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NIGERIA: PROVISIONS OF THE 'PREVENTION OF TERRORISM BILL 2009' ARE INCOMPATIBLE WITH NIGERIA'S HUMAN RIGHTS OBLIGATIONS

BRIEFING TO THE NATIONAL ASSEMBLY

This document analyses certain provisions of the Prevention of Terrorism Bill 2009 (the Bill) in the context of Nigeria's international and regional human rights obligations, particularly the African Charter on Human and Peoples' Rights[1] and the International Covenant on Civil and Political Rights[2] (ICCPR). In summary, Amnesty International considers that several key provisions of the Bill are incompatible with Nigeria's human rights obligations.

Amnesty International recognizes that states have a duty to protect their populations from violent attacks, including by armed groups. Attacks by armed groups can violate national criminal laws. In addition, the indiscriminate or deliberate attacking of can also can also violate international humanitarian law and can in certain circumstances constitute crimes under international law. States have an obligation to take measures to prevent and protect civilians from attack; to investigate such crimes; to bring to justice those responsible in fair proceedings that meet international human rights standards and without the imposition of the death penalty; and to ensure prompt and adequate reparation to victims.

States must, however, ensure that all anti-terrorism measures are implemented in accordance with international human rights and humanitarian law.[3] The UN Security Council, of which Nigeria is currently a non permanent member, has repeatedly stated that: "States must ensure that any measure taken to combat terrorism comply with all their legal obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law".[4] The UN World Summit and the UN General Assembly have also emphasized this

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[1] Ratified by Nigeria in 1983.

[2] Ratified by Nigeria in 1993.

[3] Amnesty International has noted this requirement for states in its comments on draft antiterrorism laws in other countries, including South Africa (South Africa, Preserving the gains for human rights in the 'war against crime': Memorandum to the South African Government and South African Law Commission on the draft Anti-Terrorism Bill, 2000, AI Index: AFR 53/04/00, http://www.amnesty.org/en/library/info/AFR53/004/2000/en); United Kingdom (United Kingdom, Amnesty International's briefing on the draft Terrorism Bill 2005, AI Index: EUR 45/038/2005, http://www.amnesty.org/en/library/info/EUR45/038/2005/en; UK: Human rights: a broken promise, AI Index: 45/0042006, http://www.amnesty.org/en/library/info/EUR45/004/2006/en.)

[4] Attached to Security Council Resolution 1456 of 2003 in UN Doc. S/RES/1456 (2003), Annex, para.6.

principle.[5] And the UN Global Counter-Terrorism Strategy adopted unanimously by the General Assembly in 2006 recognised that measures to ensure respect for human rights for all and the rule of law are "the fundamental basis of the fight against terrorism".[6]

Amnesty International considers that key provisions of the Bill are incompatible with Nigeria's human rights obligations on the following grounds:

- Many of the provisions of the Bill use terms and definitions that are imprecise and overbroad in scope, violating the "legality" requirement for criminal offences, and/or unlawfully restricting a range of rights – such as freedom of thought, conscience and religion, freedom of opinion and expression, freedom of association and freedom of assembly – by failing to adhere to the requirements of demonstrable proportionality.

- Some criminal-offence provisions reverse the legal burden of proof in a manner that violates the presumption of innocence as required by human rights law, or have similar issues related to *mens rea* (knowledge or intent) elements.

- Some provisions relating to investigation, detention, and trial are not consistent with various provisions of human rights law.

- Some administrative provisions lack any provision for meaningful access to effective legal remedies and procedural safeguards, consequently infringing the rights of due process in a fair hearing.

The draft "Model Legislative Provisions against Terrorism" prepared by the UN Office on Drugs and Crime include an overarching article for incorporation in national counter-terrorism laws to guarantee anyone affected full enjoyment of their rights under international human rights, refugee, and humanitarian law.[7] No such article appears in the Prevention of Terrorism Bill.[8]

The issues and provisions cited below are illustrative and not exhaustive examples of problems with the Bill, and do not necessarily purport to constitute a comprehensive human rights analysis of the Bill. However, the examples below demonstrate why the Bill must not be passed into law without further detailed review and amendment.

Many of the problems cited below are interlinked. Resolving one issue may not resolve issues in related provisions. For instance, addressing *mens rea* issues in the offence of membership in a proscribed organisation under s. 2(4) and (5) would not alone address all the issues with this criminal offence, since the definition of the offence also depends on the process for proscription under article 2(1) and the definition of "acts of terrorism" more generally.

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[5] UN World Summit Declaration 2005, adopted by the Heads of State and Government gathered at the UN Headquarters from 14-16 September 2005, UN Doc. A/60/L.1, A/RES/60/1, para 85; UN General Assembly, "United Nations Global Counter-Terrorism Strategy", resolution A/60/288 (8 September 2006), Annex, Plan of Action, introductory paragraph 3.

[6] UN Global Counter-Terrorism Strategy, Plan of Action, part IV.

[7] UN Office on Drugs and Crime, "Model Legislative Provisions against Terrorist (Draft)", February 2009, ("UNODC Model Law") available at https://www.unodc.org/tldb/pdf/Model_Law_against_Terrorism.doc <accessed 25 May 2010>, article 28, pages 36-37. Amnesty International does not necessarily consider all aspects of the UNODC Model Law to be consistent with states' international human rights obligations.

[8] The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act of 1983, Chapter 10 LFN 1990, does however give general domestic legal effect to the African Charter, and Chapter IV of the 1999 Constitution of Nigeria reflects many of the rights provided by international law, though not necessarily all to the same extent as required under international law.

IMPRECISION AND OVERBREADTH

Some of the provisions of the Bill are imprecise or overbroad. Imprecision or over-breadth in the definition of criminal offences can constitute a failure to meet the requirements of human rights law for "legality" of criminal law: that is, the requirement that "the law is adequately accessible so that the individual has a proper indication of how the law limits his or her conduct; and the law is formulated with sufficient precision so that the individual can regulate his or her conduct."[9] Imprecision and overbreadth can also result in provisions unlawfully restricting rights such as freedom of thought, conscience and religion, freedom of opinion and expression, freedom of association and freedom of assembly, by failing to adhere to the requirements of demonstrable proportionality. Imprecision and over-breadth are therefore inconsistent with obligations under the ICCPR and African Charter.[10]

The definition of "act of terrorism", which is relevant for a number of provisions in the Bill, itself raises concerns with overbreadth, imprecision and/or unlawful and unjustified restriction on human rights, particularly in the following elements:[11]

- section 1(2)(a) [referring to acts which "may seriously damage a country or international organisation" without defining "serious damage"].

- section 1(2)(b) [refers to "unduly" compelling a Government or international organisation to do or abstain from doing anything, without defining "unduly". This creates particular problems because the exclusion clause in section 1(3) for certain protests and demonstrations refers back to the undefined concept of "unduly" compelling in section 1(2)(b) identified with the other provisions above. Section 1(2)(b) also creates as an alternative to subjective intent an objective element unrelated to actual intent ["can reasonably be regarded as having been intended"]].

- section 1(2)(c)(iii) [in reference to economic loss that is not necessarily likely to endanger human life].[12]

- section 1(2)(c)(viii) [for exmaple can restrict freedom of expression, especially as regards true information, and again, without necessarily including any link to violence].[13]

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[9] UN Special Rapporteur on Human Rights while Countering Terrorism, Report to the Human Rights Commission, UN Doc. E/CN.4/2006/98, para. 46, referring to article 15 of the ICCPR. Similar provision is found in article 7 of the African Charter on Human and Peoples' Rights. The UNODC Model Law and commentary (p. 23) states in respect of model provisions on "Terrorist Acts and Support Offences", "particular attention should be given to ensuring that chosen language is sufficiently precise and unambiguous to suit criminal law drafting requirements."

[10] See for example Human Rights Committee, Concluding Observations on Belgium, CCPR/CO/81/BEL, 12 August 2004; Iceland. CCPR/CO/83/ISL, 25 April 2005; Canada, CCPR/C/CAN/CO/5, 20 April 2006; Monaco, CCPR/C/MCO/CO/2, 28 October 2008. See also article 7 of the African Charter.

[11] Regarding the human rights issues with imprecise or overbroad definitions of "acts of terrorism", see in addition to the sources cited above, UN Special Rapporteur on Human Rights while Countering Terrorism, Report to the General Assembly, UN Doc. A/61/267, 16 August 2006, paras.17-19, 23, 44 and Report to the Human Rights Commission, Doc. E/CN.4/2006/98, 28 December 2005, paras. 26-50.

[12] The UN Special Rapporteur has stated (UN Doc. A/61/267, 16 August 2006, para. 44) "…at the national level, the specificity of terrorist crimes is defined by the presence of three cumulative conditions: (i) the means used, which can be described as deadly, or otherwise serious violence against members of the general population or segments of it, or the taking of hostages; (ii) the intent, which is to cause fear among the population or the destruction of public order or to compel the Government or an international organization to do or refrain from doing something; and (iii) the aim, which is to further an underlying political or ideological goal. It is only when these three conditions are fulfilled that an act should be criminalized as terrorist; otherwise it loses its distinctive force in relation to ordinary crime." See also Report to the Human Rights Commission, Doc. E/CN.4/2006/98, 28 December 2005, paras. 26-50.

[13] See ICCPR, article 19(2) ["Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds…"]. The UNODC Model Law and commentary includes a far narrower draft article on incitement (article 21), and (p. 29) further reminds States "in drafting and subsequently applying" such provisions "of

Other provisions where overbreadth or imprecision render the provisions inconsistent with human rights include:

- section 3(a) and (b) on "terrorist meetings" uses the undefined phrase "is concerned with".

- section 3(c) on "terrorist meetings", where the phrase "further the objectives of" is not limited to "acts of terrorism" the provision seems to criminalize *any* activity in support of the *causes* pursued by armed groups rather than restricting itself to criminalizing activities relating to *illegitimate means* for pursuing those causes and/or activities *organized* by the proscribed organisation itself. The ambiguity in the provision leaves open the possibility that where an otherwise legitimate ultimate, goal, for example a political goal, happens to be an objective of a group that uses acts of terrorism, other unrelated non-violent groups may be swept up in the scope of section 3(c) merely because they happen to have the same ultimate goal.

- section 4 on "support for terrorism", there is no exclusion in 4(2)(d) of legal services necessary to fulfil fair trial rights to challenge incorrectly taken decisions, or to defend accused persons in criminal trials, etc.

- sections 6 and 7 on "information about acts of terrorism" and "obstruction of terrorism investigations".

- section 24 on "intelligence gathering", there is a seemingly unrestricted power to "give directions" to communication service providers without safeguards to protect the right of individuals not to be subjected "to arbitrary or unlawful interference with his privacy, family, home or correspondence" and to have protection of the law against such interference.[14]

A further example is the definition of "terrorist" in section 33. This referentially incorporates sections that are themselves overbroad and refers to the seemingly undefined term "sponsor". It also remains unclear which other provisions of the Bill use this definition of "terrorist", as the word is used in a variety of different ways throughout the Bill.

Section 9(1)(a) is particularly overbroad as it appears to transform a wide range of financial activities related to *any* breach of a range of ordinary states listed in the schedule to the Bill (which, further, is an open-ended list) into an act of "financing of terrorism", regardless of whether there is any actual connection to the types of "acts of terrorism" set out in section 1 of the Bill. This section appears to be originally based on article 2 of the 1999 International Convention for the Suppression of the Financing of Terrorism, but whereas in that Convention reference was made to a closed list of Treaties in an Annex to the treaty, all of which were exclusively concerned with terrorism, section 9(1)(a) of the Bill refers to an open-ended list not only of treaties (that is *all* treaties of any kind, not only those specifically directed at terrorism) but also a range of ordinary and general Nigerian statutes, some or all of which have no evident link to terrorism at all (for example the Insurance Act, the Companies Act, and so on).

The definition of "terrorist investigation" in section 33, is overbroad in how far it extends beyond the investigation of a specific crime under the Bill (part (a) of the definition), and given the consequences of falling within that definition in light of section 22 and section 7 (for example). Either the definition or the particular provisions for which it is relevant need therefore to be amended to eliminate the overbreadth.

Section 22(3) on issuance of warrants is further overbroad in referring to evidence that "may be" relevant to such an investigation, when that criterion is already subject only to a "reasonable grounds for believing" standard. It would seem appropriate that given that low standard for a warrant to be issued there should be

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the need to fully respect human rights obligations in particular the right to freedom of expression, freedom of association and freedom of religion, as set forth in applicable international instruments."

[14] See ICCPR, article 17.

reasonable grounds for believing that there is material which "is" relevant to the investigation of the offence.

Section 23, providing for searches without a warrant, is also overbroad and imprecise in referring to delay that "*may* be prejudicial to the maintenance of public safety *or order*", a term which further is not defined in the Bill.

A number of the reversals of the burden of proof and other issues related to knowledge and intent, discussed in the following section, also result in problems of over-breadth.

REVERSE BURDENS OF PROOF AND OTHER ISSUES RELATED TO KNOWLEDGE AND INTENT

Some of the criminal-offence provisions in the Bill reverse the legal burden of proof in relation to serious offences that entail imprisonment as punishment, constituting a violation of the presumption of innocence.[15] Examples include sections 2(4) and (5) [on membership in proscribed organisations], sections 7(1) and (2) [on obstruction of terrorism investigations], and sections 14(1) and (2) [on dealing in terrorist property], in each case including the language "it shall be a defence for a person charged…to prove…" in respect of elements that should be for the state to prove. These provisions must be amended, as they impermissibly reverse the burden of proof and if applied as presently drafted would violate the presumption of innocence.[16] The provisions must clearly impose the burden of proof on the state to prove all elements of every offence, including knowledge/intent elements, beyond reasonable doubt.

It also appears that under section 2(4) and (5), a person may be found criminally responsible under these provisions even if he or she did not at any relevant time know that the organisation had been proscribed. This effectively creates an absolute liability offence with serious criminal and penal consequences.[17]

The language in section 1(2)(b), "or can reasonably be regarded as having been intended to", as a possible alternative element to actual intent should also be deleted.

In addition, a number of provisions refer to "knowingly" doing things but do not explicitly specify which elements must be subject to the requirement of knowledge. Unless it is absolutely clear under Nigerian law that these provisions will be applied in a manner that requires actual knowledge that the acts in question will contribute to an "act of terrorism" (for example in s. 1(1)), this needs to be made explicit in the law.

SOME PROVISIONS RELATING TO INVESTIGATION, DETENTION, AND TRIAL ARE NOT CONSISTENT WITH VARIOUS PROVISIONS OF HUMAN RIGHTS LAW

A number of provisions in the Bill relating to investigation, detention, and trial are not consistent with Nigeria's international and regional human rights obligations.[18]

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[15] See ICCPR article 14(2); African Charter article 7(1)(b).

[16] For instance, see the judgment of the UK House of Lords, finding that to apply the terms of a UK provision almost identical to section 2(4) and (5) of the Nigerian Bill would violate the presumption of innocence under the European Convention on Human Rights, in *Attorney General's Ref. no 4 of 2002*, [2004] UKHL 43, paras 45-51.

[17] The UNODC Model Law and commentary (page 12) states that "It is understood, in line with the International treaties, that the conducts described therein have to be criminalized by States Parties when committed 'unlawfully' and 'intentionally'."

[18] The UNODC Model Law and commentary cautions (p. 35): "Whereas most States rely on the general procedural law applicable to all crimes, others include special powers/authorities. Especially if they decide to depart from ordinary criminal procedures, national authorities are reminded of their parallel obligations under international human rights law." Specific examples are also provided (p. 36).

Section 23(4) is of particular concern, providing as it does for two months of detention without charge of criminal suspects, a length of time far in excess of any internationally acceptable standard, which further appears to be ordered without any representations being made on behalf of the individual. (It is assumed in this analysis that, the word "expert" in the draft under review was intended to say "ex parte"). No explicit provision is made for review of this decision. Nor are any grounds specified for such detention other than that the person is "a suspect under this Act". Section 23(4) is for all these reasons flagrantly inconsistent with prescribed human rights in relation to deprivation of liberty and fair trial.[19]

Section 26 provides for up to 48 hours incommunicado detention by direction of law enforcement officers. The inclusion of a time limit, prescription of limited grounds for such a direction, and access to a medical officer, while welcome, are not sufficient safeguards for such measures. The absence of any explicit requirement that the person be brought immediately before a court or other judicial authority, that any such measures be ordered by an independent judicial authority, that such detainees have immediate access to medical personnel of the detainee's choice or even medical personnel that are independent of the law enforcement agency, and access to a lawyer, or for notification of family members of the fact and place of detention, are of concern and, taken together, appear inconsistent with various international human rights obligations.[20]

Other examples include:

- Sections 15(2)(c) and 16(1)(a) as written appear to violate the right to silence and not to be compelled to give evidence against oneself.[21]

- The use of evidence provided for in section 19 [which incidentally should presumably refer to section 18 rather than section 17] may in some circumstances be incompatible with the right to a fair trial and/or the prohibition of use of evidence obtained through torture or other cruel, inhuman or degrading treatment. Unless it is absolutely clear under Nigerian law that section 19 does not affect those rights in any way (i.e. if "prima facie" in section 19 will be read as preserving absolute rules against admission of evidence obtained through such abuse, or evidence which would render the trial unfair due to the effective inability of an accused to challenge it) an explicit qualification of "where compatible with the right to fair trial and prohibition of use of information obtained by torture or other cruel, inhuman or degrading treatment" should be added.

- Sections 23(2) and (3) provide for the compulsory collection of personal information about persons taken into custody under the Act, including "samples" [which is undefined but presumably includes collection of physical samples]. No provision appears to set out any requirements for privacy and other protections for this information and material, for the individual to be informed

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[19] See ICCPR articles 9 and 14; African Charter articles 6 and 7; African Commission on Human and Peoples' Rights, Principles and Guidelines on the Rights to a fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247 (2001), especially "M. Provisions Applicable to arrest and Detention".

[20] See the analysis and sources cited in Amnesty International, *Spain: Out of the shadows - Time to end incommunicado detention*, AI Index Number: EUR 41/001/2009 (15 September 2009); and the African Commission's Principles and Guidelines on the Rights to a fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247 (2001), especially Part "M". See also UN Committee against Torture, General Comment no. 2, UN Doc. CAT/C/GC/2 (24 January 2008), para 13; Reports of the UN Special Rapporteur on Torture, UN Doc. E/CN.4/2003/68, 17 December 2002 - paragraph 26 (g), and UN Doc. E/CN.4/2004/56/Add.2, 6 February 2004, paragraph 41.

[21] See ICCPR articles 14(2) and 14(3)(g) and African Charter article 7(1)(b). "[T]he right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under article 6 [Fair Trial]": European Court of Human Rights, *Murray v. United Kingdom*, (41/1994/488/570), 8 February 1996, at 20. "The presumption of innocence is universally recognised. With it is also the right to silence. This means that no accused should be required to testify against himself or to incriminate himself or be required to make a confession under duress (Article 6(2) and 14(3)(g) of ICCPR):" African Commission on Human and Peoples' Rights, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, Comm. No. 218/98 (1998), para 40. See also the African Commission's Principles and Guidelines on the Rights to a fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247 (2001), M.2(f).

about use or transfer of the information, or for its destruction in the event the person is not charged or convicted.

- Section 23(6) is a detention power that does not appear to be subject to any specific time limits – it is linked to completion of a search under 23(1), but no time limit is placed on the search in 23(1).

- Section 23(10) provides complete civil and criminal immunity to law enforcement officers who use force causing injury or death to any person where they have used "such force as may be necessary for any purpose, in accordance with this Act". Total personal immunity is not permitted by international law for actions amounting to crimes under international law or violations of human rights such as torture.

Express provision should be made in section 29 limiting the Court's powers to order measures under the section to only those measures that are compatible with an accused's right to a fair trial and other requirements of open justice (for example as provided for in article 14 of the ICCPR and under article 7 of the African Charter).[22]

DUE PROCESS AND FAIR HEARINGS

Some administrative clauses do not provide for meaningful access to effective legal remedies and procedural safeguards, consequently infringing the rights of due process in a fair hearing.[23] Some provisions do not provide for *prior* notice to affected individuals or organisations, including disclosure of reasons and relevant evidence upon which the decision is based, and a prescribed fair hearing process *prior* to determinations. In some cases there would appear not even to be a prescribed notice requirement *after* determinations are made. It would seem that, if a review is possible at all, it would then generally fall to individuals to seek judicial review on their own motion under other legislation, though this is not expressly provided for in the Bill. Given the absence of provision for legal assistance to be excluded from asset freezing or "support" offence provisions, technically available review procedures may in practice be inaccessible to persons affected by proceedings under the Bill. Examples of provisions having these types of problems are:

- Section 2(1) [orders proscribing organisations]
- Section 8 [declarations of persons to be international terrorists]
- Section 11 [seizure of terrorists cash]
- Section 17 [requests from foreign states for assistance]
- Section 23(4) [detention of suspects without charge – see also concerns outlined above regarding this section].

The post-determination review process set out under s. 2(6) does not allow a person or organisation affected by a declaration to challenge the allegations upon which the declaration was originally made – it effectively enacts an absolute presumption that the original declaration was correct, notwithstanding there appears to be no notice or hearing prior to the declaration, and a person seeking to cancel the declaration has to argue that the organisation "has ceased" to do the activities of which it is accused – thereby implicitly "admitting" that the organisation *was* doing what it was originally accused of – there is no possibility to argue that the original allegations against it where in fact not true.

As regards the mutual legal assistance and extradition provisions (Part III), the UNODC Model Law and commentary (p. 57) include express recognition of limitations to fulfilling such requests, which arise from

[22] See also the African Commission's Principles and Guidelines on the Rights to a fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247 (2001).

[23] See, e.g., ICCPR article 14; African Charter article 7; the African Commission's Principles and Guidelines on the Rights to a fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247 (2001).

international human rights law. These include the ICCPR,[24] the UN Convention against Torture[25] (see article 3), and international refugee law.

CONCLUSION

The issues and provisions cited above are illustrative and not exhaustive examples of problems with the Bill and do not necessarily purport to constitute a comprehensive human rights analysis of the Bill. However, the examples demonstrate clearly that the Bill must not be passed into law without further detailed review and amendment, as well as consultation with civil society, to ensure its compatibility with Nigeria's regional and international human rights obligations.

[24] See discussion, for example, in UN Human Rights Committee, General Comment no. 31 (2004), UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para 12.

[25] Ratified by Nigeria in 2001