of IHRL to the conduct of hostilities may result in a reduced use of force against arguably legitimate targets under IHL, based on considerations such as governmental control over the area/circumstances and the intensity of violence.

#### 3.2.1.3. Case Study 3: Fight against Criminality

This case study concerns the use of force against a criminal group with armed members, which has close links to an organised armed group that is a party to a NIAC, but whose activities (the criminal group's) do not constitute direct participation in hostilities. In responding to the facts of the case study, the experts were also to consider if the applicable set of rules would depend on the location of the clashes with the groups and governmental forces (i.e., within or out of

50 See ibid paras 502 and 693.

51 ibid paras 693 and 694.

52 According to the Commission, it 'does not opine on the recognition of [continuous combat function], nor its lawfulness as an IHL-based status'. However, '[it] notes that [continuous combat function] does not appear in IHL treaties and the concept remains unsettled when assessed as custom. In such circumstances, the Commission has taken the view that it must choose, particularly with humanitarian law, the interpretation accepted a significant majority of the international community'. See ibid para 105.

53 ibid paras 695 and 696. Contrary to the Commission's view that members of an armed group must be treated as civilians unless directly participating in hostilities (see ibid paras 103-105), Schmitt claims that it is now generally accepted that members of armed groups 'are not to be considered civilians for targeting purposes'. He however states that there remains a controversy as to whether only members of such groups with a continuous combat function lose their protection, as argued by the ICRC, or whether all members, combat function or not, may be targeted, as is the case with members of state armed forces. See Michael N Schmitt, 'International Humanitarian Law and the Conduct of Hostilities' in Ben Saul and Dapo Akande (eds), *The Oxford Guide to International Humanitarian Law*, (Oxford University Press, 2020) 147, 157-158.

the conflict zone), and if the existence of governmental control and low intensity of violence in the area would, in their opinion, make LE rules applicable to the entire scenario.[54]

There is reported to have been broad agreement between the experts as to the necessity of a parallel approach i.e., LE rules against the criminal group, and COH rules against the members of the organised armed group (fighters). In this instance, questions of the practicality of the parallel approach did not arise, as the armed members of the criminal group in question and the members of the organised armed groups (fighters) only operated in close proximity according to the facts of the case study, and were not mingled.[55] Location in the conflict zone, governmental control and intensity of violence were not deemed by any of the experts as relevant to their response. Rather, the status of the persons under IHL, i.e., whether they were legitimate targets, was seen as the determining factor reaching a conclusion as to the applicable set of rules.[56] The majoritarian view of the experts on the necessity of a parallel approach in this situation is here agreed with, with a caveat about the non-applicability of COH rules to areas outside the conflict zone. Also, in the view of the present author, the factors of governmental control and intensity of violence may result in the use of reduced force against legitimate targets under IHL, because of the application of IHRL to the conduct of hostilities.

#### 3.2.1.4. Case Study 4: Escape Attempts and Riots in Detention

This case study concerns the use of force against rioting and escaping detainees (fighters detained by governmental armed forces). It was generally agreed, concerning this case study, that 'an escalation of force procedure' must be applied. However, there was controversy as to the source of the obligation, whether IHRL and thus LE rules, or IHL, particularly Article 42 of Geneva Convention III, applying by analogy in a NIAC.[57] Article 42 provides that: '[t]he use of weapons against prisoners of war, especially against those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances'.[58]

Generally, it is noted that this broad consensus of the experts on the use of an escalation of force procedure against rioting and escaping detainees did not change in the face of

54 ICRC Use of Force Report (n 5) 29.
55 ibid 30.
56 ibid 31.
57 ibid 35.
58 See art 42, Geneva Convention III. While there is no equivalent treaty provision relating to NIACs, the provision of Article 42 is argued to apply by analogy to NIACs. See ICRC Use of Force Report (n 5) 35.

complicating facts that armed fighters were simultaneously firing on the prison in a bid to release the detainees.[59] It was, however, agreed that the armed fighters were to be handled using COH rules.[60] In this case study, the experts also did not consider as decisive factors the scene of the situation described in the case study (i.e. located in the conflict zone or not); governmental control; or the intensity of violence.[61] However, it was noted that a few experts referred to the factors of control and intensity of violence as being pertinent, noting that if the riots were an attempt at taking over the detention centre rather than a means by the detainees of airing their dissatisfaction over conditions of detention, and the intensity of violence was high, COH rules could become applicable in the circumstances.[62]

The present author agrees with the necessity of an escalation of force procedure against the rioting and escaping detainees. Less-lethal weapons (including riot-control agents) may be used against them, as the use of force is governed by the rules of law enforcement.[63] Only upon a successful escape would a detained fighter become targetable under COH rules for the use of force.[64] Concerning the armed fighters in this case study, who are arguably legitimate targets under IHL and the use of force against them, it is argued that COH rules should only be applied within the conflict zone, and even where the rules are applicable, the concurrent application of IHRL may demand a reduced use of force against them in certain circumstances such as governmental control over the area/circumstances in the scenario, and a low intensity of violence.

#### 3.2.1.5. Case Study 5: Checkpoints (Lack of Respect for Military Orders)

The last case study presented to the experts during the expert meeting relates to the use of force at a clearly marked checkpoint, against the driver of a suspicious car who is arriving at high speed, and who has refused to stop upon orders to do so. This was used as an example of a situation of lack of respect for military orders during an armed conflict.[65] The general response of the experts in this case was that if it was known that the driver was either a fighter or a

59 ibid 37.
60 ibid.
61 ibid 38.
62 ibid.
63 See ICRC, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, Report for the 32nd International Conference of the Red Cross and Red Crescent, Geneva, October 2015 (hereafter, 'ICRC 2015 Challenges Report') 36. See also, United States of America Department of Defense, Office of the General Counsel, *Department of Defense Law of War Manual* (June 2015, updated December 2016) para 9.22.6.1.
64 ICRC 2015 Challenges Report (n 63) 36.
65 ICRC Use of Force Report (n 5) 39.

civilian who was directly participating in hostilities at the time, and therefore a legitimate target per IHL rules, then COH rules would apply. On the other hand, if the person was known to be a civilian, then LE rules were applicable. The determinant factor of the applicable rules in this case study thus appears to majorly rest on the 'status, function or conduct' of the driver.[66]

It was agreed by the experts that when the civilian status of the driver is in doubt, an escalation of force procedure should be applied. This would indeed be the more likely scenario, as it has been pointed out that the possibility of advance knowledge as to the status of a driver approaching a checkpoint is 'fairly low'.[67] There was, however, disagreement on the source of the escalation of force procedure with many experts reportedly finding it implied under the IHL principle of precautions in attack. However, it was pointed out by others that such person should be treated as a civilian who is not participating in hostilities, and under no circumstances does IHL permit the use of force against such civilians. Hence, to them, the source of the escalation of force procedure is IHRL/LE rules for the use of force.[68]

Many of the experts did not deem the factors of the conflict zone, level of governmental control of the area, or the intensity of violence decisive. However, one did note that in the particular circumstances described in this case study, the conflict zone could be a relevant factor in determining the applicable rules. A few of the experts also noted factual elements related to the intensity of violence for example the occurrence of similar events (as in the case study) in the preceding days or the rate of suicide attacks in the area, as relevant to the threat analysis of the driver, hence influencing the choice of the applicable rules.[69]

To the mind of the present author, the better view is, as pointed out by some other experts, that where there is doubt as to the identity of the approaching driver, the person should be treated as a civilian not participating in hostilities.[70] Under no circumstances does IHL permit direct attacks against such civilians,[71] hence, the source of the escalation of force procedure is IHRL/LE rules.[72] This is with the caveat that should the above incident occur outside the

66 ibid 40. Conduct that would allow for the use of lethal force if the status of the driver is unknown, includes for example, the driver firing at the military personnel at the checkpoint, or a passenger in the car doing so.
67 See Casey-Maslen with Haines (n 2) 82.
68 ICRC Use of Force Report (n 5) 41.
69 ibid 42.
70 This would be the result of applying art 50(1) of the Additional Protocol I to NIACs by analogy. Article 50(1) notes that: [i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian'.
71 See art 13(2), Additional Protocol II
72 ICRC Use of Force Report (n 5) 41.

conflict zone, there is no room for the consideration of the application of COH rules for the use of force, because only within the conflict zone are those rules potentially applicable.

Regarding the ICRC Use of Force Report, as part of the concluding observations therein, it was noted in relation to the general criteria for differentiating situations of law enforcement from those of conduct of hostilities, that the major '(if not the only)' factor agreed upon as legally relevant by the experts in that regard, was the 'status, function or conduct' of the individual.[73] This would mean that the status of the person in question under IHL i.e. whether a member of the armed forces of a state, a fighter, a civilian, or a civilian participating in hostilities, would determine whether a situation counted as law enforcement or conduct of hostilities. It was equally noted that other factors such as the conflict zone, the presence of governmental control, or the intensity of violence were not generally considered to be 'decisive legal criteria', although some experts regarded them as 'useful factual considerations'.[74] Also, generally concerning the use of force against legitimate targets under IHL, it was noted that the issue of the relevance of LE rules in that regard, especially in contexts such as in Case Study 1, remained highly controversial, borne out by the varied opinions of the experts in that regard. This was noted as one of the challenges to the issue of the interplay between the LE and COH rules during armed conflict situations.[75]

### 3.2.2. Commentary on the Discussions and Conclusions in the ICRC Use of Force Report

The expert meeting on the use of force in armed conflicts was convened by the ICRC in a bid to shed some light on the issue of the interplay between the LE and COH paradigms for the use of force, through discussions around some illustrative case studies. This was done with the hope of making a meaningful contribution towards the clarification of the issue, and also to influence the debate in that regard.[76] In the opinion of the present author, the meeting met its target to the extent that it has exposed the opinions of some experts on the issue, from which trends in thinking and generalizations/conclusions can be drawn, thus presenting a useful starting point for further engagement and debate on the issue. The content of the Report however relays that the matter remains contentious, especially regarding the issue of the use of

73 ibid 59.
74 ibid.
75 ibid.
76 ibid forward, iv.

force against legitimate targets i.e., individuals that can lawfully be subject to direct attack under the rules of IHL.

Regarding the criteria for differentiating law enforcement situations from those of conduct of hostilities, in the present author's opinion, the first relevant criterion is the conflict zone, i.e., whether the situation at hand occurred/or is occurring within an area of ongoing combat in a NIAC. This could be a town, municipality, province, or region, depending on the circumstances in the state. This is contrary to the position taken by many experts in the ICRC Use of Force Report, where it was noted that they did not consider the conflict zone as a decisive legal criterion in distinguishing acts of law enforcement from those of conduct of hostilities.[77] As argued in Chapter 2 concerning the scope of application of the COH rules,[78] the present author believes that such a conclusion flows from the statement of the ICTY Appeals Chamber in *Prosecutor v Tadić*, Decision on Jurisdiction,[79] where the court noted the restricted scope of applicability of the IHL rules regulating the conduct of hostilities (Hague Law), limiting such to the 'vicinity of actual hostilities' or the 'actual theatre of combat operations',[80] in contradistinction to the wide scope of applicability of the IHL rules concerned with the protection of persons in the power of a party to the conflict or the enemy (Geneva Law).[81] As a result of this, it is argued that, outside the conflict zone(s) in a state, only the rules of IHL governing the treatment and protection of persons in the power of a party to the conflict such as persons *hors de combat* and civilians i.e. Geneva law, should be applicable. COH rules would not apply in such areas until a factual spread of the conflict therein.[82] This also better protects the civilian population of a state from the effects of the more permissive COH rules for the use of force in the event of an armed conflict situation localised in particular areas within the state. It is here acknowledged, however, that this viewpoint is not (yet!) generally supported.[83]

If the conflict zone factor is accepted as a decisive legal criterion, as the present author argues, then the location of the target would be the first determining factor in distinguishing acts of law enforcement from conduct of hostilities, and this would be the case regardless of the question of the status, function or conduct of the targeted individual. Hence, for example, in

77 ibid 22.
78 See Chapter 2, text to note 144 and the accompanying text.
79 *Tadić*, Decision on Jurisdiction (n 34).
80 See ibid paras 68-69
81 ibid.
82 See Chapter 2, text to note 152. See also Casey-Maslen with Haines (n 2) 86.
83 See for example, Droege (n 14) 535; and ICRC Use of Force Report (n 5) 18.

Case Study 1, the location of the isolated sleeping fighter (arguably a legitimate target under IHL depending on the accepted view on the categorisation of members of armed groups in a NIAC) outside the zone of active hostilities would indicate that that is a law enforcement situation to be handled under the LE rules for the use of force. Thus, scenarios such as a commander in an armed group going to see family members in an area under the effective control of the government,[84] would fall under the purview of law enforcement. This would also be the case in situations of the use of force by the state against members of terrorist armed groups (which are party to a NIAC) located outside the conflict zone.

In the view of the present author, after the issue of the conflict zone, the next criterion that distinguishes law enforcement situations from those of conduct of hostilities is the status, function, or conduct of the individual in question. This is because, during an armed conflict, only legitimate targets under IHL can be directly attacked under the COH rules. Hence, once an individual is not a legitimate target under IHL, either by being a fighter in an armed group (whether it is accepted that such persons are not civilians by virtue of their membership of the group, or if they have a continuous combat function and thus lose civilian protection from direct attack); or a civilian directly participating in hostilities, any use of force against him/her by state forces must form part of a law enforcement operation which is regulated under LE rules for the use of force.

Therefore, regarding the use of force against civilians in riots and other forms of public unrest, confronting criminality (where the criminal actions do not amount to direct participation in hostilities), or a use of force in reaction to disobedience to military orders such as at checkpoints (and where the status of the individual disobeying the orders is unclear), such situations are law enforcement scenarios and should be handled according to the LE rules. This is because the individuals in those situations are not engaged in the conduct of hostilities and are therefore not legitimate targets under IHL. Participating in a riot does not make a civilian a legitimate target, as doing so does not amount to direct participation in hostilities, even when the riots turn violent.[85] Armed criminals, so long as their actions also do not constitute direct participation in hostilities, retain their civilian protection from direct attack under IHL. Also, in cases of doubt as to the status of an individual, per IHL rules, such person should be presumed to be a civilian.[86] Thus any action taken against persons in these scenarios must fall

84 ICRC DPH Guidance (n 2) 81.
85 See ibid 63.
86 See Additional Protocol I, art 50(1), applying by analogy in the case of NIACs.

under law enforcement. Persons *hors de combat* such as detained fighters or civilian internees, are also protected under IHL, and thus any use of force against them should be governed by law enforcement rules.

Relating the above to the use of force in counterterrorism operations, this would mean that acts of terrorism committed by a civilian during an armed conflict and which do not fulfil the requirements for direct participation in hostilities i.e., threshold of harm, direct causation, or belligerent nexus,[87] must be handled by the state using law enforcement measures. Similarly, if, for example, a criminal organisation has an alliance with a terrorist armed group which is a party to a NIAC, and such organisation provides support to the armed group which remains within the scope of a general contribution to their war effort and thus does not amount to direct participation in hostilities,[88] the members of the criminal organisation do not lose their civilian protection from attack and are not targetable under COH rules. The same would apply to individual sympathisers or supporters of the terrorist group whose actions do not meet the requirements for direct participation in hostilities. Situations such as these have to be addressed under the rules of LOLE as they fall within the realm of law enforcement.

It is argued here that once the two above criteria are fulfilled, i.e., that the incident occurs/occurred within the conflict zone per the court's statement in *Tadić*, and the targeted individual is, through his actions or his status, a legitimate target under IHL, the situation falls within the scope of conduct of hostilities. This is notwithstanding the oscillation of the intensity of violence within the conflict zone, or the fact that not every part of the town, municipality, province, or region that forms the conflict zone would be subject to armed violence between state forces and the members of an organised armed group. Thus, the intensity of violence or some level of governmental control over the area and circumstances of a specific operation within the conflict zone would not affect the classification of the operation as one falling under the conduct of hostilities. Hence for example, if an isolated sleeping or unarmed fighter (where such person is accepted to be a legitimate target under IHL rules) is found within the conflict zone, the fighter is ordinarily subject to COH rules for the use of force as provided under IHL.

However, the present author believes that in certain circumstances during the conduct of hostilities, a reduced use of force is desirable. This would be in situations where it is realistic or practicable to adhere to IHRL standards during situations of ongoing hostilities. Here, factual

87 See ICRC DPH Guidance (n 2) 46.
88 See ibid 51.

considerations such as the intensity of violence in the area of the operation within the conflict zone, or the level of control that government troops have over the circumstances of the operation, would be relevant. Support for this, it is argued, can be founded in the concurrent application and complementarity of IHRL and IHL to the conduct of hostilities.

As noted above, this approach is akin to that recommended by the ICRC,[89] but which is based on the principles of military necessity and humanity. According to the ICRC, these two principles acting together 'reduce the sum total of permissible military action from that which IHL does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances'.[90] Seemingly in line with the ICRC's recommendation, the African Commission on Human and Peoples' Rights notes in its General Comment on the right to life that '[w]here military necessity does not require parties to an armed conflict to use lethal force in achieving a legitimate military objective against otherwise lawful targets, but allows the target for example to be captured rather than killed, the respect for the right to life can be best ensured by pursuing this option'.[91]

The recommendation by the ICRC has, however, been quite contentious, with it being noted that the extant rules of IHL already express the principles of necessity and humanity, those two being the foundational principles upon which all the rules of IHL are founded, and hence are not additional factors to be considered.[92] While the sentiment behind the ICRC's

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89 To recall, the ICRC recommends that 'the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances'. See ICRC DPH Guidance (n 2) 77.

90 ibid 79.

91 See African Commission on Human and Peoples' Rights (ACHPR), 'General Comment No 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)' (adopted during the 57th Ordinary Session of the African Commission on Human and Peoples' Rights held from 4 to 18 November 2015 in Banjul, The Gambia) para 34. In para 32, the Commission had earlier stated that:

> In armed conflict, what constitutes an 'arbitrary' deprivation of life during the conduct of hostilities is to be determined by reference to international humanitarian law. This law does not prohibit the use of force in hostilities against lawful targets (for example combatants or civilians directly participating in hostilities) if necessary from a military perspective, provided that, in all circumstances, the rules of distinction, proportionality and precaution in attack are observed. Any violation of international humanitarian law resulting in death, including war crimes, will be an arbitrary deprivation of life.

See ibid para 32.

92 See Casey-Maslen with Haines (n 2) 161-162; Schmitt, 'Interpretive Guidance' (n 40) 39-43; UN General Assembly (UNGA), 'Report of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Killings' (13 September 2013) UN Doc A/68/382, para 78. Indeed, in the ICRC Use of Force Report, some experts, in line with this, were noted to have been of the opinion that even if the situation in Case study 1 i.e., the use of force against an isolated sleeping fighter (arguably a legitimate target under IHL), was held to fall under conduct of hostilities, the underlying principles of military necessity and humanity still formed legal constraints on the use of force to be adhered to in such circumstances. This was however rejected by others. See ICRC Use of Force Report (n 5) 23.

recommendation may be understood, the present author agrees with the viewpoint that such is not in consonance with extant IHL rules. However, as argued above, the idea of a reduced use of force in certain circumstances during the conduct of hostilities, such as advocated by the ICRC, can instead be based on the concurrent application of IHRL and IHL during armed conflict situations, including to the conduct of hostilities. This, and its practical implications, will be elaborated upon in the next section, which considers the issue of the application of IHRL during armed conflicts, with a focus on the use of force.

### 3.3. The Application of International Human Rights Law During Armed Conflicts: A Focus on the Use of Force in the Conduct of Hostilities

The applicability of human rights law in armed conflicts (subject to derogation, where that possibility exists) was confirmed by the ICJ in the *Nuclear Weapons Advisory Opinion*, where the court, in the face of opposing arguments by some states to the contrary, held that the International Covenant on Civil and Political Rights (ICCPR)[93] remains applicable during armed conflicts subject only to lawful derogations from its provisions.[94] This therefore means that the existence of an armed conflict does not preclude the application of human rights,[95] subject to possible derogation from certain provisions within the terms of the relevant IHRL treaties.[96]

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93 (Adopted 19 December 1966, entered into force 23 March 1976).

94 See *Legality of the Threat or Use of Nuclear Weapons* (n 8) para 25. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 8) 105-106.

95 Apart from applying within the territorial state, IHRL is also held to apply extraterritorially, such application being based on the exercise of a state's jurisdiction abroad, such as effective control over territory, as in cases of foreign occupation. See for example, the ICJ's decisions in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 8) paras 107-112; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda*), 2005 ICJ Reports 168, (19 December 2005), paras 216-217. See also, UN Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 10; UN Human Rights Committee, 'General Comment No 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life' (30 October 2018) UN Doc CCPR/C/GC/36, para 63; and generally, Sassòli 'IHL' (n 10) 428-429, MNs 9.21-9.22. It is noted that there is some opposition in that regard, for example, some states (Israel and especially the United States) oppose the extraterritorial application of the ICCPR because of the phrasing of the relevant provision of the treaty. See further, Sassòli 'IHL' (n 10) 428, MN 9.21.

96 Most IHRL treaties allow for derogations from some of their provisions during existential threats to the state. See for example, ICCPR, art 4; American Convention on Human Rights (ACHR) (adopted 22 November 1969, entered into force 18 July 1978, 1144 UNTS 123) art 27; and European Convention on Human Rights (ECHR) (adopted 4 November 1950, entered into force 3 September 1953, 213 UNTS 222), art 15(2). The African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev.5, 21 ILM 58 (1982)), on the other hand, notably contains no derogation clause.

Defining the nature of the relationship between IHRL and IHL during armed conflicts has, though, been problematic. In 1996, the ICJ in its *Nuclear Weapons Advisory Opinion* introduced the principle of *lex specialis* (*lex specialis derogat legi generali* in full) as a means of articulating the relationship between IHL and IHRL.[97] This principle means that where a general and a more special or specific rule dealing with the same subject exist, the special rule should prevail over the general one.[98] In the *Nuclear Weapons Opinion*, the ICJ in relation to the right to life (as provided under the ICCPR) during armed conflicts, held as follows:

> In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[99]

This holding by the court is to the effect that while the right to life is applicable to conduct of hostilities, a violation of that right would only be found when there is a violation of IHL, it being the law specifically designed for the regulation of the use of force in armed conflicts. However, the court in its later decision in the *Wall Advisory Opinion*[100] was more nuanced in defining the relationship between IHRL and IHL while applying the principle of *lex specialis*.[101] Therein, the court stated, concerning the law applicable in occupied territories, as follows:

> … the [c]ourt considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the

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97 See generally, Marko Milanovic, 'The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law' in Jens David Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (Cambridge University Press) available at <https://ssrn.com/abstract=2463957> accessed 30 September 2021, 1, 5 – 24.

98 See generally, Anja Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis' (2005) 74 Nordic Journal of International Law 27, 35. The rationale behind the acceptance of the principle is said to be the fact that the specific law regulates the subject in question more directly and clearly, and hence takes better cognisance of the particularities of the situation. Thus, giving preference to the more special law over the general one fully respects the intention of the parties concerning the subject or situation at hand. See International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law; Report of the Study Group of International Law Commission, Finalized by Martti Koskenniemi, (13 April 2016) UN Doc A/CN.4/L.682 (hereafter, 'ILC Fragmentation Report') para 60. See also, Lindroos (n 98) 36, and See Jean d'Aspremont and Elodie Tranchez, 'The Quest for a Non-conflictual Coexistence of International Human Rights Law and International Humanitarian Law: Which Role for the *Lex Specialis Principle* in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and International Humanitarian Law* (Edward Elgar Publishing 2013) 223, 225.

99 *Legality of the Threat or Use of Nuclear Weapons* (n 8) para 25.

100 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 8).

101 William A Schabas, 'The Right to Life' in Andrew Clapham and Paola Gaeta (eds), *Oxford Handbook of International Law of Armed Conflict* (Oxford University Press 2014) 365, 372.

> kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.[102]

While the ICJ in the above holding describes three possible situations in the relationship between IHL and IHRL, the court did not elaborate, or give examples as to which rights fell within which situation.[103] This is quite unfortunate as that would have been a valuable contribution to the dispute as to the interplay between IHL and IHRL in armed conflicts. With regard to the court's use of the *lex specialis* principle in the *Wall Advisory Opinion*, Hampson notes that '[i]t is clear that *lex specialis* is not being used to displace [human rights law]. It is rather an indication that human rights bodies should interpret a human rights norm in the light of [law of armed conflict (LOAC)]/IHL'.[104]

The principle of *lex specialis* has become a common means of articulating the relationship between IHL and IHRL.[105] However, the use of the principle in that regard has been the subject of criticism.[106] The general unsuitability of the *lex specialis* principle to the decentralised international legal order, which has no general hierarchy of norms, has been pointed out.[107] It has also been asserted that the *lex specialis* principle is intended for vertical relationships

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102 See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 8).

103 See Nancie Prud'homme, 'Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?' (2007) 40 Israel Law Review 356, 377, citing Noelle Quenivet, *The ICJ Advisory Opinion on the Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory: The Relationship between Human Rights and International Humanitarian Law* (2004).

104 See UN Commission on Human Rights, 'Working Paper on the Relationship between Human Rights Law and International Humanitarian Law by F. Hampson and I. Salama' (21 June 2005) UN Doc E/CN.4/Sub2/2005/14, para 57. See also, Schabas (n 101) 373.

105 See D'Aspremont and Tranchez (n 98) 225; and Sassòli 'IHL' (n 10) 433, MN 9.27. See also Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press 2015) 87. The *lex specialis* principle has also been applied by some human rights bodies in articulating the relationship between IHL and IHRL. See for example, the Inter-American Commission on Human Rights (IACmHR) in *Coard et al v United States*, IACmHR, Case No 10.951, Report No 109/99 (29 September 1999) para 42; and the ACHPR in *Thomas Kwoyelo v Uganda*, ACHPR Communication 431/12 (February 2018) para 152.

106 See for example, Milanovic 'Lost Origins' (n 97); Marko Milanovic, 'Norm Conflicts, International Humanitarian Law and Human Rights Law', in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (Oxford University Press 2011) available at SSRN: <https://ssrn.com/abstract=1531596> accessed 30 September 2021, 4; Prud'homme (n 103); Noam Lubell, Extraterritorial Use of Force against Non-State Actors, Oxford Monographs in International Law (Oxford University Press, 2010) 240; Francoise Hampson and Noam Lubell, '*Amicus Curiae* Submitted by Professor Francoise Hampson and Professor Noam Lubell of the Human Rights Centre, University of Essex' (2014) in *Hassan v UK*, ECtHR Application No 29750/09, <https://www1.essex.ac.uk/hrc/documents/practice/amicus-curae.pdf> accessed 21 August 2019, para 18; and Oberleitner (n 105) 95-104. See generally, Droege (n 14) 523.

107 See Prud'homme (n 103) 380-381; and generally, Lindroos (n 98) 28, 40-42.

between a general regime and special one, and not horizontal relationships between two different regimes which IHL and IHRL are, as '[o]ne is not a more specific form of the other'.[108] The fact that the principle gives no guidance on the determination of the more special rule, resulting in it being difficult to apply in many circumstances, is also a point of criticism.[109]

In addition, the uncertain nature of the principle, i.e., whether it is a tool of norm conflict resolution or a means of interpretation of norms, is likewise pointed out.[110] If regarded as a tool of resolving normative conflicts, an application of *lex specialis* would be to the effect of granting precedence to the special rule to the exclusion of the general one. However, if *lex specialis* is understood as an interpretative tool, then the special rule is only seen as an elaboration of the general one.[111] Hence, the effect of the principle is unclear, and this is adduced as a reason against its use in the definition of IHL/IHRL relations.[112] This uncertain nature of the principle perhaps explains the varied interpretations that has been given to its effect with regard to the relationship between IHL and IHRL. For example, the principle is used in some quarters to grant total primacy to IHL rules over IHRL in an armed conflict situation.[113] *Lex specialis* is also used as a tool of interpretation, allowing for IHRL and IHL to be interpreted harmoniously. The specific rule in the situation (either an IHL or an IHRL rule depending on the context), is considered to be an application of the general one, and used in interpreting it, in line with Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT).[114] In addition, the *lex specialis* principle is used as a means of resolving conflict between IHRL and IHL rules, i.e. in cases where harmonious interpretation is impossible.[115] Here, the principle works to give primacy to the more special rule, but only with respect to the specific facts or circumstances under consideration.[116]

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108 Hampson and Lubell (n 106) para 18.
109 See Prud'homme (n 103) 381-382.
110 Oberleitner (n 105) 99-101.
111 See ILC Fragmentation Report (n 98) 56-57; Oberleitner (n 105) 99-100.
112 Oberleitner (n 105) 95, 99.
113 See Milanovic 'Lost Origins' (n 97) 24-25; Oona A Hathaway *et al*, 'Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law' (2012) 96 Minnesota Law Review 1883, 1894-1895; and Prud'homme (n 103) 372-373.
114 See Milanovic 'Lost Origins' (n 97) 27-28. See also Hathaway *et al* (n 113) 1897-1900. Art 31(3)(c) of the VCLT requires account to be taken of 'any relevant rules of international law applicable in the relations between the parties' when interpreting a treaty. See Vienna Convention on the Law of Treaties (VCLT) (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(3)(c).
115 See Hathaway *et al* (n 113) 1903; and Milanovic 'Lost Origins' (n 97) 27.
116 In one approach under this variant of the use of *lex specialis*, IHL is held to always constitute the *lex specialis*. See Milanovic 'Lost Origins' (n 97) 27, and, generally, Hathaway *et al* (n 113) 1906. However, in another approach, primacy is not given automatically to either IHL or IHRL. Rather, primacy goes to whichever field is more specific to the circumstances in question, i.e., the rule that is 'most appropriate and most closely

The ICJ had another opportunity to examine the relationship between IHL and IHRL in the *Armed Activities* case, also dealing with the law applicable in situations of occupation.[117] However, unlike its previous decisions in the *Nuclear Weapons Advisory Opinion* and the *Wall Advisory Opinion*, the court made no mention of the *lex specialis* principle. After recalling its earlier holding in the *Wall Advisory Opinion* regarding the three possible situations in the relationship between IHL and IHRL, the court noted that it 'concluded [in that Advisory Opinion] that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration'. [118] While not still elaborating on the rights falling within the three possible situations in the relationship between IHL and IHRL, the court also omitted the reference it had earlier made to *lex specialis* in *The Wall Opinion*.[119] In this regard, Schabas notes that, in the *Armed Activities* case, the ICJ treated IHRL and IHL as complementary fields, 'as parts of a whole', not addressing possible conflicts between them, or implying that violations of IHRL should be seen through the lens of IHL.[120] The fact that the ICJ did not mention *lex specialis* in the *Armed Activities* case is taken by some scholars to be an indication that the court has now rejected the principle as the basis of its articulation of IHL/IHRL relations. [121] However, this would be a hasty conclusion as the court gave no reason one way or the other, for this omission.[122]

The criticism of the *lex specialis* principle with regards to its use as a means of articulating the relationship between IHL and IHRL is here agreed with. As pointed out by Milanovic, the principle 'confuses far more than it clarifies'.[123] To the mind of the present author, the focus should be on exploring the complementarity between both fields and the implications of their concurrent application in armed conflicts, with complementarity interpreted here as an 'active

tailored to the circumstances'. Hathaway et al (n 113) 1916. See also Sassòli 'IHL' (n 10) 438-439, MNs 9.43-9.44; Droege (n 14) 524.

117 *Armed Activities on the Territory of the Congo* (n 95).

118 ibid para 216.

119 Recall that in *The Wall*, the court had concluded that '[i]n order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law'. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 8) para 106.

120 Schabas (n 101) 373-374.

121 See for example, Prud'homme (n 103), 385, where the author notes this as a complete abandonment of *lex specialis*. See also Sassòli 'IHL' (n 10), 436, MN 9.34.

122 As noted by Droege, '[s]ince the court gave no explanation for the omission, it is not clear whether the omission was deliberate and shows a change in the approach of the [c]ourt'. See Droege (n 14) 522. Sassòli also notes that the court did not offer an alternative means of resolving conflicts between IHL and IHRL. See Sassòli 'IHL' (n 10) 435, MN 9.34.

123 Milanovic, 'Norm Conflicts' (n 106) 4.

interplay, communication and mutual influence of norms'.[124] The complementarity between IHL and IHRL can be implied from the ICJ's decision in the *Wall Advisory Opinion*,[125] and perhaps more strongly, because of the absence of the use of *lex specialis*, from the *Armed Activities* case where the court held that both fields have to be taken into consideration.[126] The complementary nature of IHL and IHRL is noted to enjoy 'widespread support',[127] and this, for example, is the view adopted by the UN Human Rights Committee. In its General Comment No. 31, the Committee, after noting that IHRL applies alongside IHL in armed conflict situations, stated that although the more specific IHL rules may be 'specially relevant' for the interpretation of certain rights under the ICCPR, IHL and IHRL are 'complementary, not mutually exclusive' fields of international law.[128]

The complementarity between IHRL and IHL has been said to allow 'the use of norms of human rights law to fill gaps in humanitarian law, to apply norms of both regimes cumulatively so as to heighten the level of protection, or to interpret norms in light of each other'.[129] While the present author acknowledges that IHL was specifically designed to regulate armed conflicts being a 'carefully thought out balance between the principles of military necessity and humanity',[130] it is believed that the concurrent and complementary application of IHRL to situations of armed conflicts may (and as argued in this Chapter, it should) lead to the imposition of stricter standards than currently present under IHL on specific issues such as the use of force in the conduct of hostilities. This, it is submitted, would be a manifestation of the active interplay and mutual influence of the norms in both fields, i.e., IHRL and IHL.

Concerning the interplay between IHRL and IHL during armed conflicts as a result of their concurrent application, there may be no generic formula in this regard as the interaction would be dependent on the specific issue under consideration, such as detention, or as in the case of this Chapter, the use of force. This is similar to the position taken by Hampson and Lubell in their spectrum approach to IHRL/IHL relations.[131] These authors do not offer a single answer to the question of the relationship between IHL and IHRL but rather propose an approach that

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124 See Oberleitner (n 105) 106. As Oberleitner notes, '[c]omplementarity is a variegated approach, and opinions differ considerably as to what it means'. ibid.
125 ibid 105.
126 See generally, Schabas (n 101) 374.
127 Oberleitner (n 105) 105.
128 See UN Human Rights Committee, 'General Comment No 31' (n 95) para 11.
129 Oberleitner (n 105) 108
130 Michael N Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (4 May 2010) 50(4) Virginia Journal of International Law 795, 798.
131 Hampson and Lubell (n 106) para 26.

is dependent on the consideration of different variables inclusive of the issue under consideration. They note that, as a general proposition, IHL is more likely applicable to issues relating to conduct of hostilities, while issues relating to the protection of victims would likely be regulated by a mix of IHL and IHRL. However, they note further that this proposition is itself 'subject to at least five variables,' such as the type of armed conflict; whether the operation in question is proactive or reactive; the means used; whether there is an existing IHL rule on the issue and whether such rule is found in treaty law or custom; whether there has been derogation from IHRL obligations and/or an acceptance of IHL's applicability.[132] According to the authors, all the variables form a spectrum, with one end consisting of issues for which IHL would be applicable, a violation of IHRL only being found when IHL has not been complied with; and on the other end, issues for which both fields of law must be merged and applied together.[133] The authors further assert that, '[s]ome issues will be generally at one end of the spectrum but, on occasion, a different solution will be required'.[134]

Discussing issues for which a mixture of IHL and IHRL is required, Hampson and Lubell propose that the balance and interplay of elements of both fields of law would vary according to the situation.[135] According to them, '[t]he interplay between the regimes must be context dependant, and must lead to practicable obligations based on a respect for the objectives of the two regimes in light of the circumstances at hand'.[136] Criteria that could affect such interplay are noted to include '[t]he status of the affected individuals'; 'proximity to hostilities and the level of control that the military has over the situation'; 'means used in the operation'; among others.[137] The authors note as an example of a situation whereby applicable criteria would necessitate greater reliance on IHRL in the interplay, 'attempting to detain a civilian who does not pose a direct threat at the precise moment, in an area under the complete control of the military and in which they can operate unhindered.'[138] As stated by Hampson and Lubell, '[i]n such circumstances, even if the individual may have lost civilian protection under [IHL] due to

132 ibid.
133 ibid. Sassòli, on his part, notes that it is normal that there is no general formula as to how IHL and IHRL norms interrelate during armed conflict, as it is all dependent on 'where on the spectrum between the typical armed conflict problems for which IHL was made, and the typical peacetime problems for which IHRL was made, a certain event is situated'. To him, therefore, 'the relationship between IHL and IHRL depends on many variables. The identity and weight of those variables is the subject of additional controversies among lawyers'. See Marco Sassòli, 'International Humanitarian Law and International Human Rights Law', (hereafter, Sassòli 'IHL and IHRL') in Saul and Akande (n 53) 381, 401-402.
134 Hampson and Lubell (n 106) para 26.
135 ibid 27.
136 ibid.
137 ibid.
138 ibid 29.

rules on participation in hostilities, human rights law may require a graduated use of force rather than direct lethal force'.[139]

With particular reference to the complementarity of IHRL and IHL as regards the use of force in the conduct of hostilities, the present author believes that if IHRL and IHL are both to be taken into consideration, this should be seen to imply an obligation to adhere to IHRL standards such as the use of graduated force, and the duty to attempt an arrest, when and to the extent that circumstances permit.[140] This would be when it is practicable or realistic to do so within the conflict zone. This limitation to the practicability of the application of IHRL standards (and thus LOLE rules for the use of force and firearms) is to take into consideration the exigencies of an armed conflict, and the flexibility needed on the battlefield.[141] The practicability of the application of LOLE rules will depend on factual considerations such as intensity of violence and control over the surroundings (area) and circumstances of the particular operation. Thus,

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139 ibid.

140 With regards to the relationship between IHRL and IHL during armed conflicts, Milanovic notes as follows:

> A bolder approach to the joint application of IHL and IHRL would ask whether there are killings which *do* comply with IHL but are *still* arbitrary in terms of IHRL. Can, in other words, IHRL during armed conflict impose *additional* requirements for the lawfulness of a killing to those of IHL? And can these requirements, while more stringent than those of IHL, still be somewhat less stringent than those set out in human rights jurisprudence developed in and for times of normalcy, and if so when and how?
>
> I think all these questions can be answered with a cautious 'yes.' Whether the ICCPR imposes requirements for a lawful killing during armed conflict over and above those in IHL is a matter of treaty interpretation. State practice of course has a role to play in this process, but it is not conclusive on the matter. The arbitrariness standard being as vague as it is, its interpretation ultimately depends on a policy or value judgment: can we realistically expect our troops to abide by more humane rules in some situations than IHL would require, and so without significantly limiting their combat effectiveness? Can we, in other words, further humanize IHL by introducing IHRL into the equation, and do so in practical and realistic way?

See Marko Milanovic, 'When to Kill and When to Capture?' (*EJIL Talk!*, 6 May 2011), <https://www.ejiltalk.org/when-to-kill-and-when-to-capture/> (accessed 15 December 2019) (emphases in the original).

141 In this regard, Abresch notes that: '[i]t is not enough for the direct application of human rights law to internal armed conflicts to be appropriate and desirable; it must also be possible. The challenge is to apply the broad principles of human rights law to the conduct of hostilities in a manner that is persuasive and realistic. Human rights law must be realistic in the sense of not categorically forbidding killing in the context of armed conflict or otherwise making compliance with the law and victory in battle impossible to achieve at once'. See William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya', (2005) 16(4) European Journal of International Law 741, 750. In addition to this, concerning the use of force against legitimate targets, it was noted to have been stressed during the ICRC expert meeting that 'targeting rules must be clear and simple in order to be realistic and fair for combatants who need to make split-second decisions'. See ICRC Use of Force Report (n 5), 23. In this regard, Sassòli states that '[l]awyers must, however, be careful to ensure that the results of such reasoning [i.e., on the relationship between states' IHL and IHRL obligations] are realistic for those engaged on the ground'. See Sassòli, 'IHL and IHRL' (n 133) 401

in the opinion of the present author, in situations where it is practicable for state forces to use less harmful means than not prohibited under IHL, those means must be attempted.[142]

The additional constraints that would result from an interpretation of the complementarity of IHRL and IHL in the manner proposed above i.e., in the sense of an active interplay and mutual influence of the norms in both fields, would in practice imply an obligation to arrest or attempt to do so when practicable, or the use of an escalation of force procedure/graduated force where feasible. Where it is a proactive operation, state forces would be required to consider the possibility of using less harmful means and planning the operation in such a way as to allow for such, as far as the circumstances would permit. Hence, for example, under this proposed approach, an isolated sleeping fighter as in Case Study 1, an unarmed fighter found alone, or even a lone armed fighter, all arguably legitimate targets under IHL rules (and who are located in the conflict zone), should be arrested or an attempt made in that regard, where it is feasible to do so, even though such situations count as hostilities. Circumstances that would make it practicable to effect an arrest in these instances, thus leading to an obligation to do so, would

142 The argument advanced by Kretzmer *et al* regarding the use of force against legitimate targets in NIACs must be here noted. These authors argue that firstly, the application of COH rules should be limited to 'contexts of hostilities'. This, they note, is different from a geographical divide between a conflict zone (i.e., area in which hostilities are occurring in a state) within a state and other areas, as while there may be cases where the markers of a conflict zone are hazy, there would still be a clear difference between such contexts of hostilities and contexts of law enforcement. Illustrating the 'context of hostilities' they refer to, the authors note that a fighter within a conflict zone 'may not be targeted when it is perfectly reasonable to arrest him.' However, they also note that if such fighter is outside the conflict zone, 'but is surrounded by other fighters and is likely to engage any forces that come to arrest him in combat, it will be acceptable to employ the hostilities model against him'. According to these authors, outside this 'context of hostilities', state forces may not apply COH rules on the use of force. See Kretzmer *et al* (n 11) 221. The authors also note that: '[t]he state involved may resort to the norms relating to the conduct of hostilities only in those concrete situations in which the scope and level of organised armed violence are such that a policing, law-enforcement model of law is clearly inappropriate'. Stating further, they note that: '[w]hen a policing model of law may reasonably be employed, there is no justification for employing the rules relating to the conduct of hostilities merely on the strength of the argument that an internal armed conflict is taking place in the state's territory'. See ibid 195. This argument is similar to that of the present author because it calls for a restriction of the scope of application of COH rules for the use of force during a NIAC, and it also seeks for some adherence to IHRL standards (and thus LE rules for the use of force) where force is used against legitimate targets. However, this goes beyond the present author's argument because of the notion of 'context of hostilities,' whereby COH rules are not strictly limited to the conflict zone but can be extended to other areas (which may even be quite far away) without a prior factual spread of hostilities therein, just because of the existence of fighters 'likely to engage' in armed violence with state forces. Also, Kretzmer *et al* appear to advocate for a stricter standard of application of LE rules than the present author does. The authors state that LE rules should be applied except where 'clearly inappropriate', although it is recognised that they also refer several times to the standard of reasonableness and feasibility. See for example, ibid 214, where they note that the state may only resort to applying COH rules in relation to the actual context of hostilities paradigm 'where resort to a policing paradigm is clearly unrealistic. Where the state can reasonably employ the policing model of law, it is required to do so'. See also, ibid 224, where they note that 'a state may not employ lethal force against a member of an armed group involved in an internal armed conflict in a situation in which it is perfectly feasible to employ law enforcement mechanisms'. To be clear, the present author seeks only for a relaxed standard of practicability (or feasibility), to allow the soldiers on the ground to have the flexibility required for combat effectiveness.

be, for example, where state forces have a considerable degree of control of the area the fighter is found in, with the intensity of violence in the surroundings, low.

The same would also apply to a scenario such as unarmed civilians deliberately obstructing the passage of government troops in pursuit of rebel forces. While the actions of those civilians arguably constitute direct participation in hostilities, thereby resulting in their loss of protection from direct attack,[143] under the proposed approach, government troops would have an obligation to attempt to arrest them, according to the practicability of the circumstances, or use an escalation of force procedure against such civilians, such as warning shots. This would also apply to an unarmed civilian passing on intelligence through the phone from within the conflict zone, if such act is accepted as constituting direct participation in hostilities as argued by the ICRC in their DPH Guidance.[144]

This proposed approach is similar to that taken by the Israeli Supreme Court, in its 2006 judgment in the *Public Committee against Torture in Israel v The Government of Israel* (Targeted Killings Case).[145] In its judgment regarding the legality of Israel's policy of targeted killings of terrorists, the court having held that there was an armed conflict between Israel and Palestinian terrorist armed groups (in the context of a belligerent occupation),[146] further held that the terrorists did not have combatant status, and that they also were not civilians enjoying protection from attack under IHL rules as they directly participated in hostilities.[147] With regard to the use of force against these terrorists, the court held that:

> [A] civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed… Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed… Arrest, investigation, and trial are not means which can always be used. At times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers, that it is not required… However, it is a possibility which should always be considered. It might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation, and trial are at times realizable possibilities… Of course, given the circumstances of a certain case, that possibility might not exist. At times, its harm to nearby innocent civilians might be greater than that caused by refraining from it. In that state of affairs, it should not be used.[148]

143 See ICRC DPH Guidance (n 2) 81.
144 See ibid, where the ICRC states that such action probably constitutes direct participation in hostilities.
145 *Public Committee against Torture in Israel v The Government of Israel* (n 29).
146 ibid para 16.
147 ibid para 26.
148 ibid para 40.

The Court from the above ruling, thereby requires that in the use of force against legitimate targets under IHL, where it is possible and practical to make an arrest or use other less harmful means, that route must be followed.[149]

Case law from human rights institutions such as the ECtHR demonstrate the possibility of using IHRL standards, expressed in the LE rules for the use of force, against legitimate targets in NIACs.[150] While it may be true that an analysis of the interplay between IHL and IHRL was not explicitly conducted by the ECtHR in those judgments, the cases nevertheless provide insights and allow for discussion on how and to what extent LE rules could be applied in regulating the use of force in hostilities during NIACs.[151] There is the argument that the ECtHR's application of LE rules in such situations partly results from the denial of the states in question, of the existence of NIACs on their territories, causing the ECtHR to refrain from applying IHL.[152] However, as noted above, the court has now departed from what may have

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149 See Milanovic 'When to Kill and When to Capture?' (n 140), where the author notes that the Targeted Killings case is the 'best evidence' for how a joint application of IHL and IHRL in a realistic manner may work. It is also recalled that this was one of the cases presented to the experts in the ICRC expert meeting, as part of the examples of instances where LE rules have been applied to situations of conduct of hostilities. See ICRC Use of Force Report (n 5)15. For a similar view as in the Targeted Killings case, see Louise Doswald-Beck, 'The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers? (2006) 88 International Review of the Red Cross 881, 891, where the author notes, regarding the use of force against legitimate targets in a NIAC, that:

> … even as regards the fighting rebel forces, they must not be attacked on sight if they can be easily arrested without undue risk for government forces. Such situations do occur in reality. These conditions respect both IHL and human rights: they would allow government forces to deal with the insurrection but at the same time require the government to take the necessary measures to plan for an arrest where possible rather than use lethal force.

150 See David Kretzmer, 'Rethinking the Application of IHL in Non-International Armed Conflicts' (2009) 42 Israel Law Review 8, 30, where the author notes that ECtHR has shown that 'it is possible to apply a human rights framework to certain types of non-international armed conflicts without ignoring the extraordinary features of such conflicts, which demand that the norms applied not prevent the States involved from pursuing their legitimate interests'.

151 See ibid 30-31.

152 See ICRC Use of Force Report (n 5) 22. It is noted that there is a peculiarity in the ECHR concerning its framing of the right to life, unlike in the ICCPR, the African Charter, and ACHR. These three latter instruments while providing for the right to life, only protect against 'arbitrary deprivations' of life, with the word 'arbitrary' open to further interpretation as to what would be in breach of the provision (see art 6(1) of the ICCPR, art 4 of the African Charter, and art 4(1) of the ACHR). Under those instruments, the right to life is also non-derogable. In fact, the African Charter allows no derogations from any of its provisions. However, in the case of the ECHR, its Article 2(1) only notes that no individual shall be intentionally deprived of his life except in the case of an execution of a court sentence. Then Article 2(2) goes ahead to make an exception for that, concerning 'the use of force which is no more than absolutely necessary; (i) in defence of any person from unlawful violence; (ii) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (iii) in action lawfully taken for the purpose of quelling a riot or insurrection'. Under art 15(2), the right to life is derogable but only 'in respect of deaths resulting from lawful acts of war'. However, art 15(1) only allows derogations from obligations under the Convention 'to the extent strictly required by the exigencies of the situation'. Doswald-Beck has argued that art 15(2) only applies to IACs, with art 2(2)(iii) already covering NIACs as it allows the use of force in quelling insurrections. See Doswald-Beck (n 149) 883-884. However, in the present author's opinion, so long as an insurrection reaches the threshold for qualification as a NIAC i.e., requisite intensity of violence, and organisation of an armed group,

been its previous approach, as in the case of *Benzer v Turkey*,[153] the court clearly noted that IHL was applicable to the circumstances before it, even where the existence of an armed conflict was not admitted by the state concerned.[154] While it still did not address the question of the interplay between IHRL and IHL during armed conflicts, the court used IHL together with IHRL rules to condemn the indiscriminate bombing of civilians in Turkish villages by state security forces, finding a violation of the right to life of the victims.[155]

Regarding the ECtHR cases dealing with the use of force against persons who could be considered legitimate targets under IHL, Droege notes that the court seems to broadly distinguish between two situations, although not explicitly or quite consistently.[156] She notes as a first group, cases such as *Gül v Turkey*, *Oğur v Turkey*, and *Hamiyet Kaplan v Turkey*,[157] which deal with the use of lethal force against individual members (or alleged members) of armed groups where care was not taken to avoid the use of such force altogether in situations where it was possible to effect an arrest. She then notes a second group of cases, dealing with situations in which state forces were engaged in either counterinsurgency or full-blown combat operations against armed groups, wherein the court did not question the necessity of the use of

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then it qualifies as 'war' for which art 15(2) would be applicable. Abresch notes that while the decisions of the ECtHR in cases where it assessed situations that arguably fall under conduct of hostilities using LE rules, could perhaps be explained as a result of a failure of the concerned European states to derogate from art 2(2) of the ECHR, this would be a mistaken assessment. He notes that even if there was a derogation from art 2(2) (there has been no such derogation by any state till date), it would not be difficult for the ECtHR to continue applying its already established case law. See Abresch (n 141) 745 at footnote 12. Concerning the extent of derogation permitted under Article 15(1) of the ECHR, he quotes Svensson-McCarthy as stating that:

> [i]n interpreting the derogation provisions of human rights treaties in *armed conflicts*, international humanitarian law should not be ignored, because it provides an *absolute minimum level of protection* beyond which no interpretation of the human rights treaties could possibly ever be allowed to go. On the other hand, whilst this absolute minimum level *may perhaps* in certain particularly severe circumstances be allowed to guide the interpretation of the aforementioned derogation provisions, *it is in no way of any conclusive importance for the interpretation of these provisions*, which may in many respects provide a higher and more general level of protection. These derogation provisions do thus have a life of their very own, and they should in all circumstances be interpreted with due respect for the object and purpose of the treaties within which they are contained, so as to preserve to a maximum degree the full enjoyment of the rights and freedoms guaranteed therein. (Emphasis from Abresch)

See Svensson-McCarthy, *The International Law of Human Rights and States of Exception: With Special Reference to the Travaux Préparatoires and Case-Law of the International Monitoring Organs* (1998), 378, cited in Abresch (n 141) 745 at footnote 12. This, it is submitted, would mean that even in the event of a derogation from art 2(2) of the Convention, that may not result in the ECtHR applying the provisions of IHL relating to the use of force i.e., COH rules, where the circumstances do not strictly require it.

153 *Benzer v Turkey* (n 31).

154 See ibid para 89, where the Court noted the applicability, to the facts before it, of Common Article 3 to the Geneva Conventions of 1949, which had been ratified by Turkey in 1954.

155 See ibid paras 184-185.

156 Droege (n 14) 532-533.

157 *Gül* (n 26); ECtHR, *Oğur* (n 27); *Hamiyet Kaplan* (n 28).

lethal force, or question the right of the state to attack the rebels without proof of an imminent threat to life.[158] The second group of cases include *Ergi v Turkey*,[159] *Isayeva, Yusupova and Bazayeva v Russia* (*Isayeva I*),[160] and *Isayeva v Russia* (*Isayeva II*).[161]

For instance, in *Ergi,* a case dealing with an ambush operation by Turkish security forces to capture members of the PKK (Workers Party of Kurdistan), which resulted in an armed clash leading to the death of the applicant's sister, the court did not question the necessity of the use of deliberate lethal force by state agents. However, the court found that the operation was not planned and carried out in a manner that prevented or minimised civilian casualties.[162] In *Isayeva I* and *Isayeva II,* both concerning the aerial bombardment of a civilians during the Chechen conflict, the court, while presuming the necessity of the military to use force against rebels based on the security situation in Chechnya,[163] found violations of the right to life as a result of insufficient care in the planning and execution of the operations to avoid or minimise the risk of civilian casualties.[164] For this second group of cases, Droege notes that 'the [c]ourt appears to use standards, that are, if not explicitly then implicitly, inspired by humanitarian law, ' particularly relating to the question of the avoidance of incidental civilian loss.[165] She however noted that the court at times used a stricter yardstick than IHL, such as in *Ergi,* relating to precautionary measures, where the court required that the possibility of return fire from members of the PKK should have been factored in during the planning of the operation.[166]

In the opinion of the present author, whatever could be said about the motives or approach of the ECtHR in this regard, the case law emanating from it illustrates how IHRL standards may be jointly or concurrently applied with IHL with regard to the use of force during conduct of hostilities, while accommodating the peculiar characteristics of a given situation. Although it is here argued that the joint application of IHRL and IHL supports an imposition of the duty to adopt less harmful means – in line with IHRL standards –where circumstances so permit during

158 Droege (n 14) 532-533. See also, ibid 534.
159 *Ergi v Turkey*, ECtHR, Judgment (28 July 1998).
160 *Isayeva, Yusupova and Bazayeva v. Russia (Isayeva I)*, ECtHR, Former First Section, Judgment (24 February 2005).
161 *Isayeva v. Russia (Isayeva II)*, ECtHR, Former First Section, Judgment (24 February 2005).
162 *Ergi* (n 159) para 81. See also, para 79.
163 See *Isayeva I* (n 160) para 178; *Isayeva II* (n 161) para 180.
164 See *Isayeva I* (n 160) para 199; *Isayeva II* (n 161) para 191.
165 Droege (n 14) 533.
166 *Ergi* (n 159) para 79. See Droege (n 14) 533. She also notes that in *Isayeva II*, the court required that state forces ought to have warned the civilian population of the anticipated entry of rebels in their village if such entry could not be prevented. See *Isayeva II* (n 161) para 187. See also Gloria Gaggioli Gasteyger and Robert Kolb, 'A Right to Life in Armed Conflicts? The Contribution of the European Court of Human Rights' (2007) 37 Israel Yearbook on Human Rights 115, 142-143.

the conduct of hostilities, the present author acknowledges that this viewpoint is not widely held. It is however hoped that the law would develop in that direction, spurred on by further engagement on the issue of the interaction between IHL and IHRL, and what it should translate to practically.[167]

### 3.4. Law Enforcement or Conduct of Hostilities? An Application of the Proposed Approach

To recap, in this Chapter, the present author has argued that the two determinative criteria for distinguishing between situations of law enforcement and conduct of hostilities are the location the targeted individual, and then afterwards, the status or conduct of such person under IHL rules. In addition, it has also been argued that even where such person is located within the conflict zone, and is assessed as a legitimate target under IHL, i.e., one who is not protected from direct attack, less harmful means than not prohibited under COH rules for the use of force should be pursued against such person where those are practicable in the circumstances. In this section, these arguments will be applied to the circumstances of two cases that have come before the ECtHR, in a bid to further appreciate their practical application and implications for the use of force. These cases are *Finogenov and Others v Russia*[168] and *Jaloud v Netherlands*,[169] and they will be examined in turn, below.

#### 3.4.1. *Finogenov and Others v Russia*

This case dealt with the siege of the Dubrovka theatre in Moscow by terrorists belonging to the Chechen separatist movement, on 23-26 October 2002. Protesting the activities of the Russian

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167 In its 2018 General Comment 36 (on the right to life), the UN Human Rights Committee noted, regarding the application of the Article 6 of the ICCPR which provides for the right to life, in armed conflicts, that:

> Like the rest of the Covenant, article 6 continues to apply also in situations of armed conflict to which the rules of international humanitarian law are applicable, including to the conduct of hostilities. While rules of international humanitarian law may be relevant for the interpretation and application of article 6 when the situation calls for their application, both spheres of law are complementary, not mutually exclusive. Use of lethal force consistent with international humanitarian law and other applicable international law norms is, *in general*, not arbitrary.

See UN Human Rights Committee, 'General Comment No 36 on the Right to Life' (n 95) para 64 (emphasis added). The last statement in the above quotation has been stated to have been so drafted with the qualifier 'in general', in order to leave room for, among others, the possibility of the future development of interpretations such as an obligation in armed conflicts to capture rather than kill lawful targets, or the inclusion of religious and military medical personnel in the proportionality assessment in targeting, resulting from the influence of IHRL. See Ryan Goodman *et al*, 'Human Rights, Deprivation of Life and National Security: Q&A with Christof Heyns and Yuval Shany on General Comment 36' (*Just Security*, 4 February 2019), <https://www.justsecurity.org/62467/human-life-national-security-qa-christof-heyns-yuval-shany-general-comment-36/> accessed 12 December 2019.

168 *Finogenov and Others v Russia*, ECtHR, First Section, Judgment (20 December 2011).

169 *Jaloud v Netherlands*, ECtHR, Grand Chamber, Judgment (20 November 2014).

Federation in Chechnya and demanding a withdrawal of government troops, the terrorists who numbered over 40 and who were armed with guns and explosives, took more than 900 persons hostage in the theatre.[170] The siege ended after Russian security forces released a narcotic gas into the theatre with the intent of incapacitating the terrorists before storming in.[171] 129 hostages (including three who were shot) however died after being affected by the gas used in the rescue operation, with a number of survivors also suffering serious health problems following the incident.[172] An application was brought before the ECtHR by a number of survivors and relatives of some of the deceased, alleging a violation of Article 2 of the ECHR (the right to life) by Russia.

The court in this case did not find that the state had used disproportionate force by using the gas in the storming of the building. In its reasoning, the ECtHR accepted that the intent behind the use of the gas was most likely not to kill either the terrorists or the hostages. While stating that the gas was 'closer to "non-lethal incapacitating weapons" than firearms' (a lethal weapon), the court however noted the potentially dangerous nature of the gas when utilised, concluding that the gas was a main cause of death among the hostages.[173] Regarding the use of lethal force, the court noted that while the standard under Article 2 remained 'absolutely necessary', because of the magnitude of the situation at hand, and which the government had little control over and had to deal with under great time pressure, it was 'prepared to grant them a margin of appreciation' regarding the 'military and technical aspects' of decisions made.[174] However, the court noted that later stages of the operation may be judged more strictly. [175]

The court, having found that the decision taken by the authorities to storm the theatre was justified under Article 2,[176] then considered whether the use of the gas was a disproportionate measure. While noting that the 'gas was dangerous and even potentially lethal', the court found that 'it was not used "indiscriminately" as it left the hostages a high chance of survival, which depended on the efficiency of the authorities' rescue effort'.[177] The court therefore concluded that the use of the gas did not violate the right to life. However, regarding the subsequent rescue

170 See *Finogenov* (n 168) paras 8-9.
171 ibid paras 22 and 194.
172 ibid para 24.
173 See ibid para 202.
174 ibid 213. As earlier noted, the validity of this 'margin of appreciation' granted by the court, has been questioned. See Chapter 2, note 66; and Stuart Casey-Maslen and Sean Connolly, *Police Use of Force under International Law* (Cambridge University Press 2017) 87, footnote 33; and 285.
175 *Finogenov* (n 168) para 214.
176 ibid para 226.
177 ibid para 232.

and evacuation operation (inclusive of the provision of medical services to the hostages), the court found that it was inadequately planned and implemented, finding a violation of the right to life in that regard.[178]

The present author agrees with the treatment of the circumstances in the case as a law enforcement situation. This is because although the terrorists belonged to the Chechen separatist movement, with their actions having a direct link to the NIAC the Russian Federation was facing in Chechnya, the situation occurred in Moscow, far outside the area of hostilities or the conflict zone. Thus, the siege of the theatre falls under the purview of law enforcement rules, and not that of conduct of hostilities. Because the situation falls under law enforcement, the use of the narcotic gas by Russian forces might not be per se unlawful.[179] However, if it fell under conduct of hostilities, it would have been unlawful as the use of chemical weapons is prohibited therein as a method of warfare.[180]

### 3.4.2. *Jaloud v Netherlands*

This case arose out of a checkpoint scenario, such as in Case Study 5 of the ICRC Use of Force Report, although in the context of the occupation in Iraq. According to the facts before the court, on 21 April 2004, a car had approached a checkpoint under the control of the Netherlands military personnel, with speed. It hit one of the barrels that had been used to set up the checkpoint but continued to advance regardless. Shots were fired at the car, including by a Dutch serviceman. The applicant's son, who was sitting at the passenger's side of the car, was hit in several places, and died one hour later. It was also noted in the facts before the court, that prior to this incident, another car had approached that same checkpoint, slowed down, turned, and opened fire at the guards, who returned fire. No one was hit in the crossfire, and that car later drove off. The serviceman who shot at the victim in the later incident was held to be acting in self-defence in that situation, by the Regional Court of Appeal of Arnhem, Netherlands, and the decision of the Public Prosecutor to decline to prosecute was upheld. In its decision, the ECtHR did not focus on the use of force, but on the obligation to investigate under Article 2 of the ECHR, as the applicant had alleged a violation of the right to life due to the failure of the

178 ibid para 266.

179 See the combined effect of art 2(1)(a) and 2(9)(d) of Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Chemical Weapons Convention) (adopted 13 January 1993, entered into force 29 April 1997) 1974 UNTS 45.

180 See ibid, arts 1 and 13; and ICRC Study of Customary IHL (n 8) Rule 74 ('Chemical Weapons') 259. See also, generally, Casey-Maslen and Connolly (n 174) 286.

Netherlands government to properly investigate the incident. The court held in favour of the applicant.

While the use of force was not the focus of the ECtHR's decision in *Jaloud*, it presents us with facts upon which the present author's proposed approach to the interplay between LE and COH rules for the rules of force can be appreciated. To do this, we assume that these facts occurred in a NIAC, and within an area where hostilities are ongoing, making COH rules for the use of force generally applicable. In the opinion of the present author, the approach of the military personnel in the assumed facts, should be to treat the occupants of the car as civilians, per Article 50 of Additional Protocol I (applying by analogy in a NIAC), since their identity is unknown. By so doing, LOLE rules become applicable, wherein the use of force should be a last resort. Here, there would be the requirement to use an escalation of force procedure, with the use of intentionally lethal force only permissible when strictly unavoidable to protect life, including for self-defence. Assuming however, that the occupants of the car are somehow known to be fighters of the organised armed group that is a party to the NIAC, then COH rules for the use of force would be applicable, whereby the necessity of lethal force against legitimate targets is presumed. However, as argued earlier, even in such an instance, where it is practicable to utilise less harmful means, such as shooting to stop the car, in order to attempt to capture the fighters, then such means should be pursued.

### 3.5. Concluding Remarks

In this chapter, the question of the interplay between the LE and COH rules for the use of force was discussed, with a view to outlining general criteria for differentiating situations of law enforcement from those of conduct of hostilities. This was geared towards assisting in clarifying which rules govern the use of force by state agents in counterterrorism operations, in situations where it could be difficult to differentiate between law enforcement and conduct of hostilities. In this regard, two criteria i.e., the location of the targeted individual, and then his status, function, or conduct of the individual under IHL, have been argued to be determinative. Hence where a person who as a result of his status, function in an armed group, or conduct (for example, a civilian directly participating in hostilities) under IHL is regarded as a legitimate target, and such person is located within the conflict zone, the use of force against the person falls within a conduct of hostilities situation. In line with this, for example, members of terrorist armed groups who are legitimate targets under IHL may be targeted using

COH rules only within the conflict zone. Any use of force against persons who are located outside the conflict zone, falls within the realm of law enforcement.

The related issue of the interrelationship between IHL and IHRL during armed conflicts, with a focus on the use of force in the conduct of hostilities, was also discussed. It was concluded that the *lex specialis* principle, which is the common means of articulating the relationship between IHL and IHRL, is in fact not very helpful in this regard. It was argued that the focus should instead be on the complementarity between the two fields of law during armed conflicts and its implications. Accordingly, in the view of the present author, one such implication should be stricter restrictions on the use of force against legitimate targets during the conduct of hostilities, such as a duty to capture or arrest rather than kill, or the use of graduated force where feasible.

All that has been discussed in this chapter have gone towards further clarifying the legal framework against which the use of force in counterterrorism policing by African states will be assessed. The next chapter will now turn to an examination of the experience of counterterrorism policing on the African continent, focusing on three selected states, Egypt, Kenya, and Nigeria.

# Chapter 4: Use of Force in Counterterrorism Policing in Africa: Egypt, Kenya, and Nigeria in Focus

## 4.1. Introduction

This chapter is centred on the use of force by African states in counterterrorism policing, i.e., when combating terrorism through law enforcement operations. As set out in detail in Chapter 2 concerning the use of force in counterterrorism, when the criteria for a non-international armed conflict (NIAC) are not met, the relevant rules applicable to the actions of the security forces are the law enforcement rules for the use of force (LE rules). LE rules would also be applicable where, although the security situation qualifies as an armed conflict, the terrorist act being responded to either has no nexus to the conflict at hand, or, in the case of such nexus, occurs outside the conflict zone- an area where there is no ongoing hostilities. In all other cases, the conduct of hostilities (COH) rules for the use of force under international humanitarian law (IHL) also apply.[1] This thesis is focused primarily on counterterrorism operations which fall to be governed by the LE rules for the use of force.

The chapter examines counterterrorism policing on the African continent, with three states – Egypt, Kenya, and Nigeria – used as illustrative case studies. The chapter sets out the three case studies sequentially, describing first the background to the incidence of terrorism, then looking in turn at the domestic legal and policy framework for the use of force in counterterrorism policing; the different security forces engaged in law enforcement operations against terrorist groups; and relevant practice relating to the use of force. After this, there is a comparison of the experiences in the three states under focus, with a view to identifying broader trends in the use of force in counterterrorism policing operations across Africa. The chapter also discusses whether the level of force used in counterterrorism is, in fact, also a driver of violence on the continent.

## 4.2. Egypt: A Short Socio-Political Background

Egypt (officially the 'Arab Republic of Egypt') is the third most populous state in Africa (after Nigeria and Ethiopia),[2] with an estimated population of about 105 million.[3] Egypt is a transcontinental state as while most of Egypt's landmass is in North Africa, a small part, i.e.,

1 See generally, Chapter 2, section 2.4.
2 Worldometer, 'Countries in the World by Population (2021)' <https://www.worldometers.info/world-population/population-by-country/> accessed 24 September 20201.
3 Worldometer, 'Egypt Population' <https://www.worldometers.info/world-population/egypt-population/> accessed 24 September 2021.

the Sinai Peninsula, lies in Asia.[4] Egypt currently has the second largest economy in Africa (behind Nigeria) and the largest in North Africa.[5] The predominant religion therein is Islam, and it is recognised as the state religion.[6]

The Republic of Egypt was declared in 1953, following a military *coup d'état* in 1952 which ousted the monarchical rule that had been in place since 1922.[7] In 1958, Egypt and Syria formed a political union called the United Arab Republic, but which dissolved in 1961 when Syria declared its independence after a military coup.[8] However, Egypt continued using the name 'United Arab Republic' until 1971.[9] Since 1953, Egypt has mostly been ruled by military dictatorships, with her first democratically elected President only coming to power in 2012.[10] Egypt is currently ruled by an elected President, Abdel Fattah el-Sisi.

Egypt has had an enduring problem with police brutality. In fact, the '25 January Revolution' which resulted in the fall of the Mubarak regime in 2011 was motivated by protest against police abuses, but which then grew into an anti-government protest.[11] The date of 25 January was chosen by the organisers of the protest because it was 'National Police Day' in Egypt, to 'publicly disdain rather than commemorate a security force marked by a long history of brutality and human rights abuses'.[12] In the course of the protests, at least 846 persons were killed by security forces, with over 6,400 left injured.[13]

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4 World Atlas, 'Transcontinental Countries of the World', <https://www.worldatlas.com/articles/which-are-the-transcontinental-countries-of-our-world.html> accessed 26 September 2021.

5 See Statista, 'African Countries with the Highest Gross Domestic Product (GDP) in 2021', <https://www.statista.com/statistics/1120999/gdp-of-african-countries-by-country/> accessed 24 September 2021.

6 See art 2 of the Constitution of the Arab Republic of Egypt, 2014.

7 See generally, Encyclopedia.com, 'Arab Republic of Egypt', <https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/arab-republic-egypt> accessed 25 September 2021.

8 Britannica, 'United Arab Republic', <https://www.britannica.com/place/United-Arab-Republic> accessed 25 September 2021.,

9 ibid.

10 See David D Kirkpatrick, 'Named Egypt's Winner, Islamist Makes History' (*The New York Times*, 24 June 2012, <https://www.nytimes.com/2012/06/25/world/middleeast/mohamed-morsi-of-muslim-brotherhood-declared-as-egypts-president.html> accessed 26 September 2021.

11 See generally, Fanack.com, 'Egypt Arab Spring Revolution of 25 January 2011' <https://fanack.com/egypt/history-of-egypt/the-revolution-of-25-january-2011/> accessed 24 September 2021.

12 See Jon Jensen, 'Behind Egypt's Revolution: Youth and the Internet' (*GlobalPost*, 13 February 2011) <https://www.pri.org/stories/2011-02-13/behind-egypts-revolution-youth-and-internet> accessed 2 October 2021.

13 BBC, 'Egypt Unrest: 846 Killed in Protests- Official Toll' (19 April 2011) <https://www.bbc.com/news/world-middle-east-13134956> accessed 26 September 2021.

### 4.2.1. Terrorism in Egypt

Egypt's significant problem with terrorism is not a recent phenomenon. In October 1981, President Anwar Sadat was assassinated by members of the Egyptian Islamic Jihad.[14] Since the assassination, Egypt is said to have experienced three 'waves' of terror: the first wave 'ostensibly dominated by the activities of *Al Jama'a Al-Islamiya* in Cairo and Upper Egypt', resulting in hundreds of fatalities; while the second wave revolved around attacks by *Al-Tawhid wal-Gehad* in Sinai in the wake of the intervention in Iraq by the West, featuring several bloody attacks in Taba and Nuwabie in 2004, in Sharm El Sheikh in 2005, and in Dahab in 2006.[15] These first two waves occurred under the Mubarak regime. The third wave of terror, which is noted to have 'really captured international attention',[16] was set off by the crackdown on pro-Morsi demonstrators after his removal from office via a *coup d'état* in July 2013.[17] This third wave of terrorist violence, which was 'primarily unleashed by groups in Sinai', is stated to have been 'provoked and fed by repression under the state's heavily militarised [counterterrorism] campaign', which has left Sinai, and Egypt generally, highly volatile.[18]

In July 2013, a 'war on terror' was declared in Egypt by the then-defence minister Abdel Fattah el-Sisi, now the President.[19] In December that year, the Muslim Brotherhood, 'Egypt's oldest and largest Islamist organization',[20] was declared a 'terrorist group', an act that granted the authorities greater power to crack down on the organisation.[21] The Muslim Brotherhood was

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14 See International Federation of Human Rights (FIDH), 'Egypt: Counter-terrorism against the Background of an Endless State of Emergency' (January 2010) 5; and Saferworld, 'We Need to Talk about Egypt: How Brutal "Counter-terrorism" is Failing Egypt and its Allies' (October 2017), 3, available at <https://www.saferworld.org.uk/long-reads/we-need-to-talk-about-egypt-how-brutal-acounter-terrorisma-is-failing-egypt-and-its-allies> accessed 20 May 2020.

15 See Saferworld (n 14) 3.

16 ibid 3.

17 ibid 4.

18 ibid 6.

19 See ibid 11; Jacob Green and Allison McManus, 'Mysterious Deaths and Forced Disappearances. This is Egypt's U.S.-Backed War on Terror', (*The Intercept*, 11 November 2017) <https://theintercept.com/2017/11/11/egypt-war-on-terror-extrajudicial-killings/> accessed 28 August 2020; The Tahrir Institute for Middle East Policy (TIMEP), 'Egypt Security Watch: Five Years of Egypt's War on Terror' <https://timep.org/wp-content/uploads/2018/07/TIMEP-ESW-5yrReport-7.27.18.pdf> accessed 28 August 2020, 4.

20 Zachary Laub, 'Egypt's Muslim Brotherhood', '(*Council on Foreign Relations*, last updated 15 August 2019) <https://www.cfr.org/backgrounder/egypts-muslim-brotherhood> accessed 30 July 2020.

21 BBC, 'Egypt's Muslim Brotherhood declared "terrorist group"', (25 December 2013) <https://www.bbc.co.uk/news/world-middle-east-25515932> accessed 30 July 2020. The declaration came after the suicide bombing attack on a police headquarters in Mansoura, in the Nile Delta, which resulted in 16 deaths and over a hundred wounded persons. See ibid. However, it is noted that responsibility for the bombing was claimed by *Ansar Bayt al-Maqdis* (now known as *Wilayat Sinai*), and the Brotherhood also condemned the attack. See Shadia Nasralla, 'Egypt Designates Muslim Brotherhood as a Terrorist Group' (*Reuters*, 25 December 2013) <https://www.reuters.com/article/us-egypt-explosion-brotherhood/egypt-designates-muslim-brotherhood-as-terrorist-group-idUSBRE9BO08H20131225> accessed 30 July 2020.

formed in 1928, and while it has been illegal for the majority of its existence, it had been, for decades, Egypt's 'largest and most organised opposition party'.[22] It was also upon the platform of the Muslim Brotherhood's Freedom and Justice Party that former President Morsi came to power in June 2012.[23] However, in contrast to the government's position, the Brotherhood has been stated to be 'ostensibly non-violent',[24] with the crackdown on the Brotherhood said to increase the possibility of a resort to violent tactics by members of the organisation, especially the younger ones, in order to achieve their goal of Islamic rule.[25]

*Wilayat Sinai* (or Sinai Province), a group which had changed its name in November 2014 from *Ansar Bayt al-Maqdis* (ABM)[26] after swearing allegiance to the Islamic State (IS),[27] is based in the Sinai Peninsula. *Wilayat Sinai* is mainly operational in North Sinai. North Sinai is noted to be 'thinly populated and broadly underdeveloped, with some of the local population feeling marginalised from the [Egyptian] government's investment programme on the mainland'.[28] It has been asserted that '[t]he sense of disconnect is seen as helping fuel a level of support for the militants there'.[29]

The Sinai Peninsula borders Israel and Gaza. It was occupied by Israel for 15 years (1967-1982), and has been entangled in the 'complex history of Arab-Israeli conflict'.[30] While the tourism industry in Sinai blossomed after the reintegration of the Peninsula with Egypt, the local population has remained subject to economic marginalisation and political repression.[31] According to Saferworld, state neglect, geographical isolation, and proximity to regional conflicts made North Sinai an 'attractive base for Islamist militants' for many years,[32] although

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22 Saferworld (n 14) 8.
23 See generally, Laub (n 20).
24 See Saferworld (n 14) 9.
25 See ibid; Nathan J Brown and Michele Dunne, 'Black Label' (*Carnegie Middle East Center*, 25 January 2017) <https://carnegie-mec.org/diwan/67771> accessed 30 July 2020; Mohamed Taha, 'Where Next for Egypt's Muslim Brotherhood after Death of Mohamed Morsi' (*The Conversation*, 1 July 2019) <https://theconversation.com/where-next-for-egypts-muslim-brotherhood-after-death-of-mohamed-morsi-119134> accessed 30 July 2020.
26 *Ansar Bayt al-Maqdis* means 'Supporters of Jerusalem'.
27 See Saferworld (n 14) 7.
28 BBC, 'Sinai Province: Egypt's Most Dangerous Group' (12 May 2016) <https://www.bbc.com/news/world-middle-east-25882504> accessed 30 July 2020.
29 ibid.
30 See Saferworld (n 14) 6.
31 ibid.
32 Saferworld notes that: 'North Sinai has long been a hotspot for violence – with its geography, history, society and politics all helping to explain why armed militant groups have arisen there. Communities living in Sinai – predominantly indigenous Bedouins – have been marginalised by successive Egyptian regimes. As a minority in Egypt, Bedouin populations have had unequal access to basic state services, while their nomadic way of life has been adversely affected by the influx of tourism to the region. Discrimination towards communities in Sinai is based on the common accusation that they are not 'real' Egyptians, or that they are

violence only broke out there recently. Tensions are said to have risen in the region in the wake of attacks on tourist resorts in South Sinai from 2004 to 2006. A hunt for perpetrators came afterwards in North Sinai, in the course of which it is stated that only few families were unaffected by arrests, harassment, and sentencing in absentia.[33] The situation in North Sinai, where residual grievances were simmering, escalated following the security vacuum in Sinai after the 2011 uprising in Egypt that brought on the fall of the Mubarak government.[34] It was in this environment that ABM/*Wilayat Sinai* flourished, growing into the 'most dangerous violent group in Egypt'.[35] Saferworld notes that, before the July 2013 coup, ABM/*Wilayat Sinai* targeted Israeli interests, but now its focus has moved explicitly to the police and army in Egypt, with its attacks said to be reactions to 'bloody massacres perpetrated by the regime'.[36]

Human Rights Watch opines that the security situation in North Sinai relating to the activities of *Wilayat Sinai* and the response of governmental forces 'most likely' qualifies as a non-international armed conflict (NIAC) which started in 2014.[37] A July 2018 legal study of the situation in North Sinai released by the Egyptian State Information Service (SIS) has also characterised it as an armed conflict, noting that the 'legal nature of the government response (to the militancy in Sinai) … is one that is usually regulated internationally by the rules of armed conflict, and locally by military laws'.[38] The Rule of Law in Armed Conflicts (RULAC)

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traitors who work for Israeli interests. As a result, the central government has treated Sinai's population with a combination of disdain, political exclusion and neglect'. See ibid.

33 ibid.

34 ibid.

35 See ibid 6-7.

36 ibid 7.

37 Human Rights Watch, '"If You Are Afraid for Your Lives, Leave Sinai!': Egyptian Security Forces and ISIS-Affiliate Abuses in North Sinai' (28 May 2019) available at <https://www.hrw.org/sites/default/files/report_pdf/egypt0519_web3_0.pdf> accessed 26 August 2020, 2 and 34. Human Rights Watch also notes that although *Wilayat Sinai* has perpetrated attacks outside of North Sinai, the NIAC is limited to North Sinai only. See ibid 34, at footnote 82. This seemingly accords with the viewpoint of the present author as to a geographically limited 'conflict zone' within the territorial state of a NIAC. It is only within this conflict zone that COH rules for the use of force would be applicable. Outside such zone, only IHL rules relating to persons in the power of a party to the conflict i.e., Geneva Law, would be applicable. See Chapter 2, text to notes 144 and 152.

38 See Judge Adel Maged and Rowan Adel Maged, 'Countering Terrorism and its Impact on Human Rights' (11 July 2018) 1 Studies in Human Rights, State Information Service 15-16, cited in Human Rights Watch, 'If You Are Afraid for Your Lives, Leave Sinai!' (n 37) 35. However, the study states that members of 'armed terrorist groups' are not protected under IHL, being 'illegal combatants'. As Human Rights Watch reports, the study claims that the situation in Sinai is governed by a 'new model' under international law i.e., 'state versus terrorist groups armed conflict model', by which 'unlawful combatants' such as terrorist groups are left unprotected by IHL. The authors of the study are also said to justify the use of 'brute force' in Sinai with the fact that regular law enforcement 'proved unable' to repress the activities of the armed terrorist groups. See Human Rights Watch, 'If You Are Afraid for Your Lives, Leave Sinai!' (n 37) 35 and 39. It is noted that in February 2018, the military launched 'Comprehensive Operation Sinai 2018', a counterterrorism operation covering North and Central Sinai, as well as the Nile Delta and the Western Desert. This operation came after a call from President El-Sisi in November 2017 following an attack on a

mosque in North Sinai which resulted in over 300 fatalities, for the military to secure Sinai within 3 months -- with the mandate to use 'all brute force necessary'. See Romany Shaker, 'Egypt Launches Massive Anti-terrorism Operation Ahead of March Elections' (*Foundation for Defense of Democracies*, 23 February 2018) <https://www.fdd.org/analysis/2018/02/23/egypt-launches-massive-anti-terrorism-operation-ahead-of-march-elections/>; and Ali Abdelaty, 'Egypt's Sisi Calls on Military Chief to Secure Sinai in Three Months' (*Reuters*, 29 November 2017) <https://www.reuters.com/article/us-egypt-security/egypts-sisi-calls-on-military-chief-to-secure-sinai-in-three-months-idUSKBN1DT13E> both accessed 28 August 2020. Also, as noted by the authors of the study, civilians lose their status if they turn 'hostile' to the state, and when they pick up arms against the state, become 'unlawful combatants'. See Human Rights Watch, 'If You Are Afraid for Your Lives, Leave Sinai!' (n 37) 39. It is the considered opinion of the present author that these above-cited views expressed in the study do not conform with the provisions of international law. Firstly, there is no such 'state versus terrorist groups armed conflict model' under international law/IHL. The regular rules governing NIACs apply when a state is faced with combating an armed terrorist group during a NIAC. Secondly, there is no such status of 'illegal combatants' or 'unlawful combatants' by which members of a terrorist group which constitute one of the parties to a NIAC do not enjoy any protection under IHL. There is in fact, no combatant status in a NIAC at all. Depending on the viewpoint adopted, members of organised armed groups in a NIAC may be deemed to be civilians who only lose their protection when and for such a time as they directly participate in hostilities; or civilians who have lost their status and are now targetable at any time according to COH rules. See Chapter 2, note to text 206 and the accompanying text. Membership of those groups for the purpose of targeting may also be defined according to the 'continuous combat function' touted by the International Committee of the Red Cross (ICRC), wherein only 'individuals whose continuous function it is to take a direct part in hostilities' may be targeted. See Nils Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (ICRC, 2009) 36. See generally ibid 33-36. However, whatever the case may be, such 'terrorists' are not left without any protection by IHL. The fundamental guarantees in Common Article 3 to the Geneva Conventions of 1949, as well as relevant provisions under Additional Protocol II to the Geneva Conventions of 1949 and customary IHL, are applicable. See generally Common Article 3 to the Geneva Conventions of 1949, i.e. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31 (Geneva Convention I); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85 (Geneva Convention II); Geneva Convention relative to the Treatment of Prisoners of War, 75 UNTS 135 (Geneva Convention III); and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (Geneva Convention IV)- all ratified by Egypt on 10 November 1952. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (Additional Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 - ratified by Egypt on 9 October 1992; as well as the customary IHL rules identified by the ICRC in J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, (ICRC/Cambridge University Press, 2005). Thirdly, the use of 'brute force' cannot be justified by the inability of law enforcement to seize control of a security situation. As long as a situation does not qualify as a NIAC, LE rules for the use of force are applicable and they do not permit the use of 'brute force'. It is only when the threshold for a NIAC is met i.e., requisite intensity of violence and organisation of the armed group, that COH rules come into play. While COH rules are largely more permissive than LE rules, they are not unrestricted. It is also reiterated that international human rights law (IHRL) remains applicable during armed conflict situations. Lastly, civilians properly so-called do not lose their status by participating in a conflict. They only temporarily lose the protection accorded to civilians under IHL for the duration in which they directly participate in the armed conflict. See also art 13(3) of Additional Protocol II. As a result of the points advanced above, it is imperative that the opinion stated in the study be reviewed to be in conformity with Egypt's obligations under IHL and IHRL. In this regard, it is noted that this study released by the Egyptian SIS is said to have 'demonstrated the [Egyptian] Armed Forces' full respect for international human rights standards in fighting terrorism'; and have 'also asserted the Armed Forces' respect for the rules of engagement within the course of combat operations in line with international conventions and the UN General Assembly's resolutions'. See Egypt Today, 'SIS: Comprehensive Operation Sinai 2018 'Model' of Human Rights Commitment' (11 July 2018) <https://www.egypttoday.com/Article/1/53761/SIS-Comprehensive-Operation-Sinai-2018-model-of-human-rights-commitment> accessed 26 August 2020.

database of the Geneva Academy of International Humanitarian Law and Human Rights has also characterised the situation in Sinai as a NIAC.[39] The present author accepts the characterisation of the violence between the state and *Wilayat Sinai* in North Sinai as a NIAC, which would result in the use of force therein by Egyptian security forces against *Wilayat Sinai* falling to be regulated under COH rules. However, if such characterisation is in doubt,[40] the use of force by the state in repressing the activities of *Wilayat Sinai* should be deemed to constitute law enforcement operations, regulated by LE rules for the use of force.

Other terrorist groups operating in Egypt include the Islamic State in Egypt, which is the Islamic State affiliate operational in mainland Egypt i.e. outside Sinai;[41] *Ajnad Misr*;[42] *Ansar al-Islam*; *Jund-al-Islam*, operating in Sinai; and the *Hasm* Movement.[43] The *Hasm* Movement,[44] which is regarded by many experts as the largest militant group on the mainland, has been linked to the Muslim Brotherhood by the Egyptian government.[45] It is noted that this link has been denied by the Brotherhood.[46] As these groups are not involved with a NIAC with the Egyptian state, any use of force against them during counterterrorism operations falls to be regulated under LE rules for the use of force.

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39 See Rule of Law in Armed Conflict (RULAC), 'Non-international Armed Conflict in Egypt' (last updated 22 April 2021) <http://www.rulac.org/browse/conflicts/non-international-armed-conflict-in-egypt> accessed 5 October 2021.

40 Basil, for example, considers whether the criteria for the existence of the NIAC in Egypt continued to be met in 2019, and what effect that would have on the classification of the situation as a NIAC. See Annabel Basil, 'The War Report: Non-International Armed Conflict to Continue in Sinai?' (November 2019) Geneva Academy of International Humanitarian Law and Human Rights, <https://www.geneva-academy.ch/joomlatools-files/docman-files/Non-International%20Armed%20Conflict%20To%20Continue%20In%20Sinai%20.pdf> accessed 25 August 2020, 6-7.

41 TIMEP, 'Islamic State in Egypt' (8 May 2017) <https://timep.org/esw/non-state-actors/islamic-state-in-egypt/> accessed 27 August 2020.

42 Meaning 'Supporters of Islam'.

43 See BBC, 'Who are Egypt's Militant Groups' (24 November 2017) <https://www.bbc.com/news/world-middle-east-34751349> accessed 11 August 2020.

44 In Arabic, *Hasm* means 'decisiveness'. It is also an abbreviation of '*Ḥarakat Sawa'd Miṣr*' which translates into 'Arms of Egypt Movement'. See Mohamed Abdel Maguid, 'Four Ws about Brotherhood-linked Hasm Group' (*Egypt Today*, 2 February 2018) <https://www.egypttoday.com/Article/1/41701/Four-Ws-about-Brotherhood-linked-Hasm-group>, accessed 26 August 2020.

45 Muhammad Mansour, 'Operations Against Hasm Continue but Security Forces Still Face Challenges' 23 April 2019) Terrorism Monitor, 17(8), The Jamestown Foundation, <https://jamestown.org/program/operations-against-hasm-continue-but-security-forces-still-face-challenges/>, accessed 27 August 2020. See also Ashraf Abdelhamid, 'Egypt Arrests Members of Hasm Muslim Brotherhood-linked Extremist Cell' (*Al-Arabiya*, 25 May 2017) <https://english.alarabiya.net/en/News/middle-east/2017/05/25/Egypt-arrests-members-of-Hasm-Muslim-Brotherhood-linked-extremist-cell.html> accessed 27 August 2020.

46 See Maguid (n 44).

### 4.2.2. Egyptian National Legal Framework

Presently, the main Egyptian counterterrorism legislation is the Anti-Terrorism Law, Law No 94 of 2015.[47] Article 2 of the Law sets out its definition of terrorism thusly:

> A terrorist act shall refer to any use of force, violence, threat, or intimidation domestically or abroad for the purpose of disturbing public order, or endangering the safety, interests, or security of the community; harming individuals and terrorizing them; jeopardizing their lives, freedoms, public or private rights, or security, or other freedoms and rights guaranteed by the Constitution and the law; harms national unity, social peace, or national security or damages the environment, natural resources, antiquities, money, buildings, or public or private properties or occupies or seizes them; prevents or impedes public authorities, agencies or judicial bodies, government offices or local units, houses of worship, hospitals, institutions, institutes, diplomatic and consular missions, or regional and international organizations and bodies in Egypt from carrying out their work or exercising all or some of their activities, or resists them or disables the enforcement of any of the provisions of the Constitution, laws, or regulations.
>
> A terrorist act shall likewise refer to any conduct committed with the intent to achieve, prepare, or instigate one of the purposes set out in the first paragraph of this article, if it is as such to harm communications, information, financial or banking systems, national economy, energy reserves, security stock of goods, food and water, or their integrity, or medical services in disasters and crises.[48]

The above definition has been criticised for its overly broad reach. For instance, it has been said to contain vague terms such as 'force', 'violence', and 'threat', 'which permit the state to take prejudicial action against persons'.[49] It is also said to contain terms like 'infringing "public order," "the safety of the society", "society's interests", and "national unity"', which 'are so broad that they can be interpreted in various ways depending on who holds power'; and whose inclusion in the definition mean that 'all crimes in the Penal Code, regardless of how trivial, could conceivably be subsumed under the crime of terrorism, because any crime is likely to achieve these same ends'.[50] The definition has also been said to be an opportunity for the state to silence critics and opponents,[51] with it noted to be 'so broadly worded it could encompass

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47 For an (unofficial) English translation of the Law, see <https://www.atlanticcouncil.org/wp-content/uploads/2015/09/Egypt_Anti-Terror_Law_Translation.pdf>

48 Art 2, Anti-Terrorism Law, Law No 94 of 2015.

49 See Egyptian Initiative for Personal Rights and Cairo Institute for Human Rights Studies, 'The New Counterterrorism Law: Another Blow to the Constitution, Encourages Extrajudicial Killing- Commentary on Law 94/2015 on Counterterrorism August 2015' available at <https://eipr.org/sites/default/files/reports/pdf/the_new_counterterrorism_law.pdf> accessed 24 September 2015, 6.

50 ibid.

51 See Human Rights Watch, 'Egypt: Counterterrorism Law Erodes Basic Rights' (19 August 2015) available at <https://www.refworld.org/docid/55d58e414.html> accessed 24 September 2021, where in reacting to the 2015 Anti-terror Law, Nadim Houry, Human Rights Watch's Deputy Middle East and North Africa director,

civil disobedience'.[52] Similar concerns as to broadness have been raised about the definition of terrorism in the Egyptian Penal Code, No 58 of 1937 (as amended by Law No 97 of 1992),[53] and that of 'terrorist entity', in the Terrorist Entities Law, Law No 8 of 2015.[54]

Having stated the above concerning the Egyptian definition of terrorism, it is reiterated that the focus of this thesis is on the policing of terrorism however defined under the national law of the state. In that regard, the 2015 Anti-Terrorism Law grants security forces broad discretion in the use of force. As stated in Article 8 of the Law, '[e]nforcers of the provisions of this Law shall not be held criminally accountable if they use force to perform their duties or protect themselves from imminent danger to lives or properties, when the use of this right is necessary and adequate to avert the risk'. The permissive stance of this article potentially allows for excessive use of force in counterterrorism policing.[55]

There are other Egyptian laws relevant to the use of force in counterterrorism policing. For instance, Article 206 of the Egyptian Constitution, which provides for a national police force, notes that the police shall respect human rights and fundamental freedoms in executing its

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is reported as stating that '[t]he government has equipped itself with even greater powers to continue stamping out its critics and opponents under its vague and ever-expanding war on terrorism'.

52 See ibid.

53 Art 86 of the Penal Code defines terrorism as: 'any use of force or violence or any threat or intimidation to which the perpetrator resorts in order to disturb the peace or jeopardize the safety and security of society and of such nature as to harm or create fear in persons or imperil the lives, freedoms or security; harm the environment; damage or take possession of communications; prevent or impede the public authorities in the performance of their work; or thwart the application of the Constitution or of laws or regulations'. See FIDH (n 14) 12. This definition of terrorism is said to be 'ambiguous and comprises a variety of different, prohibited acts'. See ibid.

54 The definition of a 'terrorist entity' under art 1 of the Terrorist Entities Law is said to 'include "every association, organization, group, or gang" that uses violence; incites fear; puts the lives or rights of individuals at threat; violates the national unity; harms the environment or the country's natural resources; seizes or occupies public or private property; impedes the work of public officials, government bodies, homes of worship, hospitals, institutions, scientific entities, or diplomatic missions; blocks public or private transportation; endangers social peace; or impedes the application of the country's Constitution and laws'. See Mai El-Sadany, 'The Terrorist Entities Law: Egypt's Latest', (*TIMEP*, 12 December 2014) <https://timep.org/commentary/analysis/terrorist-entities-law-egypts-latest/> accessed 24 September 2021. This definition has been said to be 'worryingly broad'. See ibid. It has also been asserted that '[u]nder this definition, human rights defenders, political parties, or developmental associations may be easily labeled terrorist entities and their members terrorists'. See Cairo Institute for Human Rights Studies, 'Law on Terrorist Entities Allows Rights Groups and Political Parties to be Designated Terrorists' (28 February 2015) <https://cihrs.org/law-on-terrorist-entities-allows-rights-groups-and-political-parties-to-be-designated-terrorists/?lang=en> accessed 24 September 2021. The definition of a 'terrorist entity' was extended by Law 14 of 2020 to include companies, and unions, as entities that could be considered as terrorist. See Freedom of Thought and Expression Law Firm, 'Verdict before Conviction: A Reading in the Application of the Terrorist Entities Law' <https://afteegypt.org/en/afte_publications/2021/01/10/20657-afteegypt.html> accessed 26 September 2021.

55 See Mohammed Hamama (translated by Heba Afify and Nadia Ahmed), 'License to Kill?' (*Mada Masr*, 21 August 2015) <https://www.madamasr.com/en/2015/08/21/feature/politics/license-to-kill/> accessed 28 August 2020. See also, Egyptian Initiative for Personal Rights and Cairo Institute for Human Rights Studies (n 49) 11.

duties.[56] On the war on terrorism, Article 237 of the Constitution notes specifically that the state commits to countering all forms of terrorism while guaranteeing public rights and freedoms.[57] Article 55 of the Egyptian Constitution also prohibits the torture, intimidation, coercion or physical harm of anyone arrested or detained. Such person must be treated with dignity.[58] Also concerning torture, Articles 126 and 129 of the Egyptian Penal Code of 1937 (as amended) prohibit the use of torture by a public official to elicit confessions, and the use of cruelty in the performance of a public service respectively.

Concerning the use of firearms, this is regulated by Article 102 of the 1971 Egyptian Police Act, which limits such use to cases where it is strictly necessary to achieve a legitimate objective and where the use would be proportionate to the objective sought. Police officers are, however, allowed to use firearms to capture convicted or accused individuals where such persons resist arrest and where their actual or potential conviction could result in a sentence of three months imprisonment and above- in violation of international standards.[59] Terrorism falls within the scope of this authorisation as nearly all the offences under the Egyptian Anti-Terrorism Law are punishable by a term exceeding three months imprisonment.[60]

### 4.2.3. Government Bodies Involved in Counterterrorism Policing

The state agencies engaged in counterterrorism operations in Egypt include the police and the armed forces, which have been noted as 'the main actors countering terrorism in Northern Sinai and the mainland'.[61] Other agencies also involved in counterterrorism are the National Security Agency (NSA), Military Intelligence (MI), the Central Security Forces (CSF), and specialist military units. The roles of these other agencies are examined below.

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56 See Egyptian Constitution of 2014, art 206.
57 ibid art 237.
58 ibid art 55.
59 See Amnesty International, 'Agents of Repression: Egypt's Police and the Case for Reform' (Amnesty International, 2012) 30, available at <https://www.rightofassembly.info/assets/downloads/Amnesty_International_Report-_Egypt.pdf> accessed 7 July 2020; The Law on Police Use of Force Worldwide, 'Egypt' <https://www.policinglaw.info/country/egypt> accessed 10 July 2020; It is noted that what is permissible under international standards, is the use of firearms in order to stop persons resisting arrest, when they present a danger of perpetrating a particularly serious crime involving a grave threat to life. See Basic Principles, Principle 9.
60 See Egyptian Anti-Terrorism Law, Chapter 2, 'Offences and Penalties'.
61 Eman Ragab, 'Counter-Terrorism Policies in Egypt: Effectiveness and Challenges' EuroMesco Research Paper, European Institute of the Mediterranean (October 2016) 20, available at <https://www.iemed.org/wp-content/uploads/2020/12/EuroMeSCo-Paper-30-Counter-Terrorism-Policies-in-Egypt-Effectiveness-and-Challenges.pdf> accessed 26 September 2021.

#### 4.2.3.1. The Role of the National Security Agency

The NSA was created in 2011 as a replacement for the notorious State Security Investigation Service (SSIS), which had, for decades, had allegations of human rights abuses levelled against it.[62] In fact, excesses by the SSIS are said to have contributed to the uprising against the Mubarak government, with its agents also accused of having tried to put an end to the protests at Tahrir Square in Cairo through violent means.[63] The NSA's mandate includes national security, information collection, and counterterrorism,[64] all supposed to be carried out in accordance with human rights principles.[65] However, violations of human rights are noted to have continued under the NSA.[66]

#### 4.2.3.2. The Role of the Central Security Forces

The Central Security Forces (CSF) are a paramilitary force which was set up in 1977 to handle internal disturbances.[67] The force falls under the Ministry of Interior, and it has been deployed against militants in the Sinai.[68] Within the CSF, there is also a specialist counterterrorism unit known as the Black Cobra.[69] Black Cobra is noted to be 'one of several special forces groups in the Egyptian military and interior ministry to focus on counter-terrorism, but is the first such unit in the CSF'.[70]

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62 See BBC, 'Egypt Dissolves Notorious Internal Security Agency' (15 March 2011) <https://www.bbc.com/news/world-middle-east-12751234> accessed 26 September 2021. It is noted that '[t]he post-Mubarak government renamed the [SSIS] as the [NSA] and forced a number of its senior officers into retirement, but it was never dismantled or reformed'. See Sarah El Deeb (Associated Press), 'Hotline Marks Return of Egypt's Security Agency' (*US News*, 6 January 2014) <https://www.usnews.com/news/world/articles/2014/01/06/hotlines-mark-return-of-egypts-security-agencies> accessed 2 October 2021.

63 BBC, 'Egypt Dissolves Notorious Internal Security Agency' (n 62).

64 Amnesty International, Egypt: 'Officially You Do Not Exist' – Disappeared and Tortured in the Name of Counter-terrorism' Amnesty International, (2016) <https://www.amnesty.org/download/Documents/MDE1243682016ENGLISH.PDF> accessed 6 July 2020, 18.

65 See BBC, 'Egypt Dissolves Notorious Internal Security Agency' (n 62).

66 See Amnesty International, 'Officially You Do Not Exist', (n 64) 17-18.

67 See Joseph Kechichian and Jeanne Nazimek, 'Challenges to the Military in Egypt' (September 1997) 5(3) Middle East Policy, <https://go.gale.com/ps/i.do?id=GALE%7CA19995275&sid=googleScholar&v=2.1&it=r&linkaccess=abs&issn=10611924&p=AONE&sw=w&userGroupName=nysl_ca_arg> accessed 26 September 2021.

68 See for example, BBC, 'Egypt Forces Killed in Sinai Vehicle Accident' (8 October 2012) <https://www.bbc.com/news/world-middle-east-19871181> accessed 26 September 2021.

69 See Egypt Defence Review (@EgyptDefReview), Twitter Thread, (4 April 2019, 12:37 pm) <https://twitter.com/egyptdefreview/status/1113752544885510145?lang=en> accessed 26 September 2021.

70 TIMEP, 'Egypt Security Watch: Week in Brief March 30- April 5, 2019' 2, available at <https://timep.org/wp-content/uploads/2019/04/TIMEP-ESW_briefing-3.30-4.5.pdf> accessed 2 October 2021.

#### 4.2.3.3. The Role of the Military Intelligence

The Egyptian Military Intelligence is under the Ministry of Defence.[71] The Military Intelligence is noted as 'overseeing the counter terror campaign'.[72] Military Intelligence has been implicated in human rights violations during counterterrorism operations.[73] It has also been noted to contribute to the difficulty in independent press coverage of terrorism-related incidents in Egypt, as '[e]ven senior journalists can be summoned by military intelligence if they discuss the conduct of the army or military courts in print'.[74]

#### 4.2.3.4. The Role of Specialist Military Units

One of the specialist units within the Egyptian military is Task Force 777, a counterterrorism and special operations unit. It was created in 1977 under President Sadat 'in response to terrorist menaces'.[75] Task Force 777 had been deployed abroad for counterterrorism missions such as plane hijackings. However, it was disbanded and later reformed to focus on domestic threats.[76] Task Force 777 has been involved in operations against the Muslim Brotherhood,[77] and against *Wilayat Sinai*.[78]

Unit 888, a new counterterrorism unit, was created in July 2017.[79] It is attached to the Rapid Deployment Forces (RDF) of the army, and its first deployment was in the Comprehensive Operation Sinai 2018.[80]

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71 See Global Security.org, 'Mukhabarat el-Khabeya (Military Intelligence Service)- Egyptian Military Intelligence (DMI)' <https://www.globalsecurity.org/intell/world/egypt/dmi.htm> accessed 26 September 2021; FAS- Intelligence Resource Program, 'Egypt: Intelligence Agencies' <https://irp.fas.org/world/egypt/> accessed 26 September 2021.

72 See Robert Springborg, 'Sisi's Egypt Moves from Military Economy to Family Firm' (6 December 2020) <https://www.ispionline.it/en/pubblicazione/sisis-egypt-moves-military-economy-family-firm-28504> accessed 26 September 2021.

73 Human Rights Watch, 'If You Are Afraid for Your Lives, Leave Sinai!' (n 37) 85-86.

74 See Saferworld (n 14) 14.

75 Egypt Independent, 'Army Spokesperson Denies Involvement of Army's Task Force 777 in Sit-In Dispersals' (15 August 2013) <https://egyptindependent.com/army-spokesperson-denies-involvement-army-s-task-force-777-sit-dispersals/> accessed 26 September 2021.

76 ibid. Two of the counterterrorism missions Task Force 777 was deployed abroad for, i.e., Cyprus and Malta (both plane hijackings) are noted to have ended in disasters. See SpecWarNet, 'Task Force 777' <http://www.specwarnet.net/world/777.htm> accessed 26 September 2021.

77 See SpecWarNet (n 76).

78 See Arabian Aerospace Online News Service, 'Egypt Inducts Armed Chinese Drones' (29 April 2019) <https://www.arabianaerospace.aero/egypt-inducts-armed-chinese-drones.html> accessed 26 September 2021.

79 Mahmoud Gamal, 'Egypt's Newly-Formed Counter-Terror Unit-888' (*Egypt's Defence Blog*, 2 February 2019) <https://egyptiandefenseblog.wordpress.com/2019/02/02/all-what-you-want-to-know-about-the-newly-egyptian-counter-terrorism-unit/> accessed 26 September 2021.

80 ibid.

### 4.2.4. The Use of Force in Counterterrorism Policing in Egypt

After the assassination of President Sadat in 1981, his successor, President Mubarak, instituted a national state of emergency which remained in place until 2012, being continually renewed until Mubarak's ouster from office.[81] According to Burgrova, President Mubarak had noted two weeks after the enactment of the state of emergency, that it was a necessary measure to confront terrorism and which would not be lifted until normalcy could be guaranteed.[82] Under the state of emergency, Egyptian security forces were given 'sweeping powers'.[83] Writing in 2010, the International Federation of Human Rights (FIDH) had noted that '[s]ince 1981, Egypt has had a history of legalizing abuse in the name of the fight against terrorism', including 'an endemic practice of incommunicado detention and torture';[84] stating further that '[t]he use of torture has been a major element in the Egyptian's government's counter-terrorism strategy for over two decades'.[85] According to them, '[t]he emergency law [was] used to justify many crimes and acts of violence by the Government which gravely [contradicted] the Constitution and [violated] human rights'.[86]

However, the fall of the Mubarak regime did not put an end to brutal counterterrorism tactics in Egypt. For example, in response to the assassination of Egypt's chief prosecutor, Hisham Barakat in June 2015 by Islamist militants, the Anti-terrorism Law was passed.[87] President Sisi had stated in a speech at Barakat's funeral, that 'the prompt hand of justice is tied by the laws, and we can't wait for that', promising to amend the existing laws 'to implement the law and justice in the fastest possible time'.[88] It is reported that a day after the speech by the President, 13 leaders in the Muslim Brotherhood- the group that was blamed for the assassination- were killed by security forces.[89] As to the Anti-terrorism Law, it is recalled, that its Article 8 gives

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81 Amnesty International, 'Hosni Mubarak: A Living Legacy of Mass Torture and Arbitrary Detention' (25 February 2020) <https://www.amnesty.org/en/latest/news/2020/02/hosni-mubarak-legacy-of-mass-torture/> accessed 29 September 2021.

82 See Helena Reimer Burgrova, 'Egypt's Endless State of Emergency: The "War on Terror" during the Reign of Husni Mubarak (1981-2011)' Doctoral Thesis, Bundeswehr University Munich (2017), 52.

83 See Amnesty International, 'Hosni Mubarak' (n 81).

84 See FIDH (n 14), 5.

85 ibid 16.

86 ibid 11.

87 Reuters Investigates, 'Egypt Kills Hundreds of Suspected Militants in Disputed Gun Battles' (5 April 2019) <https://www.reuters.com/investigates/special-report/egypt-killings/#interactive-egypt-killings-sidebar> accessed 28 September 2021.

88 Human Rights Watch, 'Egypt's Counterterrorism Law Erodes Basic Rights' (n 51).

89 See Omar Ashour, 'Egypt's Extrajudicial Killings' (*Al Jazeera*, 4 July 2015) <https://www.aljazeera.com/opinions/2015/7/4/egypts-extrajudicial-killings/> accessed 29 September 2021; Raeesah Cassim Cachalia, 'Extremism in Egypt: When Countering Terrorism Becomes Counter-Productive' (*ISS Today*, 3 November 2015) <https://issafrica.org/iss-today/extremism-in-egypt-when-countering-terrorism-becomes-counter-productive> accessed 29 September 2021. According to Ashour, the

immunity to security forces from prosecution for the use of necessary and adequate force in the course of their counterterrorism duties.[90] This has been noted to be 'the start of a brutal crackdown', where 'the police embarked on a spate of "extrajudicial killings knowing no one will hold them accountable"'.[91]

The Reuters press agency notes in this regard the case of 465 men killed between July 2015 and the end of 2018, and whom the Ministry of Interior allege to be Islamist militants or criminals, all killed in shootouts.[92] A total of 104 of these deaths occurred in North Sinai.[93] In interviews with relatives of 11 of the 465 deceased men, however, the Ministry's claim was disputed as the relatives allege that their family members had been forcibly disappeared by security agents- for several months in some instances, only for their deaths to be announced later by the Ministry of Interior.[94] In addition to this, three forensic experts who were showed mortuary images of two of the men, also doubted the Ministry's version of the facts.[95] In another instance, three witnesses to the shooting of two Muslim Brotherhood members in Cairo, also stated by the Ministry to have died in a shootout, instead allege that there was no exchange of fire or a gun battle on that day.[96]

Similarly, it has been reported that between May 2015 and December 2017, there were official reports of shootouts or clashes by the security forces with suspected terrorists such as alleged members of the *Hasm* Movement, on mainland Egypt, leading to their deaths. Some of these reported deaths are regarded as suspicious and likely extrajudicial killings, as it is claimed that some of the suspected 'terrorists' were already in police custody at the time the 'shootouts' or 'clashes' were reported to have taken place.[97]

In September 2021, Human Rights Watch also reported on extrajudicial killings of alleged 'terrorists' by Egyptian security forces who the authorities had claimed were killed during

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Muslim Brotherhood alleged that their deceased members had been held, searched, fingerprinted, and then killed. Security forces on the other hand, claimed that the deceased had resisted arrest and were killed in a firefight. See Ashour (n 89).

90 See Article 8 of the Anti-terrorism Law; and text to note 55 above.

91 See Reuters Investigates (n 87).

92 Out of 471 men involved in 108 incidents, there were six surviving suspects- representing a 'kill ratio of 98.7 percent'. Of the 465 dead, 320 were classified as terrorists, 117 as members of the Muslim Brotherhood, and 28 as criminals. See ibid.

93 ibid.

94 ibid.

95 ibid.

96 See ibid.

97 See TIMEP, 'Egypt Security Watch: Five Years of Egypt's War on Terror' (n 19)13. See also, Green and McManus (n 19).

'shootouts'.[98] They note that between January 2015 and December 2020, the Egyptian Ministry of Interior had announced the deaths of no less than 755 terrorist suspects in 143 alleged shootouts. Only one suspect was ever reported as arrested. Human Rights Watch examined the cases of 14 persons from a group of 75 men killed in nine alleged shootouts in mainland Egypt-incidents where no suspects were arrested, and where security forces suffered no casualties. Family members and acquaintances interviewed, allege that the 14 men had been arrested, most probably by the NSA, and were held in custody before their deaths. In addition, independent forensic analysis of photographs and videos of the bodies of five of the deceased, and photographs of two of the shootout scenes, was undertaken. The analysis, in three cases, proved 'inconsistent with the shootout narrative', as '[p]hotographs show that the hands of the three bodies appear to have been restrained or cuffed behind their backs immediately before death'.[99] According to Human Rights Watch, while it is impossible to reach definite conclusions about all of the killings because of lack of adequate information provided by the Ministry, 'the conclusions drawn from the documented incidents demonstrate a clear pattern of unlawful killings and cast serious doubt on almost all reported "shootouts"'.[100]

In October 2014, a state of emergency was declared in North Sinai after a terror attack that left 33 police officers and military personnel dead.[101] As noted, Egypt has been involved in a NIAC with *Wilayat Sinai* in North Sinai, since 2014.[102] The state of emergency lasted until April 2017, when after attacks at two Coptic churches killing at least 44, President Sisi declared a nationwide state of emergency which has been continuously renewed.[103] Following an attack at the Rawda Mosque in Sinai in November 2017, President Sisi mandated the military to secure Sinai within three months, stating that they could utilise 'all brute force necessary' in

98 Human Rights Watch, 'Egypt: 'Shootouts' Disguise Apparent Extrajudicial Executions' (7 September 2021) <https://www.hrw.org/news/2021/09/07/egypt-shootouts-disguise-apparent-extrajudicial-executions> accessed 29 September 2021.

99 ibid.

100 ibid.

101 See Yussef Auf, 'The State of Emergency in Egypt: Exception or Rule', 2 February 2018, <https://www.atlanticcouncil.org/blogs/menasource/the-state-of-emergency-in-egypt-an-exception-or-rule/> accessed 28 September 2021.

102 See text to note 37 above.

103 See ibid; Al Jazeera, 'Egypt Extends State of Emergency for Twelfth Time Since 2017' (28 April 2020) <https://www.aljazeera.com/news/2020/4/28/egypt-extends-state-of-emergency-for-twelfth-time-since-2017> accessed 29 September 2021. The latest extension of the state of emergency (as of writing) began on 24 July 2021, to last for 3 months. See Egypt Today, 'Egyptian Parliament Approves Extension of State of Emergency for 3 Months Nationwide', 12 July 2021, <https://www.egypttoday.com/Article/1/105943/Egyptian-Parliament-approves-extension-of-state-of-emergency-for-3> accessed 29 September 2021. This 2017 declaration of a nationwide state of emergency is noted to have ended nearly 5 years (save for a few months in 2013) where Egypt had been without one. See Saferworld (n 14) 10.

that regard.[104] In February 2018, the military launched 'Comprehensive Operation Sinai 2018', which according to Human Rights Watch, 'included a wave of arrests and killings'.[105] A coalition of Egyptian and regional non-governmental organisations have also noted that the state of emergency and the counterterrorism operations in North Sinai have 'given way to outright human rights violations at the hands of State security forces', including 'extrajudicial killings by the military, arbitrary arrests and detentions, and violations of social and economic rights'.[106]

Concerning North Sinai, Human Rights Watch reported that in 2019, 'security forces led by the military [continued] to brutalize civilians in North Sinai in its conflict with [*Wilayat Sinai*]'.[107] They noted further that, '[t]he army and pro-government militias carried out serious abuses, including demolishing homes and arbitrarily arresting, torturing, and extrajudicially executing residents'.[108] On the conflict generally, it was noted that since it escalated in late 2013, both sides i.e., the Egyptian security forces, particularly the army, and the *Wilayat Sinai* militants, have perpetrated serious and widespread abuses. Some of the abuses, which include 'several indiscriminate and possibly unlawful air and ground attacks by security forces', arbitrary arrests, enforced disappearances, and extrajudicial killings, are alleged to be war crimes.[109]

According to Human Rights Watch, children as young as 12 have been arrested and subject to enforced disappearance by the army, with a spokesman for the army noted to have acknowledged and justified the detention of some children as part of their fight against terrorism.[110] The organisation also notes that persons detained and forcibly disappeared by the army are typically held either in Camp al-Zohor in Sheikh Zuwayed, Battalion 101 base located in al-Arish, or al-Galaa military base in the neighbouring Ismailia governorate- all unofficial sites without judicial oversight- where the detainees are frequently victims of ill-treatment,

104 See Shaker (n 38) and Abdelaty (n 38).
105 Human Rights Watch, 'If You Are Afraid for Your Lives, Leave Sinai!' (n 37) 30.
106 Committee for Justice, 'Egypt: Human Rights Violations in the Context of Counter Terrorism and National Security' (30 September 2019) para 63, <https://www.cfjustice.org/egypt-human-rights-violations-in-the-context-of-counter-terrorism-and-national-security/>, accessed 28 September 2021.
107 Human Rights Watch, 'Egypt. Events of 2019' <https://www.hrw.org/world-report/2020/country-chapters/egypt> accessed 8 July 2020.
108 ibid. See also Human Rights Watch, 'If You Are Afraid for Your Lives, Leave Sinai!' (n 37) 1.
109 Human Rights Watch, 'Egypt. Events of 2019' (n 107).
110 ibid.

abuse, and at times, subject to torture.[111] As revealed by interviews with Sinai residents, some detainees were tortured by military officers until they revealed identities of terrorists or militants.[112] A former detainee recounted how one of the interrogators had seemingly acknowledged that the use of brutal tactics produced deadly mistakes. According to that interrogator, '[i]t's true that in army [detention] some people are taken wrongly, and others die'; '[b]ut we also fight takfiris, and arrest [many] of them'.[113]

The military is also noted to recruit local residents into irregular militias for help with intelligence gathering in Sinai, having not operated in the region for decades before the current escalation of violence therein.[114] This recruitment began in 2015, and the militias are stated to perform 'a function that blends intelligence gathering with police action', being armed, given uniforms, and also often, shelter at military bases. The militias operate under the military's direction, and they play an important role in the arrest campaigns in Sinai. It is however noted that the militias use the campaigns as a means of settling personal scores or serving their own interests. According to the brother of a disappeared person who was interviewed by Human Rights Watch, '[t]he masked army collaborators are the ones who settle scores with people and are the reason why many innocent people are arrested'.[115] The militias are also stated to 'play a major role in abuses'.[116]

Simon Crowther, Legal Advisor at Amnesty International, in reaction to the appointment of Egypt as co-lead with Spain, of a review of the UN Global Counterterrorism Strategy in November 2019, stated that '[t]his move puts Egypt - a country with a long and egregious record of human rights abuses - in a perfect position to delete the provisions protecting an individual's human rights from the UN's counter-terrorism strategy. This would have catastrophic consequences'.[117] He further noted how Egyptian authorities regularly detained,

111 ibid. On the other hand, those arrested by the police are usually taken to the North Sinai governorate headquarters of the NSA, also in al-Arish. See Human Rights Watch, 'If You Are Afraid for Your Lives, Leave Sinai!' (n 37) 6.

112 Human Rights Watch, 'If You Are Afraid for Your Lives, Leave Sinai!' (n 37) 6.

113 ibid. 'Takfiri' is 'the Arabic word for extremists who believe in excommunicating fellow Muslims and which the Egyptian authorities use broadly to describe all militants'. See ibid.

114 ibid 91.

115 ibid.

116 ibid.

117 Amnesty International, 'UN: Appointing Egypt to Co-lead Global Counter-terrorism Review Will Have Catastrophic Consequences for Human Rights', Press Release (22 November 2019) <https://www.amnesty.org/en/latest/press-release/2019/11/un-appointing-egypt-to-co-lead-global-counter-terrorism-review-will-have-catastrophic-consequences-for-human-rights/> accessed 6 July 2020.

forcibly disappeared, and tortured thousands of political opponents, all under the guise of counterterrorism.[118]

From the above, it can be gleaned that counterterrorism in Egypt is typified by the use of excessive force and heavy-handed tactics on the part of the security forces, whether in law enforcement/policing operations or those that are undertaken in the context of the NIAC in North Sinai. The use of tactics such as extrajudicial killings, torture, and enforced disappearances in counterterrorism is problematic from an international law perspective, falling foul of the relevant LE rules for the use of force, and in the case of a NIAC, COH rules for the use of force.

It is acknowledged that Egypt has recorded some successes from her counterterrorism operations. For example, the capacity of *Wilayat Sinai* has been significantly weakened due to the actions of the Egyptian security forces.[119] This has reduced the number of terror attacks and deaths resulting from terrorism in Egypt.[120] However, while the use of heavy-handed tactics or excessive force by security forces in counterterrorism may seem to produce some results in the short term, it is noted that such can be counterproductive, fuelling grievances among the populace and ultimately resulting in further terror attacks/violence. For example, in the case of Egypt, Burgrova has asserted that '[t]he government's inflexibility and/or unwillingness to reassess the terrorist threat and the heavy-handed counterterrorism measures, which target scores of Egyptians beyond the perceived terrorists, affect the security outlook in the mid- and long-term'.[121] Stating further, she noted that '[t[he radicalization of disenfranchised Muslim Brotherhood members along with other Egyptians, and the strengthening of the transnational terrorist networks of IS and al-Qaeda in Egypt are among the fallout of this misguided strategy and represent major destabilizing factors to be concerned about'.[122]

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118 ibid.

119 See Basil (n 40) 4.

120 The 2019 Global Terrorism Index notes terror attacks in Egypt fell from 169 to 45 within a year, while the deaths from terrorism reduced by 90 percent. As a result of these, Egypt dropped out of the top 10 countries most impacted by terrorism. See Egypt Independent, 'Egypt Drops Out of List of Top 10 Countries Affected by Terrorists' (17 December 2019) <https://egyptindependent.com/egypt-drops-out-of-list-of-top-10-countries-affected-by-terrorists/> accessed 28 August 2020. See also Institute for Economies and Peace, 'Global Terrorism Index 2019: Measuring the Impact of Terrorism' Sydney (November 2019) available at <http://visionofhumanity.org/app/uploads/2019/11/GTI-2019web.pdf> accessed 4 May 2020, 13 and 39.

121 Helena Burgrova, 'Egypt's Failing "War on Terror"' (February 2017) Policy Brief Egypt 1- Security, available at <https://www.boell.de/sites/default/files/egypt-paper1-security.pdf>, accessed 31 July 2020, 4.

122 ibid.

Underpinning the violations is a culture of impunity. In 2015, when the new Anti-terrorism Law was enacted, it was pointed out 'that law enforcement officers [had] generally been exempt from prosecution over the past two years,' a practice that Article 8 of the Law could codify into law.[123] Concerning Article 8 (which grants immunity to security forces), in 2019, Egyptian human rights groups are said to 'have documented several cases of security forces using force with total impunity against people accused of alleged" [*sic*] terrorism crimes"'.[124] Similarly, Human Rights Watch stated in its report on Events in Egypt in 2020, that '[s]ecurity forces continued to operate with impunity in war-torn North Sinai'.[125]

### 4.3. Kenya: A Short Socio-Political Background

Kenya (officially the 'Republic of Kenya') is located in East Africa, and currently has the largest economy in that region and the sixth largest in Africa.[126] Kenya has a current population of approximately 55 million,[127] making it the 7th most populous state on the African continent.[128] Constitutionally, there is no state religion in Kenya,[129] although the two major religions therein are Christianity (85.5% of the population) and Islam (11% of the population).[130]

Kenya became a republic in 1964, a year after her independence.[131] Beginning from 1969, Kenya *de facto* operated a one-party system, which received legislative and constitutional backing in 1982.[132] This remained the case until 1991 when the one-party provision in the constitution was annulled, and in December 1992, multi-party democracy was restored.[133]

123 See Hamama (n 55).
124 Committee for Justice (n 106), para 6.
125 Human Rights Watch, 'Egypt. Events of 2020' <https://www.hrw.org/world-report/2021/country-chapters/egypt> accessed 29 September 2021.
126 See Statista, 'African Countries with the Highest Gross Domestic Product (GDP) in 2021' <https://www.statista.com/statistics/1120999/gdp-of-african-countries-by-country/> accessed 24 September 2021.
127 Worldometer, 'Kenya Population' <https://www.worldometers.info/world-population/kenya-population/> accessed 26 September 2021.
128 See Worldometer 'Countries in the World by Population (2020)' (n 2).
129 Art 8, Constitution of the Republic of Kenya (2010).
130 Kenya National Bureau of Statistic, '2019 Kenya Population and Housing Census- Volume IV: Distribution of Population by Socio-Economic Characteristics', (Kenya National Bureau of Statistics, December 2019), 12.
131 Kenya- Embassy of the Republic of Kenya in Japan, 'A Brief History on Kenya' <http://www.kenyarep-jp.com/kenya/history_e.html> accessed 3 July 2020.
132 ibid.
133 ibid.

The human rights record of Kenya, with particular regard to actions by her security forces, is poor. There is a long history of police brutality and abuses in the country, noted to have begun during the colonial era where policing was used to further the interests of the colonial regime, and as a means of social control rather than protection.[134] Police brutality was however carried over into the post-independence era, with the police also being used by those in power to further their interests such as supressing dissent and political repression.[135] There is now a general policing culture of impunity in Kenya, and other factors fingered as causes of the violence now associated with policing in Kenya apart from its foundation under British colonial rule include corruption, lack of accountability, and poor recruitment policies.[136] Despite attempted policing reforms, the problem of police brutality and general heavy-handedness in Kenya remains significant.[137]

### 4.3.1. Terrorism in Kenya

Since at least the 1970s, Kenya has suffered from acts of terrorism. In March 1975, there was a bomb explosion in a bus waiting at a terminal in Nairobi, killing 27 persons and injuring about 100 others. This bus explosion had been a third in a series of bomb blasts in two weeks, but the first to result in fatalities.[138] On 31 December 1980, there was another explosion at the

134 See Douglas Lucas Kivoi, 'Why Violence is the Hallmark of Kenyan Policing and What Needs to Change' (*Mail and Guardian*, 8 June 2020) <https://mg.co.za/africa/2020-06-08-why-violence-is-a-hallmark-of-kenyan-policing-and-what-needs-to-change/> accessed 3 July 2020. See also Andrew Ratanya Mukaria, 'Police Brutality in Kenya: is it "utumishi kwa wote ama utumishi kwa wanasiasa" (Service to All or to Politicians)?', Master's Thesis, Faculty of Law, University of Oslo (2018), 21-2, available at <https://www.duo.uio.no/handle/10852/63465> accessed 3 July 2020.

135 See Kivoi (n 134). See also Mukaria (n 134) 22-25.

136 Kivoi (n 134).

137 See for example, Human Rights Watch, 'Kenya Events of 2017' <https://www.hrw.org/world-report/2018/country-chapters/kenya> accessed 3 July 2020; and Human Rights Watch, 'Kenya Events of 2019' <https://www.hrw.org/world-report/2020/country-chapters/kenya#9cffc9> accessed 3 July 2020. See also, Tessa Diphoorn, 'Why Decades of Kenya Police Reforms Have Not Yielded Change' *The Conversation*, 25 November 2019) <https://theconversation.com/why-decades-of-kenya-police-reforms-have-not-yielded-change-127332> accessed 3 July 2020.

138 See generally, New York Times, '27 Killed in Nairobi as a Crowded Bus is Ripped by a Bomb' (3 March 1975), <https://www.nytimes.com/1975/03/03/archives/27-killed-in-nairobi-as-a-crowded-bus-is-ripped-by-a-bomb.html> accessed 20 May 2020; Lewiston Daily Sun, '27 Killed in Kenyan Terrorist Bombing' Vol 3 (3 March 1975), <https://news.google.co.uk/newspapers?id=quYpAAAAIBAJ&sjid=KGYFAAAAIBAJ&pg=4574,200382&dq=bombing+kenya&hl=en> accessed 20 May 2020. The masterminds behind the bombing at the bus terminal remain unknown as no one claimed responsibility for the attack. See Juliet Atellah, 'The Aftermath of Terror Attacks in Kenya since 1975' (*The Elephant*, March 4, 2019) <https://www.theelephant.info/data-stories/2019/03/04/an-aftermath-of-terror-attacks-in-kenya-since-1975/> accessed 20 May 2020.

Fairmont Norfolk Hotel in Nairobi, killing 20 and injuring a further 80 persons.[139] It has been estimated that from 1975 to March 2019, there were about 350 terrorist attacks in Kenya.[140]

The deadliest ever terrorist attack on Kenyan soil took place on 7 August 1998, with the bombing of the United States Embassy in Nairobi by *al-Qaeda*, killing 212 and injuring about 4,500 others. There was a simultaneous bombing of the United States Embassy in Dar es Salaam, Tanzania on the same day, which resulted in 12 deaths.[141] It was this attack that first thrust *al-Qaeda* (and Osama bin Laden) into the international limelight.[142] The second deadliest attack is the April 2015 Garissa University College attack by *al-Shabaab*, in which 148 people were killed, 142 of whom were students, while about 79 others were injured during the attack.[143] Prior to this, *al-Shabaab* had perpetrated other attacks such as the 2013 Westgate Shopping Mall attack, killing 67 and injuring over 175,[144] and claimed responsibility for others such as the 2014 Mpeketoni attacks in Lamu County, where about 60 people were killed between 15 June and 17 June 2014.[145] In January 2019, *al-Shabaab* also attacked DusitD2 Hotel Complex in Nairobi, resulting in 21 deaths and several more injured.[146]

While Kenya is also plagued by some domestic 'terrorist' groups, such as the Sabaot Land Defence Forces and the *Mungiki*,[147] *al-Shabaab* currently poses the main threat to Kenya in

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139 Atellah (n 138).

140 ibid.

141 ibid.

142 See Jan Phillip Wilhelm, 'When Al-Qaida Brought Terror to East Africa' (*DW*, 6 June 2018), <https://www.dw.com/en/when-al-qaida-brought-terror-to-east-africa/a-44961662> accessed 3 July 2020.

143 See BBC 'Garissa University College Attack in Kenya: What Happened?' (19 June 2019), <https://www.bbc.com/news/world-africa-48621924> accessed 3 July 2020.

144 See an account of the Westgate Mall attack in Chapter 2, text to note 262 and the accompanying text.

145 See Atellah (n 138). This claim of responsibility by *al-Shabaab* was disputed by Kenyan President Uhuru Kenyatta, who instead attributed the attack to 'local political networks'. It was later settled by intelligence agencies that the attacks were indeed executed by *al-Shabaab*. See Thomas Nyagah, James Mwangi, and Larry Attree, 'Inside Kenya's War on Terror: The Case of Lamu' <https://www.saferworld.org.uk/long-reads/inside-kenyaas-war-on-terror-the-case-of-lamu> 20 May 2020.

146 Atellah (n 138). See also Oxford Research Group, 'Counterterrorism in Kenya: An Interview with Oscar Mwangi' <https://www.oxfordresearchgroup.org.uk/blog/counter-terrorism-in-kenya-an-interview-with-oscar-mwangi> accessed 20 May 2020.

147 See Emmanuel Okurut, 'Preventing Human Rights Violations by Law Enforcement Agencies During Counterterrorism Operations in Kenya and Uganda' LLD Thesis (November 2017), University of Pretoria 64. The Sabaot Land Defence Forces (SLDF) and the *Mungiki* are examples of some vigilante/militia groups in Kenya who use terrorist violence in pursuit of some political ends. The case of these groups is noted to fall under 'vigilante terrorism', manifesting 'in the form of criminal organisations that use extreme violence against the general public to attract government attention for a pseudo political domestic cause'. See Kennedy Mochere Nyaundi, 'How does the Implementation of Counter Terrorism Measures Impact on Human Rights in Kenya and Uganda?' PhD thesis (February 2014) University of Cape Town 65-67. Though the SLDF and the *Mungiki* may not have been pronounced as terrorist organisations by the government, their actions arguably constitute terrorism. See Okurut (n 147) 64. See also, Adams Oloo, 'Domestic Terrorism in Kenya', in Wafula Okumu and Anneli Botha (eds), *Domestic Terrorism in Africa: Defining, Addressing*

terms of terrorism. *Al-Shabaab*, which is based primarily in Somalia,[148] began to target Kenya with terrorist attacks because of Kenya's military intervention in Somalia both individually and as part of the African Union Mission in Somalia (AMISOM).[149] Kenya first sent military troops into Somalia in October 2011 as part of Operation *Linda Nchi* (Protect the Country), because of repeated intrusions of *al-Shabaab* into Kenya.[150] Kenya has also been a troop-contributing nation to AMISOM since 2012, after 're-hatting' its troops in Somalia under the umbrella of AMISOM.[151] However, the Kenyan military has reportedly also continued to operate independently of AMISOM.[152]

Kenya has been classified as being engaged in a NIAC with *al-Shabaab* only as long as its troops continue to conduct operations in Somalia independently of AMISOM.[153] This is asserted because the formal authority for AMISOM's mission in Somalia seems to rest with the African Union. Thus, only AMISOM's military component can be regarded as a party to the conflict with *al-Shabaab*, not the states who have placed their troops at AMISOM's

*and Understanding its Impact on Human Security*, (Institute of Security Studies 2009) 85, 85-93; where groups such as the *Mungiki* are also described as terrorist organisations.

148 *Al-Shabaab* started as the military wing of the Islamic Courts Union (ICU) which disbanded after it was driven out of Mogadishu in December 2006 by Ethiopian forces and troops of the Somalian Transitional Federal Government. After the ICU's defeat, *al-Shabaab* became independent, and has now become the main force opposing the Somalian government, with a view to creating a Somalian state administered in accordance with its own version of Sharia law. See Mapping Militant Organizations, 'Al Shabaab' (*Stanford University*, last modified January 2019) <https://cisac.fsi.stanford.edu/mappingmilitants/profiles/al-shabaab> accessed 14 July 2020; and BBC, 'Who are Somalia's al-shabaab?' (22 December 2017) <https://www.bbc.com/news/world-africa-15336689> accessed 14 July 2020.

149 Caroline Siewert, 'The Armed Forces in Somalia: Escalating Fatalities', in Annyssa Bellal (ed), *The War Report 2017* (Geneva Academy of International Humanitarian Law and Human Rights, March 2018) 128.

150 ibid.

151 See Rule of Law in Armed Conflict (RULAC), 'Kenya' (last updated 23 October 2017) <http://www.rulac.org/browse/countries/kenya#collapse1accord> accessed 4 July 2020. See also African Union Mission in Somalia (AMISOM), 'Kenya- KDF' <https://amisom-au.org/wp-content/cache/page_enhanced/amisom-au.org/kenya-kdf/_index.html_gzip> accessed 4 July 2020.

152 Kenya is reported to have military troops in Somalia operating outside the AMISOM framework. For example, it is noted that since 2016, the non-AMISOM Kenyan Defence Forces (KDF) troops in parallel to AMISOM-KDF troops acting under the AMISOM Framework, have been conducting airstrikes against al-Shabaab in Somalia. See United Nations Assistance Mission in Somalia, 'Protection of Civilians: Building the Foundation for Peace, Security and Human Rights in Somalia' (December 2017) <https://unsom.unmissions.org/sites/default/files/protection_of_civilians_report_20171210.pdf> accessed 4 July 2020, paras 27 and 39. See also United Nations Security Council (UNSC), Report of the Secretary-General on Children and Armed Conflict in Somalia, (22 December 2016) UN Doc S/2016/1098, paras 10, 39, 43, 50, and 56 for mention of and incidences of the continued independent operations of the Kenyan Defence Forces in Somalia. See further, Paul D Williams *et al*, 'Assessing the Effectiveness of the African Union Mission in Somalia/AMISOM', *Effectiveness of Peace Operations Network (EPON)* Report 1/2018, <https://effectivepeaceops.net/wp-content/uploads/2019/04/EPON-AMISOM-Report-LOWRES.pdf> accessed 20 July 2020, 40, where it is noted that Kenya, since the end of its Operation *Linda Nchi* in 2012, has continued to undertake unilateral operations in Somalia, the majority of which are airstrikes. See also, generally, Siewert (n 149) 128; and RULAC 'Kenya' (n 151).

153 See RULAC 'Kenya' (n 151); and Siewert (n 149) 128.

disposal (i.e. the troop contributing countries (TCCs)).[154] This position is supposedly based on the general rules of attribution under international law which determine whether TCCs who have placed their troops at the disposal of an international organisation (such as the AU in the case of AMISOM) can be regarded as parties to the armed conflict in question, the issue turning on the level of control exercised by the organisation over the troops.[155] In the case of AMISOM and Kenya, while formal authority for the mission may indeed rest only with AMISOM, an

154 Siewert (n 149) 128.

155 Whether or not troop contributing countries (TCC) who have placed their troops at the disposal of an international organisation can be deemed parties to the armed conflict depends on the rules of attribution under international law, i.e., rules indicating to whom the acts of war conducted can be attributed. IHL has no provisions regarding to attribution, thus general rules of international law in that regard come into play. See ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', Report for the 32nd International Conference of the Red Cross and Red Crescent, Geneva, October 2015 (hereafter, 'ICRC 2015 Challenges Report') 23. According to the draft articles developed by the International Law Commission (ILC) on the responsibility of international organisations, attribution would depend on the level of control ('effective control') the international organisation has over the conduct of the troops placed at its disposal. See art 7 of the Draft Articles on the Responsibility of International Organizations (DARIO), (adopted by the International Law Commission at its 63rd session, in 2011, and submitted to the UN General Assembly as a part of the Commission's report covering the work of that session (A/66/10)). However, the ILC left 'effective control' undefined. Regarding 'effective control', Akande notes that an international organisation would only have effective control over troops from a TCC where 'the [organisation] has operational control of it'. See Dapo Akande, 'Classification of Armed Conflicts' in Ben Saul and Dapo Akande (eds), *The Oxford Guide to International Humanitarian Law*, (Oxford University Press 2020) 49. Whether an 'overall control' test should be used rather than an 'effective control' test in attribution of responsibility is debated by scholars. See ICRC 2015 Challenges Report (n 155) 23, footnote 20. See also Tristan Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces' 95 International Review of the Red Cross 891/892 (2013) 561, 591–92. However, the key determinant remains the level of control exercised by the international organisation, in the instant case, the AU, over the troops from the TCC. Attribution based on the control test must be determined in relation to the command and control arrangements of the case at hand. See ICRC 2015 Challenges Report (n 155); Ferraro (n 155) 589; ICRC, 2016 Commentary on the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, para 252. Generally, with regard to AU peace operations, Ferraro notes that the AU's command and control arrangements (such as in its missions in Somalia (AMISOM) and Mali) seem similar to those of the United Nations (UN) peace operations. He submits that, in the case of the UN, there exists a (rebuttable) presumption that only the UN mission is a party to the conflict as the mission generally exercises operational control over military operations, which he notes meets the threshold of effective -and also overall- control. Ferraro explains that 'the formal authority vested in the organisation combined with the [command and control] structure effectively in force generate a presumption that only the UN mission, as a subsidiary organ of the UN, should be deemed party to the armed conflict'. With the AU's structure appearing similar to that of the UN, Ferraro surmises that there would also be a presumption that only the AU mission (the military component) is a party to the conflict. See Ferraro (n 155) 592–94. Akande also asserts, concerning the UN, that in an 'unlikely scenario' where only the UN has effective control of troops placed at its disposal, such troops are a UN organ only and there is no armed conflict between the TCCs and the state (or armed group in the case of a NIAC) being engaged in the conflict. Akande (n 155) 50. He however adds a rider to his statement, i.e., '[u]nless one accepts that attribution of the acts to the UN does not also preclude attribution to the state'; which to the present author indicates that this remains an unsettled issue under IHL and international law more broadly. See Akande (n 155) footnote 152. Generally, it is possible to have dual attribution – i.e., for both the international organisation and the TCC to be deemed parties to the conflict. An example of a case where dual attribution would occur is given as that of the North Atlantic Treaty Organization (NATO) arrangements, where it is stated to be 'almost impossible to discern whether it is NATO itself or the TCCs that have overall or effective control over military operations'. See ICRC 2015 Challenges Report (n 155) 24. See also, Ferraro (n 155) 593–594.

examination of the factual circumstances of the command and control structure within AMISOM reveals that AMISOM has only weak/limited command and control over the TCCs. This largely leaves the TCCs in charge of the sectors of Somalia they have been allocated, 'often without informing or being instructed by AMISOM headquarters (taking orders from their capitals instead), nor [with] much coordination or communication with the other TCCs'.[156] Thus, in the view of the present author, both AMISOM and its TCCs, including Kenya, are to be regarded as parties to the conflict. Therefore, Kenya should be regarded as a party to the NIAC in Somalia both as a result of its operations within and independent of the AMISOM framework.

*Al-Shabaab* has attacked both civilians and security forces in Kenya.[157] In September 2015, Kenya launched Operation *Linda Boni*, with the goal of dislodging *al-Shabaab* militants hiding out in the Boni forest, in Lamu County, Kenya, near the border with Somalia, from where they launched terrorist attacks into Lamu and neighbouring counties.[158] The scope of the operation includes over 10 villages extending from the north-eastern parts of Lamu to the southern part of Garissa county, by the border with Somalia.[159] Operation *Linda Boni* is multi-agency – led by the KDF and the National Police Service. It was originally to last for only 90 days. However,

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156 See Adam Moe Fejerskov *et al*, 'Regional Interests in African Peace Operations' Danish Institute for International Studies (DIIS) Report (2017: 11) 64, <https://pure.diis.dk/ws/files/1234928/DIIS_Report_11_African_peace_WEB.pdf> accessed 20 July 2020. See also in this regard, Dawit Yohannes Wondemagegnehu and Daniel Gebreegziabher Kebede, 'AMISOM: Charting a New Course for African Union Peace Missions' (2017) African Security Review, 26(2)199, 211 and 214; Paul D Williams *et al* (n 152) 73-74, 89; and Jide Martyns Okeke, 'Deadline or Deadlock? AMISOM's Future in Somalia' (October 2019) Institute for Security Studies (ISS) Policy Brief 133, 9 available at <https://issafrica.s3.amazonaws.com/site/uploads/pb133.pdf> accessed 20 July 2020. This examination of the factual circumstances of AMISOM's command and control arrangements would rebut the (rebuttable) presumption which Ferraro had noted, that only AMISOM is a party to the conflict. See Ferraro (n 155) 593. One could even go as far as arguing that only the TCCs in AMISOM are parties to the NIAC in Somalia, based on weak command and control seemingly exhibited by AMISOM over the TCCs.

157 See Joanne Stocker, 'Al Shabaab Attacks Kenya Military Base in Lamu' (*The Defense Post*, 5 January 2020) <https://www.thedefensepost.com/2020/01/05/us-kenya-repel-al-shabaab-attack-lamu-base/> accessed 4 July 2020.

158 Cheti Praxides, 'KDF Tries to Win Hearts and Minds in Lamu' (*The Star*, 20 February 2020) <https://www.the-star.co.ke/counties/coast/2020-02-20-kdf-tries-to-win-hearts-and-minds-in-lamu/> accessed 4 July 2020. The operation is said to be targeted at *Jaysh al-Ayman*, an elite militant wing *of al-Shabaab* stated to comprised mostly of Kenyans, and which was responsible for the Garissa University attack, as well as the Mpeketoni attacks. See Benard Sanga, 'Officers Say Boni Forest Still Dangerous' (*The Standard*, 3 April 2016) <https://www.standardmedia.co.ke/amp/kenya/article/2000196980/officers-say-boni-forest-still-dangerous> accessed 29 August 2020. For more details on *Jaysh al- Ayman*, see Sunguta West, 'Jaysh Al-Ayman: A 'Local' Threat in Kenya' (*The Jamestown Foundation*, 23 April 2018) <https://jamestown.org/program/jaysh-al-ayman-a-local-threat-in-kenya/> accessed 29 August 2020.

159 See Reuben Mwambingu and Murimi Mutiga, 'Why Operation Linda Boni is in Limbo' (*PD Online*, 8 January 2020) <https://www.pd.co.ke/news/national/why-operation-linda-boni-is-in-limbo-19132/> accessed 4 July 2020. Operation *Linda Boni* covers three counties- Lamu, Garissa, and Tana River- which border Somalia. See Praxides 'KDF Tries to Win Hearts and Minds' (n 158).

it has continued to date, with the security forces unable to secure the forest and drive out the militants despite numerous raids and bombing campaigns.[160] Operation *Linda Boni* is now called Operation *Amani Boni.*[161]

While Kenya is involved in an extraterritorial NIAC with *al-Shabaab* in Somalia and thus in the view of the present author, the geographical scope of the armed conflict extends unto the territory of Kenya; only IHL rules dealing with the protection of persons in the power of a conflict i.e. Geneva Law, apply automatically.[162] COH rules for the use of force would only be applicable in Kenya if it is shown that hostilities have spread into Kenyan territory, and then only to the particular areas where hostilities occur. As noted previously in Chapter 2, the test for such spread of hostilities is the same as that for the existence of a NIAC: intense combat and sufficient organisation of the armed group.[163]

Analysing the current situation on the ground in Kenya, while *al-Shabaab* is also active in Kenya, it would be hard to categorise the exchange between Kenyan security forces and *al-Shabaab* on Kenyan territory as that of 'intense combat' except perhaps for the case in specific areas of Kenya- i.e., villages in Lamu, Garissa and Tana River counties- falling under Operation *Linda Boni* (now *Amani Boni*) since 2015. However, this would only be limited to such areas. Hence, COH rules, if applicable in Kenya, would be limited to only those areas being the 'conflict zone'. As a result, all counterterrorism operations in Kenya outside of those areas would fall to be regulated under LE rules for the use of force, that is if the argument that the areas under Operation *Amani Boni* constituting a 'conflict zone' can be sustained.

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160 See Mwambingu and Mutiga (n 159). See generally, Galgalo Bocha, 'How Boni Forest Became the Warzone it is Today' (*Daily Nation,* 19 July 2017) <https://www.nation.co.ke/news/Boni-Forest-the-inside-story/1056-4022288-2kjqr4z/index.html> accessed 4 July 2020; Kalume Kazungu and Galgalo Bocha, 'KDF bombs Boni Forest to flush out al-Shabaab' (*The East African*, 21 August 2017) <https://www.theeastafrican.co.ke/news/ea/KDF-to-start-bombing-of-Boni-Forest/4552908-4064762-wp72y6z/index.html> accessed 4 July 2020; Kalume Kazungu, 'Kitiyo Says Linda Boni has Reduced Shabaab Attacks' (*Daily Nation,* 19 September 2017) <https://www.nation.co.ke/counties/lamu/Operation-Linda-Boni-thumbs-up/3444912-4103270-10uck1rz/index.html> accessed 4 July 2020; and Mohammed Yusuf, 'Civilians Bear Brunt of Terror as Kenya's Operation Against Al-Shabab Continues in Forest' (*VOA,* 17 February 2021) <https://www.voanews.com/a/africa_civilians-bear-brunt-terror-kenyas-operation-against-al-shabab-continues-forest/6184384.html> accessed 26 September 2021.

161 See Cheti Praxides, 'The Charitable Side of KDF in Lamu as Peace Prevails' (*The Star,* 30 March 2021) <https://www.the-star.co.ke/news/big-read/2021-03-30-the-charitable-side-of-kdf-in-lamu-as-peace-prevails/> accessed 26 September 2021. See also Kalume Kazungu, 'Kenya: Two Al-Shabaab Militants Killed in Boni Forest' (*Daily Nation,* 5 June 2021), <https://allafrica.com/stories/202106070327.html> accessed 26 September 2021; Ministry of Defence- Kenya, 'Operation Amani Boni Gets New Commander' 5 March 2021, <https://mod.go.ke/news/operation-amani-boni-gets-new-commander/> accessed 26 September 2021.

162 See Chapter 2, text to note 145.

163 ibid, text to note 152.

### 4.3.2. Kenyan National Legal Framework

Kenya's principal counterterrorism legislation is its Prevention of Terrorism Act, No 30 of 2012 (as amended).[164] Article 2(1) of the Act defines a terrorist act as 'an act or threat of action:'

> (a) which- (i) involves the use of violence against a person; (ii) endangers the life of a person, other than the person committing the action; (iii) creates a serious risk to the health or safety of the public or a section of the public; (iv) results in serious damage to property; (v) involves the use of firearms or explosives; (vi) involves the release of any dangerous, hazardous, toxic or radioactive substance or microbial or other biological agent or toxin into the environment; (vii) interferes with an electronic system resulting in the disruption of the provision of communication, financial, or transport or other essential services; (viii) interferes or disrupts the provision of essential or emergency services; (ix) prejudices national security or public safety; and
>
> (b) which is carried out with the aim of- (i) intimidating or causing fear amongst members of the public or a section of the public; (ii) intimidating or compelling the Government or international organization to do, or refrain from any act; or (iii) destabilizing the religious, political, constitutional, economic or social institutions of a country, or an international organization:
>
> Provided that an act which disrupts any services and is committed in pursuance of a protest, demonstration or stoppage of work shall be deemed not to be a terrorist act within the meaning of this definition so long as the act is not intended to result in any harm referred to in paragraph (a)(i) to (iv).

This definition has been criticised as being too broad and for using vague and unexplained terms such as 'serious risk to the health or safety of the public', 'result in serious damage to property', or that 'prejudices national security or public safety'.[165] The exception clause for protests, demonstrations, and work stoppage,[166] stated to also be vague, was, however, noted as a possible restraint on 'the law's potential for unleashing excessive policing powers'.[167]

Regarding the use of force in counterterrorism policing, the focus of this thesis, the Prevention of Terrorism Act contains no provisions. However, Kenya has other national legislation dealing

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164 The Act was amended in 2014 by the Security Laws (Amendment) Act, No. 19 of 2014.

165 See Open Society Justice Initiative and Muslims for Human Rights (MUHURI), '"We Are Tired of Taking You to Court": Human Rights Abuses by Kenyan's Anti-Terrorism Police Unit' Open Society Foundations, 2013, 62. The terms 'intimidating or causing fear amongst members of the public or a section of the public', 'intimidating or compelling the Government or international organization to do, or refrain from any act', or 'destabilizing the religious, political, constitutional, economic or social institutions of a country, or an international organization'; were also noted to be 'vague'. ibid. The present author notes, however, that while the first two phrases i.e., relating to causing fear among the public, and compelling a government or international organization may indeed be vague, they are the common formulations used in the definition of international terrorism under a number of relevant international treaties to designate the 'terrorist intent'.

166 ibid 62–63.

167 See the proviso to art 2(b)(iii) of the Prevention of Terrorism Act, 2012.

in some detail with the use of force by law enforcement,[168] which are applicable in the case of counterterrorism policing. For example, the National Police Service Act No 11A of 2011 (as amended through 2016) provides in its Sixth Schedule that non-violent means must be attempted as a first resort, with force only to be used where 'non-violent means are ineffective or without any promise of achieving the intended result.'[169] Any force used shall be proportionate to the objective sought, the seriousness of the offence at hand, and the resistance of the suspected offender; and only to the extent necessary in the situation.[170] In the case of firearms, it is provided that they 'may only be used when less extreme means are inadequate and for the following purposes': to save or protect the police officer's life or that of another; in self-defence or to defend another 'against imminent threat of life or serious injury'; to protect 'life and property through justifiable use of force'; in 'preventing a person charged with a felony from escaping from lawful custody'; or to prevent 'a person who attempts to rescue or rescues a person charged with a felony from escaping lawful custody'.[171] These rules relating to the use of firearms are more permissive than international law standards as they allow for the use of firearms in the defence of property and to prevent escape in situations not posing a grave threat to life.[172] There is also no distinction between cases where firearms may be used with the intent to stop the suspect only, and when they can be used with the deliberate intent to kill. It is recalled that firearms (and other lethal weapons) should only be used with intent to kill when it is 'strictly unavoidable in order to protect life'.[173]

Concerning the use of force in custodial settings, the 1962 Prisons Act (as amended through 2016) provides that prison officers can only use force 'against a prisoner as is reasonably

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168 See generally, The Law on Police Use of Force Worldwide, 'Kenya' <https://www.policinglaw.info/country/kenya> accessed 5 July 2020.

169 See National Police Service Act, 2011, Sixth Schedule, A- Conditions as to the Use of Force, para 1.

170 ibid, para 2.

171 See National Police Service Act, 2011, Sixth Schedule, B- Conditions for the Use of Firearms, para 1(a)-(e). When firearms are intended to be used, the police officer shall give a clear warning and allow for sufficient time for such warning to be heeded, except in circumstances where the warning would put him or another at risk of death or serious injury, or where the warning would 'be clearly pointless or inappropriate.' ibid, para 2. It is also provided under the National Police Service Act that police officers 'shall make every effort to avoid the use of firearms, especially against children.' See ibid, art (3). Any use of firearms must be reported to his superior by the police officer in question, even where there are no resultant injuries. ibid, para 4. Where the use of firearms results in 'death, serious injury and other grave consequences', such shall be reported to the Independent Policing Oversight Authority (IPOA), Kenya's civilian oversight mechanism, for investigation. See ibid para 5.

172 See UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (hereafter, 'Basic Principles') (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990) Principle 9. See also, Chapter 2, text to note 70; Law on Police Use of Force Worldwide, 'Kenya' (n 168).

173 Basic Principles, Principle 9. See also, Chapter 2, text to note 86.

necessary in order to make him obey lawful orders which he refuses to obey or in order to maintain discipline in a prison'.[174] Under the Act, weapons including firearms may be used to prevent escape or breaking out, or to disrupt riotous behaviour (where the prison officer has reasonable cause to believe that he cannot otherwise achieve those objectives); and where there is a threat to life or of grave injury and the use of weapons 'is the only practicable way of controlling the prisoner'.[175] These provisions of the Kenyan Prisons Act are more permissive than the international standards. For example, under Principle 15 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, force shall only be used in custodial settings where 'strictly necessary'.[176] On its part, firearms may only be used 'in self-defence or in the defence of others against the immediate threat of death or serious injury, or when strictly necessary to prevent the escape of a person in custody or detention' posing a grave threat to life.[177]

The provisions of the Kenyan Constitution which provide for the right to human dignity and the right to freedom and security of person are also relevant.[178] In addition to this, Kenya also enacted its Prevention of Torture Act in April 2017, giving effect to the prohibition under Articles 25(a) and 29(d) of the Constitution, of torture and cruel, inhuman or degrading treatment or punishment, as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[179]

### 4.3.3. Government Bodies Involved in Counterterrorism Policing

As in the case of Egypt, a range of Kenyan security actors are involved in counterterrorism. These include specialised units under the National Police Service aside from the regular police; the Kenyan Defence Forces; and the National Intelligence Service. The National Counterterrorism Centre is also relevant in this regard. The roles of these bodies are highlighted hereunder.

174 Prisons Act of 1962 (as amended through 2016), art 12.
175 ibid.
176 Basic Principles, Principle 15.
177 ibid Principle 16.
178 See arts 28 and 29 of the Constitution of Kenya, 2010.
179 (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85. See the Prevention of Torture Act, No 12 of 2017, Kenya.

#### 4.3.3.1. The Role of the National Police Service

Apart from the regular police activities, there are some units under the National Police Service which have specialised roles in counterterrorism. The main one is the Anti-Terrorism Police Unit (ATPU), created in 2003 under the Directorate of Criminal Investigations in response to the US Embassy bombing in 1998, and a subsequent 2002 attack on an Israeli-owned hotel complex in Mombasa.[180] The roles of the ATPU include to 'prevent, disrupt and interdict terrorist activities within the country', 'investigate all terrorism related cases'; and 'to lead other agencies at scenes of terrorist related incidents'.[181] The ATPU has been condemned for human rights abuses while countering terrorism.[182]

In addition to the ATPU, the General Service Unit (GSU) is also relevant. The GSU is a paramilitary force in the National Police Service which has as one of its duties, combating terrorism and insurgencies.[183] The GSU has been implicated in some cases of abuses involving the ATPU.[184] The Border Police Unit of the Administration Police is also noted to be involved in counterterrorism activities.[185] The unit which was formerly known as the Rural Border Patrol Unit, was formed in 2008, with its mission being 'to contribute to [n]ational [d]evelopment through interdiction of terrorism activities, small-arms control, and the reduction of cross-border crimes within and along [Kenyan] ports of entry'.[186] As with the ATPU and the GSU,

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180 See Human Rights Watch, 'Kenya: Killings, Disappearances by Anti-Terror Police' (18 August 2014) <https://www.hrw.org/news/2014/08/18/kenya-killings-disappearances-anti-terror-police> accessed 8 July 2020.

181 See Directorate of Criminal Investigations, 'Anti-terrorism Unit (ATPU)' <http://www.cid.go.ke/index.php/sections/formations/atpu.html> accessed 7 July 2020. Other roles of ATPU are stated to include: 'to create profiles for suspected terrorists and keep an updated databank'; 'to share intelligence with other stakeholders'; 'to review and monitor security of vital installations and soft targets'; and to sensitize the police on terrorism awareness on need basis.' ibid.

182 See Human Rights Watch, 'Kenya: Killings, Disappearances by Anti-Terror Police' (n 180).

183 Other duties of the GSU include riot mobs control, and quelling civil disturbances, anti-poaching operations, escort services, and preventing banditry and cattle rustling. See The African Crime and Conflict Journal, 'Kenya's Paramilitary Service Force: The General Service Unit' (10 December 2017) <https://theafricancriminologyjournal.wordpress.com/2017/12/10/last-resort-inside-kenyas-general-service-unit/> accessed 7 July 2020; and Joseph Ndunda, 'Proposal Floated to End GSU Autonomy' (*Daily Nation*, 22 January 2020) <https://www.nation.co.ke/kenya/news/proposal-floated-to-end-gsu-autonomy-243500> accessed 7 July 2020.

184 See Human Rights Watch, 'Kenya: Killings, Disappearances by Anti-Terror Police' (n 180).

185 United States Department of State, 'Country Reports on Terrorism 2019', 22, available at <https://www.state.gov/wp-content/uploads/2020/06/Country-Reports-on-Terrorism-2019-2.pdf> accessed 7 July 2020.

186 Administration Police, 'Border Police Unit' <https://aps.go.ke/bpu/> accessed 26 September 2021. See also Stephen Musau, 'Combating Terrorism and Upholding Human Rights in Kenya' (January 2018) APCOF Research Paper 213.

the Border Police Unit has also been alleged to commit human rights violations during counterterrorism.[187]

#### 4.3.3.2. The Role of the Kenyan Defence Forces

The Kenyan Defence Forces (KDF) are also deployed in counterterrorism operations within Kenya. This for example, was the case in response to the Westgate Shopping Mall attack in 2013.[188] The KDF is also part of the multi-agency operation (Operation *Amani Boni*) in the Boni Forest to flush out *al-Shabaab* operatives from their hideouts.[189] The authority for the deployment of KDF Forces in policing operations is found in section 33 of the Kenya Defence Forces Act of 2012 (as amended in 2016) and Article 241(3)(c) of the 2010 Constitution of Kenya.[190] The KDF has been accused of complicity in human rights violations, including torture and extrajudicial killings, in its conduct of counterterrorism within Kenya.[191]

#### 4.3.3.3. The Role of the National Intelligence Service

The National Intelligence Service (NIS) is a 'disciplined civilian service' which is 'responsible for security intelligence and counter intelligence to enhance [Kenyan] national security'.[192] Regarding communications surveillance, Privacy International noted in 2017 that '[c]ommunications surveillance powers are concentrated around the agency – the NIS – that is subject to the least oversight.[193] The information gathered by the NIS is then fed to other security agencies for direct use in counterterrorism operations.[194] Privacy International noted

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187 See Human Rights Watch, 'Deaths and Disappearances: Abuses in Counterterrorism Operations in Nairobi and Northeastern Kenya' (20 July 2016) <https://www.hrw.org/report/2016/07/20/deaths-and-disappearances/abuses-counterterrorism-operations-nairobi-and#_ftn43> accessed 7 July 2020.

188 See BBC, 'Nairobi Attack: Kenyan Forces 'Clearing' Westgate Centre' <https://www.bbc.com/news/world-africa-24206913> accessed 7 July 2020.

189 In Operation *Amani Boni*, KDF is reportedly working together with the GSU, Rural Border Patrol Unit (now Border Police Unit), Rapid Deployment Unit (of Kenya's Administration Police), Kenya Wildlife Service, and Kenya Forest Service, among others. See Praxides (n 158).

190 Musau (n 186) 10.

191 See for example Patrick Mutahi, 'Just When Kenya's Military Needs More Civilian Oversight, A Proposed Bill Calls for Less' (*African Arguments*, 1 October 2015) <https://africanarguments.org/2015/10/01/just-when-kenyas-military-needs-more-civilian-oversight-a-proposed-bill-calls-for-less/> accessed 7 July 2020; and Kenyan National Commission for Human Rights (KNCHR), '"The Error of Fighting Terror with Terror": Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism' (September 2015) <http://www.knchr.org/Portals/0/CivilAndPoliticalReports/Final%20Disappearances%20report%20pdf.pdf> accessed 7 July 2020.

192 See National Intelligence Service Act of 2011 (as amended through 2014), Kenya, sections 4(1) and 5(1).

193 See Privacy International, 'Track, Capture, Kill: Inside Communications Surveillance and Counterterrorism in Kenya' March 2017, 24, <https://privacyinternational.org/sites/default/files/2017-10/track_capture_final.pdf> accessed 7 July 2020.

194 ibid.

further that: '[t]he NIS share information liberally with police units engaged in grave human rights abuses. Information obtained through communications surveillance is central to the identification, pursuit, and 'neutralisation', or killing, of suspects – a process in which Kenyan citizens' fundamental human rights are seriously abused'. [195]

#### 4.3.3.4. The Role of the National Counter Terrorism Centre

The National Counter Terrorism Centre (NCTC) which was formally established by the Security Laws (Amendment) Act 2014,[196] is the body 'responsible for the co-ordination of national counterterrorism efforts in order to detect, deter and disrupt terrorism acts'.[197] The NCTC is an inter-agency body, consisting of offices from organisations such as the NIS, the KDF, the Attorney General, the Directorate of Immigration and Registration, and the National Police Service.[198] The director of the NCTC is appointed by the Kenyan National Security Council.[199] Among the duties of the NCTC are to 'establish a database to assist law enforcement agencies''; 'conduct public awareness on prevention of terrorism'; 'develop strategies such as counter and de-radicalization'; and to 'facilitate capacity building for counter-terrorism stakeholders'.[200] The NCTC's efforts in this regard have included 'training law enforcement, border control personnel, and those in the prison services'.[201]

In 2016, the Kenyan National Strategy to Counter Violent Extremism (NSCVE) was launched.[202] The aim of the strategy is to 'rally all sectors of Kenyan social, religious, and economic life to emphatically and continuously reject violent extremist ideologies and aims in order to shrink the pool of individuals whom terrorist groups can radicalise and recruit'.[203] The NCTC is the lead agency for coordinating the implementation of the strategy.[204]

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195 ibid 25.
196 See section 40A (1) into the Prevention of Terrorism Act 2012 (as amended by section 74 of the Security Laws (Amendment) Act 2014).
197 ibid section 40B (1).
198 ibid, section 40(A)(1) and (2).
199 ibid section 40(A)(2)(a).
200 ibid section 40 (B)(2).
201 See Action on Armed Violence, 'Kenyan National Counterterrorism Center (NCTC)' (2 March 2016) <https://aoav.org.uk/2016/kenya-national-counterterrorism-center-nctc/> accessed 2 August 2020.
202 See Republic of Kenya, 'National Strategy to Counter Violent Extremism' (September 2016) <https://a940c34f-5a95-4994-ac06-102e48f9da02.filesusr.com/ugd/00daf8_ce5e170ce8ef4c32850f775aaf2ecdbc.pdf> accessed 10 July 2020.
203 ibid 13.
204 ibid 15.

### 4.3.4. The Use of Force in Counterterrorism Policing in Kenya

According to Privacy International, Kenya's counterterrorism operations 'have been particularly brutal and disproportionate'. They note the arrest by security forces of no fewer than 4,000 majority ethnic Somali Kenyans during Operation Usalama Watch, a policing operation launched in April 2014 designed to stop the rise in terror attacks in Kenya.[205] Operation Usalama Watch commenced in Eastleigh, Nairobi, an area mainly populated by ethnic Somalis,[206] and which remained the main focus; but it extended later into other parts of Nairobi, as well as into Mombasa, Nakuru, Thika, Eldoret, Lamu, Malindi, Garissa, Mandera, and Kitale.[207] Privacy International also note the scores of Kenyan citizens most of whom were male and Muslim, who were killed by the police or have been made victims of enforced disappearance by Kenyan security forces during counterterrorism operations.[208]

The Kenyan National Commission on Human Rights (KNCHR), in its report on Usalama Watch, stated that the evidence it gathered indicated that serious violations of human rights -- including violations of the rights to security of person, human dignity, freedom from torture and cruel, inhuman and degrading treatment -- had been committed by the security agencies.[209] According to the KNCHR, they 'received plausible allegations of brutality, sexual harassment and intimidation by security agencies during arrests, while on transit and in detention at police stations'.[210] Allegations include accounts of raids by police officers of businesses and homes, unleashing terror on families under the pretext of searching for weapons and illegal aliens. People also recalled being subject to beatings with fists, kicks, batons, and gun butts by the police while being ordered to produce their identification documents, money, and valuables to avoid arrest.[211] A particular instance of brutality was also noted, wherein a hearing- and speech-impaired female was allegedly pushed off a 3rd floor balcony by the police, leading to serious injuries including a fractured leg and a damaged spine. The police officers had taken her failure

205 ibid 9.
206 See Amnesty International, 'Somalis are Scapegoats in Kenya's Counter-terror Crackdown' (2014) <https://www.amnesty.org/download/Documents/4000/afr520032014en.pdf> accessed 4 September 2020, 4.
207 KNCHR, 'Return of the Gulag: Report of KNCHR investigations into Operation Usalama Watch' (July 2014) 3, available at <https://www.knchr.org/Portals/0/CivilAndPoliticalReports/Report%20of%20KNCHR%20investigations%20on%20Operation%20Usalama%20Watch.pdf?ver=2018-06-06-194906-830> accessed 7 July 2020.
208 ibid.
209 KNCHR 'Return of the Gulag' (n 207) 3.
210 ibid 7.
211 ibid.

to respond to them which was actually caused by her disability, to be 'arrogance and stubbornness'.[212]

KNCHR also found that 'Usalama Watch operation has disproportionately targeted certain groups of people particularly ethnic Somalis and members of the Muslim faith'.[213] KNCHR noted that many instances were recounted by interviewees 'in which security agencies separated ethnic Somalis from other Kenyans even when they were arrested in similar circumstances. The other Kenyans were let free without providing any identification while the Somalis (including those with valid documents) were detained for further screening'.[214]

In a September 2015 report, '"The Error of Fighting Terror with Terror": Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism', the KNCHR also documented over 120 cases of violations of human rights -- inclusive of 25 cases of extrajudicial killings, and 81 cases of forced disappearances – committed in the course of counterterrorism operations by security agencies such as the ATPU, the KDF, and Kenya Police Reservists (KPR), among others.[215] Violations were noted to be 'widespread, systematic and well-coordinated and include but are not limited to arbitrary arrests, extortion, illegal detention, torture, killings and disappearances'.[216] Suspects were alleged to have been detained in 'extremely overcrowded and inhumane and degrading conditions', and many tortured in detention with methods such as 'beatings, waterboarding, electric shocks, genital mutilation, exposure to extreme cold or heat, hanging on trees, mock executions, and exposure to stinging by ants in the wild, denial of sleep and food'.[217]

Particularly, Kenya's Anti-Terrorism Police Unit (ATPU) has been called out by human rights groups for its use of excessive force in its operations. Human Rights Watch notes that the ATPU 'has been responsible for extrajudicial executions, disappearances, and ill-treatment of detainees since 2007'.[218] In a report on research carried out between November 2013 to June

212 ibid.
213 ibid 10.
214 ibid 10–11.
215 See KNCHR, 'The Error of Fighting Terror with Terror' (n 191) 6.
216 See also Human Rights Watch, 'Deaths and Disappearances' (n 187), for an account of abuses such as extrajudicial killings, torture, and enforced disappearances, perpetrated by Kenyan law enforcement agencies (security agencies) such the ATPU, KDF, Rural Border Patrol Unit (now Border Police Unit), GSU, among others, during counterterrorism in north-eastern Kenya between December 2013 and December 2015.
217 ibid.
218 Human Rights Watch, 'Kenya: Counterterrorism Operations Undermine Rights- No Justice for Security Force Abuses' (29 January 2015) <https://www.hrw.org/news/2015/01/29/kenya-counterterrorism-operations-undermine-rights> accessed 7 July 2020.

2014, Human Rights Watch found about 10 cases each of extrajudicial killings and enforced disappearances, as well as 11 cases of 'mistreatment or harassment' of suspected terrorists 'in which there is strong evidence of the counterterrorism unit's involvement, mainly in Nairobi since 2011'.[219] Reportedly, in some of these cases, members of the GSU, Kenyan military intelligence, and the NIS were implicated in the abuses by the ATPU.[220] In three cases of alleged extrajudicial killings, the ATPU had alleged that the victims died as a result of a firefight, but Human Rights Watch found no evidence of a shootout.[221]

In 2013, Open Society Justice Initiative and Muslims for Human Rights (MUHURI) also documented abuses by the ATPU dating back to 2007, inclusive of excessive use of force and torture.[222] The torture methods used by ATPU operatives on terror suspects are allegedly more brutal than those that were documented as used in Guantanamo Bay. One horrific torture method that has been used by ATPU is said to be 'covering a detainee's head with a metallic drum and firing bullets at it'.[223]

There have been allegations that Kenya had a policy of elimination of terrorists, although this has been denied by the government. According to Al Jazeera, four officers from Kenyan security agencies (one from the ATPU, two from the GSU, and one from the National Security Intelligence Service), admitted (on condition of anonymity) that 'the police assassinated suspects on government orders', with such orders originating from the Kenyan National Security Council. A justification for this policy or programme of elimination was said to be the weak Kenyan Judicial system whereby the police failed to gather enough evidence for prosecution of the suspects, hence the assassinations.[224] The intelligence underlying the programme of elimination is allegedly received from Western intelligence agencies.[225] An ATPU officer also allegedly admitted to the BBC (on condition of anonymity) that the ATPU was involved in the killing of a radical preacher, Ibrahim 'Rogo' Omar in Mombasa, in October

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219 See Human Rights Watch, 'Kenya: Killings, Disappearances by Anti-Terror Police' (n 180).

220 ibid.

221 The report states that 'witness descriptions painted to a short-lived, targeted killing by security officers and the scene suggested the shooting was unidirectional without any damage to the surrounding buildings as ATPU had suggested'. ibid.

222 See Open Society Justice Initiative and Muslims for Human Rights (MUHURI) (n 165).

223 See Okurut (n 147) 158–59.

224 See Kris Jepson, 'Al Jazeera Investigative Units Presents: Inside Kenya's Death Squads- Kenya's Counter-terrorism Police Confess to Extrajudicial Killings' (*Al Jazeera)* <https://interactive.aljazeera.com/aje/kenyadeathsquads/#article2> accessed 7 July 2020. See also Al Jazeera America, 'Exclusive: Kenyan Counterterrorism Police Admit to Extrajudicial Killings' (8 December 2014) <http://america.aljazeera.com/articles/2014/12/8/kenyan-counter-terrorismpoliceconfesstoextrajudicialkillings.html> accessed 7 July 2020.

225 Al Jazeera America (n 224).

2013. The Kenyan government denies being involved in Omar's death. However, the ATPU officer was stated as saying: '[t]he justice system in Kenya is not favourable to the work of the police. So we opt to eliminate. We identify you, we gun you down in front of your family, and we begin with the leaders'.[226]

In the same vein, in 2014, after a terror attack (a church shooting) in Mombasa, the County Commissioner is noted, on record, to have declared a shoot-to-kill order against terrorist suspects.[227] According to the Commissioner, Nelson Marwa, it was counter-productive to charge the suspects to court seeing as it was extremely difficult to either prosecute them or find witnesses to testify against them.[228] The difficulty in finding prosecution witnesses was attributed to the fear harboured by witnesses of testifying in terrorism trials, or the execution of potential witnesses by the terrorists themselves.[229] However, this order was countermanded by the Inspector General of Police, David Kimiayo, who asked officers to disregard it as it was against the law.[230]

HAKI Africa, in a report dealing with extrajudicial killings and enforced disappearances of suspected terrorists in Kenya's coastal region between 2012 and November 2016, noted the lack of accountability for and lack of investigation into those abuses perpetrated by the security forces.[231] They also note these abuses on the victims who are Muslims, being part of a wider range of 'iron fist' counterterrorism tactics by the government, have served to alienate many coastal Muslims from the authorities, who are increasingly seen as violators of rights and not protectors of rights.[232] As explained by Hussein Khalid, the executive director of HAKI Africa, the absence of legal means of redress for victims and their families leads to vulnerability to

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226 BBC, 'Kenya's Anti-Terror Forces Face Accusations after Westgate' (19 December 2013) <https://www.bbc.com/news/world-africa-25436316> accessed 7 July 2020.

227 See Stanley Mwahanga, 'Police Issue Shoot to Kill Order on Terrorism Suspects' (*The Standard*, 26 March 2014) <https://www.standardmedia.co.ke/coast/article/2000107870/police-issue-shoot-to-kill-order-on-terrorism-suspects> accessed 12 August 2020; Cecil Yongo, 'Public Pressure, Temptation of Power and Unconstitutional Actions in the War Against Terrorism in Kenya: Suggesting a Link' (January 2016) Strathmore University Law Journal 53, 69.

228 Mwahanga (n 227); Yongo (n 227).

229 Mwahanga (n 227).

230 Nation, 'Kimiayo: We'll Appeal Ruling' (28 March 2014, updated 2 July 2020) < https://nation.africa/kenya/news/kimaiyo-we-ll-appeal-ruling--966796?view=htmlamp> accessed 5 October 2021.

231 See HAKI Africa, 'What do We Tell the Families? Killings and Disappearances in the Coastal Region of Kenya, 2012-2016' (December 2016) <http://hakiafrica.or.ke/wp-content/uploads/2019/01/HakiAfricaWDWTTF_V14.pdf> accessed 10 July 2020, 5–6.

232 ibid 4.

recruitment into terrorist groups, who offer solace to the victims.[233] Buttressing this statement by the executive director is the fact that al-Shabaab is reported to have played on the 'real and perceived grievances' experienced by Kenyan Muslims (ethnic Somalis and non-Somali Muslims) at the hands of security agencies, in its recruitment efforts in Kenya.[234] *Al-Shabaab* is noted to have especially found success with this strategy in the coastal areas where inhabitants are predominantly Muslim.[235] There is also a background of existing social grievances such as marginalisation, in the coastal areas, as well as in north-east Kenya.[236]

### 4.4. Nigeria: A Short Socio-Political Background

Nigeria (officially the 'Federal Republic of Nigeria') is the most populous nation on the African continent with an estimated population of about 213 million.[237] Nigeria also currently has the largest economy in Africa.[238] While Nigeria has no state religion,[239] it is nearly equally split into a mainly Muslim north and a mainly Christian South.[240] Religion is noted to play 'a very vital and influential role in the [Nigerian] society that has manifested itself as a potent force in the political development of the Nigerian state from pre-independence to post-independence'.[241] Indeed, according to Danjibo, '[h]ardly can the Nigerian state be talked about without reference to religion'.[242]

Nigeria returned to civilian rule in May 1999 after enduring several years of repressive military regimes.[243] Unfortunately, human rights violations in Nigeria did not cease upon transition to

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233 Ramadhan Rajab, 'Extrajudicial Killings an Epidemic, Haki Africa Says, Details 81 cases' (*The Star*, 7 December 2016) <https://www.the-star.co.ke/news/2016-12-07-extrajudicial-killings-an-epidemic-haki-africa-says-details-81-cases/> accessed 1 August 2020.

234 See Anne Speckhard and Ardian Shajkovci 'The Jihad in Kenya: Understanding Al-Shabaab Recruitment and Terrorist Activity inside Kenya—in Their Own Words' (2019) 12(1) African Security 3, 13-14.

235 ibid 14.

236 See BBC, 'In Prison with Al-Shabaab: What Drives Somali Militants' (5 October 2013) <https://www.bbc.com/news/world-africa-24379013> accessed 4 September 2020.

237 Worldometer. 'Nigeria Population' <https://www.worldometers.info/world-population/nigeria-population/> accessed 26 September 2021.

238 See Statista, 'African Countries with the Highest Gross Domestic Product (GDP) in 2021' <https://www.statista.com/statistics/1120999/gdp-of-african-countries-by-country/> accessed 24 September 2021.

239 See section 10 of the Constitution of the Federal Republic of Nigeria (as amended).

240 See generally, Haldun Çancı and Opeyemi Adedoyin Odukoya, 'Ethnic and Religious Crises in Nigeria: A Specific Analysis upon Identities (1999-2013)', (2016) 16(1) African Journal on Conflict Resolution 87, 95.

241 ND Danjibo, 'Islamic Fundamentalism and Sectarian Violence: the "Maitatsine" and "Boko Haram" Crises in Northern Nigeria' (2009) Peace and Conflict Studies Paper Series, Institute of African Studies, University of Ibadan 3.

242 ibid.

243 Between 1966 and 1999, Nigeria was ruled by successive military regimes except for a brief period between 1979 and 1983 when there was a brief return to civil rule (later truncated by a *coup d'état*); and another period from 27 August 1993 to 17 November 1993 when there was an Interim National Government.

civilian democratic rule in 1999.[244] Among some of the most rampant abuses are those perpetrated by the Nigerian police. The Nigerian police is noted to 'have a long history of engaging in unprofessional, corrupt, and criminal conduct, and using excessive and often brutal force',[245] with the use of violence, repression, and excessive force, a legacy from its origins under the British colonial government.[246] The Nigerian police has been implicated in several cases of extrajudicial killings, torture, and other forms of ill-treatment.[247] The #EndSARS protests in Nigeria in October 2020 were driven by a long history of brutality by a notorious (now-disbanded) specialist police unit, the Special Anti-Robbery Squad (SARS).[248] Nigerian security forces are accused of opening fire on protesters in Lagos on 20 October 2020, resulting in at least 12 fatalities.[249]

### 4.4.1. Terrorism in Nigeria

Chuku *et al* note that '[t]errorism related activities are not altogether new in Nigeria'.[250] The authors further state that 'these terrorism-related crimes have been escalated by the multi-faceted political and religious demands of different competing groups, and for reasons of ethnic fractionalization'; with the most contentious matters stated to include 'demands for appropriation of oil rents, reforms in fiscal federalism and political restructuring'[251]. These are

244 See generally, Alka Jauhari, 'Colonial and Post-colonial Human Rights Violations in Nigeria', (May 2011) 1(5) International Journal of Humanities and Social Science, 53.

245 See Human Rights Watch, '"Everyone is in the Game": Corruption and Human Rights Abuses by the Nigerian Police Force' (2010) 12, available at <https://www.hrw.org/sites/default/files/reports/nigeria0810webwcover.pdf> accessed 9 July 2020.

246 ibid 13–14.

247 See for example, Open Society Justice Initiative and Network on Police Reform in Nigeria (NOPRIN), 'Criminal Force: Torture, Abuse, and Extrajudicial Killings by the Nigerian Police Force', Open Society Institute and the Network on Police Reform in Nigeria (NOPRIN), 2010, available at <https://www.justiceinitiative.org/uploads/8063279c-2fe8-48d4-8a17-54be8ee90c9d/criminal-force-20100519.pdf> accessed 9 July 2020; Leighann Spencer, '#EndSARS; Why a Few Reforms Won't Fix the World's Worst Police Force' (*African Arguments*, 7 December 2017) <https://africanarguments.org/2017/12/07/nigeria-endsars-why-a-few-reforms-wont-fix-the-worlds-worst-police-force/> accessed 9 July 2020; Amnesty International, 'Nigeria: Time to End Impunity: Torture and Other Violations by Special Anti-Robbery Squad (SARS)' Amnesty International Nigeria, 2020, available at <https://reliefweb.int/sites/reliefweb.int/files/resources/AFR4495052020ENGLISH.PDF> accessed 9 July 2020.

248 See Al Jazeera, 'Timeline: #EndSARS Protests in Nigeria' 22 October 2020, <https://www.aljazeera.com/news/2020/10/22/timeline-on-nigeria-unrest> accessed 26 September 2021.

249 ibid.

250 Chuku *et al*, 'Growth and Fiscal Consequences of Terrorism in Nigeria', (September 2017), African Development Bank Working Paper Series, No. 284, 6, available at <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/WPS_No_284_Growth_and_Fiscal_Consequences_of_Terrorism_in_Nigeria_A.pdf> accessed 9 July 2020.

251 ibid.

said to be the principal causes of the 'emergence of militia and terrorist groups in the southern and northern regions [of Nigeria] respectively'.[252]

Several groups in Nigeria's history could be noted to have either qualified as terrorist groups or have clearly employed terror tactics. One of these, the *Maitatsine* sect, is said to have unleashed 'a carefully planned series of terrorist acts that spanned five years and cut across virtually all the northern states'.[253] Particularly, the December 1980 riots involving the sect resulted in over 4,000 deaths in Kano state, along with considerable property loss.[254] Among other groups that have employed terror tactics are the Niger Delta militant groups, such as the Niger Delta Peoples' Volunteer Force (NDPVF) and the Movement for the Emancipation of the Niger Delta (MEND), which engaged in vandalization of oil pipelines, bombing and other attacks on oil installations in Nigeria, kidnapping foreign oil workers as well as holding them hostage, among others.[255] The violence by the militants in the oil-rich Niger Delta is stated to have been aimed at 'intimidating the Nigerian government into addressing what is considered the state-orchestrated marginalisation and repression of the interests of the people of that region'.[256] Fulani herdsmen militia groups are also noted to perpetrate terror attacks especially against farmers in Nigeria.[257] The majority of the terror-related deaths in Nigeria in 2018 are attributed to the militant herdsmen, with a total of 1,158 fatalities.[258]

Most notorious and specifically associated with terrorism in Nigeria is the fundamentalist Islamic group, *Boko Haram*, which is predominantly active in the north-eastern states of Borno, Adamawa, and Yobe.[259] The group has carried out attacks against religious and political groups in Nigeria, as well as the police, military, and civilians.[260] *Boko Haram* was founded in the early 2000s with the aim of creating an Islamic state in Nigeria ruled by Sharia law. It was able

252 ibid.
253 The *Maitatsine* was an Islamic fundamentalist group which used guerrilla tactics on security agents and regular citizens, the violence lasting between 1980 to 1985. See Olajide O Akanji, 'The Politics of Combating Domestic Terrorism in Nigeria', in Okumu and Botha (n 147) 55, 60.
254 The Nigerian Army had to be deployed by then President Shagari as the police could not get the riots which lasted about 11 days, under control. Danjibo (n 241) 9.
255 See Akanji (n 253) 58–59.
256 ibid 55.
257 See Bayo Akinloye, 'Report: Fulani Herdsmen Killed 2,539 Nigerians in 654 Attacks' 9*ThisDay*, 7 June 2020 <https://www.thisdaylive.com/index.php/2020/06/07/report-fulani-herdsmen-killed-2539-nigerians-in-654-attacks/> accessed 9 July 2020.
258 See Institute for Economies and Peace (n 120) 21.
259 It is said that Boko Haram's April 2014 kidnapping of over 200 secondary school girls drew international attention to the threat from the group and the inability of the Nigerian government in handling the threat. See Council on Foreign Relations, 'Boko Haram in Nigeria' <https://www.cfr.org/global-conflict-tracker/conflict/boko-haram-nigeria> accessed 9 July 2020.
260 ibid.

to attract a strong following especially among the poor and unemployed youths, who harboured resentment against the political elite for their plight.[261] As a result of an uprising by the group in July 2009 lasting several days, a full-scale military operation was ordered by the Nigerian government, resulting in the arrest and subsequent extrajudicial murder of Mohammed Yusuf, *Boko Haram*'s leader, at the hand of the Nigerian police.[262] This is said to have further radicalised the group, leading to greater violence in Northern Nigeria as 'its terrorism entered a new dimension',[263] escalating until the crisis was determined to have reached the threshold of a NIAC since at least May 2013.[264]

In 2014, states in the Lake Chad Basin created the Multinational Joint Task Force (MNJTF) to combat the activities of *Boko Haram* in the region. The MNJTF is composed of troops contributed by Cameroon, Chad, Niger, and Nigeria, as well as Benin.[265] The deployment of the MNJTF was authorised by the AU Peace and Security Council in 2015.[266] Since 2016, the original *Boko Haram* has been split into two main factions- *Jama'atu Ahlis Sunna Lidda'awati Wal-Jihad* (JAS- often still referred to as *Boko Haram*[267]), and Islamic State in West Africa Province.[268] As of today, Nigeria is involved in parallel NIACs with each faction.[269] The death

261 See generally, Freedom C Onuoha, 'The Audacity of Boko Haram: Background, Analysis and Emerging Trend', Security Journal, advance online publication, 13 June 2011; doi: 10.1057/sj.2011.15, 1, 7–8.

262 See generally, Antonio Cascais, '10 Years of Radicalization: Boko Haram' (*DW*, 29 July 2019) <https://www.dw.com/en/10-years-of-radicalization-boko-haram/a-49781704> accessed 9 July 2020; Al Jazeera, 'Boko Haram: Behind the Rise of Nigeria's Armed Group' (*Al Jazeera Special Series*, 22 December 2016) <http://www.aljazeera.com/programmes/specialseries/2016/11/boko-haram-rise-nigeria-armed-group-161101145500150.html> accessed 9 July 2020.

263 Cascais (n 262).

264 See Office of the Prosecutor, International Criminal Court (2013), 'Report on Preliminary Examinations Activities 2013', November 2013, paragraph 218, <https://www.icc-cpi.int/OTP%20Reports/otp-report-2013.aspx> accessed 9 July 2020.

265 International Crisis Group, 'What Role for the Multinational Joint Task Force in Fighting Boko Haram?' Africa Report No 291, 7 July 2020, i, <https://reliefweb.int/sites/reliefweb.int/files/resources/What%20role%20for%20the%20multinational%20Joint%20Task%20Force%20in%20fighting%20Boko%20Haram.%20Africa%20Report%20N%C2%B0291%20-%207%20July%202020.pdf> accessed 2 August 2020.

266 ibid.

267 See John Campbell, 'Boko Haram is Back in the Media Spotlight but It Was Never Really Gone' (*Council on Foreign Relations*, 20 September 2019) <https://www.cfr.org/blog/boko-haram-back-media-spotlight-it-was-never-really-gone> accessed 9 July 2020.

268 See generally, Omar S Mahmood and Ndubuisi Christian Ani 'Factional Dynamics Within Boko Haram' (July 2018) Institute for Security Studies (ISS) Research Report, <https://issafrica.s3.amazonaws.com/site/uploads/2018-07-06-research-report-2.pdf> accessed 9 July 2020.

269 See RULAC, 'Nigeria' (last updated 15 March 2020) <http://www.rulac.org/browse/countries/nigeria#collapse1accord> accessed 9 July 2020.

of the leader, Abubakar Shekau in May 2021, however, is believed to have severely weakened the *Boko Haram* faction.[270]

Recently, there have been an increase in activities of criminal gangs generally referred to as bandits, in Nigeria's North-western and North-central regions, further heightening the insecurity in the country.[271] In addition to attacks on local communities, the armed bandits have carried out many mass abductions, especially from schools.[272] These bandits are alleged to have some involvement with *Boko Haram*, 'either directly or by means of collaboration'.[273]

### 4.4.2. Nigerian National Legal Framework

Nigeria's principal counterterrorism law is the Terrorism (Prevention) Act 2011 (as amended).[274] The Act defines acts of terrorism in its section 1(3) and (4)[275] as:

> … an act which is deliberately done with malice aforethought and which: (a) may seriously harm or damage a country or an international organization;(b) is intended or can reasonably be regarded as having been intended to - (i) unduly compel a government or international organization to perform or abstain from performing any act, (ii) seriously intimidate a population, (iii) seriously destabilize or destroy the fundamental political, constitutional, economic or social structures of a country or an international organization, or (iv) otherwise influence such government or international organization by intimidation or coercion; and (c) involves or causes, as the case may be - (i) an attack upon a person's life which may cause serious bodily harm or death; (ii) kidnapping of a person; (iii) 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; (iv) the seizure of an aircraft, ship or other means of public or goods transport and diversion or the use of such means of transportation for any of the purposes in paragraph (b) (iv) of this subsection; (v) the 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 without lawful authority; (vi) the

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270 See, for example Jeff Seldin, 'Nigeria Says "Safe to Assume" Boko Haram Leader is Dead' (*Voice of America*, 24 August 2021) <https://www.voanews.com/a/africa_nigeria-says-safe-assume-boko-haram-leader-dead/6209934.html> accessed 14 October 2021; Moki Edwin Kindzeka, 'Cameroon Repatriates Nigerian Ex-Fighters, Family Members' (*Voice of America*, 20 September 2021) <https://www.voanews.com/a/cameroon-repatriates-nigerian-ex-fighters-and-their-family-members/6235699.html > accessed 14 October 2021.

271 Philip Obaji Jr, 'Why Insurgent and Bandit Attackers are Intensifying in Nigeria' (*TRT World*, 7 May 2021) <https://www.trtworld.com/magazine/why-insurgent-and-bandit-attacks-are-intensifying-in-nigeria-46539> accessed 27 September 2021.

272 See Oluwole Ojewale, 'Rising Insecurity in Northwest Nigeria: Terrorism Thinly Disguised as Banditry' (*Brookings*, 18 February 2021) <https://www.brookings.edu/blog/africa-in-focus/2021/02/18/rising-insecurity-in-northwest-nigeria-terrorism-thinly-disguised-as-banditry/> accessed 27 September 2021; Obaji (n 271).

273 Obaji (n 271). See also, Malik Samuel, 'Boko Haram Teams Up with Bandits in Nigeria' (ISS Today, 3 March 2021) <https://issafrica.org/iss-today/boko-haram-teams-up-with-bandits-in-nigeria> accessed 27 September 2021.

274 The Terrorism (Prevention) Act No 10, 2011 was amended by the Terrorism (Prevention) (Amendment) Act, 2013.

275 Originally section 1(2) and (3) prior to the Terrorism (Prevention) (Amendment) Act in 2013.

> release of dangerous substance or causing of fire, explosions or floods, the effect of which is to endanger human life; (vii) interference with or disruption of the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life; (d) an act or omission in or outside Nigeria which constitutes an offence within the scope of a counter terrorism protocols and conventions duly ratified by Nigeria.
>
> An act which disrupts a service but is committed in pursuance of a protest. However, demonstration or stoppage of work is not a terrorist act within the meaning of this definition provided that the act is not intended to result in any harm referred to in subsection (2)(b)(i), (ii), or (iv) of this section.

Sampson and Onuoha note that the Terrorism (Prevention) Act 'has defined terrorism in such a manner that [tends] to subsume almost all violent organized crimes under its definitional tenor, which, though prohibited, may not necessarily harbour terrorist intents'.[276] They give an example of 'acts of kidnapping' which has become rampant in Nigeria, as one such act that may fall to be treated under the Act as terrorism without such intent.[277] The present author believes that this should not be the case, as the provisions of section 1(2) (b) of the Act set out the 'intent' necessary for an act to qualify as terrorism under the Act. Only when such intent is present would an act be deemed a 'terrorist act'.

While the Terrorism (Prevention) Act (as amended) gives law enforcement agencies extensive intelligence gathering and investigation powers,[278] it only addresses the use of force in counterterrorism policing with regard to the detention of a suspect for a terrorism-related offence until the conclusion of the investigation and prosecution of the matter. Under section 27(1) of the Act, a court may grant an *ex parte* order for such detention, for a period of time not exceeding 90 days (but which can be renewed). Section 27(2) of the Act then goes ahead to provide that '[a]ny officer of the law enforcement or security agency may use such force as may be reasonably necessary for the exercise of the powers conferred by subsection (1)'.

However, Nigerian law contains provisions for the use of force by law enforcement, which are applicable in the case of counterterrorism.[279] The Constitution of the Federal Republic of Nigeria (amended), provides for the right to life in its section 33(1), stating that no person shall be intentionally deprived of his life except in execution of a court sentence in a criminal case held in Nigeria. Section 33(2) however allows for deprivation of life where a person dies from

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276 Isaac Terwase Sampson and Freedom C Onuoha, '"Forcing the Horse to Drink or Making it Realise its Thirst"? Understanding the Enactment of Anti-Terrorism Legislation (ATL) in Nigeria', (September 2011) 5(3-4), Perspectives on Terrorism 33, 46.

277 ibid.

278 See section 1(A)(3)-(6) of the Terrorism (Prevention) Act as amended.

279 See generally, The Law on Police Use of Force Worldwide, 'Nigeria', <https://www.policinglaw.info/country/nigeria> accessed 10 July 2020.

the use of reasonably necessary force 'in such circumstances as are permitted by law', and in 'defence of any person from unlawful violence', in 'defence of property', or 'to effect a lawful arrest or to prevent the escape of a person lawfully detained'.[280] It is submitted that this provision is more permissive than international standards as it could be interpreted to allow for intentional lethal force when not strictly unavoidable in order to protect life; and also because it allows for the use of lethal force at all in defence of property.[281] It is noted that the Constitution also provides in its Section 34, for the right to dignity of person, prohibiting torture and inhuman or degrading treatment.[282] The Anti-Torture Act of 2017 was enacted to criminalise acts of torture and other ill-treatment, and to establish penalties for such violations.[283] The provisions of the Nigeria Police Act of 2020 are also relevant. Per the Act, '[a] suspect or defendant may not be handcuffed, bound or subjected to restraint except: (a) there is reasonable apprehension of violence or an attempt to escape; (b) the restraint is considered necessary for the safety of the suspect or defendant; or (c)by order of court'.[284]

The Administration of Criminal Justice Act (ACJA) of 2015 (which is applicable in the Federal Capital Territory and other federal courts); the Criminal Code Act of 1916 (generally applicable in the southern states of Nigeria);[285] the Criminal Procedure Act of 1945; and the Criminal Procedure Code of 1960;[286] also contain rules relevant to the use of force in law enforcement. For example, the ACJA provides in section 5, concerning arrests, that '[a] suspect or defendant may not be handcuffed, bound or be subjected to restraint except: (a) there is reasonable apprehension of violence or an attempt to escape; (b) the restraint is considered necessary for the safety of the suspect or defendant; or (c) by order of a court'.[287] This would be directly

280 It is noted that section 33(2) also allows for deprivation of life 'for the purpose of suppressing a riot, insurrection, or mutiny'.

281 Section 33(2)(c) of the Constitution of the Federal Republic of Nigeria (as amended) also allows for the use of reasonably necessary force in 'suppressing a riot, insurrection or mutiny'.

282 See section 34 of the Constitution of the Federal Republic of Nigeria (as amended).

283 See Anti-Torture Act 2017, Nigeria.

284 See section 34 of the Nigerian Police Act, 2020.

285 The Criminal Code is contained in the Schedule to the Criminal Code Act.

286 As of writing, 29 states in Nigeria have adopted their own Administration of Criminal Justice Laws (ACJLs). For the list of states who have done so, see ACJL tracker, <https://www.partnersnigeria.org/acjl-tracker/>, accessed 18 October 2021. For the states which have no ACJLs, the Criminal Procedure Act (applicable in Southern states in Nigeria) or the Criminal Procedure Code (applicable in Northern states in Nigeria) continue to apply.

287 This is identical to the provision in section 34 of the Nigerian Police Act, 2020. For a similar provision, see section 4 of the Criminal Procedure Act. Section 8(1) of the ACJA also provides for respect for the right to dignity of the suspect, stating that he shall be given humane treatment, and not be subject to torture, or ill-treatment.

applicable to terrorist suspects. The Criminal Procedure Code allows use of 'all means necessary' to effect an arrest where there is resistance or attempted evasion.[288]

Section 271 of the Criminal Code allows for the use of reasonably necessary force to prevent avoidance of arrest for a felony (and in a case where the offender may be arrested without a warrant); and where the punishment for the offence is death or not less than seven years imprisonment, a suspect may be killed if there are no other means to effect an arrest. This provision, which violates the international standards for the use of force as it allows for intentional lethal force where not strictly unavoidable to protect life, would be applicable in the case of terrorism as it is a felony under Nigerian law,[289] and suspects can be arrested without a warrant.[290] The punishment for committing an act of terrorism is also conviction to maximum of a death sentence.[291] Section 273 similarly allows the use of reasonably necessary force to prevent the escape or rescue of an arrested suspect. Where the offence is one that may be arrested without a warrant (such as terrorism), force can be used 'which is intended or is likely to cause death or grievous harm'. This also falls foul of the international standards for the use of force by law enforcement. Section 281 of the Criminal Code also allows any person to use reasonably necessary force to prevent the commission of an offence for which a person may be arrested without a warrant or to prevent any act, which he believes on reasonable grounds, would amount to such an offence if done.

The 2019 Reviewed Police Force Order 237 which provides a manual on the use of force, firearms, and less-lethal weapons for police officers, is also of great relevance.[292] This Reviewed Order attempts to provide a guide on the use of force and firearms which is in step with the international standards. Order 237, as it stood before revision, was very permissive.[293] For instance, it permitted the use of firearms by a police officer not only in self-defence with regard to a threat to life, but also to defend another who is being attacked where there are no

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288 See section 31 of the Criminal Procedure Code.

289 A felony means 'any offence which is declared by law to be a felony, or is punishable, without proof of previous conviction, with death or with imprisonment for three years or more'. See section 3 of the Criminal Code. Terrorism qualifies as a felony as it is punishable upon conviction to a maximum of death sentence. See section 1(2) of the Terrorism (Prevention) Act (as amended).

290 See section 5 of the Criminal Code which notes that '[e]xcept when otherwise stated, the fact that an offence is within the definition of a felony as set forth in this code imports that the offender may be arrested without warrant'. Terrorism is a felony under Nigerian law and there is no requirement that the offender cannot be arrested without a warrant.

291 See section 1(2) of the Terrorism (Prevention) Act (as amended).

292 The Nigerian Police Force, 'Reviewed Police Order 237: Manual of Guidance on the Use of Force, Firearms and Less Lethal Weapons by Police Officers' (2019).

293 See generally, Force Order 237 (Nigeria), Rules of Guidance in Use of Firearms by the Police.

other means to do so; if necessary to disperse a riot or prevent the rioters 'from committing serious offences against life and property'; to arrest a person who escapes lawful custody when the offence at hand is a felony (such as terrorism) or a misdemeanour;[294] or to arrest a person fleeing arrest when the offence is punishable by death or not less than seven years imprisonment, where he cannot do so by any other means.[295]

However, the Reviewed Police Force Order 237 on its part, authorises the use of firearms (or other lethal/potentially lethal force) under the following circumstances: when there is an imminent threat to life or of serious injury to the officer and there is no alternative means to remove the threat; in defence of another from imminent death or serious injury where he cannot otherwise do so; 'when necessary to disperse violent assemblies' where 'there is an imminent threat of death or serious injury, and less extreme means are insufficient' (and only against the particular individual(s) posing such threat); or, in order to arrest a person escaping lawful custody or avoiding arrest, where such person 'poses a threat of imminent death or injury to the police and innocent persons', and there are no other means to do so.[296] Concerning counterterrorist activity, it is noted in the Reviewed Order that it may be appropriate for senior officers to direct that shots be fired in instances where such is necessary, for example, in a siege or a terrorist incident; although such direction would not remove the personal responsibility of the individual or senior officer from ensuring that such use of force is justified under the law.[297] This is a clear indication that the rules in the Revised Order would apply to all counterterrorism operations which fall within the realm of law enforcement.

These reviewed provisions are much more in line with the international standards for the use of force and firearms than the previous version of the Order and the provisions of the Criminal Code. They even go beyond the international standards in some respects, such as requiring 'threat of imminent death or injury' in the case of persons escaping custody or avoiding arrest, rather than just 'grave threat to life'. It is recalled that firearms can be used against persons posing a grave threat to life, i.e., an ongoing threat to life, such as terrorist suspects.[298] It is,

294 A misdemeanour means 'any offence which is declared by law to be a misdemeanour, or is punishable by imprisonment for not less than six months, but less than three years'. See section 3 of the Criminal Code.

295 See generally, Force Order 237 (n 293) para 3(a)-(e). It has been noted that the provisions of the original Order 237 were 'made possible' by the extant Nigerian legislation on the use of force such as under the Criminal Code and the Constitution. See generally, The Law on Police Use of Force Worldwide, 'Nigeria' (n 279).

296 See Reviewed Police Order 237 (n 292) Section Two, Part K, paras 2.1(a)-(e), and 2.2.

297 ibid Part I, para 2.2.

298 See Chapter 2, text to notes 70 and 76.

however, noted that despite this Reviewed Police Order, the provisions of Nigerian law relating to the use of force by law enforcement such as in the Criminal Code have not been amended and remain extant law.[299]

The Nigerian Prisons Act of 1972 also regulates the use of force in custodial settings. Under the Act, a prison officer may use weapons (and, as far as possible, only with the intention to disable not kill) to prevent escape where there are no other means to do so; to forestall a breakout; or, in self-defence or in defence of another in case of a threat to life or limb, or grievous hurt.[300] This is more permissive that the international standards as it still allows for the intentional use of lethal force where it is not strictly unavoidable in order to protect life.

### 4.4.3. Government Bodies Involved in Counterterrorism Policing

Several government agencies are involved in counterterrorism in Nigeria. They include the Office of the National Security Adviser (ONSA); Nigerian Police Force (particularly the counterterrorism unit); the Nigerian Military; the Nigeria Security and Civil Defence Corps (NSCDC); the Civilian Joint Task Force; among others. The roles of these agencies are examined briefly, hereunder.

#### 4.4.3.1. The Role of the Office of the National Security Adviser

The Office of the National Security Adviser (ONSA) is the body designated under the Terrorism (Prevention) Act 2011 (as amended) to coordinate counterterrorism activities by all security and enforcement agencies in Nigeria.[301] Specifically, ONSA is mandated to 'provide support to the relevant security, intelligence, law enforcement agencies, and military services to prevent and combat acts of terrorism in Nigeria'; develop a counterterrorism strategy for Nigeria; and to 'build capacity for the effective discharge of the functions of relevant security,

299 The Reviewed Police Order recognises the Nigerian constitution and the Criminal Code as sources of rules for the use of force in Nigeria. See Reviewed Police Order 237 (n 292) Section Two, Part A, para 2.4. It further states that '[t]he use of force and firearms by police officers, as authorized under Nigerian laws, is also in compliance with the rules set out under the African Charter on Human and People's Rights, the International Covenant on Civil and Political Rights (ICCPR) and the Basic Principles on the Use of Force and Firearms (BPUFF) by Law Enforcement Officials (BPUFF) [*sic*]'. See ibid, para 2.5. This would imply that the extant Nigerian law on the use of force accords with international standards. This is even when the Reviewed Order recognises that some provisions of the Criminal Code are overly broad and recommends that officers take a more restrictive approach. See for example, Section Two, Part F, para 2.1.

300 See section 10 of the Nigerian Prisons Act of 1972.

301 See section 1A of the Terrorism (Prevention) Act (as amended).

intelligence, law enforcement and military services'.[302] Pursuant to this, the Counter-Terrorism Centre (CTC), located in the ONSA, was established.[303]

ONSA coordinates the implementation of the Nigerian National Counter Terrorism Strategy (NACTEST) in 2014 (revised in 2016).[304] The document generally sets out the nation's strategy for tackling terrorism, outlining the objectives to be achieved and measures to be used in that regard. In addition to this is the Nigerian Policy Framework and National Action Plan for Preventing and Countering Violent Extremism,[305] whose implementation is also coordinated by ONSA. The Policy Framework and National Action Plan presents non-kinetic measures for addressing the threat of violent extremism, with the understanding that kinetic measures alone cannot tackle the root causes.[306]

#### 4.4.3.2. The Role of the Nigerian Police Force

Under NACTEST, the Nigerian Police Force (NPF) is noted to have the role of the first responder in the five strands of the strategy.[307] Aside from regular policing activities, the Nigerian Police Force has a specialised counterterrorism unit called the Anti-Terrorism Squad. This squad is responsible for carrying out specialized operations, investigations, and interdicting terrorist acts.[308] The squad is headed by a Commissioner of Police. It is noted that the Nigerian police has been implicated in human rights abuses in counterterrorism.[309]

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302 ibid, (1)(a)-(c).

303 See Office of the National Security Adviser Counter Terrorism Centre, 'About CTC' <https://ctc.gov.ng/about-ctc/> accessed 2 September 2020.

304 See Office of the National Security Adviser, 'Nigerian National Counter Terrorism Strategy (NACTEST)' 2016 (revised) <http://ctc.gov.ng/wp-content/uploads/2017/04/NACTEST.pdf> accessed 11 July 2020. NACTEST is founded on 5 workstreams/strands: (a) 'Forestall- To stop people from becoming or supporting terrorism'; (b) 'Secure- Strengthen protection capacity against terrorist attacks'; (c) 'Identify- Pre-emption through detection, early warning and ensuring that terrorist acts are properly investigated'; (d) 'Prepare- To mitigate the impact of terrorist attacks by building resilience and redundancies to ensure continuity of business'; and (e) 'Implement- 'A framework for the mobilization of coordinated cross-governmental efforts'. See ibid 2–3.

305 See Federal Republic of Nigeria, 'Nigerian Policy Framework and National Action Plan for Preventing and Countering Violent Extremism' (August 2017) <https://ctc.gov.ng/wp-content/uploads/2020/03/PCVE-NSA-BOOK-1.pdf> accessed 2 September 2020.

306 ibid 13. The 'core objectives' of the Policy Framework and National Plan are listed as: '1) Institutionalise, mainstream and coordinate PCVE programmes at national, state and local levels; 2. Strengthen accessible justice system and respect for human rights and rule of law; 3) Enhance capacity of individuals/communities to prevent and counter violent extremism; and recover from violent occurrences; 4) Institutionalise, mainstream and integrate strategic communication in PCVE programmes at all levels'. ibid 12–13.

307 See Office of the National Security Adviser, 'NACTEST' (n 304) 45.

308 See Nigerian Police Force, 'Anti-Terrorism Squad' <https://www.npf.gov.ng/formations/anti_terrorism.php> accessed 10 July 2020.

309 See for example, Human Rights Watch, 'Spiraling Violence: Boko Haram Attacks and Security Force Abuses in Nigeria' < https://www.hrw.org/sites/default/files/reports/nigeria1012webwcover_0.pdf > 60-64.

#### 4.4.3.3. The Role of the Nigerian Military

The Nigerian military plays a major role in counterterrorism in Nigeria. With regard to the *Boko Haram* insurgency, the military has been involved in battling the terrorist group since 2009, a long time before the conflict was determined to be a NIAC, having been deployed by the President in that regard. Under the Nigerian Constitution, the President is empowered to deploy the state's armed forces to suppress insurrections or aid civil authorities in restoring order within the state.[310] The Nigerian military has been accused of committing human rights violations in the course of counterterrorism as well as of perpetrating war crimes in the fight against the *Boko Haram* insurgency.[311] It is noted that the operations of the military largely fall to be assessed within the IHL rules on COH.

#### 4.4.3.4. The Role of the Nigeria Security and Civil Defence Corps

The Nigeria Security and Civil Defence Corps (NSCDC) is a paramilitary agency of the Nigerian government 'commissioned to provide measures against threat and any form of attack or disaster against the nation and its citizenry'.[312] While the history of the NSCDC dates back to the Nigerian Civil War, it was only statutorily established under the Nigerian Security and Civil Defence Corps Act of 2003 (as amended in 2007).[313] The NSCDC is involved in counterterrorism in Nigeria as it is statutorily mandated to 'monitor, investigate and take every necessary step to forestall any act of terrorism'.[314] The NSCDC also has a counterterrorism unit.[315]

#### 4.4.3.5. The Role of the Civilian Joint Task Force

The Civilian Joint Task Force (CJTF) describes the community self-defence and vigilante groups formed from June 2013 by locals in north-eastern Nigeria, beginning in Maiduguri, Borno State, in response to the threat of *Boko Haram*.[316] According to Human Rights Watch,

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310 See section 217 (2)(c) of the Constitution of the Federal Republic of Nigeria, 1999.

311 See for example, Human Rights Watch, 'Spiraling Violence' (n 309) 58-59; and Amnesty International, 'Stars on their Shoulders. Blood on their Hands: War Crimes Committed by the Nigerian Military' (Amnesty International, 2015) <https://www.amnesty.org/download/Documents/AFR4416572015ENGLISH.PDF> accessed 11 July 2020.

312 Nigeria Security and Civil Defence Corps (NSCDC), 'History of Nigeria Security and Civil Defence Corps' <http://nscdc.gov.ng/history-of-nigeria-security-and-civil-defence-corps/> accessed 10 July 2020.

313 ibid. The Act was amended by the National Security and Civil Defence Corps (Amendment) Act of 2007.

314 See section 3(1)(h) and (i) of the National Security and Civil Defence Corps Act (as amended).

315 See Olumuyiwa Temitope Faluyi *et al*, *Boko Haram's Terrorism and the Nigerian State: Federalism, Politics and Policies* (Springer 2019) 99.

316 See Chitra Nagarajan, 'Protecting and Harming Civilians: Perceptions of the Civilian Joint Task Force in North East Nigeria' (*Centre for Civilians in Conflict*, 29 June 2018) <https://civiliansinconflict.org/blog/cjtf/> accessed 11 July 2020; and See Amy Pate, 'Boko Haram: An

'the CJTF was initially loosely organized, but began to receive military training and financial and logistical support from both the federal and state governments'.[317] The CJTF patrol their communities, mount checkpoints, and detain suspected *Boko Haram* members.[318] They also provide intelligence to the Nigerian security agencies which have been instrumental in the fight against *Boko Haram*, working with the military to identify and capture members of *Boko Haram*.[319] In this regard, the military and police are said to rely heavily on the CJTF for operational intelligence.[320] This has led to reprisal attacks on CJTF members.[321] However, the CJTF has been implicated in human rights abuses such as extrajudicial killings[322] and the recruitment of child soldiers.[323] They have also been accused of sometimes falsely identifying opponents as *Boko Haram* members.[324] As noted by an author, 'CJTF claims are often the dominant, if not sole, basis of raids and arrests [by the Nigerian military and police], yet such intelligence is often completely unreliable, unverified, and random, motivated merely by desire for further financial payments or as a means of revenge for previous perceived grievances against local rivals'.[325]

### 4.4.4. The Use of Force in Counterterrorism Policing in Nigeria

Nigerian security operatives have been accused of acting unlawfully in the fight against terrorism, committing human rights violations through use of excessive force, the commission of extrajudicial killings, torture and other ill-treatment, among others. Focusing on the situation

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Assessment of Strengths, Vulnerabilities, and Policy Options' Report to the Strategic Multilayer Assessment Office, Department of Defense, and the Office of University Programs, Department of Homeland Security, College Park MD: START, January 2014, 44, available at <https://www.start.umd.edu/pubs/START_%20SMA-AFRICOM_Boko%20Haram%20Deep%20Dive_Jan2015.pdf> accessed 11 July 2020.

317 Human Rights Watch, '"They Didn't Know if I Was Alive or Dead": Military Detention of Children for Suspected Boko Haram Involvement in Northeast Nigeria' (2019) 9, available at <https://www.hrw.org/sites/default/files/report_pdf/nigeria0919_web.pdf> accessed 11 July 2020.

318 Pate (n 316) 44.

319 See Idayat Hassan and Zacharias Pieri, 'The Rise and Risks of Nigeria's Civilian Joint Task Force: Implications for Post-Conflict Recovery in North-Eastern Nigeria', in Jacob Zenn (ed), 'Boko Haram Beyond the Headlines: Analyses of Africa's Enduring Insurgency' (May 2018) <https://ctc.usma.edu/wp-content/uploads/2018/05/Boko-Haram-Beyond-the-Headlines_Chapter-4.pdf> accessed 2 August 2020, 74, 85. See also Pate (n 316) 44.

320 Dario Mentone, 'The Counterterrorism Framework in Nigeria: Strategic and Operational Pitfalls' (*European Eye on Radicalization*, 2 October 2018) <https://eeradicalization.com/the-counterterrorism-framework-in-nigeria-strategic-and-operational-pitfalls/> accessed 3 September 2020.

321 Hassan and Pieri (n 319) 85; and Pate (n 316) 44.

322 See Nagarajan (n 316); Pate (n 316) 45.

323 Human Rights Watch, 'They Didn't Know if I Was Alive or Dead' (n 317) 10.

324 See Hassan and Pieri (n 319) 81.

325 Vanda-Felbab Brown, 'Nigeria's Troubling Counterinsurgency against Boko Haram' (*Foreign Affairs*, 30 March 2018) <https://www.foreignaffairs.com/articles/nigeria/2018-03-30/nigerias-troubling-counterinsurgency-strategy-against-boko-haram>, accessed 2 September 2020.

with *Boko Haram* mainly,[326] the excesses of the security agencies in this regard can be traced back to at least 2009 during the July uprising of Boko Haram, which, as noted above, involved the extrajudicial killing of Mohammed Yusuf, the founder of the group.[327] Human Rights Watch documented some of the abuses that took place in July 2009, noting that 'the police and soldiers in Maiduguri carried out scores of extrajudicial killings of detainees—many of them committed execution-style—according to witnesses interviewed'.[328]

Since 2009, security personnel are noted to have abused detained suspects, including at an underground detention centre in Giwa Military Barracks in Maiduguri. Suspects were subject to detention-related abuses inclusive of extrajudicial killings and torture, with Human Rights Watch stating that '[m]embers of security forces who have carried out alleged abuses have done so with near-total impunity'.[329] Soldiers were also said to carry out raids in the communities, in the course of which houses, shops and cars were set ablaze; men were randomly arrested with a number of summary executions occurring in front of houses or shops. The frequency of the raids by the security personnel became so steady in Maiduguri that a young man interviewed recounted that: [m]y father told us anytime soldiers are shot, the JTF [Joint Task Force - comprising mainly the military, the police, and State Security Service

326 An unrelated incident of the use of excessive force against alleged terrorists is here noted, concerning the events in Odi, Bayelsa state, in November 1999. In response to the killing of some security personnel in Odi, by an armed gang, then President Obasanjo deployed the military to the town, who destroyed nearly all buildings there, and allegedly killed hundreds of community members. See Heather Murdock, 'Nigerian Government Ordered to Pay for Human Rights Violations' (*VOA*, 20 February 2013) <https://www.voanews.com/a/nigeria-gpverment-ordered-to-pay-for-human-rights-violations/1607340.html> accessed 27 September 2021. The Environmental Rights Association (ERA) of Nigeria has put the number of those killed as 2, 483. See The New Humanitarian, 'Group Takes Odi Killings to International Court' 22 November 2002 <https://www.thenewhumanitarian.org/report/37653/nigeria-group-take-odi-killings-international-court> accessed 27 September 2021. A court in 2013 ordered payment of compensation to the community for violation of their human rights. See Murdock (n 326); and Nicholas Ibekwe, 'Odi Massacre: Court Orders Nigerian Government to Pay N37bn Damages to Residents' (*Premium Times*, 20 February 2013) <https://www.premiumtimesng.com/news/121196-odi-massacre-court-orders-nigerian-government-to-pay-n37bn-damages-to-residents.html> accessed 27 September 2021. The Obasanjo government has defended its actions in the community on the basis of counterterrorism. See Murdock (n 326); and Emmanuel Aziken, 'Obasanjo Faults Jonathan on Odi' (*Vanguard*, 20 November 2012) <https://www.vanguardngr.com/2012/11/obasanjo-faults-jonathan-on-odi/> accessed 27 September 2021. The Obasanjo government has similarly defended its actions in the town of Zaki Biam in Benue state in October 2001- where after the murder of 19 soldiers, the military also killed community members- as counterterrorism operations. See Aziken (n 325) and Relief Web, 'Nigerian Army Apologizes for Killing 100 citizens in 2001' (6 November 2007) <https://reliefweb.int/report/nigeria/nigerian-army-apologizes-killing-100-citizens-2001> accessed 27 September 2021.

327 Human Rights Watch, 'Spiraling Violence' (n 309) 35–36.

328 ibid 58.

329 ibid.

personnel] will come and attack the community and kill the youth, so we should run away and save our lives'.[330]

Amnesty International also documented the use of excessive force by the JTF in Maiduguri, in violation of the international standards for the use of force by law enforcement. They noted that they 'received consistent accounts of witnesses who saw people summarily executed outside their homes, shot dead during operations, after arrest, or beaten to death in detention or in the street by security forces in Maiduguri'.[331] They also noted that several people interviewed, 'described how they saw people who were clearly no threat to life – unarmed, lying down or with their hands over their head and cooperating with security forces – shot at close range by the security forces'.[332]

Amnesty International also reported that in the first six months of 2013, about 950 persons died in military custody, most occurring in detention facilities for suspected members or associates of *Boko Haram*.[333] A majority of the deaths are said to have occurred in Giwa Barracks, Maiduguri; and Sector Alpha (usually called 'Guantanamo') and Presidential Lodge (referred to as 'Guardroom'), both facilities located in Damaturu, Yobe state. The deaths are said to have resulted from suffocation or other overcrowding related injuries; starvation; lack of medical care after suffering serious injuries resulting from severe beating; and extrajudicial killings, with some detainees allegedly shot in the leg in the course of interrogation, and left by the soldiers to bleed to their deaths.[334] The figure of 950 deaths given by Amnesty International has even been alleged to be but a fraction of the reality, as the true figure of deaths in that timeframe should be into several thousands.[335]

Even in the context of a NIAC i.e., as from about May 2013 when the conflict between *Boko Haram* and the Nigerian security forces reached the threshold for a NIAC, the Nigerian security forces are also reported to have committed violations of IHL and international human rights

330 ibid 59.

331 See Amnesty International, 'Nigeria: Trapped in the Cycle of Violence' (2012) <https://www.amnesty.org/en/wp-content/uploads/2021/06/afr440432012en.pdf> accessed 3 October 2021, 19.

332 ibid.

333 Amnesty International, 'Nigeria: Deaths of Hundreds of Boko Haram Suspects in Custody Requires Investigation' (15 October 2013) <https://www.amnesty.org/en/latest/news/2013/10/nigeria-deaths-hundreds-boko-haram-suspects-custody-requires-investigation/> accessed 3 September 2020.

334 ibid.

335 The New Humanitarian, 'Detainee Abuses "Monumental" in Northern Nigeria' (15 November 2013) <https://www.thenewhumanitarian.org/news/2013/11/15/detainee-abuses-monumental-northern-nigeria> accessed 3 September 2020.

law in seeking to quash the insurgency. For example, it is reported that about 640 detainees from Giwa Barracks in Maiduguri were extrajudicially executed by the Nigerian military, assisted by the CJTF on 14 March 2014. This incident occurred after *Boko Haram* broke into the detention centre and released some of their members being held there. It is alleged that the majority of those killed were unarmed recaptured detainees.[336] The incident has been described as 'among the most horrific incidents perpetrated by the military in the ongoing conflict in the north east'.[337] A 2015 Amnesty International report also documented evidence of war crimes committed by the Nigerian military and possible crimes against humanity committed by the Nigerian military. The extrajudicial execution of at least 1,200 persons within 2013 and 2014 is noted therein, with 'countless acts of torture' also alleged.[338]

In January 2020, Amnesty International also accused the army of razing entire villages and forcibly displacing the inhabitants, as a reaction to increased attacks by *Boko Haram*. This was noted to be a continuation of the pattern of brutal tactics employed by the military.[339] The army was also accused acts of arbitrary detention, and torture or other ill-treatment.[340]

While the above human rights abuses during counterterrorism in Nigeria are quite well-known and documented, many of the alleged perpetrators are yet to be held accountable or prosecuted. Concerning the CJTF for example, it is stated that '[t]he government has taken few steps to investigate or punish CJTF members who committed rights abuses, including past recruitment and use of child soldiers'.[341] However, a notable investigatory move by the Nigerian

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336 See generally Amnesty International, 'War Crimes and Crimes against Humanity as Violence Escalates in North-East' (31 March 2014) <https://www.amnesty.org/en/latest/news/2014/03/nigeria-war-crimes-and-crimes-against-humanity-violence-escalates-north-east/> accessed 11 July 2020; Amnesty International, 'Nigeria: Gruesome Footage Implicates Military in War Crimes' (5 August 2014) <https://www.amnesty.org/en/latest/news/2014/08/nigeria-gruesome-footage-implicates-military-war-crimes/> accessed 11 July 2020; Samuel Ogundipe, 'Six Years After, No Justice for Victims, Families of Giwa Barracks Killings- Amnesty' (*Premium Times*, 14 March 2020) <https://www.premiumtimesng.com/news/headlines/381750-six-years-after-no-justice-for-victims-families-of-giwa-barracks-killings-amnesty.html> accessed 11 July 2020.

337 See Ogundipe, 'Six Years After' (n 336).

338 See generally Amnesty International, 'Stars on their Shoulders' (n 311).

339 Amnesty International, 'Nigeria: Military Razes Villages as Boko Haram Attacks Escalate' (14 February 2020) <https://www.amnesty.org/en/latest/news/2020/02/nigeria-military-razes-villages-as-boko-haram-attacks-escalate/> accessed 3 September 2020. The military has reportedly stated that the report by Amnesty International was falsified. However, Amnesty International's findings were corroborated by three residents of the affected villages interviewed by Reuters. See Reuters, 'Nigeria's Military Razed Villages in War on Islamist Insurgents: Amnesty International' 14 February 2020 <https://www.reuters.com/article/us-nigeria-security-amnesty/nigerias-military-razed-villages-in-war-on-islamist-insurgents-amnesty-international-idUSKBN208009> accessed 3 September 2020.

340 Amnesty International, 'Nigeria: Military Razes Villages' (n 339).

341 Melissa Dalton, 'Conduct is the Key: Improving Civilian Protection in Nigeria' (*Centre for Strategic and International Studies*, 9 July 2020) <https://www.csis.org/analysis/conduct-key-improving-civilian-protection-nigeria> accessed 3 August 2020.

government was the setting up of a Judicial Commission of Inquiry in August 2017, 'to review compliance of the Nigerian Armed Forces with human rights obligations and rules of engagement, especially in local conflict and insurgency situations'.[342] Among the allegations that had been levelled against the army, had been extrajudicial killings of suspected *Boko Haram* members.[343] Prior to the setting up of the Commission of Inquiry, it is reported that the military was to a large extent, left to investigate itself, often clearing itself of any allegations.[344]

The Nigerian Army on its part, has frequently rejected allegations of wrongdoing in its activities against *Boko Haram*, as levelled in reports by Amnesty International.[345] Instead, it is claimed that the army placed great priority on the respect of human rights, with soldiers who have violated human rights stated to be made to face the court martial and punished, to serve as deterrent to others.[346] On one occasion, the Nigerian National Human Rights Commission

342 Idris Ibrahim, 'Osinbajo Sets Up Judicial Commission to Probe Human Rights Abuses by Nigerian Military' (*Premium Times*, 4 August 2017) <https://www.premiumtimesng.com/news/headlines/239297-just-osinbajo-sets-judicial-commission-probe-human-rights-abuses-nigerian-military.html> accessed 16 August 2020.

343 ibid.

344 See ibid.

345 See for example, Peter Clottey, 'Nigerian Military Rejects Amnesty International Report' (*VOA*, 3 June 2015) <https://www.voanews.com/africa/nigerian-military-rejects-amnesty-international-report> accessed 3 September 2020; and Premium Times, 'Presidential Panel Hearing Alleged Rights Abuses by Nigerian Army Sits in Port Harcourt' (25 September 2017) <https://www.premiumtimesng.com/regional/south-south-regional/244147-presidential-panel-hearing-alleged-rights-abuses-nigerian-army-sits-port-harcourt.html> 3 September 2020. See also, Maj Gen AB Abubakar, 'Military's Reaction to Amnesty International's Allegation' (*Blueprint*, 29 June 2015) <https://www.blueprint.ng/militarys-reaction-to-amnesty-internationals-allegation/> accessed 3 September 2020, which is a response by the army to some allegations by Amnesty International. The statement, which was written by the Chief of Administration of the Nigerian Army, claimed that Amnesty International was merely rehashing past allegations it had made against the army, while increasing the number of victims. It also stated that 'the Nigerian Military has zero tolerance for Human Rights abuses, extra judicial killings and acts perceived to be war crimes', being 'a conventional and professional military that is driven by international standards and best practices'. The statement also noted that 'Human Rights Watch on some occasions had to recant its allegations of human rights abuses by the Nigerian military after thorough investigations'; and called for patience and restraint, while allowing the army to conduct the necessary investigations into the claims by Amnesty International. See ibid. In December 2018, the army went as far as to accuse Amnesty International of trying to 'destabilise and dismember' the country through 'fictitious allegations', stating that it would call for a ban of the organisation in the country if such continues. See Bukola Adebayo and Aanu Adeoye, 'Nigerian Military Tightens Grip on Rights Group over Human Rights Argument' (*CNN*, 18 December 2018) <https://edition.cnn.com/2018/12/18/africa/nigeria-amnesty-row-intl/index.html> accessed 3 September 2020. On an occasion, the Nigerian government also reacted to the activities of Amnesty International regarding the war on terror with 'concern', stating that it was 'damaging the morale' of the army. The spokesperson for the President also stated that: '[i]t often appears as if the Nigerian government is fighting two wars on terror: against Boko Haram and against Amnesty International'. See Al Jazeera, 'Nigeria's Presidency Expresses "Concern" over Amnesty Activities' (18 December 2018) <https://www.aljazeera.com/news/2018/12/nigeria-presidency-expresses-concern-amnesty-activities-181218064350752.html> accessed 3 September 2020.

346 See Vanguard, 'NHRC Criticises Amnesty Report on Human Rights Abuses in North East' (10 March 2017) <https://www.vanguardngr.com/2017/03/nhrc-criticises-amnesty-report-human-rights-abuses-north-east/> 3 September 2020.

(NHRC) is noted to have criticised an Amnesty International report alleging human rights violations by the military, as being unsupported by the facts on the ground and that the military had always conducted its activities in line with international standards.[347] While the Judicial Commission of Inquiry has submitted a report of its findings and recommendations to the Nigerian Government, it is yet to be released to the public.[348]

The use of excessive force during counterterrorism in Nigeria has been noted to be one of the causes of the escalation of terrorist violence in the state. Notably, the extrajudicial killing of *Boko Haram*'s founder, Muhammed Yusuf, is looked back upon as the turning point in the *Boko Haram* crisis,[349] which led to its eventual descent into a NIAC. While some four police officers were charged to court over his death, they were all later acquitted for lack of evidence in 2015, and eventually reinstated to their positions in the force.[350] This acquittal and reinstatement was described as a 'source of concern' because *Boko Haram* had for long touted the lack of prosecution and conviction for Yusuf's death as a reason for their armed activities. The acquittal of those charged was thus seen as granting the group more fodder for use in its recruitment and radicalisation of new members, it being evidence of lack of justice from the Nigerian state that just as it had earlier alleged.[351] Also, the activities of the military in north-eastern Nigeria is said to have 'built the legend of Boko Haram', as locals sought solace in the group from the heavy-handedness and repression of the Nigerian military.[352]

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347 See ibid; and Blueprint, 'NHRC Condemns Amnesty Reports' (13 March 2017) <https://www.blueprint.ng/nhrc-condemns-amnesty-reports/> accessed 3 September 2020.

348 See Samuel Ogundipe, 'Alleged Military Abuses: Presidency Replies Amnesty Int'l on Judicial Panel Report' (*Premium Times*, 11 September 2018) <https://www.premiumtimesng.com/news/top-news/283177-alleged-military-abuses-presidency-replies-amnesty-intl-on-judicial-panel-report.html> accessed 3 September 2020.

349 Cascais (n 262).

350 News24, 'Police Accused of Killing Boko Haram Founder Reinstated' (19 February 2018) <https://www.news24.com/news24/africa/news/police-accused-of-killing-boko-haram-founder-reinstated-20180219> accessed 16 August 2020. Regarding the lack of evidence against the accused persons, the judge in the case noted that the Investigating Police Officer (IPO) who was a Prosecution witness never visited the crime scene but instead relied on hearsay evidence in charging the accused persons. See Senator Iroegbu, 'Court Releases Suspected Killers of Boko Haram Leader, Mohammed Yusuf' (*ThisDay*, 21 December 2015) <https://data2.unhcr.org/en/news/11859> accessed 16 August 2020.

351 News24 'Police Accused of Killing Boko Haram Founder Reinstated' (n 350).

352 See statement by Marc-Antoine Perouse de Montclos in Al Jazeera, 'Boko Haram: Behind the Rise of Nigeria's Armed Group', (n 251). In a related development, the Islamic Movement of Nigeria (IMN), a Shia Muslim organisation, was designated as a terrorist group in July 2019 after a string of deadly clashes with law enforcement which resulted in the death of at least 12 IMN members. See Eromo Egbejule, 'In Nigeria, Shia IMN Group Now Classed as Terrorists' (*The African Report*, 30 July 2019) <https://www.theafricareport.com/15793/in-nigeria-shia-imn-group-now-classed-as-terrorists/> accessed 10 July 2020. The group whose founder and leader, Ibrahim El-Zakzaky was detained by the Nigerian government since 2015 despite a 2016 court order mandating his release, has a history of violent clashes with security forces. See Human Rights Watch, 'Nigeria: Deadly Crackdown on Shia Protest' (24 July 2019) <https://www.hrw.org/news/2019/07/24/nigeria-deadly-crackdown-shia-protest> accessed 10 July 2020.

### 4.5. Comparative Analysis of the Experiences in Egypt, Kenya, and Nigeria

In the previous sections, the counterterrorism policing experience in Egypt, Kenya, and Nigeria were examined in some detail. It is reiterated that these three states which have significant terrorist threats, were chosen only as illustrative case studies, and the findings made in this context may not be generalisable to the entire continent. However, they present a good starting point for examining the problem of the excessive use of force in counterterrorism policing on the African continent.

While all three states grapple with combating terrorism, the circumstances in the states have some peculiarities. For example, in Egypt, the biggest threat therein concerning terrorism is the activities of *Wilayat Sinai* in North Sinai, a situation which has been categorised as a NIAC beginning in 2014. However, *Wilayat Sinai* has also carried out attacks outside North Sinai,[353] and there are other terrorist groups active on mainland Egypt and in the Sinai Peninsula. Kenya on the other hand while also confronting threats from indigenous terrorist groups, is mainly faced with combating the activities of *al-Shabaab* within its territory, a transnational group with which it is engaged in an extraterritorial NIAC in Somalia since 2011- a conflict which has arguably extended into the areas around the Boni Forest near the border with Somalia. Nigeria on its own part, is mainly faced with combating the threat of Boko Haram (here referring to both factions), a security situation which has been in existence since 2009, and which has been classified as a NIAC since about May 2013. There is the added complication with the bandits, criminal gangs in Nigeria with alleged links to *Boko Haram*.

In the examination of the practice of counterterrorism in all three states - and relating to law enforcement operations in particular, being the focus of this thesis - it has been shown that

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This labelling as a terrorist group came after clashes during a protest calling for the release of El-Zakzaky whose health is believed to be deteriorating fast. There is the fear that the Nigerian government is likely creating another *Boko Haram*-like insurgency by its actions, with parallels drawn with this situation and the extrajudicial killing of Yusuf, in addition to the harsh crackdown the IMN group faces. See Eromo Egbejule, 'Nigeria: Repressing the Shia will Create Another Boko Haram' (*The African Report*, 23 July 2019) <https://www.theafricareport.com/15528/nigeria-repressing-the-shia-will-lead-to-another-boko-haram/> accessed 10 July 2020; and Egbejule, 'In Nigeria' (n 352). See also Cascais (n 262). On 28 July 2021, El-Zakzaky (along with his wife who had also been in detention), was discharged and acquitted by a court, and has finally been released after about six years. See The Guardian, 'El-Zakzaky: A Travesty of Justice' (15 August 2021) <https://guardian.ng/opinion/el-zakzaky-a-travesty-of-justice/> accessed 27 September 2021; and Abdul Seye, 'Elzakzaky: Like Dasuki, Sowore, Government Could Rearrest IMN Leader Despite Court Ruling' (*Daily Post*, 2 August 2021) <https://dailypost.ng/2021/08/02/elzakzaky-like-dasuki-sowore-government-could-rearrest-imn-leader-despite-court-ruling>, accessed 27 September 2021. It is noted that fresh charges based on terrorism and treasonable felony, have been filed against El-Zakzaky. See Seye (n 352).

353 See TIMEP, 'Egypt Security Watch: Five Years of Egypt's War on Terror' (n 19) 20.

counterterrorism policing is characterised by the use of excessive force which is in violation of the LE rules on the use of force under international law. The use of heavy-handed operational practices is common to all three states- Egypt, Kenya, and Nigeria. Some factors present in the background/circumstances in these states may perhaps present explanations for such use of excessive force in counterterrorism policing.

A first factor is the existence of a permissive legal framework on the use of force in law enforcement and counterterrorism. In Egypt, for example, the legal regime for the use of force is already more permissive than under international law, as demonstrated above. Compounding this problem, is Article 8 of the 2015 Anti-Terrorism Law which removes criminal liability from law enforcement officials who use the necessary and proportionate amount of force in the execution of their duties or in self-defence. This potentially gives a great leeway for law enforcement officers to utilise excessive force during counterterrorism. Related to these, are pronouncements such as mandating the use of 'all brute force necessary' in counterterrorism coming from the Presidency, which can be taken as permitting the use of extra-legal measures, resulting in the use of excessive force by security operatives. On the part of Kenya, the laws for the use of force therein are also more permissive than international standards, with particular reference to the use of firearms. In the case of Nigeria, the laws for the use of force by law enforcement are also more permissive than international standards, particularly relating to the use of firearms and other forms of intentional lethal force. It remains to be seen whether changes in Nigeria in relation to the Revised Police Force Order 237 will lead to improvements in operational practice, and greater restraint in the use of lethal force by law enforcement.[354]

Closely connected to the existence of permissive legal frameworks is the lack of accountability or prosecutions for unlawful behaviour in counterterrorism policing on the part of security forces. This has been discussed above in the case of all three states, and it was found that lack of prosecution/accountability is a problem in each of them. The case of Egypt is unique in this

[354] For example, in March 2021, concerning the fight against banditry, the President issued a shoot-on-sight order, against persons in illegal possession of sophisticated weapons such as an AK-47. See Vanguard, 'Shoot Anyone With AK-47 in the Bushes, Buhari Tells Security Agents' (4 March 2021) <https://www.vanguardngr.com/2021/03/shoot-anyone-with-ak-47-in-the-bushes-buhari/> accessed 27 September 2021; and Premium Times, 'Buhari Restates Shoot on Sight Order For Illegal Possessors of AK-47' (11 March 2021) <https://www.premiumtimesng.com/news/top-news/448237-buhari-restates-shoot-on-sight-order-for-illegal-possessors-of-ak-47.html> accessed 28 September 2021. This echoes a similar call in August 2019 by the President, for the military to eliminate all bandits found. See Kazeem Ugbodaga, 'Buhari Orders Military to Kill and Not Spare Bandits' (*PM News*, 17 August 2019) <https://pmnewsnigeria.com/2019/08/17/buhari-orders-military-to-kill-and-not-spare-bandits/> accessed 27 September 2021.

regard because of the provision of Article 8 of the 2015 Anti-terrorism Law, which potentially protect security forces from prosecution in the case of the use of excessive force in counterterrorism.

A second factor is existing police brutality outside of the context of counterterrorism. In all three states, law enforcement officers are known to already use excessive force and commit abuses in other policing scenarios, even falling foul of the extant albeit permissive legal frameworks for the use of force in the states. This prevailing background of police brutality has already been highlighted in the background of each case study. With this in perspective, it would seem that the use of excessive force in counterterrorism policing would fit the mould of the usual police culture or policing activity in the states i.e., the use of tactics such as extrajudicial killings, enforced disappearances, and torture. However, the nature of terrorism with it often cast as an existential threat to the state, appears to heighten the problem of police brutality in the context of counterterrorism.

A third factor to consider is the involvement of the military in law enforcement, as part of counterterrorism efforts. In Egypt, the military carries out counterterrorism operations on the mainland mostly as part of Operation Sinai 2018, i.e., in the Western Desert and in the Nile Valley- areas of mainland Egypt that fall under the operation alongside North and Central Sinai. The military is also noted to have long operated in those areas.[355] In the case of Kenya, the KDF is also involved in counterterrorism efforts, outside of the Boni Forest which could arguably be considered a conflict zone to allow for the application of COH rules for the use of force. On the part of Nigeria, the military has also been involved in combating *Boko Haram* since 2009, way before the situation qualified as a NIAC. Military involvement in law enforcement has the potential to escalate a situation, changing the dynamics therein and resulting in the use of excessive force. This is because of the military is primarily trained for armed conflict situations as against the police which is trained for peacetime operations. The military is often the 'harder' alternative, called in to intervene in a situation that the usual law enforcement officials are deemed unable to handle. An illustrative case in this regard is the response to the Westgate Mall siege in Kenya. The first responders on the scene were the Kenyan police, but the military were later deployed to take over the operation.[356] The members of the KDF that came on the scene reportedly arrived 'armed to destroy and extinguish',

355 See TIMEP, 'Egypt Security Watch: Five Years of Egypt's War on Terror' (n 19) 42.
356 See Dennis Okari, 'Kenya's Westgate Attack: Unanswered Questions One Year on' (*BBC*, 22 September 2014) <https://www.bbc.com/news/world-africa-29282045> accessed 1 September 2020.

carrying 'powerful guns, had anti-tank weapons, thousands of rounds of ammunition and helicopters hovering over the air'.[357]

It has been acknowledged that these heavy-handed or iron fist tactics seem to produce results. However, the problem of terrorism persists because a forcible response to terror on its own cannot put an end to the menace. Focus needs to be placed on underlying factors which allow terrorism to flourish such as economic deprivation and lack of development, as the use of force needs to be situated within a broader counterterrorism/countering violent extremism strategy to be effective. As noted by one author, 'evidence-based research … has identified deep-rooted social, political, economic, religious and environmental factors that contribute to various individuals and groups becoming radicalised and involved in extremist and terrorist activities'.[358] Going further, the author notes that '[e]ffective counter-terrorism strategies should therefore be multidimensional, and any realistic fight against radicalisation, religious extremism and terrorist activities must take into account these factors'.[359] This much is acknowledged by the states under focus, as, for example, Nigeria developed its National Counterterrorism Strategy (NACTEST) and its Policy Framework and National Action Plan for Countering Extremism (PCVE). Kenya on its part has the National Strategy for Countering Violent Extremism (NSCVE). These policies lay an emphasis on the use of soft approaches and addressing structural drivers of violent extremism/radicalization as a means of addressing the menace of terrorism. Egypt is also undertaking activities relating to CVE such as addressing extremist ideology.[360] However, the level of implementation of these strategies and policies needs to be strengthened.[361]

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357 Nyambega Gisesa, 'Confusion Played Out Between GSU and KDF during Westgate Operation' (*The Standard*, 19 October 2013) <https://www.standardmedia.co.ke/nairobi/article/2000095786/confusion-played-out-between-gsu-and-kdf-during-westgate-operation> accessed 1 September 2020.

358 See Peter Aling'o, 'Kenya's Current Probe on Terror: Why Operation Usulama Watch Won't Cut It' (*Institute for Security Studies*, 2 May 2014) <https://issafrica.org/iss-today/kenyas-current-probe-on-terror-why-operation-usulama-watch-wont-cut-it> accessed 31 August 2020.

359 ibid.

360 See United States Department of State, 'Country Reports on Terrorism 2019: Egypt', <https://www.state.gov/reports/country-reports-on-terrorism-2019/egypt/> accessed 3 September 2020.

361 See for example, Freedom House, 'Online Survey: Kenya's Antiterrorism Strategy Should Prioritize Human Rights, Rule of Law' (November 2018), Policy Brief <https://freedomhouse.org/sites/default/files/2020-02/Final_PolicyBriefKenya_11_14_18.pdf> accessed 3 September 2020, 2, which notes that Kenya has a 'largely militaristic and security-focused approach' to combating terrorism. This is noted to have remained unchanged despite the 2016 NSCVE which has called for 'soft approaches' such as providing employment and business opportunities for youths. In the case of Nigeria, it has been noted that '[d]espite the strong rhetoric associated with the implementation of the PCVE, the strategy "continued to be hindered by impunity for the security forces' harsh treatment of civilians, lack of trust between security services and communities, and lack of economic opportunities in the northeast"'. See Mentone (n 320), quoting a statement in the United States Department of State, 'Country Reports on Terrorism 2016: Nigeria' (July 2017) available at

Improved intelligence-gathering operations and law enforcement investigative techniques are also the way to go in better counterterrorism policing.[362] In some of the states under focus, there is seemingly some poor intelligence-gathering practices in counterterrorism. For instance, in the case of Nigeria, there is heavy reliance of the security forces on the CJTF for intelligence gathering;[363] intelligence which has been noted to be 'often completely unreliable, unverified, and random', and inspired by financial gain or the settlement of grievances with rivals.[364] Also, the use of torture as a means of intelligence gathering by security forces in Nigeria is notorious. In Egypt, there is some reliance of torture in gathering intelligence,[365] and in Sinai, on the use of militias which has sometimes led the arrest of innocent persons.[366] However, there is reportedly also 'enhanced intelligence gathering- the surveillance of terrorist elements and assembly points, tracking, cutting off sources of financing and logistic support, and bolstering border security'.[367] Kenya is noted to utilise communications surveillance as part of its intelligence gathering methods.[368]Also, in the wake of the Westgate Mall attacks, new intelligence policies are stated to have been put into effect so as to make the fight against terrorism more effective, such as the beefing up of community policing and the upgrading of surveillance systems.[369] However, despite these, it is said that some intelligence received was

<https://www.state.gov/wp-content/uploads/2019/04/crt_2016.pdf> accessed 3 September 2020. With regard to Egypt, it is noted for example, that '[d]espite measures taken by the Egyptian government – such as establishing parameters to identify individuals vulnerable to recruitment and offering training and religious guidance to inmates – concerns persisted that Egyptian prisons continue to be a fertile environment for terrorist recruitment and radicalization'. See US Department of State, 'Egypt' (n 360). Another concern which had been noted regarding Egypt's CVE efforts is the concentration of efforts on 'the religious aspect of the fight against terrorism and radicalism'. See Ragab (n 61) 23.

362 See GPH Kruys 'The Role of Intelligence in Countering Terrorism and Insurgency' available at <https://repository.up.ac.za/bitstream/handle/2263/5638/Kruys_Role%282007%29.pdf?sequence=1&isAllowed=y> accessed 3 September 2020, 83; and Ureriram Raymond Shamaki, 'Right to Life in Counterterrorism Operations: Perspectives from Nigeria and Kenya' LLM Thesis (October 2018), University of Pretoria 42-43.

363 Mentone (n 320). Mentone also notes that: '[t]he military remains heavily involved in the collection of intelligence for counter-terrorism purposes through the military Joint Investigation Committee. There is little cooperation between the military and law enforcement agencies and collected intelligence is mainly used for tactical purposes, drastically affecting the capacity of the Federal Government to investigate and prosecute terrorist offenders'. ibid.

364 See Vanda-Felbab Brown (n 325).

365 See for example, Human Rights Watch, 'If You Are Afraid for Your Lives, Leave Sinai!' (n 37) 6.

366 ibid 91.

367 See Ahmad Kamel Al-Beheiri, 'Egypt: Taming Terrorism' (*Ahram Online*, 11 June 2020) <http://english.ahram.org.eg/NewsContent/50/1201/371839/AlAhram-Weekly/Egypt/Egypt-Taming-terrorism-.aspx> accessed 4 September 2020.

368 See generally, Privacy International (n 193).

369 See Patrick Muthengi Maluki, 'Kenya's Security Forces Did Better This Time. But There are Still Gaps' (*The Conversation*, 20 January 2019) <https://theconversation.com/kenyas-security-forces-did-better-this-time-but-there-are-still-gaps-110039> accessed 4 September 2020.

not acted upon to prevent subsequent attacks.[370] Intelligence assistance from foreign partners to the states under focus, is also noted.[371]

The better the actionable intelligence, the less need there would be for a resort to force, especially to the perceived need for excessive force. Hence, a sophisticated approach to gathering intelligence for counterterrorism needs to be adopted, or leaned upon, in states where such is already practiced. This could be through the use of amnesties, reduced sentences, or plea deals, given to defectors or as a way of infiltrating the ranks and turning existing members, in order to break into the network of the groups. Modern technology such as surveillance drones could also be a means of gathering information about the activities of the groups.[372] Communications surveillance and analysis are also useful in this regard. However, both the use of drones and communications surveillance must be strictly regulated to ensure the protection of the right to privacy of individuals and compliance with other international human rights norms, and also be subject to oversight by appropriate authorities.[373]

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370 ibid.

371 For example, Kenya is also reported to have received Western Intelligence which it has utilised in its alleged elimination programme. Al Jazeera, 'Exclusive: Kenyan Counterterrorism Police Admit to Extrajudicial Killings' (n 224). Also, the Egyptian army has reportedly used images taken by French satellites in its security operations in the Sinai. See Middle East Monitor, 'Egypt: Sinai 'Top Priority' for New Military Intelligence Head' (14 January 2019) <https://www.middleeastmonitor.com/20190114-egypt-sinai-top-priority-for-new-military-intelligence-head/> accessed 4 September 2020.

372 African countries are reportedly increasingly using drones as part of their military and security capabilities because of the advantages they bring in terms of surveillance, air strikes, and covert reconnaissance. In 2019, Nigeria was reported to be the only sub-Saharan African state to have fielded and used armed drones in battle- against Boko Haram. See African Aerospace Online News Service, 'Africa in the Drone Zone' (25 November 2019) <https://www.africanaerospace.aero/africa-in-the-drone-zone.html> accessed 15 August 2020. In the battle against Boko Haram, Nigeria has also used drones for surveillance and intelligence collection. See Vidi Nene, 'Nigerian Government Deploys Drones Against Boko Haram' (*Drones Below*, 4 December 2018) <https://dronebelow.com/2018/12/04/nigerian-government-deploys-drones-against-boko-haram/> accessed 31 August 2020. In an alarming development, Islamic extremists have reportedly begun to use drones for surveillance in North-eastern Nigeria. News 24, 'Nigerian Leader: Islamic Extremists Are Now Using Drones' (30 November 2018) <https://www.news24.com/news24/africa/news/nigerian-leader-islamic-extremists-are-now-using-drones-20181130-2> accessed 31 August 2020. Kenya, in 2015, ordered a ScanEagle Unmanned Aerial Vehicle (UAV) system which is a pilotless aircraft, for use by defence forces in surveillance and reconnaissance. See Samuel Messo, 'Kenya Buys Powerful US Drone for Terror War' (*Kenyans.co.ke*, 25 February 2016) <https://www.kenyans.co.ke/news/kenya-buys-powerful-us-drone-terror-war> accessed 15 August 2020. This drone has been billed as 'Kenya's biggest counter-terrorism weapon'. See The East African, 'Kenya Buys $9.86m Pilotless Aircraft in War on Al Shabaab' (25 February 2016) <https://www.theeastafrican.co.ke/tea/news/east-africa/kenya-buys-9-86m-pilotless-aircraft-in-war-on-al-shabaab-1346660> accessed 15 August 2020. The drone is noted to have been used at least once, in support of an attack against *al-Shabaab* by Kenyan and Somali forces, with the drones used to monitor *al-Shabaab* forces and provide GPS coordinates used to guide artillery strikes. African Aerospace Online News Service (n 372). Egypt has also used drones in its battle with *Wilayat Sinai*, using it to gather intelligence (to search for tunnels used for smuggling by IS members between Giza and Sinai), and to carry out airstrikes against members of the group. See Arabian Aerospace Online News Service (n 78).

373 The need for strict control regulation and oversight over state communications surveillance was highlighted in Privacy International's report on Kenya's NIS communications surveillance practice. See Privacy International (n 193).

A case in point relating to the impact of the use of intelligence in dismantling a terrorist group is that of *Sendero Luminoso* (Shining Path), active in Peru since 1980. The security forces tried brute and indiscriminate use of force and instead of being contained, the insurgency spread.[374] Ultimately, one of the most successful tactics used by the Peruvian government was the reliance on law enforcement techniques in intelligence gathering, as well as the use of amnesties or reduced sentences offered to members of the rank- and-file through the Repentance Law, which elicited invaluable intelligence on the group plans and location.[375] All these led to the 1992 bloodless arrest of the leader, Abimael Guzman, as well as other leading members of the group which struck at the heart of the group's capacity and resulted in a gradual decline in their operations.[376] Perhaps the nature of the group wherein Guzman was the central figure around which the activities of Shining Path revolved, led to the decapitation of the leadership causing a drastic decline in the group.[377] This may not be the case for contemporary Islamist fundamentalist groups such as *Boko Haram*/ISWAP, *Wilayat Sinai*, and *al-Shabaab*, which tend to be hydra-headed and seem to have quick replacements for dead leaders.[378] Nevertheless,

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374 See Edgar Malone, 'The Shining Path of Peru: Defeated or Alive?' Master's Thesis (19 November 2010), Georgetown University Washington DC, <https://repository.library.georgetown.edu/bitstream/handle/10822/553355/maloneEdgar.pdf;sequence=1> accessed 31 August 2020, 74–77. Concerning the very repressive methods used by the Peruvian government during counterterrorism against Shining Path, the military is noted to have been consistently accused of violating human rights and brutality throughout the 1980s. As noted by an author, '[t]orture, rape, and murder of suspected rebels remained a mainstay of the counterinsurgency in subsequent years, leaving Peru the world's highest number of "disappeared" from 1988 to 1991'. See Orin Starn, 'Villagers at Arms: War and Counterrevolution in the Central-South Andes' in Steve J Stern, *Shining and Other Paths: War and Society in Peru, 1980-1995* (Duke University Press 1998) 237, cited in Sara Blake, 'The Shining Path of Peru: An Analysis of Insurgency and Counterinsurgency Tactics' (27 October 2017) Small Wars Journal, <https://smallwarsjournal.com/jrnl/art/shining-path-peru-analysis-insurgency-and-counterinsurgency-tactics> accessed 31 August 2020.

375 Blake (n 374). See also Charles Lane, '"Superman" Meets Shining Path: Story of a CIA Success' (*Washington Post*, 7 December 2020) <https://www.washingtonpost.com/archive/politics/2000/12/07/superman-meets-shining-path-story-of-a-cia-success/a152b9a0-3d85-4c42-9210-69b717fef10c/?utm_term=.7841d3065588> accessed 31 August 2020; for a general description of some of the detective work undertaken by the intelligence officers in the search for Guzman and other leaders of Shining Path.

376 See Andina, 'Peru: Abimael Guzman's Capture, A Stab into Shining Path's Heart' (12 September 1999) <https://andina.pe/ingles/noticia-peru-abimael-guzmans-capture-a-stab-into-shining-paths-heart-766418.aspx> accessed 31 August 2020. Other tactics utilised by the Peruvian government in its counterinsurgency war must be noted such as the use of peasant patrols ('*rondas campesinas*'), i.e., rural defence groups that enabled the peasants to protect themselves from Shining Path. The patrols were established as an alliance between the Peruvian military and the peasant communities, and they have been noted to be '[a]rguably, the most successful tactic of the Peruvian government'. Blake (n 374).

377 See Andina (n 376) wherein it is noted that: 'Guzman's arrest was also important because the leader embodied everything about Shining Path: He was the head of the group's Central Committee and Political Bureau, among other posts, and "had to supervise every process and action"'.

378 With regard to the effect of decapitation of a terrorist group, see Audrey Kurth Cronin, 'No Silver Bullets: Explaining Research on How Terrorism Ends' (April 2010) 3(4) CTC Sentinel 16, available at <https://ctc.usma.edu/wp-content/uploads/2010/08/CTCSentinel-Vol3Iss4-art7.pdf> accessed 5 October 2021.

intelligence-led counterterrorism will also lead to the decline of those groups, although at a likely slower pace. In addition, it would eliminate to a considerable extent, the targeting of innocents which can lead to isolating and opposition from the local communities.

Morocco is an African state that has been noted to have an effective model for counterterrorism.[379] The primary law enforcement agency in the state is the Bureau central d'investigation judiciare ((BCIJ)- Central Bureau of Judicial Investigations), whose operations are supervised by the public prosecutor of the court of appeals.[380] Agents of the BCIJ have the power to arrest, conduct investigations, and interrogate suspects. Based on written approval from the court, they also carry out electronic tracking and eavesdropping.[381] As evidence of the effectiveness of the model, since 2002, Moroccan security services are stated to have dismantled 183 terror cells, foiled 361 attacks, and arrested over 3,129 terrorists. In fact, since 2012, Morocco has only been a victim of two attacks- noted to be the fewest in North Africa by a wide margin.[382] However, despite the achievements of the security forces as a result of their professionalization, they too have been accused of perpetrating abuses such as mass arrests, beatings, and torture- tactics which are noted to harbour the risk of 'creating more terrorists and achieving tactical success at the expense of long-term strategic failure'.[383]

Morocco complements the professionalization of its security forces during counterterrorism with the implementation of a countering violent extremism (CVE) programme which has policies relating to economic empowerment and addressing poverty, the promotion of education, and the eradication of extremist religious ideologies- which all go towards underlying factors for radicalization and joining extremist groups in Morocco.[384] This CVE programme, in addition to actions by its security forces, contributes greatly to Morocco's success in containing to a large extent, terrorism and the spread of violent extremism within its borders.

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379 James B Cogbill, 'America First ≠ America Alone: Morocco as Exemplar for U.S. Counterterrorism Strategy' (*Washington Headquarters Services*, 18 November 2019) <https://www.whs.mil/News/News-Display/Article/2018975/america-first-america-alone-morocco-as-exemplar-for-us-counterterrorism-strategy/> accessed 31 August 2020.

380 They also report to the General Directorate for Territorial Surveillance. ibid.

381 ibid.

382 ibid.

383 ibid. See also Ben Abboudi, 'The Ongoing Fight to Contain Terrorism in Morocco' (*The Jamestown Foundation*, 6 November 2019) <https://jamestown.org/program/the-ongoing-fight-to-contain-terrorism-in-morocco/> accessed 31 August 2020; where the author notes that 'criticisms leveled at the BCIJ, such as intrusive surveillance, torture of detainees, and detainment and prosecution on politically motivated charges will likely continue to ensure a low-lying jihadist presence'.

384 Cogbill (n 379).

From the above analysis, some trends in the use of force in counterterrorism policing in Africa can be identified. The first, as seen from the case studies, is the use of heavy-handed tactics or excessive force in a bid to contain the terrorist threats in affected states. This usually takes place within a background of pre-existing police brutality, and the military is often co-opted into counterterrorism policing efforts, a move which as discussed above, has the potential to change the dynamics of the situation and result in even more repressive tactics. Not only is this use of excessive force a violation of international obligations as highlighted above, but it is also unable to bring about an end to terrorism in itself without being situated within an implemented strategy that addresses the underlying factors driving radicalization and the spread of violent extremism; indeed, excessive force in counterterrorism has been itself noted to be a driver of violence in Africa.

The notion of the use of excessive force as a driver of violence in Africa is backed up by research undertaken such as that United Nations Development Programme (UNDP) into the drivers, incentives, and tipping points for recruitment into violent extremism in Africa. The research found that actions by state security forces was a 'prominent accelerator of recruitment' as 71% of respondents noted that it was action by the government, usually a traumatic event involving state security forces such as the death or arrest of a family member or friend, that was the tipping point in their decision to join extremist groups.[385] Hence, the use of excessive force in counterterrorism policing by African states is potentially counterproductive to their efforts to contain the threat of terrorism and thus should be discontinued.

The above shows that the effectiveness of counterterrorism operations would not be undermined by human-rights complaint use of force. Rather, it is strengthened by such as it would prevent, as noted in the case of Morocco, 'achieving tactical success at the expense of long-term strategic failure'.[386] This must, therefore, be promoted within African states.

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385 See United Nations Development Programme (UNDP), 'Journey to Extremism in Africa: Drivers, Incentives and Tipping Points for Recruitment' (2017) 5, 73, 92. See also Allan Ngari and Denys Reva, 'How Ethnic and Religious Discrimination Drive Violent Extremism' (September 2017) 4 Institute of Security Studies (ISS) Africa in the World Report 9-10, which notes evidence from Nigeria and Egypt showing that there exists 'a strong link between abuse sustained at the hands of security services and recruitment into violent extremist organisations'. Likewise, it has also been noted from research conducted amongst community leaders, village chiefs, and armed Islamists in the Sahel, that 'it is vengeance over extrajudicial executions and other abuses by soldiers and pro-government militias that – more than anything else – is driving recruits into the Islamist ranks'. See Corinne Dufka, 'Sahel: Atrocities by the Security Forces are Fueling Recruitment by Armed Islamists' (*Human Rights Watch*, 1 July 2020) <https://www.hrw.org/news/2020/07/01/sahel-atrocities-security-forces-are-fueling-recruitment-armed-islamists> accessed 28 September 2021.

386 Cogbill (n 379).

### 4.6. Concluding Remarks

In this chapter, the use of force by African states in counterterrorism policing has been examined from the perspective of three illustrative case studies - Egypt, Kenya, and Nigeria. A comparative analysis of the case studies revealed some trends in the use of force in counterterrorism policing by states on the continent such as the use of excessive force and heavy-handed tactics, which is noted to be a violation of international standards as well as potentially counterproductive to the cause of eradicating terrorism and violent extremism. The next chapter will build upon the findings in this chapter, by examining the response of the African Union counterterrorism and human rights institutions to this problematic use of excessive force in counterterrorism policing by African states.

# Chapter 5: Use of Force in Counterterrorism Policing and the African Regional System

## 5.1. Introduction

Chapter 4 focused on the use of force in counterterrorism policing by African states. It found that the use of force in counterterrorism policing in some states on the continent was persistently excessive, in violation of international norms. It also highlighted that this excessive use of force could act to prolong the problem of terrorism and violent extremism in Africa, being a driver of violence.

The present chapter examines the current legal and policy response of the African regional system, particularly action by its counterterrorism and human rights institutions, to the use of excessive force in counterterrorism policing by African states. First, the chapter gives an overview of the African regional cooperation against terrorism, describing the principal instruments and institutions that form the AU counterterrorism architecture. It goes on to analyse the regional definition of terrorism, as well as the AU counterterrorism instruments and institutions, assessing their role in the regulation and response to the use of excessive force in counterterrorism policing on the continent. After this, it considers the African human rights system and its role in ensuring human rights-compliant use of force in counterterrorism. The role of the African Commission on Human and Peoples' Rights (ACHPR) in regulating the use of force in counterterrorism policing in Africa is given particular attention. The chapter proposes a framework for a comprehensive regional response to the use of excessive force during counterterrorism policing on the continent, before making concluding remarks.

## 5.2. African Regional Cooperation against Terrorism

Regional cooperation by African states against terrorism effectively began in 1992. This was despite the existence of the Organization of African Unity (OAU) since 1963. The OAU Charter[1] neither addressed the issue of terrorism nor declared it to be a threat to peace and security on the continent, in spite of the fact that it was already a contentious issue during the struggle against colonialism.[2] Liberation fighters were labelled 'terrorists' by the colonial powers with the OAU memorably termed 'the political centre or an umbrella organization of

1 Charter of the Organization of African Unity (OAU Charter), (adopted 25 May 1963, entered into force 13 September 1963), 479 UNTS 39, art II(2)(f).

2 Martin Ewi and Anton du Plessis, 'Counter-terrorism and Pan-Africanism: From Non-action to Non-indifference' in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (2nd ed, Edward Elgar Publishing 2020) 654, 654.

terrorist groups'.[3] While the OAU objected strongly to its 'terrorist label', it took no steps policy-wise in response to that rhetoric, choosing to turn the label of 'terrorism' to colonial activities.[4]

Between 1963 and 1992, the OAU seemingly adopted, in practice, what has been termed a 'policy of "non-action or indifference" ' to matters of terrorism, whereby it either overlooked altogether, or at least took no direct steps to tackle, rising terrorist threats.[5] However, the OAU's policy changed to one of 'non-indifference' in 1992, with its adoption of Resolution 213 on the Strengthening of Coordination and Cooperation among African States.[6] The shift in attitude came on the heels of an issue brought before the OAU by Algeria regarding its problems with violence from Islamist fundamentalist groups following its 1991/1992 elections.[7] Religious extremism had become a major threat to continental peace and security by the 1990s,[8] and action by the OAU was taken against that backdrop. In Resolution 213 adopted on Algeria's recommendation, African Heads of State and Government pledged:

> NOT TO ALLOW any movement using religion, ethnic, or other social or cultural differences to indulge in hostile activities against Member States as well as to refrain from lending any support to any group that could disrupt the stability and the territorial integrity of member States by violent means, and to strengthen cooperation and coordination among the African countries in order to circumvent the phenomenon of extremism and terrorism.[9]

The adoption of the Declaration on a Code of Conduct for Inter-African Relations in 1994 consolidated this new attitude of the OAU towards terrorism.[10] This Declaration, a soft-law instrument like Resolution 213, notably condemned terrorism as a criminal act -- the first time it was described as such by African leaders.[11] African states pledged to, among others, adhere to international law on the regulation of terrorism and thus refrain from the support of or participation in terrorist acts;[12] as well as to either prosecute or extradite terrorist suspects,

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3 ibid. See also Simon Allison, 'Good Talk, Not Enough Action: The AU's Counter-terrorism Architecture, and Why It Matters' (2015) Institute for Security Studies Policy Brief 66, 1-2.
4 Ewi and Du Plessis, 'Counter-terrorism and Pan Africanism' (n 2) 654.
5 ibid. According to Ewi and Du Plessis, Non-action 'means deliberate avoidance, staying aloof or taking no action in response to incidents that called for action'. ibid 656.
6 OAU Resolution 213 on the Strengthening of Cooperation and Coordination among African States, (Resolution 213), AHG/Res. 213, Dakar: OAU (XXVIII), 1992. See Ewi and Aning 'Assessing the Role of the African Union in Preventing and Combating Terrorism in Africa' (2006) 15(3) *African Security Review*, 32, 35. See generally, Ewi and Du Plessis, 'Counter-terrorism and Pan Africanism' (n 2) 742-743.
7 Ewi and Du Plessis, 'Counter-terrorism and Pan Africanism' (n 2) 659.
8 ibid 660.
9 See Resolution 213, operative para 2.
10 Declaration on a Code of Conduct for Inter-African Relations, 1994 AHG/Decl. 2 (XXX), Tunis: OAU, 1994.
11 ibid operative para 10; Allison 'Good Talk' (n 3) 4.
12 See Declaration on a Code of Conduct for Inter-African Relations, operative paras 15 and 16.

introducing the 'key counterterrorism principle of *aut dedere aut judicare'*.[13] According to Ewi and Aning, the adoption of this Declaration was a watershed moment in the OAU counterterrorism response, establishing a continental agenda in that regard.[14] However, the OAU's subsequent inability to bring to account Sudan, which was accused of supporting the Egyptian Islamist militant groups behind the attempted assassination of President Mubarak of Egypt in Addis Ababa on 26 June 1995, demonstrated the shortcomings of the soft-law based response/policy frameworks, i.e. Resolution 213 and the Declaration.[15]

The 7 August 1998 twin bombings of the United States of America embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, once more catapulted terrorism onto the agenda of the OAU.[16] The twin bombings were, at that time, the deadliest in contemporary history.[17] In their aftermath, the OAU recognised the need for a stronger, more proactive and a binding legal framework for counterterrorism,[18] leading to the OAU Convention on the Prevention and Combating of Terrorism, adopted in Algiers in 1999.[19] This Convention established a 'solid and fundamental criminal justice framework' for counterterrorism on the continent, also codifying counterterrorism norms and consolidating common standards for African states.[20] It also presented a continental definition of terrorism.[21] The Convention remains the principal African counterterrorism instrument.[22]

The 9/11 attacks in the United States of America led to the adoption of more counterterrorism instruments at the African regional level. The Dakar Declaration against Terrorism, adopted in October 2001 at the African Summit against Terrorism,[23] strongly condemned all acts of terrorism whether perpetrated in Africa or elsewhere[24] and appealed to African states to ratify

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13 See ibid operative paragraph 16. See also, Ewi and Du Plessis, 'Counter-terrorism and Pan-Africanism' (n 2) 744.

14 Ewi and Aning (n 6) 36. To the authors, '[a]dopting the [Declaration] should be seen as the first step in the development of the African counter-terrorism regime'. ibid.

15 Ewi and Du Plessis, 'Counter-terrorism and Pan-Africanism', (n 2) 661-662.

16 Allison (n 3), 4.

17 Ewi and Du Plessis, 'Counter-terrorism and Pan-Africanism' (n 2) 662.

18 ibid.

19 Organization of African Unity Convention on the Prevention and Combating of Terrorism (OAU Convention), (adopted 14 July 1999, entered into force 6 December 2002), 2219 UNTS 179.

20 Ewi and Du Plessis, 'Counter-terrorism and Pan-Africanism' (n 2) 663.

21 See OAU Convention, art 1(3)(a).

22 See UNODC, 'E4J University Module Series: Counter-Terrorism- Module 5: Regional Counter-Terrorism Approaches- The African Region' <https://www.unodc.org/e4j/en/terrorism/module-5/key-issues/african-region.html> accessed 27 November 2020.

23 Dakar Declaration Against Terrorism (17 October 2001) <http://www.refworld.org/pdfid/3deb22b14.pdf> accessed 27 November 2020.

24 See ibid para 5.

the OAU Convention and similar UN counterterrorism instruments, while calling for measures to combat terrorism to be taken at the national, sub-regional, regional, and global levels.[25]

The AU formally replaced the OAU in July 2002. Unlike the OAU Charter, which had not addressed terrorism, counterterrorism was envisaged as one of the roles of the AU in its Constitutive Act.[26] Counterterrorism was also set as one of the objectives of the PSC in the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (PSC Protocol).[27] In September 2002, a Plan of Action was adopted at the AU High-Level Inter-Governmental Meeting on the Prevention and Combating of Terrorism held in Algiers.[28] The Plan of Action elaborated on the counterterrorism function of the PSC;[29] created a role for the African Union Commission (AUC) in counterterrorism;[30] and provided for the creation of an African Centre for the Study and Research of Terrorism (ACSRT).[31]

A Protocol to the OAU Convention was concluded in 2004.[32] An African Model Anti-terrorism Law (the Model Law) was adopted in 2011.[33] The OAU Convention, together with the Plan of Action, the Protocol to the OAU Convention, and the Model Law are the main instruments that make up the AU legal and policy framework for counterterrorism. These instruments, and the institutions they created or to which they gave roles in counterterrorism, together form the African regional counterterrorism architecture.

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25 ibid para 7.

26 See Constitutive Act of the African Union (AU Constitutive Act) (signed 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3; UN Reg No I-37733; OAU Doc CAB/LEG/23.15, art 4(o).

27 Protocol Relating to the Establishment of the Peace and Security Council of the African Union (PSC Protocol), (adopted 9 July 2002, entered into force 26 December 2003), art 3(d) thereof. According to Ewi, art 4(o) of the AU Constitutive Act and art 3(d) of the PSC Protocol are the 'theoretical and legal basis of the AU's involvement in the fight against terrorism'. See Martin Ewi, 'The Role of Regional Organizations in Promoting Cooperation on Counter-terrorism Matters: The European and the African Institutions in a Comparative Perspective' in Larissa van der Herik and Nico Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge University Press 2013) 128, 144-145.

28 See African Union, Plan of Action of the African Union High-level Inter-governmental Meeting on the Prevention and Combating of Terrorism in Africa (AU Plan of Action), (2002) Mtg/HLIG/Conv.Terror/Plan.(I), para 9.

29 See AU Plan of Action, para 16.

30 ibid paras 17 and 18.

31 ibid para 20.

32 Protocol to the OAU Convention on the Prevention and Combating of Terrorism (Protocol to the OAU Convention), (adopted 8 July 2004, entered into force 26 February 2014).

33 African Model Anti-terrorism Law (Model Law), Final Draft as endorsed by the 17th Ordinary Session of the Assembly of the African Union, Malabo, 30 June – 1 July 2011.

While the AU counterterrorism framework has been widely portrayed as robust and progressive,[34] its impact in countering terrorism on the continent has been questioned.[35] Nevertheless, the existence of the framework is a testament to regional cooperation and solidarity against a common security threat on the continent, one which was heightened by the events of 9/11. It is also a key first step in a continental solution to a common threat, as while primary responsibility for security in their territories lies with states, international and regional organisations (as in the case of the OAU/AU) could also play a significant role 'as agents of interstate cooperation and coordination of regional counter-terrorism activities'.[36]

### 5.2.1. The African Counterterrorism Architecture and the Use of Force in Counterterrorism Policing

This sub-section discusses the current African counterterrorism architecture and its regulation of the use of force in counterterrorism policing in Africa, looking first at the regional definition of terrorism and then the instruments along with the institutions they create. Before doing so, it is necessary to consider the distinction between international and domestic terrorism.[37] In brief, while the essence of each is the same, what sets international terrorism apart is the 'international element' present within.[38] This occurs where the terrorist act has foreign consequences, i.e., when it affects the interests of more than one state,[39] such as where the act occurs in two or more states; or when the perpetrator and the victims are from different states; or when the effects of the act or acts affect another state.[40] The international element also occurs when a domestic attack is planned with foreign support, control, or financing.[41] For example, in relation to the case studies in Chapter 4, the *al-Shabaab* group is very likely committing acts of international terrorism in Kenya, being a transnational group affiliated with *al-Qaeda* and based primarily in Somalia. Likewise, *Wilayat Sinai* in Egypt could be in the same position, because of its affiliation with the Islamic State (IS) as one of its provinces, regardless of attacks

34 See Allison 'Good Talk' (n 3) 1 and 5.
35 ibid 5. See also Simon Allison '26th AU Summit: Why isn't the AU's Counterterrorism Strategy Working?' ISS Today (29 January 2016) <https://issafrica.org/iss-today/26th-au-summit-why-isnt-the-aus-counter-terrorism-strategy-working> accessed 2 December 2020.
36 Ewi and Aning (n 6) 33.
37 See Chapter 1, note 148.
38 See Robert Kolb, 'The Exercise of Criminal Jurisdiction over International Terrorists' in Andrea Bianchi (ed), *Enforcing International Norms against Terrorism* (Hart Publishing 2004) 227, 242-244.
39 ibid 234.
40 ibid 243-244. See also Reuven Young, 'Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and its Influence on Definitions in Domestic Legislation' (2006) 29 (1) Boston College International and Comparative Law Review 23, 31.
41 See generally Richard Iroanya, 'The Role of the African Union in Combating Terrorism' (April 2007) 37(1) African Insight 63, 67.

which may only harm Egyptian citizens or properties.[42] Purely domestic terrorism, on the other hand, supposedly has no international elements or affects no international interests- although this would be from the international perspective, as it may be that states have greater latitude to define domestic terrorism in broader terms.

Generally, only acts of international terrorism are regulated under international law,[43] thus making the difference between acts of international and domestic terrorism pertinent. However, as Kolb notes, '[t[he elements internationalising a terrorist act… are quite sweeping and pose many questions of delimitation'.[44] Young finds the 'strict international-domestic distinction' an artificial one, 'given the pervasive influence of human rights'.[45]

The notion of human rights has intruded greatly into the principle of domestic jurisdiction, with a state no longer having the absolute 'right to manage or mismanage its affairs'.[46] Through human rights law, international law mandates states to protect persons their populations from acts of terror.[47] As the OAU Convention decrees, 'terrorism constitutes a serious violation of human rights, and in particular, the rights of physical integrity, life, freedom and security, and impedes socio-economic development through destabilization of [s]tates'.[48] The Protocol to the OAU Convention similarly declares terrorism to be 'a serious violation of human rights', as well as 'a threat to peace, security, development, and democracy';[49] states parties thereto pledge to 'take all necessary measures to protect the fundamental human rights of their populations against all acts to terrorism'.[50] Not only this, the policing of terrorism also has to comply with human rights norms as established in relevant instruments.[51] These potentially

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42 The same could be said for *Boko Haram* in Nigeria, which had links to *al-Qaeda* and which has carried out attacks in the Lake Chad Basin countries- Nigeria, Cameroon, Chad, and Niger. However, it later became alienated from *al-Qaeda* despite receiving training from them. In 2015, the group pledged loyalty to the IS, becoming the Islamic State West African Province (ISWAP), also training with IS. Since 2016 though, it is divided into two main factions- ISWAP, and *Jama'atu Ahlis Sunna Lidda'awati Wal-Jihad* (JAS- usually referred to as '*Boko Haram'*). The JAS/*Boko Haram* faction has not retracted its pledge to IS. See Jacob Zenn, 'ISIS in Africa: The Caliphate's Next Frontier', (*Newslines Institute for Strategy and Policy*, 26 May 2020 <https://newlinesinstitute.org/isis/isis-in-africa-the-caliphates-next-frontier/> accessed 26 March 2021.

43 Kolb (n 38), 242.

44 ibid, 244.

45 Young (n 40), 31, note 36.

46 See UNCHR (Sub-Commission), 'Report by Special Rapporteur Kallopi K Koufa 2001/31' UN Doc E/CN.4/Sub.2/2001/31, para 47.

47 Kolb (n 38), 242.

48 OAU Convention, preambular para 9.

49 Protocol to OAU Convention, preambular para 14.

50 ibid, art 3(1)a).

51 See ibid, art 3(1)(k) which outlaws torture and ill treatment, 'including discriminatory and racist treatment of terrorist suspects'.

brings all terrorism, to the extent that it intersects with human rights, within the purview of international human rights law (and thus international law), and global and regional (as well as sub-regional) human rights systems. Would this not mean that all terrorism, i.e., all acts of terror that could be categorised into either international or purely domestic terrorism, is now to some extent, internationalised?

The UN Security Council now considers 'terrorism in all forms and manifestations' as 'one of the most serious threats to international peace and security'.[52] This contrasts with its earlier, narrower language limiting such threats to 'international terrorism'.[53] Perhaps all terrorism is now within the scope of action by the Security Council per Chapter VII of the UN Charter.[54] It could be implied that 'purely domestic terrorism' no longer pertains, given that all forms and manifestations of terrorism affect the peace and security of the international community. At the AU level, the Common African Defence and Security Policy (CADSP) considers both intra-state acts of terrorism and 'international terrorism and terrorist activities' to be common threats to the collective peace and security of the continent,[55] and which require collective action by member states.[56] The PSC is empowered to implement this policy.[57] Again arguably this implies that the AU similarly considers all terrorism to be internationalised as it poses a common security threat and a danger to the peace and security of all states on the continent. It

52 See for example United Nations Security Council (UNSC) Resolution (Res) 2214 (27 March 2015) UN Doc S/RES/2214 preambular para 3; UNSC Res 2341 (13 February 2017) UN Doc S/RES/2341, preambular para 4; UNSC Res 2395 (21 December 2017) UN Doc S/RES/2395, preambular para 2; and UNSC Res 2396 (21 December 2017) UN Doc S/RES/2396, preambular para 2; UNSC Res 2462 (28 March 2019) UN Doc S/RES/2462, preambular para 2. See also UNSC, 'Statement by the President of the Security Council' (12 January 2021) UN Doc S/PRST/2021/1, para 3.

53 See in this regard, UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373, preambular para 3; and UNSC Res 1377 (12 November 2001) UN Doc S/RES/1377, Annex, para 2; UNSC Res 1390 (16 January 2002) UN Doc S/RES/1390, preambular para 9; UNSC Res 1455 (17 January 2003) UN Doc S/RES/1455 preambular para 7. It is noted that the UN Security Council has also simply mentioned in some of its resolutions that '*terrorism* in all its forms and manifestations constitutes one of the most serious threats to *peace and security*', as against threats to international peace and security. (emphases mine). See for example, UNSC Res 1456 (20 January 2003) UN Doc S/RES/1456, Annex, preambular para 1; UNSC Res 1566 (8 October 2004) UN Doc S/RES/1566, preambular para 7, and operative para 1; UNSC Res 1624 (14 September 2005) UN Doc S/RES/1624, preambular para 3; UNSC Res 1904 (17 December 2009) UN Doc S/RES/1904, preambular para 2; UNSC Res 2322 (12 December 2016) UN Doc S/RES/2322, preambular para 2.While Resolution 2368 also notes in preambular para 2 that all forms and manifestations of terrorism form one of the most serious threats to peace and security, it later recognises that 'terrorism poses a threat to international peace and security'. See UNSC Res 2368 (20 July 2017) UN Doc S/RES/2368, preambular para 3.

54 Charter of the United Nations (UN Charter), (adopted 26 June 1945, entered into force 24 October 1945), 1 UNTS XVI, Chapter VII.

55 See AU Solemn Declaration on a Common African Defence and Security Policy (CADSP) (adopted by the Heads of State and Government of Member States of the African Union, in Sirte, Libya, on 24 February 2004) operative paras 8(ii)(f) and 9(d).

56 See ibid, para 13(a).

57 PSC Protocol, arts 3(a) and 7(1)(h).

could even be argued that AU counterterrorism instruments referring to 'international terrorism' actually cover all terrorism.

This leaves a lack of clarity concerning the importance, and indeed the existence, of the distinction between international and domestic terrorism. Back in 2004, Kolb claimed 'the circle of "internationality" of terrorist acts' had expanded 'while narrowing the correspondent circle of purely domestic terrorism'.[58] Indeed, increasingly, terrorist acts are committed by perpetrators in a bid to attract international attention to their cause(s), leading to their decision to attack international interests.[59]

Accordingly, the discussion now turns to the African regional definition of terrorism.

#### 5.2.1.1. The OAU/AU Definition of Terrorism

In Article 1(3), the OAU Convention introduced into the African regional legal system, a definition of a 'terrorist act' as follows:

> (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).

In Article 3(1), the Convention goes on to note that:

> 1. Notwithstanding the provisions of Article 1, the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.

58 Kolb (n 38) 245.
59 ibid 245-246.

The above definition has been described as the 'African definition of terrorism'.[60] Regarding the distinction made between 'terrorist acts' and acts committed by liberation fighters, this was said to be done in a bid to 'reconcile the historical ambiguities implicit in the use of the term 'terrorism' in Africa'.[61] This is in spite of the provision in Article 3(2) which stipulates that no motive, whether 'political, philosophical, ideological, racial, ethnic, religious', or otherwise, shall provide a 'justifiable defence' for terrorism.[62] However, the fact that the actions of liberation fighters are exempted from the meaning does not preclude the legality of such actions from being adjudged under other bodies of international law, such as international humanitarian law (IHL) and international criminal law.[63]

The OAU/AU definition of terrorism in Article 1(3) has been criticised for its vagueness, for being overly broad, and for failing to comply with the principle of legality, which is to the effect that criminal offences must be clearly and precisely defined.[64] Examples are given of the expressions, 'according to certain principles',[65] 'which may', and 'causes or may cause';[66] whose meanings are noted as unclear, 'and do not spell out the ways in which the acts they refer to are criminal'.[67] Likewise, it is said that the phrase 'induce any government, body, institution, the general public or any segment thereof … to adopt or abandon a particular standpoint'

60 Ewi and Aning (n 6) 36. See also Ewi and Du Plessis, 'Counter-terrorism and Pan-Africanism' (n 2) 663; Ewi (n 27) 149; and preambular para 4 of the Economic Community of West African States (ECOWAS) Political Declaration and Common Position against Terrorism (adopted by the Authority of Heads of State and Government in Yamoussoukro, Cote d'Ivoire, 28 February 2013).

61 Ewi and Aning (n 6) 37. See also Ben Saul, 'The Crime of Terrorism within the Jurisdiction of the African Court of Justice and Human and Peoples' Rights: Article 28G of the AU's Malabo Protocol 2014' in Charles C Jalloh *et al* (eds), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (Cambridge University Press 2019) 439.

62 See OAU Convention, art 3(2) thereof.

63 See Ewi and Du Plessis, 'Counter-terrorism and Pan-Africanism' (n 2) 663-664; and Saul, 'The Crime of Terrorism' (n 61), 439. Contrast the definition in the OAU Convention with the definition of terrorist acts in art 2(1) of the draft UN Comprehensive Convention against International Terrorism. The present text of the Draft UN Convention is set out in UNGA 'Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996 of 17 December 1996' 16th Session (8 to 12 April 2013) UN Doc A/68/37, Annex I. See also, Chapter 1, text to note 107.

64 Saul, 'The Crime of Terrorism' (n 61) 416; Martin A Ewi and Anton du Plessis, 'Criminal Justice Responses to Terrorism in Africa: The Role of the African Union and Sub-regional Organizations' in Ana Maria Salinas de Frias *et al* (eds), *Counter-terrorism: International Law and Practice* (Oxford University Press 2012) 990, 1001; and International Federation for Human Rights (FIDH), 'Human Rights Violations in Sub-Saharan African Countries in the Name of Counter-Terrorism: A High Risks Situation' 6-7, <https://www.fidh.org/IMG/pdf/afriqueantiterr483eng2007.pdf> accessed 14 December 2020.

65 OAU Convention, art 1(3)(a)(i).

66 See ibid art 1(3)(a).

67 FIDH (n 64) 7.

potentially allows for the categorisation of certain 'overzealous' violent acts of protests as terrorists acts when they in actuality 'fall short of the concept of terrorism.'[68]

The above definition was practically duplicated in Article 28 (G) of the 2014 Malabo Protocol[69] regarding the proposed regional crime of terrorism.[70] The few significant differences include an expansion in the Malabo Protocol of the underlying acts for the crime of terrorism to encompass acts in violations of AU laws, laws of a regional economic community (REC) recognised by the AU, or international law;[71] as well as the exclusion from the purview of the definition under the Protocol of acts committed in the course of an armed conflict which are regulated by IHL.[72]

However, the definition in the African Model Law differs more substantially from that in the OAU Convention. The Model Law defines a terrorist act as follows:

> "**terrorist act**" shall mean an act or omission, actual or threatened, inside or outside **[name of country]** that is an offence as set out in any of the United Nations and African Union instruments to which **[name of country ]** is a party and includes an act, actual or threatened, that is intended, or can reasonably be regarded as being intended, to intimidate the public or any section of the public or compel a government or international organization to do or refrain from doing any act and to advance a political, religious or ideological cause, if the act;
>
> (a) involves serious violence against persons;
>
> (b) involves serious damage to property;
>
> (c) endangers a person's life;
>
> (d) creates a serious risk to the health or safety of the public or any section of the public;
>
> (e) involves the use of firearms or explosives;
>
> (f) involves exposing the public to any dangerous, hazardous, radioactive or harmful substance, any toxic chemical or any microbial or other biological agent or toxin;
>
> (g) is designed to disrupt, damage, destroy any computer system or the provision of services directly related to communication infrastructure, banking and financial services, utilities, transportation or key infrastructure;
>
> (h) is designed to disrupt the provision of essential emergency services such as the police, civil defence and medical services; or

68 Saul, 'The Crime of Terrorism' (n 61) 416. For more criticism of the definition, see ibid; Ibrahima Kane, 'Reconciling the Protection of Human Rights and the Fight Against Terrorism in Africa' in De Frias *et al* (n 64) 838, 842; and FIDH (n 64) 7.

69 See Article 28(G)(C) of the Malabo Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), (adopted 27 June 2014, not yet in force).

70 See generally, Saul, 'The Crime of Terrorism' (n 61) 420-421.

71 See Malabo Protocol, art 28(A)

72 ibid art 28 (D).

(i) involves prejudice to public security or national security.[73]

Exceptions are allowed for some acts resulting from 'advocacy, protest, dissent or industrial action'.[74] Saul notes this as the 'inclusion of a "democratic protest" defence'.[75] Also excluded, in addition to actions by liberation fighters,[76] are acts committed during armed conflicts which are already covered by IHL.[77]

It is curious that the Model Law's definition differs from that of the OAU Convention, given the definition in the Convention is the 'African definition of terrorism'. If the thought during the drafting of the Model Law was that there were problems with the definition in the Convention, one might assume that this would have led to an amendment of that definition- although not necessarily the case given the complexity involved in amending a treaty. Nevertheless, this existence of differing definitions is rather odd.

That said, despite the definition of terrorism in the OAU Convention (and that of the Model Law), most African states have tended to adopt their own definitions, which are worded differently.[78] Some have a markedly wider reach than others.[79] Hence, there is no uniform definition of terrorism on the African continent, despite the so-called 'African definition' in the OAU Convention and the efforts of the Model Law.

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73 (Emphasis in the original). See Model Law, section 4(xxxix).

74 ibid section 4(xl)(a).

75 Saul, 'The Crime of Terrorism' (n 61) 418.

76 Model Law, section 4(xl)(b). As with the OAU Convention, no motive is a justifiable defence for the commission of a terrorist act- including for prosecution and extradition purposes. See ibid section 4(xl).

77 ibid section 4(xl)(c).

78 For instance, see the differently worded definitions of terrorist acts in art 2(1) and (2) of the Botswanan Counter-terrorism Act, No 24 of 2014; art 2 of the Egyptian Anti-Terror Law of 2015; art 3 of the Ethiopian Anti-Terrorism Proclamation of 2009, No.652/2009; art 2-4 of the Ghanaian Anti-Terrorism Act, 2008 (Act 762) (as amended); art 2(1) of the Kenyan Prevention of Terrorism Act, No 30 of 2012 (as amended); art 3(2) of the Mauritian Prevention of Terrorism Act, Act No 2 of 2002 (as amended); section 1(3) and (4) of the Nigerian Terrorism (Prevention) Act 2011 (as amended); arts 2 and 3 of the Rwandan Law on Counter Terrorism 2008, No 45/2008; section 1(1), and (2)-(5) of the South African Prohibition of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004; art 4(2)-(4) of the Tanzanian Prevention of Terrorism Act, No 21 of 2002 (as amended); and section 7(2) of the Ugandan Anti-Terrorism Act, 2002 (as amended). In contrast, the definition in section 1(1) and (2)-(3) of the Namibian Prevention and Combating Terrorism Activities Act, No 12 of 2012 is a virtual copy of the OAU Convention's definition.

79 See for example, the reach of the definition in art 2 of the Egyptian Anti-Terror Law 2015, as compared to those in art 2(1) of Kenya's Prevention of Terrorism Act 2012 (as amended), and section 1(3) and (4) of the Nigerian Terrorism (Prevention) Act 2011 (as amended).

### 5.2.1.2. The African Framework for Counterterrorism and the Use of Force in Counterterrorism Policing

To recap, the legal and policy framework for counterterrorism in Africa principally consists of the 1999 OAU Convention, the 2002 Plan of Action, the 2004 Protocol to the OAU Convention, and the African Anti-terrorism Model Law. The institutional framework on the other hand, consists mainly of the PSC, the AUC, and the ACSRT; supported by sub-regional mechanisms.[80] These legal and policy instruments, as well as the institutions charged with counterterrorism roles are examined seriatim, with relevance to their role in the regulation of the use of force in counterterrorism policing on the continent.

#### a) The OAU Convention on the Prevention and Combating of Terrorism (1999)

The OAU Convention, the continent's principal counterterrorism legislation, had 43 states parties (of 55 AU members) as of writing.[81] It is fundamentally an instrument for continental cooperation against terrorism on the basis of a framework for criminal justice, codified norms, and common standards for counterterrorism.[82] It requires African states to criminalise acts of terrorism (on the basis of the definition it espouses) with accompanying penalties to be commensurate with the 'grave nature' of terrorist offences; and calls on them to 'consider, as a matter of priority', ratifying and implementing global counterterrorism treaties.[83] Part II of the Convention, which deals with 'areas of cooperation', requires states to among others, refrain from supporting terrorism;[84] and take 'legitimate measures' in the prevention and combating of terrorism, including preventing their territories from being used as bases for terror groups,[85] monitor and detect illegal cross-border movements and use of weapons,[86] improve border control measures,[87] promote exchange of information and expertise on terrorism,[88] and arrest

80 See PSC Protocol, art 6.
81 Find the status list of the Convention at <https://au.int/sites/default/files/treaties/37289-sl-oau_convention_on_the_prevention_and_combating_of_terrorism_1.pdf>, accessed 18 October 2021.
82 Ewi and Du Plessis, 'Counter-terrorism and Pan-Africanism' (n 2), 663.
83 See OAU Convention, art 2(a)-(c).
84 ibid art 4(1).
85 ibid art 4(2)(a).
86 ibid art 4(2)(b).
87 ibid art 4(2)(c).
88 ibid art 4(2)(e). See also, ibid art 5 (1)-(6) wherein states are also mandated to cooperate with themselves in the areas of strengthening information exchange on the activities of terrorist organisations; information exchange that would result in the capture of suspected terrorists, or the seizure of weapons and funds used for or intended for terrorist purposes; respect for the confidentiality of information exchanged; assistance regarding the procedures for the investigation and apprehension of terrorist offenders; conducting and exchanging studies and research on counterterrorism; and where possible, the provision of technical assistance in designing programmes or organising joint counterterrorism training courses to improve states' 'scientific, technical and operational capacities'.

and prosecute (or extradite) terrorist offenders.[89] Part III of the Convention clarifies the issue of the jurisdiction of states over terrorist offences; while Parts IV and V deal with extradition, extra-territorial investigations, and mutual legal assistance.[90]

Perhaps surprisingly, the Convention scarcely refers to the use of force in counterterrorism policing, nor the standards that should be followed. The only inference that could perhaps be drawn is from Article 22(1) of the Convention which states that '[n]othing in this Convention shall be interpreted as derogating from the general principles of international law, in particular the principles of international humanitarian law, as well as the African Charter on Human and Peoples' Rights'.[91] This would imply that all counterterrorism measures mandated under the Convention -- including the counterterrorism policing and the use of force therein -- should be implemented with respect for the principles of human rights law.[92] However, this is but a very general provision which does not address adequately the issues regarding the excessive use of force in counterterrorism policing in African states.

**b) The Plan of Action of the African Union High-Level Inter-Governmental Meeting on the Prevention and Combating of Terrorism in Africa (2002)**

In its preamble, the 2002 Plan of Action notes that '[t]errorism is a violent form of transnational crime that exploits the limits of the territorial jurisdiction of [s]tates, differences in governance systems and judicial procedures, porous borders, and the existence of informal and illegal trade and financing networks'.[93] According to Sturman, '[the Plan] is premised on the need to strengthen the capacity of African states [in counterterrorism] through intergovernmental co-operation and coordination'.[94]

The Plan of Action contains both general and specific provisions.[95] As regards the general provisions, states agree to, among others, 'sign, ratify and fully implement' the OAU

89 ibid art 4(2)(h).
90 See also Ewi and Du Plessis, 'Counter-terrorism and Pan-Africanism' (n 2) 664.
91 OAU Convention, art 22(1).
92 Ewi and Du Plessis state that the OAU Convention 'falls short of incorporating human rights concerns', particularly by failing to oblige states to respect human rights at all levels of their counterterrorism operations, so as to prevent abuses by security services. They note that 'the flimsy reference to the [African Charter] in Article 22 seems to suggest that the drafters were aware of this problem, but never addressed it'. See Ewi and Du Plessis, 'Criminal Justice Responses' (n 64) 1003.
93 AU Plan of Action, preambular para 7.
94 See Kathryn Sturman, 'The AU Plan of Action: Joining the Global War or Leading an African Battle?' 2002 11(4) African Security Review 103, 104.
95 AU Plan of Action, part II and III.

Convention and other international counterterrorism treaties, and adopt policies targeted at the root causes of terrorism.[96] For the specific provisions, states undertake to:

- effect police and border control measures, such as border control and surveillance, a Passport Stop list, and computerised entry points to monitor arrivals and departures;[97]
- implement legislative and judicial measures such as amending laws relating to procedural issues to ensure prompt investigation and prosecution, harmonization of counterterrorism laws, and designating terrorist acts as grave crimes with appropriate penalties;[98]
- suppress terrorism financing through measures such as operationalising the International Convention for the Suppression of Terrorism Financing;[99] criminalising through laws, terrorism financing and money laundering; and establishing 'financial intelligence units';[100]
- exchange information on terrorist groups; enhance intelligence exchange and capacity building, including specialised training for counterterrorism staff; establish units, well-equipped and trained particularly in intervention, protection, and detection; and promote access to specialised training in counterterrorism operations; among others;[101] and
- set up 'contact points at [sub-regional level] to follow-up and liaise on matters relating to implementation of the Plan of Action'; and 'prepare model legislation and guidelines to assist Member States to adapt their legislation to the provisions of the relevant [AU] and international instruments'.[102]

The Plan of Action also outlines the roles of the PSC, the AUC, and the ACSRT in the AU counterterrorism framework.[103] The role of these bodies is examined later.

Seemingly, the Plan of Action does not address standards governing the use of force in counterterrorism policing. It does mandate states to set up equipped and trained counterterrorism units but does not explicitly call for adherence to human rights principles during counterterrorism, as seen for example, with the OAU Convention.

96 ibid para 10.
97 See generally, ibid part III, section, A, paras 11(a) to (o).
98 See generally, ibid part III, section B, paras 12 (a) to (n).
99 International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 229.
100 See generally, AU Plan of Action, part III, section C, paras 13 (a) to (j).
101 See ibid part III, section D, paras 14, (a) to (i).
102 ibid part III, section E, paras 15 (a) and (b).
103 ibid part III, sections F, G, and H.

### c) The Protocol to the OAU Convention on the Prevention and Combating of Terrorism (2004)

According to Article 2(2) of the Protocol to the OAU Convention, the instrument's 'main purpose is to enhance the effective implementation of the [OAU] Convention and to give effect to Article 3(d) of the [PSC Protocol]' regarding the coordination and harmonization of Africa's counterterrorism efforts in all respects.[104] The Protocol is also said to shore up the provisions concerning the financing of terrorism and the insufficient coverage of human rights protection in the OAU Convention, as well as to address the possibilities of weapons of mass destruction getting into the hands of terrorists.[105] The Protocol has so far been ratified by 21 states.[106]

In the Protocol, states parties commit to fully implement the OAU Convention,[107] and undertake to 'protect the fundamental human rights of their populations' against terrorism;[108] to 'prevent the entry into, and the training of terrorist groups on their territories';[109] to take actions against mercenarism;[110] to submit regular reports to the PSC on their counterterrorism measures and 'report to the PSC on all terrorist activities in their territories as soon as they occur';[111] and to adhere to all continental and global counterterrorism treaties,[112] among other actions.

With regard to the suppression of the financing of terrorism, states undertake to 'freeze or seize any funds and any other assets used or allocated for' terrorism, and to create a mechanism for their use in the compensation of victims of terrorist attacks.[113] They also commit to instituting 'national contact points in order to facilitate timely exchange and sharing of information on terrorist groups and activities' as well as for states' cooperation regarding the suppression of terrorism financing.[114] On human rights, states pledge to 'outlaw torture and other degrading and inhumane treatment, including discriminatory and racist treatment of terrorist suspects,

104 See Protocol to the OAU Convention, art 2(2).
105 Ewi and Aning (n 6) 38.
106 Find the status list of the Protocol at <https://au.int/sites/default/files/treaties/37291-sl-protocol_to_the_oau_convention_on_the_prevention_and_combating_of_terror.pdf>, accessed 18 October 2021.
107 Protocol to the OAU Convention, art 3(1).
108 ibid art 3(1)(a).
109 ibid art 3(1)(b)
110 ibid art 3(1)(e).
111 ibid art 3(1)(h) and (i).
112 ibid art 3(1)(j).
113 ibid art 3(1)(c).
114 ibid art 3(1)(d)

which are inconsistent with international law'.[115] States are also required to carry out their commitments under the Protocol while keeping with the provisions of relevant regional and international treaties, 'in conformity with Article 22 of the OAU Convention'.[116]

The Protocol designates the PSC as the organ primarily responsible for ensuring the 'day-to-day harmonization and coordination of AU counter-terrorism efforts'.[117] The Protocol further outlines the role of the AU Commission,[118] and introduces the complementary role of regional mechanisms in the implementation of the Convention.[119]

**d) The African Model Anti-Terrorism Law (2011)**

The Model Law was developed by the AU to help 'stimulate and guide domestic implementation of international counter-terrorism obligations' by African states.[120] It 'also provided an opportunity to clarify some of the key legal issues that often paralyse states' efforts, as well as to harmonize and standardize counter-terrorism laws in Africa'.[121]

After establishing offences and penalties relating to terrorism and terrorist acts,[122] the Model Law contains 'measures to prevent money laundering and financing of terrorism';[123] relating to 'reports and monitoring orders';[124] on jurisdiction;[125] on the 'proscription of entities';[126] on 'investigations, arrests and sharing of information';[127] on 'freezing orders and declarations of forfeiture on conviction';[128] and on 'extradition and mutual legal assistance in criminal matters'.[129] The Model Law reads as a counterterrorism document with a general reach, as it aims to criminalise all terrorist acts within the adopting state; takes action against terrorism

115 Ibid art 3(1)(k).
116 ibid art 3(2).
117 Ewi (n 27) 197. See also, Protocol to the OAU Convention, art 4.
118 Protocol to the OAU Convention, art 5.
119 ibid art 6.
120 Saul, 'The Crime of Terrorism' (n 61) 417. See also, AU PSC, 'Report of the Chairperson of the Commission on Terrorism in Africa and the AU's Efforts to Address this Scourge' 303rd Meeting, Addis Ababa, Ethiopia (8 December 2011) PSC/PR (CCCIII) (hereafter AU PSC, 'Report of the Chairperson' (2011)) para 21.
121 Ewi and Du Plessis, 'Counter-terrorism and Pan-Africanism' (n 2) 667.
122 See Model Law, Part II.
123 ibid Part III.
124 ibid Part IV.
125 ibid Part V.
126 ibid Part VI.
127 ibid Part VII.
128 ibid Part VIII.
129 ibid Part IX.

financing; outlines the basis for exercise of jurisdiction over terrorist suspects by the state; and regulates investigation of a suspect upon information by foreign states as well as extradition.

With regard to the use of force in counterterrorism policing, the Model Law reaffirms in its optional preamble 'that the fight against terrorism must be carried out in accordance with international law, including international human rights, refugee, and humanitarian law'.[130] The Model Law also reiterates that the rights of an accused person to 'fair trial and due process, including the right to legal counsel', must be respected.[131] The reiteration that counterterrorism actions must comply with human rights standards would have been better placed as a substantive provision in the Model Law.[132] As the Model Law is supposed to be a template for states, the incorporation in a preamble, and what is more, an optional preamble, is not a good signal.[133]

### e) The AU Peace and Security Council (PSC)

The PSC is the AU's 'standing decision-making organ for the prevention, management, and resolution of conflicts'.[134] It is also 'a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa'.[135] The PSC is supported in its duties, by the AUC, the Panel of the Wise (PoW), the Continental Early Warning System (CEWS), the African Standby Force (ASF), and the Peace Fund.[136] It is the 'key pillar of the African Peace and Security Architecture (APSA), which is the framework for promoting peace, security and stability in Africa'.[137]

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130 ibid Optional Preamble, para 7.

131 ibid section 51(2).

132 The Model Law notes that its preamble is 'optional and relevant for those member states who use preambles in their national laws'. See ibid Optional Preamble.

133 The current impact of the Model Law is unclear, although in 2014, the AUC reported that three states- Burkina Faso, Ghana, and Mauritius, had approached the Commission for assistance in incorporating relevant provisions of the Model Law into their legal frameworks. See AU PSC, 'Report of the Chairperson of the Commission on Terrorism and Violent Extremism', 455th Meeting, Nairobi, Kenya (2 September 2014) PSC/AHG/2(CDLV) (hereafter AU PSC, 'Report of the Chairperson' (2014)) para 47.

134 PSC Protocol, art 2(1). The Protocol has been ratified by 52 out of the 55 AU member states. The three states who had not ratified the Protocol as of writing were Cape Verde, Democratic Republic of the Congo, and South Sudan. See the Protocol's status list which is available at <https://au.int/sites/default/files/treaties/37293-sl-protocol_relating_to_the_establishment_of_the_peace_and_security_council_of_the_african_union_1.pdf > accessed 18 October 2021.

135 PSC Protocol, art 2(1).

136 See ibid art 2(2); AU, 'Peace and Security Council' <https://au.int/en/psc> accessed 21 January 2021.

137 See AU, 'Peace and Security Council' (n 136). APSA is 'the umbrella term for the key AU mechanisms for promoting peace, security and stability in the African continent'. ibid. It was established in 2002 with the adoption of the PSC Protocol which outlines its components and their responsibilities. See African Union Peace and Security, 'The African Union Peace and Security Architecture (APSA)' (last updated 2 October

The PSC is composed of 15 AU member states each of which has equal voting power. They are elected by the Executive Council and then must be endorsed by the AU Assembly.[138] The PSC generally reaches its decisions by consensus, but where such is not achieved, decisions are adopted on a two-thirds majority vote with the exception of procedural matters which require only a simple majority.[139] The PSC has no permanent members.[140] It is also not the supreme organ of the AU, with that distinction held by the AU Assembly, made up of the Heads of State and Government or their representatives.[141]

The Assembly is the AU's 'supreme policy and decision-making organ'.[142] It 'determines the AU's policies, establishes its priorities, adopts its annual programme and monitors the implementation of its policies and decisions;'[143] as well as ensuring compliance by member states with such policies and decisions.[144] As in the case of the PSC, the Assembly's decisions are reached by consensus, or on a two-thirds majority vote (save for procedural matters which require a simple majority).[145]

The Assembly is the principal organ in charge of matters regarding the collective defence and security of the continent.[146] However, it delegates its powers over peace and security matters to the PSC, per Article 9(2) of the AU Constitutive Act which allows the Assembly to 'delegate any of its powers and functions' to other AU organs.[147] The PSC has been granted considerable decision-making powers and responsibilities by the Assembly,[148] and member states undertake to 'accept and implement the decisions of the [PSC]'- also agreeing that the Council 'acts on

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2012) <https://www.peaceau.org/en/topic/the-african-peace-and-security-architecture-apsa> accessed 17 March 2021. APSA consists of five pillars, i.e., the PSC, the PoW, the CEWS, the ASF, and the Peace Fund; and its aim is 'to prevent, manage and resolve conflicts by working collaboratively with the Regional Economic Communities and Mechanisms'. See Dominique Mystris, 'The AU's Peace and Security Architecture: Filling the Gaps' (*The Conversation*, 23 August 2020) <https://theconversation.com/the-aus-peace-and-security-architecture-filling-the-gaps-144554>, accessed 17 March 2021.

138 See PSC Protocol, art 5(1) and (2); AU, *African Union Handbook 2020* (7th ed, 2020) 32. The AU Executive Council is made up of Minsters of Foreign Affairs (or other designated ministers or authorities) of the member states. See art 10 of the AU Constitutive Act.

139 PSC Protocol, art 8(13).

140 Ten of the members of the PSC are elected for a term of two years, while the other five members are to serve a three-year term 'in order to ensure continuity'. ibid art 5(1)(a) and (b).

141 See AU Constitutive Act, art 6(1) and (2).

142 AU, 'The Assembly' <https://au.int/en/assembly> accessed 13 April 2021.

143 ibid. See also, AU, *African Union Handbook 2020*, (n 138) 32; and generally, AU Constitutive Act, art 9(1).

144 AU Constitutive Act, art 9(1)(e).

145 ibid art 7(1).

146 CADSP, art 15.

147 See AU, 'The Assembly' (n 142); and AU, *African Union Handbook 2020* (n 138) 32.

148 See Nina Wilén and Paul D. Williams, 'The African Union and Coercive Diplomacy: The Case of Burundi' 4(2018) 56 Journal of Modern African Studies 673, 674. See also PSC Protocol, art 7(1)(a)-(r), for the powers of the PSC.

their behalf' in performing its duties.[149] However, it is noted that the Assembly reserved to itself the power to decide on three key issues: 'humanitarian intervention',[150] intervention by the AU upon the request of a state,[151] and the imposition of sanctions on member states.[152] The PSC can only act on these issues where the Assembly delegates such power to it.[153] Also, the PSC generally remains subsidiary in relation to the Assembly,[154] with the latter retaining the underlying right to 'approve, reject or annul its decisions'.[155]

One of the objectives of the PSC is to 'co-ordinate and harmonize continental efforts in the prevention and combating of international terrorism in all its aspects'.[156] Among the powers of the PSC, to be wielded in conjunction with the AUC Chairperson, is ensuring the implementation of the OAU Convention as well as other relevant conventions and instruments, and the harmonization and coordination of regional and sub-regional efforts aimed at countering international terrorism.[157]

In fulfilling its responsibility in 'harmonizing and coordinating continental efforts in the prevention and combating of terrorism', the PSC is mandated under Article 4 of the Protocol to the OAU Convention to set up 'operating procedures for information gathering, processing, and dissemination';[158] 'establish mechanisms to facilitate the exchange of information among [s]tates [p]arties on patterns and trends in terrorist acts and the activities of terror groups and

149 PSC Protocol, arts 7(2) and (3). In paragraph (4) of art 7, member states also agree to 'extend full cooperation to, and facilitate action by the [PSC] for the prevention, management and resolution of crises and conflicts, pursuant to the duties entrusted to [its] Protocol'.

150 Per art 4(h) of the AU Constitutive Act, the AU has a right of intervention into member states following a decision by the Assembly, 'in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'.

151 Per art 4(j) of the AU Constitutive Act, member states have the right to request for intervention from the AU to restore peace and security within their territories.

152 See Balingene Kahombo, 'The Peace and Security Council of the African Union: Rise or Decline of Collective Security in Africa? (December 2018) KFG Working Paper Series No 23, 3, 13. With regard to the reserved powers by the Assembly, see arts 4(j) and 7(1)(e) of the PSC Protocol where the right to intervene by the AU stays hinged on the approval of the Assembly; art 7(1)(f) of the PSC Protocol which provides that an intervention by the Union upon request by a state would only follow a decision by the Assembly; and art 7(1)(g) of the PSC Protocol where the power of the Council to impose sanctions is limited to an unconstitutional change of government. Concerning sanctions, generally, the Assembly per art 23(1) and (2) of the AU Constitutive Act has the power to institute sanctions on states who default in their financial contributions to the Union, as well as those who do not comply with AU policies and decisions.

153 Kahombo (n 152) 13 and 25. See also, art 9(2) of the AU Constitutive Act, and art 7(r) of the PSC Protocol.

154 See, for example, art 9 of the AU Non-Aggression and Common Defence Pact (adopted 31 January 2005, entered into force 18 December 2009), which notes that the PSC shall be responsible for the Pact's implementation, 'under the authority of the Assembly'.

155 Kahombo (n 152) 13. It is noted that per art 7(1)(q) of the PSC Protocol, the PSC is to 'submit, through its Chairperson, regular reports to the Assembly on its activities and the state of peace and security in Africa'.

156 PSC Protocol, art 3(d).

157 ibid art 7(1)(i). see also art 2(2) of the Protocol to the OAU Convention.

158 OAU Convention Protocol, art 4(a).

on successful practices on combating terrorism';[159] 'present an annual report to the [AU Assembly] on the situation of terrorism on the continent';[160] 'monitor, evaluate and make recommendations on the implementation of the Plan of Action and programmes adopted by the [AU]';[161] examine the reports submitted by states on their implementation of the Protocol to the OAU Convention;[162] and to establish a network of information having 'national, regional and international focal points on terrorism'.[163]

The PSC has the power to establish subsidiary bodies to help in performing its functions.[164] Based on this, the PSC created a Sub-committee on Counterterrorism with the mandate to ensure 'the implementation of the relevant AU instruments and preparing, distributing, and regularly revising a list of persons, groups, and entities involved in terrorist acts on the continent', among others.[165] In addition, the sub-committee will play an important role in driving the PSC's work of harmonising and coordinating counterterrorism efforts at the regional level, all in line with Articles 3(d) and 7(i) of the PSC Protocol.[166] Although the sub-committee has been set up since 2012,[167] it is yet to be activated, despite the PSC noting the 'urgent need' for its activation.[168]

As part of its role in relation to peace and security, the PSC was charged with a human rights mandate under the PSC Protocol, with the recognition 'that the development of strong democratic institutions and culture, observance of human rights and the rule of law, as well as the implementation of post-conflict recovery programmes and sustainable development policies, are essential for the promotion of collective security, durable peace and stability, as

159 ibid art 4(b).
160 ibid art 4(c).
161 ibid art 4(d).
162 ibid art 4(e).
163 ibid art 4(f).
164 PSC Protocol, art 8(5).
165 Kane (n 68) 869.
166 See AU PSC, 'Report of the Chairperson of the Commission on Terrorism and Violent Extremism in Africa', 341st Meeting, Addis Ababa, Ethiopia (13 November 2012) PSC/PR/2.(CCCXLI) (hereafter AU PSC, 'Report of the Chairperson' (2012)) para 44.
167 See ibid; and AU PSC, 'Communique', 341st Meeting, Addis Ababa, Ethiopia (13 November 2012) (AU PSC, 'Communique' (2012)) PSC/PR/COMM.1(CCCXLI) para 13.
168 See AU PSC, 'Communique', 687th Meeting, Addis Ababa, Ethiopia (23 May 2017) PSC/PR/COMM.(DCLXXVII) para 16 (hereafter AU PSC 'Communique' (2017)); and AU PSC, 'Communique', 812th Meeting, Addis Ababa, Ethiopia (23 November 2018) PSC/PR/COMM. (DCCCXII) (hereafter AU PSC 'Communique' (2018a) para 18. See also, AU Assembly, 'Report of the Peace and Security Council on its Activities and the State of Peace and Security in Africa from the Period from February 2019 to February 2020' (9-10 February 2020) Addis Ababa, Ethiopia, Assembly/AU/5(XXXIII) para 171.

well as for the prevention of conflicts'.[169] In line with this, the PSC has as one of its objectives, to 'promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and [IHL], as parts of efforts for preventing conflicts'.[170] The PSC is also to be guided by the principles in the AU Constitutive Act, the UN Charter, and the Universal Declaration of Human Rights.[171] In particular, it must also be guided by 'respect for the rule of law, fundamental human rights and freedoms, the sanctity of human life and international humanitarian law'.[172]

The PSC is also supposed to, per Article 19 of the Protocol, cooperate closely with the ACHPR 'in all matters relevant to its objective and mandate'.[173] Particularly, the ACHPR is to bring to the PSC's notice, any information pertinent to its (the PSC's) objectives and mandate.[174] Perhaps in accordance with this, the PSC has requested that the AUC 'work closely' with the ACHPR and other relevant stakeholders to support the efforts of AU member states in the protection of human rights while countering terrorism.[175] This was after emphasizing 'the imperative need, in the fight against terrorism and violent extremism, to uphold the highest standards of human rights and [IHL], bearing in mind the provisions of Article 3(1k) of the [OAU Convention Protocol]'.[176] The PSC has made repeated pronouncements on the need to adhere to human rights standards during counterterrorism.[177] The PSC has also requested the ACSRT, the ACHPR, and the African Court of Justice, to 'design appropriate strategies and

169 PSC Protocol, preambular para 15. See also Solomon A. Dersso, 'The Role and Place of Human Rights in the Mandate and Works of the Peace and Security Council of the AU: An Appraisal' LVIII (2011) Netherlands International Law Review 77, 81; and ACHPR, 'Presentation of the African Commission on Human and Peoples' Rights (ACHPR) to the African Union Peace and Security Council (PSC)' (ACHPR Presentation), by Dr Solomon Ayele Dersso, ACHPR Commissioner and Focal Person of the ACHPR on Human Rights in Conflict Situations, at the 866th meeting of the PSC on the consultative meeting between the PSC and the ACHPR, 8 August 2019, available at <https://www.achpr.org/public/Document/file/English/Presentation%20at%20866th%20session%20of%20the%20PSC.pdf>, accessed 25 April 2021, 6.

170 PSC Protocol, art 3(f).

171 Universal Declaration of Human Rights (UDHR), (UN General Assembly Res 217 A (III)) (adopted 10 December 1948). See PSC Protocol, art 4.

172 PSC Protocol, art 4(c). It is recalled that one of the principles the AU is to function by, as encapsulated in the Constitutive Act, is respect for human rights. See AU Constitutive Act, art 4(m).

173 PSC Protocol, art 19.

174 ibid.

175 African Union Peace and Security Council (AU PSC), 'Communique', 249th Meeting, Addis Ababa, Ethiopia (22 November 2010) (hereafter AU PSC, 'Communique' (2010)), PSC/PR/COMM.(CCXLVIX) para 11. See also AU PSC, 'Communique', 455th Meeting at the Level of the Heads of State and Government, Nairobi, Kenya (2 September 2014) (hereafter AU PSC, 'Communique' (2014)), PSC/AHG/COMM.(CDLV) para 28.

176 ibid.

177 See ibid, and also AU PSC, 'Communique', 303rd Meeting, Addis Ababa, Ethiopia, 8 December 2011, PSC/PR/COMM.2 (CCCIII) para 14; AU PSC, 'Communique' (2012) (n 167) para 12; and AU PSC, 'Communique' (2017) (n 168) para 5.

activities in support of Member States', regarding compliance with human rights law and IHL during counterterrorism.[178] After years of the PSC and the ACHPR working on an ad hoc basis, steps were finally taken in 2019 to operationalise Article 19 of the PSC by institutionalising the relationship between the PSC and ACHPR. This will be discussed in more detail later.

Given that counterterrorism policing, and the consequent use of force in its prosecution, is part of a state's counterterrorism measures to be taken in implementation of the provisions of the OAU Convention as well as other relevant anti-terrorism treaties, it surely falls within the purview of the PSC's mandate to -- of particular relevance to the subject of this thesis -- ensure that the use of force in counterterrorism policing by African states complies with human rights standards. However, despite the PSC emphasizing that states should, as a matter of necessity, uphold human rights standards during counterterrorism, and urging relevant stakeholders to support the activities of states in this respect, this seems to be the extent of the PSC's involvement in that regard. No concrete steps from the PSC appear to have followed those pronouncements, for example, by calling out or censuring specific states with records of human rights violations during counterterrorism. Also, there is a reported failure by many states to regularly report to the AU (the PSC) on their counterterrorism activities, as mandated under the Protocol to the OAU Convention and the Plan of Action.[179] As a result of this failure, there is an inability to monitor state compliance with their counterterrorism obligations, including the adherence to human rights standards.[180]

### f) The African Union Commission (The Commissioner in charge of Peace and Security)

The AUC is one of the organs of the AU,[181] and it is the Union's secretariat, responsible for its executive functions.[182] Currently, the AUC is composed by a chairperson, a deputy chairperson, and six commissioners. The commissioners run the AUC's six portfolios, one of which is Political Affairs, Peace and Security.[183] The Chairperson is the Chief Executive Officer, legal representative of the AU, as well as the Chief Accounting Officer of the

178 AU PSC, 'Communique' (2012) (n 167) para 12.
179 Ewi and Du Plessis, 'Criminal Justice Responses' (n 64) 1015; and Institute for Security Studies (ISS), 'Peace and Security Report' 100 (March 2018) 3-4. See also, art 4(e) of the Protocol to the OAU Convention, and para 16(b)of the AU Plan of Action.
180 Ewi and Du Plessis, 'Criminal Justice Responses' (n 64) 1015.
181 AU Constitutive Act, art 5(1)(e).
182 See ibid art 20(1), and African Union, 'The Commission', <https://au.int/en/auc> accessed 27 January 2021.
183 It is noted that formerly, the AUC was composed of eight portfolios, one of which was Peace and Security.

Commission.[184] The commissioners assist the Chairperson with the administration of the AUC and are responsible for implementing all decisions, policies, and programmes with respect to their specific portfolios.[185]

The AUC supports the PSC in the 'prevention, management, and resolution of conflicts'.[186] Regarding counterterrorism, the AUC Chairperson has the power, in conjunction with the PSC, to ensure the implementation of anti-terrorism instruments, and to harmonize and coordinate sub-regional and regional counterterrorism efforts.[187] The Chairperson, '[i]n the exercise of his/her functions and powers', is to be aided by the Commissioner in charge of Peace and Security, who bears the responsibility for the Council's affairs.[188]

As noted above, the Protocol to the OAU Convention outlines the role of the AUC with regard to counterterrorism at the regional level. Per the Protocol, the Commissioner in charge of Peace and Security, under the AUC Chairperson's leadership, is tasked with following-up on issues related to counterterrorism.[189] The Commissioner is to be supported by the unit created within the AUC's Peace and Security Department and the ACSRT, and has the following among its functions:

- providing 'technical assistance on legal and law enforcement matters', such as combating terrorism financing, and preparing model laws and guidelines for states;
- following-up on the implementation of the PSC (as well as other AU organs) decisions concerning terrorism, by states and sub-regional mechanisms;
- reviewing and making recommendations on updating the AU counterterrorism programmes and the ACSRT's activities;
- developing and maintaining a database on an array of terrorism-related issues such as the experts and technical assistance available;
- maintaining contacts with bodies dealing with terrorism issues; and

184 AU, *African Union Handbook* (n 138) 95. The Chairperson is elected by the AU Assembly. See ibid.
185 See AU, *African Union Handbook* (n 138) 97.
186 See the combined effect of arts 2(1) and (2) of the PSC Protocol. Per Article 10(1) of the PSC Protocol, 'the Chairperson of the Commission shall, under the authority of the Peace and Security Council, and in consultation with all parties involved in a conflict, deploy efforts and take all initiatives deemed appropriate to prevent, manage and resolve conflicts'.
187 PSC Protocol, art 7(1)(i).
188 ibid art 10(4).
189 Protocol to the OAU Convention, art 5(1).

- providing advice and recommendations to states on securing technical and financial assistance in implementing regional and international counterterrorism measures.[190]

As part of its counterterrorism duties, the AUC Chairperson has, over the years, prepared reports examining the situation of terrorism on the continent and counterterrorism measures taken in response.[191] The first report in 2010 resulted from a call from the AU Assembly to the AUC to 'expeditiously submit to the [PSC] concrete recommendations aimed at strengthening the effectiveness of Africa's action in the prevention and combating of terrorism'.[192] Since then, the AUC has prepared further reports for the PSC's consideration, on its request.[193] In general, the reports outline the threat of and vulnerability to terrorism on the continent; provide updates on efforts undertaken by the AU to tackle terrorism during the period under review; and conclude with recommendations for further action.[194]

The AUC has also provided states with ongoing technical assistance and capacity building support in a wide array of areas, towards facilitating the effective implementation of the AU counterterrorism framework.[195] This has included elaborating the Model Law, and providing states with technical assistance in incorporating its provisions of into their legislations.[196] In addition, the AUC has provided states with support in strengthening regional coordination,[197] and establishing regional cooperation initiatives against terrorism;[198] operationalised the

190 ibid art 5(2) (a)-(f).

191 See for example, AU PSC, 'Report of the Chairperson of the Commission on Measures to Strengthen Cooperation in the Prevention and Combating of Terrorism', 249th Meeting, Addis Ababa, Ethiopia (22 November 2010) PSC/PR/2(CCXLIX) (hereafter AU PSC, 'Report of the Chairperson'(2010)); AU PSC, 'Report of the Chairperson' (2011) (n 120); AU PSC, 'Report of the Chairperson' (2012) (n 166); and AU PSC, 'Report of the Chairperson' (2014) (n 133).

192 See AU Assembly, 'Decision on the Prevention and Combating of Terrorism' (adopted by the Fifteenth Ordinary Session of the Assembly of the Union, 27 July 2010, Kampala, Uganda) Assembly/AU/Dec.311(XV), (hereafter AU Assembly (2010)) para 5; and AU PSC, 'Report of the Chairperson' (2010) (n 191) paras 1 and 2.

193 See AU PSC, 'Communique' (2010), (n 175) para 13; AU PSC, 'Report of the Chairperson' (2011) (n 120) para 1; and AU PSC, 'Report of the Chairperson' (2012) (n 166) para 2. It is noted that the AU Assembly had also requested the Commission to 'submit regular reports on the status of the fight and cooperation against terrorism in Africa'. See AU Assembly (2010) (n 192) para 9.

194 See AU PSC, 'Report of the Chairperson' (2010) (n 191) para 2; AU PSC, 'Report of the Chairperson' (2011) (n 120) para 2; AU PSC, 'Report of the Chairperson' (2012) (n 166), para 2; and AU PSC, 'Report of the Chairperson' (2014) (n 133), para 3. See also, generally, ibid.

195 See AU PSC, 'Communique', 517th Meeting at the Level of Heads of State and Government, Addis Ababa, Ethiopia (29 January 2016) PSC/AHG/COMM.1(DLXXI) (hereafter AU PSC 'Communique'(2016a)) para 11; and AU PSC, 'Communique', 957th Meeting, Addis Ababa, Ethiopia (20 October 2020) PSC/PR/COMM.(CMLVII) (hereafter AU PSC 'Communique' (2020)) para 9.

196 See AU PSC, 'Report of the Chairperson' (2014) (n 133) para 47.

197 See AU PSC, 'Communique' (2016a) (n 195) para 11.

198 ibid para 12.

African Mechanism for Police Cooperation (AFRIPOL),[199] which currently plays an important role in supporting states' counterterrorism efforts;[200] and has worked through and with the Committee on Intelligence and Security Services (CISSA)[201] in supporting AU member states in implementing the AU counterterrorism framework.[202]

Much of the technical assistance and capacity building support provided by the AUC to states has been through the ACSRT. The ACSRT was created as a structure within the AUC, and it is regarded as part of the AUC's Peace and Security Department.[203] The ACSRT has been deemed 'the main AU body for the implementation of the counter-terrorism framework'.[204] The ACSRT was created 'to serve as a structure to centralize information, research and analyses on terrorism and terrorist groups and develop training programmes for [m]ember [s]tates'.[205] Its mission is to conduct research and study on terrorism and develop strategic policy, operational, and training mechanisms to strengthen the capacity of the AU and its

199 AFRIPOL was set up under the auspices of the AU as an independent and specialised mechanism for police cooperation among its member states. See AFRIPOL, 'The African Union Mechanism for Police Cooperation', <https://afripol.africa-union.org>/, 14 February 2021. Its establishment was a reaction to increased criminal activities on the continent particularly terrorism and organised transnational crime, which pose a common challenge to African states and require an effective response through 'the harmonisation of police methods, the exchange and extension of best practices in terms of training, prevention, investigative techniques, and expertise, as well as the strengthening of African police capabilities.' See Algiers Declaration on the Establishment of the African Mechanism for Police Cooperation- AFRIPOL, adopted by the African Conference of Directors and Inspectors General of Police on AFRIPOL, Algiers (10-11 February 2014) paras 10-16.

200 See for instance, AU PSC 'Communique' (2020) (n 195) paras 9 and 10. Notably, among the steps AFRIPOL is taking to assist states, is the development, by request of the PSC, of a five-year strategic roadmap for the prevention and combating of terrorism and violent extremism, in conjunction with the ACSRT and the Committee of Intelligence and Security Services (CISSA), working in consultation with AU partners and other stakeholders. See AU PSC 'Communique' (2017) (n 168) para 18; and AU PSC 'Communique' (2018a) (n 168) para 17.

201 CISSA was established in 2004 as a result of the need for information sharing on transnational security threats faced by African states, and which require cooperation and collaboration between their Intelligence and Security Services. It provides the AUC 'with timely and insightful intelligence, to help in making appropriate decisions, based on accurate information, and addressing the security challenges facing Africa'. See The North African Post, 'African Union Inaugurates New HQ of Intelligence & Security Services' (12 February 2020) <https://northafricapost.com/37970-african-union-inaugurates-new-hq-of-intelligence-security-services.html> accessed 15 February 2021. CISSA has supported states in countering terrorism and violent extremism through capacity building (see AU PSC 'Communique' (2017) (n 168), paras 13; and AU PSC 'Communique' (2018a) (n 168), paras 11), and by providing early warning (see AU PSC 'Communique'(2016a) (n 195), para 14(vii)). CISSA also briefs the PSC on counterterrorism efforts in Africa. See AU PSC, 'Communique', 628th Meeting (28 September 2016) Addis Ababa, Ethiopia, PSC/PR/COMM.1(DCXXVIII) (hereafter AU PSC, 'Communique'(2016b)), para 11.

202 See AU PSC, 'Communique' (2016b) (n 201), para 11.

203 ACSRT, 'About Us: African Centre for the Study and Research on Terrorism- ACSRT/CAERT', <https://caert.org.dz/3389-2/> accessed 16 February 2020.

204 See AU PSC, 'Report of the Chairperson' (2012), (n 166), para 51; and AU PSC, 'Report of the Chairperson' (2014) (n 167), para 83.

205 See AU PSC, 'Report of the Chairperson' (2014) (n 133), para 39; and generally, AU Plan of Action, para 20.

member states in counterterrorism.[206] The ACSRT is 'designed to function in permanent and continuous coordination with National Focal Points' representing all AU member states, and Regional Focal Points representing the RECs.[207]

The mandate of the ACSRT is quite wide, including assisting states in developing counterterrorism strategies; providing technical and expert advice on implementing the AU counterterrorism instruments and on updating and strengthening AU counterterrorism policies and programmes; creating and maintaining a database on a number of counterterrorism issues, especially on terror groups and their activities within the continent, along with a database on the available experts and technical assistance; undertaking and disseminating research studies and policy analyses periodically to sensitize states; developing capacity for early warning and early response; and, 'conducting studies and analyses on the best strategies and methods for suppressing the financing of terrorism'.[208]

Since its launch in 2004, the ACSRT has been very active. For instance, it is noted that, through its network of National and Regional Focal Points, and alongside its close cooperation with the CISSA and the Fusion and Liaison Unit (UFL) which brings together relevant services of states in the Sahelo-Saharan region, the ACRST has established a platform for counterterrorism interaction, debate and cooperation among states and the RECs/Regional Mechanisms for Conflict Prevention, Management and Resolution.[209] It has also made efforts to build the technical, scientific, and operational capacity of AU member states in counterterrorism, through training programmes and seminars.[210] These programmes and seminars are conducted with the assistance of several stakeholder partners.[211] The ACSRT also carries out evaluation

206 ACSRT 'About Us' (n 203).
207 ibid.
208 See ibid.
209 AU PSC, 'Report of the Chairperson' (2014) (n 133) para 39.
210 ibid. For some examples of trainings organised by the ACSRT, see AU, 'Press Release No 05/2015: Organisation of the 5th Training Course on Operational Intelligence Analysis at the African Centre for the Study and Research on Terrorism' <http://caert.org.dz/Press-releases/Press%20release%208%20Dec%2015.pdf> accessed 22 September 2018; ACSRT, 'NATO-African Union Joint Advanced Training Course on 'Counter Terrorism Capacity Building Through Training and Education' <https://caert.org.dz/nato-african-union-joint-advanced-training-course-on-counter-terrorism-capacity-building-through-training-and-education/> accessed 15 February 2021; AU, 'First Regional Senior Course on the Prevention of Violent Extremism (PVE) for Economic Community of Central African States (ECCAS) Member States' (6-9 August 2019) Yaoundé, Cameroon, <https://caert.org.dz/Reports/Report%206-9%20Aug%202019-en.pdf> accessed 15 February 2021; and ACSRT 'Webinar on Counterterrorism and Judicial Cooperation (Interplay of Intelligence, Evidence, and Prosecution)' <https://caert.org.dz/webinar-on-counter-terrorism-and-judicial-cooperation-interplay-of-intelligence-evidence-and-prosecution/> accessed 16 April 2021.
211 ACSRT 'About Us' (n 203).

missions to states, to assess their capacity to fulfil their obligations under the AU and global counterterrorism decisions and instruments; evaluate the capacity of National Focal Points to implement their tasks; and to develop recommendations on measures to be taken by states as well as identify areas where technical assistance is required by the state under review.[212] In addition to this, the ACSRT also participates actively in the UN Security Council Counter-Terrorism Executive Directorate's (CTED) monitoring missions, 'contributing, in this way, to the reports submitted to the UN Security Council'.[213]

Generally, the AUC has been mindful of the need to respect human rights during counterterrorism. Indeed, its reports have repeatedly pointed to the need for states to uphold human rights standards in the fight against terrorism.[214] As the AUC Chairperson stated in the AUC's 2014 report to the PSC, '[n]o sustainable results can be achieved in the prevention and combatting of terrorism if the efforts undertaken are not based on the scrupulous adherence to human rights and international humanitarian law instruments'.[215] Further, after echoing the 'repeated pronouncements' of the PSC on the need to comply with human rights standards while countering terrorism, as well as relevant provisions of the OAU Convention Protocol, he stated the intent of the AUC to 'convene a meeting bringing together the relevant AU organs and national security institutions to identify practical steps aimed at better mainstreaming human rights and IHL consideration into the challenging and ever relevant struggle against the evil of terrorism'.[216] The ACSRT has also underscored the need for states to comply with human rights law during counterterrorism. During evaluation missions to states for example, the importance of ensuring the application of human rights safeguards in counterterrorism efforts has been explicitly raised.[217] This has also been done during trainings organised by the ACRST.[218]

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212 AU PSC, 'Report of the Chairperson' (2014) (n 133) para 52.

213 ibid para 40. The ACSRT also provides briefings to the PSC on counterterrorism efforts in Africa (see AU PSC, 'Communique'(2016b) (n 201) para 11); and it has created a database through which it collects and processes information on terrorism i.e., terrorist groups and individuals, and activities, which it also analyses so to pass on to the AUC and member states as well as proffer advice on countermeasures. See ACSRT Brochure <http://caert.org.dz/Brochures/About%20ACSRT.pdf> accessed 16 April 2021.

214 See AU PSC, 'Report of the Chairperson' (2010) (n 191), para 39; AU PSC, 'Report of the Chairperson' (2011) (n 120) para 42; AU PSC, 'Report of the Chairperson' (2012) (n 166) para 48; and AU PSC, 'Report of the Chairperson' (2014) (n 133) para 82.

215 AU PSC, 'Report of the Chairperson' (2014) (n 133) para 82.

216 ibid.

217 See AU PSC 'Report of the Chairperson' (2011) (n 120) para 30.

218 See for example, forums organised by the ACSRT in this regard such as two workshops on 'Implementing Internationally Accepted Good Practices for Investigating and Prosecuting Terrorism Cases: The Use of Undercover Operations and the Protection of Sensitive Information' organised in conjunction with the US Department of Justice, as noted in ACSRT, '2nd UNCCT International Conference on Engaging Partners

As noted above, the PSC has requested on a number of occasions, including in response to the 2014 AUC report, that the AUC and the ACRST work in collaboration 'with the [ACHPR] and other stakeholders to promote and ensure the respect for human rights and [IHL]' during counterterrorism.[219] However, the effect of such collaboration, if any, is yet to be seen in practice despite the stated intent and an appreciation of the need to do so. It has also been noted that the AUC's ability to follow up on the implementation of the PSC's decisions with regard to counterterrorism is severely limited by a lack of capacity in that regard.[220]

### g) The Regional Economic Communities/Regional Mechanisms for Conflict Prevention, Management and Resolutions (RECs/RMs)

RECs[221] are intra-continental groupings among African states which developed separately and have their unique roles and structures.[222] The main objective of the RECs is the facilitation of economic integration within the sub-regions as well as under the broader African Economic Community (AEC).[223] However, the RECs are increasingly involved in other matters within their sub-regions such as peace and security, development, and governance.[224] The RECs 'work closely with the AU and serve as its building blocks', with a complementary relationship in existence between them.[225] The eight RECs recognised by the AU are: the Arab Maghreb Union (UMA); Common Market for Eastern and Southern Africa (COMESA); Community of Sahel-Saharan States (CEN-SAD); East African Community (EAC); Economic Community of Central African States (ECCAS); Economic Community of West African States (ECOWAS);

for Capacity Building: United Nations' Collaboration with Counter terrorism Centres, Brussels, Belgium' (July – December 2014) ACSRT/CAERT Newsletter, 22 <http://caert.org.dz/Publications/Newsletter/ACSRT%20Newsletter-Jul-Dec-2014.pdf> accessed 5 October 2018. See also ACSRT, 'NATO-African Union Joint Advanced Training Course on 'Counter Terrorism Capacity Building Through Training and Education' <https://caert.org.dz/nato-african-union-joint-advanced-training-course-on-counter-terrorism-capacity-building-through-training-and-education/> accessed 15 February 2021; and ACSRT, 'Regional Webinar for Southern African Development Community States Members on Human Rights and the Rule of Law in the Prevention and Countering of Terrorism, Violent Extremism and Transnational Organized Crime (PCT and TOC)' <https://caert.org.dz/regional-webinar-for-southern-african-development-community-states-members-on-human-rights-and-rule-of-law-in-the-prevention-and-countering-of-terrorism-violent-extremism-and-transnational-organized/> accessed 16 April 2021.

219 See AU PSC, 'Communique' (2010) (n 175) para 11; and AU PSC, 'Communique' (2014) (n 175) para 28.

220 ISS 'PSC Report' (2018) (n 179) 3.

221 It is noted that 'regional' here means sub-regional groups within the continent.

222 AU, *African Union Handbook*, (n 138) 150.

223 ibid. The AEC was established under the Treaty Establishing the African Economic Community (Abuja Treaty) (adopted 12 May 1994, entered into force 24 January 2013). Under the 1980 Lagos Plan of Action for the Development of Africa and the Abuja Treaty, the creation of RECs is proposed as the foundation for wider African integration, towards facilitating sub-regional and eventual regional (continental) integration. AU, *African Union Handbook*, (n 138) 150

224 AU, *African Union Handbook*, (n 138) 150.

225 ibid.

Intergovernmental Authority on Development (IGAD); and the Southern African Development Community (SADC).[226] The AU also recognises two sub-regional mechanisms (RMs, not managed by RECs) active in the peace and security sector i.e. the East African Standby Force Secretariat (formerly the East African Standby Force Coordination Mechanism (EASFCOM)) and the North African Regional Capability (NARC).[227]

The RECs/RMs 'are part of the overall [AU] security architecture' which is primarily responsible for ensuring the 'peace, security and stability' of the continent.[228] The PSC and the AUC Chairperson are to 'harmonize and coordinate the activities' of the RECs/RMs in this regard, and to work closely with them - to ensure an effective partnership, whose modalities should be 'determined by the comparative advantage of each and the prevailing circumstances'.[229] In 2008, a binding Memorandum of Understanding (MOU) on Cooperation in the Area of Peace and Security between the AU, the RECs and the Coordinating Mechanism of the Regional Standby Brigades of Eastern Africa and North Africa was concluded, a binding instrument that sets out the framework for cooperation between the AU and the RECs/RMs.[230] While the MOU notes that the AU bears the primary responsibility for maintaining and promoting peace, security, and stability in Africa,[231] it states that the partnership between the AU and the RECs/RMs shall be guided by 'the principles of subsidiarity, complementarity and comparative advantage'.[232] The meaning of these principles were not defined in the MOU, and currently, there is some vagueness as to how the relationship between the AU and RECs/RMs should work.[233] RECs have been at the forefront when it comes to peace and security, hence

226 ibid.

227 See Sophie Desmidt and Volker Hauck, 'Conflict Management under the African Peace and Security Architecture (APSA): Analysis of Conflict Prevention and Conflict Resolution Interventions by the African Union and Regional Economic Communities in Violent Conflicts in Africa for the Years 2013-2015' (April 2017) European Centre for Development Policy Management (ECDPM) Discussion Paper, No 211, 6-7. It is noted that while the AU only recognises two RMs, there are other sub-regional organisations that operate in the field of peace and security such as the International Conference on the Great Lakes Region (IGCLR), G5-Sahel and the Lake Chad Basin Commission (LCBC). The G5-Sahel and the LCBC were, for instance, present in a meeting between the PSC and RECs/RMs. See AU PSC, '1st Joint Consultative Meeting between the Peace and Security Council of the African Union and the Regional Economic Communities/Regional Mechanisms for Conflict Prevention, Management and Resolution (RECs/RMs)' (24 May 2019) Addis Ababa, Ethiopia, INAUGURAL MEETING (I) PSC/REC/RMS, para 4.

228 See PSC Protocol, art 16(1).

229 ibid art 16(1)(a) and (b).

230 See the Memorandum of Understanding on Cooperation in the Area of Peace and Security between the African Union, the Regional Economic Communities and the Coordinating Mechanism of the Regional Standby Brigades of Eastern Africa and North Africa (MOU), (2008), art 2.

231 ibid art 4(ii).

232 ibid art 4(iv)

233 On this issue, see Desmidt and Hauck (n 227) 7-8; and Adriana Lins de Albuquerque, 'The African Peace and Security Architecture (APSA): Discussing the Remaining Challenges' October 2016, FOI-R--4301—SE, 23-26.

leading to questions concerning the role of the AU as against the RECs in addressing conflicts/crises.[234] Pursuant to a January 2017 decision by the AU Assembly,[235] attempts are currently underway to clearly define the division of labour between the AU, RECs, RMs, member states, and other regional institutions.[236]

Under the Protocol to the OAU Convention, African regional mechanisms are given 'a complementary role in the implementation' of the Convention and the Protocol, alongside the relevant AU institutions.[237] The RMs are mandated to: 'establish contact points on terrorism at the [sub-regional] level'; work with the AUC in the development of counterterrorism measures; foster cooperation in the implementation of the OAU Convention and its Protocol; 'harmonise and coordinate' states' counterterrorism measures within their sub-regions; create modalities for information exchange on the actions of terrorists as well as best practices for counterterrorism; support states in the implementation of sub-regional, regional and global counterterrorism instruments; and to send regular reports to the AUC on counterterrorism measures adopted at the sub-regional level.[238]

The RECs/RMs, in varying degrees, have played a significant role in developing sub-regional counterterrorism strategies and galvanising action against terrorism and violent extremism within their areas of mandate.[239] Since they generally complement the efforts of the AU institutions and work in tandem with them on peace and security issues; they also have a complementary role to play in ensuring that African counterterrorism efforts comply with human rights standards. As the RECs/RMs are not the main focus of this thesis, this discussion will not go into the details of their individual counterterrorism activities. However, there will

234 ISS, 'Peace and Security Council Report' 130 (November 2020) 1, 2.
235 ibid.
236 See generally, ibid 2-5.
237 See Protocol to the OAU Convention, art 6. See also the MOU, art 5(vi) where one of the areas of cooperation for the AU and the RECs/RMs is noted to be counterterrorism; with art 11(1) stating that the AU and the RECs/RMs 'shall promote closer cooperation in the prevention and combating of terrorism, based on the [OAU] Convention, Protocol, and [the Plan of Action], as well as other relevant regional and international instruments'.
238 See Protocol to the OAU Convention, art 6(a)-(g).
239 See AU PSC, 'Communique' (2014) (n 175) para 11; and AU PSC, 'Communique', 749th Meeting at the Level of Heads of State and Government, Addis Ababa, Ethiopia, 27 January 2018, PSC/AHG/COM.(DCCXLIX) para 10. Some of the counterterrorism strategies developed by RECs include the ECOWAS Counterterrorism Strategy (which is annexed to the 2013 ECOWAS Political Declaration on a Common Position against Terrorism); the 2014 EAC Counterterrorism Strategy; and the 2015 SADC Counterterrorism Strategy. See generally, African Union Peace and Security Architecture, 'APSA Roadmap 2016-2020' Addis Ababa (December 2015) 20. In 2019, ECOWAS also adopted a 2020-2024 action plan to eradicate terrorism in the region. See Samson Kwarkye, 'Slow Progress for West Africa's Latest Counter-terrorism Plan' (17 February 2021) <https://issafrica.org/iss-today/slow-progress-for-west-africas-latest-counter-terrorism-plan> accessed 30 September 2021.

be mention of ways in which the AU counterterrorism institutions could cooperate with the RECs/RMs to enhance the compliance with human rights while countering terrorism.

From the discussion above on the instruments and institutions that make up the African counterterrorism architecture and their role in regulating the use of force in counterterrorism policing, some points can be noted. For one, the instruments tend to generally remind states that their obligations under human rights law and IHL remain intact, without many specifics. It is noteworthy that the Model Law's reminder came in its preamble- even, an optional preamble. The only real details are in the Protocol to the OAU Convention's prohibition of torture and ill-treatment of terrorist suspects, and the Model Law's affirmation of the right of an accused to a fair trial and due process. As a result of these, the instruments examined are not very helpful when dealing with the regulation of the specifics of the use of force in counterterrorism policing on the continent.

Turning to the actions of the institutions, the PSC -- which has a human rights mandate and has also acknowledged the necessity to address the issue of human rights protection during counterterrorism -- seems to have taken no concrete steps yet on that front. Whatever actions the AUC (which encompasses the ACSRT) has taken in training and capacity building of states' counterterrorism staff/agents, the current impact is unclear, and the effect not pronounced as evidence from the field relays that human rights are still widely violated in the fight against terrorism in Africa, including concerning the use of force in counterterrorism policing. There is thus a need for a stronger response from the AU counterterrorism architecture in this regard.

### 5.3. The African Human Rights System and its Role in Ensuring Human Rights-Compliant Use of Force in Counterterrorism Policing on the Continent

This section considers the role of the African regional human rights system in ensuring compliance with the international standards for the use of force in counterterrorism policing on the continent. It first discusses the general role played by regional rights mechanism in ensuring compliance with human rights at the domestic level. Following that, it gives an overview of the African human rights system- highlighting its foundational instrument, and its main institutions. It then goes on to focus on the response of the ACHPR to the use of excessive force in counterterrorism policing in Africa.

### 5.3.1. Regional Human Rights Mechanisms and Domestic Compliance with Human Rights Norms

Regional human rights systems are frameworks that have been put in place by different regional intergovernmental organisations to safeguard human rights within their respective regions of the world i.e., a particular continent or hemisphere.[240] Sub-regional human rights mechanisms also exist, formed by states within a more restricted region e.g. a section of a continent.[241] The global human rights system operating under the auspices of the UN, the regional human rights systems, and the sub-regional systems are the three levels at which international human rights law (IHRL) operates outside of the national/domestic/municipal sphere- which remains 'the inner layer and core of human rights protection'.[242] Regional human rights systems are noted to typically comprise of 'one or more multilateral legal instruments, a mechanism for monitoring the compliance of state parties with these instruments, and a judicial or quasi-judicial body authorized to resolve individual claims for the violation of rights guaranteed under these instruments'.[243]

While the global human rights system which is centred around the UN 'provides the main architecture of the international human rights protection regime', regional human rights systems 'constitute one of its fundamental pillars by complementing and often improving it on a regional level'.[244] According to Viljoen, 'the relative advantage' that sub-regional and regional human rights systems have over the global system is 'the higher level of convergence and coherence between states, allowing for greater norm-specification'; and 'the immediacy of interlocking interests, opening the possibility for faster response and improved implementation when states are closely bound by economic and political ties'.[245] He further states that '[c]loser economic, cultural, and political ties and common loyalties are further likely to ensure better implementation and more immediate and effective 'mobilization of shame'; and that '[c]ommunities sharing bonds of mutuality ('common loyalties') are more likely to be attuned to each other than those separated by vast geographical and psychological divides'.[246]

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240 See Georgetown Law Library- Human Rights Law Research Guide, 'Regional Human Rights Systems' <https://guides.ll.georgetown.edu/c.php?g=273364&p=6025368> accessed 19 April 2021; and Frans Viljoen, *International Human Rights Law in Africa* (2nd ed, Oxford University Press 2012) 9.

241 Viljoen (n 240) 9.

242 ibid.

243 Georgetown Law Library (n 240).

244 European Parliament- Directorate-General for External Policies Policy Department, 'The Role of Regional Human Rights Mechanisms' EXPO/B/DROI/2009/25 (November 2010), 26.

245 Viljoen (n 240) 9-10.

246 ibid 10.

Regional human rights systems, where present, play an increasingly important role in monitoring, promoting, and protecting human rights in their member states.[247] Whereas states remain primarily responsible for implementing human rights within their territories, regional human rights systems (along with the global and sub-regional systems as applicable) help to ensure compliance with human rights obligations at the domestic level.[248] The regional human rights instruments 'help to localise international human rights norms and standards, reflecting the particular human rights concerns of the region'; while the human rights mechanisms such as commissions, special rapporteurs, and courts, help to facilitate the implementation of the instruments on the ground.[249]

With regards to human rights and counterterrorism generally, Ewi asserts that 'as the clearing house for regional norms, [regional organisations] have a specific mandate to ensure that states' counter-terrorism activities are conducted in conformity with the relevant regional and international human rights law'.[250] According to him, actions that can be taken in this regard include 'making respect for human right [*sic*] in counter-terrorism actions a regional norm by incorporating human rights concerns into regional counter-terrorism instruments'; scrutinising counterterrorism activities/measures by states; 'promoting awareness and strategies' for human rights protection during counterterrorism; reviewing states' counterterrorism laws and advising them on best practices; and creating 'regional human rights courts and other mechanisms to coordinate and harmonize states' counter-terrorism actions and policies with human rights'.[251]

There is an established regional human rights system in Africa founded under the auspices of the OAU, which overlaps with the geography of the continent.[252] It is noted that there are currently no sub-regional human rights systems in Africa, although the mandates of some RECs such as ECOWAS and SADC include a concern for human rights.[253]

247 See International Justice Resource Center, 'Regional Systems' <https://ijrcenter.org/regional/> accessed 19 April 2021; and Universal Rights Group Geneva, 'A Rough Guide to the Regional Human Rights Systems', <https://www.universal-rights.org/human-rights-rough-guides/a-rough-guide-to-the-regional-human-rights-systems/> accessed 19 April 2021.
248 See generally Viljoen (n 240) 9-10.
249 Universal Rights Group Geneva (n 247).
250 Ewi (n 27) 165.
251 ibid.
252 Viljoen (n 240) 11-12.
253 ibid 10.

### 5.3.2. Overview of the African Human Rights System

The foundational instrument of the African human rights system, the African Charter on Human and Peoples' Rights,[254] was adopted in Banjul, The Gambia, on 28 July 1981 by the Assembly of Heads of States and Government of the OAU (OAU Assembly). It entered into force in 1986. Currently, all African states except Morocco are a party to the Charter.[255]

The Charter embraces the indivisibility of human rights, providing for civil and political rights, socio-economic and cultural rights, as well as peoples' rights. Its provision for peoples' rights such as the right to equality,[256] right to self-determination,[257] right to development,[258] and the right to peace;[259] is one of the unique features of the Charter.[260] Yet another unique feature of the Charter, is its imposition of duties on individuals.[261] It also does not contain a derogation clause, hence the full spectrum of rights under the Charter are applicable during states of emergency and other special circumstances; subject only to permissible limitations under Article 27(2) of the Charter, relating to 'the rights of others, collective security, morality and common interest'.[262]

Other instruments relevant to human rights promotion and protection in Africa include the Convention Governing the Specific Aspects of Refugee Problems in Africa,[263] the African Charter on the Rights and Welfare of the Child (African Children's Charter),[264] the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,[265] the African Charter on Democracy, Elections and Governance,[266] among others. The OAU

254 African Charter on Human and Peoples' Rights (African Charter), (adopted 28 June 1981, entered into force 21 October 1986), OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982).
255 See the Charter's status list which is available at <https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf>, accessed 18 October 2021.
256 African Charter, art 19.
257 ibid art 20.
258 ibid art 22.
259 ibid art 23.
260 ACHPR, 'Addressing Human Rights Issues in Conflict Situations: Towards a Systematic and Effective Role for the African Commission on Human and Peoples' Rights' (2019), (hereafter ACHPR 'Conflict Study') 33, para 64.
261 See articles 27-29 of the Charter. See also ACHPR, 'Conflict Study' (n 260) 34, para 67.
262 See *Media Rights Agenda and Others v Nigeria,* ACHPR Communications 105/93, 128/94, 130/94 and 152/96 (1998) paras 67-69.
263 (Adopted 10 September 1969, entered into force 20 January 1974).
264 (Adopted 1 July 1990, entered into force 29 November 1999).
265 (Adopted 11 July 2003, entered into force 25 November 2005).
266 (Adopted 30 January 2007, entered into force 15 February 2012).

Convention is also relevant, as it calls for the protection of human rights during counterterrorism; as well as the PSC Protocol, which gives the PSC a human rights mandate.[267]

There are three main human rights institutions under the African system.[268] The principal one,[269] the African Commission on Human and Peoples' Rights (ACHPR), was established under the African Charter,[270] and it is made up of 11 human rights experts (known as commissioners), serving in their personal capacity.[271] The main functions of the ACHPR include human rights promotion,[272] ensuring human rights protection per the African Charter,[273] and interpreting the Charter.[274] The promotion mandate is implemented through means such as studies and researches;[275] awareness creation and public mobilisation through seminars, symposia and conferences;[276] norm elaboration by formulating principles and rules resolving legal human-rights related problems;[277] examination of state reports required under Article 62 of the Charter;[278] cooperation with other African and international institutions (such as the PSC) concerned with human rights promotion and protection;[279] as well as through special mechanisms and promotional visits/missions.[280] Regarding state reporting under Article 62, states are to submit bi-annual reports to the ACHPR, containing measures taken towards implementing the Charter, progress made, as well as challenges faced.[281] The reports are examined by the ACHPR in open session while engaging in dialogue with state representatives.[282] Thereafter, concluding observations, which recognise the positive aspects of the report, note areas of concern, and make recommendations, are adopted in closed session.[283] Afterwards, they are also sent to the Assembly.[284]

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267 See text to note 169 above.
268 See Viljoen (n 240) 169.
269 ACHPR, 'Conflict Study' (n 260) 3.
270 African Charter, art 30.
271 ibid art 31(1) and (2).
272 ibid art 45(1).
273 ibid art 45(2).
274 ibid art 45(3). The Commission is also to 'perform any other tasks' assigned to it by the OAU Assembly (now AU Assembly). ibid art 45(4).
275 African Charter, art 45(1)(a).
276 See ibid, and ACHPR, 'Conflict Study' (n 260) 43, para 94.
277 African Charter, art 45(1)(b). See also ACHPR, 'Conflict Study' (n 260) 43, para 94.
278 ACHPR, 'Conflict Study' (n 260) 43, para 94.
279 African Charter, art 45(1)(c).
280 ACHPR, 'Conflict Study' (n 260) 43, para 94.
281 See Centre for Human Rights (CHR), University of Pretoria and the ACHPR, *A Guide to the African Human Rights System* (Pretoria University Law Press 2016) 27.
282 ibid, 28; and ACHPR, 'State Parties to the African Charter' <http://www.achpr.org/states/> accessed 29 April 2020.
283 See ACHPR, 'State Parties to the African Charter' (n 282); and CHR and ACHPR (n 281) 28.
284 See CHR and ACHPR (n 281) 29.

The ACHPR currently has 12 special mechanisms composed of five special rapporteurs, and seven working groups and committees, whose mandates cover specific themes.[285] The mechanisms 'investigate human rights violations, research human rights issues and undertake promotional activities through country visits', with their reports being the basis of some ACHPR resolutions.[286] ACHPR commissioners serve as special rapporteurs, while members of the working groups and committees may also include independent experts.[287] In addition to the thematic special mechanisms, there are four internal special mechanisms, also composed by commissioners.[288] ACHPR commissioners also act as country rapporteurs for specific state parties to the Charter, responsible for monitoring the human rights situation in those states.[289]

Central to the ACHPR's protective mandate is its communications (complaints) procedure by which it hears individual complaints brought against state parties concerning alleged violations of rights contained in the Charter.[290] The ACHPR reaches its findings, and issues recommendations where necessary.[291] The ACHPR also hears inter-state communications on violations of the Charter,[292] but this has only been activated once.[293] Under the provisions of Article 58 of the Charter, when one or more communications before the ACHPR 'relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights', the Commission is to refer such cases to the AU Assembly for action.[294] The ACHPR's decisions on the communications it hears are included in the Activity Reports which it submits to the AU Assembly per Article 54 of the Charter. However, the

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285 The current Special Rapporteur mandates comprise the following: Prisons and Conditions of Detention and Policing in Africa; Rights of Women; Freedom of Expression and Access to Information; Human Rights Defenders and Focal Point on Reprisals in Africa; and Refugees, Asylum Seekers, Internally Displaced Persons, and Migrants in Africa. The Working Groups relate to Indigenous Populations/Communities and Minorities in Africa; Economic, Social and Cultural Rights; Death Penalty, Extra-judicial, Summary or Arbitrary Killings and Enforced Disappearances in Africa; Rights of Older Persons and People with Disabilities; and Extractive Industries, Environment and Human Rights Violations; while the Committees relate to Prevention of Torture in Africa; and the Protection of the Rights of People Living with HIV (PLHIV) and Those At Risk, Vulnerable to and Affected by HIV. See ACHPR, 'Special Mechanisms' <https://www.achpr.org/specialmechanisms> accessed 20 April 2021.

286 CHR and ACHPR (n 281) 32.

287 ibid.

288 These internal special mechanisms are: Working Group on Specific Issues Related to the Work of the African Commission; Advisory Committee on Budgetary and Staff Matters; Working Group on Communications; and Committee on Resolutions. See ACHPR, 'Special Mechanisms' (n 285).

289 See ACHPR, 'Conflict Study' (n 260) 65, para 166.

290 African Charter, art 55.

291 See CHR and ACHPR (n 281) 22. The ACHPR could also issue provisional measures pending the determination of the complaint or promote amicable settlement of disputes. See ibid 21-22.

292 African Charter, art 47.

293 This was in the case of *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda*, ACHPR Communication 227/99 (2003).

294 African Charter, art 58(1).

recommendations of the Commission are not legally binding on states,[295] and there is no mechanism in place to monitor states' compliance with them.[296] As part of its protective mandate, the ACHPR also undertakes protective missions (both on-site and fact-finding missions),[297] issues resolutions (both thematic and country-specific), and sends urgent letters of appeal.[298] Press statements or releases are also issued by the ACHPR to denounce or voice concern over ongoing human rights violations.[299]

Another main human rights institution under the African regional system is the African Court on Human and Peoples' Rights, which was established in 2004 by a Protocol to the African Charter.[300] The Court has jurisdiction over 'all cases and disputes submitted to it' regarding the African Charter, the Protocol, and other human rights instruments ratified by the relevant state.[301] The Court was created as a complement to the ACHPR's protective mandate,[302] as the decisions of the Commission are not legally binding on states.[303] By contrast, state parties to the Court's Protocol are bound by its decisions, with the execution of judgments monitored by the Council of Ministers of the AU on behalf of the AU Assembly.[304] The ACHPR is 'entitled to submit cases to the Court'.[305] It (the ACHPR) may refer complaints involving state parties to the Protocol which it decided on its merits to the Court, and where the states have failed to comply with the decision.[306] It may also submit communications to the Court in cases of massive violations of human rights within a state party, and ask the Court for advisory

295 See ACHPR, 'Conflict Study' (n 260) 70, para 184.
296 CHR and ACHPR, (n 281) 40.
297 CHR and ACHPR, (n 281) 34.
298 ACHPR, 'Conflict Study' (n 260) 43, para 93.
299 ibid 61-62, para 154.
300 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol), (adopted 10 June 1998, entered into force 25 January 2004). The Protocol currently has 30 state parties. See its status list at <https://au.int/sites/default/files/treaties/36393-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf>, accessed 18 October 2021. It is noted that two protocols amending the African Human Rights Court Protocol have been adopted by the AU. Both protocols have not entered into force. The first, the Protocol on the Statute of the African Court of Justice and Human Rights (adopted 1 July 2008, not yet in force) is intended to merge the African Court on Human and Peoples' Rights and the African Court of Justice into a single court known as the African Court of Justice and Human Rights. The second protocol, the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (adopted 27 June 2014, not yet in force), aims to vest the proposed African Court of Justice and Human Rights with international criminal jurisdiction.
301 African Court Protocol, art 3(1).
302 ibid art 2.
303 See ACHPR, 'Conflict Study' (n 260) 70, para 184.
304 See CHR and ACHPR (n 281) 43; and African Court Protocol, arts 29 and 30.
305 African Court Protocol, art 5(1)(a).
306 CHR and ACHPR (n 281), 45 and 47.

opinions.[307] Other bodies entitled to bring cases to the Court include state parties and African intergovernmental organisations.[308] NGOs with observer status before the ACHPR and individuals may have such direct access to the court only if the state concerned has made a declaration to that effect per Articles 5(3) and 34(6) of the Protocol.[309]

The third main African human rights institution is the African Committee of Experts on the Rights and Welfare of the Child, established under Article 32 of the African Children's Charter. It is a specialised institution dealing only with the rights and welfare of children;[310] and its mandate covers promoting and protecting the rights of the child, as well as interpreting and ensuring the implementation of the Children's Charter.[311]

### 5.3.3. The African Commission on Human and Peoples' Rights and the Use of Excessive Force in Counterterrorism Policing in Africa

Concerning the use of force in counterterrorism policing, the African Charter provides for the right to life- prohibiting the arbitrary deprivation of life;[312] and the right to dignity of person, with torture, and cruel, inhuman, or degrading punishment and treatment explicitly prohibited.[313] The ACHPR's General Comment No 3[314] elaborates on the right to life as provided for under the Charter, and the obligations imposed on states in that regard.[315] It also discusses the international standards for the use of force (and firearms) in law enforcement, noting the principles of necessity and proportionality.[316] In addition, the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa,[317] also adopted by the

307 ibid 47.
308 African Court Protocol, art 5(1)(b)-(d).
309 As of writing, only six states (Burkina Faso, Ghana, Malawi, Mali, The Gambia, and Tunisia) have the declaration in place. Four states (Benin, Côte d'Ivoire, Rwanda, and Tanzania) which had previously filed the declaration, have withdrawn it. See African Court on Human and Peoples' Rights, 'Declarations' <https://www.african-court.org/wpafc/declarations/> accessed 18 October 2021.
310 African Children's Charter, art 32.
311 ibid art 47.
312 African Charter, art 4.
313 ibid art 5.
314 ACHPR, 'General Comment No 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)' (adopted during the 57th Ordinary Session of the African Commission on Human and Peoples' Rights held from 4 to 18 November 2015 in Banjul, The Gambia).
315 ibid para 1.
316 ibid para 27. See Chapter 2 for an in-depth discussion of the international standards for the use of force during law enforcement operations.
317 Guidelines on the Conditions of Arrest, Police Custody and Pre-trial Detention in Africa (the Luanda Guidelines), 2016.

ACHPR, highlight the rules for the lawful use of force and firearms during arrest, police custody and pre-trial detention;[318] as well as prohibiting torture and other ill-treatment.[319]

Under the regional human rights system, it would be for the institutions created to ensure the promotion and protection of the rights enshrined in the Charter to act in response to the use of excessive force during counterterrorism policing, in violation of the provisions of the African Charter and other human rights instruments. Foremost in this regard, is the ACHPR. Despite general human rights promotion and protection mandate, it has no formal role in the AU Counterterrorism Architecture. Nevertheless, it has a 'potentially crucial role in ensuring human rights observance in an age of counter-terrorism'.[320] Also important is the African Court. However, as noted previously, its potential role would be quite limited to clarifying the applicable legal standards while deciding cases alleging violations of human rights norms on the use of force in counterterrorism, and granting remedies.[321] Also, the African Committee of Experts on the Rights and Welfare of the Child is focused specifically on the rights of children, and thus would not be relevant to the issue of the use of excessive force in counterterrorism policing except when it affects children's rights and their welfare.[322] The focus of attention here is on the action (and inaction) of the ACHPR.

In 2005, in a bid to strike a balance between the need of states to effectively counter terrorism and their obligations to respect human rights law, the ACHPR passed Resolution 88 on the Protection of Human Rights and the Rule of Law in the Fight Against Terrorism.[323] This intervention came at the 37th meeting of the Commission, as a result of queries by human rights organisations concerning the actions of certain states during counterterrorism which were inconsistent with the provisions of the African Charter.[324] In the resolution, the ACHPR noted the duty of states to adhere to international human rights obligations in their counterterrorism measures, 'including the right to life, the prohibition of arbitrary arrests and detention, the right to a fair hearing, the prohibition of torture and other cruel, inhuman and degrading penalties

318 See ibid paras 3(c), and 25(b)-(f),
319 See ibid paras 4(a), 9(c), 22, and 24.
320 See Viljoen (n 240) 281. See also, Ewi and Aning (n 6) 42.
321 See Chapter 1, note 61. To the knowledge of the present author, there has yet been no case decided by the Court which alleges violations of human rights by states in the course of counterterrorism with regard to the use of force.
322 See Chapter 1, note 61.
323 ACHPR, '88 Resolution on the Protection of Human Rights and the Rule of Law in the Fight Against Terrorism' (Resolution 88) (adopted at the 37th Ordinary Session of the ACHPR held from 21 November to 5 December 2005, Banjul, The Gambia) <http://www.achpr.org/sessions/38th/resolutions/88/> 20 September 2018.
324 Kane (n 68) 861.

and treatment and the right to seek asylum'.[325] The ACHPR also undertook to make certain that its various special procedures and mechanisms considered the protection of human rights while combating terrorism within their mandates and also collectively, with a coherent approach;[326] and decided to organise a meeting of experts on this topic.[327]

Despite the promising provisions of this resolution, its implementation has been quite slow. In 2013, a group of civil society organisations (CSOs) delivered a joint letter to the ACHPR at its 53rd Ordinary Session,[328] asking the Commission to 'better ensure that States engaged in fighting terrorism fully comply with their human rights obligations'.[329] The letter noted that it had been eight years after the ACHPR passed Resolution 88, and yet the mechanisms envisaged by the resolution to prevent the violation of human rights while countering terrorism 'ha[d] never been fully implemented'.[330] It thus called on the ACHPR to, as previously committed to in Resolution 88 of 2005, ensure its special mechanisms and procedures consider the subject of the protection of human rights while fighting against terrorism in the context of their respective mandates, and act in coordination in that regard towards a coherent approach; as well as organise the planned meeting of experts on the issue.[331] The letter also recommended that the ACHPR bring itself up to date on the situation of terrorism and human rights in Africa; 'regularly engage' with the PSC on the issue of states' observance of their human rights obligations while countering terrorism, and that it '[c]onsider developing for the AU Member [s]tates [d]raft guidelines and principles on the protection of human rights in the fight against terrorism in Africa.'[332]

In 2015, the ACHPR adopted the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa (Principles and Guidelines),[333] prepared by the Special Rapporteur on Human Rights Defenders in Africa. The mandate of the Rapporteur is not directly linked with counterterrorism in Africa, except perhaps with regards to the effect of

325 Resolution 88, operative para 2. Viljoen notes that the listed rights were 'highlighted as a cause for special concern. See Viljoen (n 240) 282. See similarly, Kane (n 68) 862.
326 See Resolution 88, operative para 3.
327 See ibid operative para 4.
328 The letter is available at <https://www.opensocietyfoundations.org/sites/default/files/african-commission-letter-counterterrorism-20130413.pdf> accessed 24 September 2018.
329 See ibid 1.
330 ibid.
331 ibid 1-2.
332 ibid.
333 They were adopted during the ACHPR's 56th Ordinary Session in Banjul, Gambia (21 April to 7 May 2015), available at <http://www.achpr.org/files/special-mechanisms/human-rights-defenders/principles_and_guidelines_on_human_and_peoples_rights_while_countering_terrorism_in_africa.pdf> accessed 25 August 2018.

states' counterterrorism operations on human rights defenders.[334] The Principles and Guidelines were designed to meet four objectives, one of which was to respond to emerging issues 'unfortunately commonly associated with preventing and combating terrorism and violent extremism'.[335] The Principles and Guidelines first set out 14 general principles to be observed by states while countering terrorism,[336] one of which is 'non-derogations and restrictions on human rights and freedoms',[337] and proceeds to address specific issues concerning counterterrorism, such as 'arbitrary deprivation of life and the use of force',[338] and 'liberty, arrest and detention',[339] each of which is clearly relevant to the use of force in counterterrorism policing.

Concerning the use of force in counterterrorism policing, the Principles and Guidelines states the general legal principles applicable, such as the need to respect the right to life,[340] and the international standards for the use of lethal and non-lethal force by law enforcement.[341] On the use of lethal and non-lethal force, states are to note particularly that '[c]ounterterrorism operations must be narrowly tailored and strictly proportionate to the aim of protecting individuals against violence', and planned in such a way as to minimise to the greatest extent, the need for recourse to force.[342] States are also to note the obligation to report and investigate

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334 For details of the mandate of the Special Rapporteur on Human Rights Defenders, see ACHPR, '69 Resolution on the Protection of Human Rights Defenders in Africa' (4 June 2004) <http://www.achpr.org/sessions/35th/resolutions/69/> accessed 8 October 2018; and ACHPR, '273: Resolution on Extending the Scope of the Mandate of the Special Rapporteur on Human Rights Defenders in Africa' (adopted at the 55th Ordinary Session of the ACHPR held in Luanda, Angola, from 28 April to 12 May 2014) <http://www.achpr.org/sessions/55th/resolutions/273/> accessed 8 October 2018.

335 The Principles and Guidelines, Foreword by the Special Rapporteur on Human Rights Defenders in Africa, 6.

336 See Part 1 of the Principles and Guidelines.

337 See ibid Principle M.

338 This deals with the 'right to life' and the 'use of lethal and non-lethal force'. See ibid Part 2.

339 Issues dealt with here include the 'rights of individuals arrested or detained' and 'humane treatment of persons deprived of liberty'. See ibid Part 3.

340 ibid Part 2, para A.

341 See ibid Part 2, para B, which states in part:

> The use of force shall be strictly regulated under national law and in conformity with international standards. State authorities may not use force unless doing so is strictly necessary and done only to the extent required or the performance of their duty. The use of lethal force shall be regarded as an extreme measure. Lethal force should not be used except when in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest an individual presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of force may only be made when strictly unavoidable in order to protect life. When non-lethal force is used it must also be necessary and proportionate to the threat, such that the least harmful form of force is used, and never for purposes of punishment. International human rights law prohibits targeted killings and extrajudicial, summary, or arbitrary executions.

342 ibid Part 2, para B (i).

situations where death or injury results from the use of force, and to prosecute where necessary; as well as to provide medical assistance to those injured during counterterrorism operations.[343] Relating to the deprivation of liberty, arrest, and detention, the Principles and Guidelines also states the general principles applicable, noting the requirement of humane treatment and the prohibition of the use of torture.[344] Regarding implementation, states are to adopt necessary measures giving effect to the Principles and Guidelines, and ensuring the rights therein are guaranteed;[345] widely disseminate the document;[346] train counterterrorism officials based on the provisions of the Principles and Guidelines, where appropriate, in consultation with the ACSRT;[347] and providing in their periodic reports to the ACHPR and other relevant bodies, information as to the extent to which their counterterrorism measures comply with the Principles and Guidelines.[348]

While stating the general rules is fine, the Principles and Guidelines do not deal with some key issues. Firstly, it does not highlight the 'exceptionality' of the use of excessive force in counterterrorism, tied to the notion that it is an existential security threat to the state, as against many other crimes. Similarly, it does not underscore the specific problem of the counterproductive nature of the use of excessive force in counterterrorism on the continent. It also does not address the interplay between the law enforcement (LE) rules and the conduct of hostilities (COH) rules for the use of force- which would be relevant in situations of a non-international armed conflict between a state and a 'terrorist' armed group. The Principles and Guidelines do not discuss or stress that all counterterrorism operations fall under the realm of law enforcement, and thus subject to LE rules, except the conditions of a NIAC are met i.e., requisite intensity of violence, and organisation of the armed group. It also does not speak to the wide use of the military in counterterrorism even when the conditions for a NIAC are not met.

Despite the critique above, the adoption of the Principles and Guidelines by the ACHPR is commendable as it presents a starting point from which a stronger human rights focus may be pursued. It is the most notable step taken within the AU regime towards the protection of human rights while countering terrorism. However, there is the issue of their acceptance and

343 ibid Part 2, paras B(ii) and (iii).
344 ibid Part 3, para D.
345 ibid Part 14, para A.
346 ibid Part 14, para B.
347 ibid Part 14, para C.
348 ibid Part 14, para D.

implementation by states. In May 2017, the ACHPR passed Resolution 368,[349] which notes that African states and their law enforcement agencies 'are yet to take ownership of the principles enshrined in the Guidelines while countering terrorism'.[350] The resolution calls on states to adhere to the Principles and Guidelines in line with their obligations under the African Charter,[351] and to add in information in their reports to the ACHPR on the progressive implementation of human rights compliant counterterrorism measures, as well as the extent to which their counterterrorism measures (either ongoing or proposed) comply with the Principles and Guidelines.[352] The ACHPR also undertook in the resolution, to 'develop and recommend for adoption… a strategy and workplan that ensures the effective implementation of the Principles and Guidelines while Countering Terrorism in Africa', again through the Special Rapporteur for Human Rights Defenders.[353] The resolution further urged states to ensure capacity building relating to the Principles and Guidelines for relevant stakeholders, and to include its provisions in rules of engagement and deployment plans for all operations;[354] while also calling on the AU to support the efforts of states in implementing the Principles and Guidelines.[355]

However, the actualisation of the strategy and workplan recommended in the resolution is still waited upon. Also, an examination of state reports of Egypt, Kenya, and Nigeria- the three case studies used in this thesis and chosen here to sample compliance with reporting as urged by both the Principles and Guidelines and Resolution 368- submitted after 2015, reveal that not much information concerning compliance with human rights while countering terrorism is included in the reports.[356] Where there is such, it is mostly generalised information and there is no mention of the Principles and Guidelines.[357]

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349 ACHPR, '368 Resolution on Implementation of the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa' ACHPR/Res. 368 (LX) 2017 (22 May 2017) <http://www.achpr.org/sessions/60th/resolutions/368/> accessed 20 September 2018.

350 ibid preambular para 7.

351 ibid operative para 1.

352 ibid operative para 2.

353 ibid operative para 3.

354 ibid operative para 4.

355 ibid operative para 5.

356 See generally, the state reports submitted to the ACHPR by Egypt, Kenya, and Nigeria as of 5 October 2021, available at ACHPR, 'State Reports and Concluding Observations' <https://www.achpr.org/statereportsandconcludingobservations> accessed 5 October 2021.

357 For example, the latest report submitted by Egypt (which covers 2001-2017) has a section addressing the respect for human rights in the context of counterterrorism, in response to a recommendation made by the ACHPR in its concluding observations regarding Egypt's previous report which covered 2001-2004), notes national counterterrorism efforts undertaken without prejudice to human rights safeguards, including the promulgation of its 2015 Anti-terrorism Law. See 'Periodic Report of Egypt to the African Commission of

Concerning the effectiveness of the African human rights protection mechanisms in ensuring the effective protection of human rights during counterterrorism, Ewi and Aning had noted in 2006 that the capacity of the AU to handle matters in that regard was inadequate, [358] while pointing out a lack of coordination between the AUC and the ACHPR.[359] Ewi, in 2013, also noted gaps in the 'AU counterterrorism human rights regimes', particularly concerning states' accountability.[360] Asserting a lack of strict enforcement of counterterrorism and human rights regime,[361] he mentions as 'most disturbing', the fact that the AU 'is kept completely out of the loop on counter-terrorism developments in member states, especially on matters relating to legislation, investigation, police enforcement and the judiciary';[362] noting how the failure of many states to report regularly on their counterterrorism activities results in the AU not being able to assess their compliance with the regional counterterrorism instruments.[363] He attributed the inability of the AU to effectively monitor states' compliance with human rights during counterterrorism to the absence of an enforcement mechanism such as a human rights court, noting that the ACHPR had 'no clout' to enforce provisions of the African Charter.[364] He also noted as another reason the fact that terrorism was not mentioned in the Charter and did not

Human and Peoples' Rights for 2017' 95-98. However, as noted in Chapter 4 of this thesis, the Egyptian Anti-Terrorism Law contains an overly broad definition of terrorism, while section 8 of the Law gives officers a wide latitude to use force during counterterrorism. See Chapter 4, text to notes 49 and 55. On the part of Kenya, its latest state report covering 2015-2020 does not cover the issue of human rights during counterterrorism. See generally Republic of Kenya, 'Combined Report of the 12th and 13th Periodic Reports on the African Charter on Human and Peoples' Rights and the Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (April 2020). In the case of Nigeria, in its latest report (covering 2015-2016), it notes concerning the trial of terrorism suspects and adherence to human rights states (in response to a recommendation made by the ACHPR in its concluding observations on Nigeria's previous state report), that initiatives have been taken to ensure compliance, including training of military field commanders and other senior security and defence intelligence officers on human rights in counterterrorism operations. See Federal Republic of Nigeria, 'Nigeria's 6th Periodic Country Report: - 2015-2016 on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria' Section 2, 2.1, para 100. Also, it is also noted, concerning general adherence to human rights and IHL by military personnel in the fight against *Boko Haram*, also in response to a recommendation by the ACHPR (see Federal Republic of Nigeria (n 357), Section 2, 2.1, para 97), that allegations about extrajudicial killings, torture, and war crimes made against the military would be investigated; with a Nigerian Military Human Rights Dialogue launched by the National Human Rights Commission, whose objectives include the integration of human rights practices into the codes, field training, education systems, and disciplinary systems of the army. See Federal Republic of Nigeria (n 357) Section 3, 33-34.

358 Ewi and Aning (n 6) 42.

359 ibid.

360 Ewi (n 27) 170.

361 ibid 170-171. See also, Ewi and Du Plessis, 'Criminal Justice Responses' (n 64) 1006.

362 Ewi (n 27) 171. See also, Ewi and Du Plessis, 'Criminal Justice Responses' (n 64) 1015.

363 See Ewi (n 27) 171, and Ewi and Du Plessis, 'Criminal Justice Responses' (n 64) 1015.

364 Ewi (n 27) 171-172; and Ewi and Du Plessis, 'Criminal Justice Responses' (n 64) 1015-1016. Ewi and Du Plessis recommend that the ACHPR 'be strengthened and entrusted with the responsibility to streamline national counter-terrorism legislation in accordance with human rights obligations, and to ensure that no aspects of those laws contravene the African Charter'. See Ewi and Du Plessis, 'Criminal Justice Responses' (n 64) 1025.

feature on the ACHPR's agenda until after the 9/11 attacks.[365] According to him, the ACHPR had thus been unable to 'examine the anti-terrorism activities of member states in terms of their compliance with the Charter'.[366] He hoped that the operationalisation of the African Court will be 'a positive development in efforts towards ensuring the day-to-day protection of human rights in Africa'.[367]

Kane, writing in 2012, on a necessary new approach of the African human rights mechanisms in ensuring the effective protection of human rights by African states while countering terrorism - with a primary focus on the ACHPR,[368] recommended measures such as a review of the mandates of the ACHPR's special mechanisms to enable more effective supervision of states' counterterrorism activities;[369] and the use by the ACHPR of the state reporting procedure to deeply analyse the different aspects of states' counterterrorism measures, and establish 'genuine dialogue' with the states on compliance with the African Charter in the fight against terrorism.[370] He also proposed that the ACHPR refers cases regarding terrorism and human rights to the Court for review, where the state fails to comply with the Commission's recommendations; and to refer cases of serious human rights violations during counterterrorism to the Court per Article 58 of the African Charter.[371]

Further recommendations by Kane include the adoption of Guidelines and Principles on the protection of human rights during counterterrorism; organisation of regular meetings between the ACHPR and AU specialised organs on best practices for safeguarding human rights while combatting terrorism; engaging with states through seminars to identify and exchange best practices and measures; and insertion of a section on counterterrorism in the ACHPR's annual reports to the Assembly, 'to enable regular evaluation of the related actions of State parties'.[372] He also highlighted the need for constructive dialogue between key continental players such as the need for more effective information dissemination and sharing of best practices on decisions by the ACHPR, the African Court, sub-regional courts towards coherence in the

365 See Ewi (n 27) 172; and Ewi and Du Plessis, 'Criminal Justice Responses' (n 64) 1016.
366 See Ewi (n 27) 172; and Ewi and Du Plessis, 'Criminal Justice Responses' (n 64) 1016.
367 Ewi (n 27) 172. See also, Ewi and Du Plessis, 'Criminal Justice Responses' (n 64) 1016, and 1025.
368 He had described the reactions of the mechanisms to human rights violations by states during counterterrorism as 'extremely timorous or even indifferent'. See Kane (n 68) 840.
369 See ibid 863-864, and 871.
370 ibid 864.
371 ibid 867. Kane notes that serious violations frequently occur in the aftermath of a terrorist attack, citing as an example, the Egyptian government's response to the terror attacks at Taba and Sharm El-Sheik. See ibid, 867 and footnote 165.
372 ibid 871.

human rights jurisprudence and approach with regard to human rights protection during counterterrorism.[373] He also advocated for dialogue between the ACHPR and political organs of the AU e.g., the PSC and the AUC, RECs, and civil society organisations (CSOs), which should revolve around the PSC and would mainly involve information exchanges on state practices, as well as improved harmonization of domestic laws with African treaties providing for human rights safeguards during counterterrorism.[374]

Some of the above observations and recommendations may today be dated, and no longer reflect the reflect the situation on the ground. For example, the ACHPR is now more involved in ensuring compliance with human rights during counterterrorism, such as the adoption of the Principles and Guidelines, and requiring states' to report on their counterterrorism activities through the state reporting procedure. However, some remain relevant, such as the recommendations on use of the ACHPR's special mechanisms to monitor human rights compliance; meetings between the ACHPR and AU specialised organs; and the necessity for dialogue and cooperation between key continental players.

With specific regard to the use of excessive force during counterterrorism policing in Africa and action in this regard by the AU regime, the Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa organised a panel discussion on 'Counter-terrorism and Human Rights Compliant Policing: Challenges and Prospects' in 2015. The crucial role played by law enforcement in counterterrorism was noted, with participants at the discussion encouraged to propose ways to tackle challenges in the policing and terrorism context such as inadequate human rights training for the police; lack of independent oversight mechanisms; and the economic, social, and cultural factors which contribute to the violation of human rights by police officials during counterterrorism.[375]

The report of the panel discussion summarises the presentations made by panellists and the range of issues discussed at the gathering.[376] Among the presentations made was one on 'the Mechanisms in Place to Ensure Human Rights Compliant Policing while Countering Terrorism.' The presenter, Ibrahima Kane, observed that while police agencies on the continent

373 ibid 867-869.
374 ibid 868 and 871.
375 ACHPR, 'Report of the Panel Discussion on Counter-Terrorism and Human Rights Compliant Policing: Challenges and Prospects' Panel organised on 5th November 2015 at the margins of the 57th Ordinary Session of the Commission <http://www.achpr.org/news/2015/12/d204/> accessed 24 September 2018.
376 ibid.

had adopted counterterrorism measures that were in line with counterterrorism laws, the power granted them under those laws were expansive and posed challenges to human rights protection. In this regard, he particularly noted the use of renditions, extradition and refoulement, incommunicado detention, and the use of private security outfits. Discussing the available mechanisms for supervising the role of the police in counterterrorism, Kane is reported as noting 'continental level mechanisms through AU structures', in doing so remarking on the 'need for a specific mechanism to deal with terrorism-related matters at the [ACHPR] level;' along with 'judicial supervision, police oversight, national human rights institutions and the Ombudsmen'.[377] The ACHPR's Principles and Guidelines was recognised but Kane also urged the ACHPR to adopt 'a Model Law on Police and Oversight Institutions in terms of counter-terrorism.'[378]

In August 2019, the PSC and the ACHPR took steps to operationalise the provisions of Article 19 of the PSC Protocol, and institutionalise their cooperation and collaboration in line with that provision.[379] Prior to this, there had only been ad hoc interactions between both bodies, particularly regarding the investigation of human rights issues during conflict or crises; for example requests by the PSC for investigation by the ACHPR in Cote d'Ivoire, Darfur, the Republic of Guinea, Mali, Somalia, among others.[380] In institutionalising their relationship, the PSC decided, among others, to hold annual joint consultative meetings with the ACHPR; receive regular briefings from the ACHPR on human rights-related issues in Africa; communicate decisions on peace and security issues relating to human rights with the ACHPR (and vice-versa); have human rights and peace and security as a standing thematic agenda of the PSC by which identified thematic issues will be addressed; to institute regular interaction between the PSC Chairperson and the ACHPR Chairperson or the ACHPR Focal Person on Human Rights in Conflict Situations, on issues of common concern; and to undertake joint field missions in conflict or post conflict situations in Africa as necessary.[381]

377 ibid.
378 ibid.
379 See generally, AU PSC, 'Communique', 866th Meeting, 8 August 2019, Addis Ababa Ethiopia, PSC/PR/COMM.(DCCCLXVI) (hereafter AU PSC, 'Communique' (2019)). It is recalled that Article 19 of the PSC Protocol states that: '[t]he [PSC] shall seek close cooperation with the [ACHPR] in all matters relevant to its objectives and mandate. The [ACHPR] shall bring to the attention of the [PSC] any information relevant to the objectives and mandate of the [PSC]'. See PSC Protocol, art 19.
380 See ACHPR, 'ACHPR Presentation' (n 169),7.
381 AU PSC, 'Communique' (2019) (n 379) para 12.

The institutionalisation of the relationship between the PSC and the ACHPR is a good development, and it presents opportunities for a further exploration of the human rights mandate of the PSC relating to peace and security issues, of which terrorism is one; and the mainstreaming of human rights considerations during the prevention and combating of terrorism. This institutionalisation was facilitated by Resolution 332 of the ACHPR on 'Human Rights in Conflict Situations'.[382] In the resolution, the ACHPR recognised 'the urgent need for institutionalizing a human rights-based approach to conflict prevention, management and resolution on the continent',[383] as well as 'the need to work closely with the AU Peace and Security Council in accordance with Article 19 of the PSC Protocol and other regional and sub-regional processes, in addressing human rights in conflict situations'.[384] It thus appointed a Focal Person on Human Rights in Conflict Situations to '[c]onduct a study on human rights in conflict situations in Africa, with a view to developing a comprehensive strategy and framework on the same'.[385]

The resulting Study notes that while the ACHPR has not been inactive regarding human rights issues that arise from conflict situations, 'the nature of human rights violations in conflict or crisis situations demands much more than the ad hoc and largely reactive approach that has thus far characterised the Commission's engagement'.[386] 'Conflict', in the context of Resolution 332 and the Study, was interpreted to cover 'violent and sustained political and/or social disputes',[387] with terrorism noted to be covered under that term.[388] The Study also acknowledges that '[d]espite similarities, the nature and manifestation of human rights issues are not the same for all conflict and crisis situations', noting, for instance, that the issues that may come up in a civil war, or stem from resource-related disputes, would vary from those that would arise from terrorism-related conflicts or counterterrorism.[389]

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382 See ACHPR, '332 Resolution on Human Rights in Conflict Situations- ACHPR/Res.322(EXT.OS/XIX)2016' <https://www.achpr.org/sessions/resolutions?id=248> accessed 13 October 2021.
383 ibid preambular para 8.
384 ibid preambular para 9.
385 ibid operative para 1.
386 ACHPR, 'Conflict Study' (n 260) 4, para 8.
387 'Conflict situations' on its part, was interpreted to cover 'armed conflicts, both international and non-international, and also other instances of crisis situations manifesting violent actions of various gravity short of armed conflict, such as conditions of major instability or violence lacking the use of organised armed force'. See ibid, x, and 7-9.
388 See ibid 8-9, para 16; and 16, para 35.
389 ibid 8, para 26.

The Study sets out a proposed 'five-pillar approach' for a 'comprehensive response to human rights issues in conflict situations' in Africa, which would be relevant to the use of excessive force in counterterrorism. The five thematic priorities of the approach are: 'monitoring and response'; 'prevention though addressing root causes of conflict'; 'mainstreaming of human rights into conflict prevention, management, resolution and post-conflict reconstruction and development'; 'remedial measures within the Commission's procedures'; and 'institutional coordination and synergy, including the operationalisation of Article 19 of the PSC Protocol'.[390] Concerning Article 19 of the Protocol, the Study noted, among other things, 'a lack of institutionalised working relationship between the Commission and the PSC, envisaged under Article 19 of the PSC Protocol', and proposed modalities for such institutionalisation.[391] As part of measures under 'monitoring and response', the Study recommended the creation, within the ACHPR, of a new special mechanism on human rights in conflict situations, which would be focused on 'monitoring, reporting and responding to human rights violations that occur in conflict and crises situations, and for coordinating the strategy and efforts within the Commission and with other relevant organs of the AU'.[392] The mechanism will also be charged with following up on the ACHPR's decisions and actions during conflict and crisis.[393]

The proposal of the creation of a special mechanism is noted to be the 'most pertinent' of all recommendations identified in the Study.[394] The proposed mechanism 'could also be supported by a pool of experts upon whom the Commission can call for expert contributions'.[395] The creation of this dedicated mechanism is to assist the ACHPR in initiating promotional measures intended to forestall human rights violations or abuses during conflict situations.[396] It is also crucial since ad hoc arrangements currently used 'such as Commissions of Inquiry, assessments and [s]tate reporting, do not offer the timeliness and predictability that are required to inform political decision-making and effective responses'.[397] Until such time as the proposed mechanism supported by experts can be put in place, the Study recommends that the ACHPR

390 See ibid 83, para 221.
391 ibid 89, para 237. See generally, 89-92, paras 238-247. The Study had earlier noted that the overlap in human rights mandates of both institutions and the effective implementation of their respective responsibilities of the two institutions in the areas of common interest, 'require that the two bodies adopt an institutionalised mechanism for a close working relationship'. ibid 69, para 180.
392 See ibid 92, para 251. See also, ibid 84, 223.
393 ibid 84, 223.
394 ibid xiv.
395 ibid 92, para 251.
396 ibid 84, para 222.
397 ibid.

Focal Person on Human Rights in Conflict Situations should handle the envisaged duties of the mechanism.[398]

Another development of note is the study commissioned by the ACHPR on the Use of Force by Law Enforcement Officials in Africa.[399] This study is being conducted under the auspices of three mandates- the Working Group on Death Penalty, Extra-Judicial, Summary or Arbitrary Killings and Enforced Disappearances in Africa, the Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa, and the Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals in Africa.[400] States and non-State actors are also called upon to contribute to the study.[401] This could also be a good opportunity for the ACHPR to consider the issue of the use of force in counterterrorism policing as against regular policing in African states, and promote positive legislative and policy changes.

From the above discussion, it is noted that on the part of the ACHPR, there has been some significant action on the protection of human rights while countering terrorism in Africa, inclusive of issues surrounding the use of force in counterterrorism. However, the limitations of the current action in that regard has been noted, along with relevant recommendations that have been made by scholars. New developments that present opportunities for increased protection of human rights during counterterrorism have also been discussed, such as the proposed five-pillar approach in the Conflict Study, especially the suggestion of the creation of a special mechanism for monitoring and response; as well as the Study's initiation of the operationalisation of Article 19 of the PSC Protocol, thus institutionalising the relationship between the ACHPR and the PSC from its previous ad hoc state. With this institutionalisation, there is a chance for there to be meaningful, structured, and continuous collaboration between the AUC, ACSRT, ACHPR, and other stakeholders on measures to ensure compliance with human rights norms during counterterrorism.

With there now being a regular forum for collaboration between the PSC and the ACHPR on human rights issues, which could be the basis of a robust working relationship on ensuring the protection of human rights during counterterrorism, there is the need to craft a framework for

398 See ibid 93, para 252.
399 See ACHPR, '437 Resolution on the Need to Prepare a Study on the Use of Force by Law Enforcement Officials in Africa' ACHPR/Res. 437- (EXT.OS/ XXVI1) 2020' <https://www.achpr.org/sessions/resolutions?id=468> accessed 13 October 2021, operative para i.
400 ibid operative para ii.
401 ibid operative para iii.

a comprehensive approach in that regard. This would deal with the individual roles of the relevant institutions, as well as matters of collaboration and joint action, among others. All these are the focus in the next section of this Chapter.

### 5.4. Creating a Framework for a Comprehensive Response to the Use of Excessive Force during Counterterrorism Policing in Africa: A Proposal

The preceding sections have examined the response of both the African counterterrorism architecture and the African human rights system to the problem of the use of excessive force in counterterrorism policing on the continent. While steps have been taken on both sides, inadequacies were also found in the responses, requiring a stronger and more comprehensive approach.

With the current spread of terrorism on the continent, and it now being 'the principal enemy of the African people',[402] every effort has to be taken towards countering it. This brings the problem of the use of excessive force during counterterrorism policing operations to the fore since it is one of the drivers of terrorist violence. It is not only a matter of great priority for the individual states, but it is one that touches on the collective security and defence of the continent per the CADSP as well as the potential for the continued spread of the scourge. This is thus a matter that needs greater attention from the regional counterterrorism and human rights institutions, towards guiding the regional counterterrorism approach and ensuring compliance with human rights standards in the use of force during counterterrorism policing on the continent.

This thesis focuses particularly on the problematic use of excessive force during counterterrorism policing, with a view to identifying interventions within relevant AU institutions that would result in positive changes. Taking into account the earlier discussions in Chapters 2 and 3 on the international legal framework for the use of force in counterterrorism policing, and the interplay between the LE and COH rules for the use of force during armed conflicts; as well as the trends in counterterrorism policing on the continent highlighted in Chapter 4, this section seeks to propose a framework for a comprehensive response by the AU institutions to the use of excessive force in counterterrorism policing in Africa. Account will also be taken of suggestions made by authors concerning general human rights protection while counterterrorism in Africa (as discussed above), as well as recent developments such as the

[402] See AU Assembly, 'Report of the Peace and Security Council on its Activities' (n 168) para 4.

recommendations of the ACHPR Conflict Study, and the subsequent operationalisation of Article 19 of the PSC Protocol.

The framework proposed here is two-pronged. The first concerns the need for clarification of the rules concerning the use of force during counterterrorism, while the second concerns actions by the AU counterterrorism and human rights institutions. Both elements are examined hereunder.

**a) Rules Clarification**

As noted earlier, the AU counterterrorism instruments speak of the human rights obligations of states during counterterrorism in a largely general manner. While the Principles and Guidelines adopted by the ACHPR go into greater detail, they still lack specificity. For example, the Principles and Guidelines do not address issues such as: the exceptionality of the use of excessive force in counterterrorism in contrast to regular policing, because of the existential threat terrorism is deemed to pose to the state; the problem of the counterproductive nature of such use of excessive force; and the pervasive use of the military in counterterrorism policing, with its attendant problems. The ACHPR in its General Comment No. 3 states that '[m]embers of the armed forces can only be used for law enforcement in exceptional circumstances and where strictly necessary'.[403] However, terrorism may indeed be deemed by states as 'exceptional circumstances', hence this requires further clarification. States need to be encouraged to, as much as possible, use their regular law enforcement agencies for counterterrorism policing; and to train and equip them for such duties.

With regard to the content of the international standards for the use of force as it relates to counterterrorism policing, several details are also left out in the Principles and Guidelines. These concern, particularly, the interplay between the LE and COH rules for the use of force. This is relevant because counterterrorism policing in African states may take place within the context of a complex security situation. For instance, two or more terrorist groups could be operational within a state, but with state security forces only engaged in an armed conflict with one of them i.e., the requirement for the existence of a NIAC- intense combat with state forces

[403] ACHPR, 'General Comment No 3 on the Right to Life' (n 314), para 29. The paragraph also states that '[w]here this takes place all such personnel must receive appropriate instructions, equipment and thorough training on the human rights legal framework that applies in such circumstances'.

and organisation of the armed group- is not met in all the cases.[404] It may also be that even where such armed conflict exists between the state and one or more of the terrorist groups, the conflict is geographically limited to a particular region of the state.[405] There could as well be criminal gangs with alleged links to a terror group whom the state is opposing in a NIAC.[406]

The above are scenarios for which merely noting the general LE rules for the use of force will not likely suffice. In such cases, it is important to clarify that unless the actions of the particular terrorists targeted meet the threshold of a NIAC, the security situation does not qualify as an armed conflict and thus must remain exclusively under the realm of law enforcement, governed by LE rules for the use of force. This would be regardless of the fact that the terrorists are conducting consistent (and even large-scale) terror attacks against sections of the population; or that the affected state is concurrently in a NIAC with one or more other terrorist groups within the state. Every situation must be analysed on its own merits, and the applicable legal regime determined. Related to these are acts of terrorism committed within an armed conflict, but with no link to the ongoing hostilities- such as attacks perpetrated for private reasons, or other reasons unconnected with the conflict. These would fall under counterterrorism policing and be regulated under LE rules for the use of force (and not COH rules). Of course, law enforcement activities continue during armed conflicts, for all crimes that have no nexus to the conflict.

For situations of a NIAC between the state and a terror group which is localised in particular areas/regions of the state, the present author supports the view that outside of the conflict zone(s) i.e., area of active hostilities, any action against members of the group constitutes policing operations and should be governed by LE rules for the use of force.[407] This is notwithstanding a connection to the armed conflict. This viewpoint is not only in accord with the holding of the court in *Prosecutor v Tadić*,[408] it also potentially better protects the general population from the more permissive COH rules for the use of force.[409] Also, during an armed conflict, terrorist acts committed by civilians which do not fulfil the requirements for direct

404 This for instance is the case in Egypt discussed in Chapter 4, with the government currently only involved in a NIAC with *Wilayat Sinai*, even though there are other terrorist groups operating within the state.
405 Egypt would also be a good example for this scenario, with hostilities between state forces and *Wilayat Sinai* limited to North Sinai.
406 This is the case in Nigeria with the allegations of the bandits in North-western and North-central Nigeria said to have links with *Boko Haram*.
407 See Chapter 2, text to note 144.
408 *Prosecutor v Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72 (2 October 1995) paras 68 and 69.
409 See Chapter 2, text to note 153.

participation in hostilities, i.e., threshold of harm, direct causation, or belligerent nexus, are subject only to law enforcement measures, including the LE rules for the use of force.[410] The same would apply to criminal organisations with alliances with and who support terrorist armed groups but whose activities only generally contribute to the group's war effort- therefore only an indirect participation in hostilities; and individual sympathisers or supporters of terror groups involved in an armed conflict whose actions do not also amount to direct participation in hostilities.[411]

It is necessary that the above issues be addressed by the ACHPR, with the applicable rules clearly outlined and perhaps even explained using illustrative scenarios so as to properly guide states in complying with their international obligations. This would require the elaboration of guidelines or a manual specific to the use of force during counterterrorism policing operations, which would comprehensively clarify and state the applicable human rights standards in the context of counterterrorism.[412] It is worth repeating here that the rules regulating counterterrorism policing and regular policing remain essentially the same, just that the difference in context i.e., the existential security threat associated with terrorist attacks, often leads to harsher measures taken by law enforcement in combating terrorism.

The ACHPR can also use opportunities presented in communications brought before it concerning violations of rights arising from the use of excessive force in the context of counterterrorism, to clarify and elaborate on the applicable norms. One such communication that has come before the ACHPR is *Law Office of Ghazi Suleiman v Sudan.*[413] In that case, among others, some persons were detained without charge on the allegation of the commission

410 See Chapter 3, text to note 87 and the accompanying text.
411 See ibid, text to note 88 and the accompanying text.
412 The necessity of written guidance restraining the use of force by law enforcement officials is buttressed by research, both relating to lethal and non-lethal force, which suggests that more restrictive use of force policies lead to a reduction in the use of force by officials on the field. See concerning less-lethal force, Stephen A Bishopp *et al*, 'An Examination of the Effect of a Policy Change on Police Use of TASERs' (2015) 26(7) Criminal Justice Policy Review 727-746; and William Terrill and Eugene A Paoline III, 'Police Use of Less Lethal Force: Does Administrative Policy Matter?' (2017) 34(2) Justice Quarterly, <http://dx.doi.org/10.1080/07418825.2016.1147593> 193-216. Concerning lethal force, see James J Fyfe, 'Administrative Interventions on Police Shooting Discretion: An Empirical Examination', (1979) 7 Journal of Criminal Justice, 303-323; and Michael D White, 'Controlling Police Decisions to Use Deadly Force: Reexamining the Importance of Administrative Policy' (2001) 47(1) Crime & Delinquency, 131-151. It should however be noted that White also found, in his study, that a formal use of force policy could be 'outweighed by the personal philosophies and polices of the chief (or commissioner) [of the Police Department], and that [the policy's] impact was limited to elective encounters [i.e., encounters where the police officer is not faced with the threat of death or of imminent serious injury]. See White 'Controlling Police Decisions' (n 412) 148; and generally, 132, 144-148.
413 *Law Office of Ghazi Suleiman v Sudan,* ACHPR Communications 222/98 and 229/98 (2003).

of terrorist acts endangering Sudanese peace and security. They were subject to torture while in detention, for which the ACHPR found a violation of Article 5 (dealing with the right to dignity) of the African Charter.[414] Here, the Commission did not touch specifically on human rights safeguards during counterterrorism. However, in *Kevin Mgwanga Gunme et al v Cameroon*,[415] another communication before it, the ACHPR held, concerning allegations of torture, amputations, and denial of medical treatment, and where the response of the state had been that some persons had carried out terrorist acts within the state, 'killing law enforcement officers, vandalising [s]tate properties, stealing weapons and ammunitions', that it 'holds the view that even if the [s]tate was fighting alleged terrorist activities, it was not justified to subject victims to torture, cruel, inhuman and degrading treatment or punishment'.[416] It is advocated that the ACHPR uses all opportunities in communications before it to clarify the applicable standards in the use of force in counterterrorism.

**b) Required Actions from the AU Counterterrorism and Human Rights Institutions**

The AU counterterrorism institutions and human rights institutions need to play a greater role and take further actions than thus far to ensure compliance with human rights during counterterrorism. Concerning the counterterrorism institutions, the principal one is the PSC. A key step for the PSC in relation to monitoring adherence to and ensuring compliance with human rights norms in the fight against terrorism, would be the operationalisation of its Sub-committee on Counterterrorism which has been called for severally,[417] including by the PSC itself.

The sub-committee, when finally activated, would presumably become the centre of action within the PSC for counterterrorism matters. With part of its mandate being the implementation of AU counterterrorism instruments such as the OAU Convention and the Protocol to the OAU Convention, and the harmonisation and coordination of regional efforts against terrorism;[418] this should cover the issue of human rights and counterterrorism. Should that not be the case, it would be necessary to empower the sub-committee with a role in human rights protection. This would make the sub-committee in charge of galvanising action within the Council on monitoring state's compliance with human rights standards while countering terrorism. The

414 See ibid para 47.
415 *Kevin Mgwanga Gunme et al v Cameroon*, ACHPR Communication 266/03 (2009).
416 See ibid para 113 and 114.
417 ISS, 'PSC Report' (2018) (n 179) 4.
418 See Kane (n 68) 869; and AU PSC, 'Report of the Chairperson' (2012) (n 166) para 44.

sub-committee would likely be primarily responsible for the examination of states' reports (when states do report) on national counterterrorism measures as well as the implementation of the OAU Convention, its Protocol, and the Plan of Action.[419] Through this, it would be able to monitor compliance with human rights norms, including concerning the use of force during counterterrorism policing, and where necessary recommend action from the PSC as a whole. In the same vein, the sub-committee could also recommend action against states who fail to submit their reports.

An active sub-committee would also be important in the newly institutionalised relationship between the PSC and the ACHPR, as it would, for example, be the unit within the PSC which would ensure that issues on human rights and counterterrorism are placed on the agenda of the PSC for discussion and action; and also brief the PSC Chairperson on issues relating to human rights in the fight of terrorism- including the use of excessive force in counterterrorism policing- which need to be discussed with the ACHPR. Also, as Kane has noted, the ACHPR could exchange the section of states' report dealing counterterrorism and human rights (as well as the Commission's recommendations), with the PSC, the AUC and the RECs, as this would help to keep the bodies updated on the states' counterterrorism measures.[420] He also notes that, within the relationship envisaged under Article 19 of the PSC Protocol (which has now been institutionalised), the exchange would assist the ACHPR to fully implement its monitoring of the compliance of states with their human rights obligations and, where necessary, request the PSC to follow up on states' progress in that regard.[421]

Article 20 of the PSC Protocol deals with the relationship of the Council and CSOs. Per the provision, the PSC is to encourage CSOs to 'participate actively in the efforts aimed at promoting peace, security and stability in Africa', and it also allows the PSC to invite such organisations to address it when required.[422] In view of the alleged failure of many states to submit report on their counterterrorism activities to the PSC, the Council can liaise with CSOs to obtain information about states' activities when such is not forthcoming from the states.[423]

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419 See arts 3(h) and 4(e) of the Protocol to the OAU Convention

420 See Kane (n 68) 869.

421 ibid.

422 PSC Protocol, art 20. Also, according to art 8(10)(c) of the Protocol, when the PSC chooses to hold an open meeting, CSOs 'involved and/or interested in a conflict or a situation under consideration by the [Council may] be invited to participate, without the right to vote, in the discussion relating to that conflict or situation'.

423 It is noted that a framework known as the Livingstone Formula has been put in place to regulate interactions between the PSC and CSOs in promoting peace, security, and stability on the continent, per art 20 of the PSC Protocol. See Conclusions on a Mechanism for Interaction between the Peace and Security Council and

Apart from the above, there is the necessity of concrete steps or measures from the PSC regarding the states with records of human rights violations during counterterrorism, especially those using excessive force in their counterterrorism policing operations. This could take the form of censuring or calling out those states, as well as naming them in the PSC's annual report to the AU Assembly on the situation of terrorism on the continent. The PSC's powers to sanction states is limited only to situations of unconstitutional changes of government,[424] and thus there is the need for the AU Assembly to play a role in that regard. This proposed role for the AU Assembly will be discussed later.

Concerning increased roles for the AUC and the ACSRT in ensuring better compliance by states with their human rights obligations and international standards for the use of force in counterterrorism policing, the AUC and the ACSRT could, in conjunction with the ACHPR and other relevant stakeholders including CSOs, design scenario-based training programmes and activities on the use of force in counterterrorism. A first step in this regard would be the clarification of the rules for the use of force in counterterrorism policing as advocated for above. After that would come the design of real-life scenarios based on complex security situations that may be present in states faced with combating terrorism, which states' law enforcement officers would have to react to. Instead of simply learning the theory, the realism of the scenarios would enable the officers better appreciate how to apply the LE rules for the use of force as they would in the field, eventually leading to greater compliance with the rules during counterterrorism policing.[425]

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Civil Society Organizations in the Promotion of Peace, Security and Stability in Africa' Annex 3, Retreat of the Peace and Security Council of the African Union (4-5 December 2008), Livingstone, Zambia, PSC/PR/(CLX) para 3. However, one problematic area of the Livingstone Formula is its inclusion of the eligibility criteria for CSOs as provided in art 6 of Statutes of the Economic, Social and Cultural Council of the African Union (ECOSOCC) (adopted in July 2004 by the Assembly of the African Union). The criteria in art 6, e.g., requiring that at least half of a CSOs budget be funded by members' contributions, have been noted to be too restrictive. See Michael Aeby, 'Civil Society Participation in Peacemaking and Mediation Support in the APS: Insights on the AU, ECOWAS, and SADC' Institute for Justice and Reconciliation, January 2021, available at <https://www.ijr.org.za/home/wp-content/uploads/2021/01/Aeby-IJR-GIZ-Report-Civil-Society-in-Peace-Making-Mediation-Support-APSA-28-01-2021.pdf> accessed 1 October 2021, 20 and 22. See also, art 6(6) of the ECOSOCC statutes. In 2014, the PSC reaffirmed the inclusion of ECOSOCC criteria in the Livingstone Formula while also introducing the principles of relevance and flexibility. See 'Maseru Conclusions on Enhancing the Implementation of the Livingstone Formula for Interaction between the Peace and Security Council and Civil Society Organisations in the Promotion of Peace, Security and Stability in Africa', Retreat of the Peace and Security Council of the African Union, Lesotho (22-23 February 2014) PSC/Retreat.4/6 paras 4(a), (c), and (d). These principles have made enabled more interaction and cooperation between the PSC and CSOs. See Aeby (n 423) 20 and 22.

424 See art 7(1)(g) of the PSC Protocol. See also text to note 152 above, as well as note 152.

425 See generally, Lon Bartel, 'Preventing Unreasonable Use of Force: Scenario-Based Training' (*Envisage Technologies*, 13 May 2021) <https://www.envisagenow.com/resource/preventing-use-of-force-with-training> accessed 1 October 2021.

The complementary role of the RECs in combating terrorism at the regional level has been discussed above. Through the roles outlined for them in the Protocol to the OAU Convention,[426] RECs which have the capability to do so can assist in ensuring that states comply with human rights norms during counterterrorism policing, including in relation to the use of force. This could for instance be through taking measures at the sub-regional level to support states in fulfilling their human rights obligations such as scenario-based trainings advocated for above; monitoring of states' counterterrorism measures for compliance with human rights; and promoting the need for adherence to the international standards for the use of force during counterterrorism. RECs could also liaise with the AUC on measures promoting adherence to human rights during counterterrorism,[427] and likewise through reporting to the AUC on regional counterterrorism efforts,[428] share activities undertaken in that regard.

On the role of the ACHPR, it has been advocated above that the Commission develop a more detailed guideline or manual on the use of force during counterterrorism policing, which would deal with the issues discussed above. Also, the ACHPR should partner with the AUC, ACSRT, and other stakeholders to develop scenario-based training programmes for states' forces based on the guidelines/manual. Mention has also been made of the potentials of the newly institutionalised relationship between the PSC and the ACHPR in relation to ensuring compliance of states with the human rights standards for the use of force during counterterrorism policing.

Kane has recommended the creation of a dedicated special mechanism focusing on counterterrorism matters in the ACHPR, as against the current set-up where per Resolution 88, the ACHPR had undertaken to ensure that its special procedures and mechanisms all consider the human rights protection during counterterrorism within their mandates, and also collectively, for a coherent approach.[429] At present, much of the direct action on counterterrorism by the ACHPR is seemingly handled by the office of the Special Rapporteur for Human Rights Defenders and Focal Point on Reprisals in Africa, based on the office having been tasked with the drafting the Principles and Guidelines, and also charged with developing a strategy for its implementation. However, other special procedures are still active in terrorism matters as evinced by the panel discussion organised by the Special Rapporteur on Prisons,

426 Protocol to the OAU Convention, art 6.
427 ibid art 6(b).
428 ibid art 6(g).
429 See Resolution 88, operative para 4.

Conditions of Detention and Policing in Africa in 2015.[430] It is worth considering whether a dedicated mechanism for counterterrorism matters whose mandate would cover issues of the use of force, as well as other concerns during counterterrorism, is indeed needed in the ACHPR.

While the ACHPR has a quite useful state reporting procedure,[431] actual periodic reports submitted by states are infrequent, with a majority of states currently behind on their reports.[432] The reports are also not comprehensive at times, with some issues left off the report by states. Although the incomprehensive reports may be supplemented by reports from National Human Rights Institutions and shadow reports submitted by CSOs, the entire procedure still depends on states not falling behind on their reports, which is not presently the case. Presently, there is no procedure at the ACHPR for reviewing the activities of states who have not submitted their reports.[433] As observed in the ACHPR Conflict Study, ad hoc measures such as state reporting 'do not offer the timeliness and predictability that are required to inform political decision-making and effective responses'.[434] This underscores the importance of the role of a dedicated special mechanism in ensuring compliance with human rights in the context of counterterrorism.

However, will the fact that the existing special mechanisms are already collectively tasked with considering human rights and counterterrorism in relation to their respective thematic mandates not suffice to take care of the situation? This is more so with the peculiar constraints of the ACHPR where only the commissioners- which itself is but a part-time undertaking- act as special rapporteurs.[435] In addition to being special rapporteurs or members of working groups/committees,[436] the commissioners also act as country rapporteurs for a number of states at a time; and perform their other duties as commissioners such as considering communications

430 See ACHPR, 'Report of the Panel Discussion' (n 375).

431 It has been used by the ACHPR to monitor the compliance of states with human rights during counterterrorism. For example, in its Concluding Observations and Recommendations on Egypt's seventh and eighth periodic report, the ACHPR notes that 'the measures taken to fight against terror are not always consistent with the respect for human rights', and subsequently urges the state to brings its action into conformity with its human rights obligations. See ACHPR, Concluding Observations and Recommendations on the Seventh and Eighth Periodic Report of the Arab Republic of Egypt, paras 23 and 34, respectively.

432 At the time of writing, only Kenya and Eswatini are currently up to date with all their reports to the ACHPR. See ACHPR, 'State Reports and Concluding Observations' (n 356).

433 ACHPR, 'Conflict Study' (n 260) 56, para 138.

434 ibid 84, para 222.

435 CHR and ACHPR (n 281) 33.

436 Some commissioners serve in more than one thematic special mechanism as the number of special mechanisms (16, inclusive of 12 thematic mechanisms and four internal mechanisms) outnumbers the total number of commissioners (11). See also, Viljoen (n 240) 370. For the various ACHPR commissioners and the mechanisms they serve in, see ACHPR, 'About ACHPR- Current Commissioners' <https://www.achpr.org/currentcommissioners> accessed 1 October 2021.

and state reports, among others. External (independent) experts are only appointed as members of working groups or committees alongside ACHPR commissioners, with a ratio of five experts to three commissioners in a group made up of eight members (which is the maximum size).[437]

At the level of the UN, one of the considerations that led to the creation of a dedicated mechanism for counterterrorism and human rights in 2005 (instead of relying on the various special procedures of the Commission on Human Rights to consider matters related to their mandates) was the fact that the latter mandate holders were only able to assess counterterrorism measures relevant to their mandate.[438] Also of concern was the fact that while thematic mandate holders might be able to 'exercise a more comprehensive control' during country missions, these were only conducted twice or thrice per year; and that although country-specific mandate holders would have had a wider latitude to examine states' counterterrorism measures, in the UN very few states were subject to that procedure.[439] It was concluded that '[t]he special procedures thus provide a diffuse and non-comprehensive system of monitoring of national counter-terrorism measures insofar as those measures affect all persons and human rights not addressed by mandate holders'.[440]

It is recognised that the situation at the UN level is not the same as that of the AU. For one, in the ACHPR, every state party to the African Charter has a country rapporteur- one of the 11 ACHPR commissioners. However, the issue with the 'diffuse and non-comprehensive system of monitoring' also holds true for the ACHPR mechanisms, because of the same limitation of only examining counterterrorism measures from the perspective of the specific mandates. While these concerns could have been assuaged to some extent by the existence of country rapporteurs for every state party to the African Charter, it is the same 11 commissioners who in addition to having full-time jobs as they only work part-time for the ACHPR, act as both special rapporteurs for thematic mandates and country rapporteurs -- not counting their other

437 See ACHPR, 'Standing Operating Procedures on the Special Mechanisms of the African Commission on Human and Peoples' Rights' (adopted during the 27th Extra-Ordinary Session of the Commission, held from 19 February to 4 March 2020, in Banjul, The Gambia) available at <https://www.achpr.org/legalinstruments/detail?id=68> para 6. Only an ACHPR commissioner can chair a working group/committee. See ibid, para 4. There is no specification as to the ratio of the composition of the group (i.e., of the experts and the commissioners) where the total members are less than eight. See ibid, para 6; and International Justice Resource Center, 'ACHPR Publishes Special Mechanism Rules Ahead of New Rules of Procedure' (15 April 2020) <https://ijrcenter.org/2020/04/15/achpr-publishes-special-mechanism-rules-ahead-of-new-rules-of-procedure> accessed 1 October 2021.

438 United Nations Commission on Human Rights (UNCHR), 'Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Robert K. Goldman' (7 February 2005) UN Doc E/CN.4/2005/103 para 86.

439 ibid para 86.

440 ibid para 87.

duties in the Commission. In these circumstances, it is hard to imagine that the commissioners would have the time to attend to all issues within their purview adequately and comprehensively.[441] With this, the need for a dedicated counterterrorism mechanism becomes apparent; one handled by an independent expert, and not one of the ACHPR commissioners.[442]

The establishment of a dedicated special mechanism for the protection of human rights during counterterrorism in the form of an independent expert is therefore desirable. However, as noted above, the ACHPR Conflict Study has recommended the creation of a special mechanism on human rights in conflict situations, which could be supported by a pool of experts who can be called upon for expert contributions.[443] Terrorism is one of the conflict situations the Study deals with, and hence counterterrorism matters would fall under the purview of this proposed mechanism. Nonetheless, the need for a dedicated mechanism for counterterrorism and human rights could perhaps also be accommodated within this proposed overarching mechanism for conflict situations. The Conflict Study already notes that the human rights issues that arise from the various conflict and crisis situations vary, and thus, it would be prudent for there to be expertise on the different conflict/crisis situations within the special mechanism. This can be accomplished with the creation of a working group or a committee as the proposed mechanism, which although chaired by an ACHPR commissioner, would also be made up of independent experts. These external experts should each possess considerable knowledge in one or more of the conflict/crisis situations under the purview of the mechanism- preferably one for each;[444] and should be able, within the framework of the mechanism, to undertake country visits (missions), elaborate norms, publish reports and studies, organise trainings, among other promotional and protective activities.

Under such an arrangement as described above, there should be an independent expert solely focused (ideally) on all aspects of counterterrorism and human rights on the continent- including the use of force in counterterrorism policing, which would help with monitoring,

441 See also Viljoen (n 240) 370; CHR and ACHPR (n 281) 33.

442 See generally Viljoen (n 240) 369-370, for a discussion on the necessity of appointing external experts as Special Rapporteurs rather than relying on the ACHPR commissioners.

443 ACHPR, 'Conflict Study' (n 260) 92, para 251.

444 According to the current rules, only 5 independent experts may be in a working group/committee of 8 members (the maximum size). The other 3 members must be ACHPR commissioners. See ACHPR, 'Standing Operating Procedures' (n 437), para 6. In the Conflict Study, the conflict/crisis situations in Africa mentioned include intra-state conflicts (civil wars and other forms of instability); transnational warfare; conflicts resulting from election disputes; crises arising from contested political transitions; terrorism; riots and violent protests; and resource-related conflicts. See ACHPR, 'Conflict Study' (n 260) 13-20, paras 26-40. Hence, there would likely not be enough independent experts for every single conflict/crisis situation except some groupings are made.

reporting, and responding to human rights violations that occur in the context of counterterrorism, and for coordinating the strategy and efforts in ensuring states' compliance with human rights standards in the fight against terrorism within the ACHPR and other relevant AU organs/institutions.[445] The activities of this independent expert would complement those of other existing special mechanisms who would, where possible, continue to consider issues on counterterrorism and human rights protection as it involves their mandates; [446] and work in that regard with the independent expert, who would also ensure that a coherent approach is maintained among all the mechanisms. The issue of the use of excessive force in counterterrorism policing would also benefit from the appointment of an independent expert as the expert would be able to give the necessary attention to the problem where the special mechanisms whose mandates are relevant to it are unable to do so because of their workload and other activities.

The adoption by the ACHPR of a Model Law on Police and Oversight Institutions in terms of counterterrorism has also been recommended.[447] It is here recognised that there needs to be greater supervision of law enforcement actions during counterterrorism policing by policing oversight bodies (including National Human Rights Institutions) at the domestic level, so as to promote compliance with human rights norms on the use of force. If the elaboration of the suggested Model Law would contribute to that, then this is a step that the ACHPR should consider taking. However, the value of such proposed Model Law is debatable. What is needed is for the regular policing oversight bodies to be more active and pay greater attention to the activities of law enforcement during counterterrorism because of the heightened possibility of abuse of powers in such situations. Also, states need to strengthen and empower the oversight bodies- or put such in place were absent- and give them the independence and wherewithal to execute their mandate/activities especially during counterterrorism operations. These, it is believed, are what the ACHPR should primarily encourage, even as part of measures to improve states' compliance with human rights standards for the use of force while countering terrorism.[448]

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445 See ibid.

446 UNCHR, 'Report of the Independent Expert' (n 438) para 92.

447 ACHPR, 'Report of the Panel Discussion' (n 375).

448 The need for greater supervision of law enforcement actions is underscored by research which suggests that even where there exists a restrictive use of force policy, such could be 'outweighed by the personal philosophies and policies of the chief (or commissioner) [in the policing department]'. See White 'Controlling Police Decisions' (n 412) 148. Hence, it is not enough for there to be detailed guidance on the applicable international rules for the use of force during counterterrorism policing, the organizational

One cannot discount the constraints faced by African regional institutions in executing their mandates, such as limited resources[449] and lack of capacity.[450] There is also the problem of setting up institutions without the necessary ability to compel compliance with or enforce their own decisions- such as the ACHPR,[451] or even the PSC to some extent.[452] This evokes the necessity of a role for the AU Assembly— the organisation's supreme organ—in ensuring that states comply with their human rights obligations during counterterrorism.

If the PSC's report on the state and spread of terrorism on the continent and how it has become the chief threat on the continent is accepted by states,[453] and the research on the counterproductive nature of the use of excessive force during counterterrorism policing is equally accepted,[454] it becomes clear that it is in the interest of every and all African states for the use of force in counterterrorism policing on the continent to comply with human rights standards. This is thus a subject of major concern for the AU Assembly, which is made up of all African Heads of State and Government. Therefore, the Assembly should be able to bring its considerable powers to bear, from simply willing to call out states who use excessive force to sanctioning those who fail to comply with decisions or resolutions, adhere to observations, submit necessary reports, or otherwise fail to cooperate with either the ACHPR, the PSC or the

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subculture needs to reflect such guidance starting from the leadership. According to White, '[l]ine officers tend to behave in accordance with the informal norms established by peers and supervisors'. See Michael D White, 'Examining the Impact of External Influences on Police Use of Deadly Force over Time' (2003) 27(1) Evaluation Review, 50, 69. See also White 'Controlling Police Decisions' (n 412) 145. As White also noted, his research findings suggest that 'absent meaningful enforcement, administrative policies that purport to control officers' discretion are mere homilies rather than guides to action'. See White 'Controlling Police Decisions' (n 412) 146. Hence, efforts are needed at the domestic level to ensure that whatever guidance or policy on human rights-compliant rules for the use of force in counterterrorism policing is adopted, such are enforced by the leadership of institutions/ agencies involved in counterterrorism policing. Supervision by oversight bodies would be helpful in this regard.

449 See for example, CHR and ACHPR (n 281) 33.

450 See ISS, 'PSC Report' (2018) (n 179) 3.

451 Regarding the ACHPR, the African Court was created as a means of complementing the Commission's with respect to its communications procedure. Ewi had even ascribed the part of the AU's inability to monitor the compliance of states with their human rights obligations in the context of counterterrorism to ACHPR's lack of enforcement powers, hoping that the creation of the African Court would be a positive development in this regard. See Ewi (n 27) 171-172. While it is here agreed that because of the binding nature of the Court's decisions, it may actually be a positive force (if states decide to honour their obligations on that note). However, by nature, any role of the Court is reliant on and limited to cases being brought before it.

452 See ISS, 'PSC Report' (2018) (n 179) 3, which notes that '[n]either the PSC nor the AUC has a binding compliance and follow-up mechanism when it comes to the implementation of legal instruments on terrorism'.

453 See AU Assembly, 'Report of the Peace and Security Council on its Activities' (n 168) para 4. The report also notes that 'terrorism and its expansion within the Continent is now the single most destructive and disruptive scourge'. See ibid para 167.

454 See United Nations Development Programme (UNDP), 'Journey to Extremism in Africa: Drivers, Incentives and Tipping Points for Recruitment' (2017) 5, 73, 92; and Allan Ngari and Denys Reva, 'How Ethnic and Religious Discrimination Drive Violent Extremism' (September 2017) 4 Institute of Security Studies (ISS) Africa in the World Report 9-10.

AUC.[455] The Assembly needs to drive institutional action and policy in this regard, including also spurring members of the PSC into action.[456]

### 5.5. Concluding Remarks

This Chapter has examined the legal and policy response of the African counterterrorism architecture and the human rights system to the use of excessive force in counterterrorism policing on the continent, focusing principally on the role and actions by the relevant institutions i.e., the PSC, AUC, ACSRT, RECs, the ACHPR, in that regard. It was found that although there had been some positive strides, there were still gaps and inadequacies in the response by the institutions. The Chapter then went ahead to propose a two-pronged framework for a comprehensive regional response to the problem of the use of excessive force in counterterrorism policing in Africa- based on the clarification of the applicable rules, and further roles and actions to be taken on by the institutions, including the AU's supreme organ, the Assembly.

The next—and final—chapter of this thesis summarises the findings of the research and sets out its recommendations, and then concludes it.

455 The fact that the Assembly does not have to reach its decision by consensus is helpful in this regard. See AU Constitutive Act, art 7(1).

456 For instance, the three states used as case studies in this thesis, Egypt, Kenya, and Nigeria, and who were found to use excessive force during counterterrorism, are all currently members of the Peace and Security Council. See African Union, 'Composition of the PSC' (last updated 16 June 2021) <https://www.peaceau.org/en/page/88-composition-of-the-psc> accessed 1 October 2021. Nigeria in fact has a dedicated seat on the PSC, reserved for it by ECOWAS 'for the foreseeable future'- sort of a '*de facto* permanent member of the council'. See PSC Report, 'AU Summit 32: Big Powers Back on the Peace and Security Council?' (6 February 2019) <https://issafrica.org/pscreport/psc-insights/au-summit-32-big-powers-back-on-the-peace-and-security-council> accessed 1 October 2021. See also PSC Report, 'New PSC Members, Old Ways?' (5 February 2020) <https://issafrica.org/pscreport/psc-insights/new-psc-members-old-ways> accessed 1 October 2021.

# Chapter 6: Summary, Recommendations, and General Conclusion

## 6.1. Summary

This thesis has considered how the African regional system has sought to regulate the use of force during counterterrorism policing on the continent. As the thesis has described, several affected African states, when faced with the challenge of preventing or repressing terrorism on their territory, employ excessive force during counterterrorism policing operations. Such force is both a violation of their international obligations and a potential driver of terrorist violence. These, when considered alongside the vulnerability of African states to violent extremism, make the matter of the use of excessive force in the policing of terrorism a matter of regional concern and priority, especially given the current prevalence and expansion of the terrorism on the continent.

The main research question the thesis sought to answer was what legal, institutional, and policy interventions the relevant African regional institutions could make to ensure that the use of force in counterterrorism policing on the continent is brought into line with the international standards. In answering the question, the thesis considered the following sub-research questions:

a) What are the international legal standards for the use of force in counterterrorism, including the distinction between the law enforcement and the armed conflict paradigm?
b) What are the trends in the use of force in counterterrorism policing in Africa, focusing especially on the experiences in Egypt, Kenya, and Nigeria?
c) To what extent has the African regional institutions responded to the level of force used during counterterrorism policing in Africa?
d) How should the African regional institutions properly respond to the level of force used in counterterrorism policing on the continent?

The answers to these questions are set forth in six chapters. Chapter 1, the general introduction, set out the background to the research and reviewed scholarly literature on the subject matter of the thesis, indicating gaps which the thesis attempts to fill. It described the methodology used to fill those gaps and clarified the notion of ‘terrorism’.

Chapter 2 described the international legal standards for the use of force in counterterrorism. It defined 'counterterrorism policing' as the deployment by the state of its law enforcement mechanisms against terrorists and terrorist activities, noting that such mechanisms encompass not only the police, but also other state agencies involved in law enforcement, such as the military. The chapter then moved on to discussing the international legal framework applicable to the use of force in counterterrorism policing operations as provided for under the international law regulating law enforcement, itself mainly derived from a combination of international human rights law (IHRL); customary international law rules drawn mostly from criminal justice standards; and general principles of law. It found that the law enforcement (LE) rules for the use of force were the default standards for judging the legality of any use of force by law enforcement, including during counterterrorism operations. This is so unless the situation at hand qualified as an armed conflict wherein the conduct of hostilities (COH) rules for the use of force may also become applicable. The chapter also showed that the LE rules were more permissible than the COH rules, save for certain exceptions.

Any force used by law enforcement during counterterrorism policing must be necessary and proportionate in the circumstances, with precautions to be taken in the planning of operations to minimise the need to resort to force. Force must be used only exceptionally, with only the minimum necessary force sanctioned –to the extent required to achieve the legitimate objective sought. Efforts must be made to effect an arrest where possible rather than to have recourse to potentially lethal force, and any use of force must be proportionate to the objective sought, as well as mitigate the potential harm to the suspect and bystanders. There is also the requirement for the use of differentiated and graduated force.

Where less extreme means would not suffice, LE rules would allow the use of lethal force such as firearms with the intent to stop or disable a suspected terrorist in cases of self-defence or defending others from imminent death or serious injury. Such force would also not be prohibited in preventing the perpetration of a potential terror attack involving an imminent or continuous grave threat to life, or to either effect an arrest or prevent the escape of a would-be perpetrator of such attack. For the use of firearms (or other means of lethal force) with the deliberate intention to kill during counterterrorism policing, this is only permissible where it is strictly unavoidable in order to avert an imminent threat to life.

The use of force during interrogation and detention was also considered. The threat or use of force is not permissible to elicit information from a suspect or a witness and torture is always

prohibited. It can never be legally justified, regardless of the perceived urgency of the circumstances. During detention or in custodial settings, only necessary and proportionate force is also permitted, with the use of firearms similarly restricted.

COH rules for the use of force derived from international humanitarian law (IHL) come into play only during armed conflict situations, alongside which IHRL remains applicable. In the case of a security situation in a state involving a terrorist group, a non-international armed conflict (NIAC) to which COH rules are applicable only exist where the threshold of intense combat between state forces and a militarily organised terrorist group is met. Where the threshold is not met, even where, for example, the terrorist group in question widely targets the general population through shootings or bombings, but there is no intense combat between the group and the state forces sent in to dispel the threat, the situation remains within the realm of law enforcement and regulated by the LE rules for the use of force. Even when IHL applies, as the present author endorses in this thesis, the scope of application of COH rules on the use of force is limited to the parts of the state's territory with actual hostilities i.e., the conflict zone. This is in contradistinction to the IHL rules concerning the protection of detainees and civilians, which apply throughout the territory of the state.

This viewpoint, as argued in this thesis, is not only supported by the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber decision on jurisdiction of 1997 in *Prosecutor v Tadić*, but it also better protects the general population in the areas outside the zone of hostilities as the COH rules for the use of force are generally more permissive than the LE rules. This view also better reflects the reality of many NIACs where fighting is limited to particular areas of the state. For such places outside the conflict zone, IHRL and thus LE rules for the use of force, as well as domestic criminal law, continue to apply.

An additional requirement for the application of COH rules is the necessity of a nexus to the ongoing conflict. Thus, for COH rules to apply to counterterrorism operations by a state, not only must the threshold for a NIAC be met and there be the existence of hostilities in that part of the state, but the use of force must also bear nexus to the conflict at hand. This was stated to mean that a terrorist act committed for private reasons during an armed conflict would fall in the realm of law enforcement, except there is a nexus to the ongoing conflict.

Delving into the substance of the COH rules for the use of force, Chapter 2 stated the two key regulatory principles – the principles of distinction and proportionality – as well as the related

principle of precautions in attack. Regarding the principle of distinction, it was noted that under COH rules military objectives could be attacked at any time using intentional lethal force, with there being no obligation to use less-lethal or graduated force or to seek rather to effect an arrest. It was further noted that the principle of proportionality in attack *in bello* operates to prevent excessive incidental civilian loss (judged against the military advantage anticipated from an attack), while the precautionary principle requires that feasible measures be taken to minimize incidental civilian harm during an attack.

Particularly, concerning state counterterrorism operations and the principle of distinction, the concept of direct participation in hostilities by civilians was explained to mean that supporters or financiers of terrorist groups who only support the general war effort of such groups would not lose their civilian immunity from attack. This would also be the case where a civilian commits acts of terrorism during an armed conflict, but with no intention to cause advantage to one of the parties to the conflict over the other. Also discussed in relation to the principle of distinction was the controversial notion of 'continuous combat function' as introduced by the International Committee of the Red Cross (ICRC) in an attempt to resolve the problem of the categorization of members of organised armed groups in NIACs, i.e., whether they were just civilians who lost their immunity from attack only during direct participation in hostilities, or if by their membership of the group, they lost their civilian protection and became targetable at all times. Noted was the ICRC's 'solution', which was to limit the meaning of 'membership' of an organised armed group to persons with the continuous function of direct participation in hostilities, i.e., the military wing of the group, with such function to be assessed based on facts. By this, a person with a continuous combat function ceases to be a civilian until disengagement from the group. This fact that this notion of continuous combat function has proved to be very contentious was also considered. As mentioned, the present author accepts the idea of permanent fighters being regarded as forming the armed forces or military of non-state parties to NIACs with other persons in the group retaining their civilian status, this being a logical inference from relevant treaty provisions touching on the principle of distinction. However, it was also recognised that the complex question of the categorization of members of armed groups clearly needs further discussion and engagement.

Equally considered were the rules governing the use of weapons during the conduct of hostilities. Particularly, certain weapons that are prohibited under IHL as a means or method of warfare, specifically expanding bullets and riot control agents, were noted to be potentially

permissible for use during law enforcement. This is one of the limited instances where LE rules for the use of force are more permissive than those of COH rules.

The chapter also highlighted that any action undertaken by state security forces (inclusive of the military) against terrorists or members of terrorist groups where the situation does not qualify as a NIAC constitutes a law enforcement operation and thus must accord with LE rules for the use of force. Similarly, it noted that acts of terrorism during armed conflicts, but which have no nexus with the hostilities, must be responded to using LE rules. In addition, it was argued that acts by terrorist groups or their members in a NIAC which have a nexus to the conflict but occur outside the conflict zone, do not fall within the scope of application of COH rules, but should be responded to using LE rules for the use of force. Finally, it considered whether the 'feared inadequacy' of the LE rules for the use of force was justified, and in that regard, it was argued that the LE rules were comprehensive enough for counterterrorism policing operations as they grant law enforcement officers considerable latitude to act against terrorist suspects.

Chapter 3 considered in further depth the interplay between the LE and COH rules for the use of force. Noting the difficulty in differentiating between instances of law enforcement and of hostilities during situations of NIAC, which leads to uncertainty as to the applicable rules for the use of force, the chapter considered the main conclusions from the report of the ICRC's 2012 expert meeting, which discussed the interplay between the COH and LE rules for the use of force during NIACs through a number of illustrative case studies. This discussion by the experts aimed to identify general criteria for the determination of the applicable rule in particular circumstances. Contrary to the views of a majority of experts in the meeting, this thesis argued that the only two legally determinative factors for distinguishing between law enforcement and conduct of hostilities situations are first, the location of the targeted individual i.e., whether within the conflict zone), and then the status, function, or conduct of said individual i.e., whether such person is a lawful target under IHL. Where the targeted individual is within the conflict zone, and is a lawful target under IHL either based on status or function in armed group, or conduct (in the case of a civilian directly participating in hostilities), it was noted that the situation at hand falls with the scope of conduct of hostilities.

For instance, during a NIAC involving a terrorist armed group, COH rules for the use of force may only be used by state forces against members of the group who are lawful targets under IHL or civilians assisting such a group by directly participating in hostilities, when they are

operating within a conflict zone. Outside of a conflict zone, any use of force falls within the realm of policing or law enforcement, to be regulated by the LE rules for the use of force. Rejected in this thesis as relevant determinative factors for separating law enforcement situations and conduct of hostilities were the intensity of violence within the conflict zone or the level of governmental control within the area and circumstances of the specific operation. As argued, oscillation of violence within the conflict zone, or governmental control of the area, will not remove the operation from the realm of conduct of hostilities as COH rules will continue to apply in those circumstances. However, it was argued that there were certain circumstances where a reduced use of force was desirable, such as when it would be practicable to apply IHRL standards. Here, the above rejected factors i.e., intensity of violence and governmental control, become relevant factual considerations in assessing the practicability of a reduced use of force. It was further argued that support for the idea of a reduced use of force relying on the assessment of factual considerations, can be founded in the concurrent application and complementarity of IHRL and IHL to the conduct of hostilities.

It was noted that the above approach of reduced use of force is similar to the idea of a constraints on the use of force in the conduct of hostilities advocated for by the ICRC, but which it purportedly based on a combined application of the IHL principles of military necessity and humanity. The fact that this approach by the ICRC has proved contentious was mentioned; and while it has seemingly been echoed by the African Commission on Human and Peoples' Rights (ACHPR), the present author agreed that the ICRC's approach was not in accordance with extant IHL rules.

The chapter then proceeded to discuss the interrelationship between IHL and IHRL during armed conflicts, focusing on the issue of force in the conduct of hostilities. The *lex specialis* principle, the popular means of formulating the relationship between IHL and IHRL, was examined and determined to be not very helpful. Focus should instead be placed on exploring the complementarity between IHL and IHRL, and the implications of their concurrent application in armed conflict situations. Complementarity in this regard was interpreted as an active interplay and mutual influence of the norms of both fields of law. It was further argued that one implication of the complementary relationship between and the concurrent application of IHL and IHRL should be the application of IHRL standards (expressed in the LE rules for the use of force) against lawful targets during the conduct of hostilities where feasible. This, it was said, should imply a legal duty to adopt less harmful means, such as an attempt to capture

or arrest rather than kill, or to use graduated force where practicable, within the conflict zone. Here, as mentioned above, factors such as the level of violence or the level of control by government forces over the area as well as the circumstances of the operation would come into play, as relevant factual considerations in determining the feasibility of the application of LE rules in the conduct of hostilities.

This proposed approach to a reduced use of force during conduct of hostilities is akin to that taken in *Public Committee against Torture in Israel v The Government of Israel* (Targeted Killings Case), by the Israeli Supreme Court. It was also argued that case law emanating from the European Court of Human Rights' illustrates how IHRL and IHL standards may be jointly or concurrently applied with regard to the use of force during conduct of hostilities, while taking the particular characteristics of a given situation into account, lending credence to the workability of the proposed approach. All of the foregoing discussion in Chapter 3 went towards clarifying the legal framework by which the use of force in counterterrorism policing by African states would be assessed.

Chapter 4 examined the experience of counterterrorism policing on the African continent, with a focus on three selected states –Egypt, Kenya, and Nigeria– used as illustrative case studies. For each of the three states, a brief background of the incidence of terrorism was considered, followed by its national legal and policy framework for the use of force in counterterrorism policing, the governmental agencies involved in counterterrorism policing, and then the practice of the use of force counterterrorism policing within the state. After this came a comparative analysis of the experience of counterterrorism in the three states. While all three states were affected by terrorism, it was made clear that each state faced a particular set of circumstances. Egypt on its part, was noted to be in a NIAC with *Wilayat Sinai* in North Sinai (although the group also operated outside North Sinai), while also facing threats from other groups, in the Sinai Peninsula and elsewhere on Egyptian territory. Kenya's main terrorist threat was said to come from the activities of *al-Shabaab*, with which it is engaged in an extraterritorial NIAC in Somalia, a conflict which may have extended into Kenyan territory, particularly the areas around the Boni Forest near the Kenyan/Somalia border. Nigeria's main terror threat was stated to stem from the two main factions of *Boko Haram- Jama'atu Ahlis Sunna Lidda'awati Wal-Jihad* (JAS- often still referred to as *Boko Haram*), and Islamic State in West Africa Province- with which it is involved in parallel NIACs.

The examination of the practice of counterterrorism in the three states found that counterterrorism policing in each was characterised by the use of excessive force in violation of the LE rules for the use of force, highlighting a trend of the use of heavy-handed tactics in a bid to contain terrorist threats in affected African states. Three factors present in the background of the states under focus may explain the use of such excessive force, to wit: the existence of a permissive legal framework on the use of force in law enforcement and counterterrorism, to which the lack of prosecution/accountability for unlawful behaviour in counterterrorism policing is closely connected; existing prevalence of police brutality outside the context of counterterrorism; and the involvement of the military in law enforcement.

It was also noted in the chapter that while heavy-handed counterterrorism tactics used within African states may seem to produce some results, a forcible response to terror alone cannot put an end to terrorism. There is a need to situate the use of force within a broader counterterrorism/countering violent extremism (CVE) strategy: one which addresses the underlying factors driving radicalization and the spread of violent extremism. Some response to this need for broad counterterrorism/CVE strategies and policies was discerned, but their level of implementation needs to be strengthened.

Also advocated for, were adoption and greater reliance on sophisticated intelligence-gathering practices, as better actionable intelligence reduces the need for a resort to force, especially a perceived need for excessive force. Example was given of how the use of intelligence led to the dismantling of *Sendero Luminoso* (Shining Path) in Peru, after brute and indiscriminate use of force failed to contain the insurgency waged by the group. Intelligence-led counterterrorism, it was averred, would also largely reduce the targeting of innocents, which risks alienating local communities.

Morocco was given as an example of an African state with an effective counterterrorism model, whose success is based on professionalized security forces complemented by the implementation of a CVE programme which goes towards addressing the underlying factors for radicalization and joining extremist groups. It was, however, noted that Moroccan security forces have also been accused of abuses during their counterterrorism operations. The notion of excessive force in counterterrorism being a driver of violence on the continent again reveals the necessity of adopting human rights-compliant use of force. This would therefore strengthen rather than undermine the effectiveness of counterterrorism operations on the continent.

Building on these conclusions, Chapter 5 examined the legal and policy response of African Union (AU) counterterrorism and human rights institutions to the use of excessive force in counterterrorism policing in Africa. The main instruments that make up the AU legal and policy framework for counterterrorism were noted to be the 1999 Organization of African Unity (OAU) Convention on the Prevention and Combating of Terrorism (OAU Convention); the 2002 Plan of Action on the Prevention and Combating of Terrorism in Africa (AU Plan of Action); the 2004 Protocol to the OAU Convention; and the 2011 African Model Anti-terrorism Law (the Model Law). The main AU counterterrorism institutions were also noted i.e., the AU Peace and Security Council (PSC), and the AU Commission (AUC), which the African Centre for the Study and Research of Terrorism (ACSRT) is also a structure of; supported by African Regional Economic Communities and Regional Mechanisms for Conflict Prevention, Management and Resolution (RECs/RMs).

There was analysis of the African regional definition of terrorism found in the OAU Convention, with a number of important criticisms noted such as it being overly broad and not complying with the principle of legality. It was also shown that despite the existence of a regional definition (as well as another definition in the Model Law), most African states have adopted differently worded definitions, some broader than others, resulting in a lack of uniformity in the definition of terrorism on the continent.

AU counterterrorism instruments usually only contain a general reminder of states' IHRL and IHL obligations without adequate detail on the lawful use of force. On the part of the AU institutions, the PSC –the main regional counterterrorism institution– has acknowledged the necessity of addressing the issue of human rights protection during counterterrorism but has still to take concrete steps towards ensuring this becomes a reality. For the AUC and the ACSRT, the current impact of their training and capacity-building activities is unclear and the effects, if any, are not pronounced.

The discussion of the African human rights system focused on the role of the ACHPR in promoting and ensuring human rights-compliant use of force in counterterrorism. An example of such action is the adoption of the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa (Principles and Guidelines). But while the Principles and Guidelines set forth the general legal principles applicable to the use of force, it fails to address certain critical issues regarding counterterrorism policing on the continent. These are: the counterproductive nature of excessive use of force and how all use of force in counterterrorism

is regulated by LE rules except in defined circumstances within an ongoing NIAC (and without dealing with the interplay between LE and COH rules on the use of force).

More broadly, the current response of the ACHPR to the use of excessive force in counterterrorism policing was found to have had considerable limitations. Recent developments that present opportunities for further and increased action by the Commission are the institutionalisation of its relationship with the PSC, and the suggested creation in the ACHPR's study on addressing human rights in conflict situations in Africa (ACHPR Conflict Study) of a special mechanism on human rights in conflict situations.

Moving forward, the chapter argues that a two-pronged framework for a comprehensive regional response by African institutions is needed. One prong requires clarification of the applicable legal rules on the use of force during counterterrorism; while the other involves further roles and actions to be taken on by AU counterterrorism and human rights institutions, including the Assembly of the AU which is its supreme organ. The roles and actions include the creation of the scenario-based training programmes for law enforcement officers; the institution of a dedicated special mechanism at the ACHPR for the promotion and protection of human rights while countering terrorism in Africa, in the form of an independent expert; as well as the establishment of human rights-compliant use of force during counterterrorism policing as an AU institutional policy.

## 6.2. Recommendations

Within the context of this proposed two-pronged framework, this thesis recommends the following:

### a) To the Peace and Security Council

1. The PSC should, as a matter of urgency, operationalise its Sub-committee on Counterterrorism. This action, already sought by several quarters, is especially important because the sub-committee would in all probability be the 'nerve centre' of the Council on counterterrorism matters. The sub-committee should have an explicit human rights mandate, empowering it to lead monitoring of the compliance by states with human rights norms in their counterterrorism activities. The sub-committee should also serve as the hub within the PSC for liaising with the ACHPR on matters of counterterrorism based on the institutionalised relationship between both bodies. Additionally, it should promote structured cooperation, collaboration, and dialogue

between the PSC, the AUC, ACSRT, ACHPR, RECs/RMs, and other relevant stakeholders on measures to safeguard human rights during counterterrorism.

2. The PSC should liaise with civil society organisations (CSOs) in monitoring states' compliance with the international standards for the use of force in counterterrorism policing. This could be through inviting them to submit and/or address it on information relating to the practice of the use of force by states in the context of counterterrorism. This would be especially useful where states fail to report on their counterterrorism activities to the Council as required. However, even where states do report, information from CSOs is still useful for verification purposes.

3. The PSC should censure and/or call out states who use excessive force in their counterterrorism policing operations; and should also identify such states in its annual report to the AU Assembly on the situation of terrorism on the continent. This would help to highlight that the use of excessive force is problematic and likely help to provoke positive changes on the part of states.

**b) To the African Union Commission (and the African Centre for Study and Research on Terrorism)**

4. The AUC and the ACSRT should liaise with other stakeholders such as the ACHPR and civil society to create scenario-based training programmes and activities on the use of force in counterterrorism, which would be used to train states' counterterrorism and law enforcement officials on the application of the international legal standards for the use of force in counterterrorism policing operations. The design of the scenario-based training programmes should ideally come after clarification of the applicable standards in a set of detailed guidelines or a manual by the ACHPR, as also recommended in this thesis. The range of scenarios designed in this regard should be wide enough to encompass the different and complex security situations that are present in states combating terrorism or which the officials could face on the field.

**c) To the Regional Economic Communities/Regional Mechanisms for Conflict Prevention, Management and Resolution**

5. RECs/RMs with the human, technical, and financial wherewithal to do so should take steps at sub-regional level to complement actions by the regional institutions in ensuring states' compliance with the rules for the use of force in counterterrorism policing. These

actions could include running scenario-based training programmes; monitoring states' counterterrorism policing activities for compliance with international standards for the use of force; promoting those standards; and liaising/cooperating with the regional institutions, as necessary.

**d) To the African Commission on Human and Peoples' Rights**

6. The ACHPR should develop a more detailed and comprehensive set of guidelines or manual to clarify the applicable international standards on the use of force in the context of counterterrorism. The standards should be outlined with as much specificity as possible, to cover issues such as the exceptional nature of the use of excessive force in counterterrorism in contrast to regular policing; its problematic counterproductive nature; minimising the involvement of the military in counterterrorism policing; necessity of training and equipping regular law enforcement officials; and the interplay of LE and COH rules for the use of force. The rules could also be explained using illustrative scenarios so as to properly guide states in complying with their international obligations.

7. The ACHPR should also utilise opportunities in communications brought before it to clarify the norms applicable to the use of force during counterterrorism policing.

8. The ACHPR should partner with the AUC, ACSRT, and other stakeholders in creating scenario-based training programmes for states' security forces based on the detailed guidelines or manual recommended above.

9. The ACHPR should exploit to the fullest its new institutionalised relationship with the PSC to ensure compliance by states' with their human rights obligations during counterterrorism, with particular reference to the use of force.

10. The ACHPR should create a dedicated special mechanism in the form of an independent expert, to focus specifically on the promotion and protection of human rights while countering terrorism in Africa, which would cover issues of the use of force. This can possibly be accommodated within an overarching mechanism on human rights and conflict situations recommended by the ACHPR Conflict Study, if such overarching mechanism takes the form of a working group or committee made up of the maximum number of independent experts permissible under the current ACHPR rules i.e., five

experts, each having expertise on one or more of the different conflict situations identified in the Conflict Study; along with the three ACHPR commissioners mandated by the rules. The appointment of independent experts would prevent more work being placed on the shoulders of the already heavily-burdened ACHPR commissioners. The dedicated special mechanism on counterterrorism and human rights would also complement the efforts of the current special mechanisms on issues related to counterterrorism.

11. The ACHPR should encourage states to put in place or empower policing oversight institutions with the independence and resources to act, particularly concerning counterterrorism operations.

**e) To the Assembly of the African Union**

12. As the supreme organ of the AU, the Assembly should lead from the front and drive institutional policy by making the issue of human rights-compliant use of force during counterterrorism operations a regional priority, even also spurring the members of the PSC into action as necessary.

13. The Assembly should call out states who employ excessive force in their counterterrorism policing operations, in violation of their IHRL obligations. It should also sanction those who do not comply with decisions or resolutions, adhere to observations, submit reports as required, or cooperate with the PSC, AUC, or the ACHPR on issues related to human rights and counterterrorism- thus giving teeth to those institutions.

## 6.3. General Conclusion

The use of excessive force during counterterrorism policing is a major contemporary problem on the continent. It is not only in violation of international legal standards, but is also itself a driver of terrorist violence, turning terrorism and counterterrorism into ever more vicious cycles of violence. Because of the vulnerabilities of African states to violent extremism, the use of excessive force in counterterrorism is an urgent regional problem: one that demands regional action. While existing literature has probed the necessity of human rights safeguards during counterterrorism in Africa, including the rejection of the use of excessive force, the role and capability of the AU counterterrorism architecture and human rights system have hitherto

been underexplored. In this regard, available literature was found to contain some dated observations and recommendations which no longer reflect the position on ground such as the need for the ACHPR to adopt Principles and Guidelines on the protection of human rights during counterterrorism in Africa and to require states to report on their counterterrorism activities, which have both been put in place. They also do not consider recent developments within the AU counterterrorism and human rights architecture relevant to ensuring states' compliance with human rights while countering terrorism; and do not deal adequately with the specific and critical issue of the use of excessive force.

In its focus on the use of excessive force by African states during counterterrorism policing operations, this thesis has set out the key legal, institutional, and policy interventions that African counterterrorism and human rights institutions could make to ensure far better compliance by African states with international standards on the use of force. While there have been some positive strides by those institutions, the current response has material gaps and significant inadequacies. The two-pronged framework proposed for a comprehensive response and approach comprises clarification of the applicable rules and greater, dedicated action by the relevant regional institutions. Taken together, both actions would constitute a great step towards ensuring the incorporation of the necessary human rights standards into the domestic practice of the use of force in counterterrorism policing by African states, even moving us closer to a peaceful Africa where all guns are indeed silent. The future of our continent depends on the actions we, as Africans, take today.

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