

# African counter-terrorism legal frameworks a decade after 2001



Jolyon Ford

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**Cover photograph** Nigerian police inspect the shells of burnt cars after a car bomb exploded in Abuja, Nigeria, 1 October 2010. Two car bombs blew up as Nigeria celebrated its 50th independence anniversary, killing a number of people in an unprecedented attack on the capital by suspected militants from the country's oil region. (AP Photo/Sunday Alamba) # Abuja # NGA

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# About the author

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Ford's recent publications for the ISS include *Bringing fairness to international justice: a handbook on the ICC for defence lawyers in Africa* (2009), and *Beyond the 'war on terror': a study of criminal justice responses to terrorism in the Maghreb* (2009), as well as *Unable or unwilling? case studies on domestic implementation of the ICC statute in selected African countries* (edited jointly with Max du Plessis, 2008).

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The author is an independent consultant. The monograph is a desktop study of obstacles to ratification and is intended to stimulate informed and reasonable debate about the potential for improving terrorism prevention through adherence to international conventions and related legal reform in Africa. Any views or opinions expressed in this monograph reflect the views of the author individually; they should not be seen as representing the views of the ISS.

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# Abbreviations and acronyms

ACSRT	African Centre on the Study and Research of Terrorism, Algiers
AU	African Union
CTC	Counter-Terrorism Committee of the UN Security Council
CTED	Executive Directorate of the CTC
CGCC	Centre for Global Counter-Terrorism Cooperation, New York
ECOWAS	Economic Community of West African States
ICAP	International Crime in Africa Programme of the ISS
ICCPR	International Covenant on Civil and Political Rights 1966
IGAD	Inter-Governmental Authority on Development
ISS	Institute for Security Studies
RECs	Regional Economic Communities
SADC	Southern African Development Community
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNODC	United Nations Office on Drugs and Crime
UNSC	United Nations Security Council
US	United States



# Executive summary

As we approach the first decade after the 11 September 2001 (9/11) terrorist attacks in the US, and with the recent shift in rhetoric and tone after the ‘global war on terror’, it is timely to take stock of African criminal justice responses to the threat of terrorism.

Law, based on regional and international legal frameworks, is a key part of any legitimate and effective counter-terrorism strategy. Law-based responses are undoubtedly an asset in the long-term struggle against extremist violence. Ultimately, compliance with the rule of law expressed through internationally and regionally agreed instruments, and in national laws, is what distinguishes legitimate actors from terrorists. Time has shown that government counter-terrorism actions that have not complied with international law have been actions that undermine the global response to terrorism in the long term.

Ratification of the range of universal and regional instruments on counter-terrorism is generally considered an important component of this ‘law as strategy’ approach. UN Security Council (UNSC) resolution 1373, passed shortly after the 11 September attacks, calls on all states to pass comprehensive counter-terrorism laws and measures, including by ratifying various international instruments and complying with legally binding UNSC resolutions. The global response is based on national level legal measures that aim to underpin legitimate, effective and coordinated actions to prevent and respond to terrorism. The international instruments can provide a ready and legitimate template for the development of national laws and a basis for international legal cooperation.

The monograph considers the performance of African states in terms of ratifying the universal counter-terrorism instruments, as well as the continental and regional instruments. Rates of ratification (and implementation) in Africa are generally low, and are subject to considerable regional variation. There is a

range of complex, interrelated political and technical (or capacity) reasons why African states have not ratified and implemented counter-terrorism instruments more widely. Some of these reasons are not specific to counter-terrorism but affect many other legal regimes. Devoting a full chapter to these reasons, the monograph observes a degree of stagnation with regard to ratification rates in Africa. The ritualistic reaffirmation of the importance of ratification is found to be unhelpful.

The key political factors limiting ratification relate to the priorities and perceived level of importance of counter-terrorism efforts especially when weighed against other pressing demands facing many African countries. More specifically, ratification in Africa is hampered because states do not see counter-terrorism as a sufficient priority, resist the manner in which the agenda is presented, face internal political struggles to bring legal measures forward, or (for mainly historical reasons) entertain reservations about the discourse of counter-terrorism. Capacity problems are well known and are both a function and a product of some of the political dimensions of non-ratification. Reasons for non-ratification may be the same as for non-implementation, but this is not necessarily the case.

Ratification still matters. The overall objective of the universal scheme informing this approach is to harmonise all national laws to create a seamless web of preventive, punitive and international cooperative legal measures. Ratification provides a legal foundation for institutionalising and tailoring terrorism prevention efforts to meet local needs. Moreover, ratification remains significant because of the need for international cooperation and to contain what states do in national law in the name of combating terrorism. Basing national laws on international instruments minimises the risk of overly broad definitions of terrorism that can have negative human rights and political consequences. It is not satisfactory that cooperation takes place informally or on an ad hoc basis: ratification of counter-terrorism instruments is an important means of formalising and regularising a lawful, legitimate, functional procedure for international cooperation by a state.

Ratification, however, matters only so far, and must be evaluated relative to other challenges facing states. This is not so as to diminish the importance of international legal frameworks in counter-terrorism. Rather, the key question is whether a country has the required capacity and can act lawfully to prevent and suppress terrorist activity in coordination with other states, within the rule of

law and consistent with international standards on human rights. Ratification may or may not be a useful or necessary element of this process. A narrow focus on securing ratification can obscure opportunities to advance other important rule of law measures.

Governments, the UN counter-terrorism system actors, donors and others should ask specific questions about how best to achieve a rule of law-based approach to counter-terrorism for a particular country. This approach will often involve ratification and implementation. But focusing exclusively on the ratification of instruments may reveal a lack of responsiveness to local human rights, security and counter-terrorism needs.

The 2006 UN Global Counter-Terrorism Strategy and the altered political climate since 2009 may allow internal African realities and priorities to shape counter-terrorism responses in Africa, albeit within the global framework. This period provides an opportunity to re-examine counter-terrorism efforts in Africa, which may include widening the focus to simultaneously address justice system capacity and crime prevention in general. Moreover, there is a need for further research on how and why African countries have responded as they have to the various UNSC resolutions on terrorism, most importantly resolution 1373 and its call for wider ratification of counter-terrorism instruments.

There has been an insufficient prioritisation of countries most at threat and most in need of assistance, and a tendency to focus resources on regions where there is a low threat perception and a correspondingly low chance of achieving action on national counter-terrorism strategies, including ratification.

Central to improving counter-terrorism prevention and response in Africa is building generic criminal justice system capacity. Beyond support for ratification, resources should be channelled into building foundational law enforcement, cooperation and prosecution capacity and embedding human rights values. There is already awareness of the need for partnerships and integrated strategies between departments. The need now is for improved engagement between those working on counter-terrorism on the one hand, and those working on broad rule of law programmes in Africa, on the other. As is the case with initiatives to improve responses to other complex international crimes, counter-terrorism capacity building should be integrated into broader rule of law and criminal justice programming.

Ratification of counter-terrorism instruments should not be pursued dogmatically where it is unlikely to obtain adherents, where it is daunting to low

capacity public services, and where it is pursued at the expense of seeking other ways to achieve the overall objective. Rather than focusing on ratifying the 16 instruments themselves, advocacy and support should focus on complying with resolution 1373 broadly, take into account other regional measures, and enable generic legal cooperation.

The more contextualised approach articulated in the 2006 UN Global Counter-Terrorism Strategy is important and acknowledges that countries' priorities differ and that longer term actions are needed to undermine radicalisation and violence. As such, the strategy is more likely to resonate with governments and civil society in Africa. However, integrating counter-terrorism into development generally, and enrolling a range of agencies and interests can be taken too far: counter-terrorism can become about everything – and therefore all too often about nothing.

In terms of the search for an 'African voice' on counter-terrorism, the challenge is to encourage discussion, mutual assistance and support to further African counter-terrorism responses. Initiatives to encourage or assist ratification and implementation should not only be couched in terms of the overall objective, but should embrace the reality that terrorism has different manifestations at regional and sub-regional levels.

Sometimes ratification is part of a considered response, while at other times it is simply a formal act with little consequence. Building effective law-based national terrorism prevention strategies requires dedication that goes beyond the ratification of conventions or protocols or the introduction of counter-terrorism legislation. There remains a need to move beyond a checklist approach to satisfying UN commitments.

Proponents of ratification need a revitalised vocabulary that enables them to articulate to decision makers and officials the significance of ratification as one way to defeat and prevent terrorism. Those involved in promoting counter-terrorism measures in Africa must be more honest about what is likely, and more humble about what is possible.

# 1 Introduction

As we approach a decade since the 11 September 2001 terror attacks in the US, and the extraordinary global response that followed, it is both timely and important to take stock of African counter-terrorism responses over this period. The international community's response to the events of 2001 was, reassuringly, to use the pooled powers of states acting through the UN to frame any country's responses within the boundaries of international law.

By preventing the fight against terrorism from deteriorating into a spiral of terrorist acts and unregulated violent state responses, this law-based approach to countering terrorism was both the right path, and the path most likely to lead to success. Law-based responses are undoubtedly an asset in the long-term struggle against extremist violence. Ultimately, compliance with the rule of law expressed through a multilateral forum is what distinguishes legitimate actors from terrorists. So it was understood at the time of UNSC resolution 1373, and that understanding is now reinforced by bitter lessons on the counter-productive effect of attempting to pursue terrorists outside of legal parameters, or in violation of them, and without the strategic resource of international law at one's disposal. Time has shown that actions that undermined international law have been actions that undermined the global response to terrorism in the long term.

Law is, therefore, part of the strategy to prevail, eventually, in the global struggle with extremist elements prepared to use terrorist methods. Global responses are premised on national legal measures and institutions that simultaneously enable and delimit legitimate, effective and coordinated actions to prevent and respond to terrorism. Ratification of the various conventions and treaties ('instruments') is considered to be a significant element in this process: a template to shape national responses and to empower but also circumscribe states' actions.

Thus the global response is based on lawful measures that take the form of legal instruments agreed by states as being the vehicles for international legal cooperation and national level action. On the other hand, there is a certain element of staleness in the ritualistic reaffirmations of the importance of ratification. Since ratification is not necessarily indicative of real action on countering terrorism, 'taking stock' requires an examination of how states have responded since signing up to legal instruments, and whether ratification continues to matter. What is the overall objective and strategy on counter-terrorism for African states, and where does ratification really sit within that? What is an appropriate, honest and workable policy approach to ratification now?

## **NATURE AND PURPOSE OF THIS MONOGRAPH**

This monograph assesses the above issues in relation to Africa in 2010. The performance of African states in terms of ratifying the 16 universal counter-terrorism instruments, as well as continental and regional instruments is considered. The monograph seeks to explain why rates of ratification, although higher immediately after 2001, are generally low in Africa, and are subject to such regional variation. On the basis that ratification of instruments may be an important component of African responses to terrorism, one purpose of the monograph is to present some suggestions for more effectively securing ratification of the various instruments (and hopefully their implementation in national law).

However, the monograph has a twin purpose: to put the issue of ratification in perspective, not so as to diminish its significance or the importance of legal frameworks in counter-terrorism, but to act as a reminder that the objective of

the global strategy on terrorism is not to secure ratification of instruments, but to achieve a global web of states capable of lawfully and fairly responding to the threat of terrorist actions. Thus the aim remains internationally acceptable legal frameworks to enable country level prevention and response through the criminal justice system, and to regularise international cooperation. Ratification may or may not be a useful or necessary element of a country's journey to that destination. Focusing too heavily on ratification can preclude attention to other justice sector reforms related to counter-terrorism.

The monograph therefore aims to both promote ratification and suggest ways to better obtain it, while also providing a reflective analysis of the shortfalls of focusing narrowly on the ratification of instruments. Much that is written in this field attempts to justify one or other strategic decision or policy framework. In the case of this monograph, however, the Institute for Security Studies (ISS) has commissioned an independent analysis on current trajectories in counter-terrorism. The richer the debate, the more effective our concerted response to terrorism is likely to be, and the less damaging to other development and security debates of importance to the African public.

This monograph has a limited ambit. It deals primarily with ratification of instruments (as an important component of preventing terrorism in Africa), and less so with their implementation, either generally or in particular countries. The obstacles to ratification will often – but certainly not always – be the same issues affecting implementation. In theory, no state will ratify an instrument unless it intends to implement its terms into the national laws and procedures. However, theory and practice have generally not matched up over the last decade.

It should also be noted at the outset that the monograph is not a comprehensive overview of the legal frameworks applying to the prevention and combating of terrorism.<sup>1</sup> Nor does it purport to add further to our understanding of drivers, contributing factors, manifestations or patterns of terrorism as a phenomenon in Africa, on which a growing literature exists.<sup>2</sup> The monograph is the result of a desktop study, albeit drawing on the author's previous experience with ratification of international instruments in Africa and elsewhere. Indeed, one principal point of this monograph is that more country and region specific research is needed in order to ascertain, with the input of officials, civil society and others, the precise problems and possibilities for ratification in particular

states, as part of a considered, relevant and internationally compliant counter-terrorism strategy.

Another issue can be put aside: counter-terrorism responses in so-called ‘failed states’<sup>3</sup> will no doubt be of a different character, where ratification of instruments is not a subject of policy discussion (which is not to say that they cannot and should not still be grounded in rule of law principles, attempt a criminal justice response where possible, and be conducted within the limits prescribed by international law). Such issues are not considered here.

This study is part of the multi-year project entitled ‘Strengthening the criminal justice capacity of African states to investigate, prosecute and adjudicate cases of terrorism’ which commenced in 2008. The project is a central component of the International Crime in Africa Programme (ICAP) of the ISS. One important ICAP objective is to contribute to the empirical and conceptual groundwork for legal and policy reform, awareness and capacity building, debate and consensus on international and transnational crime issues in African countries. This study seeks to contribute to the ISS’s mission as an applied policy research institute for the African continent, administered by Africans with African issues and perspectives at the fore: conceptualising, informing and enhancing security debates in Africa, and setting those debates in the context of the continent’s development as a whole.

## **STRUCTURE OF THE MONOGRAPH**

Chapter two deals with the issues: it briefly sets out the wider context within which ratification of counter-terrorism instruments ought to be considered. This includes how legal frameworks and ratification sit within overall counter-terrorism strategies, and how legal actions in relation to terrorism are located within broader efforts to deepen the rule of law in African states. The chapter concludes with a clear statement of the nature of the problem underpinning this monograph: the generally poor record of ratification (and implementation) across Africa.

Chapter three deals with facts: it provides an overview of the relevant global and continental counter-terrorism conventions, and of legal and policy frameworks applicable to terrorism prevention in Africa. The chapter records



the facts about the level and pattern of ratification of instruments among African states.

Chapter four deals with opinions and reasons: the implications of ratification patterns and the question of why and how ratification matters are first discussed. The chapter then considers why ratification of counter-terrorism instruments in Africa has been incomplete and why it varies considerably by region. Consideration is given to a range of related obstacles, both political and technical in nature, in order to inform the more forward-looking analysis in chapter five.

Chapter five deals with actions. Drawing on what we know of the obstacles to greater ratification (and implementation) in African countries, and given the importance of ratification, the question becomes how ratification can be achieved as part of comprehensive national and regional counter-terrorism strategies. Ten interrelated ways in which African governments, along with civil society groups and those agencies, organisations or states mandated to or interested in offering support, might be assisted in relation to ratification. The chapter ends with brief conclusions and recommendations for the consideration of actors and institutions involved or interested in this field generally.



# 2 The issues: Africa's approach to counter-terrorism

This chapter examines the broad issues and debates in relation to counter-terrorism measures in Africa over the past decade. It is within this context that the significance of legal frameworks – of law as a component of overall counter-terrorism strategy – is discussed, along with a broad introductory statement of the problem: the generally poor levels of ratification in Africa. These themes are developed further in subsequent chapters.

## **RATIFICATION AS A COMPONENT OF TERRORISM PREVENTION**

The Algiers Convention – a specifically African continental legal counter-terrorism platform – was promulgated in 1999. The year 2011 marks a decade after the September 11 2001 bombings and the passing of UNSC resolution 1373 which obliged all states to institute comprehensive counter-terrorism laws and measures, including by ratifying various international instruments. It is now also half a decade since the 2006 UN Global Strategy on Counter-Terrorism was unanimously approved at the UN General Assembly. An assessment of

ratification issues is therefore timely in asking the question ‘What can be said about the measures taken by African states in the past ten years?’

There is another reason why it is now timely to assess African counter-terrorism measures: since 2001 the US has provided the most active leadership in global counter-terrorism efforts, including through the UN system. In 2009, US President Barack Obama took office and projected a somewhat different message from the ‘global war on terror’ articulated by the Bush administration. Given that the shape and tone of the US approach has affected national measures around the world, it is timely to ask how the change in US leadership might have affected counter-terrorism measures on the continent.

In setting the context for this monograph, it is important to dwell briefly on the shift in tone of the US’s stance on counter-terrorism. The approach adopted between 2001 and 2008 affected Africa both directly (in terms of US policies) and indirectly, in terms of the responses of some African states to the climate created by US rhetoric. In direct terms, in its dealings with other regions, much of the US’s foreign, security and development assistance became coloured by the application of a counter-terrorism lens. The approach was often perceived – even if unfairly – as favouring counter-terrorism actions by the military and intelligence establishments over national criminal justice initiatives that operate within clear legal frameworks. Across much of Africa, the perception certainly was that such a ‘counter-terrorism lens’ existed, with US assistance becoming more explicitly focussed on terrorism-related issues, sometimes irrespective of the host country’s own perceptions of security risks and priorities, and development needs.<sup>4</sup>

Indirectly, the effect of the ‘global war on terror’ discourse in Africa was sometimes perverse. The thrust of the UNSC regime since 2001 has been that states act against the threat of terror through national laws that create criminal offences and are based on international frameworks.<sup>5</sup> In the years after 2001 this ‘criminal justice response’ message of the UNSC became somewhat distorted. The tone of the US-led ‘war on terror’ may have contributed, even inadvertently, to a somewhat permissive overall climate. Worldwide, there was a steady expansion of executive power less fettered by law. This was seen as justifiable in the face of a long-term, open-ended struggle against a largely opaque enemy.

In Africa, one consequence of the new vocabulary of a ‘war on terror’ and the prevailing encouragement towards strong actions by states, has been a miscasting of the campaign in many situations. Combined with UNSC

mandates that lacked detail, this message had a certain political usefulness in many situations. The result has in some cases been the promulgation or continuation of broadly termed legislation on counter-terrorism in Africa. This has enabled some governments to abuse the international campaign so as to deal with domestic issues: casting a range of non-violent political opponents as ‘terrorists’ so as to draw on the new legitimacy given to countering terrorism.<sup>6</sup>

Thus although African states predominantly featured as victims of terrorism or as bystanders during the last decade of action, in other respects some state actors on the continent have been active participants in the process – sometimes pursuing a range of local interests in the name of the global ‘war on terror’. Another indirect effect of the message was that where the US was satisfied that counter-terrorism cooperation with African country ‘X’ could proceed on the basis of ad hoc arrangements or informal, extra-legal dealings, country ‘X’ consequently felt no particular pressure to implement resolution 1373 and create national laws and mechanisms. One result is that ratification was not actively pursued since it was not seen as necessary to the US-led global effort.

Now that hard lessons have been learned about the counter-productive effect of extra-legal and unlawful counter-terrorism methods, the original emphasis of resolution 1373 is receiving its due attention. This message was always about long-term rule of law-based strategies and criminal justice system responses, founded in strong legal frameworks. The UNSC has, in particular through resolutions 1267 (1999), 1373 (2001) and 1624 (2004) put heavy obligations on states to implement its decisions through their national criminal justice systems. In the US, the change in emphasis is illustrated by, among other things, the decision to try terrorist suspects in US national courts rather than specialist military tribunals. It is now possible to perceive the basis for a fundamental shift in the entire counter-terrorism effort towards the pursuit of national counter-terrorism strategies through legal frameworks and the criminal justice system and using traditional crime prevention and law enforcement techniques.<sup>7</sup> In any event, the original criminal justice model has become the paramount approach, both for reasons of legitimacy and effectiveness.

What does this change of emphasis mean for terrorism prevention strategies in Africa? A recent ISS monograph put it as follows:

In 2009, as a new US administration signals, at one level, a departure from the ‘war on terror’,<sup>8</sup> what opportunities exist to examine and re-evaluate

terrorism prevention strategies on the continent? While a criminal justice system based approach to preventing and combating terrorism is at the heart of the global institutional response, what level of uptake [ratification] and implementation has there been in African countries?<sup>9</sup>

The altered climate provides an opportunity to re-examine and re-orient counter-terrorism efforts in Africa. In more general terms, there is an opportunity for all donors working on rule of law programmes to position these programmes less expressly towards counter-terrorism, and more on broad justice and legal capacity needs of countries, through which any sustainable counter-terrorism response must come. Opportunities now exist in Africa to improve justice system capacity and crime prevention in general, simultaneously with counter-terrorism strategies. The Obama change, in addition to the message of the UN's global strategy (discussed in chapter three) may also allow African realities and priorities to shape counter-terrorism responses on the continent, albeit within the global policy framework.

Thus both the 2006 strategy and the more recent 2009 shift away from the 'war on terror' rhetoric have 'opened up the space to engage in a discussion of counter-terrorism that goes beyond the narrow military, law enforcement and other security-related issues', although at the same time African governments 'will find the space for engaging in extra-judicial counter-terrorism activities such as extraordinary rendition will shrink. This reinforces the need to strengthen national criminal justice capacities to allow governments to combat terrorism within the law.'<sup>10</sup> One expert has predicted that henceforth:

... fighting terrorists will no longer fall within the primary domain of spies and the military. Criminal justice responses to terrorism will become increasingly important, with law enforcement and justice officials becoming key players in the new model. This approach will correctly treat terrorism as a crime. ... Due process, rule of law and human rights protections will become more important.<sup>11</sup>

In this context, it is necessary to consider ratification issues in Africa. It may be important to ask questions about ratification policies of donors and others, even if the answers lead elsewhere: if resources and political capital are to be expended on ratification efforts, is that a sensible way to apportion counter-

terrorism and rule of law resources? Will ratification in fact help secure the overall objective of a law-based national capacity and strategy? Will emphasis on securing ratification preclude other avenues for assisting and encouraging national level responses? If (on the other hand) ratification matters and needs to be re-emphasised, what are the obstacles and how is this renewed ratification strategy to occur?

In addition to the UNSC mechanisms for assessing measures taken by states and regions, there have been a number of specific examinations of Africa's response to terrorism. In particular, these studies were conducted around the time of the 2006 UN Global Strategy,<sup>12</sup> but also more recently, including a mid-2009 meeting convened by the UN Secretary General's Special Representative for Africa to review progress on counter-terrorism on the continent.<sup>13</sup> There are, however, not many studies on how individual African countries have responded to resolution 1373, including its call for wider ratification of counter-terrorism instruments, nor on how criminal justice systems have fared in particular African countries that have taken or needed counter-terrorism actions.<sup>14</sup> A decade after the Algiers Convention and nearly a decade after resolution 1373, this monograph seeks to partly address this question, although there remains a great deal of especially country specific research to be done.

## **RATIFICATION AS A BEGINNING, NOT AN END IN ITSELF**

Before setting out, in chapter three, the various instruments and legal frameworks applicable to African counter-terrorism responses, it is worthwhile to reflect on the significance of law-based approaches to terrorism prevention. This constitutes a broad reminder of why ratification remains of interest.

An inherent aspect of assessing African counter-terrorism responses is to assess the degree of uptake, by ratification and implementation, of international legal frameworks. The international community agrees that terrorism is a crime.<sup>15</sup> However, the primary responsibility for acting on this global consensus does not lie with any international organisation, but with states themselves. Through the UN system in particular, the international community has jointly framed binding duties on states to take action. There are no international tribunals that deal systematically with terrorism in the way that the International Criminal

Court (ICC) and other bodies can adjudicate genocide, war crimes and crimes against humanity. Instead the global effort is inherently premised upon national level lawful actions to prevent and punish terrorist activity. However, those national level actions can draw directly from jointly negotiated global and continental legal instruments that create and describe various offences (for the detail of these, see chapter three).

At the heart of the international criminal justice system are measures that states must take to ensure that no safe harbour exists for international criminals including those who fund, advocate and use methods of terror. These measures must also ensure that there are no barriers to cooperation between states, and that national procedures safeguard human rights so that prosecutions are not jeopardised by deficient investigations. It is not satisfactory that cooperation takes place informally or on an ad hoc basis: ratification of counter-terrorism instruments is an important means of formalising and regularising a lawful, legitimate, functional procedure for international cooperation. However, it is not enough for states to show by ratification they are *willing* to cooperate or implement measures, if they do not take the steps to ensure that they are *able* to prosecute suspects, or to validly extradite them for prosecution elsewhere.

Law is a strategic asset in countering terrorism. Effectiveness in countering and preventing terrorism and radicalisation does not simply require good policing, border control, international intelligence sharing, and so on. The global counter-terrorism effort is premised upon national level lawful actions to prevent and prosecute terrorist activity. UNSC resolution 1373 constitutes a landmark in the international fight against terrorism by creating formal obligations on all 191 UN member states and aiming to raise the average level of government performance against terrorism all over the world. It does so principally through requiring legal measures, including ratification of relevant instruments.

Although counter-terrorism strategies are complex and multi-dimensional, this study considers one significant element: the ratification (and to a lesser extent, the implementation) of global and regional treaties, conventions and instruments. These instruments underpin a preventive, criminal justice system based response. This approach requires national legal and institutional measures to investigate, prevent, prosecute and punish terrorism related activity according to internationally acceptable laws and procedures.



The alternative is that states use methods outside the law to deal with terrorism: fighting illegality with illegal acts. This is counter-productive, as will be discussed in chapter three. The criminal justice approach also requires valid laws and procedures to enable international cooperation and the movement of suspects and convicted persons in a lawful and transparent manner. The alternative is to use extra-legal methods of rendition that bring democracies into disrepute and create propaganda material for the radicalisation of future terrorists. The overall objective is to harmonise all national laws to create a seamless web of preventive, punitive and international cooperative legal measures. Ratification provides a legal foundation for institutionalising and locally tailoring terrorism prevention.

The focus is on terrorism prevention where possible: here the aim is to bring terrorists and their supporters to formal justice by prosecuting or otherwise lawfully disrupting their conduct before it culminates in an act of terrorism. This requires the creation, in national law, of preparatory and other offences (such as financing of terrorism or material support thereto, incitement to terrorism, recruitment, conspiracy, and attempted acts). The international instruments provide a basis for criminalisation provisions in national law, allowing states to adopt the offences described in the instruments. By implementing offences into national law which closely resemble those in the instrument, states are able to cooperate with each other based on an identity of legal wrongs described in their respective laws. This greatly assists in extradition and mutual legal assistance requests and support. Ratification matters for this reason.

Thus while national actions take their shape from globally applicable agreements, the success or failure of the global strategy against terrorism will depend on the implementation of global frameworks and the capacity of national justice systems. At the heart of this issue is the capability of the criminal justice system to detect, investigate, prevent and prosecute terrorist attacks, while maintaining the rule of law and respect for human rights. Justice systems must be able to coordinate preventive and disruptive legal measures at home and across jurisdictions. Following appropriate investigatory procedures, national legal systems need to be able and willing either to competently and properly prosecute terrorist activity, or to extradite suspects to other appropriate jurisdictions.

Despite the fact that the criminal justice response to terrorism rests inescapably on national laws and legal systems, these laws and their practical

application must comply with various aspects of international law. Thus the point ought to be made that these standards are the same whether viewed through the lens of African, Arab or international instruments and frameworks. Although every country perceives its challenges differently, there are no grounds for diverting the debate about standards into discussions of national contingencies and circumstances. A criminal justice-based counter-terrorism approach can also help by dealing with terrorists as mere criminals, thereby denying them the public space and attention that defines their violent actions.

It follows that the touchstone of success in counter-terrorism in Africa ought to be whether the authorities can, within a largely ordinary civil policing paradigm, lawfully prevent and deal with terrorist threats while complying with constitutional and international standards. Ratification of instruments provides a strong foundation for an approach of this nature. However, as this monograph makes clear, success in counter-terrorism is certainly not limited to whether authorities have ratified some or all of the various UN and other counter-terrorism instruments. This is an important theme taken up later in this study.

Ratification is not easy to secure, or else all states would be parties to all instruments. In most cases in Africa, a more significant challenge after ratification is to ensure that new laws are implemented. Beyond implementation (and beyond the scope of this monograph) lies an even more difficult challenge: that of reducing the gap between existing laws nominally in force ('law on the books'), and actual practice ('law on the streets').

## **THE PROBLEM: AFRICAN LEVELS OF RATIFICATION**

In the context of what has been stated above about the significance of a law-based approach, the problem facing African countries is the generally poor and uneven pattern of ratification of counter-terrorism instruments. This situation has not arisen through a lack of trying: there have been repeated and high-level statements, including by African leaders, about the need to ratify instruments. Since 9/11, and in addition to what has been stated in UNSC resolutions and the General Assembly's global strategy, ratification has been emphasised in many forums as a means to structure national responses to international terrorism, and to demonstrate solidarity:

- Representatives from African countries have emphasised the need for a legal framework as the first step of any sustainable response to the threat of terrorism.<sup>16</sup>
- Immediately after 9/11 the principal message of UN Secretary General Kofi Annan's message to African leaders meeting on terrorism issues in Dakar in October 2001 was to encourage the ratification and implementation of existing counter-terrorism conventions, including the African Union (AU) Algiers Convention.<sup>17</sup>
- An important part of the 2004 Declaration of the 2nd High Level Intergovernmental Meeting of the AU on the Prevention and Combating of Terrorism in Africa was a call (in paragraphs II(a) and (b)) to 'scrupulously' implement international counter-terrorism instruments; members decided to 'underscore' the need to accede to the Algiers Convention and protocol.<sup>18</sup> Commitment 6 of the related Plan of Action of the High-Level Meeting was to ratify international counter-terrorism instruments and domesticate their provisions.
- The protocol to the 1999 Algiers Convention stresses in its preamble 'the imperative for all member states ... to implement all relevant continental and international humanitarian and human rights instruments' alongside effective implementation of UN and AU instruments, resolutions and schemes. In this regard, see too article 3(1)(j) on the undertaking of signatories to the protocol to become parties to all continental and international instruments on terrorism.
- The AU Peace and Security Council has repeatedly called upon member states to expedite the ratification of the Algiers Convention and its protocol (described in chapter three).<sup>19</sup>
- A recent conference on strengthening regional capacities for preventive action in Africa generally noted ratification and implementation of global and regional instruments as one of three core elements for enhancing regional peace and security.<sup>20</sup>
- Leading sub-regional bodies have also reiterated the importance of ratification. For example, part 2 of the implementation plan that followed IGAD's June 2003 Addis Ababa Conference on Prevention and Combating of Terrorism is an agreement to ratify instruments 'as a matter of urgency.'
- African states have sought support with ratification and have never themselves formally stated that it is not applicable as a strategy. For example,

a 2007 meeting of west and central African states to prepare responses to UNSC reviews, while asking for further support, did not hesitate to exhort participant states to ‘become parties to the relevant international conventions and protocols relating to terrorism, without delay, in accordance with the relevant Security Council and General Assembly resolutions’ and enact related legislation.<sup>21</sup>

However, as chapter three reveals, despite a notable increase in the levels of ratification and implementation of these instruments immediately after 2001, much work remains to be done in Africa to achieve a seamless international legal framework that can deny safe haven to terrorists.<sup>22</sup> The problem is not confined to the global instruments: despite being African documents, the Algiers Convention and protocol attract the same low levels of ratification and implementation in Africa as do the global instruments.

It must also be noted that ratification is of course not sufficient. Implementation of ratified instruments remains as important as ratification itself, and Africa is marked by relatively poor rates of conversion of ratifications into national legislation. As the UNSC stated in 2004, in terms that are still applicable:

...universal ratification of the international antiterrorist conventions is an important way to broaden anti-terrorist activities, as stated in paragraph 3(d) of [Security Council Resolution 1373 of 2001]. A significant impetus to ratification was initiated in 2001 and many countries have become party to the main conventions, although important regional disparities remain. However, the reports submitted to the CTC [the Counter-Terrorism Committee of the Security Council] reveal that too many countries ratify these conventions without proceeding to adopt internal enforcement measures, without which these conventions can have no practical effect. There must be follow-up machinery, either through technical assistance programmes or as part of the work of CTC, in order to monitor the relevance and effectiveness of the implementation of these conventions.<sup>23</sup>

For various reasons discussed in chapter four, even when ratification is secured, it may not amount to much more. Some officials in African countries have suggested to researchers that where ratification has occurred, terrorism-related

laws may be drafted ‘to satisfy minimum international obligations’ but officials then often pay ‘little more than lip service to the international instruments, as their implementation is put on the back burner.’<sup>24</sup> This is often described as the ‘checklist’ approach to implementing UN and continental counter-terrorism commitments, which involves ‘adopting laws and signing and ratifying treaties without implementing them, and participating in donor sponsored or funded training programs without applying the training’.<sup>25</sup>

However, the checklist problem is not one-sided: it is in part a function of the approach of donors and technical assistance providers. Their own reporting and revenue raising cycles mean that there is sometimes a temptation to seek indicators of progress that enable a long list of ‘ticks’ but do not necessarily represent fulfilment of need. Ratification is important. However, its main drawback as an explicit element of strategy is that both the pusher and the pushed end up focussing on achieving ratification in a way that may detract from dealing effectively with the actual rule of law or security challenges.

These comments prompt important questions that ought to be borne in mind when considering and explaining the levels of ratification in African countries. That is, is the problem really a lack of ratification? As we have seen, ratification is not enough, and implementation in law is not enough without operationalising these laws as part of a coherent national strategy. Action on ratification and implementation can be understood negatively (merely seeking to comply with international obligations) or positively (where states accept and internalise the utility and benefits of ratification). Either way, both ratification and implementation into national law are ways to achieve compliance, capacity and a comprehensive strategy. These measures are not themselves the main objective, but only milestones on the way to reaching the objective. The problem may be not that ratification levels are low, but that a focus on ratification can distort other avenues for reaching the goal of rule of law-based national responses in Africa. This is one of the thematic queries that recur throughout this monograph.

In trying to understand ratification trends in Africa, an important observation must be made. As will be seen in chapters three and four, it is difficult to properly assess the legal measures taken by different African states and sub-regions without also considering the nature of the threat of terrorism in Africa. The scope of this monograph does not, however, provide for a discussion of threats and threat perceptions in Africa.<sup>26</sup>



# 3 The facts: legal and policy frameworks

This chapter starts by providing an overview of the global, regional and sub-regional legal and institutional frameworks related to counter-terrorism. The key questions that the overview seeks to answer are: what is the origin of the universal, continental and global instruments, and what is their relationship to the overall global approach to countering terrorism? The chapter then looks at the actual levels and pattern of ratification (and, to a lesser extent, implementation) in African states, with some discussion about the significance of these findings. These facts are then analysed in chapter four in an attempt to explain the African map of ratification.

## **GLOBAL AND CONTINENTAL FRAMEWORKS**

Looking separately at the global (UN) level and the continental and regional levels, this section sets out the overall legal and policy scheme in which ratification of instruments takes place: both the resolutions and policy statements that call for ratification, as well as the various legal instruments themselves. Of particular importance are the raft of 16 universal legal instruments (in the form of various conventions, protocols and related amendments adopted at various points since the 1960s) which, when taken together with significant

UNSC resolutions that have been adopted under chapter VII of the UN Charter, constitute a universal legal regime for counter-terrorism. This overview does not exhaustively chart the many possible sources that, in addition to formal international law ones, may exert a regulatory influence on the way in which an individual African country acts in relation to counter-terrorism. Such sources include bilateral arrangements with donors, inter-ministerial meetings and their statements and undertakings, the activities of NGOs and technical assistance outfits, and so on.

## Global level

The 16 universal counter-terrorism instruments<sup>27</sup>

International terrorism is not a new phenomenon and from the outset international responses have highlighted the role of national level measures. Since 1963, through the UN and its various specialised agencies, the international community has promulgated a comprehensive set of universal legal instruments (there are now 16 conventions, treaties or protocols) to provide a legal basis for all states who become parties to them, to act to prevent and prosecute terrorist acts (Table 1). Developed over time and often in response to particular manifestations of terrorism, the 16 instruments cover the following terrorist acts:

- Aircraft hijacking
- Aviation sabotage
- Violence at airports
- Acts against the safety of maritime navigation
- Acts against the safety of fixed platforms located on the continental shelf
- Acts against internationally protected persons
- Unlawful taking and possession of nuclear material
- Hostage-taking
- Terrorist bombings
- Funding the commission of terrorist acts and terrorist organisations
- Nuclear terrorism



**Table 1: Overview of universal counter-terrorism instruments<sup>28</sup>**

<b>1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft (Aircraft Convention)</b>	<ul style="list-style-type: none"> <li>• Applies to acts affecting in-flight safety</li> <li>• Authorises the aircraft commander to impose reasonable measures, including restraint, on any person he or she has reason to believe has committed or is about to commit such an act, where necessary to protect the safety of the aircraft, and</li> <li>• Requires contracting states to take custody of offenders and to return control of the aircraft to the lawful commander</li> </ul>
<b>1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Unlawful Seizure Convention)</b>	<ul style="list-style-type: none"> <li>• Makes it an offence for any person on board an aircraft in flight to 'unlawfully, by force or threat thereof, or any other form of intimidation, [to] seize or exercise control of that aircraft' or to attempt to do so</li> <li>• Requires parties to the convention to make hijackings punishable by 'severe penalties'</li> <li>• Requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution, and</li> <li>• Requires parties to assist each other in connection with criminal proceedings brought under the convention</li> </ul>
<b>1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Civil Aviation Convention)</b>	<ul style="list-style-type: none"> <li>• Makes it an offence for any person unlawfully and intentionally to perform an act of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of the aircraft; to place an explosive device on an aircraft; to attempt such acts; or to be an accomplice of a person who performs or attempts to perform such acts</li> <li>• Requires parties to the convention to make offences punishable by 'severe penalties', and</li> <li>• Requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution</li> </ul>
<b>1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (Diplomatic Agents Convention)</b>	<ul style="list-style-type: none"> <li>• Defines an 'internationally protected person' as a Head of State, Minister for Foreign Affairs, representative or official of a State or international organisation who is entitled to special protection in a foreign State, and his or her family, and</li> <li>• Requires parties to criminalise and make punishable 'by appropriate penalties which take into account their grave nature' the intentional murder, kidnapping or other attack upon the person or liberty of an internationally protected person, a violent attack upon the official premises, the private accommodations, or the means of transport of such person; a threat or attempt to commit such an attack; and an act 'constituting participation as an accomplice'</li> </ul>

<p><b>1979 International Convention Against the Taking of Hostages (Hostages Convention)</b></p>	<ul style="list-style-type: none"> <li>• Provides that any person ‘who seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third party, namely, a state, an international intergovernmental organisation, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostage within the meaning of this convention’</li> </ul>
<p><b>1980 Convention on the Physical Protection of Nuclear Material (Nuclear Materials Convention)</b></p>	<ul style="list-style-type: none"> <li>• Criminalises the unlawful possession, use, transfer or theft of nuclear material and threats to use nuclear material to cause death, serious injury or substantial property damage</li> <li>• Amendments to the Convention on the Physical Protection of Nuclear Material add the following: <ul style="list-style-type: none"> <li>– Makes it legally binding for states parties to protect nuclear facilities and material in peaceful domestic use, storage as well as transport, and</li> <li>– Provides for expanded cooperation between and among states regarding rapid measures to locate and recover stolen or smuggled nuclear material, mitigate any radiological consequences or sabotage, and prevent and combat related offences</li> </ul> </li> </ul>
<p><b>1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Airport Protocol)</b></p>	<ul style="list-style-type: none"> <li>• Extends the provisions of the Montreal Convention to encompass terrorist acts at airports serving international civil aviation</li> </ul>
<p><b>1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (Maritime Convention)</b></p>	<ul style="list-style-type: none"> <li>• Establishes a legal regime applicable to acts against international maritime navigation that is similar to the regimes established for international aviation, and</li> <li>• Makes it an offence for a person unlawfully and intentionally to seize or exercise control over a ship by force, threat, or intimidation; to perform an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship; to place a destructive device or substance aboard a ship; and other acts against the safety of ships</li> <li>• The 2005 Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation: <ul style="list-style-type: none"> <li>– Criminalises the use of a ship to further an act of terrorism</li> <li>– Criminalises the transport of various materials knowing or intending that they be used to cause death or serious injury or damage</li> </ul> </li> </ul>

	<ul style="list-style-type: none"> <li>– Criminalises the transporting on board a ship of persons who have committed an act of terrorism</li> </ul>
<p><b>1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (Fixed Platform Protocol)</b></p>	<ul style="list-style-type: none"> <li>• Establishes a legal regime applicable to acts against fixed platforms on the continental shelf that is similar to the regimes established against international aviation (The 2005 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf adapted the changes to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation to the context of fixed platforms located on the continental shelf)</li> </ul>
<p><b>1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection (Plastic Explosives Convention)</b></p>	<ul style="list-style-type: none"> <li>• Designed to control and limit the use of unmarked and undetectable plastic explosives (negotiated in the aftermath of the 1988 Pan Am Flight 103 bombing)</li> <li>• Parties are obligated in their respective territories to ensure effective control over ‘unmarked plastic explosives’</li> </ul>
<p><b>1997 International Convention for the Suppression of Terrorist Bombings (Terrorist Bombing Convention)</b></p>	<ul style="list-style-type: none"> <li>• Creates a regime of expanded jurisdiction over the unlawful and intentional use of explosives and other lethal devices in, into, or against various defined public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction of the public place</li> </ul>
<p><b>1999 International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention)</b></p>	<ul style="list-style-type: none"> <li>• Requires parties to take steps to prevent and counteract the financing of terrorists, whether direct or indirect</li> <li>• Commits states to hold those who finance terrorism criminally, civilly or administratively liable for such acts, and</li> <li>• Provides for the identification, freezing and seizure of funds allocated for terrorist activities, as well as for the sharing of the forfeited funds with other states on a case-by-case basis. Bank secrecy is no longer an adequate justification for refusing to cooperate</li> </ul>
<p><b>2005 International Convention for the Suppression of Acts of Nuclear Terrorism (Nuclear Terrorism Convention)</b></p>	<ul style="list-style-type: none"> <li>• Covers a broad range of acts and possible targets, including nuclear power plants and nuclear reactors</li> <li>• Covers threats and attempts to commit such crimes or to participate in them as an accomplice</li> <li>• Stipulates that offenders shall be either extradited or prosecuted</li> <li>• Encourages states to cooperate in preventing terrorist attacks by sharing information and assisting each other in connection with criminal investigations and extradition proceedings, and</li> <li>• Deals with both crisis situations (assisting states to solve the situation) and post-crisis situations (rendering nuclear material safe through the IAEA)</li> </ul>

The instruments create international legal obligations for states parties to adopt, in their own laws, substantive criminal and procedural criminal law measures to counter various forms of conduct, to exercise jurisdiction, and to provide for international cooperation that enables states parties to either prosecute or extradite alleged offenders. The conventions therefore provide the basis for international cooperation that is regularised, rather than unbounded by law in a fashion that brings counter-terrorism into disrepute and undermines the rule of law generally. The instruments also provide the basis for national criminal justice initiatives, in keeping with the understanding that global problems require each country to ensure its own 'house' is in order. Some of the instruments have been essential for building legal consensus on acceptable definitions of terrorism.

The overall objective of the universal scheme is to harmonise all national laws to create a seamless web of preventive, punitive and cooperative legal measures that constitute the primary resource in counter-terrorism strategies. Underlying the universal legal regime is the notion that the state should bring terrorist suspects to criminal trial, or should be able and willing to extradite them lawfully to another state (with jurisdiction over the offences) that will try them. This 'extradite or prosecute' (*aut dedere, aut judicare*) principle is intended to deprive those intent on engaging in, financing or supporting terrorist conduct of any safe haven in the world. Again, however, the scheme's success is premised on ratification followed by national level measures and actions.

## UN Security Council resolutions

Along with the 16 instruments, the universal legal regime is composed in large part of a series of UNSC resolutions over the last decade, in particular resolutions 1267 (1999), 1373 (2001) and 1540 (2004). The adoption of these resolutions under chapter VII of the UN Charter has the effect that the actions therein mandated are legally binding on all UN member states.

The most significant part of the global legal frameworks is of course resolution 1373 of 2001, adopted in the aftermath of the 11 September 2001 attacks on the US. This was a particularly significant instrument, being open-ended (not time limited) and universal in application, while imposing significant legal obligations on states. In particular it envisaged that the principal response

should be a national level, preventive one aimed at bringing suspects formally to justice, whereby all states shall:

Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.<sup>29</sup>

The intent of the resolution is that states, by enacting specific counter-terrorism legislation based where possible on ratified instruments, should no longer need to resort to vague legal provisions, ad hoc methods, informal international cooperation or customised interpretations in order to prosecute terrorist acts. Instead, states should establish a clear, complete and consistent legal framework that specifies terrorist acts as serious criminal offences, penalises such acts according to their seriousness, and helps the courts bring terrorists to justice.

The executive directorate of the UNSC's Counter-Terrorism Committee (CTED) has explained that the intent behind UNSC resolution 1373 is that states establish:

...a clear, complete and consistent legal framework that specifies terrorist acts as serious criminal offences, penalizes such acts according to their seriousness and helps the courts bring terrorists to justice. This framework should in turn provide the basis for the development of a domestic counter-terrorism strategy that is rooted in a legal approach, ensures due process of law in the prosecution of terrorists and appropriately protects human rights, while combating terrorism as effectively as possible.<sup>30</sup>

Before 2001, resolution 1267 of 1999 had dealt with sanctions against the Taliban and Al-Qaeda, and this issue has been the subject of further resolutions.<sup>31</sup> Since 2001 a number of other significant UNSC resolutions have been passed including resolutions 1267 (1999), 1456 (2003), 1535 (2004), 1540 (2004), and 1566 (2004). The effect of the resolutions was not to license states to pursue counter-terrorism measures by any means, but to create binding obligations upon states to:

- Reform their national laws, law enforcement and border control systems, and financial systems
- Criminalise the commission, funding, incitement to, or preparation of, terrorist attacks
- Detect and freeze assets of terrorists and their supporters
- Deny safe havens and free movement to terrorists
- Deny terrorists access to weapons and explosives and other means
- Cooperate with other justice systems, including through extradition and other forms of exchange of suspects or information by legal means
- Ratify and implement the universal legal instruments.

## UN Security Council mechanisms

Resolution 1373 (2001) also created the Counter-Terrorism Committee of the UNSC (CTC) to better coordinate the UNSC's engagement on these issues, including to receive reports from states on the measures taken by them. Through resolution 1535 (2004), the UNSC established the Counter-Terrorism Committee Executive Directorate (CTED) to support the work of the CTC, including by making recommendations to states in relation to their responses.

## International human rights, humanitarian and refugee law instruments

In addition to relevant UNSC resolutions and any treaty obligations assumed by becoming party to some of the 16 universal instruments, states' responses are also framed and circumscribed by a number of other complementary international legal obligations, in particular international human rights, humanitarian, refugee and customary law.<sup>32</sup> These provide various norms which limit or constrain state conduct (reinforcing other human rights limitations which may exist in national constitutions or national laws). The counter-terrorism response is intended to be influenced by, and integrated with, these safeguards against excessive use of state authority. Common to human rights frameworks is the notion that any security related limits on human rights need to be necessary, the means adopted need to be proportional to the threat or risk,

and the limit needs to be justifiable in an open and democratic society based upon the rule of law.

The UNSC has emphasised that any measures taken by states to combat terrorism must comply with all their obligations under international law, and that states should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.<sup>33</sup> The international consensus on the need for national counter-terrorism measures to comply with international human rights law has been made clear by (among others) the UNSC (resolutions 1456 of 2003, 1566 of 2004, and 1624 of 2005), the UN General Assembly (59/191 of 20 December 2004; 60/158 of 28 February 2006) and the UN Commission on Human Rights (resolution 87/2004). Article 22 of the Algiers Convention states that counter-terrorism measures under the convention must be implemented in a manner consistent with the general principles of international law, international humanitarian law, and the African Charter on Human and Peoples' Rights. Since at least 2001, the repeated message from the UN Secretary General has been that respecting human rights in counter-terrorism operations and policy is not only a legal obligation but a core component of any successful strategy.<sup>34</sup> The UN Global Counter-Terrorism Strategy emphasises the link between observing human rights and long-term security, a link that dates back to the preamble of the Universal Declaration on Human Rights of 1948. The most significant of these sources from a counter-terrorism perspective include:

- The International Covenant on Civil and Political Rights 1966 (ICCPR)
- The Convention Against Torture 1984 (CAT)
- The Refugees Convention 1951
- The International Convention for the Protection of All Persons from Enforced Disappearances 2007
- The body of norms around the Geneva Conventions 1949 comprising international humanitarian law (the law of armed conflict) which have led to terrorist acts committed in war time attracting the status of international crimes.

The African Charter on Human and People's Rights, while not a global instrument, nevertheless belongs in this list and is an important component of the rule of law and respect for human rights in Africa.

There are of course institutional mechanisms, not considered here, that relate to these various instruments. While human rights protections are explicit in UNSC resolutions, and are in-built in many of the 16 instruments, it is certainly the case that ratification of core human rights instruments is complementary to any counter-terrorism response. When assessing African counter-terrorism ratifications, this means that a country which has ratified and implemented all major human rights conventions (and which relies on traditional criminal law and international cooperation channels) may be better prepared, legally, to respond to terrorism than one which has ticked all the counter-terrorism instrument boxes but has not ratified or implemented human rights treaties. Africa has fairly high levels of ratification of the principal human rights instruments; the challenge is mainly one of implementation.

### The UN General Assembly's global strategy

Following the 2005 World Summit, the UN General Assembly unanimously adopted the Global Counter-Terrorism Strategy as a resolution promoting comprehensive and coordinated responses to international terrorism.<sup>35</sup> The strategy is premised on the following four pillars:

- Measures to address the conditions conducive to the spread of terrorism
- Measures to prevent and combat terrorism
- Measures to build states' capacity to prevent and combat terrorism and to strengthen the role of the UN system in this regard
- Measures to ensure respect for human rights and the rule of law as the fundamental basis of the fight against terrorism.

A role for ratification in providing the foundation for national justice system based responses is at the heart of the global strategy, with UN members agreeing to:

...make every effort to develop and maintain an effective and rule of law-based national criminal justice system that can ensure, in accordance with our obligations under international law, that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in support of terrorist acts is brought to justice, on the basis of the



principle to extradite or prosecute, with due respect for human rights and fundamental freedoms, and that such terrorist acts are established as serious criminal offences in domestic laws and regulations...<sup>36</sup>

The strategy led to the creation of the Counter-Terrorism Implementation Task Force to support all activities under the strategy. To this end, several working groups were established dealing with a variety of issues including countering terrorist financing, human rights and counter-terrorism, and integrated implementation of the strategy (which has evolved into the Integrated Assistance for Countering Terrorism working group).<sup>37</sup>

## Global instruments on transnational and organised crime

Global instruments on transnational and organised crime, in particular the 2000 UN Palermo Convention on Transnational and Organised Crime, are significant when considering counter-terrorism ratification in Africa. These instruments are linked to counter-terrorism either in operational law enforcement terms or in terms of capacity building and the ‘bundling’ of technical assistance across all transnational crime issues. As noted in chapter five, one way to improve counter-terrorism capacity where ratification of global counter-terrorism instruments is not taking place, is to develop a comprehensive transnational and international crimes strategy that builds capacity across the board to deal with all these issues.

## Continental level

At the continental level, in addition to two primary legal instruments (and associated protocols) there exists a web of institutions, declarations of sub-regional bodies and regional economic communities (RECs), and policy frameworks that in some way contribute to the overall picture of counter-terrorism, security and development on the continent.

### The Algiers Convention 1999

The OAU Convention on the Prevention and Combating of Terrorism (Algiers Convention) was adopted by African heads of state in Algiers in July 1999 and

came into force in December 2002 once 30 states had ratified. This was the first African instrument on preventing and combating terrorism which provided an African definition of terrorism.<sup>38</sup> The definition contained in the convention enabled African parties to create criminal offences in national law on the basis of a shared, internationally negotiated and accepted definition. The Algiers Convention is consistent with and complementary to the international legal regime and to the Arab Convention.<sup>39</sup>

## African Union mechanisms

The AU was inaugurated in July 2002 shortly after the 11 September 2001 attacks and the global response through resolution 1373. The spectre of terrorism therefore had a formative influence on the organisation, shaped by the 1999 Algiers Convention as well as the reality of international terrorism in Africa after the 1998 US embassy bombings in Kenya and Tanzania. Counter-terrorism became a key part of the AU's peace and security architecture from the outset.

In Algiers in September 2002, the AU publicly endorsed the universal legal instruments against terrorism and adopted a Plan of Action on the Prevention and Combating of Terrorism.<sup>40</sup> This would come to include a counter-terrorism policy role for the AU's Peace and Security Council (PSC) once it came into being in 2004. The plan was given further impetus two years later by the Declaration of the second High Level Intergovernmental Meeting on the Prevention and Combating of Terrorism in Addis Ababa in October 2004. One focus of the AU's counter-terrorism effort has been the establishment of the African Centre for the Study and Research of Terrorism (ACSRT or CAERT), conceived as an independent research centre for cooperation, capacity building and consensus on counter-terrorism issues in the AU.<sup>41</sup>

The AU's counter-terrorism framework is a significant element of Africa's overall counter-terrorism scheme. The AU framework and institutional action has 'helped place global counterterrorism norms into an African context' including illustrating that terrorism is not simply an externally imposed post-9/11 agenda.<sup>42</sup> In assessing the AU's role in continental counter-terrorism, Ewi and Aning note that the AU and the African Commission have acted mainly as a catalyst and interface with the global counter-terrorism system, as well as a clearing house for norm advancement. The role has primarily been

a coordinating one, whether in terms of policy or technical assistance.<sup>43</sup> The AU's Peace and Security Council has model counter-terrorism legislation in the pipeline, currently in draft form. This model law will provide a template for African states to implement both the AU and global counter-terrorism regime. In addition to the AU Peace and Security Council, other AU institutions that could play a significant role in furthering implementation of both the AU framework and the UN strategy are the Early Warning System and the Panel of the Wise, along with the new African Court on Human and Peoples' Rights.

In relation to the subject of this monograph, however, the AU lacks a system for monitoring implementation of measures by states even if they do ratify.<sup>44</sup> Despite being African instruments, the Algiers Convention and protocol suffer from the same low levels of ratification and implementation as the global counter-terrorism instruments in Africa. One shortcoming noted by Ewi and Aning has been the AU's failure to escape the legacy of the OAU: a tendency 'to adopt landmark decisions and make pronouncements without ensuring effective and appropriate follow-up.' The AU is also unable to verify which member states are complying with or actually implementing the African and global schemes.<sup>45</sup> Moreover, the well-known weakness of the AU in dealing with human rights issues affects the organisation's credibility and effectiveness as a counter-terrorism body. Ewi and Aning are right in saying that although it is a relatively young organisation faced with huge challenges, the 'biggest challenge' that the AU faces remains,

to fully and effectively convert into reality the commitment and ideals of its member states vis-a-vis the continental and international instruments.<sup>46</sup>

## Regional and sub-regional level

There is a range of regional and sub-regional institutional frameworks that are relevant when one considers the ratification 'map' of Africa.

For north African countries, a significant legal instrument is the Arab Convention for the Suppression of Terrorism 1998 – a comprehensive regional instrument enabling legal and other cooperation between member states of the Arab League. Since the landmark 1998 accord when 20 Arab League countries agreed to coordinate their efforts against terrorism and extremism, the league remains for north African states an important regional policy forum for

coordination, communication and consensus on counter-terrorism measures. In general, as we shall see below, north African states are inclined to believe that they need not further ratify UN-sponsored instruments since their legal systems are thought to be well aligned in terms of combating terrorism. This is not necessarily the case, especially in terms of financing of terrorism, and cooperation and extradition with non-League states.

The New Partnership for Africa's Development (NEPAD) associated with the AU can shape country responses on security and development issues, including counter-terrorism, although this is not the focus of the scheme. NEPAD's African Peer Review Mechanism is intended to improve compliance, which may conceivably include ratification. Another body that has impacted on African responses to terrorism is the Commonwealth. The institution has been active on counter-terrorism issues in Africa through both consensus at heads of government meetings and capacity building, including promulgation of model counter-terrorism laws for common law countries. Among Francophone countries in Africa, La Francophonie remains an important organisation able to advance cooperation on issues such as mutual legal assistance and extradition among member states. At a recent Annual Conference of the Ministers of Justice of Francophone Countries, a convention on mutual legal assistance and extradition against terrorism was adopted. The convention was signed by 14 African countries.

Among the other regional and sub-regional bodies, both ECOWAS and SADC – while they lack any specific protocols or strategies dealing with terrorism<sup>47</sup> – have evolving peace and security architectures. Both organisations have made various declarations in support of efforts on counter-terrorism and have a number of relevant protocols such as protocols on legal affairs, mutual legal assistance and extradition, small arms, and combating illicit drugs.

Compared with other sub-regional organisations, IGAD has been more proactive. Through its Capacity Building Programme against Terrorism (ICPAT), IGAD has – since its June 2003 Addis Ababa Conference on Prevention and Combating of Terrorism – led the way among sub-regional organisations on counter-terrorism strategy.<sup>48</sup> In April 2009, the ministers of justice of IGAD member states agreed on draft conventions on extradition and mutual legal assistance.

Although lacking any counter-terrorism function, the Community of East African States includes an mutual legal assistance and extradition framework

which is relevant to a discussion of ratification related international cooperation. Like the Community of East African States, which is primarily an economic and trade related body, bodies such as the West African Economic and Monetary Union and the Central African Economic and Monetary Community have a number of instruments, declarations and initiatives in place that are intended to curb financing of terrorism.<sup>49</sup> Whether or not they are effective, these various sub-regional frameworks ought not to be neglected in favour of pushing for the ratification of global instruments.

## LEVELS AND PATTERNS OF RATIFICATION IN AFRICA

This section provides a general overview of ratification trends by region. The extent of implementation, where information on this is available, is also noted. The overview does not consider all aspects of countries' strategies, such as border and weapons control, law enforcement practice and coordination, inter-agency cooperative networks, community relations and conduct to prevent the spread of radicalism, and so on.

It is possible that a state may be fully ratified and may have all relevant legal frameworks in place, and yet lack a functioning national counter-terrorism system. On the other hand, a state may not have ratified most or any of the instruments, but still have a functional criminal justice system that enables it to extradite or try suspects in accordance with international minimum standards. A country may lack specific legislative provisions for dealing with terrorist offences, but otherwise have a comprehensive law enforcement strategy and operational ability that enable it to respond to terrorism threats. A major component of any national preventive strategy is a sound, rights based legal framework: ratification is just one means of achieving that.

### North Africa<sup>50</sup>

The level of ratification of universal counter-terrorism instruments in the sub-region is relatively high. Most countries still need to enact legislation on mutual legal assistance and extradition (at present states cooperate under bilateral treaties and the Arab League regime, including the Arab Convention, of which all are party).<sup>51</sup> The relevant institution for best achieving momentum on legal reforms is the Council of Arab Ministers, but there is a need for a sub-regional

entity (African countries of the Arab League only) to advance mutual progress on legal reforms and enactments.

All African Arab League states have introduced (or updated) counter-terrorism legislation and created adequate jurisdiction (criminalisation of offences, including recruitment and incitement), although in some states this is more comprehensive than others.<sup>52</sup> Only one state in this sub-region has introduced the principle *aut dedere aut judicare* (the duty to either try or extradite) into domestic law.<sup>53</sup>

Generally, these states have effective prosecution and judicial systems. However, a problem in the region includes overly broad legal definitions of terrorism which results in a departure from the definitions in the international instruments.<sup>54</sup> This constitutes a human rights concern and may enable abuse of counter-terrorism laws against legitimate (non-violent) political opposition in addition to affecting international cooperation. These very broad definitions are unnecessary for successfully prosecuting terrorism and merely attract international criticism. Serious concerns have been raised by UN human rights mechanisms over failure to respect the principle of *non-refoulement*.<sup>55</sup> All states have introduced anti-money laundering laws in the last few years, and are parties to the Suppression of Terrorist Financing Convention, but not all have criminalised the conduct or operationalised the legislation, including reporting obligations on financial institutions and better regulation of charitable organisations.

In general, the main challenge in the north African states is not one of ratification but of ensuring that there is less of a gap between what the now relatively comprehensive laws say, and what actually happens in practice.<sup>56</sup> There is a need to:

- Ensure counter-terrorism measures are conducted through the criminal justice system as a preventive, prosecutions led strategy, with judicial supervision
- Examine the overly broad definition which may allow counter-productive use and abuse of counter-terrorism laws
- Ensure cooperation with the UN human rights system to find ways to better institutionalise human rights protections in the context of counter-terrorism.<sup>57</sup>

The measures taken by the Maghreb countries (Tunisia, Algeria and Morocco) are considered in more detail in a recent ISS monograph.<sup>58</sup>

## East Africa<sup>59</sup>

The level of ratification of the universal instruments varies widely in this sub-region, where for example, one state is a party to 14 instruments while its neighbour is a party to only one. The terrorist threat in the sub-region is high (along with other security threats), but only some states have taken legislative and practical counter-terrorism measures that ensure their international human rights obligations are fully respected.<sup>60</sup> Very few states have adopted laws on extradition and mutual legal assistance, further limiting their ability to respond positively and within the rule of law to requests from other states. The principle *aut dedere aut judicare* is not applied throughout the sub-region (it has not been explicitly incorporated into domestic law in implementing the international counter-terrorism instruments). In 2009, the ministers of justice of IGAD member states agreed on a draft IGAD-wide convention on extradition and a convention on mutual legal assistance. The adoption and implementation of both conventions will enhance cooperation in criminal matters among a large number of east African states.

Although ratification rates vary considerably, all states appear to have some legislative measures in place to allow for jurisdiction. Only some states have introduced comprehensive counter-terrorism laws, while others still have draft laws. Most states do not fully incorporate the offences of those international instruments to which they are parties. None of the states with counter-terrorism laws in place has reported using these for investigations or prosecutions (this is not to say that counter-terrorism operations have not taken place).<sup>61</sup> The CTC has recently said that ‘in view of the vulnerability of the subregion, more legislative steps to criminalise recruitment should be taken.’<sup>62</sup>

Four of the nine states in this sub-region that are party to the Suppression of the Financing of Terrorism Convention have adopted appropriate legislation, and significant challenges remain in this area. Most states have anti-money laundering legislation in place, and all but one have laws to regulate charitable organisations, although only one of these states effectively implements these in a counter-terrorism preventive fashion.

In addition to other law enforcement and governance challenges, there is inadequate judicial oversight of compliance with counter-terrorism laws and human rights obligations, and inadequate protections against *refoulement*. Among the recent recommendations of the CTC for this sub-region was the need for ‘the adoption of national counter-terrorism legal frameworks that are comprehensive and coherent and include all the terrorist offences set forth in the international counter-terrorism instruments while conforming to international human rights standards.’<sup>63</sup>

## Southern Africa<sup>64</sup>

The rate of ratification of the universal counter-terrorism instruments also varies widely in this sub-region. For example, one state has ratified 13 of the instruments, while three others have ratified at least ten, and three have ratified four or fewer. Zimbabwe has not ratified any instruments. Most southern African states have yet to provide information on their implementation of the legislative measures introduced. Even though some states have ratified over ten instruments, these states need to take further action to incorporate the instruments into domestic law. The CTC noted in 2009 that ‘States with lower levels of ratification should be encouraged to ratify more instruments, as limited progress has been made in this regard.’<sup>65</sup> Half of the states have comprehensive domestic laws on mutual legal assistance and extradition, although certain sub-regional cooperation mechanisms exist, and most states are also Commonwealth members.

Only two of the ten states in this sub-region have comprehensive counter-terrorism laws in place, while there has been concern over the improper use of counter-terrorism laws (modelled on the UN system) for overtly domestic political purposes in at least one state (Swaziland).<sup>66</sup> Less than half of states in this region have taken adequate criminalisation measures or measures to found jurisdiction. Some are not responsive in reporting at all. Six states are party to the Suppression of Financing of Terrorism Convention. Criminalisation of financing of terrorism is patchy, with some full compliance and some criminalisation, but not in terms of the relevant convention, and some states have not taken action on this at all. Anti-money laundering provisions are insufficiently broad to deal with terrorist financing unrelated to other offences.<sup>67</sup>



## West and central Africa<sup>68</sup>

As with east and southern Africa, the rate of ratification of the universal counter-terrorism instruments in west and central Africa also varies widely. There is a general lack of institutional and operational capacity to effectively implement the instruments:<sup>69</sup> most states have yet to take legislative and practical counter-terrorism measures that conform to international requirements, including human rights standards.<sup>70</sup> Some states have yet to address human rights concerns related to terrorism cases. There are inadequate legal frameworks to guard against *refoulement*. States cooperate with one another primarily through bilateral treaties and not all states have established the principle *aut dedere aut judicare* in domestic law. Legal cooperation in the sub-regions is made more challenging due to Anglophone and Francophone systems, and perceived major differences between these. The CTC observes that, ‘States of the subregion need to strengthen their domestic legal framework to improve their cooperation in criminal matters, in particular through the enactment of laws governing extradition and mutual legal assistance.’<sup>71</sup>

Some states have only partially introduced the necessary legislative measures and most have not established adequate jurisdiction for offences. Among the recent recommendations of the CTC for this sub-region was the need for ‘the adoption of national counter-terrorism legal frameworks that are comprehensive and coherent and include all the terrorist offences set forth in the international counter-terrorism instruments while conforming to international human rights standards.’<sup>72</sup> All save two are now party to the Suppression of the Financing of Terrorism, but not all have criminalised terrorist financing and support. Most have anti-money laundering laws in place, although not all of these are applicable in terrorist financing scenarios lacking another substantive offence (e.g. drug trafficking). Directives on financing of terrorism and anti-money laundering from sub-regional bodies also apply,<sup>73</sup> but have not been implemented by most countries in the sub-region.

## Reflections on patterns of ratification

In general, CTC reviews of compliance with resolution 1373 around the world have found that after a rise in ratification levels since 2001, levels have flattened out. Many regions have low or patchy rates of ratification. Moreover, many

states do not have comprehensive counter-terrorism legislation in place, and among those that have introduced counter-terrorism related legislation covering various criminal acts, these laws tend to lack specificity, comprehensiveness and complementarity. These three comments are true of African states' responses: both ratification and implementation remains 'spotty' across the continent.<sup>74</sup>

Since the previous CTC survey of responses to resolution 1373 (2004), an additional 127 ratifications have taken place. The most important two conventions are arguably the Suppression of Terrorist Bombings 1997 and Suppression of the Financing of Terrorism Convention 1999. The number of ratifications of the 1997 instrument almost tripled after 2001, while the financing instrument had only five parties before 2001 and now has over 100. The main instruments that have received support are the Suppression of the Financing of Terrorism Convention which now has 169 state parties, and a number of instruments related to nuclear material. A significant number of UN member states have actually now become parties to ten or more instruments. However, there are regional discrepancies in the level of ratification, as evidenced in Africa.

Some instruments have very low levels of ratification globally, not just in Africa: the 2005 Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation has only nine parties, and the 2005 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf has only five. In relation to terrorist financing, although most states worldwide are now parties to the convention, a significant number of African countries are not. Many of those that are have either not yet criminalised the terrorist financing offence, or have introduced an offence that does not reflect the relevant convention. The problem extends to reporting. For example, globally fewer than half of UN member states (99) have reported to the Counter-Terrorism Committee on the steps they have taken to implement UNSC resolution 1624 (2005).<sup>75</sup> Only six of these were African (mostly north African countries as well as South Africa, Namibia and Burkina Faso).<sup>76</sup>

As is discussed further in chapter five, this global pattern suggests that there is little utility in advocating ratification of all instruments (notwithstanding the appeal and the propriety of full compliance with resolution 1373). If the focus is to remain on ratification, it should probably be on those instruments that provide the basis for a reasonable national counter-terrorism scheme with

criminalisation of preparatory, supporting, financing and incitement acts, and one that allows for international legal cooperation as well as the protection of human rights. The last two concerns – international legal cooperation and human rights protections – can equally be grounded in other mechanisms or instruments that are not counter-terrorism specific: ratification of some of the 16 instruments is not necessarily a *sine qua non* of lawful responses in such cases. The focus should otherwise be on compliance with resolution 1373 rather than ratification of the 16 instruments which is merely one dimension of the legal framework approach set out in resolution 1373. Where piracy and maritime terrorism are a threat, ratification of related instruments might be bundled as part of comprehensive security and legal assistance and reform measures aimed at improving the capacity to deal firmly but fairly (lawfully) with threats to security whatever their source and motivation.

Most states, in most regions, now have legal and administrative measures in place to grant legal assistance to other states upon request and enable extradition, especially on the basis of reciprocity. However, several African states have yet to ensure treaties or other instruments are in place, enact the relevant laws, and build the necessary networks and relationships for effective cooperation. The ratification of certain instruments can help provide a basis for cooperation if this is lacking. There has been progress on legal cooperation at sub-regional level. Extradition and mutual legal assistance in Africa tends to be treaty based or conducted on a regional basis such as the East African Economic Community, or the Harare Commonwealth scheme. Extradition remains treaty based, not offence based. The Commonwealth scheme for extradition and mutual legal assistance continues to promote and strengthen counter-terrorism efforts. IGAD has initiated the drafting of two IGAD-wide conventions on extradition and on mutual legal assistance. In 2008 a declaration was adopted at the Fifth Conference of Ministers of Justice of the French speaking African countries in Rabat, Morocco on the implementation of the international counter-terrorism instruments. Progress is thus being made more often at sub-regional level and between states with similar legal heritage.

All African countries have filed at least one report with the CTC on resolution 1373. However, as is clear from the discussion above, their progress beyond this differs considerably. In 2007 Kegoro grouped African countries into four clusters in terms of their counter-terrorism ratification and legislative implementation progress:

- Group 1: countries that have enacted counter-terrorism legislation substantially implementing the 1373 requirements (Uganda, Tanzania, Mauritius, South Africa, The Gambia)
- Group 2: countries that assert that their legislative scheme before 2001 already substantially provided for 1373 requirements (north African countries: Egypt, Libya, Tunisia, Algeria, Morocco)
- Group 3: countries that have attempted to implement formal measures to comply with 1373, but by 2007 had been unable to do so (Namibia and Kenya)
- Group 4: countries that have not ratified instruments nor implemented these or 1373, nor enacted formal counter-terrorism laws, either because (in Kegoro's view) these countries see their generic criminal code as sufficient, do not believe counter-terrorism is relevant or of sufficient priority, or lack technical expertise or capacity.<sup>77</sup>

Chapter four considers possible reasons for such different responses to the issue of ratification (and implementation). While formally the requirement is for ratification of all universal instruments, realistically ratification and implementation of at least the following would provide most African states with an adequate legal foundation for a globally recognised yet locally relevant counter-terrorism strategy:

- The Algiers Convention, the Suppression of Terrorist Financing and the Terrorist Bombing conventions
- Legal procedures for extradition, mutual legal assistance and international legal cooperation
- The implementation of other legal framework requirements of resolutions 1373 and 1624, including measures to ensure respect for human rights and international refugee law.

The legal foundation is an essential component of a strategic approach to terrorism. Complying with the rule of law and not resorting to illegal methods to combat illegality is what provides democracies with long-term resilience against transnational terrorists. As is evident from the survey above, those regions and states that are party to conventions are more likely to have national laws in place, and (it follows) more likely to have a workable counter-terrorism strategy.

Of course, ratification and legislative implementation is only a necessary and not a sufficient element of a comprehensive strategy.



# 4 Opinions: explaining Africa's ratification levels

Drawing on the facts and trends identified in chapter three, the focus of this chapter is on analysing the reasons for the disparate and overall poor levels of ratification of counter-terrorism instruments in African countries. As a starting point and before trying to explain African ratification patterns, it is useful to consider the significance of ratification for effectively countering terrorism. This reflects a key theme of this monograph: that ratification ought to be seen as a means to an end, rather than an end in itself.

## **DOES RATIFICATION MATTER?**

### **A starting point for countering terrorism**

It has been argued that one of 'the most objective and reliable indicators of counter-terrorism compliance is the increase in the number of states' that ratify the various conventions.<sup>78</sup> The CTC has described ratification of the universal counter-terrorism instruments as a 'barometer' of international cooperation.<sup>79</sup> But to what extent and in what ways does it matter for ensuring rule of law-based counter-terrorism efforts? How significant is ratification in terms of measuring

counter-terrorism progress? What does ratification tell us about actual counter-terrorism capacity?

It is true that one public sign of formal commitment to global counter-terrorism efforts is ratification of instruments. However, ratification is only a means to an end, and does not necessarily say much about the commitment of the ratifying state to implementing the provisions faithfully and expeditiously into its national laws. As stated earlier in this monograph, ratification is inherently important – a form of progress. But it is just a starting point and not the equivalent of having a comprehensive, country specific, law-based, national counter-terrorism strategy. Ratification should not be the focus when assessing states' counter-terrorism responsiveness, just as numbers of human rights ratifications don't reveal much about where human rights are best protected, promoted, respected and fulfilled.

The fact that post-conflict Liberia was able to ratify over 100 international instruments in a single day tells two tales: first, that with political consensus or political will, progress on ratification can be very rapid indeed (although implementation is another thing); second, the Liberia story reveals the approach to ratification in some parts of Africa. There is a pervading feeling among some observers that Liberia wanted to tick off lists for donor satisfaction to enable the release of funding, rather than setting in motion a considered and feasible strategy to implement the measures. Still, it might be said, ratification is a starting point. On the other hand, it is unfortunately (and counter-intuitively) sometimes the case that ratification tends to make an issue fall off the national policy radar rather than excite and energise governmental action to 'bring the treaty home' and implement it. Indeed the ratification process is a time to leverage as much progress on implementation and sustainable actions as possible, because this attention generally does not last.

Merely having ratified one or more instruments does not necessarily provide for a seamless, internationally responsive web against terrorism. Aside from the fact that ratification is an inalienable part of countering terrorism, a country that has well-developed legal measures for cooperation and prosecution may be a shining example of counter-terrorism cooperation and capacity without having ratified most or indeed any instruments. In the same way, the lack of formal counter-terrorism legislation does not necessarily mean a country is inactive in dealing with terrorism-related issues. Kenya, for example, continues



to have a robust counter-terrorism experience despite the lack of an explicit, dedicated national legal framework.

On the other hand, the mere fact that a country has modern legislation in place does not guarantee that the authorities will actually channel their conduct through those means: Tanzania, which has a comprehensive legislative scheme,<sup>80</sup> has tended to pursue international cooperation measures outside of the scheme. African countries have generally dealt with the issues they have been confronted with by reference to specialist terrorism laws, outside of those schemes, or irrespective of the lack of special schemes. The most obvious example of unacceptable practice is the removal of five suspects from Malawi in June 2003 in violation of basic procedural requirements of Malawi's generic criminal laws and procedures. What remains somewhat debatable is whether the suspects would have been dealt with differently (according to law) had Malawi been a fully signed up and ratified member of the global counter-terrorism scheme.

These observations tend to suggest that a culture of respect for the rule of law is more important than ratification. A country may be a good example of law-based responses without having ratified, depending on the quality of its own laws and procedures and the fact that it actually adheres to them in its treatment of terrorism cases. Kegoro has observed the following, in terms that are analogous for ratification and for implementation:<sup>81</sup>

The debate on counter-terrorism legislation in pursuance of the UN resolution [1373] now questions the necessity for such legislation in the first place. The assumption that [counter-terrorism legislation] will reduce the threat of terrorism is severely undermined by situations where such legislation exists but is not invoked... It is simplistic to assume that countries that have in place specific counter-terrorism legislation are worse off from a human rights point of view than those that do not.

Kegoro has a point to the extent that merely because a country has ratified instruments and implemented national laws, does not mean that it is necessarily more capable of preventive responses, or more likely to use lawful methods to do so. Having legal measures in place to prosecute preventively is important, and in this sense legislation can help prevent terrorism: the threat that Kegoro is referring to is not the threat of terrorism per se, but the threat to human

rights and the rule of law involved in the state's response. Kegoro's point is important in that not basing counter-terrorism actions in clear formal laws and procedures can be as damaging as sidestepping laws and procedures that have been set up. Such a practice undermines state legitimacy and in that way ratification and legislative measures, undertaken without accompanying bona fide intention and capacity to follow through, could contribute to conditions in which terrorist messages of state hypocrisy and human rights shortcuts are more likely to gain support.

Kegoro's statement that it is simplistic to assume that countries that have in place specific counter-terrorism legislation are worse off from a human rights point of view than those that do not, is curious. The assumption is surely that countries that do not have resolution 1373 laws in place are worse off from a human rights point of view, since 1373 compliant laws would include human rights safeguards. What Kegoro is really addressing – and a more common assumption – is that having specific counter-terrorism legislation means that human rights protections are assured. Kegoro's own example (Tanzania) is illustrative of the problem with this assumption: ratification compliance sheets and human rights protections in national laws provide no human rights safeguards if the authorities simply disregard the national legislative scheme when pursuing counter-terrorism responses. In a number of African countries with a reasonable level of counter-terrorism activity, elaborate laws now exist – but there are hardly any criminal prosecutions for terrorism. Furthermore, international cooperation is sometimes been dealt with in an ad hoc and informal manner. In those cases, only the combination of a vigilant civil society, oversight institution and/or legal profession, along with independent and competent courts, can bring authorities back into line with a rule of law-based response.

Arguments like Kegoro's are not arguments against the utility of ratification and implementation. They are reminders that state authorities will find a way to deal with terrorism issues, and the challenge is to ensure that they know about, understand and accept the merits and principles of a rule of law-based approach. Having 'laws on the books' is a necessary, but not sufficient, component of this. The wider challenge – and indeed the challenge of the rule of law in Africa, assuming law reform has taken place – is to translate 'law on the books' into 'law on the streets'.

This discussion reflects findings of a 2007 ISS study of the implementation of the Rome Statute of the International Criminal Court in certain African countries.<sup>82</sup> The study noted that the lack of ICC cooperation legislation in some African countries which had ratified the instrument, did not preclude them from cooperating with the ICC or other states parties. It is not necessarily the case that, absent ratification and the implementation of legislation, countries will be unable to cooperate internationally. The question then became one of whether, in the absence of implementing legislation, the measures taken were clearly compliant with the rule of law and capable of challenge and assertion of legal protections, and subject to judicial review. This is why one challenge for Africa is to ensure that *de facto* channels of cooperation and formal ways of dealing with terrorist threats have a clear rule of law basis, for reasons both of legitimacy and effectiveness.

These are some of the reasons why those concerned with improving counter-terrorism measures should focus less on ratification or implementation in Africa (although these are significant milestones), and more on whether securing these milestones contributes in a meaningful way to strengthening the rule of law in Africa. Ratification and implementation may result in a very sound system that is simply not used. The challenge is thus far greater than ratification and formal implementation of laws: it is to channel official conduct through the limited and transparent avenues of the law. Mere ratification does not necessarily assist in that – and in some respects may obscure it.

Some human rights advocates make the same point about ratification by highly oppressive states of the International Covenant on Civil and Political Rights (ICCPR). Indeed, there is a risk that the idea of law may be discredited if the gap between ‘law on the books’ and ‘law on the street’ is too wide. Taken to an extreme, this can constitute an argument against ratification until the conditions are adequate for *bona fide* conduct of counter-terrorism measures through the criminal justice system.

It follows that the focus is beginning to shift away from specific counter-terrorism measures, such as securing ratification of the 16 instruments, towards a broader more integrated way in which a state can respond to international and transnational crimes within the parameters of international law and human rights. As argued in chapter five, this suggests that sometimes the most effective law related counter-terrorism assistance may not be towards ratification, but towards building the generic capacity of the national criminal justice system

to serve its people efficiently, justly and with respect for their basic procedural rights.

This can work in two ways. On the one hand, counter-terrorism initiatives, with the associated funding and expertise they bring, provide an opportunity to reinvestigate reforms of the criminal and procedure codes, which in the long term, will strengthen rule of law generally. On the other hand, building generic capacity on crime and justice issues bears a strong relationship with a state's ability to respond to specialised issues such as counter-terrorism, the ICC scheme, or transnational organised crime. Especially where generic international legal cooperation measures can be put in place and criminal codes updated, it is debatable whether ratification of global instruments deserves the attention currently afforded to it.

## The rule of law approach is right and it works

In chapter two, the significance of legal frameworks (and ratification) was briefly considered in terms of an overall strategic response to terrorism. This line of argument underpins the entire global response and is difficult to refute. The question, however, is whether ratification remains integral to ensuring national legal frameworks (a rule of law-based response). There are at least two possible ways for a government to consider why ratification matters (or for those advocating reform to present it):

- UNSC resolution 1373 is binding, requiring state action to comply. In order to effectively meet one's international duties, it is essential to establish a comprehensive and coherent counter-terrorism legal framework. This normally requires ratification of important instruments. These instruments form the legal basis for national laws and signal to the international community one's commitment to the joint effort.
- Whether or not it is obligatory, even if one is simply concerned with defeating terrorism in the long term, it makes sense strategically that one's counter-terrorism prevention and response has a lawful basis. This normally requires ratification of instruments that form the legal basis for national laws.

The first approach above represents following the rule of law (a UNSC resolution is binding on a state under the UN Charter), in that ratifying and implementing

is pursued because it is the right thing to do. The second approach appears, initially, to be a more pragmatic approach: ratification and implementation should take place because it works to have a sound legal framework. Ideally, a state ratifies and implements for both reasons: it is right, and it works. Indeed, the experience of many countries over many years of combating extremism and terrorism has revealed that a rule of law-based approach works because it is right: laws that comply with human rights safeguards and prevent the state from itself behaving like a terrorist organisation are a strategic asset or weapon in the fight against terrorism. Legitimacy and limits on powers, transparency and process are resources that strengthen the arm of the state in dealing with those intent on terrorist violence. The CTC has noted:

The effective practical implementation of counter-terrorism policies and procedures requires a well-defined strategy, bolstered by a strong, well-coordinated domestic security and law enforcement apparatus that can detect, prevent and investigate terrorist activities. States are therefore encouraged to ensure that counterterrorism measures are managed and conducted by appropriate law enforcement agencies and to establish a coordinated national legislative mandate to guide their work.<sup>83</sup>

Traditionally, the approach has been that ratification is an essential element of preparing for a 'coordinated national legislative mandate', and guides the creation of this mandate, including the creation of new offences. It may be that a state can validly create new offences and lawfully engage in mutual legal assistance and international cooperation without having ratified specialist instruments. In such cases, donor attention should go to strengthening rule of law conditions around this satisfactory legal position, rather than repeatedly calling for ratification.

However, ratification remains potentially significant because of the need for seamless international cooperation, and the need to contain what states do, in their national laws, in the name of combating terrorism:

- Ratification provides a foundation for international legal cooperation that might not otherwise be there. For example, by ratifying the protocol to the 1999 Algiers Convention, the convention is then deemed to be an adequate legal basis for extradition in the absence of any other arrangements

(article 8). Ratifying many of the 16 instruments creates a mechanism for international cooperation. The need to regularise international cooperation and extradition in terrorist cases is of great importance. The attempted informal or short cut handling of such situations without proper, prescribed procedures and human rights safeguards might endanger otherwise safe convictions or discredit and undermine the international effort against terrorism.

- Ratification can help to ground national responses in international standards especially in limiting the definition of terrorism offences in a way that ensures respect for human rights and mitigates the improper use of terrorism legislation against non-violent political opponents. A continuing concern is the definition of terrorist offences and related concepts (such as support and assistance) contained in criminal legislation in some states. Definitions in some African states remain vague or broad. This can lead to misuse and may also raise obstacles to international cooperation. One problem has been the use of legislation enacted to comply with resolution 1373 for domestic political purposes unrelated to the fight against global terror networks.<sup>84</sup> Peaceful political competitors and opponents become framed within a discourse of terrorism that seeks to appropriate the consensus on transnational terrorism, to cover or justify what are manifestly local political contests. Examples include the arrest in 2005 of Ugandan opposition leader Dr Kizza Besigye and others for charges of terrorism,<sup>85</sup> or the use in Swaziland in 2008 of new counter-terrorism laws against local political groups. While it takes more than well-drafted laws to prevent these abuses, provisions based on international instruments mitigate the possibility that overly broad definitions of terrorism will be used.

While the first point above deals with international cooperation, both points relate to ensuring that measures are undertaken according to valid laws and procedures. If ratification can help ensure this, ratification matters. Law in this sense is a strategic resource: it matters because law enforcement that ignores certain standards can itself become a factor that escalates violence. It has become axiomatic that taking short cuts on human rights and legal procedures tends, over time, to undermine the state's authority rather than enforce it; to alienate the wider community and increase levels of distrust and non-

cooperation; to weaken the morale and legitimacy of officials; and to provide a propaganda victory for the other side. History and experience point towards a transparent, prosecutions-based strategy. In contrast, a pure ‘security’ approach to combating terrorism is destined to fail. Maintaining rule of law and human rights standards in the face of terrorist threats is a form of societal ‘grace under fire’ and is vital to preserving the democratic order. However, the challenge remains to increase understanding and awareness about these issues among justice officials and law enforcement agencies.

The lack of awareness about the importance of the law-based approach is one reason for the low and uneven levels of ratification in African countries. The discussion below considers several other reasons as well as the interplay between technical (knowledge and capacity) and political (willingness) factors.

## APPROACHES TO ANALYSING RATIFICATION IN AFRICA

In attempting to explain ratification trends, it should be borne in mind that not all comments about ratification levels across Africa apply uniformly. As was outlined in chapter three, some countries or sub-regions have responded more robustly than others, for reasons that are considered below. Several approaches can be taken to understanding counter-terrorism ratification patterns in Africa:

- Is the principal problem that a country is unable to move forward or unwilling to do so? From the perspective of outsiders offering assistance, a lack of political will requires different strategies to secure ratification than does ‘inability’. Of course, there may be a combination of lack of will and lack of ability, or the two may compound each other.
- Are the primary obstacles to ratification political or technical?
- Is the lack of progress particular to counter-terrorism instruments (either global or continental), or do counter-terrorism ratification trends reflect generic ratification challenges in a country or region?

Of course, it is simplistic to separate political factors from technical factors, for two reasons. First, many apparent technical or capacity issues signify political ones. Although some countries undoubtedly have endemic capacity problems, familiar complaints about capacity or resource constraints are, to some extent, a

function of political issues. That is, if those in power acknowledge the relevance and priority of a project, the capacity to follow through the requisite technical tasks can normally be found.<sup>86</sup>

The second reason for caution in distinguishing between political and technical factors is that almost every technical issue is a political one. On subjects such as law reform (and especially on security, counter-terrorism and human rights issues), it is naive to think that legislative drafting is merely a technical exercise, as if the provision of adequate expertise alone would enable the drafting. This point remains under-appreciated, including in the counter-terrorism programming field,<sup>87</sup> despite the fact that experience in developing countries in the last few decades has shown that technical assistance and law reform are highly political. This is not necessarily a drawback: the fact that technical assistance is a political undertaking means that support is more likely to be provided in a responsive and inclusive way, by showing an appropriate degree of deference to the political dynamic. Acknowledging the political context in which technical advice and assistance is given is part of ensuring effectiveness and appropriateness in delivery.

## **POLITICAL ISSUES AFFECTING RATIFICATION**

The UN Global Counter-Terrorism Strategy represents a global consensus on dealing with terrorism – a unanimous General Assembly resolution. However, the consensus is very much a formal one. It says little about the views of individual administrations in African states towards counter-terrorism or the reasons for their action or inaction with regard to ratification. The increase in levels of ratification after 2001, followed by the current overall relative lack of ratification, and the partial and regionally dependent patterns in Africa, can largely be explained by the following interrelated political factors:

- Relevance
- Resistance
- Reservation



## Relevance

### Other threats and priorities

For many African states, in the context of a range of competing political, security, development and resource priorities, dealing with the threat of transnational terrorism is simply not a national priority (or even if it is, ratification of instruments is not seen as a priority step). This is partly a function of the perceived degree of threat. Certainly in southern Africa, but also in central and west African states, one explanation for low rates of ratification is the low level of perceived threat of terrorism in those states.<sup>88</sup> Terrorist action by transnational networks in north Africa and parts of east Africa may be seen as a significant threat, but despite AU pronouncements of consensus, this is not in fact how the issue is seen across the continent as a whole.

Agreement on the urgency of terrorism as an issue varies considerably by region.<sup>89</sup> For many governments in Africa, particularly those with weak democratic legitimacy and mandate, the threat of transnational terror networks is simply too small to provide political relevance relative to other sources of insecurity (military coups, civil resistance, invasion, civil or ethnic or religious conflict, piracy, violent organised crime and so on). Certainly, a primary factor holding back AU coordinated responses to terrorism is the divergence in threat perceptions among AU members, albeit in the context of competing priorities within the AU Peace and Security Council.

For most countries south of the Sahara, terrorism is not a major threat to their security, or is not perceived as such. Aside from the insecurities facing political elites, most ordinary African people face far greater threats from civil conflict or violent crime than from terrorist activity (in the way in which this is conceived in the global and AU instruments).<sup>90</sup> For much of Africa, transnational terrorism as we know it after 2001 is a far less pressing threat than a host of other problems. In relation to southern Africa, one experts' report states:

Perhaps the greatest obstacle to improving counterterrorism cooperation in southern Africa is the lack of any urgent or common perception of the threat posed by international (as opposed to domestic) terrorism ... this attitude is not surprising [emphasis added].<sup>91</sup>

As Botha has previously written, it is important (here, when assessing ratification responses) to recognise that:

The different sub-regions in Africa each have their own unique threat perception that directly influences the commitment of governments to develop and implement counter-terrorism strategies...

The resolve of States to counter terrorism is determined by their respective threat perception. A low threat perception impacts the extent of implementation – a check list mentality developed in reaction to international instructions, in particular UN Resolution 1373. In a number of countries, counter-terrorism legislation is considered the culmination of all counter-terrorism initiatives, without its being followed by implementation.<sup>92</sup>

The reality of competing priorities can partly explain the relevance problem: even those African states that are not chronically insecure for the reasons noted above, face a bewildering array of development challenges. Relative to these challenges, the global counter-terrorism effort is, in many capitals, not considered sufficiently politically important or possible. Assuming that governments and elites are in fact committed to addressing their country's needs, the priorities in many parts of Africa are likely to be poverty alleviation, economic growth, development, and mitigating disease rather than terrorism. The result is that for many African states faced with numerous demands on their public institutions, it makes as little sense to devote time and money to counter-terrorism compliance as it would for a landlocked state to ensure – simply for the sake of appeasing global opinion – that it ratified and complied with maritime conventions.<sup>93</sup> As one study that considered counter-terrorism ratification in southern African countries has noted:

Political ambivalence is partly the result of differing priorities. Some political leaders may sign onto multilateral CT initiatives to not appear out of step with the rest of the international community, but are then often unable to get political support for implementing these initiatives

from their domestic constituencies because these groups insist that the limited government resources be devoted to more urgent priorities.<sup>94</sup>

In these circumstances, 'even the best-intentioned African leader would be hesitant to shift the focus to counter-terrorism.'<sup>95</sup> The frustration for those seeking greater African ratification is that the process does not drain resources or expertise, especially with the technical assistance currently available. However, the 'relevance' issue manifests more in terms of political resources for mobilising action on counter-terrorism issues in the face of perceptions that existing political capital and bureaucratic focus should be allocated elsewhere.

This is well illustrated by attempts to secure ratification and implementation of measures to counter terrorist financing. Hubschle has argued that (in southern Africa), the cost and complexity of implementing comprehensive counter-terrorism financing measures in this sub-region bears no proportional relationship with the urgency or threat of terrorist financing, relative to other pressing issues.<sup>96</sup> That is, it is not seen as particularly relevant to many African states. This lack of local political relevance makes it awkward for local politicians to advance the issue and to secure the cooperation of relevant non-state actors.<sup>97</sup> In the financing field, Hubschle has described the 'significant dilemma' confronting some African countries in relation to the global counter-terrorism measures:

They are under pressure to either comply with the international obligations or be blacklisted as non-cooperative and risk economic sanctions. There is no evidence that terrorism is considered a significant threat to many of these countries. There is, in consequence, *no obvious benefit* in adopting the measures stipulated... [emphasis added]. ... the sentiments of an implicit 'persuasion' have been echoed [by officials in Africa] ... political will is low and the perception of bullying is strong...<sup>98</sup>

This has prompted Hubschle to ask (in relation to southern Africa):

Should countries in southern Africa implement anti-terrorist financing measures costing a lot of money that could otherwise be used for development purposes? ... African governments should support initiatives that take account of African realities... Development should be

the region's top priority, not combating terror financiers with complicated new measures that lack applicability to developing nations or their development goals.<sup>99</sup>

It is therefore not surprising that several African states (especially in southern Africa), do not presently see the relevance of many of the global instruments on countering terrorism. This rather inconvenient truth is a primary reason for the lack of more complete ratification of the various counter-terrorism instruments.

### Global/continental questions

The point about 'relevance' is often expressed in terms of whether African countries find the global (UN) and US driven counter-terrorism concerns relevant. Although regional variations in threat perception are acknowledged, it is seldom pointed out that 'relevance' is not only raised in relation to global instruments: many African states do not find continental schemes particularly relevant either. Although there is a tendency to assume so, the African origin of instruments or declarations does not make these instruments and institutions necessarily any more appealing or likely to receive African accession. It is simply a fact that some African states, like some states on the global scene, are far more concerned and proactive on counter-terrorism than others: thus, it is no accident of history that the AU's terrorism convention was negotiated in Algiers.

### The adequacy of local laws

Several African states have raised another aspect of 'relevance' in relation to counter-terrorism ratification. The view is that specific counter-terrorism laws pursuant to resolution 1373 are unnecessary because the existing domestic law (criminal substantive and procedural laws) adequately provides for law-based prevention and prosecution strategies. This is, in most cases, an unfounded position since there are many aspects of criminal justice system-based, preventive and cooperative counter-terrorism legal strategies that require specific adaptations. For example, ensuring that convictions for preparatory offences are possible, or financing of terrorism (where no money laundering

or other substantive offence is committed yet the funds-gathering is clearly directed to terrorist activity). Nevertheless, it ought to be acknowledged that this belief in the adequacy of local laws is fairly widespread. Kegoro goes so far as to say that the failure to enact counter-terrorism legislation in the bulk of African countries can be explained by:

...the perception that these countries have no need of their own for such legislation. Faced with diplomatic and donor pressure to do so, they have approached the task of complying with Resolution 1373 rather perfunctorily.<sup>100</sup>

It should be added that these sorts of misconceptions (that colonial-era criminal and emergency laws are adequate for countering transnational terrorism) are the reason why effective continent wide counter-terrorism strategies are so highly dependent upon awareness raising among lawmakers, officials and the legal profession.

### A universal counter-terrorism instrument in the near future

There is an assumption among several senior African legal officials that a single, comprehensive counter-terrorism convention will soon come into existence, and that it is 'best to wait' until that time rather than attempt to navigate the complex 'spaghetti bowl' (see below) of the 16 universal instruments.

### Lack of awareness and understanding

Finally, it is the true that many of the political judgments about threat or relevance may stem from a lack of information (or understanding) about the nature of the current or future possible threat of terrorism in so-called low risk African states, or lack of understanding about the impact of a major terrorist incident.<sup>101</sup> This issue – which relates to both political relevance and capacity – reinforces the need for advocacy on ratification to be accompanied by genuine offers of assistance rather than resorting to the regular, ritualistic appeals to the propriety of ratification simply for ratification's sake.

## Resistance

### Resistance within the state apparatus

One reason for the lack of more complete ratification in Africa is the historical ambivalence that many governmental actors have on the issue of terrorism. This is particularly marked in southern Africa, where the term ‘terrorist’ was used and abused in the context of colonial and liberation struggles.<sup>102</sup> The pervading historical legacy of some ruling parties and leaders means that several African countries appear to be uncertain about global counter-terrorism efforts. As a result, they do not robustly support or show leadership on UN-led counter-terrorism efforts despite the global consensus represented by the UN Global Counter-Terrorism Strategy.<sup>103</sup>

### Resistance within society as a whole

Even if ratification is perceived to be relevant by political leaders, whether it happens can depend on the resistance to counter-terrorism policies from various social and political constituencies. There is nothing peculiarly African about this phenomenon. Coalitions of human rights groups, lawyers, religious minorities and political minority groups at times resist actions taken in the name of implementing the global consensus on terrorism. This resistance is typically founded in a mistrust of government’s motives for having new, powerful laws on the statute books, as well as concerns about the adequacy of human rights protections, the erosion of civil liberties, and targeting of minorities in a new, legally framed way. In some quarters, a calculation may have been made that the risks of dealing with terrorism without a proper legal framework are outweighed by the political costs of trying to implement counter-terrorism laws in the face of resistance from political opponents and concerned groups in society.

For example, in Kenya, the Suppression of Terrorism Bill 2003 met with strong resistance from Islamic and human rights groups and constituencies. It is one political factor explaining the hesitancy of some in that country towards ratification. It has its familiar corollary in the resistance of conservative religious or cultural authorities to the ratification of human rights instruments that protect the equality of women, for example. To the extent that this resistance impedes ratification and implementation, those working in the

counter-terrorism field may learn from the experiences of those working to secure ratification and implementation of instruments such as CEDAW and the Convention on the Rights of the Child.

### The 'imposition of external agendas'

The non-responsiveness of African states on counter-terrorism issues is partly linked to the quite natural perception of counter-terrorism as an external priority that is imposed on African states.<sup>104</sup> This relates to the 'relevance' point above, but is more concerned with the manner in which issues are pursued, and the consequent reactions. In other words, a state may find the need for new counter-terrorism measures relevant and convincing, but nevertheless still obstruct progress because of the way in which the agenda is pushed by outsiders.

At least between 2001 and the promulgation of the UN Global Counter-Terrorism Strategy in 2006, but perhaps throughout the post-2001 Bush presidency, one reason for the lack of progress on ratification, implementation and coordination was a degree of resistance by some African leaders and officials to perceived bullying by the US and other actors. It is true that many countries responded to 9/11 and resolution 1373 on the basis of objective threats and obligations to UN resolutions. Many were inspired or induced to take action and did take action where they otherwise might not have. It is also true that after 2001, counter-terrorism instrument ratification levels increased.

However, this type of resistance partly explains the conduct of some states in not acting swiftly to comply with 1373 and to ratify counter-terrorism instruments. These states were genuinely objecting to what they perceived to be undue pushiness, a lack of concern for their own priorities and the forced acceptance of a foreign driven policy agenda. This is not an entirely unnatural reaction, even though it causes frustration among many Western donor and government officials at the inaction of some African states.

As noted above, Hubschle has detected, in the programmes to obtain African ratification and compliance on countering terrorist financing, that African officials echo 'the sentiments of an implicit "persuasion" ... political will is low and the perception of bullying is strong...'<sup>105</sup> It is not clear how much of this has changed since the new US administration took office.

## Failure to recognise African experiences of terrorism

In certain African states, a different sort of resistance has manifested after 2001. Algeria, in particular, has repeatedly expressed frustration that its long struggle with extremism and terrorism is not acknowledged since 9/11, and that it tried to mobilise African and international attention for many years before the UNSC became so active on the issue after 9/11. In this sense it is not enough for those interested in furthering Algerian implementation of international counter-terrorism standards to simply assert the need for compliance. What is required is the recognition that non-compliance largely comes not from a lack of interest or ability to respond, but from a push-back and an ‘I told you so’ perspective. For some Algerian officials, the international community is perceived as a relative newcomer to problem of terrorism and as being insufficiently informed or failing to acknowledge Algerian experiences.

## The trade-off against national interests

It is unfortunate but true that resistance also results from a degree of political horse-trading. Related to ‘relevance’ point above is the view that ‘this is for the most part your big war, not ours; so we will cooperate, but what’s in it for us – what will you give us for our support?’ As noted in chapter two, it will be interesting to track how ratification and implementation levels change now that the US seems to be moving beyond the ‘global war on terror’. It may not be palatable that some states delay the implementation of binding UN resolutions to allow for horse-trading on issues that they see as a priority, and in order to salvage some pride as negotiating equals. But it is nevertheless often the way in which these matters advance. This kind of resistance is a reality in securing developing country interest in a range of matters that locals perceive as external priorities. Efforts to convince or cajole countries to enact intellectual property protection laws are a good example.

## Reservation

In the mid-2000s in particular, it was not unusual to hear state officials in some ‘low threat perception’ African countries privately expressing reservations about the consequences of full, swift compliance with global counter-terrorism



efforts. Whether justified or not, some senior officials in low risk states believed that if their countries were suddenly viewed as champions of counter-terrorism initiatives driven by the US or UN, or held up as models of implementation and cooperation, this would attract the attention of transnational terror networks. Some officials believed that an enthusiastic public embrace of UN strategies could paint them as a target, while maintaining the status quo might spare them the interest of, in particular, Al-Qaeda-inspired extremists. This political factor may be somewhat less significant than the previous two. However, it has certainly had some effect in dampening response to ratification requirements.

## CAPACITY ISSUES AFFECTING RATIFICATION

Political issues aside, progress on ratification and implementation of counter-terrorism instruments in Africa is affected by certain generic and specific capacity and resource constraints. These ought to be understood in the context of the political viewpoints discussed above, and in particular, in the context of perceived relevance and priority.

In terms of the relationship between political and technical obstacles to ratification, in many African countries the general governance constraints are so disabling that it is tempting to describe these as the sole cause of lack of progress. A study of southern African responses to terrorism stated that an effective approach must:

...contend with the realities on the ground in a sub-region where more fundamental capacity problems often dwarf any perceived counter-terrorism shortcomings and political sensitivities...<sup>106</sup>

Lack of sufficient expertise, staff and resources in some African government administrations can, in the context of competing priorities, make it very difficult to contemplate widespread ratification (and implementation) of all the counter-terrorism instruments. As with other instruments, there is a general fatigue and lack of capacity to carry out needs analyses (pre-ratification) and strategy development, coordination of ministries, implementation, and compliance and reporting. Reporting burdens are often cited as a reason for non-ratification of specialist instruments in particular.<sup>107</sup> It is not hard to see how the 16 global counter-terrorism instruments might represent – to the average law ministry

official in a developing country – a truly daunting prospect. Here, counter-terrorism ratification must compete with a whole range of requests to states to ratify, implement, and report on issues other than terrorism. In this context there is certainly a role for the AU to consolidate and simplify reporting burdens on African states.

Those actors interested in promoting ratification and implementation of global counter-terrorism standards ought to be aware of the wider patterns and problems of ratification among many African countries. The recent rise of regional mechanisms has meant that the counter-terrorism legal landscape is rather cluttered or overlapping, or is perceived as such. For low capacity state institutions, addressing the various legal measures is akin to ‘swimming in a spaghetti bowl.’<sup>108</sup> Part of the problem with counter-terrorism ratification and implementation in Africa, therefore, has nothing to do with counter-terrorism per se. Instead, the challenge is the huge proliferation of instruments, both global and regional, on a bewildering array of subject matters such as the WTO system, trade, investment, intellectual property, human rights, human movement, etc.

Writing in relation to the challenges of developing countries in ratifying and complying with global, regional and sub-regional trade related instruments, Majluf has noted the effects of the ‘rapidly growing web of regional [and global] agreements that increasingly infringe on sensitive development policy areas.’ Majluf’s comments are worth repeating in full:

In such a context, developing countries are confronting the complex challenge of completing and perfecting the regional integration schemes as a vehicle for development while managing and adapting to a rapidly changing trading environment. There is therefore a need to bring some coherence to this overlapping agenda and to ensure that it works to facilitate rather than compromise the development process... [this] demands a comprehensive analysis of the different rule-making developments in the different layers – multilateral, hemispheric, regional and bilateral – and identification of additional space available for action in each level. The real political viability of adopting further commitments should be evaluated, realistically assessing what would be possible to achieve and in what time framework. In this regard, the following are relevant questions: what is the politically available space at each level of

negotiation to introduce the elements that would confer a developmental friendly ‘plus’ or bonus characteristic on the agreements? What would differentiate agreements to be implemented at different levels? And what issues should be incorporated in the different layers of integration?<sup>109</sup>

Majluf notes that this capacity deficit is increasingly being aggravated by the multiplicity of processes in which developing countries are simultaneously participating; this is true of the counter-terrorism field with its 16 universal instruments:

Capacity constraints are hampering effective participation in the different negotiating processes, and also are evident in the daily administration of the existing agreements in which developing countries participate. The difficulties facing developing countries with the implementation of the WTO Agreements, and even with the notification requirements, and also problems faced ineffectively engaging in the current negotiations in the WTO, and in other instances, attest to existing serious institutional weakness.<sup>110</sup>

## **OTHER OBSTACLES TO RATIFICATION**

In order to tailor assistance and advocacy efforts it is important to consider whether the political or technical reasons for lack of progress are something specific to counter-terrorism, or are more generic obstacles preventing better levels of ratification as a whole. In addition to generic capacity issues and political resistance to externally promoted agendas, some other obstacles to ratification of instruments in Africa are discussed below.<sup>111</sup>

### **Perceived economic cost<sup>112</sup>**

In almost all subject areas requiring ratification (human rights, trade law, etc), one enduring concern and reason for a lack of progress is the perception of the economic cost of compliance and implementation. The indirect cost of compliance is often cited; in other words the opportunity cost of devoting public service resources to these issues. Often, concerns are also about direct costs such as the cost of training prosecutors and judges. Some of these perceptions

are based on misunderstandings. For example, in research on the lack of implementation of the Rome Statute of the ICC in one east African country, a reason given for the lack of movement was the mistaken belief at ministerial level that cooperation with the ICC meant undertaking the cost of building new, high-quality prisons.<sup>113</sup>

## Lack of awareness and a specific constituency

There is a widespread lack of awareness about the UN Global Counter-Terrorism Strategy and the global counter-terrorism instruments, and how they assist in framing a national preventive response. Generally, those instruments that receive most uptake by states have been the subject of concerted local campaigns for ratification involving specialised UN agencies and alliances of influential international and local NGOs. On counter-terrorism issues, however, there is no UNICEF or UNIFEM with national offices, whose work revolves often explicitly around a single thematic convention (such as the Convention on the Rights of the Child or the Convention on the Elimination of All Forms of Discrimination Against Women). At least one of the reasons the Geneva Conventions have a far higher rate of ratification in Africa than the Rome Statute of the ICC or counter-terrorism instruments is that the conventions have a respected, dedicated guardian or ambassador (the International Committee of the Red Cross) and a local constituency (the national military) which often has a strong incentive to ensure the state ratifies (for example, to enable the military to benefit from UN peacekeeping troop contributions).

By contrast, apart from some Western countries and the UN CTC system, in African countries there is no comparable, discernible constituency at home or abroad calling for legal framework action to be taken on counter-terrorism measures. If anything, the advocacy is directed to stopping governments from ratifying or enacting counter-terrorism laws.

In terms of implementation (which is not directly the subject of this monograph), the principal problem compounding both capacity and political obstacles, is simply the lack of momentum post-ratification. This is highly evident in the patterns of implementation of the Rome Statute on the continent: many African countries that were at the forefront of advocacy and consensus building for the creation of the ICC, and which ratified the instrument early on, have taken no steps to implement measures in their national laws to ensure

that they are able to prosecute or extradite those accused of genocide, crimes against humanity, and war crimes.<sup>114</sup> Arguably, those instruments that are ratified and implemented are ones which have a combined internal and external constituency that keeps up the momentum, persuasion, education and capacity building associated with the decision making and action needed for ratification and implementation.

## Constitutional issues: perceived or real legal obstacles

In many states, the belief exists that constitutional provisions prevent action on ratification of some kinds of instruments. In the counter-terrorism field in Africa, this has in the past been advanced as an important obstacle to ratification. However, it is difficult to understand how ratification of important instruments is subject to constitutional barriers; nor should the project of enhancing ratification be made contingent on constitutional reform. The author's experience with promoting ratification of human rights instruments in a range of developing countries shows that it is often asserted that the country's constitution represents an obstacle to ratification, with officials being unable to explain exactly how this is the case. In some instances, this response appears to represent a concern that the country might lose control of its own law development, and the reassurance that the constitution remains supreme law in a national setting needs to be made.

However, in other cases it seems the 'constitutional obstacle' is simply asserted with the expectation that the outsider will give deference to the invocation of such a fundamental law, and the matter will be left alone. It is not always clear in what ways many African constitutions prevent or preclude ratification of instruments designed to provide a legal basis for advancing national security and wellbeing. Deference to the supremacy of constitutional provisions – both as a strategy and as a principle – ought not to obscure opportunities to build consensus around what is possible within constitutional limits, and suppositions around what those limits are.

Related to the 'constitutional obstacle' is a perception about ratification on any subject: many officials believe that before ratification can occur, the entire legal system must be audited to ensure that it complies with the substance of the proposed instrument. This task is so daunting that ratification is repeatedly stalled. This obstacle probably relates to a lack of information

and understanding on the nature, purpose and consequences of ratifying international instruments.

## Concluding comments

In commenting on the reluctance or unresponsiveness of many states in Africa to becoming party to the global counter-terrorism instruments, the Centre on Global Counterterrorism Cooperation has concluded that it is 'not clear' whether lack of resources or capacity, or ambivalence at a political level is the reason for non-ratification and implementation.<sup>115</sup> This conclusion reveals the need for diligent country-specific research and inquiry in consultation with government, civil society and the legal profession, and donors working on rule of law issues. However, this fact aside, the above analysis does enable a number of general recommendations to be made about the kind of action needed to advance ratification in Africa. These are the subject of the next chapter.

# 5 Actions: improving ratification in Africa

Chapter two noted that a new approach to counter-terrorism strategies has developed in Africa that is more responsive to local perceptions of threat, need and process. As discussed in chapter three, ratification is recognised as an important component of a rule of law-based strategy for preventing and countering terrorism. Taking this into account and drawing on the insights of chapter four, what are some ways ratification of counter-terrorism instruments can be enhanced in Africa? Who are some of the important actors involved? What are the strategic choices, alliances or compromises that might need to be made? This chapter proposes ways in which counter-terrorism strategies involving ratification might be pursued in Africa in the second decade after 2001.

## **ENDS VERSUS MEANS**

As discussed in chapter two, it is vital to remain focused on the objectives of ratification (the ‘ends’) and not the means or manner of reaching these objectives. The danger is that emphasis is placed on obtaining full ratification of instruments, when what is actually required is comprehensive national counter-terrorism strategies (that might include ratification). A nuanced approach is necessary because ratification remains important for its own sake, including

as a demonstration of intent and solidarity. Moreover, ratification shows that the rule of law prevails in wider international society by demonstrating compliance with UNSC resolutions (which call for ratification). Certainly, it is not the case that ‘anything goes’ in countering terrorism: human rights and rule of law limitations mean that not all methods are available or desirable. However, the ‘ends versus means’ mindset is important since ultimately ratification is merely a means to an end, and not an end in itself.

Governments, the UN counter-terrorism system actors, donors and others should ask region and country specific questions about ‘what is the best means to establish the objectives of a rule of law-based approach to counter-terrorism in this country?’ Normally, this will involve ratification and implementation. But focusing on ratification may reveal a lack of responsiveness to local human rights, security and counter-terrorism needs, and may compound existing ritualism in compliance.

In general, advocacy and support around counter-terrorism in Africa should focus on taking implementation steps that represent compliance with resolution 1373, and not on ratification of the 16 instruments themselves. That is to say that depending on its other actions, a country may be considered to have taken important steps in ensuring a strong, rights-compliant legal framework for countering terrorism, even if it has not ratified many of the 16 instruments.

## FLEXIBILITY IN PURSUING THE RULE OF LAW

Those advocating greater implementation of continental and global counter-terrorism strategies should not be mechanical in their approach to ratification. For one thing, merely repeating the need for countries to sign up to the 16 instruments is not likely to lead to any greater accession rate. When considering how irrelevant many of the 16 counter-terrorism instruments are for some African states, advocates of implementation ought to adopt a more flexible approach and not repeat *ad nauseam* the need for the ratification of all instruments when achieving this is so unlikely. The constant refrain about the need to ratify all 16 instruments is not only daunting to some officials but might preclude opportunities to assist a country to ratify, say, one important instrument such as the Suppression of Terrorist Financing Convention, or to pursue national legislation irrespective of whether the country has first ratified one or more of the instruments or not.



Ten years after 9/11 – and with a greater awareness about the problems of prescribing supposedly self-evident rule of law orthodoxies from one hemisphere to another<sup>16</sup> – progress on counter-terrorism is best enhanced by a combination of assistance, genuine responsiveness to articulated needs and priorities, and appropriate political influence or pressure. While not stepping back from the ideal of universal ratification, the focus should be on achievable ratification and implementation targets, with buy-in from regional organisations and other relevant actors, and where necessary, as part of a bundled package of assistance that responds to needs articulated by African states themselves.

A more nuanced approach is now required in Africa; one that focuses on the implementation of resolution 1373 and 1624, the terrorist financing convention, the creation of substantive offences and procedural mechanisms and safeguards, human rights protection, and mechanisms for international cooperation. The reality is that most African countries will probably not ratify or implement all 16 instruments. The focus should be on country- and region-specific strategies – developed by the states themselves with the assistance of international and regional agencies, organisations and donors – which include ratification as one element.

The need for a flexible approach has become necessary because of the narrow focus on ratification of counter-terrorism instruments. Concentrating on ratification to understand African approaches to counter-terrorism reveals as little about a country's law-based response capabilities as looking at ratification statistics for human rights treaties tells one about the state's will or ability to promote human rights. The same goes for implementation in national law: while it is certainly useful to have internationally acceptable counter-terrorism laws on the books, the greater challenge is to work towards ensuring that the 'law on the streets', in the prison cells and in the courtrooms more closely resembles the 'law on the books'. This is the real challenge of a rule of law-based response to terrorism in Africa.

## Lessons from the promotion of human rights instruments

When a new global issue is identified, mechanisms are usually established and the message goes out that certain milestones need to be reached. However, over time the milestones become the objectives, rather than mere markers

on the road to achieving the objective. With ratification of instruments, this institutional ritualism is an acute danger. It is repeated in the institutions of review and policy, and the focus on the objectives is lost.

The author's experience with running the programme of ratification of human rights instruments in certain Commonwealth countries is revealing. In this case the political pressure was on achieving the numbers: how many countries could be persuaded or assisted to ratify the twin 1966 Covenants before the 60th anniversary of the Universal Declaration on Human Rights? Of course, ratification of the ICCPR and ICESCR is certainly better than non-ratification. However, it should not obscure that the objective in the countries targeted in this programme ought to have been 'how can the government best be assisted in meeting its human rights aspirations and obligations?' not 'how can we persuade these countries to ratify or draft national laws?' Eventually the focus shifted to national plans of action on human rights based on consultation and some degree of persuasion. Ratification sometimes featured in these plans, and was occasionally delayed so as to obtain progress on other issues that contributed equally towards the overall objective.

The same goes for counter-terrorism and the rule of law in Africa currently. The question ought to be 'how can states best pursue human rights compliant, justice-based, preventive counter-terrorism strategies within the rule of law, and how can the international community help to achieve this?' Ratification is likely to be a component of such a strategy but it is not an end in itself. This is why flexibility is required in pursuing rule of law programming.

## Prioritising countries

A related point in terms of flexibility is that countries most at threat and most in need of assistance have not been prioritised,<sup>117</sup> and resources have tended to be focused on regions where there is a low threat perception and a correspondingly low chance of achieving action on national counter-terrorism strategies, including ratification.

An example of this is the focus of some reports, workshops and programmes on counter-terrorism in regions such as southern Africa and the south Pacific. At times, authors and programmers appear to relish the 'new frontier' of regions like these, and develop all manner of tenuous justifications for programming work in these places. On reflection, such an approach is probably a waste of

funds and expertise that ought to be directed either to priority counter-terrorism countries, or to rule of law or other development issues in regions such as the south Pacific.

It is no wonder that some officials and activists in these recipient countries are cynical about much security-related technical assistance. Officials in low capacity countries are not blind to the fact that many assistance programmes dressed up as ‘responses to a request’ are the result of manufactured requests rather than local interest and demand. What is required is a candid, coordinated resolve – despite the challenges – to achieve progress in countries where it really does matter to have a legal framework in place to deal with terrorism. Merely seeking ratification for its own sake in regions that are unlikely to respond has, after a time, an element of futility about it that is not conducive to building respect for the global rule of law.<sup>118</sup>

## RATIFICATION LESSONS FROM OTHER FIELDS

Those interested in promoting ratification of counter-terrorism instruments in Africa need to assimilate the lessons of agencies and organisations that have sought to secure African states’ accession to the Rome Statute of the ICC, Geneva Conventions, human rights, anti-corruption, trade, labour, environment and other instruments. This relates to the question raised in chapter four: are the problems with ratification in a particular country to do with counter-terrorism as a subject matter, or are they more generic problems, such as capacity constraints?

In general, lessons from comparable areas (transnational and organised crime in Africa) reveal the possibilities for surprising levels of response where intensive engagement and support is provided. Such lessons also highlight the importance of taking time to build political will and ownership, conduct detailed gap analyses, and assist with setting strategic priorities.<sup>119</sup> Ratification is best presented as a component – in whatever sequence works best – of a wider strategy. The importance of considering lessons from other fields is related to the need for coordination, among rule of law agencies, of strategies at sub-regional and country level, on the basis of consultation with governments. If a country is highly unlikely to ratify major counter-terrorism instruments, but can be assisted in ratifying The Convention Against Torture, this surely

requires different agencies to work together to help meet the country's needs and strengthen the rule of law.

The CTED and other agencies involved in counter-terrorism capacity building ought to study lessons from other regimes. For example, the International Labour Organisation (ILO) of the UN has historically been able to achieve a relatively high degree of ratification and implementation of its various core instruments. There are a range of explanatory factors, but its success partly comes from engaging in a constructive promotional approach that combines technical assistance with political pressure, but separates the two processes. This approach 'helps improve the observance of standards far more than the mere recital of neglected obligations.'<sup>120</sup> The CTC and CTED can continue to improve in terms of this form of institutional learning.<sup>121</sup>

## **AN AFRICAN APPROACH TO COUNTER-TERRORISM**

In chapter four some of the factors explaining low rates of ratification included resistance to perceived external agendas, lack of awareness among officials, and how little happens in terms of ratification and implementation where there is no local constituency interested in promoting actions at a national level. With regard to all three of these factors, what would assist in promoting ratification of counter-terrorism instruments would be encouraging an African approach to counter-terrorism strategy, in the first instance involving greater understanding and awareness around what has been achieved to date (including the AU's work on strategic frameworks, draft model legislation, and so on).

A comprehensive review of international justice in Africa has revealed the extent to which 'outsiders' have dominated the discourse.<sup>122</sup> One of the challenges remains to build and strengthen an African constituency for international justice, including counter-terrorism measures. This is often expressed as finding an 'African voice' on counter-terrorism issues, and ensuring that this voice is heard in New York and Geneva.<sup>123</sup> The ISS has helped to lead the way with its work on terrorism in Africa since at least 2006. In saying that there needs to be an African understanding and perspective, it should be borne in mind that although the AU's strategic document assists in this regard, and although African states backed the UN global strategy, there is no single

African perspective on terrorism and counter-terrorism.<sup>124</sup> The challenge is to encourage forums and mechanisms whereby discussion, mutual assistance and support can take place to shape and encourage – through various means within the global and continental legal frameworks – counter-terrorism strategies in Africa.

## **TAILORING: RATIFICATION AS PART OF NATIONAL PLANS**

In 2009, the CTC called for a ‘more tailored dialogue’ with states on technical assistance needs, modes and priorities.<sup>125</sup> This is certainly needed for ratification and implementation assistance in Africa because the nature of the threat varies from region to region, and often within regions, making a one-size-fits-all approach unlikely to succeed.<sup>126</sup> In 2004 the CTC made a recommendation for country-specific technical assistance:

In the future, assistance should be addressed in a tailored approach to each State taking into account its own specific characteristics. Therefore, every single part of the letters should take into account the question of assistance. For example, while identifying a problem the CTC should also offer itself to help the State in the process of finding adequate technical assistance.<sup>127</sup>

Similarly in its Policy Guidance Regarding Technical Assistance, the CTED has highlighted the importance of joint identification of state needs (rather than prescribing strategy to states) and assessments aimed at ‘highest vulnerability and on which technical assistance can have the greatest impact’.<sup>128</sup> Such an approach – being right in both principle and practice – should not require re-stating. It is easy to see that being responsive to state needs and priorities and attempting to tailor assistance accordingly might require being prepared to not push for ratification of all instruments. The risks are well explained by du Plessis (in relation to the UN system):

Without taking into account the ... realities of the regions ... and states while trying to help them build their CT capacities, the UN risks creating

a reputation for itself as an insensitive body with generic, imprecise mandates and tendencies. The UN [the same goes for all donors and agencies] needs to provide tailored, sustainable training and technical assistance activities to the right people, at the right time, supported by thorough and accessible follow-up, and underpinned by candid evaluation.<sup>129</sup>

Experts at a counter-terrorism meeting on ‘African perspectives’ in 2009 highlighted the importance of developing ‘complementary sub-regional programs that are tailored to the needs, priorities, and realities of countries in each sub-region, where a common perception of the threat is more likely to be found.’<sup>130</sup>

The idea of tailored sub-regional and national counter-terrorism strategies (drawing on global and continental obligations, parameters and themes) is highly relevant to the issue of ratification. Again, an analogy can be drawn from the experience of the Commonwealth Secretariat in the Caribbean, south Asia, the Pacific and various parts of Africa. In this case, the focus was on ratification of human rights instruments as indicators and, it was thought, catalysts of national advancement on promoting and protecting human rights. While some member countries responded and ratified one or both of the 1966 covenants, the focus on ratification obscured other opportunities for developing national measures to protect human rights. This approach was ‘top down’ and ‘supply’ oriented. In terms of overall protection and promotion of human rights, far more was achieved when the strategy shifted from securing ratification to listening to members and helping them discuss a national human rights action plan.

Here the external actor (the Commonwealth) acted as a facilitator to bring line ministries together to decide on realistic priorities, needs and concerns, source technical assistance and coordinate with donors, and provide a trusting but principled supportive environment. Support included country needs assessments in concert with donors and the Commonwealth Model National Plan of Action on Human Rights (2007). This strategy was both more effective in real terms and more democratically defensible than simply applying pressure to ratify the covenants. In some cases, ratification was seen as a much later step in the human rights process, rather than the first step.

## GENERIC RULE OF LAW SUPPORT

Consistent with the idea that the focus should be on national preventive and response measures within the rule of law (rather than ratification *per se*), improvements to the criminal justice system and rule of law indicators ought to be considered progress in counter-terrorism terms. That is, if progress on counter-terrorism specific legislation or ratification is not possible, all is not lost. Achievements such as ratification of a human rights instrument, human rights training for judges and law enforcement, improving mutual legal assistance and extradition channels and arrangements, general measures to coordinate government agencies in terms of transnational and international crimes, and other initiatives that are not specifically related to counter-terrorism are nevertheless important in terms of an overall preparedness and prevention strategy. This makes sense because a comprehensive strategy for preventing radicalisation and terrorist attacks must draw on a wide range of areas of governance.

Rosand and Ipe have argued that where progress has been achieved in low threat perception countries in Africa, the motivating factor has been internal governance issues rather than a considered response to terrorism *per se*.<sup>131</sup> What this suggests is that the most efficient and justifiable measures might be those that strengthen the law and justice system as a whole, moderate it with human rights protections, and open it to international cooperation on a law-based footing. Ratification of counter-terrorism instruments may conceivably be a part of such measures but other than strict compliance with resolution 1373, there is no reason why ratification must be the main vehicle for progress.

Central to improving counter-terrorism prevention and response ability in Africa is building generic criminal justice system capacity. The connection to ratification issues is clear: support to assist in ratification may reflect form rather than substance, and may not actually improve a government's ability to deal fairly and firmly with terrorism issues. Instead, such ability will derive from building foundational law enforcement, cooperation and prosecution skills and embedding human rights values in agencies and departments.<sup>132</sup> Building capacity across the criminal justice system is a more attractive prospect in African states where the risk of terrorism is low. But it is also an important component of a strategic response to the threat of radicalisation and terrorism: a strong, functioning, rights-based legal and justice system may be far better

at preventing and dealing with terrorism than one which has nominally ticked off ratification and implementation goals but not actually strengthened the system.

This is also what the CTC means when it advocates that those promoting counter-terrorism issues engage in outreach activities aimed at potential donors, ‘including those already engaged more broadly in capacity-building activities aimed at enhancing institutions and strengthening the rule of law.’<sup>133</sup> Generic capacity building increases counter-terrorism response capacity. One merit of the approach set out in the UN Global Counter-Terrorism Strategy is that solid counter-terrorism legal measures are likely to build the overall legal and governance capacity of the country. The reverse is also true: building generic criminal justice and human rights capacity is conducive to improving counter-terrorism responses. Indeed, in low capacity settings it is arguable that even if a donor’s own priority is counter-terrorism responsiveness, emphasis should be on generic criminal justice and law enforcement capabilities, not discrete counter-terrorism ones.

This approach to counter-terrorism is one derived from hard lessons learned while trying to advance human rights goals: when presented as a human rights issue, some programmes have encountered political or cultural resistance that can be avoided if the initiative is packaged as a development or poverty-reduction issue. Using this approach, the resistance that is sometimes encountered to ‘counter-terrorism’ programmes can be avoided. For this reason, the Centre on Global Counterterrorism Cooperation has proposed (in the context of advancing implementation of the UN’s global strategy in southern Africa):

Changing labels, by moving the rhetoric on ‘counterterrorism’ toward emphasising concepts such as good governance, rule of law, and criminal justice reform, all of which are more appealing to stakeholders...<sup>134</sup>

The Centre on Global Counterterrorism Cooperation has argued that it is important to seek opportunities to use the often more politically palatable rule of law framework through which to pursue cooperation on many strategy-related issues. The view here is that the international counter-terrorism rhetoric may be too ‘muscular’ and ‘unnecessarily polarising’ for a continent where, as noted in chapter four, some view the struggle against transnational terror as



an external or Western agenda. The argument is that framing the UN's global strategy implementation efforts in the context of more palatable notions such as promoting good governance, strengthening national institutions, reducing poverty, and combating transnational crime, may resonate better with states and other stakeholders on the continent. The ability of the UN to do this, however, is said to be undermined by the lack of active participation in the Task Force of in-country agencies such as the UNDP.<sup>135</sup>

Because terrorism in Africa is often linked with other transnational criminal activities, countries need to be legally equipped and sufficiently resourced to deal not only with terrorism crimes themselves, but also with a range of crimes potentially linked to terrorism such as trafficking in drugs, firearms and persons, piracy, and money laundering. This:

highlights the importance of ensuring that counter-terrorism trainers team up more often with those involved in training national officials in related fields, with a view to delivering more unified programs that help countries develop the criminal justice capacities to address a range of interrelated transnational security threats.<sup>136</sup>

There is a need for counter-terrorism actors to actively engage with peers involved in promoting ratification and implementation of other (non-counter-terrorism) legal instruments and in rule of law work in the areas of transnational and international crimes in particular. Such engagement will enable an exploration of whether and how, on a region- and country-specific basis, their activities can be harmonised and rendered more politically palatable and suitable to the situation in the particular country. Ratification is not as important as building generic criminal justice system capacity. Certainly in countries where terrorism is not perceived as a major threat, it may be more defensible and sensible to focus on generic justice issues than to devote resources to seeking ratification.

## **THE SIGNIFICANCE OF PARTNERSHIPS**

Those involved in counter-terrorism promotion must broaden their horizons and be prepared to see general advancement on human rights, the justice system or combating transnational crime as counter-terrorism successes. This will require partnerships and cooperation. Even if the focus is solely on ratification,

it would make sense to pursue or harmonise that objective in partnership with other agencies, organisations or government departments also seeking ratification of other instruments, or seeking the same ends through different means.

In general, there has been inadequate communication between the various providers of technical assistance on the rule of law in Africa.<sup>137</sup> Participants at the 'African perspectives' meeting in 2009 noted the diversity of counter-terrorism activities and programmes being carried out on the continent by a range of UN bodies and African institutions. However, there has yet to be a focused and sustained effort by parties acting together, and led by the UN, to:

engage with a broad range of African stakeholders in a coherent manner on developing a program that a) highlights Africa's unique challenges and role in implementing the UN Strategy and b) establishes Africa's counter-terrorism priorities and needs, driven by input from African stakeholders.<sup>138</sup>

The 'African perspectives' meeting recommended a continental conference aimed at relevant UN and African stakeholders to agree on Africa's priorities and needs and to outline a division of labour among the UN and African institutions. It noted:

More efficient and effective information sharing and coordination between the UN and Africa is needed to ensure that African stakeholders are kept apprised of what UN is doing and vice versa. In addition, the quality of engagement between the United Nations and Africa needs to be strengthened, with a view to better reflecting the 'African Voice' in the UN's counter-terrorism work. In particular, African perspectives need to be heard more clearly in New York.<sup>139</sup>

Securing and maintaining partnerships is not the same as improving national counter-terrorism capabilities, but it is a necessary component of doing so efficiently and effectively. As UN Secretary General Ban Ki-moon told the General Assembly during its first formal review of the UN's global strategy in early September 2008, 'multilateral counterterrorism efforts must be done in partnership with regional and subregional organizations and with civil

society.<sup>140</sup> The UN actors on counter-terrorism, in particular, need local and regional partnerships.<sup>141</sup> These actors have been active in recent years in establishing such partnerships. The importance of regional organisations to international peace and security, including counter-terrorism efforts, has been explicitly acknowledged in UNSC resolution 1631 (2005),<sup>142</sup> and in various reports of the CTC on improving the overall response to the threat of terrorism.<sup>143</sup>

A cautionary remark is required here: some have argued that pursuing a strategy-based approach in Africa through engagement with the AU and other regional bodies may be more fruitful than an approach dominated by the UNSC (CTC and CTED).<sup>144</sup> However, AU efforts even in terms of securing national level implementation of the continent's own instrument (The Algiers Convention) have not been particularly successful. It should not therefore be assumed that the 'New York' source of counter-terrorism guidance and advocacy is the only problem.

Partnerships are also important for securing higher levels of ratification. For one thing, they can be the vehicle for innovative ideas such as combined or consolidated country reports, which ease the burden on low capacity countries. The reporting burden just in relation to the CTC's work is considered heavy, as illustrated by a request from a 2007 meeting of west and central African states that the CTC continue to refine a common strategy on reporting to reduce this burden.<sup>145</sup>

## Civil society

Civil society actors can play an important role in raising awareness within government about ratification, and assisting with countries' reporting burdens. This is true in the counter-terrorism field, too. Whether dealing with human rights or counter-terrorism treaties, African civil society has become sceptical or disinterested in ratification and prefers other strategies.<sup>146</sup> There is, however, an important role for civil society in all stages and aspects of ratification and legislation relating to counter-terrorism.<sup>147</sup> Civil society has been encouraged to see counter-terrorism as part of broader development efforts, and not to be antagonistic towards these efforts. Civil society might be able to accomplish more by constructive engagement towards a balanced and protective legislative scheme.

On the other hand, it has been pointed out that while civil society's role is often referred to, there is little willingness by civil society to work on counter-terrorism issues, including on legislation.<sup>148</sup> A 2009 conference on the role of civil society in implementing the UN's global strategy and counter-terrorism in Africa recommended that civil society organisations portray the strategy in the context of rule of law promotion, conflict prevention and good governance. The 2009 conference also noted that civil society members should undertake counter-terrorism activities that promote rule of law and criminal justice-based approaches to terrorism.<sup>149</sup>

## AFRICAN AND PEER SOURCES OF ASSISTANCE

African states should be enabled to assist other states, based on their shared understanding and experience, with ratification and implementation of counter-terrorism instruments. This may help to obtain more ready cooperation and access, build capacity on both sides, and assist in the goal of wider south-south cooperation.

One role for the AU, other regional bodies, and donors on counter-terrorism in Africa can be to facilitate greater peer contact for these purposes. In a recent study of counter-terrorism efforts in certain north African countries, it was revealed that while there was plenty of technical assistance offered to these countries (Algeria, Morocco, Tunisia) from the EU, the US, France and others, there was little opportunity for sharing of experiences between the three countries. Judges from Algeria, for example, had benefited from many meetings with judges under the European Strasbourg system, but had not had any opportunity to share experiences with neighbouring countries, despite the many common issues they faced.<sup>150</sup>

The CTC should encourage (African) states to assist others in particular fields in which they have expertise or experience.<sup>151</sup> It is important to capitalise on the success stories in ratification and implementation.<sup>152</sup> CTED has recommended that progressive states be identified and enrolled in efforts to assist their neighbours.<sup>153</sup> The UN Special Rapporteur on Human Rights and Terrorism, for example, has recommended that South Africa take a leading role in encouraging and assisting other AU members to develop counter-terrorism laws that conform with international standards, as well as the ratification and implementation of the ICCPR, CAT and others.<sup>154</sup>

The AU's Peace and Security Council is developing model counter-terrorism legislation. Currently in draft form, the model law is comprehensive and would provide a template for African states to implement both the AU and global counter-terrorism regime without necessarily ratifying instruments.

## UN GLOBAL STRATEGY

For those interested in promoting law-based prevention strategies and responses to terrorism in Africa, including greater accession to legal instruments, the UN's global strategy poses something of a dilemma. The consensus is that a contextualised and responsive articulation of counter-terrorism in the strategy is more likely to resonate with governments in Africa. However, the message of integrating counter-terrorism into more general development and enrolling a whole range of agencies and interests, can arguably be taken too far: counter-terrorism could become about everything and therefore about nothing. The approach implicit in the global strategy may go some way towards advancing African ratification and implementation of counter-terrorism instruments and legal frameworks. There is, however, also a high risk of these issues falling by the wayside in the already crowded development agenda in Africa.

In order to consider these issues, what follows is a discussion of the merits of the UN global strategy in terms of advancing ratification, followed by reasons why a somewhat narrower approach of 'bundling' other international or transnational crime and criminal justice issues, may be more successful. In commenting on the global strategy it ought to be remembered that there is often an assumption that government officials, even leaders, are aware of the strategy, and of what it contains:

There is a big difference between achieving consensus on a non-binding General Assembly resolution in New York and building political will within each member state to implement the commitments on the ground ... To date, the Strategy has had little practical impact [especially in southern Africa] and there is a general lack of awareness of the Strategy.<sup>155</sup>

In what follows below, therefore, it should not be assumed that merely invoking the global strategy will open doors and deliver problem-free cooperation.

The points below relate more to the strategy's approach (integrating counter-terrorism into the wider development agenda), than to the particulars of the strategy itself.

## Pursuing ratification through the global strategy

On the one hand, the approach of the UN's global strategy is to be commended. The strategy recognises that a comprehensive, long-term approach to countering terrorism requires the mobilisation of a range of governmental and other agencies to prevent radicalisation and terrorism, and address conditions such as poverty, exclusion, injustice, corruption and discrimination that (while they do not justify terrorism) may result in an climate in which extremist messages take root more easily.

The global strategy represents an opportunity to stimulate a more comprehensive national response to countering terrorism and to deepen interagency cooperation and coordination. According to the strategy, a national response should not be limited to traditional counter-terrorism actors but should include those in the human rights, development, health, and social services fields.<sup>156</sup> Stakeholders on the continent agree that efforts to combat terrorism in Africa should be viewed through the lens of development, good governance and poverty reduction, which are higher priorities for most of the continent.<sup>157</sup>

Advocates of this approach see the global strategy as being useful 'as an instrument to promote broader rule of law and criminal justice development'.<sup>158</sup> This approach is moreover required because efforts to implement the strategy will be futile if they are not sustainable, and they will not be sustainable without strengthening state capacity more generally. For this reason, it has been suggested that counter-terrorism strategies, in at least those African countries with a lower perception of threat, deepen their engagement with the UNDP, UNESCO and other UN entities involved in the general reform and development issues that are likely to have most traction in the local context. This involves expressly linking the security and development discourses.<sup>159</sup>

## Pursuing ratification despite the global strategy

The approach outlined above could be regarded as risky if the aim is to ensure ratification and implementation of the universal counter-terrorism instruments

and the creation of a strong, seamless legal framework for countering terrorism. For convenience, this approach will be referred to here as the ‘strategy notion.’ The risk is that if counter-terrorism measures are to be integrated with wider development modalities, they might simply be put to one side, especially in the bulk of African countries where terrorism is not regarded as a high priority.

The strategy notion seeks to situate counter-terrorism efforts within wider development challenges. A leading expert who is otherwise a proponent of this notion has noted that the challenge confronting the global strategy is that ‘its breadth and ambiguity make it potentially everything and nothing at the same time’.<sup>160</sup> Similarly, a problem with the strategy notion is that it takes the valuable dimensions of bundling, coherence and integration of counter-terrorism too far.<sup>161</sup> While it is true that terrorism is a truly complex issue, this overreach may have already occurred.

To explicitly make counter-terrorism responses about everything related to development and human security generally (to put it crudely) carries a reasonable risk that progress on counter-terrorism becomes prisoner to all manner of development priorities, agendas, agencies and processes to the point of paralysis. Resistant government officials may play off progress on counter-terrorism issues against other issues to which they have now been explicitly linked, while in fact progress on both is held up. Terrorist activity constitutes a distraction from other pressing development issues in Africa. But this is not a reason to subsume terrorism within those issues. Indeed, it is by having in place a strong, internationally acceptable legal framework for preventing and countering terrorism that African countries can concentrate on other issues.

It is perfectly feasible to conceive of implementing national counter-terrorism measures as a discrete, non-burdensome, stand-alone task that does not need to involve all national departments and international agencies. In other words, counter-terrorism measures do not need to be linked to everything else the government is doing and they do not require mobilisation of the ‘whole of government’ (which in any event is highly unlikely in low capacity countries). Ratification, legislative drafting, extradition and mutual legal assistance arrangements, and other legal framework measures – while not apolitical – can be implemented without multi-stakeholder, multi-level, integrated processes. In some countries, for example, ratification is initially an executive act, achieved by (to exaggerate for effect) simply faxing notice of an instrument of ratification

to New York. To hold milestones like ratification hostage to an unwieldy ‘whole of government approach’ is a recipe for inaction.

Contrary to the strategy notion, discrete measures such as ratification of specialist instruments (such as on terrorist financing), or mutual legal assistance and extradition, do not need to be placed on the same table as HIV/AIDS, women’s advancement and protection, and so on. If one’s strategy is simply to obtain more strands in the global counter-terrorism legal web by securing African countries’ ratification and implementation, this is arguably less likely to happen if terrorism is placed alongside wider development and security challenges, than if it is seen as slightly distinct.

It has been argued that in southern Africa, a strategy focused on security and law enforcement (particularly if closely identified with US interests) is unlikely to gain any political traction.<sup>162</sup> In this context, Makinda has called for a much broader strategy, a ‘long-term values-oriented formula based on institutions, development and social justice’.<sup>163</sup> One can hardly quibble with Makinda’s vision. However, once again the danger of integrating counter-terrorism implementation goals with development and general African continental upliftment is that the counter-terrorism components might simply disappear.

Instead, those mandated to advance counter-terrorism implementation should consistently bear in mind the overall objective, and be flexible and innovative about how best to achieve it in any one sub-region or state. One approach is to tie counter-terrorism issues in advocacy or programming to criminal justice reform and transnational crime. Counter-terrorism is then not lost in the general social development agenda, but nor is it held apart.

## **ENTRY POINTS FOR PROGRESS**

In general, the past record and future prospects are quite dim for further adherence to counter-terrorism instruments by African countries. It is highly unlikely that, in the foreseeable future, there will be universal African ratification (and certainly not implementation) of all 16 instruments. This ought to lead proponents of ratification to adopt a nuanced, pragmatic approach to counter-terrorism ratification in Africa. Rather than repeated workshops and training sessions on ratification of the 16 instruments, other law-related strategies that fulfill resolution 1373 and achieve the wider objective should be



pursued. Nevertheless, a range of opportunities exist to advance ratification and implementation (as part of coherent, tailored strategies):

- The shift away from the Bush administration's 'global war on terror' discourse, which led to resistance in some African governments, civil society organisations and communities.
- Increased harmonisation and communication between donors working on rule of law programmes in Africa.
- The evolving role and practice of the AU Peace and Security Council as a facilitative or coordinating body.
- The existence of a comprehensive AU draft model law.
- The feasibility of approaching counter-terrorism issues through generic support to criminal justice systems and security sector reform. The possibility of tying counter-terrorism measures with other criminal justice measures would at once elevate the urgency of the issue and increase the likelihood of donor support (e.g. for training prosecutors).
- The work of the Integrated Assistance for Countering Terrorism working group is important. It is currently actively engaged with two African countries as pilot studies (Nigeria and Madagascar) to identify areas where the Task Force can help countries to implement the global strategy in a more coordinated and integrated fashion. If this work results in recommendations or actions about ratification, this may encourage further ratification.
- The possibility of 'bundling' awareness and training on ratification and legal frameworks for countering terrorism into ongoing human rights and constitutional education programmes. Since many local and international agencies and NGOs run educational programmes on human rights, increased attention to the fact that comprehensive counter-terrorism measures based on international law are both protective of human rights and respectful of human rights, might increase local demand for counter-terrorism strategies and ratification of relevant instruments.
- Some African countries are interested in being recognised as leading, cooperative international citizens. This is an opportunity for leverage by those actors and agencies interested in promoting ratification. Conversely, governments seeking to build trust and goodwill with donors may find that compliance with UNSC resolutions brings incidental benefits.

- Although the vulnerabilities to terrorism vary from one sub-region to another, most African countries confront similar challenges as they seek to develop and implement strategies to address the terrorism threat. This creates a realistic basis for concerted joint efforts, including ratification if that is required as part of the strategy.<sup>164</sup>
- The strength of the ‘self-interest’ argument for ratification and implementation. This includes the embarrassment an African government might face should it find within its jurisdiction a suspected transnational terrorist of interest to the international community, and be unable to either extradite or prosecute because of a failure to ratify and implement appropriate laws.

# 6 Conclusions and recommendations

In 2009, as part of ongoing research into terrorism prevention in Africa, the ISS published a monograph entitled *Beyond the 'war on terror'*. That title was intended to capture both the need for a new approach and the opportunity created by the altered mood on counter-terrorism in Africa under the new Obama administration. It was also intended to indicate that for most people in Africa, transnational terrorism is something to move beyond, in order to deal with pressing social and political challenges for which those using terror have not offered a viable alternative. In concluding this monograph, it is worth repeating what was stated there:

Terrorism is a crime, and a particularly serious form of human rights violation. Terrorist activity constitutes a major generational threat to peace and security in Africa. It moreover represents a threat to – and major distraction from – vital human and economic development in African societies: it is a distraction from the consolidation of democracy in Africa and open, responsive, inclusive governments. In some respects the perceived threat of terrorism ironically creates national political environments that stifle the realisation of these ideals. From an African perspective, therefore, terrorism must be prevented and terrorists

overcome not only for principled and security-related reasons, but because the bulk of Africa's people require governmental and international attention to a range of other problems and possibilities.<sup>165</sup>

By having in place a strong, internationally acceptable legal framework for preventing and countering terrorism, as part of a considered national strategy, African countries can concentrate on other issues. Ratification of significant continental and universal instruments (and their implementation into national laws) forms a basis for this. The challenge in promoting ratification of counter-terrorism instruments in Africa is to position advocacy and assistance somewhere between merely securing ratification on the one hand, and, on the other, presenting terrorism prevention as one part of a wide range of governance and development tasks, few of which are likely to be acted upon.

## MOVING BEYOND RHETORIC

The 2009 CTC report on resolution 1373 encourages states 'to become party to all the international counter-terrorism instruments' (and also to incorporate the elements of those instruments into domestic law).<sup>166</sup> The committee is of course obliged to make statements like this, given the binding nature of resolution 1373. The committee is also obliged to encourage ratification of all instruments, because a rule of law position dictates, to some extent, an all or nothing approach. However, as this monograph has argued, the mindset that advocates for the ratification of 'all instruments' may be part of the problem. It is highly unlikely that African states will universally ratify all 16 instruments, or even that a majority of countries will ratify most of these.

The rule of law is an ideal describing a certain end state. With that end state in mind, the focus should be on identifying the most practical and efficient ways to achieve the desired outcomes within international human rights standards. This is not to say that 'anything goes in fighting and preventing terrorism, so long as it works'. That would be contrary to the entire message of the international community and international law. Instead, in relation to ratification (and implementation) there ought, by 2010, to be a preparedness to be more sanguine about which instruments are likely to be ratified, and need to be ratified, together with a thorough simplification of the scheme.

At present, there is no doubt that the global counter-terrorism project is intimidating in its complexity, even to members of the CTC and CTED. It is not patronising to say that it is similarly complex and intimidating to attorneys general and their staff in many countries, especially those with capacity constraints. So, if a country takes bona fide measures to implement resolution 1373 without showing any inclination to ratify instruments, this should be seen as progress in terms of the overall objectives. Ratification is not everything. Ratification of 'all instruments' should therefore not be pursued dogmatically especially when it intimidates public service officials into inaction on other counter-terrorism measures, and where it is pursued at the expense of seeking other opportunities and means towards the overall objective.

One theme of this monograph has been that those working on counter-terrorism issues – whether in governments in African countries, donor organisations or the UN system – need to see themselves as part of a wider community working on strengthening the rule of law more broadly. In particular, those seeking higher rates of ratification ought to accept that ratification is one among several responses, and should not to be prioritised to the extent that it obscures opportunities to engage with governments (and civil society) about other measures for preventing terrorist threats and improving cooperation and response actions.

It may sound trite, but the fact remains that more research is needed on particular countries' and regions' issues and concerns with regard to terrorism. This includes researching the reasons why particular countries have not ratified various instruments. It is important to note the achievements of CTED and others, including African regional organisations such as IGAD and non-governmental organisations such as the ISS, in pursuing more genuine dialogue with African states and international, regional and subregional organisations. However, progress on ratification is still undermined by ritualistic institutional practices that sometimes constitute nothing more than 'lazy' programming: repeated one-off workshops on ratification and implementation rather than the hard, patient work of building trust and dialogue with individual countries.

Instead, what is required is honesty and responsiveness to particular situations, and innovation and flexibility in approach, starting with questions like: what does country X want and need in terms of a national counter-terrorism response capacity, including legal frameworks? Is ratification regarded as significant here and is it likely? Are there other forms of support

that can be given, or areas that can be pursued, if ratification is not advancing? This approach – explicit now in the work of CTED and others (especially since UNSC resolution 1805 of 2008) – is both a more defensible use of resources and more likely to yield results.

## RATIFICATION IS NOT ENOUGH

While in general terms ratification is to be encouraged (and is mandated), the objectives of ratification should be seen as distinct from the methods used to attain them. Substance in counter-terrorism measures at a national level is thus more important than form. Sometimes ratification is part of a considered response to terrorism threats. Unfortunately, at other times it is simply a formal act with little follow-through. Building a seamless web of law-based national terrorism prevention strategies will require dedication that goes beyond the ratification of conventions or protocols or the introduction of counter-terrorism legislation. There remains a need,

... to move beyond a check list approach to satisfying UN commitments... a number of states, and also the international community, fell into the trap of using commitment to these instruments as a benchmark for actual commitment. Subsequently, a check-list approach developed... a desire to impress world powers means they often do not take concrete action to implement long-term solutions that address underlying factors.<sup>167</sup>

Writing on the rule of law in Africa in the context of AU ambivalence on the independence of the prosecutor of the ICC, Ford and du Plessis have noted:

The ‘rule of law’ requires more than ritualistic accession to formal treaties. A society and a continent governed by laws (not by the whims and personalities of men) requires leaders to display publicly their fidelity and submission to rules and procedures that have been agreed by all.<sup>168</sup>

It remains the case that initiatives to encourage or assist ratification and implementation should not only be couched in terms of the overall objective, but should ‘embrace the reality that terrorism has different manifestations at regional and sub-regional levels.’<sup>169</sup> The greatest challenge for those engaged in

ratification (and implementation) in Africa will be that some countries believe their legal frameworks are adequate for dealing with transnational terror threats. In other parts of Africa, ratification advocacy will encounter difficulties because of capacity constraints and the perception that the last thing the country needs is to further complicate the ‘spaghetti bowl’ of international commitments. Another challenge will be convincing African countries that do not consider terrorism an immediate threat to their security, to ratify instruments.

Meetings of experts in 2009 noted that current challenges include how to build on what has already been achieved on the continent, how the global and African efforts can be linked and reinforcing, and how the various initiatives at the sub-regional level can be bolstered by those at the continental level.<sup>170</sup> This raises questions about where ratification fits or ought to fit in new policies, strategies and alliances.

## **LAW AS STRATEGY AND A STRATEGIC APPROACH TO LAW**

The work of the Terrorism Prevention Branch of the UNODC, which is very much concerned with ratification and legal measures related to countering terrorism, is important and rightly praised. The Terrorism Prevention Branch has organised some 30 workshops since 2003 on the ratification and implementation of the 16 universal instruments against terrorism.<sup>171</sup> However, ratification and the drafting of national legislation – while important – are not synonymous with terrorism prevention. Law is the basis of strategy, and in this case is part of a long-term strategy to overcome terrorism. But there are limits too: legal frameworks are merely one component in an effective response. Some international lawyers have argued that international law needs to be more humble about its ability to transform situations.<sup>172</sup>

Ratification is therefore not an end point, but one possible starting point. It is one milestone in counter-terrorism measures that may require leadership at the highest level. This leadership can be forthcoming where the benefits of ratification are clearly spelled out to leaders, misconceptions allayed, and assistance offered. In the human rights field, ratification sometimes accompanies political actions by leaders as a symbolic gesture. In principle, this is quite fine, provided there is also intent to implement the instrument.

One of the issues for African leadership in terms of the rule of law, and counter-terrorism, is consistency. Even if one is only concerned with political perceptions, it is unsustainable to undermine the rule of law on some issues and then to seek refuge in the rule of law when the status quo needs to be protected. In terms of future security in Africa, one of the most precious intangible resources is a credible and legitimate concept of the rule of law and of honouring agreed procedures.<sup>173</sup> This reservoir requires actions by states to publicly commit to law-based responses, and to fashion policies that are explicitly based on legal frameworks which provide them with both legitimacy and structure.

In this context, 'law as strategy' means that legal frameworks, processes and institutions are valuable in themselves, but are also a vital part of any national strategy on terrorism. As discussed in this monograph, an approach that departs from legal frameworks is wrong in principle, and likely to be ineffective in practice, especially where the state's own conduct, unguided by law, begins to be indistinguishable from the conduct of those openly using terrorist methods. Proponents of ratification need a revitalised vocabulary that enables them to articulate to leaders, officials and others the significance of ratification as one basis for comprehensive national strategies to defeat and prevent terrorism and associated radicalisation.

## HONESTY IN POLICY

Overall, those involved in promoting counter-terrorism measures in Africa must be more honest. Reports and statements on African responses to the global counter-terrorism effort reveal an undercurrent of frustration because many agencies, consultants and donors do not accept that for many African countries, transnational terrorism is simply not a priority. Moreover, some states are perceived as delinquent or obstructive, and as recipients rather than participants in global counter-terrorism strategies. The use of words such as 'palatable' and 'traction' tends to perpetuate the mindset, in the north and the south, that counter-terrorism is something for outsiders: 'how can we get these Africans to cooperate?' If this leads to resistance among African governments, it is hardly surprising. The use of the terms 'export', 'transport' or 'sell' in the context of attempts to persuade, encourage or pressure countries to implement counter-terrorism laws,<sup>174</sup> reveals that donors and agencies do not believe their own rhetoric on consensus and long-term self-interest, and neither do those



states which signed up to the global strategy (but for whom the strategy is not currently a priority).

We must protect and nurture the fragility of the rule of law as a concept in global affairs. This may require that we still, at least formally, aspire to universal ratification of all instruments. However, it is incumbent upon all working in this field – governments, donors and others – to be honest about what is likely, and humble about what is possible. This approach is vital to furthering the objectives underlying the global counter-terrorism strategy, including an increase in rates of ratification, implementation and reporting. Law is a part of strategy, but those involved in promoting lawful counter-terrorism responses need to be strategic too. The story of efforts to secure ratification of instruments is a fine example of why this is necessary.

## RECOMMENDATIONS

Four recommendations are advanced for promoting rule of law-based counter-terrorism measures in Africa as we embark upon the second decade after 2001. These recommendations are in the form of suggested approaches to the issue of ratification, and are not addressed to particular actors such as the AU, UNODC, regional economic communities, governments, civil society, and so on.

### 1. Ratification matters

Ratification of continental and global instruments remains important. Law and fidelity to the rule of law are part of the wider strategy to overcome terrorism in the long term. Ratification of instruments illustrates solidarity in combating terrorism and provides countries with an internationally agreed basis for drafting national laws and for international cooperation, as part of national strategies.

### 2. Ratification only matters so far: tailored approaches are needed

Ratification is important for its own sake, but is not the actual objective of counter-terrorism support or response. The principal objective of the global counter-terrorism community, of which Africa is a part, is to ensure a seamless

global web of national level counter-terrorism prevention, response and cooperation measures, grounded in the rule of law and respect for human rights. Ratification is often only a start. Moreover, it ought not to be pursued at the expense of real dialogue to ascertain and respond to countries' and sub-regions' perceived counter-terrorism needs in meeting this objective. These needs might not necessarily involve ratification. Research-driven policy and legal reform is needed on a country-by-country and sub-regional basis to ensure appropriate, proactive, preventive and tailored counter-terrorism measures in Africa.

### **3. Integrate counter-terrorism into wider rule of law programming**

If it assists in achieving the objective of rule of law-based national measures on counter-terrorism, it may be useful to integrate or 'bundle' ratification, implementation and reporting on terrorism instruments with other measures as part of a comprehensive country-specific package of legal measures to deal with international criminal and security threats. Counter-terrorism objectives are also generally advanced wherever there is improvement on human rights performance, justice system capacity, and closer adherence to the rule of law. However, ratification does not necessarily require a 'whole of government' approach. Attempts to integrate counter-terrorism into wider development modalities and agendas, while consistent with the global strategy, may result in benign or deliberate neglect of counter-terrorism issues, especially in lower-risk countries.

### **4. Leadership, example and assistance**

Ratification is often an executive act that requires high-level political leadership. Proponents of ratification need to acquire a fresh, relevant set of justifications in order to obtain political attention. There are many forms of leadership in terms of ratification: civil society can create demand while also raising awareness and African countries may be well positioned to offer their experience to peers. This is to be encouraged.

# Notes

- 1 See A Sambei, A du Plessis and M Polaine, *Counter-terrorism law and practice: An international handbook*, Oxford: Oxford University Press, 2009; also C Fijnaut, J Wouters and F Naert (eds), *Legal instruments in the fight against international terrorism*, Amsterdam: Brill Academic, 2004.
- 2 The threat in Africa includes: 1) domestic terrorist attacks on African interests; 2) international terrorist attacks on Western interests; 3) use of African territory as a safe haven; 4) Africa as a terrorist breeding ground and source of recruits; and 5) Africa as a transit point for terrorists and fundraising tied to other illicit activities. For excellent overviews, see A Le Sage, Terrorism threats and vulnerabilities in Africa, in A Le Sage (ed), *African counterterrorism cooperation: Assessing regional and subregional initiatives*, Washington DC: NDU Press/Potomac Books, 2007; and A Botha, Africa's vulnerability to terrorism and its ability to combat it, in W Okumu and A Botha (eds), *Terrorism prevention in Africa: In search for an African voice*, Pretoria: Institute for Security Studies, 2007, 23. In the same volume, see also G Yoroms, Defining and mapping threats of terrorism in Africa, and S Makinda, History and root causes of terrorism in Africa. See also CGCC, *Implementing the UN Global Counter-Terrorism Strategy in southern Africa*, Chapter II; Rosand and Ipe, Enhancing counterterrorism cooperation in southern Africa, 43-44; J Cilliers, Terrorism and Africa, *African Security Review* 12(4) (2003), 91-103. For a recent affirmation of the variation in threat perceptions, see Report of the expert group meeting on African perspectives on international terrorism, UN Office of the Special Adviser on Africa, Report and Recommendations, 3-4 June 2009, Addis Ababa, Ethiopia.
- 3 For a US-oriented policy position, see T Dempsey, Counter-terrorism in African failed states: challenges and potential solutions, Carlisle, PA: US Army War College (Strategic Studies Institute), 2006.
- 4 For a more controversial view, see R Tynes, US counter-terrorism policies in Africa are counter to development, *African Security Review* 15(3) (2006), 109-113.
- 5 In particular, UNSC resolution 1373 of 2001 (S/1373/2001).

- 6 An obvious and crude example in recent years has been the designation, in November 2008, of political parties in Swaziland as 'terrorist organisations'. In the absence of any objective threat of terrorism, and certainly no threat of transnational terror, the Swazi authorities relied upon the national Suppression of Terrorism Act, explicitly enacted to fulfil Swaziland's obligations under the UN counter-terrorism framework, in order to proscribe a range of pro-democracy groups.
- 7 The momentum for such a shift is well conveyed in the support for the merits of a criminal justice system based response given in the comprehensive February 2009 report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights of the International Commission of Jurists (ICJ), *Assessing Damage, Urging Action*, Geneva: International Commission of Jurists, February 2009.
- 8 As the author explained in the 2009 publication, it is possible to say that the 'war on terror' has, in a sense, ended. This is not to say that the threat has diminished, but that the means of responding to the threat will be viewed differently. The Obama administration has acknowledged more explicitly that a holistic approach is to be followed, one that integrates human rights, due process, and the rule of law.
- 9 J Ford, *Beyond the 'war on terror': A study of criminal justice responses to terrorism in the Maghreb*, Pretoria: Institute for Security Studies, 2009, vii.
- 10 Report of the expert group meeting on African perspectives on international terrorism, UN Office of the Special Adviser on Africa, Report and Recommendations, 3-4 June 2009, Addis Ababa, Ethiopia.
- 11 See A du Plessis, A timely end to the 'war on terror', ISS Today, Pretoria, Institute for Security Studies, 7 February 2009.
- 12 Africa's response to terrorism, Report of conference proceedings, New York: Africa-America Institute, 2006.
- 13 Expert group meeting on African perspectives on international terrorism, UN Office of the Special Adviser on Africa, 3-4 June 2009, Addis Ababa, Ethiopia.
- 14 The author's previous monograph for ICAP was a preliminary and exploratory study of the measures taken in the justice systems of Morocco, Algeria and Tunisia to meet their international obligations, see Ford, *Beyond the War on Terror*. See too the work of the ISS on terrorism prevention in Africa, and the work of the Centre for Global Counter-terrorism Cooperation (CGCC), both cited throughout this monograph.
- 15 There is no universally accepted comprehensive legal definition of what constitutes 'terrorism'. UN member states continue to negotiate a comprehensive terrorism convention to complement the existing legal framework. This builds on past efforts. The 1994 UN General Assembly Declaration on Measures to Eliminate Terrorism stated that terrorist acts are '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' and that such acts always unjustifiable.

A decade later, UNSC resolution 1566 reached for elements of a definition: ‘...criminal acts, including against civilians, committed with the intent to cause death of 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 organisation to do or abstain from doing any act...’ The lack of a single universal definition is not a problem for national level responses. In any event, the universal legal instruments cover almost every conceivable kind of terrorist act, while for African states the Algiers Convention (Art. 1(3)) and the Arab Convention (Arts. 1 & 2) also offer definitions of terrorism that are not overly broad.

- 16 See for example W Mulgas, Africa’s response to terrorism, Remarks of the Permanent Mission of South Africa to the United Nations, Report of conference proceedings, New York: Africa-America Institute, 2006.
- 17 Secretary-General commends African efforts against terrorism: urges ratification, implementation of existing conventions, Press release SG/SM/799 AFR/344, New York: United Nations, 22 October 2001.
- 18 Declaration of the 2nd High Level Intergovernmental Meeting on the Prevention and Combating of Terrorism in Africa, (Mtg/HLIG/Conv.Terror/Decl. (II)), Addis Ababa: African Union, 14 October 2004
- 19 See for a recent example, Statement of the Peace and Security Council upon its 149th Meeting, Addis Ababa: African Union, August 2008.
- 20 EWI, Strengthening regional capacities for preventive action in Africa, Report of conference proceedings, East-West Institute and African Development Bank, Tunis, November 2009.
- 21 Report of the meeting of 25-27 September 2007 on the preparation of the responses by west and central African countries to the Security Council Committees dealing with counter-terrorism (A/62/479), 18 October 2007.
- 22 A du Plessis, The role of the UN in providing technical assistance in Africa, in Okumu and Botha (eds), *Terrorism prevention in Africa: In search for an African voice*, 86.
- 23 UNSC, Report by the chair of the Counter-Terrorism Committee on the problems encountered in the implementation of Security Council Resolution 1373 (2001), New York: United Nations Security Council, S/2004/70, Part C.
- 24 A Hubschle, Terrorist financing in southern Africa: are we making a mountain out of a molehill?, ISS Paper 132, Pretoria: Institute for Security Studies, 2007, 4.
- 25 CGCC, *Implementing the UN Global Counter-Terrorism Strategy in southern Africa*, New York: Centre on Global Counterterrorism Cooperation, 2007, 30.
- 26 See the references at note 2 above.
- 27 At the time of writing the universal counter-terrorism legal regime consisted of 16 instruments. Two additional instruments were adopted in December 2010: Convention on the Suppression

- of Unlawful Acts Relating to International Civil Aviation (2010), and Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (2010).
- 28 Adapted from the table 'Universal instruments against terrorism at a glance', UNODC Handbook, Vienna: United Nations, 2008.
- 29 UNSC resolution 1373 of 2001, para 2.
- 30 Survey of the implementation of Security Council resolution 1373 (2001), UN Counter-Terrorism Committee Executive Directorate, New York (S/2008/379), 2008.
- 31 See UNSC resolutions 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006) and 1822 (2008).
- 32 Some of the elements of some of the 16 global counter-terrorism instruments contain human rights related safeguards.
- 33 UNSC resolution 1456 of 2003.
- 34 For an overview see E Flynn, Counter-terrorism and human rights: the view from the United Nations, *European Human Rights Law Review* 1 (2005).
- 35 UNGA resolution 60/288 of 2006.
- 36 Part IV, Para 4 of UNGA resolution 60/288 of 2006.
- 37 The 24 different entities represented on the UN Counter-Terrorism Implementation Task Force are the Counter-Terrorism Committee's Counter-Terrorism Executive Directorate; the Department for Disarmament Affairs; the Department of Peacekeeping Operations; the Department of Political Affairs; the Department of Public Information; the Department for Safety and Security; the Expert Staff of the 1540 Committee; the International Atomic Energy Agency; the International Civil Aviation Organisation; the International Maritime Organisation; the International Monetary Fund; the International Criminal Police Organisation; the Monitoring Team of the 1267 Committee; the Office of the High Commissioner for Human Rights; the Office of Legal Affairs; the Organisation for the Prohibition of Chemical Weapons; the Special Rapporteur on the promotion and protection of human rights while countering terrorism; the United Nations Development Programme; the United Nations Educational, Scientific and Cultural Organisation; the United Nations Interregional Crime and Justice Research Institute; the United Nations Office on Drugs and Crime; the World Customs Organisation; the World Bank; and the World Health Organisation. Another significant multi-state coordinating actor is the CTAG, G8's Counter-terrorism Action Group.
- 38 Under Art. 1(3), a terrorist act is any act or threat which, amongst other things, *is in violation of the criminal law of the member state*, thus emphasising the need for criminalisation of offences in national law.
- 39 Both the Algiers Convention and the Arab Convention aim to provide the basis to criminalise acts of international terrorism as contained in the universal legal instruments against

- terrorism; condemn terrorism in all forms regardless of religious, ideological or political motives; introduce the required mandatory and optional grounds of jurisdiction; provide for enhanced international and regional cooperation in counter-terrorism; and reject the political offence exemption as a reason to refuse extradition.
- 40 For an overview of the AU's involvement in counter-terrorism issues, see [http://www.africa-union.org/root/AU/AUC/Departments/PSC/Counter\\_Terrorism.htm](http://www.africa-union.org/root/AU/AUC/Departments/PSC/Counter_Terrorism.htm)
- 41 See <http://www.caert.org.dz>. The ACSRT/CAERT was constituted under Section H, Paragraphs 19 to 21 of the AU Plan of Action on the Prevention and Combating of Terrorism. It was inaugurated during the Second High-Level Inter-Governmental Meeting on the Prevention and Combating of Terrorism in Africa held in Algiers in October 2004. The purpose of the ACSRT is to contribute to and strengthen the capacity of the AU through the PSC in the prevention and combating of terrorism in Africa, with the ultimate objective of eliminating the threat posed by terrorism to peace, security, stability and development in Africa. To this end, the ACSRT will collect and centralise information, studies and analyses on terrorism and terrorist groups and develop training programs by organising, with the assistance of international partners, training schedules, meetings and symposia.
- 42 E Rosand and J Ipe, Enhancing counterterrorism cooperation in southern Africa, *African Security Review* 17(2) (2008), 43-60, 47.
- 43 See generally M Ewi and K Aning, Assessing the role of the African Union in preventing and combating terrorism in Africa, *African Security Review* 15(3) (2006), 33-38. See too I Wani, The African Union role in global counterterrorism, in Le Sage (ed), *African Counterterrorism Cooperation*, 2007.
- 44 Rosand and Ipe, 'Enhancing counterterrorism cooperation in southern Africa', 47-8.
- 45 Ewi and Aning, *The African Union and Counter-terrorism*, 37.
- 46 Ibid.
- 47 In particular, the 1997 ECOWAS Defence and Security Commission, as evolved, and the 2001 SADC Protocol on Politics, Defence and Security Cooperation. See however M Rifer, SADC and terrorism: where is the regional strategy?, *African Security Review* 14(1) (2005), 107-116.
- 48 See Report of the expert group meeting on African perspectives on international terrorism, UN Office of the Special Adviser on Africa, Report and Recommendations, 3-4 June 2009, Addis Ababa, Ethiopia, 60 on some reasons for ICPAT's success to date. Some of these factors are relevant to re-strategising ratification in Africa.
- 49 See 'Règlement N.14/2002/CM/UEMOA relatif au gel des fonds et autres ressources financières dans le cadre de la lutte contre le financement du terrorisme' Union Economique et Monétaire Ouest Africaine (UEMOA), 2002. Also UEMOA 'Décision N.09/2008/CM/UEMOA relative à la liste des personnes, entités ou organismes visés par le gel des fonds et autres ressources financières dans le cadre de la lutte contre le financement du terrorisme' (2008) and 'Directive N.04/2007/CM/UEMOA relative à la lutte contre le financement du

terrorisme dans les Etats membres de l'UEMOA' (2007). In central Africa, see the following regulations of the Commuaute Economique et Monetaire de l'Afrique Centrale (CEMAC): Règlement N. 08/05-UEAC-057-CM-13 portant adoption de la Convention relative à la lutte contre le terrorisme en Afrique Centrale (2005). Règlement N.01/03 CEMAC-UMAC portant prévention et répression du blanchiment des capitaux et du financement du terrorisme en Afrique Centrale (2003).

- 50 Algeria, Egypt, Libya, Mauritania, Morocco, Sudan and Tunisia. Note: Morocco is not a member of the AU.
- 51 Survey on the implementation of resolution 1373, New York: UN Security Council, S/2009/620, 3 December 2009 (north Africa).
- 52 Ford, *Beyond the War on Terror*, 81-83.
- 53 Survey on the implementation of resolution 1373, UN Security Council, S/2009/620.
- 54 Ibid.
- 55 Ibid.
- 56 Ford, *Beyond the War on Terror*, Part III.
- 57 Survey on the implementation of resolution 1373, UN Security Council, S/2009/620.
- 58 Ford, *Beyond the War on Terror*.
- 59 Burundi, Comoros, Djibouti, Eritrea, Ethiopia, Kenya, Madagascar, Mozambique, Rwanda, Seychelles, Somalia, Tanzania and Uganda. Note: Eritrea is not a member of the AU.
- 60 Survey on the implementation of resolution 1373, UN Security Council, S/2009/620.
- 61 Ibid.
- 62 Ibid.
- 63 Ibid.
- 64 Angola, Botswana, Lesotho, Malawi, Mauritius, Namibia, South Africa, Swaziland, Zambia and Zimbabwe.
- 65 Survey on the implementation of resolution 1373, UN Security Council, S/2009/620 (Africa: southern).
- 66 Survey on the implementation of resolution 1373, UN Security Council, S/2009/620.
- 67 Ibid.
- 68 Benin, Burkina Faso, Cameroon, Cape Verde, Central African Republic, Chad, Congo, Côte D'Ivoire, Democratic Republic of the Congo, Equatorial Guinea, Gabon, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Sao Tome and Principe, Senegal, Sierra Leone and Togo. Note that Guinea and Niger are currently suspended from the AU (March 2010).



- 69 G Yoroms, Counter-terrorism measures in west Africa, in W Okumu and A Botha (eds), *Understanding Terrorism in Africa: building bridges and overcoming the gaps*, Pretoria: Institute for Security Studies, 2008, 90-97.
- 70 Survey on the implementation of resolution 1373, UN Security Council, S/2009/620 (Africa: west and central).
- 71 Survey on the implementation of resolution 1373, UN Security Council, S/2009/620.
- 72 Ibid.
- 73 See note 10 above.
- 74 Report of the expert group meeting on African perspectives on international terrorism, 28.
- 75 S/2009/289.
- 76 Second report of the Counter-Terrorism Committee to the Security Council on the implementation of resolution 1624 (2005), S/2008/29, 21 January 2008.
- 77 G Kegoro, The effects of counter-terrorism measures on human rights: the experience of east African countries, in Okumu and Botha (eds), *Understanding terrorism in Africa: in search for an African voice*.
- 78 D Cortright, *An action agenda for enhancing the United Nations program on counter-terrorism*, Goshen, Ind: Fourth Freedom Forum, 2004.
- 79 Survey on the implementation of resolution 1373, UN Security Council, S/2009/620.
- 80 Kegoro, The experience of east African countries, 52, 56.
- 81 Kegoro, The experience of east African countries, 56.
- 82 J Ford and M du Plessis, *Unable or unwilling? Implementation of the Rome Statute in selected African countries*, Pretoria: Institute for Security Studies, 2008.
- 83 Survey on the implementation of resolution 1373, UN Security Council, S/2009/620.
- 84 A Botha, The threat of counterterrorism legislation, ISS Today, Pretoria: Institute for Security Studies, 27 February 2007.
- 85 See Kegoro, The experience of east African countries, 54-55.
- 86 See too CGCC, 5. See also Rosand and Ipe, Enhancing counterterrorism cooperation in southern Africa.
- 87 In relation to inadequate appreciation of the political nature of technical ('non-political') assistance, see A du Plessis, The role of the UN in providing technical assistance in Africa, 89.
- 88 See the discussion of threat levels and perception of threat in the references given as note 2 above.
- 89 C Goredema and A Botha, African commitments to combating crime and terrorism: a review of eight NEPAD countries, AHSI Paper No 3, Pretoria: African Human Security Initiative,

- 2004, 9. Goredema and Botha found that consensus on drug trafficking was easier to discern than consensus on corruption or money laundering. For many, money laundering is a contingent offence to drug trafficking and is not cast as a wider offence in relation to other crimes of international concern, including terrorism.
- 90 See too CGCC, Implementing the strategy in southern Africa, 5.
- 91 Rosand and Ipe, Enhancing counterterrorism cooperation in southern Africa, 44.
- 92 A Botha, Challenges in understanding terrorism in Africa, in Okumu and Botha (eds), *Understanding terrorism in Africa: building bridges and overcoming the gaps*, 18. See also in the same collection A Botha, Initiatives to prevent and combat terrorism in southern Africa, 73. Much of the continent does not consider terrorism an immediate threat to its security.
- 93 A du Plessis, The role of the UN in providing technical assistance in Africa, 89.
- 94 CGCC, Implementing the strategy in southern Africa, 6.
- 95 A du Plessis, The role of the UN in providing technical assistance in Africa, 89.
- 96 A Hubschle, Terrorist financing in southern Africa: are we making a mountain out of a molehill? ISS Paper 132, Pretoria: Institute for Security Studies, 2007.
- 97 The relevance problems are compounded by the daunting complexity of financing obligations: there is considerable overlap between various obligations and standards (the Financing Convention, resolution 1373, special recommendations, and US executive orders possibly impacting on African financial institutions): Hubschle, Terrorist financing in southern Africa, 3.
- 98 Hubschle, Terrorist financing in southern Africa, 11.
- 99 Ibid, 11.
- 100 Kegoro, The experience of east African countries, 52.
- 101 CGCC, Implementing the strategy in southern Africa, 6.
- 102 J Nyangoro, Terrorism threats and responses in the SADC region, in A Le Sage (ed), 106.
- 103 A du Plessis, The role of the UN in providing technical assistance in Africa, 89.
- 104 A Mazrui, Africa's role in America's 'war on terrorism': some political implications; also Kurt Shillinger's thoughtful piece, Rules of engagement, both in Okumu and Botha (eds), *In search for an African voice*, 67, 135 respectively; Rosand and Ipe, Enhancing counterterrorism cooperation in southern Africa, 45 ('a widespread perception ... that the international counterterrorism agenda ... is something imposed from the outside'); also Ford, *Beyond the war on terror*.
- 105 Hubschle, Terrorist financing in southern Africa, 11.
- 106 Rosand and Ipe, Enhancing counterterrorism cooperation in southern Africa, 46.

- 107 F Manji, Improving compliance with African treaties, *The African Monitor*, 29 June 2006. Countries still find it problematic to have three separate channels of reporting and dialogue with the UNSC on counter-terrorism related matters.
- 108 L Majluf, Swimming in the spaghetti bowl: challenges for developing countries under the new regionalism, Policy Issues in Trade and Commodities, Study Series No 27, New York and Geneva: UNCTAD, 2004, 14.
- 109 Majluf, Swimming in the spaghetti bowl, 15.
- 110 Ibid, 16, 47.
- 111 See generally Ford and du Plessis, *Unable or unwilling?*, chapter 9, on some of the barriers to implementation of the Rome Statute in certain African countries. These barriers apply *mutatis mutandis* to ratification. See also generally *Handbook on Ratification of Human Rights Instruments*, London: Commonwealth Secretariat, 2006.
- 112 See for example D Chau, The price of counter-terrorism in Africa, in Okumu and Botha (eds), *In search for an African voice*, 59.
- 113 Ford and du Plessis, *Unable or unwilling?* 118.
- 114 Ibid, chapter 9.
- 115 CGCC, Implementing the strategy in southern Africa, 6. This comment was made in relation to southern African states. These make for a useful study both for the sake of those states themselves, and for what their patterns of response may reveal about the continent wide challenges to greater ratification.
- 116 Y Dezalay and B Garth (eds), *Global prescriptions: the production, exportation and importation of a new legal orthodoxy*, Ann Arbor: University of Michigan Press, 2002.
- 117 A du Plessis, The role of the UN in providing technical assistance in Africa, 89.
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- 127 S/2004/70, 9.
- 128 CTED, Operational conclusions for policy guidance regarding technical assistance'.
- 129 A du Plessis, The role of the UN in providing technical assistance in Africa, 85.
- 130 Report of the expert group meeting on African perspectives on international terrorism.
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- 132 A du Plessis, The role of the UN in providing technical assistance in Africa, 89-90.
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- 136 Report of the expert group meeting on African perspectives on international terrorism.
- 137 A du Plessis, The role of the UN in providing technical assistance in Africa, 89.
- 138 Report of the expert group meeting on African perspectives on international terrorism.
- 139 Ibid.
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- 143 CTC 1373 Report 2004, S/2004/70, Part IV, S/2009/289.
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- 149 Ibid.
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- 151 S/2004/70, 9.
- 152 S/2009/289.
- 153 Operational conclusions for policy guidance regarding technical assistance.
- 154 UN Special Rapporteur on Human Rights and Terrorism: preliminary findings on visit to South Africa, Press release, 26 April 2007, Geneva: United Nations.
- 155 CGCC, *Implementing the strategy in southern Africa*, 3.
- 156 Ibid, 5.
- 157 Report of the expert group meeting on African perspectives on international terrorism.
- 158 CGCC, *Implementing the strategy in southern Africa*, v.
- 159 CGCC, *Implementing the strategy in southern Africa*, vi, 8, 27. By way of aside, it is now commonly said that the strategy may help 'reconcile the security agenda of the global north with the development priorities of the global south': see for example CGCC, 3. However, there is a tendency to repeat this distinct security-development priorities refrain so that it glosses over at least two realities: first, it is unfair to suggest that the concern of northern rule of law donors in Africa is only or always their own security (rather than Africa's own development). Second, it tends to suggest that only the north is obsessed by security, while the south craves only development: the primary concern of many African governments is often their own security, not necessarily the development needs of their people. African countries acting on counter-terrorism implementation may be responding to a range of stimuli: duties as a global citizen, perception of their own security interests, or perception of their own development

- interests (seeing cooperation on security issues as a way to leverage more development attention).
- 160 E Rosand, Implementation of the UN Global Counterterrorism Strategy in Africa: Opportunities and challenges, Seminar series on understanding terrorism in Africa: Assessing effective counter-terrorism: strategies and measures, Nairobi, October 2008, 2.
- 161 The 'notion' deployed here is merely a rhetorical device in order to tease out substance on the issue 'how does one best advance counter-terrorism implementation, conscious of competing issues and priorities?' This continues to focus on the objectives, and is open-minded on the means to obtain these: if linking to MDGs, involving UNDP and UNHCR, etc., *helps* in the objective of a global seamless legal counter-terrorism web, it ought to be actioned. However, it is arguably quite possible that this link-making will *hinder* the attainment of the objective.
- 162 Rosand and Ipe, Enhancing counterterrorism cooperation in southern Africa, 46.
- 163 S Makinda, Terrorism, counter-terrorism and norms in Africa, *African Security Review* 15(3) (2006), 19-31, 31; cited in support of their argument by Rosand and Ipe, 46.
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- 166 S/2009/289.
- 167 Botha, Challenges in understanding terrorism in Africa, 73.
- 168 Ford and du Plessis, States are destroying their credibility.
- 169 Botha, Challenges in understanding terrorism in Africa, 73.
- 170 Report of the expert group meeting on African perspectives on international terrorism.
- 171 See, Report of the expert group meeting on African perspectives on international terrorism. The TPB has not only focused on ratification: it also played an important role in organising the meetings of IGAD ministers of justice and contributed to the drafting of the IGAD conventions on mutual legal assistance and extradition in terrorism cases.
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- 173 J Ford and M du Plessis 'States are destroying their credibility by pouring scorn on international institutions they helped create', *The Weekender*, 11 April 2009.
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# Ratification charts

## Levels of ratification of the 16 global instruments: total number of states parties

1. 1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft (185)
2. 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (185)
3. 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (188)
4. 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (173)
5. 1979 International Convention Against the Taking of Hostages (167)
6. 1980 Convention on the Physical Protection of Nuclear Material (142)
7. 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (164)
8. 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (156)
9. 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (145)
10. 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection (143)
11. 1997 International Convention for the Suppression of Terrorist Bombings (164)
12. 1999 International Convention for the Suppression of the Financing of Terrorism (171)
13. 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (62)

14. 2005 Amendment to the Convention on the Physical Protection of Nuclear Material (32)
15. 2005 Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (10)
16. 2005 Protocol of 2005 to the 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms (8)

Adapted with acknowledgment from the United Nations Office on Drugs and Crime (UNODC), Vienna. See [https://www.unodc.org/tldb/universal\\_instruments\\_NEW.html](https://www.unodc.org/tldb/universal_instruments_NEW.html)

#### Levels of ratification of the 16 global instruments: African countries

Country	1	2	3	4	5	6	7	8	
Algeria	12/10/1995	06/10/1995	06/10/1995	07/11/2000	18/12/1996	30/04/2003	06/10/1995	11/02/1998	
Angola	24/02/1998	12/03/1998	12/03/1998				16/01/2008		
Benin	30/03/2004	13/03/1972	19/04/2004	31/07/2003	31/07/2003		19/04/2004	31/08/2006	
Botswana	16/01/1979	28/12/1978	28/12/1978	25/10/2000	08/09/2000	19/09/2000	30/10/2000	14/09/2000	
Burkina Faso	06/06/1969	19/10/1987	19/10/1987	01/10/2003	01/10/2003	13/01/2004	08/12/1998	15/01/2004	
Burundi	14/07/1971		11/02/1999	17/12/1980					
Cameroon	24/03/1988	14/04/1988	11/07/1973	08/06/1992	09/03/1988	29/06/2004	13/03/2003		
Cape Verde	04/10/1989	20/10/1977	20/10/1977	10/09/2002	10/09/2002	23/02/2007	12/09/2002	03/01/2003	
CAR	11/06/1991	01/07/1991	01/07/1991	19/02/2008	09/07/2007	20/02/2008	01/07/1991		
Chad	30/06/1970	12/07/1972	12/07/1972		01/11/2006				
Comoros	23/05/1991	01/08/1991	01/08/1991	25/09/2003	25/09/2003	18/05/2007	10/03/2008	06/03/2008	
Congo	13/11/1978	24/11/1989	19/03/1987						
DR Congo	20/07/1977	06/07/1977	06/07/1977	25/07/1977		21/09/2004			
Côte d'Ivoire	03/06/1970	09/01/1973	09/01/1973	13/03/2002	22/08/1989				
Djibouti	10/06/1992	24/11/1992	24/11/1992	01/06/2004	01/06/2004	22/06/2004	11/06/2004	09/06/2004	
Egypt	12/02/1975	28/02/1975	20/05/1975	25/06/1986	02/10/1981		25/07/2000	08/01/1993	
Equatorial Guinea	27/02/1991	02/01/1991	02/01/1991	07/02/2003	07/02/2003	24/11/2003	14/01/2004	14/01/2004	
Eritrea									
Ethiopia	27/03/1979	26/03/1979	26/03/1979	16/04/2003	16/04/2003		15/12/1999		
Gabon	14/01/1970	14/07/1971	29/06/1976	14/10/1981	19/04/2005	19/02/2008	13/08/2003		
Gambia	04/01/1979	28/11/1978	28/11/1978				16/06/2000	01/11/1991	
Ghana	02/01/1974	12/12/1973	12/12/1973	25/04/1975	10/11/1987	16/10/2002	15/07/1997	01/11/2002	



	9	10	11	12	13	14	15	16
	30/06/2006	14/11/1996	08/11/2001	08/11/2001		25/04/2007		
	31/08/2006	30/03/2004	31/07/2003	30/08/2004				
	14/09/2000	19/09/2000	08/09/2000	08/09/2000				
	15/01/2004	07/07/2004	01/10/2003	01/10/2003				
					24/09/2008			
		03/06/1998	21/03/2005	06/02/2006				
	03/01/2003	04/11/2002	10/05/2002	10/05/2002				
			19/02/2008	19/02/2008	19/02/2008			
	06/03/2008		25/09/2003	25/09/2003	12/03/2007			
				20/04/2007				
			27/06/2008	28/10/2005				
			13/03/2002	13/03/2002				
	09/06/2004	11/06/2004	01/06/2004	13/03/2006				
	08/01/1993	19/07/1993	09/08/2005	01/03/2005				
	14/01/2004		07/02/2003	07/02/2003				
		01/12/1994						
			16/04/2003					
			10/03/2005	10/03/2005	01/10/2007	20/03/2008		
		20/06/2000						
	01/11/2002	22/04/1998	06/09/2002	06/09/2002				

Country	1	2	3	4	5	6	7	8	
Guinea	18/01/1994	02/05/1984	02/05/1984	22/12/2004	22/12/2004	29/11/2005	01/10/1998	01/02/2005	
Guinea-Bissau	17/10/2008	20/08/1976	20/08/1976	06/08/2008	06/08/2008	08/10/2008	17/10/2008	14/10/2008	
Kenya	22/06/1970	11/01/1977	11/01/1977	16/11/2001	08/12/1981	11/02/2002	05/10/1995	21/01/2002	
Lesotho	28/04/1972	27/07/1978	27/07/1978		05/11/1980				
Liberia	10/03/2003	01/02/1982	01/02/1982	30/09/1975	05/03/2003		10/03/2003	05/10/1995	
Libyan Arab Jamahiriya	21/06/1972	04/10/1978	19/02/1974	25/09/2000	25/09/2000	18/10/2000	26/07/1996	08/08/2002	
Madagascar	02/12/1969	18/11/1986	18/11/1986	24/09/2003	24/09/2003	28/10/2003	30/03/1998	15/09/2006	
Malawi	28/12/1972	21/12/1972	21/12/1972	14/03/1977	17/03/1986				
Mali	31/05/1971	29/09/1971	24/08/1972	12/04/2002	08/02/1990	07/05/2002	31/10/1990	29/04/2002	
Mauritania	30/06/1977	01/11/1978	01/11/1978	09/02/1998	13/03/1998	29/01/2008	08/07/2003	17/01/2008	
Mauritius	05/04/1983	25/04/1983	25/04/1983	24/09/2003	17/10/1980		17/08/1989	03/08/2004	
Morocco	21/10/1975	24/10/1975	24/10/1975	09/01/2002	09/05/2007	23/08/2002	15/02/2002	08/01/2002	
Mozambique	06/01/2003	16/01/2003	16/01/2003	14/01/2003	14/01/2003	03/03/2003	16/01/2003	08/01/2003	
Namibia	19/12/2005	04/11/2005	04/11/2005			02/10/2002	04/11/2005	20/07/2004	
Niger	27/06/1969	15/10/1971	01/09/1972	17/06/1985	26/10/2004	19/08/2004	23/12/2008	30/08/2006	
Nigeria	07/04/1970	03/07/1973	03/07/1973			04/04/2007	25/03/2003	24/02/2004	
Rwanda	17/05/1971	03/11/1987	03/11/1987	29/11/1977	13/05/2002	28/06/2002	16/05/2002		
Sao Tome and Principe	04/05/2006	08/05/2006	08/05/2006	12/04/2006	23/08/2006		08/05/2006	05/05/2006	
Senegal	09/03/1972	03/02/1978	03/02/1978	07/04/2006	10/03/1987	03/11/2003	24/03/2003	09/08/2004	
Seychelles	04/01/1979	29/12/1978	29/12/1978	29/05/1980	12/11/2003	13/08/2003	21/05/2004	24/01/1989	
Sierra Leone	09/11/1970	13/11/1974	20/09/1979	26/09/2003	26/09/2003				
Somalia									
South Africa	26/05/1972	30/05/1972	30/05/1972	23/09/2003	23/09/2003	17/09/2007	21/09/1998	08/07/2005	
Sudan	25/05/2000	18/01/1979	18/01/1979	10/10/1994	19/06/1990	18/05/2000	15/05/2000	22/05/2000	
Swaziland	15/11/1999	27/12/1999	27/12/1999	04/04/2003	04/04/2003	17/04/2003		17/04/2003	
Togo	26/07/1971	09/02/1979	09/02/1979	30/12/1980	25/07/1986	07/06/2006	09/02/1990	10/03/2003	
Tunisia	25/02/1975	16/11/1981	16/11/1981	21/01/1977	18/06/1997	08/04/1993	07/06/1994	06/03/1998	
Uganda	25/06/1982	27/03/1972	19/07/1982	05/11/2003	05/11/2003	10/12/2003	17/03/1994	11/11/2003	
Tanzania	12/08/1983	09/08/1983	09/08/1983		22/01/2003	24/05/2006	09/03/2004	11/05/2005	
Zambia	14/09/1971	03/03/1987	03/03/1987						
Zimbabwe	08/03/1989	06/02/1989	06/02/1989						

	9	10	11	12	13	14	15	16
	01/02/2005	23/01/2004	07/09/2000	14/07/2003				
	14/10/2008		06/08/2008	19/09/2008	06/08/2008			
	21/01/2002	22/10/2002	16/11/2001	27/06/2003	13/04/2006	01/08/2007		
		10/11/2009	12/11/2001	12/11/2001				
	05/10/1995		05/03/2003	05/03/2003				
	08/08/2002	10/10/2002	22/09/2000	09/07/2002	22/12/2008	19/07/2006		
	15/09/2006	23/12/2003	24/09/2003	24/09/2003				
			11/08/2003	11/08/2003	07/10/2009			
	29/04/2002	28/09/2000	28/03/2002	28/03/2002				
	17/01/2008		30/04/2003	30/04/2003	28/04/2008	28/02/2008		
	03/08/2004		24/01/2003	14/12/2004				
	08/01/2002	26/05/1999	09/05/2007	19/09/2002				
	08/01/2003	15/03/2006	14/01/2003	14/01/2003				
	07/09/2005							
	30/08/2006	06/03/2009	26/10/2004	30/09/2004	02/07/2008	28/05/2009		
		10/05/2002		16/06/2003		04/05/2007		
			13/05/2002	13/05/2002				
	05/05/2006		12/04/2006	12/04/2006				
	09/08/2004	11/02/2004	27/10/2003	24/09/2004				
	24/01/1989	14/08/2003	22/08/2003	30/03/2004		09/01/2006		
			26/09/2003	26/09/2003				
	08/07/2005	01/12/1999	01/05/2003	01/05/2003	09/05/2007			
	22/05/2000	25/05/2000	08/09/2000	05/05/2003				
	17/04/2003	13/05/2003	04/04/2003	04/04/2003				
	10/03/2003	22/07/2003	10/03/2003	10/03/2003				
	06/03/1998	28/05/1997	22/04/2005	10/06/2003				
		02/07/2004	05/11/2003	05/11/2003				
		11/02/2003	22/01/2003	22/01/2003				
		31/05/1995						



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Ratification of the many counter-terrorism conventions and protocols is the cornerstone of global efforts against terrorism. Africa's generally low rates of ratification can be explained by political and capacity related factors, including that states do not see counter-terrorism as a sufficient priority and resist the manner in which the agenda is presented. Ratification matters, but those promoting counter-terrorism measures must be more honest about what is likely and more humble about what is possible. Rather than pursuing a checklist approach to satisfying UN commitments, counter-terrorism strategy in Africa should include efforts to build foundational law enforcement, cooperation and prosecution capacity and embed human rights values.

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