ESSAY

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Issues around extradition and deportation in transnational terrorist cases

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September 11 2001 precipitated the introduction of anti-terrorism legislation in most states and enhanced cooperation between states around the world. Africa may not have witnessed many incidents of international terrorism on its soil, yet the continent has, in the post 9/11 era, often been referred to as the 'breeding ground of terrorism' or the conduit for international terrorists. The assumption that countries with weak governments and failing economies (as in most of the continent) seems to be one of the factors that earned Africa this negative image. While the validity of the assumption is debatable, it is clear that prosecuting cases of terrorism is fraught with legal intricacies. This article deals with the difficulties involved.

Introduction

Following the tragic events of 11 September 2001, the need for all states to introduce anti-terrorism legislation and to enhance cooperation between states gained momentum around the world. Africa may not have witnessed many incidents of international terrorism on its soil, yet in the post- 9/11 era the continent has often been credited with the dubious honour of being the 'breeding ground of terrorism' or the conduit for international terrorists.

Some analysts have pointed to Africa as a lethal combination of corrupt or destructive leaders, porous and unmonitored borders, and rootless and hopeless men and women, rendering it a conduit and incubator of international terrorism.

The crux of the debate[1] is that countries with weak governments and failing economies may become safe havens and fertile breeding grounds for terrorists. Where weak governments are concerned, the argument is that the absence of effective policing structures, coupled with rampant corruption, allows terrorists to exist without detection. In adverse economic conditions, people are possibly more susceptible to recruitment into terrorist organisations in countries with overwhelming socio-economic problems than in more stable countries.[2]

The case of Haroon Rashid Aswat gives some credibility to such theories. It was reported[3] that the alleged mastermind of the London bombings, Haroon Rashid Aswat, was resident in South Africa and worked undetected in

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the Johannesburg suburb of Fordsburg in the late 1990s. Aswat's mobile phone received about twenty calls from the London bombing suspects. Furthermore, a charge filed before a New York court accused Aswat of seeking to establish a terrorist training camp in a remote area in the north-western US state of Oregon, of hostage taking in Yemen, and of funding terrorist training in Afghanistan.[4]

Aswat had been on the run since 1999. Following his arrest in Zambia, British officials were anxious to interview Aswat because of concerns that he could be taken to one of the centres where the US holds terrorists. This, after Martin Mubangu, a British Muslim, was arrested in Zambia in 2002 and taken to the US detention camp in Guantanamo Bay, where he was held until his release without charge in 2005.

In the end Zambia deported Aswat, who is a British citizen, to London in August 2005. The central African nation turned down a US request for Aswat's extradition, citing that the suspect was a British national and it would hence be proper to hand him over to the British government.

The British authorities detained the suspect on arrival in London. In the aftermath of Aswat's arrest it transpired that American intelligence officials had attempted to seize the terror suspect in South Africa a few weeks earlier and secretly shift him to an undisclosed third country for interrogation. British officials were unwilling to participate in the controversial American policy of 'rendition' of one of their own citizens. 'Rendition' usually involves moving detainees to US-friendly Arab countries such as Egypt, where local interrogators are said to use torture to extract information.

This article highlights the difficulties experienced in prosecuting two further transnational terrorist cases in southern Africa. The first case study deals with the arrest and deportation of five alleged Al-Qa'eda members from Malawi. The procedures were in sharp contravention of Malawi's constitutional provisions, ultimately undermining its rule of law, constitutionalism and respect for human rights. Extradition in the Khalfan Khamis Mohamed case demonstrates that there is a distinct difference between extradition and deportation; furthermore, it is unlawful to use deportation procedures to effect an extradition.

The important and justifiable desire of states to cooperate in combating terrorism should not allow them to act unlawfully. Similarly, states should ensure that they do not violate the inalienable rights of people, even indirectly, to bring alleged terrorists to justice.

Case study 1: The arrest of five Al-Qa'eda suspects in Malawi[5]

On 22 June 2003, at about 2 am, members of the Malawi Police Service, security officials of the National Intelligence Bureau (NIB) and Malawian immigration officials and members of the United States Central Intelligence Agency (CIA) arrested five alleged Al-Qa'eda members in the Malawian city of Blantyre. The five men were woken up, identified, arrested at gunpoint, handcuffed, blindfolded and bundled in their sleeping gowns into unmarked Land Rovers, and taken to Blantyre Police Station. Police officers assured families and friends that the suspects had been arrested for routine questioning and would be released during the morning.

The five men were nationals of Saudi Arabia (Fahad al-Bahli), Kenya (Khalifa Abdi Hassan), Sudan (Mahmud Sardar Issa) and Turkey (Dr Ibrahim Itabaci and Arif Ulusam).

Three of the men were involved in charity work. Fahad al-Bahli, for example, was the resident director of the Malawian branch of the Saudi Arabian Prince Sultan bin Abdul Aziz Special Committee for Relief. Prince Sultan was the Saudi Deputy Prime Minister, Inspector General, and Minister of Defence and Aviation, and he set up the foundation, which opened a branch in Malawi in 2001, to assist with relief work at the request of the Malawi government.

Dr Ibrahim Itabaci was the executive director of Bedir International, a Turkish non-governmental organisation (NGO) that built schools in Malawi with Turkish as a language option.

Mahmud Sardar Issa was the executive director of another charitable organisation, the

Islamic Zakat Fund Trust. This Muslim-funded charity sponsored scholarships for Malawians to study at the University of Malawi and other universities in Southern Africa.

Of the two remaining men, the Kenyan, Khalifa Abdi Hassan, was a teacher at the Muslim Association of Malawi School, while Arif Ulusam ran the Istanbul Take Away Restaurant.

A sixth man, a Tanzanian of Yemeni origin who was a cross-border sugar trader, coincidentally arrived in the country on the morning of the arrests and, on learning that the police were enquiring about him, was ready to present himself to them. However, when he learned about the circumstances surrounding the arrests of the other five men, he drove to the Tanzanian border and slipped across.

After the men had been arrested, their houses were searched and computers, printers, books, other electronic equipment and money were confiscated. The men were denied access to lawyers and medical attention, despite one of them being diabetic. Attempts to visit them failed. Muhammed Kulesi, a trustee of various Muslim NGOs in Malawi and a personal adviser to the vice-president of Malawi, attempted to gain access to the suspects to provide them with food and warm clothing. This resulted in his name being added to a list of 'wanted terrorists' for 'interfering with the arrests'. The US government even launched an unofficial complaint, calling for his arrest. By this stage names were circulating of several other Muslims who were to be arrested, while the Malawi government denied knowledge of any arrests having taken place.

By mid-morning on Monday 23 June there was a rumour that the suspects had been moved to the immigration airport holding cell near Lilongwe International Airport and that they were to be flown to the Kenyan capital, Nairobi, by British Airways (BA). However, BA refused to carry them.

Although the Director of Public Prosecutions, the Attorney General and government officials still did not acknowledge the arrests, lawyers and family of the suspects feared that the men were likely to end up at Guantanamo Bay. Their lawyers decided to invoke habeas corpus[6] by showing that the arrests were unlawful and unconstitutional. In fact, the manner in which the arrests had been made raised pertinent constitutional questions.

In Malawi, laws of detention are intended to balance law enforcement and individual freedom. For the protection of the latter, an arrest is only valid when it is executed under lawful authority and in a proper manner. Section 96 of the Malawi Criminal Procedure and Evidence Act (CPE) provides that every warrant of arrest must be under the hand of the issuing judge or magistrate and must bear the seal of the court. In this case no warrant was issued. Though Section 28 of the CPE lays down the circumstances under which a police officer may make an arrest without a warrant,[7] the men's lawyers argued that their arrest under these circumstances was unjustified and that there had been total disregard for human dignity in the manner in which their clients were arrested. In addition, their blindfolding and handcuffing contravened their right to personal liberty, human dignity and other personal freedoms as guaranteed by the Malawi constitution.[8] Furthermore, the searching of their homes and the confiscation of money contravened their right to privacy.[9]

High Court Judge Healy Potani ordered the applicants to be brought before a court of law within 48 hours, failing which they were to be released from custody on condition that each of them furnished the court with surety by two Malawian nationals to the amount of US$1,000 and that they reported to designated police stations every Friday from the date of their release.

Owing to the imminent threat of deportation facing the men, the High Court directed the Office of the Registrar of the High Court to communicate the contents of the court order to all concerned parties via telephone the same night. The formal court orders were served on the Attorney General, the Minister of Home Affairs, the chief immigration officer and the airport commandant at Lilongwe International Airport the next morning, 23 June 2003.

That same evening the state sought an ex-parte application against the court order. While the state was presenting its application,

it failed to comply with the original court order and the men's lawyers accordingly argued that it was defaulting on the court order. The state, in turn, argued it had not complied with the court order as the 48 hours had not expired.

It remained unclear why the state was applying to vacate the court order before complying with it. The court refused to vacate the court order. Despite this, the state made no immediate attempt to bring the five men to court. On the morning of 25 June 2003 the court signed a formal order of release. Later that day sureties were examined and accepted by the court.

Unbeknown to the court and the men's lawyers, the five men had already been flown out of the country on 23 June 2003.

Soon after the sureties had been examined, the state served on the suspects' lawyers a notice of intention to appeal to the Malawi Supreme Court of Appeal against the initial court order. The state indicated that the men ought to have made their application for habeas corpus to a magistrate and not to a high court judge. It finally emerged that the state was ignorant of the men's whereabouts and, as they were no longer in its power, could not comply with the initial court order.

After a lengthy hearing, High Court Judge Frank Kapanda granted an order for stay of proceedings. The judge observed that serious legal issues had arisen that needed settlement by the Supreme Court of Appeal.

Despite being detained for a total of 33 days in Zimbabwe, Uganda, Sudan and Djibouti, the five men were only questioned for five hours over this period. Meanwhile, the legal battles were being fought.

After this ordeal they were released, but their confiscated property and money were not returned to them.

The CIA has not formally acknowledged the arrests. At the time of the arrests the then American ambassador to Malawi, Roger Meece, denied any American involvement in the arrests. He maintained that his embassy was unaware of any CIA activities in Malawi.

On 24 June 2003 the Malawian Director of Public Prosecutions, Fahard Assani, disclosed that the US government had identified and arrested the five on allegations that they belonged to the terror organisation Al-Qa'eda. The Americans had then requested Malawi to surrender the suspects for interrogation.[10]

Was the US government entitled to arrest the five men and have them deported from Malawi without following due process of the law in that country? Section 39(1) of the Immigration Act, Chapter 15:03, empowers the Minister to effect a deportation order. Accordingly, a non-citizen of Malawi can be deported if the Minister is satisfied that this is in the interests of defence, public safety and public order. Although the Minister may be entitled to deport individuals under this provision, Article 41 of the Malawian constitution stipulates that every person should have access to a court of law for final settlement of legal issues. In this case, the five men were deported without any offence having been established.

Furthermore, the men were not fugitives and thus could not be extradited in terms of the Malawi Extradition Act.[11] Malawi has extradition treaties with Britain, South Africa, Lesotho, Botswana, Tanzania, Zambia and Zimbabwe, but not with the US. In addition, the Act[12] provides that a fugitive offender should not be surrendered to any country unless provision is made that he or she will be prosecuted only for the offence for which he or she is surrendered.

The Malawian constitution enshrines a detained person's rights, which include the right to be promptly informed of the reason for the detention,[13] to consult confidentially with a legal practitioner of his or her choice,[14] to be given the means and opportunity to communicate with, and be visited by, his or her spouse, partner, next of kin or relative,[15] to challenge the lawfulness of the detention in person or through a legal practitioner,[16] and to be released if the detention is unlawful.[17]

The arrest and deportation of the five alleged Al-Qa'eda members was a sharp contravention of Malawian constitutional provisions. It undermined the rule of law and constitutionalism in that country. In light of the above, neither the CIA nor the Malawian government acted according to the law. Malawi is a sovereign country.[18] The role and participation of the US in the men's arrests violated its international responsibilities, the breach of

which could lead to legal liabilities.[19] Such actions put into question the efficacy of the rule of law at international or state level in relation to strong state actors such as the US and weak states that lack capacity to activate the webs of influence, dialogue, reward and coercion in the globalisation process.

Under English common law, the concept of the rule of law entails respect for human rights, due process and good governance by a transparent and accountable legal system, wherein the law is applied consistently and with a degree of predictability. The state must play a pivotal role in ensuring that all its organs and machinery uphold the principles of the rule of law, which will suffer if the state uses coercive mechanisms in total disregard for human rights considerations.

Case study 2: Extradition of Khalfan Khamis Mohamed[20]

On the morning of 7 August 1998 the embassies of the USA in the Kenyan capital of Nairobi and the Tanzanian capital of Dar es Salaam became the target of terrorist attacks. In Nairobi 212 people were killed and more than 4,500 injured. In Dar es Salaam 11 people were killed and 85 injured.

Since the mid-1990s a Federal Grand Jury in New York had been investigating the general activities of the terror network Al-Qa'eda. It concluded that the attacks on the two embassies were the work of that organisation. The Grand Jury indicted 15 men on a total of 267 counts, including conspiracy to murder, kidnap, bomb and maim US nationals, conspiracy to destroy US buildings, properties and national defence facilities, bombing the two embassies, and murdering 223 people.

One of the 15 people identified as conspirators was a 27-year-old Tanzanian citizen, Khalfan Khamis Mohamed. Mohamed, according to the indictment, procured a false passport in May 1998, rented a house in Dar es Salaam, bought a motor vehicle for use by the conspirators, and actively participated in the preparations for bombing the US embassy.

The day before the explosions he obtained a visitor's visa from the South African High Commission in Dar es Salaam and left Tanzania by road a day after the explosions. Travelling via Mozambique, he entered South Africa on 16 August 1998 and travelled to Cape Town, where he obtained employment and lodging with a South African national. In Cape Town he applied for asylum and refugee status under a false name, and on spurious grounds was granted a temporary permit to remain in South Africa pending the finalisation of his refugee application.

Mohamed lived and worked quietly in Cape Town while his application for asylum was being processed. On 17 December 1998 a warrant for his arrest was issued by the Federal District Court for the Southern District of New York on charges of murder, conspiracy and attack on US facilities. The following month, Interpol, Washington DC, at the request of the Federal Bureau of Investigations (FBI), put out an international 'wanted' notice with photographs and a description of Mohamed, cautioning that he should be considered armed and dangerous. In August 1999, a year after the bombings in Nairobi and Dar es Salaam, the South African Police Service (SAPS) and the South African immigration authorities became aware of the FBI's investigation into the embassy bombings and were requested to provide information about another suspect. By chance, on 30 August 1999 an FBI agent identified Mohamed while searching through the asylum seekers' records in Cape Town, despite the pseudonym he had used.

On receiving this information from the FBI, South African immigration officials investigated the situation. Mohamed was due to attend the refugee reception office in Cape Town some time before 5 October 1999 to extend his temporary permit. The FBI, together with South African immigration officials, began a surveillance programme at the refugee reception office on 2 October 1999 in anticipation of his arrival. On his arrival on the morning of 5 October 1999, he was arrested. Present at the arrest were immigration officials and an FBI agent. Mohamed was immediately taken to a car in the basement of the building and driven to a holding facility at Cape Town International Airport, where immigration officials questioned him.

Mohamed freely and unreservedly disclosed his part in the plot to bomb the two embassies. He also stated that he feared for his life at the hands of vengeful Tanzanians, should he be repatriated to that country. As he would rather "join his comrades in the glory of being tried for their heroic act and, God willing, to die for the cause", he preferred to be taken from South Africa to the US rather than Tanzania.

After signing the statement prepared by the South African immigration officials, Mohamed was handed over to the FBI, who interrogated him over two days. The statement constituted a comprehensive confession of his participation in the bombing of the embassies.

A plane was sent from the US to collect Mohamed and he was flown out of South Africa on 6 October 1999 in the custody of a number of FBI agents, a US attorney for the Southern District of New York, and a medical doctor. They arrived in New York the next day, and Mohammed appeared in court on 8 October 1999.

The New York trial judge formally notified him that he faced the death penalty ('he was death eligible') on a number of the charges, because, inter alia, his surrender from South Africa had not been accompanied by an assurance by the US that he would not be subject to the death penalty. Had the South African authorities sought this assurance before handing him over to the FBI, the US might well have provided it. Mohamed would then have been dealt with in the same way as his alleged co-conspirator, Salem, who was handed over to the US by Germany on such a precondition and assurance.[21]

Mohamed launched court proceedings in South Africa seeking orders to the effect that his removal from South Africa was unlawful and unconstitutional. The challenge was based on two grounds. The first was that deportations and extraditions from South Africa are unlawful and unconstitutional if they involve the possibility of capital punishment without an assurance from the receiving state that no death penalty will be sought or imposed.

The second was that the procedure through which the South African authorities caused Mohamed to face trial in a US court was unlawful because it was a deportation procedure, whereas an extradition had taken place. This was a 'disguised extradition' and such a manipulation of the law was a cynical and unlawful use of one procedure to achieve the result of another.

The Constitutional Court of South Africa ruled in Mohamed's favour.[22] The court set out a number of important principles concerning the removal of persons (even terrorists) from South Africa that highlighted the distinction between extradition and deportation. Extradition involves three elements: acts of sovereignty on the part of two states, a request by one state to another for the delivery to it of an alleged criminal; and the delivery of the person requested for trial or sentence in the territory of the requesting state. Extradition is a bilateral event in which one state surrenders an individual situated in its territory in response to a request by another sovereign state.

Deportation, on the other hand, is essentially a unilateral act of the deporting state to get rid of an undesired foreign national. Deportation is achieved when the foreigner leaves the deporting state's territory; the destination of the deportee being irrelevant to the purpose of deportation. An important distinguishing feature between extradition and deportation is thus the purpose of the state delivery act in question. Where deportation and extradition coincide in effect, difficulties can arise in practice in determining the true purpose and nature of the act of delivery.

Deportation and extradition serve different purposes. Deportation involves the removal from a state of a foreigner who has no permission to be there, while extradition is the handing over by one state to another of a person convicted or accused there of a crime to enable the receiving state to deal with such person in accordance with the provisions of its law. The purpose of extradition is the desire of states to cooperate internationally in the enforcement of criminal laws, including securing the presence of individuals.

Different procedures are prescribed for deportation and extradition and are usually material. In this case, the court did not deal with the argument that the removal was unlawful because it constituted 'disguised extradition'.

It did, however, state that where the death penalty was involved, the distinction was not relevant. The procedure that was followed in removing Mohamed to the US was accordingly unlawful, irrespective of whether it was a deportation or an extradition.

The court stated that in handing Mohamed over to the US without securing an assurance that he would not be sentenced to death, the immigration authorities failed to give any value to his constitutional right to life, his right to have his human dignity respected and protected, and his right not to be subjected to cruel, inhuman or degrading punishment.

In coming to this conclusion, judgments of the Supreme Court of Canada[23] and the European Court of Human Rights[24] were considered and approved.

It was further held that the South African constitution forbids the government knowingly to participate, directly or indirectly, in any way in imposing or facilitating the imposition of punishment that is cruel, inhuman or degrading. Such punishment includes the death penalty.

It is not permissible to extradite (or deport) any person (including Mohamed, a confessed terrorist) without securing an undertaking from the US authorities that a sentence of death will not be imposed on him before his removal to that country.

The court also stated that the international community shared its view of the death sentence, even in the context of international tribunals with jurisdiction over the worst offences, including genocide[25] and crimes against humanity.

The conclusion was that Mohamed had been removed to the US in an unlawful and unconstitutional manner. Mohamed also requested the court to direct the South African Minister of Foreign Affairs to request the US authorities, through diplomatic channels, not to seek the death penalty or, if it was imposed, not to implement it. But because of the urgency of the matter, the court directed that a copy of its judgment be submitted to the trial court in New York.

The jury convicted Mohamed on the basis of his confession and sentenced him to life imprisonment without the option of parole. He is currently serving his sentence in a federal penitentiary.

One of the many lessons from the Mohamed case is that the justifiable desire of states to cooperate in the area of terrorism must not allow them to act unlawfully. If extradition procedures are undesirable, then consideration must be given to amending those procedures. It is unlawful to use deportation procedures to effect an extradition. Similarly, states must ensure that they do not violate the inalienable rights of persons, even indirectly, in their desire to bring alleged terrorists to justice, as apparently happened in the Mohamed case.

Extradition law and practice have traditionally exempted political offenders from extradition. This rule had its origins in the nineteenth century when governments of the new liberal democracies refused to return political dissidents to the despotic states of the *ancien régime*. The principal justifications for the rule are, first, that states should not intervene in the internal political conflicts of other states by assisting in the rendition of political opponents of governments; and second, that political offenders, unlike ordinary criminals, threaten the criminal justice system of the state from which they have fled and not that of the state granting asylum.

Over the years the romantic image of the political dissident fighting for democracy has been tarnished by the image of the political terrorist fanatically determined to overthrow the regime of another state by any means, including hostage taking, hijacking and, more recently, bombings. As a result, the political offence exception has become highly controversial and courts have sought to define 'political offence' in such a way that it excludes the political terrorist, but does not abandon the protection of the genuine political dissident.

Courts throughout the world have experienced great difficulty in deciding when an offence has a political character. Terrorism presents peculiar issues, as most transnational acts of terror are politically motivated. To avoid these difficulties, states have entered into extradition treaties that exclude the political offence exception to extradition.[26]

UN Security Council Resolution 1373 (28 September 2001) requires states, for example,

to afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts. States are required to prevent those who finance, plan, facilitate or commit terrorist acts from using their territories for those purposes against other states or their citizens.

Economic development requires the free movement of goods, services and people into and out of Africa, as well as across borders within the continent. More people are moving across borders and more frequently. This allows the potential for criminals, especially terrorists, to escape justice in one country by moving to another, or by hiding where the law provides protection from prosecution. International and regional arrangements concerning extradition must therefore be implemented effectively and upgraded when necessary. The increasing incidences of terrorism transnationally require this to be done as soon as possible.

Globalisation has brought about an increase not only in the movement of people across borders, but also in transnational crime and, more particularly, in international terrorism. It is imperative that international crime, like national crime, should be dealt with firmly and fairly.

In enacting laws and adopting international and regional agreements states must ensure that the rights of individuals are not violated, including the right to a fair and just opportunity to assert claims for asylum. Similarly, people who are subject to requests for extradition must be allowed to oppose any application for their extradition in an administratively just manner.

Ultimately the tension between the inclusion of human rights in the extradition process and the demand for effective international cooperation in the suppression of crime mirrors the tension in many national legal systems between 'law and order' and human rights approaches to criminal justice. In international society, as in domestic society, it is necessary to strike a balance between the two to establish a system in which crime is suppressed and human rights are respected.

Conclusion

The arrest and deportation of the five alleged Al-Qa'eda suspects represented a sharp contravention of Malawian constitutional provisions. The US government failed to respect the sovereignty of Malawi, while the Malawian government allowed itself to be bullied by the superpower. The state, whether it is weak or strong, must play a pivotal role in ensuring that all its organs and machinery uphold the principles of the rule of law. In addition the rule of law will be undermined if the state is at the forefront in employing coercive mechanisms with total lack of respect for the human rights of its citizens.

The Mohamed case shows that the important and justifiable desire of states to cooperate in combating terrorism must not allow them to act unlawfully. If extradition procedures are undesirable, then consideration must be given to amending those procedures Extradition in the Khalfan Khamis Mohamed case demonstrates that there is a distinct difference between extradition and deportation and that it is unlawful to use deportation procedures to effect an extradition.

The deportation of British national Haroon Rashid Aswat by Zambia to Britain rather than heeding the demands of the US should be considered a shining example of a developing country sticking to best international practice despite pressure from a superpower.

Terrorist acts violate the dignity of all people, not merely those who are physically injured. There can be no dignity in a world where terrorists and/or states can act with impunity and avoid justice. The challenge is therefore to draft and implement laws, international and domestic, that are effective in combating terrorism and conform to the requirements of democratic principles and respect for the dignity of every person.

Notes

1 N Lyman and J Stephen Morrison, The terrorist threat in Africa, *Foreign Affairs*, January/February 2004, <www.foreignaffairs.org/20040101-faessay-83108/princeton-n-lyman-j-stephen-morrison/the-terrorist-threat-in-africa.html> (18 August 2005).

2 BBC News Online, Poverty fuelling terrorism, <www.bbcnews.co.uk>, http://news.bbc.co.uk/1/hi/world/1886617.stm (22 March 2002).
3 P Naidoo, SA equipped to deal with threat, *Financial Mail,* 12 August 2005.
4 Forbes, (US files) terrorist charge against Briton Haroon Rashid Aswat, <www.forbes.com/business/feeds/afx/2005/08/08/afx2175579.html>, (13 September 2005).
5 This section is based on a paper presented by Jai Banda, entitled 'Combating terrorism in Malawi: the case of the Malawi arrests', at the ISS Regional Seminar on Terrorism at the Colosseum Hotel, Pretoria, 18–19 September 2003.
6 The application for habeas corpus was made ex-parte under Sections 16(a)(i) and (ii) of the Statute Law (Miscellaneous Provisions) Act, Chapter 5:01 of the Laws of Malawi, and also in terms of the Statute Law (Miscellaneous Provisions).
7 Section 28(g) of the Criminal Procedure and Evidence Act stipulates that a police officer may arrest, without a warrant, "any person reasonably suspected to have committed an offence outside Malawi in consequence of which he is liable to be apprehended and detained in Malawi".
8 Chapter 4, Article 15(1) of the Malawi constitution guarantees the protection of human rights and freedoms by all organs and agencies of government, including the police.
9 Article 21 of the constitution provides that every person has the right to personal privacy, including not being subjected to searches of his or her person, home, property or the seizure of private possessions
10 As quoted by Jai Banda in the *Daily Times*, 25 June 2003.
11 The Extradition Act, Chapter 8:03, makes provision for the arrest, detention and surrender of any fugitive offender from a designated country to such country in the manner provided by the Act.
12 Section 6(3) of the Extradition Act.
13 Constitution of the Republic of Malawi, Article 42(10) (a).
14 Ibid, Article 42(1)(c).
15 Ibid, Article 42(1)(d).
16 Ibid, Article 42(1)(e).
17 Ibid, Article 42(1)(f).
18 The constitution provides: "The Republic of Malawi is a sovereign State with rights and obligations under the Law of Nations."
19 Quoted by Jai Banda: Beth Stevens, Conceptualizing violence under international law: Do tort remedies fit the crime?, <www-camlaw.rutgers.edu/bio/966>.
20 This section consists of a paper presented by Advocate Anton Katz entitled Extradition in the Khalfan Khamis Mohamed Case, at the ISS Regional Seminar on Terrorism at the Colosseum Hotel, Pretoria, 18–19 September 2003.
21 Recently a court in Frankfurt approved the extradition of Mohammed Ali Hassa al-Moayad and Mohammed Moshen Yahya Zayed, a Yemeni cleric and his assistant, to the US, on suspicion of assisting Al-Qa'eda in its acts of terror, on condition that they would not face the death penalty or be tried by a court outside traditional US territory, as happened to those persons subjected to military tribunals in Guantanamo Bay.
22 *Mohamed and Another v President of the RSA and Others* 2001(3) SA 893 (CC). This was an appeal after the Cape High Court had initially dismissed Mohamed's application.
23 *United States v Burns* 2001 SCC 7.
24 *Soering v United Kingdom* (1989) 11 EHRR 439; *Hilal v United Kingdom* Application No 45276/99, 6 March 2001; *Chahal v United Kingdom* (1996) 23 EHRR 413.
25 See The Statute for the International Criminal Tribunal for the Former Yugoslavia (Security Council Resolution 827 (1993). Article 24 provides that "the penalty imposed by the trial chamber shall be limited to imprisonment'". The Statute for the International Criminal Court also excludes the competence of capital punishment as a sentence.
26 See, for example, the International Convention for the Suppression of Terrorism and Bombings of 1998.