

THE UTILITY OF COUNTER-TERRORISM AND NON-PROLIFERATION OF WMD CLAUSES UNDER THE EU–ACP REVISED COTONOU AGREEMENT

I. INTRODUCTION

The Revised Cotonou Partnership Agreement (the CPA II) was signed on 25 June 2005 in Luxemburg by the Member States of the European Union (the EU or the Union) and the group of African Caribbean and Pacific (ACP) States.¹ The CPA II revises the CPA I that was endorsed on 23 June 2000 in Cotonou, Benin.² The CPA I replaced the Lomé Conventions,³ which were preceded by the Yaoundé Agreements. Under the Yaoundé and Lomé Conventions the European Community (the EC or the Community) extended trade benefits to ACP countries.⁴ The trade preferences were equally accompanied by development assistance money from the European Development Fund (the EDF).⁵ Over the years the rules underpinning the relationship

¹ ACP–EU Revised Cotonou Partnership Agreement, Luxemburg, 25 June 2005, ACP 63/OC 269 8851/05. ‘The CPA I’ is used in this contribution in those instances where the CPA II does not introduce new or revised provisions.

² ACP–EU Partnership Agreement, Cotonou, 23 June 2000, [2000] OJ L 317/3. EU Member States that endorsed the first Cotonou Agreement signed on 23 June 2000 were Austria, Belgium, Denmark, Finland, Germany, Greece, Spain, France, Ireland, Italy, Cyprus, Luxembourg, the Netherlands, Portugal, Sweden, and the United Kingdom. Under the CPA II, 10 new members of the EC have joined the partnership. These include the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, the Slovak Republic and Slovenia. Members of the ACP include, Angola, Antigua & Barbuda, the Commonwealth of the Bahamas, Barbados, Belize, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, the Central African Republic, the Comoros, the Democratic Republic of Congo, the Republic of Congo, the Cook Islands, Côte d’Ivoire, Cuba (has a *sui generis* status: not signatory to the CPA), Djibouti, Dominica, the Dominican Republic, East Timor, Eritrea, Ethiopia, Fiji, Gabon, Gambia, Ghana, Granada, Guinea, Guinea-Bissau, Equatorial Guinea, Guyana, Haiti, Jamaica, Kenya, Kiribati, Lesotho, Liberia, Madagascar, Malawi, Mali, the Marshall Islands, Mauritania, Mauritius, Micronesia, Mozambique, Namibia, Nauru, Niger, Nigeria, Niue, Palau, Uganda, Papua New Guinea, Rwanda, Saint Kitts & Nevis, Saint Lucia, Saint Vincent & the Grenadines, Samoa, São Tomé & Príncipe, Senegal, Seychelles, Sierra Leone, the Solomon Islands, South Africa (has a *sui generis* status: does not benefit from the European Development Fund but from aid debited on EC budget) Sudan, Suriname, Swaziland, Tanzania, Chad, Togo, Tonga, Trinidad and Tobago, Tuvalu, Vanuatu, Zambia, and Zimbabwe.

³ First ACP–EC Convention of 28 February 1975, OJ L 25; Second ACP–EC Convention of 31 October 1979, [1980] OJ L 347; Third ACP–EC Convention of 8 December 1984, [1986] OJ L 86; Fourth ACP–EC Convention of 15 December 1989, [1991] OJ L 229/3.

⁴ For a summary on the evolution of the preferences offered to ACP states, see Enzo Grilli, *The European Community and the Developing Countries* (CUP, Cambridge, 1993) 34; Joseph McMahon, ‘Negotiating in a Time Of Turbulent Transition: The Future of Lomé’ (1999) 36 *Common Market Law Review*, 599–624; J Ravenhill, ‘Back to the Nest? Europe’s Relations with the African, Caribbean and Pacific Group of Countries’, in V Aggarwal and E Fogarty (eds), *European Union Trade Strategies* (Palgrave Macmillan, Basingstoke, 2004) 125.

⁵ This is a common fund into which EU Member States make multi-annual contributions for development programmes in ACP States. See M Holland, *The European Union and the Third World* (Palgrave Macmillan, Basingstoke, 2002) 29.

have been sanctioned by a body of joint institutions including the Council of Ministers, the Committee of Ambassadors and the Joint Parliamentary Assembly.⁶

Under the Fourth Lomé Convention, the parties introduced the first operative provision related to political objectives, to wit, the respect for human rights and adherence to democratic values.⁷ The provision was extended under the agreement that prolonged the Fourth Lomé Convention, known as the Mid-term Review or the Convention of Mauritius.⁸ This was partly in fulfilment of their desire to establish constructive political dialogue. When the parties endorsed the CPA I in 2000 they introduced the first set of security related political clauses. The clauses refer to commitments made in Article 11 to prevent, manage and resolve conflicts. Under the CPA II of 2005 the second set of security-related political provisions has been introduced. They pertain to the fight against terrorism and the non-proliferation of weapons of mass destruction (WMDs).

The article analyses the motives of the EU for backing the introduction of the new security clauses. It equally examines the arguments for and against the integration of counter-terrorism and non-proliferation of WMD clauses in the CPA II. It is intimated that the introduction of non-proliferation of WMDs clauses is timely. The rationale for integrating counter-terrorism provisions into the treaty is open to debate.

II. MOTIVES FOR INTRODUCING THE NEW SECURITY CLAUSES

By virtue of Article 11(a) of the CPA II the EU and the ACP States:

... reiterate their firm condemnation of all acts of terrorism and undertake to combat terrorism through international cooperation, in accordance with the Charter of the United Nations and international law, relevant conventions and instruments and in particular full implementation of UN Security Council Resolutions 1373 (2001) and 1456 (2003) and other relevant UN resolutions.

They also assert their willingness to share information on terrorist groups as well as information on techniques to counter and prevent terrorism.⁹

In terms of the obligation to fight against the proliferation of WMDs Article 11(b) of the agreement stipulates, *inter alia*, that:

[t]he Parties consider that the proliferation of weapons of mass destruction and their means of delivery, both to State and non-State actors, represents one of the most serious threats to international stability and security.

⁶ For the current institutions of the Cotonou Partnership Agreement, see Arts 14–17 of the CPA I.

⁷ Art 5(1) of the Fourth Lomé Convention [1991] OJ L 229/3.

⁸ Convention of Mauritius of 4 November 1995 [1998] OJ L 156/3.

⁹ Art 11(a) of the CPA II. For legal analyses of EU's reaction to terrorism, see S Peers, 'EU Responses to Terrorism' (2003) 52 *International and Comparative Law Quarterly* 227; J Wouters and F Naert, 'Of Arrest Warrants, Terrorist Offences and Extradition Deals: An Appraisal of EU's Main Criminal Law Measures Against Terrorism after "11 September"' (2004) 41 *Common Market Law Review* 909; J Monar, 'Anti-terrorism Law and Policy: The Case of the European Union', in V Ramraj, M Hor, and K Roach (eds), *Global Anti-Terrorism Law and Policy* (CUP, Cambridge, 2006) 425. Assessments of EU's capacity to address terrorism from a political perspective include: J Wright, 'The Importance of Europe in the Global Campaign Against Terrorism' (2006) 18 *Terrorism and Political Violence* (2006) 281; G de Vries, 'The European Union's Role in the Fight Against Terrorism' (2005) 16 *Irish Studies in International Affairs* 3.

It further provides that they:

... therefore agree to cooperate and to contribute to countering the proliferation of weapons of mass destruction and their means of delivery through full compliance with and national implementation of their existing obligations under international disarmament and non-proliferation treaties and agreements and other relevant international obligations. *The Parties agree that this provision constitutes an essential element of this Agreement.*¹⁰

In affirming that the provision on the non-proliferation of WMDs is an essential element, the EU and ACP States have highlighted the salience of non-proliferation.¹¹ This is because if any of the parties defaults on the obligation regarding the clause, recourse can be made to consultations provided for under Article 11(b)(6). The provision is to the effect that should consultations fail to lead to a solution convenient to both parties 'appropriate measures' may be taken. However, what appropriate measures entail is unclear.

The introduction of the new security clauses can be interpreted as a response to global trends. It is a clear statement on the need for countries to desist from exporting WMDs or related products. Above all, the inclusion of the new security provisions can be considered as the expression of a commitment to foster a broader approach of introducing such provisions in agreements with third parties. Following the attacks of 11 September 2001 in the United States, many nations adopted measures to address terrorism. This was either done jointly or severally. Jointly, the EU adopted a series of measures to combat international terrorism. The main legal text enacted to this effect is the Council Framework Decision on combating terrorism (the Framework Decision).¹² For their part, African States fortified their commitment to implement the Organization of African Unity (OAU) Convention to Combat Terrorism that had been endorsed in 1999.¹³ They equally decided to create a counter-terrorism centre in Algiers. By introducing counter-terrorism provisions in the main treaty that sanctions their relationship, the EU and ACP States have highlighted the fact that international terrorism is a threat that transcends borders. They equally realize that the problem is becoming more manifest in certain African regions, especially in the Horn and the Sahel regions.

In incorporating the counter-WMD clauses in the CPA II, the parties reiterate the importance for the world to take the issue of non-proliferation seriously. In recent years

¹⁰ Emphasis added.

¹¹ In recent years essential element clauses in EU's international agreements with third States have been mainly confined to the respect for human rights and democratic principles. See E Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (Martinus Nijhoff Publishers, The Hague, 2003) 230–4; L Bartels, *Human Rights Conditionality in the EU's International Agreements* (OUP, Oxford, 2005) 26–7. It is noteworthy that Art 11(b) of the CPA II is a marked departure from the erstwhile approach of restricting essential elements to the respect for human rights and democratic principles.

¹² Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA) [2002] OJ L 164/3.

¹³ OAU Convention on the Prevention and Combating of Terrorism, Algiers (OAU Convention) <http://untreaty.un.org/English/Terrorism/oau_e.pdf> (last accessed 14 July 1999). See also, The Protocol to the OAU Convention on the Prevention and Combating of Terrorism, Adopted by the Third Ordinary Session of the Assembly of the African Union, Addis Ababa, 8 July 2004. For measures adopted in the Caribbean, see The Nassau Declaration on International Terrorism: The CARICOM Response, Issued at the Conclusion of the Special (Emergency) Meeting of Heads of Government of the Caribbean Community, The Bahamas, 11–12 Oct 2001.

negotiations have been conducted in a bid to check the nuclear ambitions of Iran and North Korea. The EU has been more active in terms of negotiations with Iran.¹⁴ The integration of WMD clauses in the CPA II is a means legally to restrain ACP countries from engaging in activities that relate to biological, chemical, nuclear and radiological weapons.

Another reason for the introduction of both provisions relates to the need to fortify and continue a broader trend of integrating such clauses in agreements with third States. Such States include, amongst others, Member States of the Association of South East Asian Nations (ASEAN),¹⁵ Algeria¹⁶ and Egypt.¹⁷ Prohibition of terrorism and WMDs is also included in the cooperation declaration made with Mediterranean countries participating in the Barcelona Process within which EU–North African relations are articulated.¹⁸ The European Neighbourhood Policy equally addresses these aspects.¹⁹ So the introduction of the counter-terrorism and non-proliferation clauses in the CPA II marks a continuous trend. However, the inclusion of the provisions in what may be regarded as a development cooperation agreement raises a number of issues that are now considered in depth.

III. COUNTER-TERRORISM CLAUSES

A. The Utility of Integrating Counter-Terrorism Clauses in the CPA II

Integrating counter-terrorism clauses in the CPA II may be useful. Nevertheless, the utility of the approach can be compromised as a result of the broad scope of the provisions. The indeterminate terms in which some of the clauses are couched potentially reduces the clarity and effectiveness of the obligations. That being said, arguments backing the utility of the new counter-terrorism clauses can be convincing.

Evidence of the utility of the clauses is established by the fact that more money is promised to ACP States to bolster their capacity in combating terrorism. In addition, the clauses on counter-terrorism are also useful given that they help to highlight the importance of defeating terrorists. This is more so because terrorist attacks often have devastating effects on the economies of the States that are targeted. Other countries that deal with such States also bear the brunt. What is more, by integrating the clauses in the CPA II, reluctant ACP countries are compelled to comply with international rules on

¹⁴ P Kerr, 'Iran, EU Struggle to Start Nuclear Talks', *Arms Control Today*, Oct 2006, 24.

¹⁵ Commission of the European Communities (CEC), Communication from the Commission: A New Partnership With South East Asia, COM(2003) 399, 13.

¹⁶ Council of the European Union, Council Decision on the signing, on behalf of the European Community, of the Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part, 6786/02, AL 1, 12 Apr 2002. See especially the Eighth recital to the preamble as well as Art 90.

¹⁷ Council of the European Union, Euro-Mediterranean Agreement Establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt of the Other Part, Luxembourg, 25 June 2001, Art 59.

¹⁸ The Barcelona Declaration, adopted at the Euro-Mediterranean Conference, 27–28 Nov 1995.

¹⁹ CEC, Communication from the Commission to the Council and the European Parliament, Wider Europe—Neighborhood: A New Framework for Relations with our Eastern and Southern Neighbors, Brussels, COM(2003)104 final, 11 Mar 2003, 12–13.

counter-terrorism. Simply put, a comprehensive approach to the broader challenges that face developing countries makes more sense.

Article 11(a) of the CPA II expresses a general commitment by the parties to combat terrorism. However, the Article does not reveal the method by which this commitment will be financially sustained. Most ACP countries are Least Developed Countries (LDCs). This entails that they exhibit the lowest social and development indicators of the Human Development Index.²⁰ The concerns that capture the consciousness of those living in such countries have more to do with the basic necessities of life. Discussions on counter-terrorism and other lofty strategic goals often sound remote. Although Article 11(a) does not make provision for additional money that is to be used in supporting the capacity of ACP countries in combating terrorism, the EU has been clear on the point that development money provided through the EDF is not to be used to fight terrorism. In one of its declarations appended to the CPA II, the Union reveals that financial and technical assistance in the area of cooperation in the fight against terrorism will be funded by resources other than those for the financing of ACP-EU development cooperation.²¹ The declaration is important because it promises more money for ACP countries to combat terrorism. While it is generally believed that the extra money is to be used genuinely to address the surge of terrorist activities in certain ACP countries, it is also contended that the option for more counter-terrorism funds may have the opposite and unintended effect of promoting rent-seeking by some ACP States.²²

The new counter-terrorism clauses reveal the fact that terrorism is an important international security threat that has to be dealt with by both the developed and developing countries. Amongst the key threats is the danger that States which possess or have the potential to possess nuclear weapons may become failed States vulnerable to terrorists. In the EU, the Madrid and London bombings of March 2004 and July 2005 highlighted the fact that terrorism is a serious threat to Europe.²³ This fact is established by the expediency with which European countries have implemented the EU Framework Decision on combating terrorism of 2002.²⁴ The fact is equally exposed by the Union in its European Security Strategy (the EUSS or the Strategy).²⁵ The Strategy

²⁰ There are 63 LDCs. Amongst the 63 LDCs 44 are ACP States. Of these, 38 are from Africa.

²¹ See Declaration XI: Community Declaration on Article 11(a) of the Cotonou Agreement, CPA II. See also, S Kingah, 'The Revised Cotonou Agreement between the European Community and the African, Caribbean and Pacific states: Innovations on security, political dialogue, transparency, money and social responsibility' (2006) *Journal of African Law* 59, 61.

²² N Gnesotto and G Grevi, *The New Global Puzzle: What Role for the EU in 2025?* (Institute for Security Studies, Paris, 2006) 135; S Ellis, 'Briefing: The Pan-Sahelian Initiative' (2004) 103 *African Affairs* 459, 462–3.

²³ B Hoffman, 'From the War on Terror to Global Counterinsurgency' *Current History* (Dec 2006) 426 (revealing that 70 per cent of all suicide terrorist incidents perpetrated between 1968 and 2004 occurred after 11 September 2001); P Neumann, 'Can terrorists be tamed?' *International Herald Tribune*, 11 Jan 2007, 6.

²⁴ Peers (n 9) 237.

²⁵ Council of the European Union (CEU), *European Security Strategy: A Secure Europe in a Better World* (12 Dec 2003) 3. It should be noted that the US National Security Strategy of 2002 includes terrorism as a major threat to international peace and stability: The White House, *The National Security Strategy of the United States of America* (Sept 2002) 5. In its major piece of legislation dealing with trade and development cooperation with African countries (The African Growth and Opportunity Act, AGOA), the US Government makes it clear that one of the conditions of eligibility is the commitment to fight terrorism: The One Hundred and Sixth Congress

states that '[t]errorism puts lives at risk: it imposes large costs; it seeks to undermine the openness and tolerance of our societies and it poses a growing strategic threat to the whole of Europe.'²⁶ Following the bombing in Madrid, the Council of the EU decided to adopt a number of measures to address the issue in Europe. The measures included the appointment of a counter-terrorism coordinator as well as the strengthening of the Situation Centre in the Council Secretariat.²⁷ Concrete realizations have been made within the EU, such as the control of funding to suspected terrorist groups.²⁸ These steps notwithstanding, the threat remains real and former MI5 chief, Eliza Manningham-Buller, has noted that the British secret service has been tracking more than 1600 members of suspected terrorist cells. In Germany, chief federal prosecutor, Monika Harms, has also warned of terrorist threats.²⁹ In Africa terrorists attacked US embassies in East Africa in 1998. In 2002 there was an attack in Mombassa. There have been concerns that terrorists are infiltrating the Horn³⁰ as well as the Sahel region.³¹ What is of greater concern though is the fact that instability in some African States may serve as the bait around which terrorists can regroup and plan their activities.³² Former UN Secretary General Kofi Annan intimated: 'Terrorists exploit weak states as havens where they can hide from arrest, and train or recruit personnel. Making all states more capable and responsible must therefore be the cornerstone of our global counter-terrorism effort.'³³

The greatest threat regarding terrorism is the possibility that States with established nuclear capability such as North Korea and Pakistan may become failed States, opening them to terrorist networks.³⁴ This threat is also linked to concerns over the potential that some uranium-rich African States can be structurally vulnerable

of the United States of America, at the Second Session (Monday, 24 Jan 2000) in the City of Washington, HR 434, s 104(a)(2)(3) (as amended and extended by President George Bush in 2004).

²⁶ European Security Strategy, 3.

²⁷ G de Vries (n 9) 4. On the recent challenges that have been faced by the EU's anti-terrorism coordinator (G de Vries), see H Mahony, 'EU anti-terror coordinator to step down', *euobserver.com*, 12 Feb 2007.

²⁸ Wright (n 9) 287.

²⁹ C Whitlock, 'Europe terror threat rises', *The Wall Street Journal*, 22–26 Dec 2006, 8.

³⁰ S Tisdall, 'Battle for hearts in Africa's bandit country', *Guardian Weekly*, 10–16 Mar 2006, 2; M Bryden, 'Can Somalia Salvage Itself', *Current History* (May 2006), 225–8, 226; A England, 'Somali crisis fans fears of regional conflict', *Financial Times*, 27 Oct 2006, p. 3; M Turner and A England, 'UN report names countries sending illicit arms to Somalia', *Financial Times*, 15 Nov 2006, 5; S Healy, 'Danger Zone', *World Today*, 30 Nov 2006, 11; M Turner and A England, 'US seeks forces for Somalia', *Financial Times*, 1 Dec 2006, 2; I Wallerstein, 'Ethiopia rides the tiger', *International Herald Tribune*, 24 Jan 2007, 8.

³¹ Ellis (n 22) 460.

³² See J Cilliers, 'Terrorism and Africa' (2003) 12 *African Security Review* 91, 99; R Falk, 'Regionalism and World Order: The Changing Global Setting', in F Söderbaum and T Shaw (eds), *Theories of New Regionalism* (Palgrave Macmillan, Basingstoke, 2003) 68; K Shillinger, 'After London: Reassessing Africa's Role in the War on Terror', American Enterprise Institute for Public Policy Research (September 2005) 5; 'What next?' *The Economist*, 20 Jan 2007, 46.

³³ K Annan, 'A Global Strategy for Fighting terrorism', Keynote address to the closing plenary of the International Summit on Democracy, Terrorism and Security, Madrid, 10 Mar 2005.

³⁴ M O'Hanlon, 'What if a Nuclear-Armed State Collapsed?' *Current History* (Nov 2006) 379, 383.

to terrorist networks. Such States include the Democratic Republic of Congo (the DRC), Niger and Somalia. So, the introduction of the counter-terrorism clauses in the CPA II makes sense to the extent that it strengthens the governance capacity of ACP countries.

Terrorist attacks often affect the economies of the countries that are attacked. Neighbouring countries and those that have business relations with the country attacked are also affected. In this regard, therefore, it is believed that terrorism has a direct impact on the well-being of citizens in countries afflicted by an attack.³⁵ In other words, terrorism has the potential to aggravate poverty. As such it makes sense to introduce counter-terrorism clauses in an agreement that mainly deals with poverty reduction and eradication.³⁶

Another positive aspect of integrating counter-terrorism clauses in the CPA II is the enhancement of compliance with international law. Article 11(a) of the CPA II spells out the importance of international norms in this regard. It is revealing that the majority of the parties to the CPA II have neither ratified nor signed certain important international conventions on counter-terrorism. For instance, only 11 EU-ACP countries have signed the International Convention for the Suppression of Terrorist Bombings of 15 December 1997.³⁷ In addition, nine of the signatories of the CPA II have endorsed the International Convention for the Suppression of the Financing of Terrorism adopted by the United Nations General Assembly on 9 December 1999.³⁸ At the regional level the picture is slightly encouraging for African countries. For example, of the 53 Member States of the African Union, 48 have signed the OAU Convention on the Prevention and Combating of Terrorism adopted in Algiers on 14 July 1999.³⁹ At the EU level, Member States adopted Council Regulation 2580 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism in 2001.⁴⁰ The framework decision on terrorism that was adopted in 2002 has the legal force of a Regulation.⁴¹ Although these supranational EU measures are not constitutive of international law per se, they make reference to the importance of adhering to international norms. It is believed that by introducing the clauses on counter-terrorism in the CPA II, the parties will be encouraged to sign and ratify the international conventions on counter-terrorism. The provision by the EU of more funds in this regard is a positive signal. However, the Union's Member States also need to sign up to the international conventions. The CPA II is a partnership agreement and obligations are to be applied equally on both sides. Indeed, equality is regarded by the parties as *the* fundamental principle of the partnership.⁴²

³⁵ Annan (n 33).

³⁶ The goal of poverty reduction is included in Art 1 of the CPA I.

³⁷ United Nations Treaties Series (UNTS) vol 2149, I-37517. On the EU side the signatories include Austria, Cyprus, Czech Republic, France, Slovakia, Spain, and the United Kingdom. The ACP States that have signed are Botswana, Guinea, Sudan, and Trinidad and Tobago. Only Botswana and Trinidad and Tobago have ratified the text.

³⁸ UNTS vol 2178, I-38349. France, Malta, the Netherlands, and the United Kingdom have signed (but not ratified) the convention. In the ACP camp Antigua and Barbuda, Botswana, Granada, Lesotho, Palau, St. Kitts, and Nevis have signed. Only Granada has ratified the treaty.

³⁹ OAU Convention on the Prevention and Combating of Terrorism, Algiers (14 July 1999).

⁴⁰ Council Regulation 2580/2001 [2001] OJ L 344/70.

⁴¹ Monar (n 9) 427.

⁴² Art 2 of the CPA I.

Finally, it can be argued that the integration of counter-terrorism clauses in the CPA II is sound because it reflects the comprehensive nature of the partnership. This in turn is suggestive of the fact that many challenges today are inter-linked and need to be addressed duly. The parties realize that the problems posed by terrorism cannot be resolved solely by security means. In their Summit meeting of June 2002, held in Seville, EU leaders declared that amongst the main features of their contribution to the international coalition against terrorism will be the provision of technical assistance to third countries. It is expected that assistance would be used as a fillip to bolster the capacity of developing countries to effectively address the threat of international terrorism. They also asserted their willingness to incorporate counter-terrorism provisions in EU treaties with third countries.⁴³ This explains why the Union has made the mainstreaming of counter-terrorism in its external relations one of the critical areas for cooperation in its counter-terrorism strategy.⁴⁴ That being said, it should be noted that the integration of the clauses in the development cooperation agreement is debatable.

B. Uncertainties Regarding the Introduction of Counter-Terrorism clauses in the CPA II

One may conclude from the preceding analysis that there are good reasons for the incorporation of counter-terrorism clauses in the CPA II. However, the advantages of integrating such provisions in a development cooperation agreement between developed countries and a motley of developing nations raises many questions. To begin, a number of important terms are imprecise. In addition, the strict, literal interpretation and application of the clauses may have undetermined effects that negate the goals desired by the parties. Moreover, the obligations as presented in the CPA II, as well as the appended declarations, appear to be one-sided. Furthermore, nothing is provided in terms of the consideration for victims. What is more, issues of jurisdiction are left to speculation and the presentation of the EU and the ACP States as two actors with coherent approaches on counter-terrorism appears over-stretched. Of greater importance is the fact that the CPA II needlessly over-emphasizes the terror threat in the ACP, a fortiori, Sub-Saharan African countries.

It is understandable that the CPA II is a treaty that espouses broad obligations. It would be unfair to criticize the drafters of the text for not being sufficiently specific as to the meaning of certain terms. Clarification of imprecise terms may be expected from Joint EU–ACP Council statements and decisions. Recourse may also be made to the canons of interpretation in international law as provided for in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969. However, it is believed that a clear definition of an important concept such as terrorism which is quintessential to the revised CPA could have been worthwhile. One option would have been to extrapolate

⁴³ See Wright (n 9) 295–6.

⁴⁴ De Vries (n 9) 3. On the need for this approach to be as consistent as it should be comprehensive, see K Arts, 'Political Dialogue in a "New" Framework', in O Babarinde and G Faber (eds), *The European Union and the Developing Countries* (Koninklijke Brill BV, Leiden, 2005) 155, 174. See also J-F Bayart, 'Commentary: Towards a New Start for Africa and Europe' (2004) 103 *African Affairs* 453, 453; J Harrison, 'Incentives for Development: The EC's Generalized System of Preferences, India's WTO challenge and reform' (2005) 42 *Common Market Law Review* 1663, 1666–8.

from the contextual and purposive definition of terrorist offences provided for under the EU Framework Decision on terrorism.⁴⁵ Article 1(1) of the Framework Decision stipulates, *inter alia*, that terrorist offences shall be deemed as ‘attacks upon a person’s life which may cause death’; ‘attacks upon the physical integrity of a person’; ‘kidnapping or hostage taking’ and ‘causing extensive destruction to a government or public facility’.⁴⁶ To be regarded as terrorist offences the acts must have been carried out with the goal of either intimidating a population; compelling a government or an international organization to perform an act in a specific way; or seriously destabilizing or destroying the fundamental, political, constitutional, economic, or social structures of a given country or international organization.⁴⁷ The description of terrorist offences in the Framework Decision is not perfect and may not pacify all and sundry.⁴⁸ However, its scope and degree of precision are commendable.⁴⁹ This is in stark contrast to the conspicuous absence of a definition of terrorism or the scope of terrorist activities under the CPA II. The absence of a definition of terrorism in the CPA II can be explained by the protean nature of the concept.

Uncertainties regarding the definition of terrorism are not novel. Many United Nations Conventions that are either directly or indirectly related to the fight against terrorism provide statements as to the types of actions required for the purposes of the specific convention or protocol.⁵⁰ However, none of the treaties or protocols provides an overarching or comprehensive definition of terrorism. For instance, under the

⁴⁵ [2002] OJ L 164/4.

⁴⁶ [2002] OJ L 164/4, Art 1(1)(a)–(d), respectively. The remaining sub-paragraphs relate, *inter alia*, to (e) seizure of aircraft, ships or other means of public transport; (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons; (g) release of dangerous substances, or causing fires, floods or explosions which have the effect of endangering human life; (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource which have the effects of endangering human life. Art 1(i) provides that the threat of committing any of the acts mentioned in Art 1(1)(a)–(h) will be regarded as terrorist offence. ⁴⁷ *ibid*.

⁴⁸ E Guild, ‘International Terrorism and EU Immigration, Asylum and Borders Policy: The Unexpected Victims of 11 September 2001’ (2003) 8 *European Foreign Affairs Review* 331, 339.

⁴⁹ Wouters and Naert (n 9) 927.

⁵⁰ The documents include Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 16 Dec 1970 UNTS 12325 (1973); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Montreal, 23 Sept 1971 UNTS vol 974, I-14118 (1975); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents adopted by the General Assembly of the United Nations, 14 December 1973 UNTS vol 1035, I-15410 (1977); International Convention Against the Taking of Hostages, adopted by the General Assembly of the United Nations, 17 Dec 1979 UNTS vol 1316, I-21931 (1983); Convention on the Physical Protection of Nuclear Material, Vienna, 3 March 1980 UNTS vol 1456, I-24631 (1987); 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, Montreal, 24 Feb 1988 UNTS vol. 1589, A-14118 (1990); Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Rome, 10 Mar 1988 UNTS vol 1678, I-29004 (1992); Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Rome, 10 Mar 1988 UNTS vol 1678, 29004 (1992); International Convention for the Suppression of Terrorist Bombings adopted by the General Assembly of the United Nations, 15 Dec 1997 <<http://untreaty.un.org/English/Terrorism/Conv11.pdf>>; International Convention for the Suppression of the Financing of Terrorism adopted by the General Assembly of the United Nations, 9 Dec 1999 <<http://untreaty.un.org/English/Terrorism/Conv12.pdf>>;

Convention for the Suppression for the Unlawful Seizure of Aircraft signed on 16 December 1970, qualification as to the composition of acts of terrorism for the purposes of the Convention is limited to the wording of Article 1 which provides that: 'Any person who on board an aircraft in flight (a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or (b) is an accomplice of a person who performs or attempts to perform any such act, commits an offence (hereinafter referred to as "the offence").'

The document further specifies that the Convention is not applicable to aircraft in military, customs or police services.⁵¹ The 1999 International Convention for the Suppression of the Financing of Terrorism⁵² provides a more detailed description of the acts that are constitutive of an offence under the Convention. Article 2(1) is to the effect that:

Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) [a]n act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex;⁵³ or (b) [a]ny other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict,⁵⁴ when the purpose of such act, by its nature or context, is to intimidate a population, or compel a government or an international organization to do or to abstain from doing any act.

From these two examples it may be deduced that the provisions are relatively limited in their scope of the actions or offence covered. While the 1970 Convention mainly deals with hostage takings on board an aircraft, the 1999 Treaty addresses mainly situations of armed conflict. In addition it also defers key definitions to other treaties in the annex of the document. However, as aforementioned, the treaties in the annex reveal little in terms of definitions of terrorism.

A number of non-treaty-related initiatives have been taken in a bid to specify the definition of terrorism. These include major United Nations Security Council Resolutions⁵⁵ and the report of December 2004 submitted by the High-Level Panel on Threats, Challenges and Change (HLP report).⁵⁶ Although the main Security Council Resolutions have not precisely spelt out what constitutes the act of terrorism, it is important to note that Resolution 1566 (2004) provides a clear indication of a broad and internationally agreed consensus on the meaning of terrorism. Sponsored by

International Convention for the Suppression of Acts of Nuclear Terrorism, 13 Apr 2005 <http://untreaty.un.org/English/Terrorism/English_18_15.pdf>.

⁵¹ UNTS 12325, Art 3(2), 108.

⁵² Above, n 50.

⁵³ See all but the last two documents cited, above n 50.

⁵⁴ Emphasis added.

⁵⁵ eg see United Nations Security Council (UNSC) Resolution 1269 (1999) 19 Oct 1999 S/RES/1269 (1999); UNSC Resolution 1368 (2001) 12 Sept 2001 S/RES/1368 (2001); UNSC Resolution 1373 (2001) 28 Sept 2001 S/RES/1373 (2001); UNSC Resolution 1566 (2004) 8 Oct 2004 S/RES/1566.

⁵⁶ Report of the Secretary General's High-Level Panel on Threats, Challenges and Change, *A More Secure World: One Shared Responsibility* (UN Department of Public Information, New York, 2004) (HLP Report).

Russia, following the bombings in Beslan, Ossetia, the resolution enjoyed wide support. It recalled that:

... criminal acts, including against civilians, committed with the intent to cause death or 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 person, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, and all other acts which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, *are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature*,⁵⁷ and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.⁵⁸

The emphasis on the point that terrorism cannot be justified regardless of the pretext and motive has been recurrent in other Security Council Resolutions.⁵⁹ The HLP report equally highlighted the preceding point when it noted that ‘... there is nothing in the fact of occupation that justifies the targeting and killing of civilians’.⁶⁰ The HLP considered the main difficulties associated with the definition of terrorism. It intimated that ‘[t]he first is the argument that any definition should include States’ use of armed forces against civilians.’⁶¹ It further contended that ‘[t]he second objection is that peoples under foreign occupation have a right to resistance and a definition of terrorism should not override this right.’⁶² In calling for a comprehensive convention on terrorism, the HLP went on to provide a signal as to the nature of the actions that would qualify as terrorist acts. These include:

... any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council Resolution 1566 (2004), that is intended to cause death, or serious bodily harm to civilians or non-combatants, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.⁶³

This definition approximately coincides with that of paragraph 3 of UNSC resolution 1566 (2004). Mindful that the CPA II was signed after these international initiatives, one would have expected that such endeavours geared at circumscribing the remit of terrorist actions would be reflected in the counter-terrorism clauses of the CPA II.

The second debatable issue regarding the introduction of counter-terrorism clauses under the CPA II relates to the undetermined effects that the approach may have in terms of civil liberties. One of the positive aspects of the EU Framework Decision is that it contains a safety valve. Article 1(2) is a clear caveat or symbol of caution to the entire body of norms contained in Article 1(1). It is to the effect that the implementation of the Framework Decision should not be effected in violation of fundamental rights and legal principles set in Article 6 of Treaty of the European Union. This is an important safeguard against law enforcement officials who may be poised to strictly implement the word of the Framework Decision in utter disregard of fundamental human rights such as the right to life and the right to be protected against torture. The recent debates surrounding the practice of rendition by the US Central Intelligence

⁵⁷ Emphasis added.

⁵⁸ UNSC Resolution 1566 (2004) para 3.

⁵⁹ For instance see UNSC Resolution 1269 (2001) para 1.

⁶⁰ HLP report (n 56) para 160.

⁶² *ibid.*

⁶¹ *ibid.*

⁶³ *ibid* para 164(d).

Agency (CIA) and the role of certain EU Member States as conduits or channels through which the CIA flights were conducted, highlights the importance of keeping the so-called 'global war on terror' within the law.⁶⁴

The CPA II does not make provision for the important safeguards against potential abuse of the counter-terrorism clauses by some of the authoritarian leaders in certain ACP States. In countries like Cameroon, Ethiopia, Nigeria, and Uganda amongst others, genuine political dissidents have recently been branded as terrorists.⁶⁵ Calls have been made for greater attention to be paid to 'state terrorism' used in Zimbabwe.⁶⁶ Neither the CPA II nor the EU Framework Decision correctly refers to state terrorism. This is because violations by States of the human rights of nationals and aliens are sufficiently addressed under international human rights rules and the rules on state responsibility.⁶⁷

As regards the EU, the campaign against terrorism has had inadvertent negative effects on the manner in which some security services address security concerns that are increasingly impacting on aliens.⁶⁸ There is an over-riding need to maintain the fine line between the necessities of safeguarding public security, on the one hand, and respecting civil liberties on the other.⁶⁹ Unfortunately, the parties to the CPA II fail to take bolder steps in this regard.

The CPA II provisions on counter-terrorism are predicated on the factually refutable presumption that the parties are equal. They are, de jure. De facto, however, they are not. As a major provider of development assistance to ACP States, the EU has the powers to determine the direction of its relations with ACP countries under the CPA framework. In its economic relations with other third and more influential international actors such as China, India and Pakistan, amongst others, the EU has lesser leverage than it does with ACP countries. EU Cooperation Agreements with countries such as Pakistan,⁷⁰ Jordan⁷¹ and Lebanon⁷² were all signed in the post-9/11 era but do not contain counter-terrorism clauses.⁷³ The reasons for omitting counter-terrorism

⁶⁴ Interview: G de Vries, 'Europe Today', *BBC World Service*, 16 Feb 2007.

⁶⁵ See Kingah (n 21) 62.

⁶⁶ Cilliers (n 32) 93.

⁶⁷ See Annan (n 33). For an Authoritative View on the Current State of International Rules on State Responsibility, see J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, Cambridge, 2002); Antonio Cassese, *International Law* (OUP, Oxford, 2005) 243–5.

⁶⁸ See Guild (n 48) 345. See also, R Abrahamsen, 'A Breeding Ground for Terrorists? Africa and Britain's "War on Terrorism" (2004) 102 *Review of African Political Economy* 677, 680; Bayart (n 44) 456–7; A Husarka, 'Trapped in the desert by a bad law', *International Herald Tribune*, 24 Jan 2007, 8.

⁶⁹ Peers, 'EU's responses to terrorism', 243; R Dworkin, 'Do not sacrifice principle to the new tyrannies', *Financial Times*, 9 Oct 2006, 13.

⁷⁰ CEC, Cooperation Agreement Between the European Community and the Islamic Republic of Pakistan on Partnership and Development, Islamabad (24 Nov 2001).

⁷¹ Euro-Mediterranean Agreement Establishing an Association between the European Communities and their Member States of the one part, and the Hashemite Kingdom of Jordan, of the other part [2002] OJ L 129/3.

⁷² Interim Agreement on Trade and Trade-Related Matters between the European Community, of the one part and the Republic of Lebanon of the other [2002] OJ L 262/2.

⁷³ cf Political Dialogue and Cooperation Agreement Between the European Community and its Member States of the one part, and the ANDEAN Community and its Member Countries of the other part (Dec 2003) Art 50.

clauses in agreements with countries that are more relevant in the 'global war on terrorism' (Pakistan, Jordan, Lebanon) and for introducing the clauses in the CPA II in its relations with countries whose relevance in the broader struggle against terrorism is debatable, is open to question.

Assuming that terrorism were regarded by the parties to the CPA II as a key threat, it is worrying that they do not make mention of the situation of victims who are either directly or remotely affected by terrorist attacks. Although the fate of victims is mainly confined to the eighth recital of the preamble to the EU Framework Decision on combating terrorism, this inclusion is preferable to the silence reflected in the CPA II on the matter. In contrast, the Protocol to the OAU Convention on the Prevention and Combating of Terrorism of 2004⁷⁴ has a special provision for victims. It is to the effect that they will be compensated from the confiscated assets and funds of terrorists. Although this poses a number of problems, such as uncertainty of compensation, it is preferable when compared to the muted approach adopted by the parties to the CPA II. The lot of victims needs to be considered more. This need is recognized by former UN Secretary General Kofi Annan when he asserts that 'we must pay more attention to the victims of terrorism, and make sure their voices can be heard'.⁷⁵ It should be noted that UNSC Resolution 1566 (2004) also made provision for the creation of an international fund to cater for the needs of victims and their families. Money for the fund would be partly sourced from voluntary contributions as well as from the confiscated assets of terrorists.⁷⁶

The CPA II makes no mention of jurisdictional issues. It is assumed that the provisions on counter-terrorism will be applied hitch-free. The approach adopted by Member States of the EU is different. Article 9 of the EU Framework Decision on combating terrorism is an explicit provision on jurisdiction and prosecution. Exercise of jurisdiction under the article is a function of the nationality of the offender, the location of the place where the offence is committed or a combination of both. In Article 9(2) EU Member States reveal their intention to cooperate on issues pertaining to jurisdiction. This is in sharp contrast to the broad and lofty affirmations of Article 11(a) of the CPA II that can hardly be acted upon and enforced.

The article on the need to combat terrorism in the CPA II refers to 'Parties'. This is legally sound. It is also politically correct. Reality could not be farther. ACP States are very diverse. The pervasive common feature that they tend to share is their predilection for the EU's money. The security and strategic challenges that they face vary in no small measure as a result of their cultural, demographic and natural endowments. For instance, Nigeria is the most populated African country and has about 67 million Muslims. There have been concerns that radical Islam may be gaining ground in certain parts of the country.⁷⁷ The adoption of Sharia'a law in some of the Northern States has strengthened this view. The challenges faced by countries of the Sahel as well as those in the Horn in terms of terrorism, cannot be easily compared to the relatively tranquil experiences of countries like Botswana, Namibia and Mauritius, amongst others.

⁷⁴ OAU Convention.

⁷⁵ Annan (n 33).

⁷⁶ UNSC Resolution 1566 (2004) para 10.

⁷⁷ PN Lyman and JS Morrison, 'The Terrorist Threat in Africa', *Foreign Affairs* (Jan/Feb 2004) 84.

Of greater importance is the fact that EU Member States also differ in terms of their approaches regarding the perception of terror threats and their reaction thereto. The debate surrounding collaboration between the US and some Member States of the EU in the CIA-led rendition flights has corroborated the fact that EU States perceive and react to threats in ways that are subtly different.⁷⁸ Reducing their positions in the CPA II by the use of the word 'Parties' is necessary but simplistic. The European Parliament's Committee on CIA Activities in Europe singled out countries like Austria, Italy, Poland, Portugal and the UK for criticism on their role in the CIA renditions flights.⁷⁹ What is more, in certain key areas, such as the sharing of information between EU Member States, cooperation is hardly an absolute proposition.⁸⁰

Finally, from a broad perspective, terrorism is not an over-riding or real issue for most countries of the ACP group, especially for many African countries.⁸¹ It is true that the EU Strategy for Africa refers to terrorism on eight separate occasions.⁸² That in itself is not a sufficient reason to include it in a development cooperation treaty text.⁸³ It can be argued that the problems posed by terrorist groups are more pervasive in certain North African countries including Algeria and Egypt than in Sub-Saharan Africa. For instance, in Algeria the Al-Qaeda Organization in the Islamic Maghreb formerly known as the Salafist Group for Preaching and Combat (GSPC) has been very active.⁸⁴ In Egypt, the activities of radical groups go back to the 1970s. Such groups included the Takfir Wa Al-Hijra, Al Jihad, Soldiers of God and Islamic Liberation Army, amongst others.⁸⁵ The Barcelona Declaration which underpins Euro-Mediterranean relations is clear on the need for counter-terrorism measures to be adopted by both sides.⁸⁶ In addition, anti-terrorism provisions are included in EU's cooperation agreements with Algeria and Egypt. It can be argued that Islamic proselytizing may generate concerns respecting the expansion of radicalism into Sub-Saharan Africa. Yet such fears are still to be borne out in strategic and overriding terms.

Based on the standard of a balance of probabilities, it can be concluded that the utility of the integration of counter-terrorism clauses in an agreement, the primary

⁷⁸ Monar (n 9) 430.

⁷⁹ R Goldirova, 'MEPs roast EU states and Solana for "lies" on CIA', *euobserver.com*, 23 Jan 2007. On tensions in terms of the adoption of decisions at the EU level and implementation at the national level, see Wouters and Naert, 'Of Arrest Warrants' 911. Cf, Mark Beunderman, 'EU ministers agree to share DNA and fingerprint data', *euobserver.com*, 15 Jan 2007.

⁸⁰ Wright (n 9) 288.

⁸¹ cf Shillinger (n 32) 4. Also note the link that has been made between Al-Qaeda leader, Osama Bin Laden, and the former Sudanese statesman, H Turabi in M Taylor and ME Elbushra, 'Hassan al-Turabi, Osama bin Laden, and Al Qaeda in Sudan' (2006) 18 *Terrorism and Political Violence* 449, 454, 455–60.

⁸² CEC, EU Strategy for Africa: Towards a Euro-Africa Pact to accelerate Africa's development, COM(2005)489 final, Brussels, 12 Oct 2005.

⁸³ For a similar contention, see GR Olsen, 'The Post-September 2001 Security Agenda: Have the European Union's Policies on Africa been Affected?' in G Bono (ed), *The Impact of 9/11 on European Foreign and Security Policy* (VUB Press, Brussels, 2006) 153, 174.

⁸⁴ Regarding the recent bombings for which the group claimed responsibility, see "Bomb attacks hit Algerian police," *BBC News*, 13 Feb 2007.

⁸⁵ F Aggad, 'Case study: Challenging terrorism in North Africa' <<http://www.accord.org.za>> 38, 41.

⁸⁶ The Barcelona Declaration, adopted at the Euro-Mediterranean Conference, 27–28 Nov 1995.

objective of which is poverty reduction, is debatable, at best. This need not necessarily be the case regarding the non-proliferation of WMD clauses incorporated into the CPA II.

IV. NON-PROLIFERATION OF WMD CLAUSES UNDER THE CPA II

A. Utility of Including Non-Proliferation of WMD Clauses in the CPA II

Article 11(b) of the CPA II on cooperation in countering the proliferation of weapons of mass destruction is more elaborate than the provisions relating to counter-terrorism. By virtue of Article 11(b) the parties express their desire to collaborate in addressing the problem which is deemed as 'one of the most serious threats to international stability and security'.⁸⁷ The signatories also enumerate the modalities towards the attainment of the goal of non-proliferation.⁸⁸ An outline is equally given of the procedure to be followed in the event of a breach of the obligations of Article 11(b).⁸⁹ The details included in the clauses on non-proliferation dwarf the laconic and superficial provisions on counter-terrorism. Arguments can be made in support of the inclusion of non-proliferation clauses in the CPA II.

At first glance it may appear outlandish that non-proliferation clauses are included in the CPA II, which is first and foremost a treaty aimed at poverty reduction. Nevertheless, there are positive aspects to the integration of the provisions. First, the ACP countries are promised more money in their non-proliferation efforts. Secondly, it is fair and reasonable to include non-proliferation clauses in a cooperation agreement like the CPA because WMDs constitute a real threat to the world. Thirdly, non-proliferation clauses have the potential to constrain maverick developing countries which have expensive and needless nuclear ambitions. They would be encouraged if not coerced to better use scarce funds for more productive, cheaper and sustainable programmes that respond to the needs of the poor. Fourthly, the clauses facilitate expedient compliance with an international legal security regime that matters for the stability of the world. Finally, the inclusion of sanctions for breach of the obligation on non-proliferation of WMDs can be interpreted as a means of encouraging the parties to focus on the main goal of the partnership, to wit, the development of ACP countries. These reasons will not be addressed in turn.

The last limb of Article 11(b)(2) of the CPA II is to the effect that '[f]inancial and technical assistance in the area of cooperation to counter the proliferation of weapons of mass destruction will be financed by specific instruments other than those intended for the financing of ACP-EC cooperation.' This clause is important because it indirectly guarantees extra money for countries that take positive actions to comply with the provision. It entails that resources to be used for the non-proliferation initiative will not be dependent on the amount of programmable and non-programmable funds within the framework of the EDF.⁹⁰ Tersely put, through Article 11(b)(2) the EU opens up the

⁸⁷ Art 11(b)(1) of the CPA II.

⁸⁸ Art 11(b)(2) of the CPA II.

⁸⁹ Art 11(b)(4)–(6) of the CPA II.

⁹⁰ Under the CPA I allocations regarding the financial resources provided for in the EDF are divided into programmable money known as 'envelop A' and non-programmable money termed 'envelop B.' While envelop A is used for long-term multi-annually funded projects (often for five years), envelop B is used for unforeseen contingencies that an ACP country or region may face.

option of additional money for ACP States that are actively and verifiably committed to non-proliferation. The approach reflects a broader strategy adopted by the Union to address the threats posed by WMDs.⁹¹

Whether one refers to radiological, chemical, biological, or nuclear weapons, the threats posed by WMDs have been recognized.⁹² In 2003 the High Representative for the EU's Common Foreign and Security Policy appointed a Personal Representative for Non-Proliferation. The job description of the holder of the post included the coordination of the positions of EU Member States and also the articulation and development of the EU's strategy in the area of non-proliferation.⁹³ In concrete terms the Union has adopted forward-looking measures in certain important nuclear States in a bid to address the problem of proliferation of WMDs.⁹⁴ For instance it earmarked €8.9 million for the period 1999–2000 for the destruction of the chemical weapons plant in Gorny in the Saratov region of Russia.⁹⁵

Of greater concern is the possibility that WMDs can be obtained and used by terrorists.⁹⁶ The fear that terrorists may be able to use WMDs in the future is expressed in the European Security Strategy of 2003.⁹⁷ Top officials in the world of intelligence have voiced concerns over terrorists obtaining and using WMDs.⁹⁸ So, fears regarding the threats posed by WMDs as well as the challenge that terrorists could use them are some of the factors that account for the integration of the WMD clauses in the CPA II. Issues respecting the use of failed and collapsed States (with proven WMD potential)

At the moment of writing the parties are completing the programming schedules as well as Country and Regional Strategy papers for the 10th EDF. The strategy papers outline the manner in which the money that is allocated to the country or region will be spent for a period of five years. During and at the end of the five year period mid-term and end-of-term reviews are conducted. On implementation and management procedures, see Annex IV, Chs 1 and 2 of the CPA I.

⁹¹ See EU Factsheet, *EU Strategy Against the Proliferation of Weapons of Mass Destruction*, published by the European Union on the occasion of EU–US Summit, Drommoland Castle, Ireland, 26 June 2004 (EU Factsheet) 1.

⁹² Report of the Secretary General's High Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (United Nations, NY, 2004) 39–46.

⁹³ EU Factsheet (n 91).

⁹⁴ For a policy-based description of EU's position on WMDs, see Darryl Howlett and John Simpson, 'Nuclear non-proliferation—How to Ensure an Effective Compliance Mechanism', in B Schmitt (ed), *Effective Non-proliferation: The European Union and the NPT Review Conference*, 77 Chaillot Paper (ISS, Paris, 2005) 9–26.

⁹⁵ Council of the European Union, Council Joint Action establishing a European Union Cooperation Program for Non-Proliferation and Disarmament in the Russian Federation [1999] OJ L 331/11 (1999/878/CFSP), 17 Dec 1999, Arts 2(1)(a) and 4(1).

⁹⁶ G Allison, 'The Ongoing Failure of Imagination', *Bulletin of the Atomic Scientist* (Sept/Oct 2006) 36, 36; MB Maerly, A Schaper and F Barnaby, 'Characteristics of Nuclear Terrorist Weapons' 46 *American Behavioral Scientist* (Feb 2003) 727, 728; Z Yunhua, 'Preventing Nuclear Terrorism: A View from China', 13 *Nonproliferation Review* (July 2006) 253, 253–4. Cf WW Arkin, 'The Continuing Misuses of Fear', *Bulletin of the Atomic Scientist* (Sept/Oct 2006) 42, 43; M Schroeder and R Stohl, 'Small Arms, Large Problem: The International Threat of Small Arms Proliferation and Misuse', *Arms Control Today* (June 2006) 23 (arguing that the world needs to pay greater attention to the dangers posed by small arms given that about 50 per cent of documented terrorist attacks in 2003 were carried out by small arms).

⁹⁷ The EUSS, 'A Secure Europe', 3. See also, De Vries (n 9) 6.

⁹⁸ Former US Director of National Intelligence (John Negroponte) has noted that 'intelligence reporting indicates that nearly 40 terrorists organizations, insurgencies, or cults have used, possessed, or expressed an interest in chemical, biological, radiological, or nuclear agents or weapons'; cf Arkin (n 96) 43.

as safe havens for terrorists justify a relatively innocuous preventative measure of integrating the non-proliferation of WMD clauses into the CPA II. In this regard the inclusion of the clauses into the CPA II makes sense.

As noted earlier the majority of ACP States are LDCs, meaning that the countries have a low Human Development Index. Under the Yaoundé and Lomé Conventions that preceded the CPA I, ACP countries benefited from preferences and price stabilization schemes for export products. The key element at the time was non-reciprocity.⁹⁹ Under the CPA these trade benefits have been partly forfeited. The EU is now engaged in negotiations for more liberalized trade agreements or economic partnership agreements (EPAs) with six ACP regional blocks.¹⁰⁰ The main lesson from the negotiation process of the new agreements is that ACP States would need to work harder in diversifying their economies away from high-volume/low-value products towards better marketable high-value/low-volume manufactured goods. They also need to focus on development niche areas in services. Entertaining white elephant projects such as the development of nuclear reactors cannot be considered an over-riding priority for ACP States. The inclusion of the non-proliferation clauses will encourage if not compel ACP States to focus more on core issues and sideline lofty nuclear ambitions such as those that were once entertained by President Mobutu of former Zaire.¹⁰¹

One other positive element in the introduction of the non-proliferation clauses in the CPA II is that it has the potential effect of enhancing the compliance by ACP States with international rules in the area. To illustrate, only 36 ACP States are signatories to the International Treaty for the Non-Proliferation of Nuclear Weapons (the NPT) of 1 July 1968.¹⁰² The picture is more encouraging at the level of the African Union. Amongst the 53 AU States, 51 have signed the African Nuclear-Weapons-Free Zone Treaty (Treaty of Pelindaba) adopted in July 1995. Of this number 21 countries have ratified the text. It is believed that by incorporating the non-proliferation clauses into the CPA II ACP (and especially African) countries will attach greater importance to the international regime that regulates WMD proliferation.

A more salient and positive aspect of the integration of the clauses relates specifically to the incorporation of sanctions for breach of the provisions. By introducing the option of sanctions in the event of a breach of the non-proliferation of WMD clauses, the CPA II correctly allows the parties to focus more on the broader and quintessential goal of the partnership which is that of fostering development in the ACP countries.¹⁰³ It is arguable that the terms of the new provisions that sanction illicit actions allow the partners ample latitude to adhere to the spirit of Article 3 of the CPA I which is to the effect that: 'The Parties shall, each as far as it is concerned in the framework of this Agreement, take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising from this Agreement and to facilitate the attainment of the objectives thereof. *They shall refrain from any measures liable to jeopardize these objectives.*'¹⁰⁴

⁹⁹ MG Desta, 'EC-ACP Economic Partnership Agreements and WTO Compatibility: An Experiment in North-South Inter-Regional Agreements' (2006) 43 *Common Market Law Review* 1343, 1344.

¹⁰⁰ Arts 36-8 of the CPA I.

¹⁰¹ 'Are there nuclear materials missing in the Congo?' *Foreign Policy Association*, 27 Feb 2005.

¹⁰² UNTS (1970) 169.

¹⁰³ Art 1 on the objectives of the CPA I states that one of the main goals of the agreement is to 'promote and expedite the economic, cultural and social development of the ACP States . . . '.

¹⁰⁴ Emphasis added.

The pursuit of WMDs is not consistent with the attainment of the goals of the CPA. So the reiteration of the need for the partners to refrain from such acts serves as a fillip in assisting the signatories focus on the key aspects of the partnership. Notwithstanding the cogency of these arguments, the incorporation of the non-proliferation of WMD clauses also raises a number of questions.

B. Uncertainties Respecting the Integration of Non-Proliferation of WMD Clauses in the CPA II

Regardless of the fact that the arguments for the integration of the clauses on WMDs in the CPA II may be convincing, there are also contentious issues raised respecting the incorporation of the clauses. They relate to imprecise definitions, undetermined economic costs and the questionable significance of non-proliferation as an overriding issue for ACP states.

To begin, a casual reader of Article 11(b) can be left with the impression that the drafters of the text assume that what 'weapons of mass destruction' constitute is a given. Such weapons may be biological, chemical, nuclear or radiological. Attention is often paid to nuclear weapons but they only constitute a fraction of the problem posed by WMDs. What is more, in leaving the term as general as it appears in the article readers are not directed as to the degree or nature of the intensity of the negative effects that a particular component has to meet for purposes of the article. However, in fairness to the drafters, leaving the term as open as it is makes room for a broader interpretation. In other words, as it reads, the term 'weapons of mass destruction' under the CPA II is broad enough to incorporate innocuous materials that might be judged lethal in future.

Another imprecise term used is 'appropriate measures'.¹⁰⁵ These have to be considered in the event of a breach of the non-proliferation obligation. In line with the canons of interpretation in international law as contained in the Vienna Convention on the Law of Treaties (VCLT), within the context of the CPA I 'appropriate measures' may refer to the use of the consultation procedure under Article 96 of the CPA I. A broader rendition of the term will signify measures 'acceptable' or 'taken in accordance' with international law. The latter option is the approach used in the EU's agreements with Pakistan and Russia.¹⁰⁶ However, it would have been preferable for the drafters to be clearer on the meaning of the term for purposes of legal clarity and certainty.

Secondly, Article 11(b)(2) is to the effect that the parties will cooperate in reaching the set goal of non-proliferation by, amongst others, establishing '... an effective system of national export controls, controlling the export as well as transit of weapons of mass destruction related goods, including a weapons of mass destruction end-use control on dual use technologies ...'.

The provision may appear to be anodyne. It is not. It clearly stipulates that the control of WMD-related goods will be an important aspect in the effort to combat WMD proliferation. African states like the Democratic Republic of Congo, Namibia, Niger and Somalia have the potential to produce certain WMD (nuclear) related

¹⁰⁵ Art 11(b)(6) of the CPA II.

¹⁰⁶ CEC, Cooperation Agreement Between the European Community and the Islamic Republic of Pakistan on Partnership and Development, Islamabad, 24 Nov 2001, Annex I (b); EC–Russia Partnership and Cooperation Agreement [1997] OJ L 327/3, Joint Declaration on Art 107(2).

components including uranium.¹⁰⁷ The economic effects that increased controls on exported products from these countries will have remain an open issue.

Finally, it was noted above that some ACP (a fortiori, African) countries are naturally endowed with certain elements that are used in the production of nuclear weapons. This does not mean that ACP countries have the wherewithal to venture into any WMD-related arms race (especially the nuclear arms race). Most of the States are hamstrung technically and financially. So, the introduction of non-proliferation clauses into the CPA II is, to say the least, redundant. It would rather be preferable to integrate such clauses into EU agreements with countries such as India¹⁰⁸ and Pakistan¹⁰⁹ that have verifiable WMD-related (nuclear) arms. It is equally advisable that resources be used to actively pursue and prosecute individuals whose activities have threatened the viability of the international non-proliferation regime.¹¹⁰ Having said that, these reasons do not necessarily undermine the salience of adopting prophylactic measures that aim at prohibiting or restricting the manner in which countries deal with WMDs.

V. CONCLUSIONS

From the analysis above a number of conclusions can be drawn. Legally speaking, more clarity in describing certain important terms such as 'terrorism' (or terrorist acts) and 'acceptable measures' (in terms of a breach of the non-proliferation clauses) will facilitate a better understanding of the desires and concerns of the parties. It will also ease implementation, the salience of which deserves a word.

The CPA was signed in 2005. It is still to be ratified by all the Member States of the EU as well as two-thirds of ACP States. In spite of this one might have expected that the clauses respecting the fight against terrorism would have been referred to in EU or ACP statements regarding recent events of hostage-takings in the Delta region in Nigeria, the situation in Somalia or in the Western Sudanese region of Darfur. The under-utilization of the clauses by the ACP and the EU may indicate either the absence of awareness of the implications of the provisions or the uncertainties underlying the important terms used in the CPA II such as 'terrorist acts.' Regardless of the correct reason for the 'dereliction' of the provisions by the parties it is probable that the articles on counter terrorism in the CPA II will remain cosmetic in the foreseeable future.

On a more positive note it can be asserted that the introduction of non-proliferation clauses will enhance compliance with the international rules dealing with the issue. From a broader policy standpoint, one may submit that the arguments on the utility of the counter-terrorism clauses are substantively inferior to those against the integration of the clauses into the CPA II. So, the inclusion of Article 11(a) in the CPA II is debatable. That said, the incorporation of non-proliferation of WMD clauses into the agreement makes sense. This is established by the fact that the arguments presented above regarding the utility of their integration into the CPA II over-ride those against.

¹⁰⁷ See Kingah (n 21) 62.

¹⁰⁸ Cooperation Agreement between the European Community and the Republic of India on Partnership and Development, OJ L223/24, 27 Aug 1994.

¹⁰⁹ CEC, Cooperation Agreement Between the European Community and the Islamic Republic of Pakistan on Partnership and Development, Islamabad, 24 Nov 2001.

¹¹⁰ K Butler, S Salama, and LS Spector, 'Where is the Justice?' Bulletin of the Atomic Scientists (Nov/Dec 2006) 25, 26.

Table outlining arguments for and against the inclusion of counter-terrorism and non-proliferation of WMD clauses in the CPA II

	Counter-terrorism clauses Article 11(a), the CPA II	Non-proliferation of WMD clauses Article 11(b), the CPA II
<i>Utility</i>	<ul style="list-style-type: none"> (a) More money promised; (b) important threats addressed; (c) terrorism compounds poverty; (d) enhancement of compliance with international law; (e) reflects a comprehensive, hence sensible approach to development. 	<ul style="list-style-type: none"> (a) More money promised; (b) dangers of terrorist WMD attack warrants inclusion; (c) ACP countries have more important priorities to address and not dabble with WMDs; (d) enhancement of compliance with international law.
<i>Futility</i>	<ul style="list-style-type: none"> (a) Imprecise terms used; (b) undetermined effects on civil liberties; (c) obligations are one-sided; (d) no express provisions for victims; (e) absence of a clear jurisdictional clause; (f) approaches to terrorism by the Parties are jointly and severally divergent; (g) terrorism is not a real issue for ACP States. 	<ul style="list-style-type: none"> (a) Imprecise terms used; (b) undetermined economic effects; (c) not a real issue for ACP States.

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