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Press

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Editorial

On 4-5 August 2015, Strathmore University Law School hosted its second Annual Law Conference under the theme, ‘Terrorism and challenges to emerging democracies in Africa’. This second issue of the *Strathmore Law Journal (SLJ)* continues with the practice begun in our inaugural issue of featuring scholarly commentary flowing from the theme of the Annual Law Conference, while at the same time, remaining open, as a generalist journal, to contributions from other areas of African law and the law in Africa.

Terrorism has plagued human societies from time immemorial. In recent times, as human societies have organised themselves around the nation-state, and as the nation-state has taken on the task of maintaining harmonious societies out of diverse communities under the rule of law, the ripple effects of terrorism on the national and international order have reverberated across borders and societies.

Ben Saul recalls that inter-state disputes in Europe in the 1930s arising from contentious requests for extradition of accused terrorists led to the drafting of the 1937 League of Nations Convention for the Prevention and Punishment of Terrorism and the 1938 League of Nations Convention for the Creation of an International Criminal Court, neither of which came into force due to the outbreak of war.¹

Ben Saul further points to the problematic definition of “‘terrorism’ as a legal concept” since the 1930s, an effort that has been reinvigorated by the September 11 attacks and the subsequent Chapter VII UN Security Council Resolution 1373 (2001) that directed all states to criminalise terrorism in municipal law.

It can be argued that a clear legal definition has eluded terrorism for the phenomenon has indisputably distinct cultural, historical and socio-political contexts across time and space. As liberation movements in the then colonies and social upheaval in established states increased after 1945, the 1950s-70s struggled with a wave of terrorism that was largely tied to national liberation claims. In Africa, liberation movements, from Algeria to South Africa were almost invari-

¹ Saul B, ‘Defining terrorism: A conceptual minefield’ Sydney Law School Legal Studies Research Paper No. 15/84, September 2015 SSRN: <http://ssrn.com/abstract=2664402>.

ably called ‘terrorist’ at their time. Tanzanian journalist Jenerali Ulimwengu in an opinion-editorial in March 2015 controversially highlights the difference between terrorism in the 60s and 70s to the contemporaneous actors and events. Ulimwengu’s ‘terrorists of yore’ acted in a context of a ‘blurred line between terror and struggle’.

The Supreme Court of India offers a sobering reflection on contemporary terrorism in *Peoples Union for Civil Liberties & Anor vs. Union of India* Writ Petition (Civil) 389 of 2002:

Terrorism has become the more worrying feature of the contemporary life. Though violent behaviour is not new, the present day ‘terrorism’ in its full incarnation poses extraordinary challenges to [the] civilised world. The basic edifices of [the] modern state, like democracy, state security, rule of law, sovereignty and integrity, basic human rights etc. are under the attack of terrorism. Though the phenomenon of terrorism is complex, a ‘terrorist act’ is easily identifiable when it does occur. The core meaning of the term is clear even if its exact frontiers are not.[...] To face terrorism we need new approaches, techniques, weapons, expertise and of course new laws.

Yet, alive to the inextricable links between democracy and rule of law, the Supreme Court of India further observes:

The protection and promotion of human rights under the rule of law is essential in the prevention of terrorism. [...] If human rights are violated in the process of combating terrorism, it will be self-defeating. Terrorism often thrives where human rights are violated, which adds to the need to strengthen action to combat violations of human rights. The lack of hope for justice provides breeding grounds for terrorism. Terrorism itself should also be understood as an assault on basic rights. In all cases, the fight against terrorism must be respectful to the human rights.

In Africa, continental action in combating terrorism began in 1992, when the Organisation of African Unity (OAU) adopted Resolution on the Strengthening of Cooperation and Coordination among African States [AHG/Res.213 (XXVIII)], including extremism and terrorism. Among the continental legal instruments adopted include the 1994 Declaration on the Code of Conduct for Inter-African Relations [AHG/Del.2 (XXX)], the 1999 OAU Convention on the Prevention and Combating of Terrorism and its 2004 Additional Protocol, the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, the 2002 AU Plan of Action on the Prevention and Combating of Terrorism, and the 2011 African Model Law on Counter Terrorism. In addition, regional institutions have taken significant steps to combat terrorism, for instance the decision by ECOWAS states to jointly launch military attacks against Boko Haram in Nigeria, Cameroon and Chad.

It would hardly escape notice to the keen follower of news regarding terrorism that there has been some change to the name of one terrorist group in particular. This group is variously called Islamic State in Iraq and Syria (ISIS), Islamic State in Iraq and the Levant (ISIL) – in Arabic, *al-Dawla al-Islamiya fil Iraq wa al-Sham*², Islamic State (IS) and Da’esh. Earlier references, commonly used by English speaking governments and media, was ISIL/ISIS. This occurred due to the difficulty in translating ‘al-Sham’, whose meaning has changed over centuries but largely describes the area around Syria, southern Turkey, Iraq, and may even include Jordan, Lebanon and the Palestinian Territories.³ What is clear is that the first three name changes, from Islamic State in Iraq (2006) to ISIL/ISIS (2013)⁴ to simply IS (June 2014)⁵ represent the group’s expansionist ambitions as it grew from Iraq to engulf Syria and set root in Libya as well as gain affiliates in Boko Haram in northern Nigeria/Chad/Niger/Cameroon as well.

It is in response to representations from Muslim leaders in the West that Western governments began adopting the term Da’esh to refer to the group. The Islamic Society of Britain and the Association of Muslim Lawyers pointed out to former UK Prime Minister David Cameron that ‘[the group] is neither Islamic, nor is it a state. The group has no standing with faithful Muslims, nor among the international community of nations’.⁶ As many in the Arab world including media organisations used ‘Da’esh’, which is an acronym derived from the group’s name, and given that it has ‘appropriately pejorative’⁷ connotations, given its phonetic similarity to the “Arabic..., which means to tread underfoot or crush’,⁸ this has been adopted by English speaking media and governments.⁹

While noting these considerations, and not in any way undervaluing the importance of not legitimising the self-styled ambitions of Da’esh, in this edition of the *Strathmore Law Journal*, we have retained the term used by each author.

² Irshaid F, “Isis, Isil, IS or Daesh? One group, many names” *BBC Monitoring*, 2 December 2015; Dearden L, “Isis vs Islamic State vs Isil vs Daesh: What do the different names mean – and why does it matter?” *The Independent*, 23 September 2014, variously transliterates it as “Al-Islamiya fi al-Iraq wa al-Sham”. See also, Woford T, “ISIL, ISIS or IS? The Etymology of the Islamic State, *Newsweek Europe*, 16 September 2014; Panetta A, “ISIS, ISIL, Daesh: A primer on why the terrorist group’s name keeps changing” CTV News, 18 November 2015.

³ Irshaid, ‘Isis, Isil, IS or Daesh?’.

⁴ Dearden, ‘Isis vs Islamic State vs Isil vs Daesh’.

⁵ Irshaid, ‘Isis, Isil, IS or Daesh?’.

⁶ Dearden, ‘Isis vs Islamic State vs Isil vs Daesh’.

⁷ Dearden, ‘Isis vs Islamic State vs Isil vs Daesh’.

⁸ Dearden, ‘Isis vs Islamic State vs Isil vs Daesh’, also Irshaid, ‘Isis, Isil, IS or Daesh?’.

⁹ France in September 2014 and Britain in June 2015.

In this issue, Ochieng Ahaya, who presented at the Annual Conference, opens with a socio-religious perspective of terrorism, presenting the argument that extremist violence perpetrated in the name of religion, flows not from the rightful tenets of the religion itself, but from an obfuscation of the theological notion of cosmic war and the real world, particularly with the geopolitical tensions of the ‘clash of civilisations’. This has led, in the case of Islam, to a harsh and retrogressive interpretation of *Sharia*, and the actions of such groups as Da’esh and Al-Shabaab.

Mokaya Orina, who also featured at the Annual Conference, proceeding from the lack of a comprehensive binding terrorism specific instrument in international law, investigates the interplay and potential synergies from the various sub-branches of international law, in the regulation of terrorism. Considering the tenets of human rights law as an important ‘fallback’ amid the lack of comprehensive definition and regulation, Orina affirms the need for counter-terrorism efforts to respect the rule of law.

Two authors present brief but incisive commentary on terrorism. Fred Fedynyshyn interrogates an important question regarding the regulation of terrorism and the sanctioning of abstract relationships to criminal activity beyond conspiracy or attempt. As governments legitimately seek to protect their resident populations from unspeakable violence by preventing terrorist acts, a number have sought legal authority to sanction before the terrorist act. In a comparative study of Western nations, Fedynyshyn recalls examples of such regulation including criminalising of membership, travel restrictions, intangible support and financial support. Alex Schmid, drawing from his vast experience, closes this issue’s treatment of terrorism with a frank reflection of the five key areas that need attention if terrorism is to be defeated. Schmid, who was a keynote speaker at the Annual Conference, notes that though there have been some tactical successes in counter terrorism, a strategic breakthrough is yet to be achieved, especially in religiously motivated terrorism.

In our ‘General Articles’ Section, Gadaffi and Tatu review the 2015 Kenyan Companies Act, focusing on its codification of the common law rules on derivative action as established in *Foss v Harbottle*. With a comparative study of the Kenyan Act with the UK 2006 Companies Act, whence the Kenyan Act heavily borrows, the US Federal Rules of Civil Procedure and the Model Business Corporations Act, and relevant cases thereof, Gadaffi and Tatu conclude that the new Kenyan Act fails to comprehensively address the challenges that arose from common law derivative action.

Human societies have had a poor track record in their regard of what common law tradition ill-advisedly calls persons of ‘unsound mind’. Intellectual disabilities have, for too long, been conflated with mental illness, and used to limit the due political rights of persons with such disabilities. Luciana Thuo interrogates this subject, recounting the developments of international human rights law that have sought to strengthen the protection of persons with intellectual disabilities, and linking these to Kenya’s new constitutional order.

Rosemary Mwanza discusses the competing narratives of foreign direct investments (FDIs) in developing countries: whether they undermine or affirm human rights protections. In the Kenya-China context, Mwanza identifies important gaps that need be taken note of, such as the lack of substantive human rights provisions in the 2001 Kenya-China bilateral investment treaty (BIT), and recommends legal and non-legal measures to mitigate such risks.

Mihir Kanade opens our recent developments section with a reflection on the Tenth Ministerial of the World Trade Organisation that was held in Nairobi on 15-19 December 2015. This Tenth Ministerial had opened amidst tensions over continuation of the Doha Development Agenda and a perceived challenge to the global trade regime by the emergence of regional ones. Kanade considers whether, given pertinent decisions of the Nairobi Package on such issues as subsidies for farm exports, public stockholding for food security purposes, the special safeguard mechanism for developing countries, cotton, among others, this first ever WTO Ministerial held in Africa was beneficial for developing countries.

Jerusha Asin reviews the legal and political debate surrounding the failure by South Africa to arrest Sudanese president Omar el-Bashir during the July 2015 AU Summit in Johannesburg. In reviewing the strained AU-ICC relationship and the legal questions over immunity of high ranking state officials from prosecution, Asin interrogates the currency of legalism as a model for ordering international life in the context of state cooperation, where legal obligations to cooperate do not necessarily equate to political commitment to do so.

John O Ambani reviews the struggle the African human rights system is faced with regarding sexual minority rights. Ambani recalls the relevant legal provisions and jurisprudence of international human rights instances, and the cultural relativism debate. He relates these to the debate around the request for an advisory opinion from the African Court on Human and Peoples’ Rights over the extent to which AU political organs can direct the African Commission on Human and Peoples’ Rights over its interpretive mandate of the African Charter.

This relates to the African Commission's decision to grant observer status to the Coalition of African Lesbians.

Humphrey Sipalla reviews recent developments in the work of the key institutions of the UN Convention on the Law of the Sea, namely, the Meeting of State Parties, the International Seabed Authority and the Commission on the Limits of the Continental Shelf. Sipalla also briefly makes note of the coming into force of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA).

This issue closes with three reviews of recent publications. In reflecting on the value proposition of Yaroslav Radziwill's *Cyber-attacks and the exploitable imperfections of international law* (Brill Nijhoff, 2015), Ivan Sang's review shadows the focus theme of this issue. The last two reviews are of publications on Kenya's new system of devolved governance and its comparison with the South African, whence it was inspired. As devolution has been termed 'the most complex and least understood aspect of the Constitution', the reviews by Tom Kabau of John Mutakha Kangu's *Constitutional law of Kenya on devolution* (Strathmore University Press, 2015), and Teddy Musiga's of *Kenyan-South African dialogue on devolution*, edited by Nico Steytler and Yash Pal Ghai (Juta Publishers, 2015), highlight important scholarship to redress said complexity and poor understanding.

In this second issue of the *Strathmore Law Journal*, we have focused particular effort to further strengthen our editorial processes both the external double blind peer review, and the subsequent internal editing process. The editors sincerely thank the following, whose contributions as blind peer reviewers in the period since the last issue of the *SLJ* in June 2015, have been a critical part of our continuing commitment to ensure the quality of the journal: Juliet Okoth Amenge, Evelyne Asaala, Conrad Bosire, Ken Buhere, Mihir Kanade, Joshua Kembero, Eunice Kiumi, Joy Malala, Harrison Mbori, Tem Fuh Mbuh, Teddy Musiga, Catherine Ngina Mutava, Satang Nabaneh, Kameldy Neldjingaye, Jehoshaphat John Njau, Linet Njeri, Ken Nyaundi, Walter Khobe Ochieng, Sarah Ochwada, Tom Odhiambo, Maurice Oduor, Dev Kumar Parmar, Mutuma Ruteere, Brian Sang, Solomon Sacco, Desmond Tutu and Seth Wekesa. These former are the 'giants on whose shoulders we stand'.

Humphrey Sipalla
Managing Editor
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