

# TAKING HUMAN RIGHTS HIGHER IN THE FIGHT AGAINST TERRORISM IN SOUTH AFRICA

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## INTRODUCTION

In 2004, the South African Parliament enacted the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 (“Terrorist Act”) and joined the international community in the fight against international terrorism.<sup>1</sup> Prior to 2004, according to the then Minister of Safety and Security Steve Tshwete, South African law did not recognize international terrorism as a unique crime, despite the country’s promise and commitment to cooperate with other countries in the War on Terror.<sup>2</sup> However, following the 1998 United States Embassy bombings in Kenya and Tanzania and the bombing of the twin towers in New York City in 2001, the status quo was about to change. For instance, in 2001 the Minister eloquently described the problem with the status quo when he said, “we have offered our support to the Americans in the global fight against terrorism and the fact that we do not yet have an anti-terrorism law has put us under pressure.”<sup>3</sup> The Minister also argued in favour of what is now the

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1. Other countries like Canada, United States and Great Britain have passed similar within the last decade. *See, e.g.*, Anti-Terrorism Act, S.C. 2001, c. 41 (Dec. 18, 2001) (Can.); U.S.A. Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (U.S.) (Oct. 26, 2001); Anti-Terrorism, Crime and Security Act 2001, c. 24 (U.K.).

2. Ranjeni Munusamy, *SA Puts Anti-Terror Law Back on the Agenda*, SUNDAY TIMES, Sept. 23, 2001. Previously, South Africa had terrorism laws passed by the apartheid government that were repealed in 1992. *See* Terrorism Act 83 of 1967 (S. Afr.); Internal Security and Intimidation Amendment Act 138 of 1991 (S. Afr.); Internal Security Act 74 of 1982 § 54 (S. Afr.), *repealed by* Safety Matters Rationalisation Act 90 of 1996 (S. Afr.).

3. *Id.*

Terrorist Act for South Africa when he observed that the “lack of [legislation] made South Africa a ‘safe haven’ for international terrorists and fugitives.”<sup>4</sup> The Minister was correct about this observation; in fact, one example of the problems that emerged following the United States embassy bombing in Tanzania is the case of *Mohamed v. President of the RSA*,<sup>5</sup> which involved an international terrorist fugitive in South Africa.

In this highly publicised international case,<sup>6</sup> Mr. Khalfan Khamis Mohamed successfully challenged the decision of the South African government to arrest and deport him from South Africa to the United States. He argued that his arrest, detention, and deportation was in breach of the provisions of the Aliens Control Act 96 of 1991 (“Act”) and the regulations published under it. In addition, he advanced a constitutional argument that his right to life; to human dignity; and not to be subjected to cruel, inhuman or degrading punishment under the South African Constitution (“Constitution”) had been infringed. In a unanimous decision, the South African Constitutional Court (“Court”) held that the deportation of Mr. Mohamed to the United States without securing an assurance that he would not be subjected to the death penalty was a violation of his constitutional and statutory rights.

In this Article, I intend to do two things. The first is to demonstrate that *Mohamed* is the starting point of any discussion about South Africa’s involvement in the global War on Terror because it illustrates the weak legal framework that existed prior to the adoption of the Terrorist Act. The second is to demonstrate that in the subsequent years following *Mohamed*, South Africa adopted a broad piece of anti-terrorism legislation, which has made South Africa a good partner for the United States in the War on Terror. The Article argues that the judgment in *Mohamed*, which is progressive and should be welcomed, follows a line of cases recognising the importance of the right to life and human dignity under the Constitution.<sup>7</sup> The article

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4. Barbara Slaughter, *South Africa: ANC government Pushes Through Draconian Anti-terrorism Legislation*, WORLD SOCIALIST WEB SITE, Nov. 9, 2001, <http://www.wsws.org/articles/2001/nov2001/sa-n09.shtml> (last visited June 14, 2010).

5. 2001 (7) BCLR 685, 2001 (3) SA 893 (CC).

6. See Benjamin Weiser, *U.S. to Seek Death Penalty for 2nd Defendant in Blasts*, N.Y. TIMES, June 14, 2000, at B3, available at [http://www.uniset.ca/other/news/nyt\\_deathpenalty2ddefendant.html](http://www.uniset.ca/other/news/nyt_deathpenalty2ddefendant.html) (reporting that Attorney General authorized prosecutors to seek the death penalty against Mr. Mohamed); Estelle Ellis, *Tanzanian Man’s Death Penalty Fight Fails*, IOL, (Apr. 20, 2001, 14:23:02), available at [http://www.iol.co.za/index.php?art\\_id=qw987769382274A621](http://www.iol.co.za/index.php?art_id=qw987769382274A621); Benjamin Weiser, *U.S. Judge Sees Stonewalling On Tapes in Terrorism Case*, N.Y. TIMES, Feb. 18, 2005, at B3, available at <http://www.nytimes.com/2005/02/18/nyregion/18tapes.html? r=1>, (last visited Feb. 4, 2010); *SA Court to Rule on Fate of Embassy Bomber Suspect*, NEWS 24 (Mar. 26, 2001), <http://www.news24.com/xArchive/Archive/SA-court-to-rule-on-fate-of-embassy-bomber-suspect-20010326> (last visited Feb. 4, 2010).

7. *State v. Makwanyane*, 1995 (36) SA 391 BCLR 665 (CC) (S.Afr.) (recognizing that the right to life is the most important of all human rights together with the right to dignity); *Soobramoney v. Minister of Health (KwaZulu Natal)* 1997 (12) BCLR 1696, 1998

further argues that while the constitutionality of the Terrorist Act has not been tested by the courts, *Mohamed* provides a definitive statement of South African law about the lawful treatment of terror suspects and will likely influence future interpretation of the Terrorist Act.

The Article is divided into three main sections. Section I examines the *Mohamed* case. It discusses the background and issues of the case with a view to demonstrate the weak status of South African law and its ability to prosecute international terror suspects. Section II discusses the impact of *Mohamed* on the capital case against Mr. Mohamed in the Federal District Court for the Southern District of New York (“Federal Court”), and welcomes the outcome of the Federal Court decision. Section III discusses the impact and effect of *Mohamed* on the enactment of the Terrorist Act. This section briefly discusses specific provisions of the Terrorist Act that I believe were motivated by the challenges experienced in the case against Mr. Mohamed. I argue that under current legislation, which is considerably broad, South Africa is better prepared to play an important role in the War on Terror.

## I. EXAMINING THE *MOHAMED* CASE

### A. The Background of the Case

*Mohamed* was an urgent appeal against a judgement in the Cape of Good Hope High Court (“High Court”).<sup>8</sup> The High Court dismissed Mr. Mohamed’s application to declare his arrest and deportation from South Africa to the United States as unlawful and unconstitutional. It also dismissed his application to direct the South African government to submit a written request, through diplomatic channels, to the United States government that the death penalty should not be sought in the event of a guilty verdict in charges against him in the matter of *United States v. Osama Bin Laden*.<sup>9</sup> The facts which led to the appeal are the following: in 1998, Mr. Mohamed was indicted by a federal grand jury in New York on a total of 267 counts arising

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(1) SA 765 (CC) at para. 55 (S.Afr.) (recognizing the sanctity of life). See also *United States v. Bin Laden*, 156 F.Supp.2d 359, 370 (S.D.N.Y. 2001) (noting that one of the defendants Mahmud Salim was extradited from Germany with an undertaking that if convicted he would not face the death penalty); *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. H.R. Rep. 439 (1989).

8. *Mohamed*, 2001 (3) SA 893 (holding that the State had the right to deport Mr. Mohamed to the United States without first assuring that the death penalty would not be imposed). Pursuant to the Renaming of High Courts Act 30, 2008, the Cape of Good Hope High Court was renamed as the Western Cape High Court with effect from 1 March 2009.

9. *Bin Laden*, 156 F.Supp.2d at 370. See also *United States v. Bin Laden*, 92 F.Supp.2d 225, 227 (S.D.N.Y. 2000); *United States v. Bin Laden*, 58 F.Supp.2d 113, 115 (S.D.N.Y. 1999); *United States v. Bin Laden*, 132 F.Supp.2d 168 (S.D.N.Y. 2001); *United States v. Bin Laden*, 109 F.Supp.2d 211, 213 (S.D.N.Y. 2000).

out of the bombing of the United States Embassy in Tanzania.<sup>10</sup> For this indictment, a warrant of arrest was issued by the Federal Court.<sup>11</sup> On October 5, 1999 the United States Federal Bureau of Investigation ("FBI"), together with South African authorities, arrested Mr. Mohamed at the immigration office in Cape Town.<sup>12</sup> According to South African authorities, Mr. Mohamed was advised of his right to counsel following his arrest.<sup>13</sup> This was disputed by Mr. Mohamed during trial.<sup>14</sup> He was then taken to a holding facility at the Cape Town International Airport, where he was detained and questioned by both South African and FBI authorities.<sup>15</sup>

Commenting on what transpired at the holding facility, the Court noted with disapproval that the affidavit submitted by Mr. Christo Terblanche, the Chief Immigration Officer from the Department of Home Affairs, did not indicate any warning as to the constitutional protection against self incrimination or the right to remain silent being given to Mr. Mohamed.<sup>16</sup> Equally concerning to the Court, there was no mention of the right to legal representation, nor that any such rights were waived by Mr. Mohamed.<sup>17</sup> The Court further noted with concern that the affidavit was also silent as to whether or not Mr. Mohamed had been given a choice as to whether he should be removed from South Africa to Tanzania or the United States, and that he had expressed a clear and reasoned preference for the United States.<sup>18</sup> Following the questioning, Mr. Mohamed was taken into custody by the FBI and flown to the United States where he appeared in the Federal Court to answer the charges mentioned above.<sup>19</sup>

#### B. The Issues Before the Court in *Mohamed*

According to the Court, there were two questions for determination. The first question was whether the deportation of Mr. Mohamed was lawful under the Act. The Court noted that the State's power to deport prohibited persons is derived from Sections 44 through 51 of the Act.<sup>20</sup> It was further noted that none of these provisions empowers the State to determine the destination of a deported person.<sup>21</sup> The only power granted to the State to

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10. 156 F.Supp.2d at 370.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *See* S. AFR. CONST. 1996 § 35 (detailing the rights of arrested, detained, and accused persons).

17. *Mohamed*, 2001 (3) SA 893 at para. 18.

18. *Id.* at para. 18.

19. *Id.*

20. *Id.* at para. 33.

21. *Id.*

determine the destination of a deported individual is contained in Regulation 23 of the Act. The relevant section of Regulation 23 reads as follows:

Any person to be removed from the Republic under the Act, shall –

(a) if he or she is the holder of a passport issued by any other country or territory, be removed to that country or territory; or

(b) if he or she is not the holder of such a passport –

(i) be removed to the country or territory of which he or she is a citizen or national; or

(ii) and if he or she is stateless, be removed to the country or territory where he or she has a right of domicile.<sup>22</sup>

According to the Court's interpretation of the above provision, the power to deport and determine the destination is limited to the places mentioned in paragraphs (a) and (b).<sup>23</sup> According to this interpretation, the United States was not a destination permitted by Regulation 23, and thus South African authorities were not empowered to deport Mr. Mohamed to the United States, but presumably to Tanzania where he holds citizenship.<sup>24</sup>

The second question before the Court was whether the removal of Mr. Mohamed was permissible under the Constitution.<sup>25</sup> Mr. Mohamed contended that the Constitution in Section 7 obligates the South African government to promote the right to life; dignity; and not to be treated or punished in a cruel, inhuman, or degrading way.<sup>26</sup> He further argued that such obligation required that if he was to be removed to the United States, where he would likely face the death penalty, the government should secure an undertaking from the United States that the death penalty would not be imposed on him before permitting his removal. It is important to note that the basis for this argument was the Court's landmark ruling in *Makwanyane* that capital punishment is inconsistent with the values and provisions of the Constitution.<sup>27</sup> In addressing the above question, the Court reasoned that an obligation on the South African government to secure an assurance that the death penalty will not be imposed on a person whom it causes to be removed from South Africa to another country cannot depend (as suggested by the government) on whether the removal is by extradition or deporta-

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22. *Id.* at para. 34.

23. *Mohamed*, 2001 (3) SA 893 at para. 35.

24. *Id.* at para. 68.

25. *Id.* at para. 4.

26. S. AFR. CONST. 1996 § 7(2) (providing that “[t]he State must respect, protect, promote and fulfill the rights in the Bill of Rights.”).

27. 1995 (3) SA 391.

tion.<sup>28</sup> Instead, the Court reasoned that the obligation depends on the provisions of the Constitution and not the Act.<sup>29</sup>

The Court's conclusion on this question should be welcomed because it is consistent with the constitutional obligation of the courts. In Sections 39(1)(a) and (b), the Constitution provides "that when interpreting the Bill of Rights, a court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom and must consider international law."<sup>30</sup> Some of the values that underlie an open and democratic society are the rights to life and human dignity, which, as the Court ruled in *Makwanyane* and *Soobramoney v. Min of Health, KwaZulu-Natal*,<sup>31</sup> are some of the most important rights in the Bill of Rights.<sup>32</sup> Additionally, South Africa is a party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture"), which it ratified in December 1998.<sup>33</sup> Article 3(1) of the Convention Against Torture states that "no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."<sup>34</sup> Therefore, it would have been inconsistent with Section 39(1)(a) and international law if the Court had ruled otherwise on whether or not the South African government had an obligation to secure an undertaking that the death penalty would not be imposed on Mr. Mohamed.

Furthermore, the Court's decision should be welcomed because it follows a line of other progressive decisions from Canada and Europe that have abolished the death penalty. For example, one of the landmark cases relied on by the Court in support of its decision was *Minister of Justice v. Burns*.<sup>35</sup> In this case, the Supreme Court of Canada unanimously held that there is an obligation on the Canadian government, before extraditing a suspect, to seek an assurance from the receiving State that the death penalty will not be imposed. According to the Supreme Court, such obligation arises out of

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28. See JOHN DUGARD, *INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE* 130–41 (Kenwyn ed., Juta & Co. 1994), for a discussion on the difference between extradition and deportation. Max Du Plessis, *Removals, Terrorism and Human Rights—Reflections on Rashid*, 25 SAJHR 353, 360–62 (2009); McMullen v. I.N.S., 788 F.2d 591, 596 (9th Cir. 1986); Halm v. Canada (Minister of Employment & Immigration), [1996] 1 F.C. 547104 F.T.R. 81 (Can. Ont. T.D.).

29. 2001 (3) SA 893 at para. 43.

30. S. AFR. CONST. 1996 § 39(1)(a)–(b).

31. 1998 (1) SA 765.

32. See also *Kaunda v. President of the RSA*, 2005 (4) SA 235 (CC) (S. Afr.) (discussing the importance of the right to life and human dignity in the South African Constitution).

33. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. TREATY DOC. No. 100–20, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

34. *Id.* art. 3.

35. 2001 SCC 17, [2001] 1 S.C.R. 283, para. 143 (Can.).

Section 7 of the Canadian Charter of Rights and Freedoms, which provides that “everyone has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the provision of fundamental justice.”<sup>36</sup> However, unlike under Canadian law, where the deprivation of the right to life and human dignity is qualified by other fundamental principles, the Court emphasized that South African constitutional law sets different standards for protecting the right to life; human dignity; and the right not to be treated in a cruel, inhuman, or degrading way; and noted that there are no exceptions to the protections of these rights under South African constitutional law. The Court added that while the rights in the Constitution are subject to limitation in terms of Section 36, the *Makwanyane* Court unanimously held that capital punishment was not justifiable under the Constitution.

Furthermore, the Court relied on a number of European cases decided by the European Court of Human Rights, including *Soering v. United Kingdom*,<sup>37</sup> for the proposition that it is contrary to Article 3 of the European Convention on Human and Fundamental Rights (“European Convention”), which protects against torture or to inhuman or degrading treatment or punishment, for a State party to surrender a fugitive to another State where there were substantial grounds for believing that such fugitive would be subjected to torture or inhuman and degrading treatment or punishment.<sup>38</sup> As a result, the Court was satisfied that European cases are consistent with the weight that the “Constitution gives to the spirit, purport, and objects of the Bill of Rights.”<sup>39</sup> In addition, the Court observed that European cases draw no distinction between deportation and extradition in the application of Article 3 of the European Convention. It also found that such distinction did not exist under the Convention Against Torture. In the final analysis, the Court held that it was contrary to the underlying values of the Constitution and inconsistent with the obligation to protect the right to life of everyone for the South African government to cooperate with the United States government to secure the removal of Mr. Mohamed from South Africa to the United States.

In light of the above discussion, it should be clear that *Mohamed* is the starting point of the discussion about international terrorism in post-apartheid South Africa because it was the first international terrorism case that exposed the inadequacy under South African law to prosecute international terrorism cases at the time. Additionally, *Mohamed* is important be-

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36. *Mohamed*, at 702 paras. 46-48, citing *Minister of Justice v. Burns*, 2001 SCC 17.

37. 11 Eur. H.R. Rep. 439.

38. See *Hilal v. United Kingdom*, App. No. 45276/99, 33 Eur. H.R. Rep. 31 (2001) (holding that it was a breach of article 3 of the European Convention to deport a Tanzanian citizen to Tanzania where he would face a serious risk of being subjected to torture or degrading treatment); *Chahal v. United Kingdom*, App. No. 70/1995/576/662, 23 Eur. H.R. Rep. 413 (1996).

39. 2001 (3) SA 893 at para. 59.

cause of the Court's pronouncements regarding the permissible treatment of terror suspects. For example, the Court suggested that the right to the constitutional guarantees against self-incrimination and to remain silent must be afforded to terror suspects.<sup>40</sup> Another important constitutional guarantee was the right to counsel, which the Court suggested has to be afforded to terror suspects.<sup>41</sup> These pronouncements will likely be used as a point of reference by South African courts for decades to come in the interpretation of the Terrorist Act and the treatment of terror suspects in South Africa. The *Mohamed* case is also significant because it had an impact on the outcome of the capital case against Mr. Mohamed in the Federal Court.

## II. THE IMPACT OF THE COURT DECISION ON THE CAPITAL CASE AGAINST MR. MOHAMED

Following his trial in the Federal Court case of *United States v. Osama bin Laden*, arising out of his participation in the American Embassy bombing in Tanzania, a federal jury in New York found Mr. Mohamed guilty.<sup>42</sup> Before the Federal Court began a penalty phase hearing, Mr. Mohamed filed a motion and sought the following relief: (1) that the Federal Court should preclude the United States government from further seeking the death penalty against him; or, if the United States government is permitted to proceed with its capital case, (2) that Mr. Mohamed should be permitted to introduce as a mitigating factor the decision of the Court in *Mohamed*.<sup>43</sup>

In addressing the first question, Judge Sand of the Federal Court examined the history of Mr. Mohamed's case in the South African courts and ruled that the decision of the Court, while clarifying South African law with regard to extradition or deportation of persons to countries which have the death penalty, does not disturb the Federal Court's earlier ruling in *United States v. Bin Laden*<sup>44</sup> permitting the United States government to seek the death penalty. Therefore, the Federal Court declined to reconsider that decision. The Federal Court's holding on the first question was based on a two-fold rationale. The first was that, while the Federal Court accepted the Court's decision in *Mohamed* as the definitive statement of South African law, it had an obligation to enforce United States law.<sup>45</sup> The second was that *Mohamed* clarified an area of law that was previously unsettled.<sup>46</sup> Moreover, the extradition treaty in force at the time of Mr. Mohamed's arrest and deportation did not allow the South African government to condition his

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40. *Id.* at para. 18.

41. *Id.* at para. 67.

42. 126 F.Supp. 290 (S.D.N.Y. 2001).

43. *Id.* at 293.

44. *See* 126 F.Supp. 290 (S.D.N.Y. 2001).

45. 156 F.Supp.2d 365.

46. *Id.*

extradition on a guarantee that the death penalty would not be sought.<sup>47</sup> Therefore, in light of the uncertainty in South African law it was reasonable for FBI agents, whom the Federal Court was satisfied acted in good faith, to rely on South African authorities' interpretation of South African law.<sup>48</sup> Furthermore, the Federal Court's examination of the existing extradition treaty between South Africa and the United States at the time of Mr. Mohamed's arrest revealed that no provision expressly prohibited the procedures that were followed to remove Mr. Mohamed to the United States, and hence the Federal Court concluded that Mr. Mohamed was not entitled to the first relief.

In light of this conclusion, the Federal Court then addressed Mr. Mohamed's alternative argument, which as indicated above, was a plea for permission to introduce the judgment in *Mohamed* as a mitigating factor during his penalty phase hearing. In other words, Mr. Mohamed's argument was that since his exposure to the death penalty was the product of happenstance, he should be permitted to introduce the judgment in *Mohamed* as a mitigating factor. In addressing this question, the Federal Court began by explaining that the right of Mr. Mohamed as a capital defendant to present mitigating factors to the jury during the penalty phase hearing was firmly established in *Lockett v. Ohio*.<sup>49</sup> It explained that the statute under which the United States government sought the death penalty against Mr. Mohamed enumerates eight specific categories of statutory mitigating factors.<sup>50</sup> The fourth statutory mitigating factor was the most relevant in this case; it recognised the fact that "other equally culpable defendants will not be punished by death" was a mitigating factor to be considered by the jury.<sup>51</sup>

In addition, the Federal Court reasoned that Congress's deliberate inclusion of the fourth mitigating factor into the legislative scheme requires a broad interpretation of the range of permissible statutory mitigating factors.<sup>52</sup> Accordingly, the position of other defendants like Mamdouh Mahmud Salim, Khalid al Fawwaz, Ibrahim Eidarous and Adel Abdel Bary, who were equally culpable but not subjected to the death penalty, was a com-

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47. See Treaty of Extradition, U.S.-S.Afr., Dec. 18, 1947, 2 U.S.T. 884.

48. *United States v. Yousef*, 925 F.Supp 1063, 1076 (S.D.N.Y. 1996) (holding that the United States law enforcement agents cannot be held liable for the way in which foreign government agents act in extradition proceedings of people in their custody); *United States v. Lira*, 515 F.Supp.2d 68, 71 (2d Cir. 1975) (holding that United States agents were entitled to rely on a foreign government's interpretation of its own laws).

49. 438 U.S. 586, 608 (1978).

50. *Id.*

51. 18 U.S.C. § 3592(a)(8) (2006).

52. 438 U.S. at 608.

parative factor which is appropriate for jurors to consider when evaluating whether a death sentence is appropriate.<sup>53</sup>

In particular and on the facts of this case, the Federal Court suggested that Mr. Mohamed should be able to point out that under the terms of his extradition from Germany, defendant Mamdouh Mahmud Salim was not subject to the death penalty.<sup>54</sup> Similarly, the three defendants, whose extradition from the United Kingdom was pending at the time of trial, would also not be eligible for the death penalty, presumably because of the series of cases by the European Court of Human Rights that have ruled against extradition of suspects to countries that have the death penalty without a guarantee that the death penalty would not be imposed.<sup>55</sup> According to the Federal Court, it would be relevant and consistent with the legislative scheme to permit Mr. Mohamed to argue to the jury that if things had gone as the *Mohamed* Court says they should have, he too would not be eligible for the death penalty.<sup>56</sup> In the end, the Federal Court ruled in favour of Mr. Mohamed by granting his request to present the decision of the Court in *Mohamed* as a mitigating factor. At the end of the penalty phase hearing, the jury failed to reach a unanimous verdict, and as a result the judge sentenced Mr. Mohamed to life imprisonment without parole.<sup>57</sup>

It is difficult to criticize the Federal Court's decision refusing to enforce and apply the Court's decision in *Mohamed* on the basis that its primary function is to apply and enforce American law, not South African law. It is unthinkable that this function extends to the enforcement of foreign law. In fact, I would imagine that the outcome reached by the Federal Court would be unchanged if *Mohamed* had been decided by the United States Supreme Court and Mr. Mohamed tried to enforce it in South African courts.

### III. THE IMPACT AND EFFECTS OF *MOHAMED* ON THE ENACTMENT OF THE TERRORIST ACT

The decision in *Mohamed* has had several notable effects and implications on the status of South African law. One of the important effects is that it clarified South African law on these matters. This was also acknowledged by the Federal Court when it expressed a strong view that *Mohamed* clarified an area of South African law that was unsettled at the time of Mr. Mohamed's arrest and prior to the Court's decision.<sup>58</sup> In particular, *Mohamed* clarified that the Constitution restricts the South

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53. United States v. Beckford, 962 F.Supp. 804, 814 (E.D. Va. 1997) (explaining that proportionality, equity and fairness are the goals which underlie the mitigating factor regarding equally culpable defendants).

54. *Id.*

55. See *Hilal*, 33 Eur. H.R. Rep. 31 (2001); *Soering*, 11 Eur. H.R. Rep. 439.

56. 438 U.S. at 608.

57. *Id.*

58. *Bin Laden*, 156 F.Supp.2d at 365.

African government in relation to its implementation of political or foreign policy decisions in support of the War on Terror.<sup>59</sup> Other commentators have observed that *Mohamed* stands for the proposition that political imperatives and foreign policy concerns must take a back seat when weighed against important constitutional rights.<sup>60</sup> I submit that these effects of *Mohamed* should be welcomed because they are in line with a generous and progressive approach to provide protection for civil liberties in times of heightened national security.

Another important implication of *Mohamed* is that it exposed the absence of a legal framework to try international terrorism cases, such as the one involving Mr. Mohamed, in South Africa. This revelation intensified the pressures from within and outside of South Africa to enact the Terrorist Act.<sup>61</sup> While these pressures were triggered by domestic terrorist acts in Western Cape province in the late 1990s and the circumstances of the *Mohamed* case, it became clear that following the New York bombings and the subsequent United Nations Security Council Resolution 1373 that was adopted under Chapter VII of the Charter of the United Nations in September 2001,<sup>62</sup> the Terrorist Act had to be adopted in South Africa. In his work on the comparison between South African and Canadian anti-terrorism legislation, Kent Roach has noted some of the reasons that led to South Africa's delay in the adoption of the Terrorist Act.<sup>63</sup> He suggests that one of the reasons was the South African government's reaction to the understandable sensitivities about the unpopular abuse of anti-terrorism laws during the apartheid era.<sup>64</sup> He observes that this is apparent when one reads the preamble to the Terrorist Act.<sup>65</sup> Another reason is that the first draft bill that was released in 2000 by the South African Human Rights Commission<sup>66</sup> was controversial and generated extensive debate and

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59. See also *Kaunda*, 2005 (4) SA 235 (holding that the South African foreign policy must be consistent with the Constitution).

60. See Stephen Pete & Max du Plessis, *South African Nationals Abroad and Their Right to Diplomatic Protection – Lessons from the “Mercenaries Case,”* 22 SAJHR 439, 468 (2006); STUART WOOLMAN, CONSTITUTIONAL LAW OF SOUTH AFRICA 31–116 (Michael Chaskalson ed., 2d ed. 2005); Du Plessis, *supra* note 13, at 359.

61. *But see* Martin Schonteich, *South Africa's Arsenal of Terrorism Legislation*, 9 AFR. SEC. REV. 2 (2000) (arguing that an anti-terrorism law is not needed because South Africa already has sufficient security laws that could be used to deal with terrorism crimes. The problem is that many of the available laws are not being used fully by the security forces because of a variety of operational weaknesses in the criminal justice system and the state's intelligence agencies).

62. S.C. Res. 1373, U.N. Doc. S/RES 1373 (September 28, 2001).

63. Kent Roach, *A Comparison of South African and Canadian Anti-terrorism Legislation*, 18 S. AFR. J. CRIM. JUST. 127, 130 (2005).

64. *Id.*

65. *Id.*

66. Roach, *supra* note 63 at 130.

opposition in civil society.<sup>67</sup> Following the 2000 draft bill, another draft bill was issued by the South African Law Commission in August 2002. Parliament debated and amended it, and while the 2002 bill was passed in the National Assembly, one of the two houses of Parliament, the National Council of Provinces, rejected the bill.<sup>68</sup> The bill was later passed by a new Parliament following the 2004 elections.<sup>69</sup>

In my view, *Mohamed* had a considerable effect on the bill that was eventually passed into law in 2004. For example, the broad definition of terrorist activity under Section 1 of the Terrorist Act applies to acts committed in and outside South Africa. In Section 15, the Terrorist Act requires some nexus between the terrorist activity and South Africa and provides a process for notification to other States that may have jurisdiction. These provisions were influenced by the problems that emerged in the case of *Mohamed*. For instance, one of the problems in *Mohamed* was that the crimes were committed in a foreign country or jurisdiction against a third State party. It was difficult for South Africa to prosecute, not only because it did not have sufficient legislation, but also because the United States had an interest in prosecuting the perpetrators. The Terrorist Act addresses these problems by ensuring that its provisions apply to acts committed in or outside South Africa, and by providing a process in Section 15 where South Africa will cooperate with other countries or international organizations interested in a terror suspect. Legal commentators have pointed out that the South African approach seems preferable given the practical limits on the ability of the State to prosecute terrorism offenses committed elsewhere.<sup>70</sup>

Another provision in the Terrorist Act which was influenced by *Mohamed* is Section 22. This provision confers the state with broad investigative powers with respect to persons who possess relevant information about the commission of terrorist acts. What is controversial about Section 22 is that no prior judicial authorisation is required for the exercise of such investigative powers. In other words, under the current legislation, an investigative hearing, such as the one conducted by the South African authorities and the FBI at the Cape Town International Airport on Mr. Mohamed, would probably not require judicial approval. In this sense, I agree with the observations of Roach that given that the Terrorist Act has not been tested by the courts, it remains to be seen whether the courts would defend the principle of prior judicial approval in the context of Section 22 of the Terrorist Act and strike it down on constitutional grounds. In this regard, Professor Max du Plessis has called on “South African courts to be

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67. See S. AFR. CONST. 1996 § 184. Protection of Constitutional Democracy Against Terrorist and Related Activities Act 22, 2004 (providing in part that “whereas the Republic of South Africa is a constitutional democracy where fundamental human rights, such as the right to life and free political activity, are constitutionally enshrined.”).

68. Roach, *supra* note 63 at 130

69. *Id.*

70. *Id.* at 133.

reminded of their constitutional role to act as guardians against executive overreaching, particularly in the context of the [W]ar on [T]error.”<sup>71</sup> There is no doubt that these broad investigative powers are constitutionally problematic and may not survive constitutional muster under the authority of *Mohamed*.

On the other hand, given South Africa’s heavy reliance on Canadian case law and the influence of Canada’s Anti Terrorism Act of 2001 on the Terrorist Act, it could be argued that the decision by the Canadian Supreme Court to uphold the investigative powers under Canada’s Anti Terrorism Act could be employed by South African courts as a basis to uphold similar powers under the Terrorist Act.<sup>72</sup> This potential outcome is enhanced by the striking mutual interaction between the Canadian Charter of Rights and Freedoms and the Constitution, which is well established, and the connection between the Terrorist Act and Canada’s Anti Terrorism Act.<sup>73</sup>

#### IV. CONCLUSION

Based on the forgoing discussion and the theme of this symposium, which asks, “[I]s There a War on Terror?”, I argue that if there is a War on Terror, then South Africa is a good partner to countries like the United States because it is ready to liaise and cooperate while it protects the right to life and human dignity.

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71. Du Plessis, *supra* note 13, at 358. See also *Hamdi v. Rumsfeld*, 524 U.S. 507, 536 (2004) (plurality opinion) (holding that we have long since made clear that a state of war is not a blank check for the President when it comes to the right of the nation’s citizens); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (Breyer, J., concurring).

72. *In re An Application Under Section 83.28 of the Criminal Code*, 2004 SCC 42, [2004] 2 S.C.R. 248 (Can.).

73. See *De Lange v. Smuts*, 1998 (3) SA 785 (CC) (S.Afr.) (relying on Canadian case law in the interpretation of the constitutional doctrine of separation of powers), for a review of the mutual interaction between various areas of Canadian and South African law; *Nel v. Le Roux*, 1996 (3) SA 562 (CC) (S.Afr.) (relying on Canadian case law in the interpretation of the constitutional limits on the judiciary). See generally *S v. Lawrence*; *S v. Negal*; *S v. Solberg* 1997 (4) SA 1176 (CC) (S.Afr.) (holding that the Canadian description of what encompasses freedom of religion should be adopted).

