

ANTI-TERRORISM LEGISLATION AND HUMAN RIGHTS- AN APPRAISAL OF THE NIGERIAN TERRORISM (PREVENTION) ACT, 2011

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Abstract

This study assessed the meaning of terrorism noting that it ordinarily amounts to a crime against human rights and an infraction on the fundamental freedoms of individuals with capacity to stigmatize, de-legitimize, and dehumanize those at whom it is directed. It notes that in Nigeria, the Terrorism (Prevention) Act, 2011 was clearly a direct response to the inclusion of Nigeria by the United States on the list of 'countries of interest' and the attendant pressure mounted by the International Community, especially the Western countries for Nigeria to stand up to be counted in the global anti-terrorism crusade. The research revealed that even though key provisions of the 2011 Act were incompatible with Nigeria's Domestic and International human rights obligations leading to its amendment by the Terrorism (Prevention) (Amendment) Act, 2013 which made some laudable improvements on the earlier legislation, the amended version is nevertheless still plagued by some significant flaws. It was further revealed that while it is commendable and indeed necessary to frontally confront terrorism in all its forms, it must be borne in mind that the cornerstone of democracy and democratic governance is unblemished respect for the rights of citizens. It was recommended inter alia that: the legislature should urgently review the amended version of the legislation to align it with global best practices regarding human rights; The legislature in Nigeria should further review the Terrorism Prevention (Amendment) Act, 2013 with a view to addressing the obvious lack of precision and clarity regarding terms, and definitions therein to enhance a smooth implementation of the law.

Keywords: *Terrorism, Freedom, Human Rights, Legislation.*

Introduction

There is no universally agreed definition of either Terrorism or Human Rights. Each of these two concepts is value laden and has continued to attract immense controversy amidst animated debates across the globe. The increasing wave of acts of terror or terrorist attacks and their perverse implications on human rights of citizens of the free world have for some time been occupying the front burner in global discourse. This has left thousands killed, permanently maimed or disabled, physically injured and many more psychologically devastated apart from the massive economic waste or loss occasioned¹.

Instances include: the bombing of the Federal Building in Oklahoma city on 2nd May, 1995; the truck bomb outside the United States Embassy in Nairobi, Kenya on 7th August, 1998; the bombing of the

¹ Obiaraeri, N.O., *Still on Human Rights*. Owerri: Global Press Ltd, 2012.

American World Trade Centre in New York on the 11th of September, 2001; the train bombing in Madrid, Spain on 11th March, 2004; the coordinated multiple bombings in London on 7th July, 2005; the March, 2008 detonating of Improvised Explosive Device (IED) in front of a United States Armed Forces recruiting station in Times Square; the multiple bombings in Brussels – Belgium in March, 2016; the October 2017 Flatbed Pickup truck driven into pedestrians and cyclists down the West Street section of the West Side Highway, starting from Houston Street and ending with a collision with a school bus at Chamber Street²; and recently the April, 2018 attack on the UN mission MINUSMA's military camp in Timbuktu which left one peacekeeper dead and several others injured, including seven French soldiers. This is in addition to the routine killings and bombings of both military officers and civilian populations in several states in Nigeria's northeast region particularly Borno, Yobe, Adamawa, and recently, Kaduna states.

Indeed, Nigeria was officially blacklisted as a 'country of interest' and placed on the "terror watch list" by the United States when one Umar Farouk Abdulmutallab, a twenty three year old Nigerian citizen made an unsuccessful attempt to blow up a passenger aircraft in Detroit, USA on the 24th of December, 2009. Luckily, the country was eventually removed from this terror watch list on April 21st, 2010. Unfortunately however, even after this, there have still been multiple and consistent bombings, kidnappings, killings, maiming, wanton destruction of property and corporate tranquility by a number of terrorist and clandestine militia groups operating across the length and breadth of Nigeria³. In fact, a Nigerian citizen was also fingered in the 2016 terrorist attack in Brussels.

Despite the seeming understanding that terrorism entails unjust laying of war on non-combatant population, there is no common agreement as to what terrorism actually is or who is a terrorist. This is in view of the fact that in reality, the entire subject revolves around perception and on which side of the divide the author finds himself. Thus the saying that 'one man's terrorist is another man's freedom fighter'. Nevertheless, terrorism remains an infraction of human rights and fundamental freedoms, and so this saying is grossly misleading. The reason is because, it assesses the validity of the cause, when terrorism is actually an act. One can have a perfectly beautiful cause and yet, if one commits terrorist acts pursuant thereof, it is terrorism regardless.⁴

Human Rights on the other hand is an omnibus or generic term incorporating many kinds of claims, liberties, powers, immunities, advantages, etc. which the individual seeks to enjoy from the society. Some of these claims are legal based on the fact that they are accorded recognition by the legal system having become part of the *lex lata*, while some are non-legal because they are not so recognized and so remain aspirations to be attained in the future, otherwise known as *lex feranda*⁵. It refers to rights one holds by virtue, solely, of being a human person. That is, rights naturally inhering in the human being. Unfortunately, the menace of terrorism has become a major impediment, obstacle, or challenge to the enjoyment of these rights.

² Barron, J., 'What We Know and Don't Know About the Attack in Lower Manhattan', *The New York Times*, Archived from the original on 31st October, 2017.

³ *Ibid* at P.3.

⁴ Wikipedia, 'Terrorism', <https://en.m.wikipedia.org>, accessed, 30th April, 2018.

⁵ Eze, O.C., "Dissent in Democratic Polity" in Osibanjo, Y., and Awa, K.; (eds) *Democracy and the Law*, Lagos, Federal Ministry of Justice, 1991.

However, a working definition has its uses other than increase our understanding of the term terrorism as it may serve as a guide in arriving at a preferred means of countering it. Thus, the United Nations General Assembly has adopted the following political description of terrorism since 1994.

“Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons, or particular persons for political purposes are in any circumstance unjustifiable whatsoever the considerations of a political, philosophical, ideological, racial, ethnic, religious, or any other nature that may be invoked to justify them”.

Faced with a plurality of both definitions and definitional elements therefore, terrorism expert, Walter Liqueur concludes that the only general characteristic universally agreed upon is that terrorism involves violence and the threat of violence.⁶ Yet, terrorism is not the only category of acts involving violence and the threat of violence. So does war, coercive diplomacy, and bar room brawls⁷. This lends credence to the subjective nature of the term depending largely on whether one sympathizes with or opposes the cause of the person or group concerned. It is therefore indisputable that terrorism easily falls prey to changes that suit the interests of particular states at particular times.

Thus, sometimes terrorists will have support in their particular contexts, as in Rathbone and Rowley’s example of the terrorism of the French Revolution. While the perpetrators viewed the use of force and bloodshed as a way to propagate the principles of democracy, its victims of course did not view it that way. Similarly, while the vast majority in the United Kingdom abhorred the tactics of the Irish Republican Army, yet they found supporters and founders as distant as the U.S where some Irish-Americans believed the cause justified the means.⁸

The United Nations for instance views Palestinians as freedom fighters struggling against the unlawful occupation of their land by Israel, while Israel on the other hand regards them as terrorists. Similarly, the Taliban and Osama Bin Laden were once called freedom fighters and backed by the CIA when they were resisting the soviet occupation of Afghanistan. Now the Taliban is on top of the international terrorist list while Osama Bin Laden has been executed by a team of US Navy Seals following credible intelligence from the same CIA.⁹

Unfortunately, even the United Nations itself has not agreed on a universal definition of Terrorism till date. The UN had accepted this in a Paper of October 7, 2005 by the Sixth Committee. This is because of the fear that it might lead to “profiling and linking problem with any religious faith”. Thus, a commonly accepted definition is a mirage. It also believes that national laws on terrorism never came into effect owing to disputes over extradition. However, it drew 14 legal instruments¹⁰, describing what constitutes individual acts of terrorism. Besides, since 2000 the UN Ad Hoc Committee has been examining a draft Paper on “Comprehensive Convention on International

⁶ Laqueur, W., ‘Postmodern Terrorism’, *Journal of Foreign Affairs*, Vol. 75, No.5, Sept.-Oct., 1996, 24-36.

⁷ Eze, O.C., *Op.cit.*, 11.

⁸ Rathbone, A., & Rowley, C.K., ‘Terrorism’, *Public Choice Newsletter*, Vol. 111, No.1/2, March 2002, 9-18.

⁹ Death of Osama bin Laden Fast Facts’ CNN – *CNN.com* <https://edition.cnn.com/2013/09/09/world/death-of-osama-bin-laden-fast-facts/index.html> , accessed, 1st May, 2018

¹⁰ Twelve Conventions and two Protocols

Terrorism". Unfortunately, members of various political hues are still divided over what could be the exact definition of terrorism.

In the United States for example, different agencies have adapted various definitions. This includes the Department of Defence which defines it as:

"The calculated use of unlawful violence to inculcate fear, intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological."

The FBI however defines terrorism as:

"The unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives."

The State Department on the other hand defines terrorism as:

*"Premeditated, politically motivated violence perpetuated against non-combatant targets by subnational groups or clandestine agents, usually intended to influence an audience."*¹¹

It is beyond argument that 'state terrorism', 'nuclear terrorism', 'cyber terrorism', 'religious terrorism', 'bio terrorism', and all other variants of terrorism have political undertones and are susceptible to the common denominators of terrorism namely - use of violence, coercion or intimidation, semi-clandestine operations, and violent victimization of non-combatant targets. Despite the uncertain and contested meaning of terrorism over time, the peculiar semantic power of the term, beyond its literal significance is its capacity to stigmatize, de-legitimize, denigrate, and de-humanize those at whom it is directed, including political opponents. The term is thus both ideologically and politically loaded; pejorative; implies moral, social, and value judgment; and is "slippery and much abused".¹²

Terrorism: The Nigerian Situation.

With particular reference to Nigeria, terrorism is an existential threat to the survival of the Nigerian State and the global community as borne out by the carnage unleashed by the *Boko Haram* Islamic sect and recently the notorious Fulani Herdsmen via its consistent terror attacks in the Northeast part of the country for some years now. Unfortunately however, even the obviously laudable attempts by the present administration to partner with other countries to stamp out this menace has been politicized by many Nigerians.

In the not too distant past for instance, President Muhammadu Buhari's announcement that Nigeria has joined the Islamic Coalition Against Terrorism generated a lot of anxiety, an indication that many Nigerians do not fully understand the President's motives for that decision. The reality however is that desperate situations require desperate measures and reactions. Besides, when the president initially sought help from the West, no Nigerian worried about the ideology of those willing and able

¹¹Mark Burgess, *Terrorism: The problems of Definition*, Centre for Defence Information, 2003.

¹² Tillery, L., *Essence of Counter-Terrorism*, New York: White Word Publications, 2016.

to help Nigeria to defeat terror, rather the citizens were simply united with the president in the determination to bring *Boko Haram* to an end to enable citizens in the Northeast resume their normal lives.

It was because of these internally displaced citizens and their unfortunate and desperate situation, and especially on the basis of national interest that the President accepted the offer of assistance from G7 countries at the commencement of his administration in 2015. Religion was not a consideration then. It should also not be a consideration now that he has made the decision to embrace help in fighting terrorism from the Middle-East. The safety of Nigerians and the total annihilation of *Boko Haram* should be of paramount importance than the unfounded worries of Nigeria's perceived Islamization. The religious affiliation or ideology of our benefactors should not be the primary consideration as terrorism is heathen and knows no religion. Besides, it can only be defeated by the unity of the entire humanity¹³.

Regarding funding, state sponsors have constituted a major form of funding; for example, Palestinian Liberation Organization (PLO), Democratic Front for the Liberation of Palestine (DFLP), and some other terrorist groups were funded by the defunct Soviet Union. "Revolutionary tax" is another major form of funding, and essentially a euphemism for "protection money". Revolutionary taxes are typically extorted from businesses, and they also "play a secondary role as one other means of intimidating the target population". Other major sources of funding include: kidnapping for ransoms, smuggling, fraud, and robbery. The Financial Action Task Force (FATF) is an Inter-governmental body whose mandate since October, 2001 has included combating terrorist financing.

It should be noted that a single act of domestic or international terrorism can lead to grave violation of multiple human rights of the citizens which are guaranteed under domestic, regional, and supranational legal framework. It will therefore be suicidal to underestimate the capabilities of those who use violence to pursue an ideology. The following instances will illustrate the multifaceted implication of terrorist attack in its various forms:

- a) Where there is bombing, lives are lost, scores are wounded, injured, or permanently disabled. This is a violation of the right to life guaranteed under *Section 33* of the 1999 Constitution of the Federal Republic of Nigeria (as amended).¹⁴
- b) Where terrorists kidnap innocent citizens, or indulge in hostage taking for ransom or any other purpose, it amounts to a violation of the right to dignity of human person as provided for under *Section 34* of the 1999 constitution of the Federal Republic of Nigeria.¹⁵ Kidnapping is also an affront to the right of personal liberty and security of person guaranteed under *Section 35* of the 1999 constitution of the Federal Republic Nigeria.¹⁶

13Garba, S. 'Boko Haram: Terrorism threatens Nigeria's existence', <https://www.globalsecuritynews.com> , accessed, 23rd March, 2017.

¹⁴ See also *Article 4* of the ACHPR, 1981; *Article 3* of the UDHR, 1948; and *Article 6* of the International Covenant on Civil and Political Rights, 1966.

¹⁵ See also *Article 5* of the ACHPR, 1981; and, *Article 5* of the UDHR, 1948.

¹⁶ *Article 6* of the ACHPR, 1981; and, *Article 3* of the UDHR, 1948.

- c) Where bombing and such other terrorist acts engender mass exodus of citizens from one geographical zone or ethnic stock to the other for fear of pogrom or ethnic cleansing thereby constraining citizens to evacuate completely, stay indoors or restrict their movement, there would have occurred a violation of the right to freedom of movement under *Section 41* of the 1999 Constitution of the Federal Republic of Nigeria (as amended) which gives every citizen of Nigeria the freedom to move freely and reside in any part of the country.¹⁷
- d) Terrorism usually entails wanton destruction of property, homes, and living abodes of the predominantly non-combatant population. This renders many people homeless and even forces the status of Internally Displaced Persons (IDPs) on innocent citizens in their own country thereby raising serious humanitarian issues and concerns. This is in clear violation of the right to acquire and own immovable property under *Section 43* of the 1999 Constitution of the Federal Republic of Nigeria (as amended).¹⁸
- e) Religious terrorism is rooted in faith based tenets on religious grounds with the hope of enforcing such beliefs on all and sundry. This is a direct infraction of the right to freedom of thought, conscience, and religion guaranteed under *Section 38* of the 1999 Constitution of the Federal Republic of Nigeria (as amended).¹⁹
- f) The indiscriminate and wanton attack on print and electronic media houses in Nigeria is a direct infringement and unmitigated violation of the right to freedom of speech, expression and of the press and cannot be justified by any stretch of imagination. This is provided for by *Sections 39* and *22* of the 1999 Constitution of the Federal Republic of Nigeria (as amended).²⁰

There appears to be an unending argument as to the adequacy or otherwise of the legal stipulations in the Terrorism (Prevention) Act, 2011 which clearly seeks to provide for measures for the prevention, prohibition, and combating of acts of terrorism, the financing of terrorism in Nigeria, and for the effective implementation of the Convention on the combating of terrorism and the Convention on the suppression of the financing of terrorism as well as prescribe penalties for violating any of its provisions. Scholars have sought to resolve the poser as to whether the Terrorism (Prevention) Act, 2011 is itself human rights compliant or does in fact unleash terror on some constitutionally guaranteed, regionally protected, and internationally recognized human rights norms in the guise of fighting terrorism.

One key responsibility of the UN General Assembly Global-Counter Terrorism strategy is ensuring respect for human rights for all and the rule of law as the fundamental basis for the fight against terrorism. Thus, the United Nations Security Council has advised that states must ensure that any

¹⁷See also Article 12 of the International Convention on Civil and Political Rights, 1966; Under Article 23 of the ACHPR, 1981, all peoples shall have the right to national and international peace and security.

¹⁸ See also Article 14 of the ACHPR, 1981; Articles 2 & 17(1) of the UDHR, 1948.

¹⁹ See also, Articles 2 & 8 of the ACHPR, 1981; Article 18 of the UDHR, 1948; Sections 10 & 42 of the 1999 CFRN (as amended); and Articles 2 & 26 of the ICCPR, 1966.

²⁰ See Article 9 of the ACHPR, 1981; Article 19 of the UDHR, 1948; and Article 19 of the ICCPR, 1966.

measure taken to combat terrorism must comply with all their legal obligations under International law, in particular, International Human Rights, Refugee, and Humanitarian law.²¹

An evaluation of the Terrorism Prevention Act, 2011

While *Section 1(1)* of the Terrorism (Prevention) Act, 2011 prohibits and criminalizes acts of terrorism as against any person who does, attempts or threatens to do an act preparatory to or in furtherance of an act of terrorism; commits to do anything that is reasonably necessary to promote an act of terrorism; or assists or facilitates the activities of persons engaged in an act of terrorism, *Section 1 (2)* makes up for the non-express definition of terrorism by clearly ascribing copious and expansive meaning to the expression “acts of terrorism”. “Acts of International Terrorism” on the other hand as contemplated by *Section 9(8)* refers to acts of terrorism involving a non-citizen of Nigeria; a person possessing dual citizenship as specified in *sub-section (3)* of the same section; or groups or individuals whose terrorist activities are foreign based or directed by the countries or groups outside Nigeria or whose activities transcend national boundaries.

It should be noted that to secure a conviction on a terrorism Charge, the prosecution must prove, not only the acts of terrorism, but that this was deliberately done with malice aforethought.

The Terrorism (Prevention) Act was clearly a direct response to the inclusion of Nigeria by the United States of America on the list of “countries of interest” and the attendant pressure mounted by the International community, especially the Western Countries for Nigeria to stand up to be counted in the global anti-terrorism crusade.

Terrorism clearly subjects the citizens to mindless violence, psychological trauma, or general disorder contrary to existing legal, International, Regional and Constitutional stipulations. Ironically however, there were no existing anti-terrorism laws that could adequately check possible activities of terrorism in Nigeria prior to the passage of the Terrorism (Prevention) Act, 2011. Nigeria was thus said to have failed to meet the requirement of the Financial Action Task Force (FATF) established by the G7 summit held in Paris in 1989. The main thrust of the 2011 anti-terrorism law was therefore to cure this deficiency by promulgating a law to detect, prevent, and suppress the financing of terrorism and terrorist acts.²² Prior to this, resort was only had to relevant provisions of the Criminal and Penal codes whose character, scope and contemporary relevance were very limited.

While states have a duty to protect their population from unwarranted attack, it is apposite that all nations of the world are under obligation to ensure that all anti-terrorism measures are enacted into law and implemented in accordance with International Human Rights and Humanitarian law²³, and the provisions of their own domestic Constitutions.

Indeed, there has been a proliferation of security and counter-terrorism legislation and policy throughout the world since the adoption of Security Council Resolution 1373²⁴, much of which has

²¹ Note however that the death penalty is headed for abolition going by recent trends as exemplified by the Optional Protocol to the ICCPR, 1966 and similar initiatives particularly under the European human rights regime.

²² Security Council Resolution 1456, 2003., Para.6.

²³ Obiaraeri, N.O., *Op.cit.*, 30.

²⁴ 2001.

an impact on the enjoyment of human rights. Most countries, when meeting their obligations to counter-terrorism by rushing through legislative and practical measures, have created negative consequences for civil liberties and fundamental human rights.

Instructively, in 2004, the High-level Panel on Threats, Challenges, and Change reported that recruitment by international terrorist groups was aided by grievances nurtured by poverty, foreign occupation, and the absence of human rights and democracy. Additionally, the World Summit Outcome, adopted by the General Assembly in 2005, also considered the question of respect for human rights while countering terrorism and concluded that international cooperation to fight terrorism must be conducted in conformity with international law, including the Charter of the United Nations and relevant international Conventions and Protocols.

The General Assembly and the Commission on Human Rights have emphasized that States must ensure that any measures taken to combat terrorism comply with their obligations under international human rights law, refugee law, and international humanitarian law. The Security Council has done the same, starting with the declaration set out in its resolution 1456²⁵ in which the Security Council meeting at the level of Ministers of Foreign Affairs, stated that “States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular, international human rights, refugee, and humanitarian law”. This position was reaffirmed in Security Council Resolution 1624.²⁶

Paradoxically, notwithstanding the early and conscionable objections of the Amnesty International which afforded the opportunity to remedy or redress these pitfalls at the consideration stage of the Nigerian anti-terrorism law, the Terrorism (Prevention) Act of 2011 was nevertheless passed into law with some of the following discernible infractions of Nigeria’s Constitutional, International, and Regional human rights protection obligations:

In the first instance, there is an obvious conflict between *Sections 4(2)* of the Act which prescribes a penalty of death sentence and *Section 33(1) (e)* of the same legislation which prescribes a penalty of life imprisonment where death results from any terrorist act. Since the punishment for murder or homicide under the Criminal Code²⁷ and Penal Code (Northern States) Federal Provisions Act²⁸ respectively is death sentence, it is respectfully submitted that the death sentence should be the appropriate punishment for acts of terrorism leading to death. *Section 4(2)* of the Act should therefore be retained while *Section 33(1) (e)* be expunged from the Act via legislative action.

Section 9 (i) of the Terrorism (Prevention) Act, 2011 provides that:

“The President may, on the recommendation of the National Security Adviser, or the Inspector General of Police declare a person to be a suspected International terrorist ...”

²⁵ 2003.

²⁶ 2005

²⁷ Cap. C.38/39 Laws of the Federation of Nigeria, 2004.

²⁸ Cap. P.3 Laws of the Federation of Nigeria, 2004

The power of the President to declare a person or group as International terrorists based on his suspicion²⁹, or advice of the National Security Adviser or the Inspector General of Police with the attendant severe sanctions without more *prima facie* amounts to criminal conviction without trial. It is thus, a clear usurpation of the judicial powers vested in the courts by *Section 6* of the 1999 Constitution of the Federal Republic of Nigeria (as amended), and to that extent is unconstitutional.

Section 12 (1) of the Terrorism (Prevention) Act, 2011 provides that:

“The National Security Adviser or the Inspector General of Police with the approval of the President may seize any cash where he has reasonable grounds to suspect that the cash is intended for, belongs to, or represents property obtained through acts of terrorism”.

The provision of *subsection (3)* of *Section 12* is even more interesting. It reads:

“The National Security Adviser or the Inspector General of Police may exercise his powers under subsection (1) of this section, whether or not any proceedings has been brought for an offence in connection with the terrorist cash”.

This also has a very high risk of abuse since the practical implication is that the National Security Adviser or the Inspector General of Police with the approval of the President of Nigeria can seize a suspected terrorist's funds before obtaining a court order in that regard.

Section 25 (1) of the Terrorism (Prevention) Act, 2011 provides that:

“Where, in a case of verifiable urgency, a communication with the judge in chambers to obtain a warrant would cause delay that may be prejudicial to the maintenance of public safety or order, the National Security Adviser or the Inspector General of Police may, without prejudice to the provisions of any other enactment or Act, seal up any premises while a search warrant is sought for ...”

This express power to seal up any premises without a search warrant duly issued by a judge in chambers clearly amounts to usurpation of judicial powers and is naturally subject to abuse. This is especially more so in view of the fact that there is obviously no prescribed time limit within which the National Security Adviser or the Inspector General of Police must unseal the premises should the application for a search warrant be denied.

It has however been argued that it is the expediency of the situation that dictates the sealing of the premises in a bid to preserve the *res* pending a pursuit of a court order. The danger faced by society because of the activities of terrorists is surely greater than any administrative by-pass in the circumstances. In any case, in countries where fit and proper people are given the management of those agencies, the abuse of these discretionary powers is usually minimal.

Section 26 (1) of the TPA provides that:

²⁹ Section 9(1)(a).

“Without prejudice to any other Act or enactment, the Attorney General of the Federation, the National Security Adviser, or the Inspector General of Police may, for the purpose of the prevention or detection of offences or the prosecution of offenders under this Act, give such directions as appear to him to be necessary to any Communication service provider”.

This clearly amounts to an invasion of the privacy rights of citizens guaranteed by the 1999 Constitution and which ordinarily ought not to be denied or violated except upon the order of a court. Such wide powers are equally subject to a high likelihood of abuse by the officers so permitted to exercise them by intercepting private communication of citizens. It should therefore be emphasized that these are not day-to-day powers but emergency powers that should be invoked only in times of crisis.

Section 28 (1) of the Terrorism (Prevention) Act, 2011 provides that:

“Where a person is arrested under reasonable suspicion of having committed any offence under Sections 1,2,3,4,5,6,9,10,11,13 or 14, the National Security Adviser or Inspector General of Police or a delegated officer not below the rank of Chief Superintendent of Police or its equivalent may, subject to this section, direct that the person arrested be detained in custody for a period not exceeding 24 hours from his arrest, without having access to any person other than his Medical Doctor and legal counsel of the detaining agency”.

A careful look at this provision will show a clear affront to the 1999 Constitution of the Federal Republic of Nigeria especially Section 35(2), and 36(6)(d) which guarantees the right to representation by counsel of one’s own choice. This, in addition to the authority to detain a citizen incommunicado amounts to a grave violation of the right to fair hearing.

Furthermore, while Section 31 of the Act provides for witness protection and the measures the court may take to keep the identity and addresses of witnesses secret in deserving circumstances, curiously, and embarrassingly sub-section (4) of the same Section 31 states that:

“A person who contravenes an order made under this section commits an offence under this Act’. This statement without more is a grave legislative error as no penalty is prescribed for contravention of the provisions of this section”.

By virtue of Section 32 of the Terrorism (Prevention) Act, 2011 the Federal High Court has the exclusive jurisdiction to try any offence and can impose sundry punishment and make various orders in tandem with its powers under the Act. Curiously however, there appears to be some uncertainty as to the position the court should adopt where death results from any terrorist act since Section 4 of the Act prescribes a death sentence while Section 33 (1)(e) provides for life imprisonment. Besides, the jurisdiction of the Federal High Court is clearly restricted to the Act exclusively thereby excluding other relevant enactments. The provision for instance is clearly in conflict with the child Rights Act, 2003 pursuant to which a child³⁰ is to be tried by a family court.

³⁰ Defined as a person below the age of 18.

Indeed, as Amnesty International further pointed out:

*“Key provisions of the Act are incompatible with Nigeria’s human rights obligations. Many of the provisions of the Act use terms and definitions that are imprecise and unduly broad in scope, violating the ‘legality’ requirement for criminal offences, and/or unlawfully restricting a range of rights such as freedom of thought, conscience, and religion, freedom of opinion and expression, freedom of association and freedom of assembly – by failing to adhere to the requirements of demonstrable proportionality. Some provisions relating to investigation, detention, and trial are not consistent with various provisions of human rights law; some administrative provisions lack any provision for meaningful access to effective legal remedies and procedural safeguards consequently infringing the rights of due process in a fair hearing”.*³¹

While it is commendable and indeed necessary to frontally confront terrorism in all its forms, it must be borne in mind that the cornerstone of democracy and democratic governance is unblemished respect for the rights of the citizens. Thus, recourse to human rights, rule of law, and due process remain the irreducible minimum standard in a thriving democracy. It will therefore amount to a disservice to trample on human rights norms in the guise that we are fighting the scourge of terrorism whether at domestic or international fora. This is unarguably because while every state has a right – and indeed the obligation to deploy its instruments and resources of law enforcement to counter the threat and carnage unleashed by terrorism, such measures must be human rights compliant.

The Terrorism (Prevention) Act, 2011 was made pursuant to certain provisions of the 1999 Constitution of the Federal Republic of Nigeria (as amended) as an enabling law and so such must necessarily align itself with the fundamental rights guaranteed by the same constitution. Specifically, *Section 11* of the constitution empowers the National Assembly to “make laws for the Federation or any part thereof with respect to the maintenance and securing of public safety and public order and providing, maintaining, securing of such supplies and services as may be designated by the National Assembly as essential supplies and services”. It was clearly pursuant to this provision and other relevant sections that the National Assembly with the assent of the President enacted the Terrorism (Prevention) Act of 2011.

To further guarantee the fundamental rights of the citizens, the unduly wide powers and discretion granted both the President on one hand and the National Security Adviser, the Inspector General of the Police, the Attorney-General, or the State Security Service on the other should be emasculated or completely abrogated and in its place the legislature should evolve expeditious rules or a fast-track mechanism for access to the courts in terrorism cases. This they can do by establishing special courts to try terrorism cases with a view to obviating the normal delays attendant to bringing such cases before our regular courts. This is especially more so because these powers and discretions were granted with little or no oversight or framework for accountability.

While citizenship of Nigerians by Birth is undoubtedly protected by the Act, it is regrettable that a citizen by either registration or naturalization is liable to forfeit or be deprived of his citizenship in

³¹ Obiaraeri, N.O., *Op cit.*

the event that such a person is declared a suspected International terrorist by the President. This is both excessive and unfortunate as the practical implication is that a constitutional right may then be denied in such situations upon the mere suspicion of the President or the advise of the National Security Adviser or Inspector General of Police.

Luckily, on February 21, 2013, the TPA, 2011 was amended by the Terrorism (Prevention) (Amendment) Act, 2013. It is noteworthy that the new law has addressed some of the human rights concerns of the TPA, 2011 pointed out above. The following deserve special mention:

First, the hitherto enormous powers of the trio of the National Security Adviser, the Inspector General of Police, and the State Security Service appears to have been whittled down by a framework which explicitly states that the Attorney General of the Federation “*shall be the authority for the effective implementation and administration of this Act and shall strengthen and enhance the existing legal framework to ensure conformity of Nigeria’s counter-terrorism laws and policies with International standards and United Nations Conventions on Terrorism*”, while the office of the National Security Adviser shall be the coordinating body for all security and enforcement agencies.

Second, the phrase “*without having access to any person other than his medical Doctor and legal counsel of the detaining agency*” under *Section 28* of the TPA, 2011 has been replaced with the phrase “*a medical officer of the relevant law enforcement or security agency or his counsel*”.

Third, having regard to privacy rights, while *Section 26 (1)* of the TPA, 2011 gave wide powers to the Attorney-General of the Federation, the National Security Adviser or the Inspector-General Police to intercept private communication of citizens using any communication service provider, *Section 29* of the TPA (as amended) 2013 provides that:

“The relevant law enforcement agency with the approval of the Attorney General of the Federation may, with the approval of the Coordinator on National Security for the purpose of the prevention of terrorist acts or to enhance the detection of offences related to the preparation of a terrorist act or the prosecution of offenders under this Act, apply ex-parte to a judge for an interception of communication Order”.

Fourth, an amended *Section 32* of the TPA provides that:

“The Federal High Court located in any part of Nigeria, regardless of the location where the offence is committed, shall have jurisdiction to try offences under this Act or any other related enactment”.

Despite these laudable amendments to the TPA, 2011 by virtue of the TPA (as amended) 2013, the following flaws which have till date plagued the anti-terrorism law in its revised form deserve critical attention and immediate legislative action:

- The amended law explicitly provides for extra-territorial application of the Act which may in certain circumstances contravene the prohibition of double jeopardy under *Section 36(9)* of the 1999 Nigerian constitution.
- The new *Section 28* in the amended law of 2013, though an improvement on the old *Section 28* of the TPA, 2011 still contravenes the provision of *Section 35(2)* of the 1999 constitution which guarantees contact with *inter alia* “... any other person of his own choice”. Its provision

prescribing detention for a period not exceeding forty-eight hours equally contravenes *Section 35 (4), (5)* of the 1999 constitution.

- Regarding sentencing, several provisions of the amended Act, particularly *Section 1(2)* grant extremely wide discretion to the judge which clearly constitute an affront to human rights and are naturally subject to abuse. The section apparently subjected the enumerated acts or omissions including mere ‘threats’ to a maximum of death penalty without regard to the gravity of the offences. This of course undermines the principle of proportionality.
- *Section 27(1)* of the amended law which provides that “the court may pursuant to an *ex-parte* application, grant an order for the detention of a suspect under this Act for a period not exceeding 90 days subject to renewal for a similar period until the conclusion of the investigation and prosecution of the matter that led to the arrest and detention is dispensed with,” clearly contravenes the spirit and purpose of *Section 35* of the 1999 Nigerian Constitution (as amended) regarding the fundamental right to personal liberty. Particularly instructive are *subsections 4* and *5* which clearly define the meaning and scope of a reasonable time within which a suspect ought to be brought before a court of law.
- Finally, the new *Section 28(4)* which provides that an arrested person may on the approval of the head of the relevant law enforcement agency be placed under a house arrest and be monitored, have no access to phones or communication gadgets, and speak only to his counsel until the conclusion of the investigation is illegal, unconstitutional and indeed undermines the authority of the courts in the absence of a court order.

Conclusion

While the Terrorism (Prevention) Act, 2011 has been noted to have its flaws, it is necessary to appreciate the fact that it has some very commendable provisions which indicate its desire to protect, respect, and preserve some specific sections of the 1999 Constitution of the Federal Republic of Nigeria (as amended). The following are clearly notable.

In the first place, the Act recognizes the right to peaceful assembly and association to the extent that the persons involved do not associate for the purpose of engaging in, promoting, encouraging, or exhorting others to commit or pursue acts of terrorism or terrorist meetings. The inbuilt limitation is equally the situation contemplated by *Section 45* of the Constitution. Equally commendable is the provision of *Section 2(3)(ii)* which provides that membership of political parties is protected and as such, nobody should be made to suffer any prejudice for belonging to an existing or proscribed organization because of his or her political beliefs.

Secondly, the citizenship of Nigerians by birth as provided for under *Section 25* of the Constitution is preserved and protected by the Terrorism (Prevention) Act, 2011 even when the person is declared a suspected International terrorist by the President following the requisite advise of the National Security Adviser, or the Inspector General of Police.

Thirdly, it has been posited that the provision of *Section 31* of the Terrorism (Prevention) Act, 2011 clearly serves as a protective mechanism for the identity of witnesses and their prosecution especially in high profile and risk laden terrorism proceedings.

Recommendations

Against the background of the foregoing, the following recommendations are put forward to ensure a more effective and seamless implementation of the Act:

- All countries, particularly Nigeria should ensure that any measure taken to combat terrorism must comply with all their legal obligations under their domestic constitutions and international law especially regarding human rights in line with the United Nations Security Council's Resolution in that regard.
- The legislature in Nigeria should further review the Terrorism Prevention (Amendment) Act, 2013 with a view to addressing the obvious lack of precision and clarity regarding terms, and definitions therein to enhance a smooth implementation of the law.
- It is necessary to expunge the provision on extra-territorial application of the Act as this clearly contravenes the prohibition against double-jeopardy.
- The extremely wide discretion available to judges regarding sentencing and especially the power to grant remand orders in excess of the constitutional limit should be curtailed by legislative action as that is against the principle of proportionality.
- The death sentence provided for by *Section 4(2)* of the Act for acts of terrorism leading to death should be sustained by while the conflicting provision of *Section 33(1)(e)* which curiously provides for a jail term for the same offence should be expunged for clarity.