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**RESEARCH THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE
REQUIREMENT UNDER MASTER OF LAWS DEGREE**

**COUNTER TERRORISM IN KENYA: THE ROLE OF THE KENYA NATIONAL
COMMISSION ON HUMAN RIGHTS**

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Acknowledgment

This research paper is the cumulative involvement of many individuals who in one way or the other contributed to its success.

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Dedication

This Research work is dedicated to my family,

To Dad and Mom for instilling the importance of hard work and higher education;

To Vivian for holding my hand when I thought I could not anymore;

To Collins and Griffins for their patience and understanding.

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CHAPTER ONE

INTRODUCTION AND BACKGROUND

1.0 Introduction

There is no universally agreed definition of terrorism.¹ Nonetheless, there has been an effort by the United Nations (UN) towards a global definition.² The UN has defined terrorism as criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes.³ The Kenyan Prevention of Terrorism Act⁴ defines terrorism as ‘an act or threat of action which among other things, create a serious risk to the health or safety of the public or prejudices national security or public safety, carried with the aim of destabilizing social institutions and intimidating or causing fear among members of public or compelling governments to do or refrain from any act’.⁵ The Kenyan Penal Code,⁶ the Banking Act⁷ and the Proceeds of Crime and Anti-Money Laundering Act⁸ further make it an offence for any individual or organization to open, operate, finance, recruit or assist any person or organization involved in terrorist activities.⁹

The nature of terrorism is that it is carried out purposefully.¹⁰ This often happens in a cold blooded and calculated fashion.¹¹ It is often the deliberate killing of civilians so as to inspire

¹Ana Salinas de Frías, Katja Samuel, Nigel White *Counter-Terrorism: International Law and Practice* (OUP Oxford, 2012) 1044

² Victor D. Comras *Flawed Diplomacy: The United Nations & the War on Terrorism* (Potomac Books, Inc., 30 Nov 2010) 9

³ The United Nations General Assembly *Measures to eliminate international terrorism* (United Nations, A/RES/49/60, 1995)

⁴The Kenyan Prevention of Terrorism Act 2012

⁵ *ibid*, S.2

⁶The Kenyan Penal Code cap 63

⁷The Banking Act cap 488

⁸Proceeds of Crime and Anti-Money Laundering Act Chapter 59b

⁹ The Penal Code, Cap 63 Laws of Kenya; Anti money Laundering and Crime Proceeds Act NO. 9 OF 2009

¹⁰ Benjamin Netanyahu *International Terrorism: Challenge and Response ; the Jerusalem Conference on International Terrorism* (Transaction Publishers, 1 Jun 1981)

fear.¹² Its moral intolerability being its natural connection with other forms of tyranny and sometime by anti-democratic states.¹³ Terrorism occurs everywhere. From rich to poor states.¹⁴ Terrorists are found among all calibers of people, from less to more educated people.¹⁵ This rendition point to the following inferences – that terrorism is not only dynamic but also very hard to predict.¹⁶ This difficulty in prediction equally makes anti – terrorism solutions difficult to succeed.¹⁷

Globally, the war on terrorism has necessitated an increase in security for the general population.¹⁸ This has been achieved for example through increased surveillance of citizens.¹⁹ It has also led to the enhancement of powers of security organs and intelligence agencies.²⁰ The practices, techniques and strategies that governments, militaries, police departments and corporations adopt in response to terrorist threats and/or acts are referred to as counter terrorism measures.²¹ Like every other government, the Kenyan government has a responsibility to protect its entire citizenry from extremist attacks, but in the process it must ensure that all counter terrorism measures respect human rights. This duty also springs from The Universal Declaration of Human Rights (UDHR) which provides that none of the rights and freedoms provided for

¹¹ ibid

¹² ibid

¹³ Centre of Excellence Defence Against Terrorism *Organizational and Psychological Aspects of Terrorism* (IOS Press, 2008) 2

¹⁴ ibid

¹⁵ ibid

¹⁶ Anthony F. Lang, Jr., Amanda Russell Beattie War, Torture and Terrorism: Rethinking the Rules of International Security (Routledge, 27 Oct 2008) 159

¹⁷ Iztok Prezelj *The Fight Against Terrorism and Crisis Management in the Western Balkans* (IOS Press, 2008) 169

¹⁸ R. J. Burke, Cary L. Cooper *International Terrorism and Threats to Security: Managerial and Organizational Challenges* (Edward Elgar Publishing, 1 Jan 2008) 172

¹⁹ ibid

²⁰ Corona Brezina *Public Security in an Age of Terrorism* (The Rosen Publishing Group, 2009)

²¹ Oldrich Bures *EU Counterterrorism Policy: A Paper Tiger?* (Routledge, 2016) 1

shall be destructed by the state, group or person.²² These international legal standards apply to Kenya's legal regime vide article 2(5) and 2(6) of the constitution of Kenya.²³ In this regard, although countries have a duty to fight terrorism, due respect must be paid to human rights in the adopted counter terrorism measures.²⁴

The Kenya National Commission on Human Rights, (KNCHR) plays a central role in the realm of counter – terrorism.²⁵ The commission is a constitutional commission established under article 59 (4) of the constitution of Kenya 2010 and the KNCHR Act. The KNCHR is an Independent Commission as encapsulated under article 248(2) of the constitution.²⁶ Its mandate includes: promote respect for human rights; promote protection and observance of human rights in public and private institutions; to receive and investigate complaints about alleged abuses of human rights and take appropriate redress; on its own initiative or on the basis of complaints to investigate or research a matter in respect of human rights; and to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct.²⁷ It is in this regard that this study analyses the role of KNCHR in ensuring that counter terrorism measures adopted by the Kenyan government do not violate human rights.

Since this research is based on the premise that counter terrorism and the protection of human rights are mutually complimentary aspects, the research explores the issues that the Commission

²² UN General Assembly, *Universal Declaration of Human Rights*, (United Nations, 1948) Article 30 <<http://www.refworld.org/docid/3ae6b3712c.html> > accessed 29 April 2017

²³ The Constitution of Kenya, 2010. Art.2(5) and (6).

²⁴ IOS Press, *Capacity Building in the Fight Against Terrorism* (IOS Press, 2013) 26

²⁵ Kenya National Commission On Human Rights Act No. 14 Of 2011, S.8

²⁶ Constitution of Kenya art.248(2).

²⁷ Kenya National Commission On Human Rights Act No. 14 Of 2011, S.8

deals with within the ambit of anti-terrorism with the aim of fulfilling its mandate. These issues include racial or ethnic profiling, torture, enforced disappearances and extra judicial killings.

1.1 Statement of the Problem

Human Rights Violations such as racial or ethnic profiling, torture, enforced disappearances and extra judicial killings occur in the process of terrorism and counterterrorism. By their very nature, anti – terror activities are designed to help preserve the lives of citizens who are prone to harm by acts of the terrorists. Ironically, the anti – terror processes have turned out to be anti – human rights activities. As noted above, the KNCHR is the constitutional commission mandated to protect and enhance respect for Human Rights in Kenya. Oozing from its constitutional mandate, the KNCHR has a critical role to play in mitigating anti – terror human rights violations.

This research recognizes that apart from KNCHR, there are other human rights players who equally play a critical role in vouching for preservation of human rights in anti – terror processes. Those bodies comprise of – civil society organizations including:- International Commission of Jurists - Kenya, International Federation of Women Lawyers-Kenya, Kenya Anti-Rape Organization, Kenya Human Rights Commission, Kituo Cha Sheria, Legal Education and Aid Programme, Peace Foundation (Africa) and many others. All these bodies have one common feature – they are non-governmental organizations. The only clear distinction between the organizations mentioned above and the KNCHR is that the KNCHR is a government entity with clearly spelt out constitutional and statutory mandates. As for the civil organizations mentioned above, they determine their mandates and independently delineate their scope of work. Notably, their work in preservation of human rights during counter – terrorism cannot be underestimated.

Similar to the work of KNCHR, these organizations have also exercised vigilance in protection of human rights.

Being the constitutionally and statutory sanctioned body, the KNCHR is supposed to function as the ultimate and best protector of human rights. Achieving that high calling can only be possible in an environment that is operation conducive. It is from this analogy that the constitutional and statutory mandate of the KNCHR can be reprimanded for being inadequate in design, structure and ability to combat human rights violations. Apart from the legal structure of the commission, the commission's approach and techniques of handling human rights violations can also be said to be insufficient owing to the very important nature of the work the commission is mandated with. In totality, this paper makes the preliminary presumption that the laws, structures and measures adopted by KNCHR towards achieving preservation of human rights are inadequate.

Of notoriety is the fact that, terrorism activities are on the rise, both internationally and nationally. As a consequence of the rise stated above, governments, including the Kenyan Government are stepping up efforts to combat terrorism. And as if there is a positive correlation between the increase in terror and an increase in the fight against terror, there also appears to be a positive correlation between the increase in anti – terror efforts and a consequential increase in human rights violations during anti - terror processes in Kenya. Regrettably, the increase in these human rights violations is happening in the background of a human rights Commission whose ability to carry out its mandate is on the balance. This apparent lacuna in KNCHR's ability necessitates a critical analysis of the constitutional and statutory roles, powers and functions of KNCHR in counter – terrorism. This analysis will be useful in identifying any gaps which if sealed will ensure the promotion, respect and observance of human rights in counter terrorism.

1.2 Research Questions

This research will answer the following questions;

- i. what is the nature of the various violations that occur in counter terrorism measures adopted by the Kenyan Government?
- ii. what is the constitutional and statutory role of KNCHR in mitigating these violations?
- iii. what reforms should be undertaken so as to promote human rights and fundamental freedoms in the fight against terror?

1.3 Objectives of the Study

The objective of the research is to study the nature of the various human rights violations that occur in counter terrorism measures adopted by the Kenyan Government. This will depict the current state of affairs with respect to counter terrorism. The study also seeks to find out both the national and international human rights laws protecting human rights in the process of counter – terrorism. Specifically, the study will focus more on the laws governing the organization, operation, powers and functions of KNCHR as the human rights body. The analysis of the above cited human rights law will help in discovering the level of organization and functionality of KNCHR. This analysis will also depict the inadequacies in the law governing the KNCHR and equally expose the weaknesses and challenges experienced by the KNCHR in the currency of its mandate. From this depiction, the study will be able to make suggestions and recommendations on how to restructure and revamp KNCHR as the human rights institution.

1.4 Hypothesis

This study predicts that the rise of terrorism activities often instigates an increase in efforts to combat terrorism. Equally, an increase in anti – terrorism activities often lead to increased

violations of human rights. This study also makes the assumption that as a result of the increased violation of human rights in anti – terrorism activities, the Kenya National Commission on Human Rights has either been unable to fully mitigate human rights violations or its mitigation efforts have either been inadequate or inappropriate.

1.5 Justification of the study

The study is justified on the basis that there is need to reiterate the primacy of International Human Rights Law and the duty of the Kenyan government to implement its legal obligations. By analyzing the role of KNCHR, the study strikes a balance between the need to combat terrorism on one hand and the need to respect human rights on the other hand. It also establishes some of the challenges KNCHR encounters in ensuring respect and promotion of human rights in counter terrorism. This should enable the government of Kenya to identify its entry point and provide perfect balance between the respect for human rights and counter terrorism measures.

1.6 Research Methodology

The research will largely be undertaken through the use of qualitative data collection method in order to obtain data that is relevant and appropriate to the research. Qualitative data collection is achieved through the review of relevant publications to discern the trends, thoughts and opinions of authors. This will mainly be through desk based research that will examine the literature published by scholars, human rights bodies and governments in the quest to successfully combat terrorism while upholding human rights. The choice of this method is based on the fact that qualitative method will make it possible to enable an in-depth and detailed analysis of the subject. This in-depth analysis will in turn foster a more informed understanding of the conflict between counter terrorism and human rights. This mode of research will be useful in showing the

current approach in counter-terrorism, its shortcomings and as a result set an agenda for future reform. This mode of research will also be useful in finding out the mandate of human rights bodies and the challenges they face.

1.7 Theoretical framework

Terrorism is a complex phenomenon with many dimensions that vary in intensity and scope.²⁸ As a problem, terrorism has presented itself not only as a political problem but also as a legal and social issue.²⁹ Both the impact of terror and the solutions to terror elicit human rights concerns.³⁰ This section seeks to study the existing theories and relevant concepts to the two competing interests: the fight against terrorism on one hand; and the efforts to preserve human rights on the other hand.

A number of theories have been advanced in effort to explain and understand the incentives behind terrorism, how it works and its effects on the society. In the same vein, scholars have theorized about the human rights violations during terror and how to counter them. Scholars have also endeavored to understand the complexities surrounding post – terror issues including how to contain the terrorists and prevent future occurrence of terror. These post- terror discussions have revolved around long standing doctrinal and conceptual considerations of natural laws, utilitarianism and legal positivism including international and national legal provisions among others. In summary, this limb will study the following theories and concepts: - the philosophy and theories of motivation and effects terrorism (discrimination, religion, socio – economic

²⁸ Vincent Parrillo *Encyclopedia of Social Problems, Volume 1* (SAGE, 2008)

²⁹ *ibid*

³⁰ Taiwo, Victor Olu *World Terrorism: Diagnosis And Path To Global Peace* (Manifold Grace Publishers, 2015)

status and political grievances); and the theories on combating of terror (natural laws, utilitarianism and legal positivism).

The theories of motivation and effects terrorism can well be understood by application of Newton's Third Law: action and reaction.³¹ According to this law, forces result from interactions. Newton's Law³² explains that a force is a push or a pull that acts upon an object as a result of its interaction with another object.³³ Loosely deconstructed, acts of terrorism can be deconstructed and viewed as reactions to some acts such as discrimination and political grievances among others.³⁴ Discrimination for example has been viewed as one of those high risk factors that instigate terror activities.³⁵ It has been established that states are built around universalist principles and bonds of transnational religious systems and integration of communities and individuals by means of single political ideology.³⁶ From the above, it is evident that discrimination – either on a religious or communal basis can be a trigger of terror.

Understanding the possible causes of terror makes the study of violations of human rights during counter - terrorism more meaningful and fruitful.³⁷ It has been noted that loss of freedoms, elemental human rights obligations and basic criminal law principles always occur in the process of counter – terrorism.³⁸ Such violations continue to occur despite the established rule that counter - terrorism measures must always be taken with strict regard to the principles of

³¹ Robert Lambourne *Predicting Motion* (CRC Press, 2000) 17

³² *ibid*

³³ *ibid*

³⁴ Ashton Acton *Advances in Homeland Security Research and Application: 2012* (ScholarlyEditions, 26 Dec 2012) 66.

³⁵ Louise Richardson *The Roots of Terrorism* (Routledge, 5 Sep 2013)

³⁶ Feliks Gross *The Civic and the Tribal State: The State, Ethnicity, and the Multiethnic State* (Greenwood Publishing Group, 1998) 26

³⁷ Marie-Helen Maras *Counterterrorism* (Jones & Bartlett Learning, 2012)

³⁸ David J. Whittaker *Counter-Terrorism and Human Rights* (Routledge, 2014)

legality, necessity, proportionality and non-discrimination.³⁹ These violations of human rights have occasionally been viewed by the perpetrators (mostly government) as 'collateral damage.'⁴⁰ It is this somewhat weird perception that the KNCHR struggles to turn around with efforts to prevent gross abuse of human rights during counter – terrorism.⁴¹ This solemn duty of preserving human rights by KNCHR can only best be achieved by understanding and appreciating some of the theories relevant to the legality of anti – terrorism process (natural laws, utilitarianism and legal positivism). These theories come in as useful tools in understanding and comprehending the propriety of anti – terrorism processes and consequently offering viable solutions.⁴²

A theory of natural law need be undertaken primarily for the purpose of assisting the practical reflections of those concerned to act, whether as judges, or as statesmen, or as citizen⁴³ and not for providing a justified conceptual framework for descriptive social science.⁴⁴ Similarly, proponents of utilitarianism contend that the ultimate goal of utilitarianism as a theory is to provide an answer to the practical question 'what ought a man to do?'⁴⁵ In this instance, the revisiting of natural law and utilitarianism is intended to help the KNCHR calibrate its strategies and prospects in the preservation of human rights in counter – terrorism. In early modern jurisprudence and philosophy, natural laws were closely associated with causes of both human

³⁹ International Commission of Jurists (ICJ), *Legal Commentary to the ICJ Berlin Declaration; Counter-terrorism, Human Rights and the Rule of Law*, (Human Rights and Rule of Law Series No. 1, 2008) <<http://www.refworld.org/docid/4a783eb42.html>> accessed 8 November 2017

⁴⁰ Tessa Boyd-Caine *Stamping Out Rights: The Impact of Anti-terrorism Laws on Policing* (CHRI, 2007)6

⁴¹ Kounkinè Augustin Somé, Polycarp Ngufor Forkum, Armand Tanoh, Meskerem Geset Techane, Satang Nabaneh, Michael Gyan Nyarko, Saoyo Tabitha Griffith, Paul Ogendi, Sizakele Hlatshwayo, Sarai Chisala-Tempelhoff, Seun Solomon Bakare, Roopanand Mahadew, Augustine Sorie Marrah, Ofentse Motlhasedi, Linette du Toit, Dumsani Dlamini, Grace Kamugisha Kazoba, Charles Mmbando, Agaba Daphine Kabagambe, Tarisai Mutangi *The impact of the African Charter and the Maputo Protocol in selected African states* (PULP, 2016) 124

⁴² Robert Diab *The Harbinger Theory: How the Post-9/11 Emergency Became Permanent and the Case for Reform* (Oxford University Press, 2015)174

⁴³ John Finnis *Natural Law and Natural Rights* (OUP Oxford, 2011)18

⁴⁴ *ibid*

⁴⁵ N.G. Chernyshevskii's *What is to be Done?: A Reevaluation* Indiana (University, 1995)

conduct and physical effects.⁴⁶ In contradistinction to authors like Austin, Hegel and Rousseau who shared the view that the law was a command from a sovereign, the mainstream of natural law theory as expressed by Grotius and Thomasius believed in the proposition that the law was based upon reason.⁴⁷ Natural law theory was treated as a rational foundation for moral judgment.⁴⁸ Anaximander, the Milesian philosopher portrayed the purpose of nature as accomplishing moral purposes with intent to achieve justice as it evolved.⁴⁹

The two underlying essential issues here were that natural law was treated as: - a rational foundation for moral judgment and the ultimate intent being the achievement of justice. With regards to preservation of human rights, the following lessons and inferences may be drawn from the tenets of natural law: - the government in its decisions ought to be very rational in determining how to carry its counter – terrorism processes. Similarly, the KNCHR should often intend to achieve justice for violations of human rights during counter – terrorism.

The study advances the theories that human rights in international instruments are entitlements and not favors. Everyone, irrespective of any extreme circumstances is entitled to these rights. However, the study also takes cognizance of the fact that these rights can only be conveyed, actualized and achieved through a convenient platform. This implies that the legal framework ought to be conducive to help attain these rights. In addition, the KNCHR must be well equipped so as to properly exert these rights.

⁴⁶ibid

⁴⁷ Aniceto Masferrer, Clive Walker *Counter-Terrorism, Human Rights and the Rule of Law: Crossing Legal Boundaries in Defence of the State* (Edward Elgar Publishing, 30 Sep 2013)54

⁴⁸R. P. Peerenboom *Law and Morality in Ancient China: The Silk Manuscripts of Huang-Lao* (SUNY Press, 1995)

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⁴⁹ Howard P. Kainz *Natural Law: An Introduction and Re-examination* (Open Court Publishing, 2004)1

As a theory, legal positivism is a philosophy of law that views laws as being synonymous with positive norms.⁵⁰ These positive norms are those norms made by the legislator or considered as common law or case law.⁵¹ In application of this theory and with regards to counter – terrorism and consequential human rights violations, an interested party such as the KNCHR would ask the question – what does the law (national, international, case law, natural law) say about preservation of human rights and human rights violations during counter – terrorism processes? According to Ioanna Kuçurad,⁵² ‘if we become aware of the foundation of human rights, we can give to human rights their proper place.’⁵³ If we know what human rights demand and why they demand it, we can, perhaps, obtain a criterion to use in questions of restriction of rights.⁵⁴ ... If we know what human rights demand, we can become more certain in determining the duties of the individuals and of the states in protecting them; we can leave less room open for evasions. If we know why human rights demand what they demand, ...If we know which rights of the individual are human rights, we can perhaps realize better which rights can be protected and have to be protected by international organizations, in cases where they are not protected or are violated by their natural protector i.e., the State.’⁵⁵

What therefore is the concept of human rights? The concept is a fusion of the two words ‘human’ and ‘rights.’⁵⁶ According to Brian Orend, the importance of drawing attention to the ‘human’ component of ‘human rights’ is to introduce a core concept - that of a right-holder. A right-holder, very simply, is the person who has the right in question.⁵⁷ However, are all human beings

⁵⁰ Peter Halfpenny *Positivism and Sociology (RLE Social Theory): Explaining Social Life* (Routledge, 2014)

⁵¹ *ibid*

⁵² Ioanna *Human Rights: Concepts and Problems* (LIT Verlag Münster, 2013) 3

⁵³ *ibid*

⁵⁴ *ibid*

⁵⁵ *ibid*

⁵⁶ Brian Orend *Human Rights: Concept and Context* (Broadview Press, 2002) Chapter 1

⁵⁷ *ibid*

entitled to the human rights? Brian Orend further states that ‘While this seems to follow rather obviously, when one looks at the language, it is actually a bold and substantive moral claim, and one which, when first introduced, went against the grain of history. For the longest time, a person was considered a right-holder only if possessed of certain select characteristics, like being an able-bodied, land-owning adult male.⁵⁸ The contemporary human rights idea, by contrast, suggests that every human being - man or woman, rich or poor, adult or child, healthy or sick, educated or not, holds human rights.⁵⁹

1.8 Literature Review

Dilip Das and Peter Kratcoski believe that terrorism is a contemporary cause of global concern.⁶⁰ According to them, this concern is not only pronounced in the nature of devastations it causes to humanity but also aggravated by the many complexities that emerge from the human rights issues in counter – terrorism processes.⁶¹ This position is accentuated by Aniceto Masferrer and Clive Walker who in their book,⁶² opine that when properly analyzed, it becomes apparent that there is no clear hierarchy among human rights.⁶³ In the event of counter – terrorism, the authors believe this ‘apparent equal rank’ of human rights constantly leads to conflict between the human rights themselves and with other societal values.⁶⁴ According to Aniceto Masferrer, the fragile and complex nature of fundamental rights as structured in modern constitutions has resulted into

⁵⁸ ibid

⁵⁹ ibid

⁶⁰ Dilip K. Das, Peter C. Kratcoski *Meeting the Challenges of Global Terrorism: Prevention, Control, and Recovery* (Lexington Books, 2003) 206

⁶¹ ibid

⁶² Aniceto Masferrer, Clive Walker *Counter-Terrorism, Human Rights and the Rule of Law: Crossing Legal Boundaries in Defence of the State* (Edward Elgar Publishing, 2013) 39

⁶³ ibid

⁶⁴ ibid

a negative impact in the protection of human rights in the 'war on terror'.⁶⁵ This perhaps explains the very slim rate of noncompliance to human rights in counter – terrorism.

Dr. Behnam Rastegari in his book⁶⁶ notes that the right of life is located at the summit of the hierarchy of rights in all human rights conventions within international and regional legal instruments.⁶⁷ He further notes that the right to life is a supreme and non derogable right of all human beings as confirmed by the Universal Declaration of Human Rights⁶⁸ and International Convention on Civil and Political Rights.⁶⁹ A paper written by David Kretzmer⁷⁰ attempts to qualify extra judicial killings as acts sanctioned by International Humanitarian Law as legitimate acts of war.⁷¹ He advances the argument that extra judicial killings may be deemed as legal where the state can prove that it was under imminent danger.⁷² This study analyses the role of KNCHR in upholding the rule of law and specifically human rights. In so doing, it seeks to disprove of the above notion that the right to security may supersede other human rights.⁷³

According to Jack Donnelly, the concept of 'human rights' denotes rights of humans.⁷⁴ He states that 'literally, they are rights of humans. More precisely, human rights are the rights one has simply because one is a human being'.⁷⁵ An article by Sabine Von Schorlemer⁷⁶ assesses human

⁶⁵ Aniceto Masferrer, Clive Walker *Counter-Terrorism, Human Rights and the Rule of Law: Crossing Legal Boundaries in Defence of the State* (Edward Elgar Publishing, 2013)

⁶⁶ Behnam Rastegari *Violation of fundamental liberties in counter-terrorism measures: a human rights approach* (no date)

⁶⁷

⁶⁸ UN General Assembly, *Universal Declaration of Human Rights* (UN General Assembly, 1948) art.3

⁶⁹ UN General Assembly, *International Covenant on Civil and Political Rights*, (United Nations, 1966) art.4(2)

⁷⁰ David Kretzmer 'Targeted killing of Suspected Terrorists: Extra judicial executions or legitimate means of defence?' [2005] 16, 92 *The European Journal of International Law*.

⁷¹ *ibid*

⁷² *ibid*

⁷³ Louise Doswald-Beck *Human Rights in Times of Conflict and Terrorism* (OUP Oxford, 2011)

⁷⁴ Jack Donnelly *The Concept of Human Rights* (Croom Helm, 1985)

⁷⁵ *ibid*

⁷⁶ Sabine von Schorlemer 'Human Rights: Substantive and Institutional Implications of the war against terrorism' (2003) *The European Journal of International Law* <<http://www.ejil.org/pdfs/14/2/414.pdf>> accessed 7 November 2017.

rights abuse as a consequence of terrorism.⁷⁷ He goes to the extent of proposing that terrorism should fall within the category of crimes against humanity.⁷⁸ In his view which is a view shared in this research, he asserts that there has been a legitimization of human rights violations under the pretext of combating terrorism.⁷⁹ His overall propositions encourage the respect of human rights while fighting against terrorism.⁸⁰ Unlike Schorlemer, this study narrows down to the Kenyan perspective by establishing a link between counter - terrorism and human rights abuses.

The Danish Institute for Human rights 2012 publication⁸¹ is also of material use. The paper establishes a mechanism addressing possible weaknesses or shortcomings in relation to fighting terrorism while contemporaneously complying with human rights observance at a national level.⁸² By proposing a guideline that may be of value to developing countries which are often faced with the dilemma of balancing between anti-terrorism efforts and the preservation of human rights.⁸³ The paper goes further to encourage the acquisition of basic human rights knowledge among law enforcement officers.⁸⁴ It is the position of the authors that training of police on human rights and placing emphasize on the respect of human rights at all times might be the ultimate panacea to the dilemma.⁸⁵ This study shall analyse the situation as it is in Kenya on the basis of a report by the Aljazeera.⁸⁶ The report observes that the gross violation of human

⁷⁷ ibid

⁷⁸ ibid

⁷⁹ Ivan Manokha, *The Political Economy of Human Rights Enforcement: Moral and Intellectual Leadership in the Context of Global Hegemony* (Palgrave Macmillan, 15 Jul 2008)

⁸⁰ ibid

⁸¹ Peter Vedel Kessing, Ida Søholm *Practical guidance paper on Counter terrorism and Human rights* (The Danish Institute for Human Rights, 2012)

⁸² ibid

⁸³ ibid

⁸⁴ ibid

⁸⁵ ibid

⁸⁶ Aljazeera 'Kenya police admit 'extrajudicial killings' - Officers tell Al Jazeera they are involved in assassination programme targeting suspected Muslim radicals' *Aljazeera News* (8th Dec 2014) <<http://www.aljazeera.com/video/africa/2014/12/kenya-police-admit-extrajudicial-killings-201412894130719731.html>>, Accessed 19th Dec 2016.

rights and fundamental principles by the Kenya Anti-terrorism Police Unit (ATPU) could be as a result of their lack of proper training on human rights.⁸⁷

Terrorism is an evolving and mutating concept.⁸⁸ Peter Katona, Michael D. Intriligator, John P. Sullivan in their book⁸⁹ opine that in the aftermath of the tragic events in the USA on 11 September, 2001 and the subsequent bomb attacks in Bali, Madrid, London and the insurgency in Iraq, it appears that terrorism now manifests itself in ways that states have not encountered before.⁹⁰ Consequently, the current counter – terrorism concepts and strategies ought to be reviewed so as to conclusively deal with the menace.⁹¹

Dorle Hellmuth, in his book ‘Counterterrorism and the State: Western Responses to 9/11’⁹² shares similar sentiments with Peter Katona, Michael D. Intriligator and John P. Sullivan above.⁹³ He states that the post -9/11 terror attack continues to raise questions about how to manage transnational security threats.⁹⁴ He further suggests that in order to successfully contain terrorism, there needs to be an enhanced understanding of the nature, scope and trends of decision making.⁹⁵ Of import is the concern that although counter – terrorism responses include measures designed to debilitate terrorist networks directly, states have to brace themselves with more dynamic measures so as to curb the ever changing concept of terrorism.⁹⁶ Counter –

⁸⁷ ibid

⁸⁸ Peter Katona, Michael D. Intriligator, John P. Sullivan *Countering Terrorism and WMD: Creating a Global Counter-Terrorism Network* (Routledge, 24 Jan 2007) 33

⁸⁹ Ibid page 33

⁹⁰ Ibid page 33

⁹¹ ibid

⁹² Dorle Hellmuth *Counterterrorism and the State: Western Responses to 9/11* (University of Pennsylvania Press, 2015) 1

⁹³ ibid

⁹⁴ ibid

⁹⁵ ibid

⁹⁶ ibid

terrorism as a solution to terrorism should thus be strategically deployed in a manner that minimizes human rights abuses but in the same vein curbing the vice.⁹⁷

Paul Hoffman, in a journal article titled 'Human Rights and Terrorism'⁹⁸ presents Amnesty's view the "war on terrorism" has been waged in a manner which threatens to undermine the international human rights framework so painstakingly built since World War II.⁹⁹ Hoffman expresses concerns that waging a war on terrorism without respect for the rule of law is inordinate as it undermines the very values that it presumes to protect.¹⁰⁰ To this end, he proposes that there needs to be a balance between liberty and security.¹⁰¹ As to how to achieve this, he proposes that human rights framework needs to be reasserting so as to provide for legitimate and effective efforts to respond to terrorist attacks.¹⁰²

An article by David M Anderson¹⁰³ is relevant to the extent that it serves to remind us on the importance of the rule of law. The paper succinctly details the reinvention of the terrorist group in the context of Kenyan's troubled domestic politics.¹⁰⁴ By commenting on the June 2014 Mpeketoni massacre, he observed that the retaliation attacks were motivated solely by reasons that the State was involved in the brutal oppression of Muslims in Kenya through coercion, intimidation and the extra judicial killings of Muslim scholars.¹⁰⁵ Moreover, it is contended that the area was originally occupied by Muslims and perhaps the killing of the non-Muslims was

⁹⁷International Convention on Human Rights *Policy Catching the Wind - Human Rights*, (ICHRP, 2007) 13

⁹⁸Hoffman, Paul. 'Human Rights and Terrorism.' (2004) 26-4 Human Rights Quarterly 932-955.
<www.jstor.org/stable/20069768> accessed 19 September 2017.

⁹⁹ Ibid pg.934

¹⁰⁰ ibid

¹⁰¹ ibid

¹⁰² ibid

¹⁰³ David M. Anderson 'Why Mpeketoni matters: Al-Shabaab and violence in Kenya' (2014) Norwegian Peace building Resource Centre Policy brief 1 ; Gitonga Marete, Kalume Kazungu 'Pain, tears, death and destruction as masked gunmen kill 48 in night raid' *Daily Nation* (Nairobi, Monday June 16, 2014) <<http://www.nation.co.ke/news/Mpeketoni-Lamu-Attack-Terrorism-Coast/1056-2351072-format-xhtml-11s5nbmz/index.html>> accessed 6 February 2017.

¹⁰⁴ ibid

¹⁰⁵ ibid

well in order. The author goes on to blame the government for its little effort towards winning support amongst its own Muslims. This is evidenced by the inhuman treatment of Muslims as witnessed during the Operation Usalama Watch that resulted not only to the looting of the suspects personal belongings, bribing of the security forces to authenticate the suspects' papers but also to the disappearance of 20 Muslim leaders.¹⁰⁶

Naomi Roht- Arriaza's book¹⁰⁷ looks at what should be done and what is being done to combat the problem of impunity, or lack of sanctions, for certain serious violations of human rights.¹⁰⁸

This book moves from a general consideration of the theories of punishment and redress that shape and underlie the fight against impunity, to a detailed overview of the conventional and customary international law that defines state obligations to investigate, act against, and provide redress for victims of at least the most serious violations of human rights. The study therefore compliments the work of the commission by encouraging the state to observe the rule of law in combating terrorism as opposed to the discrimination and persecutions of minority communities.

Intensive research has thus been done regarding the role that the Human Rights Organizations' play in counterterrorism. Be that as it may, no report has exclusively discussed with a bias the role of the KNCHR with a particular focus on ethnic profiling, torture, forced disappearances and extra judicial killings as well as the challenges and weaknesses in KNCHR approaches. Additionally, there has been very little emphasis on the incorporation of the Muslim communities in the fight against terror for the obvious reason that all terrorists are Muslims. This

¹⁰⁶ ibid

¹⁰⁷Roht- Arriaza,(ed), *Impunity and Human Rights in International Law and Practice*, (1995)

¹⁰⁸ ibid

study ultimately envisions an all-inclusive society that is free from discrimination on the basis of religion.¹⁰⁹

¹⁰⁹ See article 10 and 27 of The 2010 Constitution.

1.9. Proposed Chapters

Chapter I introduces the study. It contains the objectives of the study, statement of the problem, research questions, justification of the study and methodology.

Chapter II shall focus on the nature of the various violations that occur in counter terrorism measures adopted by the Kenyan Government. It shall also analyze the laws and norms on torture, enforced disappearances, extra judicial killings and ethnic profiling.

Chapter III shall focus on the role that KNCHR plays in mitigating the violations analyzed in chapter two. This chapter will also bring out the challenges and weaknesses that KNCHR encounters in this regard.

Chapter IV shall look into what reforms that should be undertaken so as to promote human rights and fundamental freedoms in the fight against terror in Kenya.

Chapter V shall comprise of a summary of the discussion, recommendations and the final conclusion.

CHAPTER TWO

HUMAN RIGHTS VIOLATIONS IN THE FIGHT AGAINST TERRORISM.

2.0 Introduction

According to the constitution of Kenya, 'National security is the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity and other national interests'.¹¹⁰ The *Constitution of Kenya* provides that 'National security of Kenya shall be pursued in compliance with the law and with the utmost respect of the rule of law, democracy, human rights and fundamental freedoms.'¹¹¹

This chapter analyzes the various incidences of human rights violation in the fight against terrorism by the Kenyan government as well as the laws and norms on torture, enforced disappearances, extra judicial killings and ethnic profiling. Before delving into the instances of human rights violation, it is prudent first of all to lay a historical background of terrorism in Kenya in a bid to understand the reason for the spirited fight against terrorism in Kenya.

2.1 Historical background of terrorism in Kenya

In the recent past, Kenya has suffered terrorist attacks. For example in 1976, the Popular Front for the Liberation of Palestine (PFLP) and the Baader Meinhof group plotted to shoot down an EL AL passenger plane as it stopped over in Nairobi.¹¹² The plan did not, however, go through as the intelligence service of both Kenya and Israel got wind of the plan and stopped it before it

¹¹⁰ *Constitution of Kenya* (2010), art 238 (1).

¹¹¹ *Ibid*, art 238 (2) (b).

¹¹² Samuel L. Aronson, 'Kenya and the Global War on Terror: Neglecting History and Geopolitics in approaches to counter terrorism' [2013] 7 *African Journal of Criminology and Justice Studies*.

could take place. In the year 1981, the same terrorist group attacked the Norfolk Hotel in Nairobi and fatally wounded 15 people.¹¹³ The attack was carried as a vengeance mission necessitated by the fact that Kenya had assisted Israel during the rescue operation of Israeli hostages in Entebbe airport in 1976.¹¹⁴

The major terrorist attack that hit Kenya and almost brought the country to a standstill was the attack on the American Embassy in 1998 in which over 200 people were killed, among them 12 Americans, and several others injured.¹¹⁵ This attack necessitated the Kenyan government to tighten up its fight against terrorism.¹¹⁶ Investigation into the attack revealed that it was not perpetrated by Somali nationals as had been suspected by the Kenyan government, but rather a vast network of international terrorist in conjunction with Kenyan nationals.¹¹⁷ It was also discovered that the attack took over five years of planning and involved the world's most wanted terrorist at the time, Osama Bin Laden.¹¹⁸ The attack also involved a former Egyptian police person who was a member of the Al Qa'ida terrorist group by the name Fazul Abdulla Mohammed, who played a great role in the recruitment of the two Saudi suicide bombers.¹¹⁹

That was not the last that Kenya would have of the terrorists though. In 2002, a Hotel that belonged to some Israelites was bombed and there was an attempt at shooting a missile at a

¹¹³ Ibid.

¹¹⁴ E Mogire and K Agade, 'Counter-terrorism in Kenya' (2011) 29 (4), *Journal of Contemporary African Studies* 473-491.

¹¹⁵ Ibid

¹¹⁶ V Krause and E Otenyo, 'Terrorism and the Kenyan public' (2005) 28(2), *Studies in Conflict Terrorism* 99-112.

¹¹⁷ Ibid

¹¹⁸ CNNLibrary '1998 U.S. Embassies in Africa Bombings Fast Facts'

<<http://edition.cnn.com/2013/10/06/world/africa/africa-embassy-bombings-fast-facts/>> accessed on 21 Dec 2016.

¹¹⁹ J Vittori, K Bremer, and P Vittori, 'Islam in Tanzania and Kenya: Ally or Threat in the War on Terror?' (2009) 32(1), *Studies in Conflict & Terrorism* 1075-1099

commercial plane as it took off in Moi International airport in Mombasa.¹²⁰ The attack was also planned by Fazul Abdullahi Mohammed who also attempted to bomb the American Embassy a second time after it was rebuilt.¹²¹ In the year 2011, the Kenyan government decided to send its troops into Somalia following a series of kidnappings of tourists along the border.¹²² The Kenyan army in collaboration with the African Union Mission in Somalia (AMISOM) has fought to wipe out the Al Shabaab terrorist group from Somalia and make the stabilization of the Somali government possible. This has not however been a smooth walk in the park. It has prompted several attacks against Kenya as a nation and put Kenya's national security at risk.

In 2013, for instance, after nearly a decade of peace without any serious threat from terrorists, an attack was carried out on the Westgate Mall in Westlands in Nairobi. The attack resulted in around 62 civilian deaths most of them from the Western world.¹²³ There have also been spontaneous and numerous attacks that have led to the death of many Kenyan citizens since the Kenyan Defence Forces were deployed in Somalia. Some of the notable attacks include; the attack in Mpeketoni Lamu in June 2014 that resulted in 68 deaths, the attack on a bus in Mandera that resulted in the death of 28 people, the attack on a Mandera quarry in December 2014 that ended up in the death of 3 quarry workers and the most painful attack in Kenyan history in 2015 April on Garissa University College in which 148 students were killed.¹²⁴

¹²⁰ <<http://mobile.nation.co.ke/lifestyle/-Terrorists-hit-Paradise-Hotel-after-elaborate-planning/1950774-2067670-format-xhtml-8rpl3g/index.html>> accessed 5th June 2017

¹²¹ Adan, H.H. Maj. 'Combating transnational terrorism in Kenya' (2005), <<http://www.dtic.mil/>> accessed 21 July 2016.

¹²² KDF Kenya <<http://amisom-au.org/kenya-kdf/>> accessed 21st July 2016.

¹²³ Dennis Okari 'Kenya's Westgate attack : Unanswered questions one year on' (BBC Africa, 22nd September 2014) <<http://www.bbc.com/news/world-africa-29282045>> accessed 3rd Feb 2017.

¹²⁴ <<https://www.start.umd.edu/pubs>> accessed on 3rd February 2017

2.2 Counterterrorism efforts by the Kenyan Government

The foregoing attacks therefore made the Kenyan state to be desperate in securing its national security and bringing to an end the sporadic terrorist attacks in the country. The Kenyan government thus engaged itself in numerous efforts to rid the country of the bad omen that had befallen it. The first act that the Kenyan government undertook was the deployment of its defense forces to Somalia. This was the hiding ground of the Al Shabaab terror group. The government therefore intended to flush out the Al Shabaab and stabilize Somalia whose control had slipped into the hands of the terror group.¹²⁵ Other efforts that the Kenyan government undertook include; the action dubbed 'Usalama watch' in 2014 which was directed at doing away with foreigners that were connected with terrorism in targeted areas such as Nairobi and Mombasa.¹²⁶ This was especially so after a series of attacks that rocked the two cities on 23rd March and 31st March respectively that resulted in the death of 11 people and several others sustaining injuries in a church in Likoni, Mombasa and various food cafes in Eastleigh, Nairobi.¹²⁷ Another notable effort by the Kenyan government was the directive by the then cabinet secretary for the Ministry for Interior and coordination of National Government, Mr. Joseph Ole Lenku, requiring all refugees who lived outside the designated refugee camps in Kakuma and Daadab to return with immediate effect.¹²⁸ The directive also ordered that all refugee registration centers in urban Nairobi, Nakuru, Isiolo, Mombasa and Malindi to be closed

¹²⁵ Ibid

¹²⁶ Ibid

¹²⁷ Ibid.

¹²⁸ Cyrus Ombati, 'Refugees ordered to relocate to Kakuma, Dadaab camps as urban registration centres shut' (Standard Digital, 25th March 2014) <<http://www.standardmedia.co.ke/article/2000107818/refugees-ordered-to-relocate-to-kakuma-dadaab-camps-as-urban-registration-centres-shut>> accessed 21 July 2016.

with immediate effect.¹²⁹ This was after an attack on a church in Likoni, Mombasa where gunmen armed with AK47 rifles escaped after killing six people and injuring 18 others.¹³⁰

Another effort undertaken by the Kenyan government in regard to combating terrorism was the announcement by the then Cabinet Secretary for Interior and Coordination, Mr. Joseph Ole Lenku on 5th April 2015 that 6,000 additional security officers had been deployed to Nairobi's Eastleigh estate in order to arrest foreign nationals that had entered the country without permission and any other person who was suspected of propagating terrorism.¹³¹ The operation to flush out foreign nationals suspected of terrorism was later spread to other major towns such as Mombasa, Thika, Nakuru, Eldoret, Lamu, Malindi, Garissa, Mandera and Kitale.¹³² The operation led to the arrest of over 4000 foreign nationals, most of them who hailed from Somalia.¹³³

The Parliament of Kenya also passed the Security Laws (Amendment) Act of 2014.¹³⁴ The Act was aimed at amending 22 Acts of Parliament touching on security in Kenya namely; Public Order Act (Cap 56), Extradition (continuous and foreign countries) Act (Cap 76), Penal Code (Cap 63), Criminal Procedure Code (Cap 75), Prevention of Terrorism Act (2012), Sexual Offenses Act (2006), Registration of Persons Act (Cap 107), Evidence Act (Cap 80), Prisons Act (Cap 90), Firearms Act (Cap 114), Radiation Protection Act (Cap 243), Rent Restriction Act (Cap 296), Kenya Airport Authority Act (Cap 395), Traffic Act (Cap 403), Investment Promotion Act (Cap 485), Labour Institutions Act (2012), National Transport Safety Authority

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ The Security Laws (Amendment) Act, No 19 of 2014.

Act (2012), Refugee Act (2006), National Intelligence Service Act (2012), Kenya Citizenship and Immigration Act (2011), National Police Service Act (2011) Civil Aviation Act (2013), and the Public Benefits Organizations Act, 2013.¹³⁵ The passing of the Act raised a lot of public outcry from various Human Rights organization and the Coalition for Reform and Democracy (CORD) an opposition coalition citing reasons that the implementation of the Act would lead to serious violation of Human Rights in the country and in the fight against terrorism. The Human Rights organizations and Coalition For Reforms and Democracy were able to successfully challenge some sections of the bill which were subsequently adjudged to be in contravention of the Bill of Human Rights and Fundamental freedoms as is enshrined in the Bill of rights in the Kenyan *Constitution*.¹³⁶ Specifically, the following provisions were challenged : Section 12, of the Security Law (Amendment), Act 2014 which amended section 66 of the Penal code¹³⁷ by inserting the following words in ‘A person who publishes broadcasts or causes to be published or distributed, through print, digital or electronic means, insulting, threatening, or inciting material or images of dead or injured persons which are likely to cause fear and alarm to the general public or disturb public peace commits an offence and is liable, upon conviction, to a fine not exceeding five million shillings or imprisonment for a term not exceeding three years or both.’ The petitioners argued that this section was unconstitutional for violating the freedom of expression and the media guaranteed under Articles 33 and 34 of the Constitution.¹³⁸

¹³⁵ Kenya National Commission on Human Rights, *Advisory on the Security Laws Amendment Bill*, (2014).

¹³⁶ Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another [2015] eKLR

¹³⁷ Penal Code Chapter 63 Laws of Kenya.

¹³⁸ Ibid. also see The Security Laws (Amendment) Lct, 2014 No.19 Of 2014.

Both CORD and the Human Rights organizations contended that under Articles 93, 94 and 95 of the Constitution, Parliament must enact laws in accordance with the Constitution. They therefore questioned the constitutionality of both the process and the substance of the amendments. They also contended that Section 16 of SLAA which amended section 42 of the Criminal Procedure Code (CPC) violated the right to fair hearing.¹³⁹ Section 42A of CPC was also argued out to be unconstitutional as it violated the right of an accused person to be informed in advance of the evidence the prosecution intended to rely on as provided under Article 50(2) (j) of the Constitution¹⁴⁰; Section 20 of SLAA which introduced Section 364A to the CPC was argued to be unconstitutional for being in conflict with the right to be released on bond or bail on reasonable conditions as provided for under Article 49(1) (h) of the Constitution;¹⁴¹ Section 26 of SLAA which introduced Section 26A to the Evidence Act was also argued out to be unconstitutional for violating the right to remain silent during proceedings as guaranteed under Article 50(2)(i) of the Constitution.¹⁴²; Section 48 of SLAA which introduced Section 18A to the Refugee Act, 2006 was also contended to be unconstitutional for violating the principle of non-refoulment as recognized under the 1951 United Nations Convention on the Status of the Refugees which is part of the laws of Kenya by dint of Article 2(5) and (6) of the Constitution.¹⁴³

Another effort by the government was after the attack on the Garissa University in April 2015 whereby the Inspector General of Police, Mr. Joseph Boinnet issued a gazette notice dated

¹³⁹ *ibid* Section 16

¹⁴⁰ *ibid*

¹⁴¹ *ibid* paragraph 464

¹⁴² *ibid*

¹⁴³ *ibid*

4th April 2015 which listed individuals, businesses and organization that he intended to classify as specified entities that were associated with terrorist groups.¹⁴⁴

Some of the organizations that were listed include; Al Shabaab, Mombasa Republican Council, Al Qa'ida, Islamic State of Iraq and Syria (ISIS) and Boko Haram. The government also listed the following persons and commercial entities linked to or suspected of having links to – Al Shabaab; - Mohamed Kuno aka Gamadheere, Abdifatah Abubakar Abdi, Ahmed Iman Ali, Fuad Abubakar Abdi ,Erick Ogada, Abdikadir Mohamed Abikadir alias Ikrima, Maalim Abass Guyo, Dahabshill Money Transfer Company, UAE Exchange Money Remittance, Kendy Money Transfer, Continental Money Transfer, Amal Express Money Transfer, Juba Express Money Transfer, Iftin Express Money Transfer, Kaah Express Money Transfer, Amana Money Transfer, Bakaal Express Money Transfer, Hodan Global Money Remittance and Exchange, Tawakal Money Transfer, Flex Money Transfer, Legend International Consulting, Abdiwali Hajir Sheik., Mohamed Girad Sheik Abdulahi., Hassan Ibrahim Kasim J/A., Mohamed Abdi Muhumed., Bashir Mohamed Hashi., Alyce Seraphine Sway, Abdullahi Mohamed Salat, Moulid Garad Sheik, Bashir Mohamed, Sky Forex, Ali Hassan Sagar Aka Qathar, Faisal Ahmed Nuur Amaje Aka Faisal Ahmed Mohamed., Mabkhut Idha Bukheit, Bashir Abdirahman Mohamed, Abdi Kassim/Osman Abdi Kassim, Mohamed Sheik Osman Egal, Mowlid Khalif/Moulid Khalif Ali, Yassir Mohamud Ahmed., Ahmed Harob, Ali Hassan Gure Aka Ali Baba, Sehikh Hassa Abdirahman, Sayed Abdullahi., Agency for Peace and Development, Haki Africa, Muslims for Human Rights Group

¹⁴⁴Kenya Gazette No. 2326 of 7th April 2015, <<http://www.knchr.org/Portals/0/CivilAndPoliticalReports/Final%20Disappearances%20report%20pdf.pdf>> accessed on 21st July 2016.

(Muhuri), Abdi Ibrahim Haithar alias Agwein Aka Gamadere, Ainul Qamar Lodge and Hotel, Sheik Mohamed Umal, Abdillahi.¹⁴⁵

The most recent effort by the Kenyan government in the fight against terrorism is the directive by the Kenyan government to close all refugees' camps in the country and to have refugees repatriated to the countries of origin.¹⁴⁶ One of the reasons provided for by the government for the closure of the camp include among others; that Al- Shabaab fighters used the camp as base for smuggling weapons.¹⁴⁷

It can be clearly seen that the Kenyan government has put up a spirited fight against terrorism in Kenya. However, the study's main concern is the manner that the foregoing efforts are being conducted in the fight against terrorism. In as much as the various efforts of counterterrorism by the Kenyan government are welcome, they should not violate the rights of citizens and even the suspects alleged to have committed the acts. The Kenya National Commission on Human Rights (KNCHR) has documented numerous human rights violation and breaches of the law committed by security agencies against innocent civilians especially against those who are the members of the Muslim Somali community.¹⁴⁸ Some of the violations of Human rights as recorded by KNHCR include; arbitrary arrest, extortion, theft and looting of businesses and homesteads, sexual harassment, arbitrary detentions, illegal deportations, torture and illegal and human degrading treatment.¹⁴⁹ Following the high number of complaints, the Commission is still pursuing some of the complaints of arbitrary arrests, detention, enforced disappearances, killings

¹⁴⁵ Strategic Intelligence Service 'List of Terrorist Groups, Terrorist Militants and Enabling Entities' <<http://intelligencebriefs.com/government-compiles-list-of-terrorist-groups/>> accessed 27 Dec. 2016

¹⁴⁶ Muriithi Mutiga and Graham Harrison, 'Kenya says it will shut world's biggest refugee camp at Dadaab' (The Guardian, 11th May 2016), <<https://www.theguardian.com/world/2016/may/11/kenya-close-worlds-biggest-refugee-camp-dadaab>> accessed 22 July 2016.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid

¹⁴⁹ Ibid.

and torture.¹⁵⁰ The following part will thus be dedicated at looking into these allegations of human rights violation by the security agencies even as they seek to fight terror.

2.3 Nature of human Rights Violation in the fight against terrorism

The Allegations on Kenya's security agencies violating the rights of civilians did not begin with the deployment of the Kenya Defense forces to Somalia¹⁵¹. It began way back as far as 2006.

¹⁵²This part is therefore dedicated to discussing the various natures that the violations by the Kenyan Security agencies take.

2.3.1 Arbitrary arrests and unlawful detention

The Constitution of Kenya provides that every person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without due course.¹⁵³ The right to freedom and security of persons is also encapsulated in international conventions and treaties. The International Convention on Civil and Political Rights provides that "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."¹⁵⁴

¹⁵⁰ Ibid.

¹⁵¹ David M. Anderson, Jacob McKnight, African Affairs, Volume 114, Issue 454.

¹⁵² Ibid

¹⁵³ Constitution of Kenya, 2010, Article 29 (a)

¹⁵⁴ International Convention on Civil and Political Rights (1966), Article 9, entry into force 23rd March 1976

The Constitution also protects the rights of the arrested persons where it provides that an arrested person has the right to be brought before a court as soon as reasonably possible but not later than twenty- four hours after being arrested unless the twenty- four hours end outside court hours or on a day that is not an ordinary court day.¹⁵⁵ It also provides that at the first court appearance, an arrested person should be charged or informed of the reason for the detention continuing or to be released.¹⁵⁶

The Kenya Security Agencies have however infringed this right for suspected persons arrested in connection with terrorism. In 2006 and early 2007, it was reported that close to 150 people had been gathered up and subjected to detention for being suspects of terrorism acts.¹⁵⁷ The people were arrested close to the Kenyan- Somalia Border as they were fleeing to Kenya from the conflict that was taking place in Somalia.¹⁵⁸ They were detained in Kenya for many weeks without being arraigned in court to take charges.¹⁵⁹ In addition, they were also denied access to a lawyer, consular assistance, the ability to challenge the legality of their detention or being awarded the status of refugees.¹⁶⁰ Some of these detainees accused the government of torturing them, and that they were being detained in conditions that amounted to inhuman and degrading treatment.¹⁶¹ There was also the allegation of violation of human rights of refugees in the process of counter terrorism. It is alleged that some of the people who attempted to flee the conflict in Somalia into Kenya were denied access to the country by the Kenyan agencies.¹⁶² Furthermore,

¹⁵⁵ Constitution of Kenya, 2010, Article 49 (1) (f)

¹⁵⁶ *Supra* n 1 art 49 (1) (g)

¹⁵⁷ Redress and Reprieve 'Kenya and Anti- Terrorism: A time for change' (2009), <<http://www.redress.org/downloads/publications/Kenya%20and%20Counter-Terrorism%205%20Feb%2009.pdf>> accessed 23 July 2016.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

some who had already gained access to Kenya were returned to Somali without having regard to the due process or to the status of them as being potential refugees.¹⁶³ The above acts amount to a violation of The ICCPR¹⁶⁴ which stipulates that ‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.’¹⁶⁵

Despite measures to counter terrorism, the state’s duty to ensure no violation of the refugee’s right accrues as long as the refugees are within a state’s territory. This is notwithstanding the fact that the government is exerting efforts to combat terrorism. This position is also in consonance with the position taken by the Human Rights Committee in its general comment No. 31 of 2004¹⁶⁶, where it is stated that the state parties to ICCPR should ensure that the covenant rights accrue to all persons within their territory and subject to their jurisdiction.¹⁶⁷ The Committee went ahead to assert that a State party must ensure such rights to anyone within its power or effective control, even if not situated within its territory.¹⁶⁸ In addition, the enjoyment of international human rights is not limited to the citizens of States parties but must be available to all individuals, regardless of nationality or statelessness, such as asylum-seekers and refugees.¹⁶⁹

It is also alleged that some of the people who attempted to flee the conflict in Somalia into Kenya were arrested and detained by the Kenyan agencies.¹⁷⁰ KNCHR officials claim that they were denied access to any prison or place where the arrested people were being detained so as to

¹⁶³ Ibid.

¹⁶⁴ Art,2 The International Covenant on Civil and Political Rights.

¹⁶⁵ Ibid

¹⁶⁶ Human Rights Committee in its general comment N° 31 (2004).

¹⁶⁷ Ibid

¹⁶⁸ Ibid

¹⁶⁹ Ibid

¹⁷⁰ Supra note 45

assess the conditions under which the refugees were being held.¹⁷¹ This was despite the fact that the KNCHR has the mandate to investigate on its own initiative or upon a complaint made by a person or a group of persons on the violation of any Human Rights as well as to visit any prisons or place of detention or related facilities with a view of inspecting and assessing the conditions under which the inmates are held and to make any recommendations.¹⁷² The detainees were subsequently released without any charge preferred on them.¹⁷³ This was thus in contravention of the Constitution of Kenya as well as the ICCPR which guarantee everyone arrested the right to be informed promptly of any charges against him or her.¹⁷⁴ The denial of the access to a lawyer as well as the right to habeas corpus was also in violation of the Constitution and the ICCPR.¹⁷⁵ The acts therefore amounted to the violation of the detainees' right to liberty.

The detainees mentioned above were also denied communication with consular officers.¹⁷⁶ This denial contravened their right as is enshrined in international instrument. The Vienna Convention on consular relations provides that:

“a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State; (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of

¹⁷¹ Ibid.

¹⁷² Kenya National Commission on Human Rights Act (2002) s. 16 (1) (a) and s.16 (1) (b).

¹⁷³ www.knchr.org/CivilAndPoliticalReports/TheErrorOfFightingTerrorWithTerror, Accessed on 9th November, 2017

¹⁷⁴ The *Constitution of Kenya*, arts 49 and 50; *International Convention of Civil and Political Rights*, came into force on 23RD March 1976, art 9 (2).

¹⁷⁵ Ibid art 25 (d) and art 9 (3) respectively. Note that the Kenyan Constitution provides that the right to Habeas Corpus is one of the rights that may not be limited under any law.

¹⁷⁶ www.knchr.org/CivilAndPoliticalReports/TheErrorOfFightingTerrorWithTerror, Accessed on 9th November, 2017

that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph; (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment.”¹⁷⁷ The contention here is that the government in the process of counter terrorism ought to uphold the rights of persons who seek asylum. By denying the detainees mentioned above the right to communication with consular officers, the government violated The Vienna Convention on Consular Relations.

2.3.2 Torture, Cruel, Inhuman and Degrading Punishment

The Kenya National Security agencies have also violated the right not to be subjected to torture cruel, inhuman and degrading punishment in their fight against terrorism. According to a report by the KNCHR, there were numerous allegations of torture, cruel, inhuman and degrading treatment that was effected on the people who had been arrested in suspicion of being connected to terrorism acts¹⁷⁸. In Wajir County for instance, the KNCHR interviewed close to ten individuals who had been arrested and treated in a manner that amounted to torture, inhuman, cruel and degrading treatment.¹⁷⁹

¹⁷⁷ Vienna Convention on consular relations (1963) came into force on 19th March 1967, art 36 (1).

¹⁷⁸ [www.knchr.org/CivilAndPoliticalReports>TheErrorOfFightingTerrorWithTerror](http://www.knchr.org/CivilAndPoliticalReports/TheErrorOfFightingTerrorWithTerror), Accessed on 9th November, 2017

¹⁷⁹ Ibid, Page 15

One of the interviewees for instance named Affey Ali Abdullahi, narrated his ordeal as follows : ‘ back of the truck.’¹⁸⁰ He also claimed to have been subjected to a series of torture sessions in a bid for him to confess that he had links to the Al Shabaab.¹⁸¹ The torture took the form of severe whipping, kicking with boots, electric shocks, mock execution as well as the denial of food.¹⁸²

Similar cases of torture were also reported in Mandera. According to one man interviewed by KNCHR named Maulid Hassan Adan, on the night of 21st April at around 9.30 pm as he was relaxing outside his house, about six men dressed in plain clothes, stormed his house and informed him that they were from African Union Mission in Somalia (AMISOM).¹⁸³ They blindfolded him, tied his hands behind his back and beat him up with what felt like plastic tubes.¹⁸⁴ They took him on a military tank and drove him to Mandera military camp.¹⁸⁵ Here, they took him while still blindfolded to what felt to him like a house, where they dipped him in ice- cold water immersing him completely and took him out then immersed him in a drum of hot water.¹⁸⁶ They also beat him for two days in a bid to having him confess to being one of the terrorists who attacked the bus that was headed to Arabiya from Mandera in which 34 people among them teachers were killed.¹⁸⁷

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² Ibid. Page 15

¹⁸³ Ibid

¹⁸⁴ Ibid

¹⁸⁵ Ibid

¹⁸⁶ Ibid

¹⁸⁷ Ibid.

The discovery of mass graves in Lanshib and Dasheg in Wajir County, also point to the presence of torture, cruel, inhuman and degrading treatment of terror suspects¹⁸⁸. According to the Error of Fighting Terror with Terror report by the KNCHR, they found at the mass graves, blood stained bandages strewn there, which indicated that the victims had been wounded and treated before being killed.¹⁸⁹

The foregoing instances are just but part of the violation of human rights by National Security Agencies in the fight against terror through torture, cruel and inhuman and degrading treatment. This is in contravention of the provisions of both the national law and the International law. The Kenyan Constitution for instance provides that the right to freedom from torture, and cruel, inhuman or degrading treatment or punishment is one of the fundamental rights and freedoms that shall not be limited.¹⁹⁰ The constitution further provides that “Every person has the right to freedom and security of the person, which includes the right not to be Subjected to any form of violence from either public or private sources; subjected to torture in any manner, whether physical or psychological; treated or punished in a cruel, inhuman or degrading manner.”¹⁹¹

The right to freedom from torture, inhuman, cruel or degrading treatment is also provided for under international instruments such as the United Nation Convention against Torture, Inhuman, Cruel and Degrading Treatment (UNCAT),¹⁹² the ICCPR¹⁹³ and the African Charter on Humans

¹⁸⁸ Human Rights Watch *Deaths And Disappearances Abuses in Counterterrorism Operations in Nairobi and in North Eastern Kenya* (2016) 42.

¹⁸⁹ Adow Mohamed, 'Mass Graves found in Wajir, 11 bodies thought to be of terror suspects found in Lanbib' (The Star, 1st May) <http://www.the-star.co.ke/news/2015/05/01/mass-grave-found-in-wajir-town-11-bodies-thought-to-be-ofterror_c1128018> accessed 16 Dec 2016

¹⁹⁰ *Supra* n 1, art 25 (a).

¹⁹¹ *Ibid*, art 29(c)(d) and (f).

¹⁹² United Nations Convention on against Torture, Inhuman, Cruel and Degrading Treatment or Punishment, (1984) entered into force on 26th June 1987.

¹⁹³ International Convention of Civil and Political Rights, (came into force on 23rd March 1976).

and Peoples Rights (ACHPR).¹⁹⁴The UNCAT for instance provides that “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”¹⁹⁵From the foregoing, it is clear that violations on human rights by security agencies in the fight against terrorism is by way of torture, cruel, inhuman and degrading treatment.

2.3.3 Enforced Disappearances

Violation of human rights by Kenya National Agencies in the fight against terrorism has also taken the nature of enforced disappearances.

Enforced disappearance has been defined to mean the “arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”¹⁹⁶

Research by the KNCHR indicates that various forms of enforced disappearances are evident. Most of the people interviewed confessed to knowing someone whom they saw being arrested by security agencies, being driven away and never to be seen again.¹⁹⁷ For instance in Wajir County, the people interviewed such as Ebla Adirahman reported of the incidence of the arrest of her

¹⁹⁴ African Charter on Human and People's Rights (ACHPR), (Entered into force in 1998).

¹⁹⁵ Supra n 56, art 22.

¹⁹⁶ International Convention for the Protection of All Persons from Enforced Disappearance (entered into force on 23rd December 2010),art 2.

¹⁹⁷ www.knchr.org>CivilAndPoliticalReports>TheErrorOfFightingTerrorWithTerror, Accessed on 9th November,2017

husband by military personnel. To date the whereabouts of her husband are still unknown.¹⁹⁸ The same case applied to a young man by the name Hassan who by the time KNCHR commissioners were interviewing his mother, had also disappeared for 45 days.¹⁹⁹ The mother reported that he had been arrested by officers in a white Probox vehicle and he is missing up to date.²⁰⁰ Similar cases were also reported in other places such as Mandera, Lamu and Garissa.²⁰¹ By the time of publishing the report, the KNCHR was still investigating into 38 cases of which six of them were dead and the rest were still missing.²⁰²

Several reports also show that numerous applications of habeas corpus have been made in relation to people who were picked up or arrested by the police.²⁰³ Some of the cases have been done away with due to the fact that the police officers allege to no longer have the arrested person in their custody.²⁰⁴ One case in point was the case of Mohamed Abdumalik.²⁰⁵ He was picked by the Anti- Terrorism Police unit in a café in Mombasa, was detained and held *incommunicado* in the Kilindini port and other police stations in Mombasa.²⁰⁶ He was constantly moved to other police stations in the country such as Hardy, Ongata Rongai, and Spring Valley police stations. His whereabouts were for a long time unknown until a certain time when the US Government announced that he was detained at Guantanamo Bay.²⁰⁷ The United States

¹⁹⁸ Ibid Page 7

¹⁹⁹ Ibid

²⁰⁰ Ibid

²⁰¹ Ibid. pg.22

²⁰² Ibid

²⁰³ Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10; others [2015] eKLR

²⁰⁴ [www.knchr.org/CivilAndPoliticalReports>TheErrorOfFightingTerrorWithTerror](http://www.knchr.org/CivilAndPoliticalReports/TheErrorOfFightingTerrorWithTerror), Accessed on 9th November, 2017

²⁰⁵ Mariam Mohamed & another v. Commissioner of Police & another [2007] eKLR.

2007).

²⁰⁶ Ibid

²⁰⁷ United States Department of Defence, Office of the Assistant Secretary of Defense (Public Affairs) 'Terror Suspect Transferred to Guantanamo,' (Press Release No. 343-04, 26 March 2007) <<http://www.defenselink.mil/releases/release.aspx?releaseid=10662>> accessed 27 July 2016.

ambassador to Kenya revealed that he had been transported to Guantanamo Bay with the full knowledge and consent of the Kenyan Government in what he termed as collaboration between the two governments to fight global terrorism.²⁰⁸

In an application for Habeas Corpus by his family, the High Court declined to issue the same on the basis that Mr. Abdumalik was no longer under the control of the Kenyan authorities and the Kenyan Police Commissioner could not be in a position to comply with the habeas corpus writ requiring his production in court.²⁰⁹ The above incidences are a clear indication of the violation of the freedom from enforced disappearances. This is against the provisions as contained in international instruments such as the International Convention for the Protection of All Persons from Enforced Disappearance which provides that “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance”²¹⁰

2.3.4 Extra Judicial Killings

Extra judicial killing is another way in which human rights have been violated by national security agencies in the fight against terrorism. Several reports have been made of where suspected terrorists and terrorists' sympathizers have been killed by police officers. One instance is in the killing of Sheikh Aboud Rogo Mohammed in 2012 which provoked riots and the

²⁰⁸ George Munyori, 'US Defends Transfer of Terror Suspect to Guantanamo Bay,' (29 March 2007) <CapitalFM.co.ke> accessed 13th Dec 2016.

²⁰⁹ Ibid

²¹⁰ Ibid

burning of churches in Mombasa.²¹¹ People accused the government for the killing but up to date no prosecution has been made.²¹² Similarly, there was the killing of Sheikh Abubakar also known as Masanduku in which the police was also accused of the death.²¹³ Yet to date nothing has been done and no arrests have been made in connection with the same.²¹⁴

The report by KNCHR also revealed other extra judicial killings in the fight against terrorism, suspected to be propagated by army officers.²¹⁵ According to the report, more than six cases in which the commission was still investigating at the time of the release of the report, the individuals had died.²¹⁶ Most of these people were claimed to have been shot by security agencies officers after being suspected of being terrorists or terrorists' sympathizers.²¹⁷ Others like Abdul- Azis Yusuf were arrested by the police only for their bodies to be found later dumped along Maragua River together with two other bodies²¹⁸ The same case also happened to a young man aged 19 years by the name Abshi Abdow Abdilahi.²¹⁹

These killings of terror suspects are in contravention of both the national laws and international laws. The Constitution for instance provides that "every person has the right to life." It goes on further to provide that "a person shall not be deprived of life intentionally except to the extent

²¹¹ Peter Onyango, 'Kenya Entangled in Proscribed Crimes of Terrorism and violations of the Human Rights Law' [2015] 3(1) Sociology and Anthropology 1-5

²¹² Ibid

²¹³ Ibid

²¹⁴ Ibid page. 4.

²¹⁵ Ibid, Page 7

²¹⁶ Ibid pg.6 This report documents over one hundred and twenty (120) cases of egregious human rights violations that include twenty five (25) extrajudicial killings.

²¹⁷ Human Rights Watch *Deaths And Disappearances Abuses in Counterterrorism Operations in Nairobi and in North Eastern Kenya* (2016) 42.

Human Rights Watch interviews with Y.H., M.O., and S.M., Mandera County, December 9, 2015. At least one person who was allegedly tortured by the military in Mandera had been reported to the military officers as an Al-Shabab sympathizer in what looked like an attempt by some members of the community to settle a personal score. The military officers targeted the individual without adequately verifying his identity or the reason for the allegations against him.

²¹⁸ *Supra* n 12, p 32.

²¹⁹ Ibid.

authorized by this Constitution or other written law.”²²⁰ The right to life is also provided for under international instruments. The Universal Declaration of Human Rights provides that, “everyone has the right to life, liberty and security of the person.”²²¹ The ICCPR also provides that ‘every human being has the inherent right to life which shall be protected by law and no one shall be arbitrarily deprived of his life.’²²² States are thus under an obligation to prevent arbitrary killings by their own security forces.²²³ The Kenyan government has however not stopped the killings of citizens suspected to be terror suspects and as such resulting in the violation of the fundamental human right to life.

2.4 Conclusion

In conclusion, this chapter has established that indeed there is a pronounced conflict between counter terrorism and the preservation of human rights in the process of combating terrorism. This discourse has made a finding that there has been mass violation of human rights in the process of counter terrorism. Specifically, the research has found that the National Security Agencies have violated human rights provisions in the constitution, ICCPR, UDHR, UNCAT and ACHPR by committing;- torture; cruel, inhuman and degrading punishment; enforced disappearances; and extra judicial killings.

Based on the findings of this chapter, I put forward that the solution to the conflict between the process of counter terrorism and the preservation of human rights is the allegiance to human rights law as provided for in the various instruments as shown above. However, this allegiance can only be attained by a combined multi agency effort by the following agencies; The

²²⁰ Supra n 1, art 26.

²²¹ Universal Declaration of Human Rights, art 3.

²²² Supra n 57, art 6.1.

²²³ Supra n 12, p 38.

presidency, The Independent Policing Oversight Authority (IPOA), Directorate of Public Prosecutions, The office of The Inspector General of Police, The Chief of Kenya Defence Forces and The Parliamentary Committees on Defense and National security. Amongst all these institutions, the KNCHR plays a central role as the Humans Rights watchdog. It is on this footing that the next chapter seeks to establish the role of KNCHR in the process of combating terrorism.

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CHAPTER THREE

ROLE OF THE KENYA NATIONAL COMMISSION OF HUMAN RIGHTS IN MITIGATING VIOLATION OF HUMAN RIGHTS IN COUNTER-TERRORISM

3.0 Introduction

The governance of human rights is complex and diffuse.²²⁴ This is further complicated in the process of counter-terrorism.²²⁵ This governance involves numerous players including the government, national institutions, civil society, an independent judiciary, law enforcement agencies, effective and representative legislative bodies.²²⁶ National human rights bodies have a vital role to play in the protection of human rights within the context of counter-terrorism.²²⁷ Like all other mentioned institutions, the KNCHR serves a number of important functions - It acts as a bridge between national authorities and the public;²²⁸ advise both the legislature and the executive on national human rights;²²⁹ it piles pressure on the executive and the judiciary to prevent abuse of discretionary power.²³⁰ In playing these roles, these institution aids both the government and the public to combat terrorism without undermining human rights. This chapter finds out the scope of powers, roles and mandate of KNCHR in the protection of human rights in the process of counter-terrorism.

²²⁴ Office of The United Nations High Commissioner for Human Rights ' National Human Rights Institutions; History, Principles, Roles and Responsibilities' [2010] United Nations New York and Geneva.

²²⁵ Institute for Security Studies *Counter-terrorism, human rights and the rule of law in Africa* (2013).

²²⁶ Supra note 102 at pg.2

²²⁷ Joint European Union – Council Of Europe Programme *Setting up an active network of independent non judicial human rights structures: "The role of National Human Rights Structures as regards anti-terrorists measures"* (2009). 31

²²⁸ Council of Europe, Commissioner for Human Rights 'National human rights structures: protecting human rights while countering terrorism' <<http://www.coe.int/en/web/commissioner/-/national-human-rights-structures-protecting-human-rights-while-countering-terrorism>> accessed 26Dec 2016.

²²⁹ Supra note 102. Pg.42

²³⁰ ibid

3.1 The establishment of KNCHR, the scope of its mandate and powers as a human rights watchdog in the process of counter-terrorism.

KNCHR was established pursuant to The Kenya National Commission on Human Rights Act.²³¹

It was established as Kenya's national human rights institution.

The preamble of the Act states that it is "An Act of Parliament to restructure the Kenya National Human Rights and Equality Commission and to establish the Kenya National Commission on Human Rights pursuant to Article 59(4) of the Constitution; to provide for the membership, powers and functions of the Kenya National Commission on Human Rights, and for connected purposes"²³² The preamble takes into account the fact that KNCHR is a successor to the former KNCHR established by The Kenya National Commission on Human Rights Act No.9 of 2002.²³³

The Kenya National Commission On Human Rights Act No. 14 of 2011 provides for functions of the commission as to inter alia ;- "promote respect for human rights and develop a culture of human rights in the Republic; promote the protection and observance of human rights in public and private institutions; monitor, investigate and report on the observance of human rights in all spheres of life in the Republic; receive and investigate complaints about alleged abuses of human rights, except those relating to the violation of the principle of equality and freedom from discriminations under the gender and equality

²³¹ Kenya National Commission On Human Rights Act No. 14 of 2011. The original KNCHR became operational in July 2003, and following the promulgation of the Constitution of Kenya in August 2010, was legally reconstituted as the Kenya National Human Rights and Equality Commission (under Article 59 of the Constitution). The 2011 legislation restructured the body, assigning the equality function to a new National Gender and Equality Commission and reestablishing the name of the KNCHR.

²³² *ibid*

²³³ Kenya National Commission On Human Rights Act No. 9 of 2002. Was AN ACT of Parliament to provide for the establishment of the Kenya National Commission on Human Rights for the better promotion and protection of human rights and for connected purposes.

commission, and take steps to secure appropriate redress where human rights have been violated; on its own initiative or on the basis of complaints investigate or research matter in respect of human rights, and make recommendations to improve the functioning of State organs; act as the principal organ of the State in ensuring compliance with obligations under international and regional treaties and conventions relating to human rights except those that relate to the rights of special interest groups protected under the law relating to equality and non-discrimination.....”²³⁴

The essence of these functions is to provide the scope of what the commission may do in safeguarding human rights in the process of counter-terrorism.

The Act also provides for the general powers of the Commission that, the commission shall have power to :- “issue summons as it deems necessary ; require that statements be given under oath or affirmation and to administer such oath or affirmation; adjudicate on matters relating to human rights; obtain, by any lawful means, any information it considers relevant, including requisition of reports, records, documents and any information from any person, including governmental authorities, and to compel the production of such information for the proper discharge of its functions; and to enter upon any land or premises for any purpose material to the fulfillment of the mandate of the Commission; interview any person or group of persons;....”²³⁵

The rationale for this provision is to dictate how the commission should effectuate its functions with special regard to safeguarding human rights in the process of counter-terrorism. It is in light of these broad and general functions and powers that the subsequent sections of this study

²³⁴ S.8 KNCHR Act No.14 of 2011

²³⁵ Ibid S.26

critically analyzes the roles of KNCHR in mitigating arbitrary arrests and unlawful detention; mitigation of Torture, Cruel, Inhuman and Degrading Punishment; mitigation of Extra Judicial Killings; and mitigation of Enforced Disappearances of suspected terrorists.

3.2 Role of KNCHR in mitigating arbitrary arrests and unlawful detention

KNCHR has played a big role in ensuring that arbitrary arrests and unlawful detention are stopped/reduced in the fight against terrorism. The commission has conducted inquiries and made recommendations on complaints of violations of human rights during counter – terrorism.²³⁶ KNCHR has called for the protection of human rights as enshrined in the Constitution of Kenya. Thus an arrested person has the right to be informed of the grounds of the arrest,²³⁷ right to remain silent²³⁸ right to communicate with an advocate, not to be compelled to make any confession, to be brought before court within reasonable time and not later than 24 hours, right to defense,²³⁹ right to a fair hearing and right to humane treatment.²⁴⁰

KNCHR has been at the forefront in the investigation of the various cases of arbitrary arrests and unlawful detention of people suspected to be propagating acts of terrorism. For instance, the commission’s investigation team conducted interviews with victims of arbitrary arrests and unlawful detention in the areas where terrorism is rampant such as Garissa, Wajir, Lamu, Mombasa and Mandera.²⁴¹ The commission also conducted interviews with other stake holders

²³⁶ Kenya National Commission On Human Rights Press Statement *Prevailing Insecurity in the North Rift Region* 2Nd March 2017 .

²³⁷ Constitution of Kenya, article 49 (1).

²³⁸ Constitution of Kenya, article 49 (1) (ii).

²³⁹ Constitution of Kenya, article 50 (1).

²⁴⁰ Constitution of Kenya, article art 51 (3).

²⁴¹ [www.knchr.org>CivilAndPoliticalReports>TheErrorOfFightingTerrorWithTerror](http://www.knchr.org/CivilAndPoliticalReports>TheErrorOfFightingTerrorWithTerror), Accesed on 9th November,2017

such as the residents of the areas affected, opinion leaders and the relevant state agencies.²⁴² The commission also visited various prisons where they believed some of the victims of arbitrary arrest were being held such as Kamiti and Shimo la Tewa Prisons. In these prisons the KNCHR interviewed several prisoners imprisoned after being convicted of various terrorism offences.²⁴³ These interviews revealed grave violations of Kenyan, regional and international human rights principles and standards that protect people from arbitrary arrests and detention. The Kenyan security agencies were mostly the perpetrators.²⁴⁴

The Commission also investigated the infringement of human rights through arbitrary arrests and unlawful detention in a counter-terrorism security operation dubbed Usalama watch where it documented the detention of hundreds of suspects in overcrowded cells in Kasarani beyond the 24 hour limit provided for in the Constitution.²⁴⁵ The Commission found the same to be in contravention of international convention that similarly provide for the right such as the ICCPR. As such KNCHR heavily condemned the infringement of this right by security agents in the fight against counterterrorism.

KNCHR also has played the role of making recommendations in regard to the arbitrary arrests and detention of terror suspects. In its preliminary report on Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism in Kenya,²⁴⁶ KNCHR recommended that the president should condemn the arbitrary arrest of people suspected to have a connection with

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ www.knchr.org/CivilAndPoliticalReports/TheErrorOfFightingTerrorWithTerror, Accessed on 9th November, 2017

²⁴⁵ Kenya National Commission on Human Rights, (Knchr, 2014) 'Are We Under Siege? The State Of Security In Kenya' An Occasional Report (2010 –2014).

²⁴⁶ Kenya National Commission on Human Rights, Preliminary Report on Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism in Kenya Pg.39

terror attacks.²⁴⁷ Secondly that the president should call upon security agencies to uphold and respect the rule of law and human rights in the fight against terrorism.²⁴⁸

The situation in Kenya can also draw lessons from Iraqi incidents. Human Rights Watch carried out a research entailing warrantless arrests and arbitrary detentions in Iraq.²⁴⁹ From this research, they filed a report²⁵⁰ where most of the women who were interviewed said that security forces arrested them without arrest warrants and did not bring them before an investigative judge within the 24 hours required by Iraq's Code of Criminal Procedure.²⁵¹ The Human Rights Watch report also documented judges colluding with security forces to provide warrants after the time required by the code.²⁵² The report covers a story of Rasha al-Hussein who was arrested by security forces from her parents' home. Security forces did not have an arrest warrant and told her family that she was being taken for questioning.²⁵³ According to a report prepared by the Human Rights Committee, a copy of which the committee gave to Human Rights Watch, Rasha al-Hussein was initially detained in the Defense Ministry but the prison and other authorities did not inform her family of any information about her whereabouts for over four months.²⁵⁴

As evidenced in the above incidences, KNCHR must thus take note of the complexity of the process of preservation of human rights in the process of counter – terrorism. The commission must thus structure itself in a manner that addresses the violations even in the most complex of situations.

²⁴⁷ ibid

²⁴⁸ ibid.

²⁴⁹ Human Rights Watch *"No one is safe Abuses of Women" in Iraq's Criminal Justice System (2014)*.

²⁵⁰ ibid page 30

²⁵¹ ibid page 30

²⁵² ibid page 31

²⁵³ ibid pagg.31

²⁵⁴ ibid

3.3 Role of KNCHR in mitigation of Torture, Cruel, Inhuman and Degrading Punishment

KNCHR is mandated to monitor human rights violations in the fight against terrorism and to report the complaints and make recommendations on how to improve the functioning of state organs in relation to human rights.²⁵⁵ In relation to torture, cruel, inhuman and degrading treatment, KNCHR has played a key role in mitigating violations by investigating into the allegations of human rights violations during counter - terrorism.

KNCHR for instance investigated into the Usalama watch operation in which it documented cases of beatings, intimidation, extortion and sexual harassment during the operation.²⁵⁶ The Commission also undertook investigation at Kasarani stadium and in various police stations such as Kasarani, Embakasi, Pangani, Buruburu, Gigiri, Jomo Kenyatta International Airport, Majengo, Kamukunji, Langata and Kiamumbi where suspects of terror were being held following allegations of torture, inhuman, cruel and degrading treatment.²⁵⁷ In Wajir County, the KNCHR interviewed close to ten individuals who had been arrested and treated in a manner that amounted to torture, inhuman, cruel and degrading treatment.²⁵⁸ The commission also carried out investigations in other parts in which there were also allegations of torture, cruel, inhuman and degrading human treatment such as in Mandera, Garrissa, Mombasa and Lamu.²⁵⁹

The Commission further visited Lanshib and Dareg places where there were allegation of the presence of mass graves in which victims who had succumbed to the torture, cruel, inhuman and degrading treatment were buried.²⁶⁰ The Commission officials also obtained video clips and

²⁵⁵ S.26 KNCHR Act No.14 of 2011

²⁵⁶ Kenya National Commission on Human Rights, '11th Annual Report 2013/2014', p. 24.

²⁵⁷ Ibid.

²⁵⁸ [www.knchr.org>CivilAndPoliticalReports>TheErrorOfFightingTerrorWithTerror](http://www.knchr.org/CivilAndPoliticalReports>TheErrorOfFightingTerrorWithTerror), Accesed on 9th November,2017

²⁵⁹ Ibid

²⁶⁰ Ibid.

photographs from the local journalists that depicted human skulls in Lanbib.²⁶¹ In addition the commission interviewed 21 individuals in Mombasa county who also testified of human rights violation by security agencies.²⁶² In Garrisa County the commission interviewed 33 individuals who also testified of the presence of torture and violation of human rights by security agencies in the area.²⁶³ The KNHCR thus established that security agencies contravened both international and national law principles by perpetrating acts of torture, cruel, inhuman and degrading treatment to terror suspects.

As stipulated in this chapter, some of the functions of the commission are to monitor, investigate and report on the observance of human rights in all spheres of life in the Republic; and to take steps to secure appropriate redress where human rights have been violated.²⁶⁴ With regards to the above investigations, the report by the KNCHR only made recommendations to government and its agencies with the hope that it could be implemented in order to redress the violations.²⁶⁵ As to whether the commission could have done more in redressing the violations, the powers of the commission are limited by the Act to investigating or researching a matter in respect of human rights, and make recommendations to the state organs.²⁶⁶ The commission may therefore not act *ultra vires* the Act. Another approach could be to take the matter directly to court. However, the design of the Act largely intends the function of the commission to be making inquiries and recommendations. These are some of the challenges that this study will address in subsequent chapters.

²⁶¹ [www.knchr.org/CivilAndPoliticalReports>TheErrorOfFightingTerrorWithTerror](http://www.knchr.org/CivilAndPoliticalReports/TheErrorOfFightingTerrorWithTerror), Accessed on 9th November, 2017

²⁶² *ibid*

²⁶³ *ibid*

²⁶⁴ S.8 KNCHR Act No.14 of 2011

²⁶⁵ www.knchr.org/CivilAndPoliticalReports>TheErrorOfFightingTerrorWithTerror, Accessed on 9th November, 2017

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²⁶⁶ S.8 KNCHR Act No.14 of 2011

3.4 Role of KNCHR in mitigation of Enforced Disappearances

As stated above, the powers of the commission under the KNCHR Act are to investigate or research on a matter in respect of human rights, and to make recommendations to the state organs.²⁶⁷ In this regard, KNCHR has investigated instances of enforced disappearances being propagated by security agencies in the fight against terrorism. Some of the areas of intervention include investigation on the Wajir and Mandera disappearances.²⁶⁸ In a research carried out by the KNCHR, various forms of enforced disappearances are evidenced.²⁶⁹ For instance in Wajir County, the people interviewed such as Ebla Adirahman reported of the incidence of the arrest of her husband by military personnel and his whereabouts are yet to be known to date.²⁷⁰ The same case applied to a young man by the name Hassan who by the time KNCHR commissioners were interviewing his mother, had also disappeared for 45 days.²⁷¹

On numerous occasions, the KNCHR has intervened in cases of arrests after receiving distress calls from petitioners following arrest and disappearance of their kin.²⁷² For example, in the case of Stephen Kabui, on Wednesday 21/11/07 at around 2:30 pm, the KNCHR received a petition through a caller from Umoja estate in Nairobi that someone identified as Stephen Kabui had been arrested by officers attached to the Kwekwe police squad who were demanding Kshs.50,000 in exchange for his release or else they would take him to the mortuary.²⁷³ The KNCHR intervened leading to the release of Stephen Kabui.²⁷⁴ Other

²⁶⁷ *ibid*

²⁶⁸ *Supra n.16*

²⁶⁹ *ibid*

²⁷⁰ *ibid*

²⁷¹ *ibid*

²⁷² KNCHR *The Cry of Blood' Report on Extra-Judicial Killings and Disappearances*, 2008. Pg 52.

²⁷³ *Ibid*

²⁷⁴ *ibid*

documented successful interventions of the KNCHR for victims of enforced disappearances abound.²⁷⁵ Regretably, several other persons arrested cannot be accounted for.²⁷⁶

3.5 Role of KNCHR in mitigation of Extra Judicial Killings

The KNCHR has continued to advocate for the right to life as provided for under the Constitution of Kenya 2010.²⁷⁷ In addition to investigations, the commission has advocated for accountability in human rights violations. The commission has pointed out that between the period of 2010- 2014, an estimated 1894 extra judicial execution took place in the country.²⁷⁸ This is even more than the deaths that occurred from the terror attacks carried out in the same period which amounted to 241 deaths.²⁷⁹ KNCHR cited the reason for the high number of extrajudicial killings as the failure to gather enough evidence substantiating convictions, something that has led to over 60% acquittals of suspects arrested.²⁸⁰ The commission also called for the proper investigation and prosecution of police officers involved in the extrajudicial killings so as to alleviate the number of people being killed by security agencies in the fight against terrorism.²⁸¹ The KNCHR Act provides that the commission can ‘obtain by any lawful means, any information it considers relevant, including requisition of reports, records, documents and any information from any person, including governmental authorities, and to compel the production of such information.’²⁸² Through this power to compel production of information, and in collaboration with institutions such as the Independent Police Oversight Authority, the KNCHR has been able to hold certain institutions and agencies accountable for

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²⁷⁶ Ibid

²⁷⁷ Supra n 1, art 26, the article is to the effect that “Every person has the right to life and a person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law.”

²⁷⁸ KNCHR “Are We Under Siege? The State Of Security In Kenya An Occasional Report (2010 – 2014)” 2014. Pg.37

²⁷⁹ Supra n 88.

²⁸⁰ Ibid.

²⁸¹ Ibid.

²⁸² S.26 KNCHR Act No.14 of 2011

extra judicial killings by police.²⁸³ As I had pointed out earlier, the net functions of the commission is limited to making recommendations on the investigation or research that it has undertaken.

In relation to extra judicial killings, the commission has also done a lot in mitigating the vice through monitoring, investigation, reporting and making recommendations. The commission for instance in its report, has reported over 25 cases of extra judicial killings by security agencies in the fight against terrorism, information that would have otherwise remained uncovered were it not for the role played by the KNCHR.²⁸⁴

In sum, the Commission can be said to have done a lot in investigating extrajudicial killings including visiting the sites in which the crimes were committed such as the visit to the Lanbib mass graves, interviewing the people responsible and reporting of these violations to the government.²⁸⁵ Relying on these reports and their recommendations, the government improved its observance of human rights in the fight against terrorism.²⁸⁶ Firstly, IPOA which is better placed to take action against responsible police officers was established.²⁸⁷ However, no

²⁸³ Sura n.159

²⁸⁴ Supra n.153 Pg.13

²⁸⁵ Supra n 12.

²⁸⁶ Kenya National Commission on Human Rights *Human Rights Baseline Survey; Report Monitoring and Evaluation Department* (2016). Pg.88

The survey found that the new constitution of Kenya (2010) has engendered remarkable improvements that have facilitated the enjoyment of human rights in diverse spheres. Key institutions, legislative and policy frameworks have been created to provide an environment of rule of law. An assessment of the security sector has proved that security sector institutions have improved to a large extent in terms of equipment and professional outlook. However, there are still tendencies of the security apparatus to resort to extra judicial methods in dealing with crime.

²⁸⁷ *ibid* pg.11 Baseline data indicate that security sector reforms have been moving but at a slow pace.

The national police are yet to be fully equipped with necessary tools, skills and attitudes. Institutions such as National Police Service Commission (NPSC) and Independent Policing Oversight Authority (IPOA) have however made efforts to hold security agencies accountable for respect of human rights in their line of duty.

substantial investigations relating to counter-terrorism have been done by IPOA.²⁸⁸ In the cases of the murder of Aboud Rogo and Makaburi,²⁸⁹ the government established a task force to investigate Rogo's killing²⁹⁰. The task force in August 2013 reported that police had mishandled the crime scene and recommended a public inquest.²⁹¹ The public prosecutions director promised to set up an inquest in August 2013 but to date he has not done so.²⁹²

The KNCHR also made recommendations to the Kenya Defence Forces Chief which are to issue clear instructions to all military personnel that abuse of civilians/suspects, including torture, extra judicial killings and arbitrary arrest that they will be illegal and will not be tolerated; direct that military police to conduct investigations of crimes committed by military personnel and hold those responsible accountable; issue clear instructions to all military personnel that the detention of civilians in military custody is illegal and will not be tolerated, and display an order to this effect publicly in all military camps; instruct his commanders to grant KNCHR unfettered access to information and facilities crucial to its investigations in line with article 59 (d) of the Constitution; investigate the role of military commanders in Lamu, Garissa, Wajir, and Mandera where most of the abuses have been reported to have taken place under their command to see if they ordered or were otherwise implicated in the abuse, or should have known about the abuse and failed to prevent or investigate it.²⁹³

²⁸⁸ Supra note.166 pg.13 The Kenya National Bureau of Statistics (KNBS) reports that there were 929 cases of police officers being reported to have been involved in offences in the baseline year (2014). The Independent Policing Oversight Authority (IPOA) recorded 1792 cases of violations of rights of the public by police officers.

²⁸⁹ KNCHR "Are We Under Siege? The State Of Security In Kenya An Occasional Report (2010 – 2014)" 2014. Pg.40

²⁹⁰ David Ochami 'Sheikh Rogo task force that hit brick wall' (Standard digital, 5th Jan 2013)<https://www.standardmedia.co.ke/?articleID=2000074273&story_title=Of-Sheikh-Rogo-task-force-that-hit-brick-wall-and-how-it-all-began> accessed 27 Dec.2016.

²⁹¹ *ibid*

²⁹² *ibid*

²⁹³ KNCHR "The Error of Fighting Terror with Terror" Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism (2 KNCHR "The Error of Fighting Terror with Terror"

To the Parliamentary Committees on Defence and National Security, the KNCHR issued the following recommendations that; -

“The Parliamentary Committees on Defense and National security should conduct an independent probe on the abuses committed by KDF particularly relating to reported existence of torture chambers in the military bases in Wajir, Mandera and elsewhere.; Parliament should restrict the involvement of the military in internal affairs given the refusal by KDF to be held accountable for their actions; The amendments to the KDF Act that attempt to oust the parliamentary oversight on KDF should be removed.”²⁹⁴

KNCHR also recommended that the government should henceforth desist from criminalizing legitimate human rights and civil society work unless it has proper evidence of misconduct and breach of the law by Public Benefit Organizations and that any other operation aimed at counterterrorism be conducted in accordance with the rule of law and respect for human rights.²⁹⁵ It also recommended that partner governments and donor agencies supporting Kenya’s security sector must insist and condition their assistance on compliance with the rule of law, respect for human rights and accountability for abuses during operations by the security agencies.²⁹⁶

3.6 Assessment of KNCHR overall intervention.

From the discussion above, it is evident that the KNCHR has engaged in capacity building of security agencies on human rights. In the 2015 financial year, the main activities undertaken by

Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism (2015). 015).

²⁹⁴ *ibid*

²⁹⁵ *ibid*,p40

²⁹⁶ *ibid*

the commission included conducting public awareness campaigns and capacity building with various stakeholders in both the public and private spheres including the police, prison officers and the civil society.²⁹⁷ The commission subsequently engaged in monitoring the outcome of human rights compliance for institutions trained on human rights.²⁹⁸ This monitoring was meant to guarantee that the human rights training programs have the desired output of learning and improving human rights compliance²⁹⁹. In the 2015/2016 period, the commission undertook outcome monitoring exercise for human rights training undertaken with the Kenya Prisons Service (KPS) and the National Prisons Service (NPS).³⁰⁰

The Commencement of the implementation of two key projects that specifically targeted Human Rights Defenders (HRDs) due to the important role played by them in the promotion and protection of human rights by the commission has led to increased awareness of the situation at grassroot level.³⁰¹ The projects created human rights defenders networks in all the regions or areas that deal with human rights defending. They include the media, HRD's and police agencies who are in the forefront in championing the human rights agenda of the local population.³⁰² The goals of the HRD projects are; to improve the observance of rule of law in the interactions between security agencies and human rights defenders; to increase the adoption of human rights standards in security related policies and legislation at national and county levels; to enhance collaborations between HRDs and local communities for better protection of rights.³⁰³

²⁹⁷ Kenya National Commission on Human Rights 2015/2016 Annual Report.

²⁹⁸ Ibid pg 22

²⁹⁹ Ibid

³⁰⁰ Ibid

³⁰¹ KNCHR 'Safeguarding Constitutional Gains, Human Rights Defenders and Security' <<http://hrd.knchr.org/About-HRD-Project>> accessed 27 Dec.2016.

³⁰² Ibid

³⁰³ Ibid

The commission also incorporated a more efficient complaints reporting mechanism referred to as The Integrated Public Complaints and Referral Mechanism (IPCRM)³⁰⁴ As a result of this system, the Commission recorded an increase in complaints lodged through the IPCRM which comprised of 40 complaints in 2015 as compared to 17 of the total complaints received in 2016.³⁰⁵ From the complaints above, the Commission conducted field investigations and Rapid Response Missions (RRM) on complaints that merited such actions.³⁰⁶ The total number of field investigations (including Rapid Response Missions) conducted by the Commission during the reporting period were 93.³⁰⁷ The KNCHR 2016 annual report documents that the commission investigated a total number of 100 reported cases of persons who had complained of violation of their rights as arrested persons.³⁰⁸ The commission also investigated 259 cases of persons who had been denied their rights to personal liberty/security³⁰⁹ and 257 cases of persons who had been denied access to justice.³¹⁰

Out of the above investigations, the commission has made successful interventions, an example is the Lanbib Investigations³¹¹ where the Commission conducted investigations surrounding the discovery of shallow graves in Lanbib.³¹² This was as a result of forced disappearances of persons and torture in Wajir County. A team visited the sites of shallow graves, made several visits to the homes of victims of torture and managed to get a few courageous petitioners who recorded statements on their missing relatives and alleged torture by the security forces.³¹³ The

³⁰⁴ Inter-Agency Standing Committee *The Integrated Public Complaints and Referral Mechanism (IPCRM)* (2016).

³⁰⁵ Kenya National Commission on Human Rights 2015/2016 Annual Report pg 31.

³⁰⁶ *ibid*

³⁰⁷ *ibid*

³⁰⁸ *ibid* pg 32

³⁰⁹ *ibid*

³¹⁰ *ibid*

³¹¹ *ibid*, pg.36

³¹² *ibid*

³¹³ *ibid*

community seemed to have no confidence in police and could not 'freely' assist the police in investigations.³¹⁴ The commission however managed to get the people's confidences and as a result, they managed to get victim statements yet the file at the county CID coordinator had only one statement.³¹⁵ From the foregoing, success in recording of statements by the commission, the Commission made recommendations to the Director of Public Prosecutions to instruct the Inspector General of Police to ensure that prompt and comprehensive investigations are conducted into the ongoing abuses by security agencies and ensure that those responsible are prosecuted.³¹⁶

The redress mechanisms adopted by the Commission have included inter alia: Public Interest litigation, Human Rights Litigation, and alternative dispute resolution.³¹⁷ With respect to Public Interest Litigation, the commission in conjunction with other human rights agencies has filed a number of cases, among them ; *CORD & KNCHR vs. Attorney General*³¹⁸ The petition involved the Security Laws (Amendment) Act which was hurriedly and un-procedurally passed by the National Assembly on the 18th of December, 2014 and subsequently signed into law by the President on 19th December, 2014.³¹⁹ The KNCHR argued that the Act infringed on the bill of rights an argument that was upheld by the Court of Appeal³²⁰ on grounds that the amendments limited the rights of arrested and accused people and also restricted freedoms of expression and

³¹⁴ ibid

³¹⁵ ibid pg.36

³¹⁶ KNCHR 'The Error of Fighting Terror with Terror' Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism, 2015.page 39.

³¹⁷ Kenya National Commission on Human Rights 2015/2016 Annual Report pg 31.

³¹⁸ CORD & KNCHR vs. Attorney General Petition No. 628 consolidated with 630 of 2014

³¹⁹ THE SECURITY LAWS (AMENDMENT) LCT,2014 No.19 of 2014. Is AN ACT of Parliament to amend the laws relating to security. Date of Assent: 19th December,2014

³²⁰ Coalition for Reform & Democracy(CORD), Kenya National Commission on Human Rights & Samuel Njuguna Ng'ang'a v Republic of Kenya & another .Petition No.628 Of 2014 Consolidated With Petition No.630 Of 2014 And Petition No.12 Of 2015.

assembly.³²¹ The Commission has also engaged in public interest litigation cases.³²² This has been informed by the functions of the Commission under its constitutive Act.³²³ Examples of these litigations include: litigation against laws that violate human rights; litigation against agencies that violate human rights in the face of terrorism; and litigation to effect the observance of human rights including the application for habeas corpus orders among others.

From the foregoing, the measures undertaken by KNCHR'S general intervention have been fairly adequate. The interventions have led to successful inquiries, increased observance of Human Rights in counter terrorism and increased human rights awareness amongst the general public. However, KNCHR faces a number of challenges, which shall be discussed below.

3.7 Challenges faced by KNCHR in its role in mitigating human rights violations in counterterrorism

The KNCHR Act provides for the commission's role after inquiry on a matter. The Act states that 'The Commission may, upon inquiry into a complaint under this Act take any of the following steps (a).....refer the matter to the Director of Public Prosecutions or any other relevant authority or undertake such other action as the Commission may deem fit against the concerned person or persons; (b) recommend to the complainant a course of other judicial redress which does not warrant an application under Article 22 of the Constitution; (c) recommend to the complainant and to the relevant governmental agency or other body concerned in the alleged violation of human rights other appropriate methods of settling the

³²¹ *ibid*

³²² *ibid*

³²³ S.8 KNCHR Act.

complaint or to obtain relief; (d) provide a copy of the inquiry report to all interested parties; and (e) submit summonses as it deems necessary in fulfillment of its mandate.³²⁴

This section holds that – legally, the commission is a toothless dog.

The role played by the KNCHR in its mitigation of the violations of human rights in the fight against terrorism has not been easy. According to the report by KNCHR, some of the challenges that it experienced include; insecurity, limited funding and lack of prosecutorial powers.³²⁵ The commission reported that some of the areas it has been investigating have been very insecure.³²⁶ This insecurity has been caused by either terrorists or the security agents themselves.³²⁷ This has hindered its mobility and accessibility of areas like Pokot, Mandera, Baringo and others.³²⁸ Consequently, reaching victims of human rights violation has been an uphill task for the commission.³²⁹ Insecurity has also resulted in intimidation of victims and witnesses.³³⁰ This has led to withdrawal by witnesses of useful information for fear of being reprimanded by the security agencies.³³¹ Despite the above challenge, the commission has made substantial progress in defending human rights in the face of counter terrorism. This is

³²⁴ S.41 KNCHR Act.

³²⁵ Alomba Doris Mundia *Strategy Implementation and Its Challenges at Kenya National Commission On Human Rights (Knchr)2010*.

³²⁶ Kenya National Commission on Human Rights 2015/2016 Annual Report pg 11

³²⁷ *ibid*

³²⁸ *Kenya National Commission On Human Rights Annual Report (2009 – 2010)*. See the report. Page 66. One of the serious causes of gross human rights violations in the region is insecurity caused by cattle rustling. Loss of lives, livestock theft, and displacements among other human rights abuses have frequently been reported mostly in Turkana/Pokot, Samburu/Pokot/Turkana, and also close to the Baringo/East Pokot borders. A part from internal conflicts, there have been cases of border conflicts involving the Toposa of Ethiopia and Karamoja of Uganda.

³²⁹ [www.knchr.org>CivilAndPoliticalReports>TheErrorOfFightingTerrorWithTerror](http://www.knchr.org/CivilAndPoliticalReports/TheErrorOfFightingTerrorWithTerror), Accessed on 9th November, 2017

³³⁰ *ibid*

³³¹ *ibid*

particularly so in investigations and monitoring. In the Lanbib Investigations for example, the commission succeeded in getting more evidence from the witnesses.³³²

It is also unfortunate that the powers of the commission are limited by the Act to investigating or researching a matter in respect of human rights, and to making recommendations to the state organs.³³³ The commission has no direct prosecutorial powers against any person or entity as this is a preserve of the Director of Public Prosecutions.³³⁴ The KNCHR Act clearly stipulates that after inquiring a matter, the commission may recommend a matter to the DPP.³³⁵ The Act does not provide that the commission can prosecute a matter *suo moto*.³³⁶ However, the commission may commence private prosecution where the state agency fails to act to redress the violation following its recommendation. This construction can be made from article 157 (6) (b) of the Constitution of Kenya which impliedly confirms that any person other than the DPP may institute criminal proceedings.³³⁷ However, the right to institute private prosecution is very limited.³³⁸ Anyone who wishes to institute such a suit must meet these thresholds; a report of the offence ought to have been made to the police or the Attorney General for them to take action; following which no action has been taken on the report; and the failure or refusal of the state to

³³² Ibid.

³³³ S.8 KNCHR Act No.14 of 2011

³³⁴ Art.157(6) The Constitution of Kenya. The Director of Public Prosecutions shall exercise State powers of prosecution and may— (a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

³³⁵ Ibid

³³⁶ KNCHR Act S.41. Action after inquiry The Commission may, upon inquiry into a complaint under this Act take any of the following steps— (a) where the inquiry into a violation of human rights or negligence discloses a criminal offence, refer the matter to the Director of Public Prosecutions or any other relevant authority or undertake such other action as the Commission may deem fit against the concerned person or persons.

³³⁷ Art.157(6)(b) The Director of Public Prosecutions shall exercise State powers of prosecution and may—take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority;

³³⁸ Floriculture International Limited and Others (High Court Misc. Civil Application No 114 of 1997):

prosecute ought to be without reasonable cause³³⁹. From the above stringent rules, it is evident that the commission faces a challenge in trying to adequately redress human rights violations. However, it is not the Commission's fault as it cannot act promptly and adequately without an enabling law. In my opinion the commission ought to increase habeas corpus applications especially in enforced disappearance cases.

Regarding limited funding, while the Commission has been successful in the implementation of many of its set out activities, there has been a challenge including inadequate staffing levels owing to limited government funding.³⁴⁰ This has grossly affected the implementation of the commission's work.³⁴¹ In 2010 financial year for example, the Commission received a total allocation of Ksh.135, 000, 000 against a budget of Ksh. 366,784,000. ³⁴²To cover this deficit, the Commission has had to engage donors to seek direct funding for its work. The budget deficit was therefore funded by development partners including European Union, Embassy of Norway, the Dutch Embassy, GTZ, UNDP and OHCHR.³⁴³ This funding has enabled the commission increase its staffing capacity to enable it to realize its goals and objectives. As a result, the commission has been able to enhance its efficiency and effectiveness.³⁴⁴

3.8 Conclusion

The Kenya National Commission on Human Rights was established with the aim of serving as a checks and balances entity on the government and its agencies in order to ensure protection and promotion of human rights. The Constitution has bestowed the commission with various powers

³³⁹ *ibid*

³⁴⁰ *ibid*

³⁴¹ *ibid*

³⁴² *ibid*

³⁴³ *Ibid*

³⁴⁴ *ibid*

and functions to assist them in carrying out their mandate such as the investigation of the violation of human rights, reporting and recommending on what should be done so as to curb the same. It is clear that the KNCHR has played a vital role in mitigating human rights violations in counter-terrorism. This research finds that in the midst of challenges, the commission has been able to carry out its mandate under the KNCHR Act.

Specifically, the commission has; engaged in capacity building of security agencies, it has also engaged in monitoring the outcome of human rights compliance for institutions trained on human rights; it has also commenced the implementation of two key projects that has specifically targeted Human Rights Defenders (HRDs); it has also established The Integrated Public Complaints and Referral Mechanism (IPCRM), the commission has also made successful interventions such as the Lanbib Investigations; and it has also carried out public interest litigation cases. The above activities of the commission have had a direct impact in the protection of human rights in the face of counterterrorism by mitigating arbitrary arrests and unlawful detention, mitigation of Torture, Cruel, Inhuman and Degrading Punishment, mitigation of Enforced Disappearances and mitigation of Extra Judicial Killings.

Nonetheless the work of the commission as the human rights defender in counter- terrorism has been impeded by a number of challenges including; insecurity, limited funding and lack of prosecutorial powers. As noted in this chapter, the powers of the commission are also limited by the Act to investigating on human rights violations and making recommendations to the state organs. Thus far, the role of the KNCHR in mitigating violation of human rights in counter-terrorism may not be entirely successful without amendments to the constitutive Act.

CHAPTER FOUR

REFORMS THAT SHOULD BE UNDERTAKEN TO PROMOTE HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN THE FIGHT AGAINST TERROR

4.0 Introduction

An effective and sustainable national human rights body contributes to the enhancement and protection of human rights for all.³⁴⁵ The KNCHR contributes significantly to the promotion of Kenya's compliance with national human rights law and treaty obligations.³⁴⁶ The value of its work in shaping the substantive content of Kenya's law is also widely acknowledged.³⁴⁷ As seen in the previous chapters, the commission has participated in numerous activities that champion the protection and compliance with human rights law in counter terrorism measures.³⁴⁸

Notwithstanding the above, the commission has experienced a number of challenges in effecting its functions.³⁴⁹ As already discussed in the previous chapters, these challenges emanate from the commissions' work environment, internal inefficiencies and the laws. This chapter seeks to highlight these flaws as possible areas in need of reform. This chapter is therefore guided by best practice from international law in the area of national human rights. These best practices will serve as indicators of success or otherwise of a human rights body. The reforms discussed here are meant to enhance the efficacy of the commission as a tool of human rights protection in counter terrorism measures adopted by the Kenyan Government. This chapter will thus strive to

³⁴⁵ Ryan Goodman, Thomas Pegrum *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* Cambridge University Press, 14 Nov 2011.pg.116

³⁴⁶ Vera Schatten Coelho, Bettina von Liers *Mobilizing for Democracy: Citizen Action and the Politics of Public Participation* Zed Books Ltd., 4 Apr 2013.

³⁴⁷ Ben Rawlence, Human Rights Watch (Organization) *"Bring the Gun Or You'll Die": Torture, Rape, and Other Serious Human Rights Violations by Kenyan Security Forces in the Mandera Triangle* Human Rights Watch, 2009

³⁴⁸ See chapters 1,2,3.s

³⁴⁹ S.8 KNCHR Act No.14 of 2011

find out the role that the commission can play in the legislation, realizing and effecting those reforms.

This chapter identifies and discusses the problems below as possible areas for reforms: Continuous gross abuse of human rights and fundamental freedoms in the course of counter terrorism; legislation of laws that lead to serious violation of human rights in the fight against terrorism; issuance of directives by the executives that amount to gross violations of human rights. An example is the directive that ordered the closure of all refugees' camps in the country and to have refugees repatriated to the countries of origin. Other areas of reform include internal challenges like funding, and lack of capacity to deal with violations.

Upholding human rights during counter terrorism is a complex affair. Addressing the human rights violations therefore becomes a difficult project; there is also a pronounced conflict between counter terrorism and the preservation of human rights in the process of combating terrorism. This makes the process of mitigating the violations complex. The study has also established that the scope of powers, roles and mandate of KNCHR in the protection of human rights in the process of counter-terrorism is limited. An example of this limitation is the lack of prosecutorial powers as mentioned in previous chapters.

The chapter contends that if those flaws will be addressed, the commission's functionality and efficiency as a human rights body will be boosted. Consequently, upholding human rights is likely to be invigorated in the process of combating counter- terrorism.

4.1 Reforms on Investigative power of the commission to curb continuous gross abuse of human rights and fundamental freedoms.

The KNCHR Act empowers the commission to receive and investigate complaints about alleged abuses of human rights.³⁵⁰ In its investigative role, the commission is also clothed with the powers of a court.³⁵¹ The Act further provides that in the performance of its functions under the Act, the Commission shall have the powers of a court to issue summonses or other orders requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission.³⁵² These provisions on investigation appear exhaustive as to what to investigate, where, when, who, why and how to investigate. However, reasonably weighed, these investigative powers are not adequate.

This study contends that these powers are mere general provisions because of the following reasons : - (i) In carrying out investigations, the Act requires the Commission to employ the services of any public officer or investigation agency of the Government at the expense of the Commission. (ii) This agency may be subject to the direction and control of the Commission. That agency is not obligated to be subject to the commission. (iii) The commission shall not investigate a matter pending before any court or judicial tribunal (iv) The commission shall also not investigate any matter for the time being under investigation by any other person or Commission established under the Constitution.

The Act ought to be amended to provide for a “Commission without borders” in investigation. The Act stifles the role of the Commission in investigation by providing it with powers to

³⁵⁰ S.8 (d) The KNCHR Act

³⁵¹ Ibid S.27

³⁵² Ibid

investigate on one hand and taking it away on the other hand by giving the power to another government agency employed by the commission. This brings about conflict of interests because it is government agencies who are best known to violate human rights in counter- terrorism. Requiring them to equally investigate such issues makes them become judges in their own cases. The proposed reform here is that S.28 of KNCHR Act ought to be amended to provide the Commission with independent, internal investigative machinery. The Commission being the chief protector of human rights in counter – terrorism, S.30 should also be amended to un-limit the scope of matters that the commission may investigate.

4.2 Reform of legislative process on limitation of the rights of terror suspects.

The constitution of Kenya states that the legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.³⁵³ The constitution further demands that Parliament shall conduct its business in an open manner, and its sittings and those of its committees shall be open to the public;³⁵⁴ and facilitate public participation and involvement in the legislative and other business of Parliament and its committees.³⁵⁵ The constitution further provides that parliament may not exclude the public, or any media, from any sitting unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for the exclusion.³⁵⁶ The essential issue of public participation was litigated in the case of *Robert N. Gakuru and Others vs The Governor Kiambu County and 3 Others*,³⁵⁷ where the court stated that “public participation ought to be real and not illusory and ought not to

³⁵³ Art.94(1).

³⁵⁴ Art.118(1)(a).

³⁵⁵ *ibid*

³⁵⁶ Art.118(2).

³⁵⁷ Petition No 532 of 2013 Consolidated with Petitions Nos.12, 35, 36, 42 and 72 of 2014 and Judicial Review Miscellaneous Application No 61 of 2014

be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates.” This implies that in its legislative role, more so with regards to legislations impacting on human rights, the participation of the people is essential.

In addition, the constitution provides that the national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets this Constitution and most important to this research is whenever any of them *enacts*, applies or interprets any law.³⁵⁸ The national values and principles of governance include the rule of law, democracy and participation of the people.³⁵⁹

In terms of substantive law, what, therefore, is the scope of parliament’s legislative power under the constitution? Does parliament have a blank cheque to legislate on anything and everything in a manner it so desires? The answer to this is embedded in the Bill of rights which provides that ‘The Bill of Rights applies to all law and binds all State organs and all persons.’³⁶⁰ The constitution further dictates that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.³⁶¹

These rights or fundamental freedoms in the Bill of Rights shall also not be limited except by law, and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.³⁶² Any limitation must take into account all relevant factors including the nature of the right or fundamental freedom; the

³⁵⁸ Art.10(1)(b).

³⁵⁹ Art.10(2)(a).

³⁶⁰ Art.20(1).

³⁶¹ *ibid*

³⁶² Art.24. (1)

importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.³⁶³

Despite the fact that the rights and fundamental freedoms in the bill of rights can be limited, freedom from torture, cruel, inhuman or degrading treatment or punishment cannot be limited.³⁶⁴

What this implies is that parliament, in its legislative role cannot limit the freedom from torture, cruel, inhuman or degrading treatment or punishment.³⁶⁵ And with regards to other rights in the bill of rights, parliament cannot limit them except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.³⁶⁶

An examination of the Security Laws Amendment Act points to the fact that various sections of the Act were carefully crafted with the intention to unjustifiably limit rights under the bill of rights.³⁶⁷ The High court confirmed the unconstitutionality of these limitations.³⁶⁸ For example, section 12 of SLAA and Section 66A of the Penal Code were declared unconstitutional for violating the freedom of expression and the media guaranteed under Articles 33 and 34 of the Constitution.³⁶⁹ Section 16, 26, 48, and 64 of SLAA as mentioned in chapter 2 above were found to be unconstitutional.

³⁶³ *ibid*

³⁶⁴ Art.25

³⁶⁵ Inference from Art.25

³⁶⁶ Art.24(1).

³⁶⁷ Section 16,26,48 and 64 of SLAA.

³⁶⁸ Coalition for Reform & Democracy(CORD), Kenya National Commission on Human Rights & Samuel Njuguna Ng'ang'a v Republic of Kenya & another.

³⁶⁹ *Ibid* see disposition of the above judgment.

A critical question here is; for the reason that the Security Laws Amendment Act touched widely on human rights law which is the mandate of KNCHR, what role did the KNCHR play in the process of such legislations? i.e. both before, during and after their enactments? And what reforms can be made to provide for KNCHR as leading partner and stakeholder in the human rights legislation process.

After reviewing the Security Laws (Amendment) Bill, 2014, the KNCHR presented its views to the National Assembly through the Administration and National Security Committee on 15th December 2014.³⁷⁰ Key concerns of the commission included the process of enactment, that contrary to Article 118(b), parliament had not facilitated meaningful and effective engagement of the public with the proposed Bill.³⁷¹

Another concern of the commission was that a number of provisions were unconstitutional.³⁷² Subject to those concerns, the commission recommended that- the Security Laws (Amendment) Bill, 2014 be withdrawn from further discussion in the National Assembly and that the subsequent Bill or Bills should, therefore, be made accessible immediately to allow quality public participation.³⁷³ The commission also recommended that all amendments must comply with the Bill of Rights and the Constitution in totality.³⁷⁴

From the foregoing, it is evident that the commission's role was majorly advisory. With regards to the enactment process, it did not play any central role. This study therefore proposes that the KNCHR Act ought to be amended to incorporate KNCHR as a major stakeholder in the

³⁷⁰ KNCHR ADVISORY ON THE SECURITY LAWS (AMENDMENT) BILL, 2014

³⁷¹ *ibid*

³⁷² *ibid*

³⁷³ *ibid*

³⁷⁴ *ibid*

enactment process of all legislation touching on human rights. A good example would be to include KNCHR in policy formulation.

4.3 Reforms to address the issuance of directives by the executives that amount to gross violations of human rights.

Presidential directives are executive orders that come from the president.³⁷⁵ From the earliest days of the federal government in the United States, presidents exercising magisterial or executive power from time to time issued directives establishing new policy, decreeing the commencement or cessation of some action, or making some other declaration.³⁷⁶

Presidential directives have also been part of Kenya's legal framework. Post independent Kenya has witnessed a number of directives issued by the incumbent presidents. This section aims at inquiring whether these directives comply with the rule of law or whether they are unconstitutional exercise of presidential powers. An example that resonates to counter - terrorism is the presidential directive that ordered the closure of the Daadab camp.³⁷⁷ February 9 2017, the High Court of Kenya ruled that the Kenyan government acted unconstitutionally when it issued a

³⁷⁵ *Black's Law Dictionary* (9th ed. 2009), available at Westlaw BLACKS.

³⁷⁶ Richard J. Ellis *The Development of the American Presidency* Routledge, 26 Jun 2015. Pg.283. Even if we limit our inquiry to executive orders, the obstacles to obtaining an accurate count are formidable, at least prior to passage of the Federal Register Act of 1935, which mandated that executive orders—unless they were classified or pertained only to particular individuals—be published:8 In the nineteenth century there was no central repository for collecting executive orders and no uniform procedures for identifying them. Indeed, what counts as an executive order in the nineteenth century is often far from clear. Some early orders consist of little more than a president scrawling "Approved" or "Let it be done" atop a recommendation emanating from a cabinet secretary. In fact, the word ((executive order" doesn't appear on any order until the presidency of Ulysses Grant and only in 1907 did the federal government—specifically the State Department—begin to assign numbers to executive orders.

³⁷⁷ COMMISSIONER FOR REFUGEE AFFAIRS The Government of Kenya has decided to stop reception, registration and close down all registration centers in urban areas with immediate effect. All asylum seekers/refugees will be hosted at the refugee camps. All asylum seekers and refugees from Somalia should report to Dadaab refugee camps while asylum seekers from other countries should report to Kakuma refugee camp. UNHCR and other partners serving refugees are asked to stop providing direct services to asylum seekers and refugees in urban areas and transfer the same services to the refugee camps. Signed Ag. DEPARTMENT OF REFUGEE AFFAIRS PRESS RELEASE.

directive to close the Dadaab refugee camp.³⁷⁸ This camp had been home to about 260,000 mostly Somali refugees, some of whom arrived in the early 1990s to escape ongoing violence in their country.³⁷⁹ The court found the intention behind the directive to be the forcible return of Somali refugees, and ruled it null and void, saying that it violated the principle of non-refoulement.³⁸⁰ The court argued that the forced return of refugees to places where their lives or freedom would be threatened and discriminated against was unconstitutional and a violation of international principles of human rights.³⁸¹ Another famous directive in Kenya was the shoot-to-kill order issued by Deputy President William Ruto against bandits in Baringo as a measure to deal with insecurity.³⁸²

Of concern is that these presidential / executive orders have a direct implication on the upholding /violation of human rights. What this section therefore inquires is how/ whether the process of issuance of these directives and their operation is amenable to check and balances and whether reforms can be undertaken to empower the KNCHR to be a stakeholder in the process of issuance of directives that have human rights implications in counter terrorism. This is possible given that Article 59 of the constitution of Kenya provides that the KNCHR has the power to monitor and report on the observance of human rights in all spheres of the Republic, including observance by the national security organs.³⁸³

³⁷⁸ Kituo Cha Sheria & 8 others v Attorney General [2013] eKLR

³⁷⁹ Jack Redden *Dadaab - World's biggest refugee camp 20 years old* Retrieved at < <http://www.unhcr.org/news/makingdifference/2012/2/4f439dbb9/dadaab-worlds-biggest-refugee-camp-20-years-old.html> > on 4th May. 2017.

³⁸⁰ Constitutional Petition 227 of 2016 available at kenyalaw.org

³⁸¹ *ibid*

³⁸² Florah Koech 'William Ruto orders police to shoot, kill bandits on sight' *The Daily Nation* (Nairobi, February 24 2017).

³⁸³ Constitution of Kenya, Article 59 (1) (d)

As noted above, the Bill of Rights applies to all law and binds all State organs and all persons.³⁸⁴

This implies that all persons who by practice or in compliance of a legal provision issue executive orders must comply with the constitution.³⁸⁵ This equally binds the president. Indeed, the constitution provides that the President shall respect, uphold and safeguard the Constitution.³⁸⁶ Decisions by the president are also required to be in a certain form. The constitution demands that- a decision of the President in the performance of any function of the President under the Constitution shall be in writing and shall bear the seal and signature of the President.³⁸⁷ This raises the issue as to the legality of a president's 'roadside orders' which may not comply with article .131 prescription that requires such decisions to be written and sealed.³⁸⁸

How/ what reforms need to be undertaken to streamline executive orders to be in line with constitutional requirements and most importantly to aid in the observance and compliance with human rights provisions? The answer to this lies in the contention that executive orders / decisions have the force of law.³⁸⁹ They are therefore laws in their own respect. Not unless these orders are meant to solve a non - weighty matter, they should be subjected to the same legislative mechanisms similar to parliamentary legislative procedure. From the foregoing therefore, all presidential decisions impacting on counter – terrorism and human rights should undergo policy formulation, discussions and consultations from all major stakeholders before the making of the ultimate process of issuance of that directive.

³⁸⁴ The Constitution of Kenya Art.20 (1).

³⁸⁵ Inference of art.20(1).

³⁸⁶ The Constitution of Kenya Art.131(2).

³⁸⁷ The Constitution of Kenya Art.135

³⁸⁸ *ibid*

³⁸⁹ <https://constitutioncenter.org/blog/executive-orders-101-what-are-they-and-how-do-presidents-use-them/>
accessed on 13th November 2017 at 11.27 a.m

As the major stakeholder in the human rights preservation and protection, the KNCHR should be involved in both the preliminary and post ‘enactment of presidential directives/ executive orders’ process by being involved in the formulation of human rights policies, further contributions and even in the making of key decisions before the president issues the order.

4.4 Reforms to expand scope of powers of KNCHR’s function

The KNCHR Act enumerates the general powers of the KNCHR to include inter alia power to - issue summons, require that statements be given under oath or affirmation , administer oath or affirmation, adjudicate on matters relating to human rights, by order of the court, enter upon any establishment or premises for any purpose material to the fulfillment of the mandate of the Commission , interview any person or group of persons, conduct audits of any public or private institution to establish the level of compliance with the Constitution with regard to integrating the principle of equality and equity in its operations, require any public or private institution to provide any special report on matters relating to the institution’s implementation of the principle of equality and equity including gender equity.³⁹⁰

In addition to the above powers, the commission also has powers conferred in Article 252 of the Constitution which include power to conduct investigations on its own initiative or on a complaint made by a member of the public.³⁹¹ The KNCHR has powers like that of a court.³⁹² In this respect, it may issue summonses ; question any person in respect of any subject matter under investigation before the Commission and require any person to disclose any information within such person’s knowledge relevant to any investigation by the Commission.

³⁹⁰ S.26 KNCHR Act

³⁹¹ Art.252 of The Constitution of Kenya.

³⁹² S.27 KNCHR Act

The above articulation of the commission's powers is designed to portray the extent to which the commission can work with the net goal of realization of the commission's mandate.

The above powers of the commission are merely powers to aid the commission's inquisitorial powers.³⁹³ These powers are very limited in scope. Ideally, the commission may not do anything after its inquiry process save for the below actions.³⁹⁴ The constitutive Act provides that the Commission may, upon inquiry into a complaint under the KNCHR Act take any of the following steps ; *refer* the matter to the Director of Public Prosecutions or any other relevant authority ; recommend to the complainant a course of other judicial redress ; *recommend* to the complainant and to the relevant governmental agency or other body concerned in the alleged violation of human rights other appropriate methods of settling the complaint or to obtain relief.³⁹⁵

From the foregoing therefore, post inquiry actions of the commission is limited to that of making recommendations and referrals.³⁹⁶ It is from the foregoing that this section contends that in order for the commission to realize its mandate without setbacks and constraints, the KNCHR Act ought to be amended to make the Commission to be a fully-fledged quasi – judicial body, a court of first instance. Article 162 (4) of the constitution provides that parliament may establish subordinate courts and therefore conferment of this powers will not have a constitutional implication. To this end therefore, section 27 on the powers of a court should be amended to include investigations, prosecution and delivering of judgments on matters brought before it.

³⁹³ Inference of the KNCHR's powers from the powers enumerated under s.26,27 of the KNCHR Act.

³⁹⁴ *ibid*

³⁹⁵ *ibid*

³⁹⁶ S.41 KNCHR Act.

4.5 CONCLUSION

This chapter set out to inquire on the reforms that should be undertaken to promote human rights and fundamental freedoms in the fight against terror. The study recognized KNCHR as the major stakeholder in human rights protection and as an effective and sustainable national human rights body which contributes to the enhancement and protection of human rights for all. This chapter discussed the following problems as possible areas for reform; - Continuous gross abuse of human rights and fundamental freedoms; legislation of laws that may lead to serious violation of human rights in the country and in the fight against terrorism; issuance of directives by the executives that amount to gross violations of human rights and the commission's limited scope. This study revealed that Kenya's security agencies have violated human rights provisions in the bill of rights and the conventions in its counter – terrorism measures. As a result therefore, this study proposes that the KNCHR's investigative role must also be revitalized. The study therefore suggests that the Act ought to be amended to provide for specific provisions to cater for wide and unlimited powers in investigation.

Following enactments of unconstitutional and anti – human rights laws , the study argues that legislative process ought to be reformed with special regards to those laws that have implications on human rights. The research proposed that the KNCHR Act ought to be amended to incorporate KNCHR as a major stakeholder in the enactment process of all legislation touching on human rights. For example, KNCHR ought to be included in the legislative process right from policy formulation. The issuance of directives/ executive orders ought to be controlled. Presidential directives that impact on human rights and those that are of general public importance ought to be subjected to a 'legislative process'. This will help deter the issuance of directives that amount to gross violations of human rights. As the major stakeholder in the human rights preservation

and protection, the KNCHR should be involved in both the preliminary and post '*enactment of presidential directives/ executive orders*' process : the formulation of human rights policies, further contributions and even in the making of key decisions before the president issues the order.

Ultimately, the scope of powers of KNCHR's function ought to be expanded to cloth the commission with prosecutorial powers, powers to make findings/ rulings and judgments similar to that of a court of law. This section contends that in order for the commission to realize its mandate without setbacks and constraints, the KNCHR Act ought to be amended to make the Commission to be a fully-fledged tribunal/ court so as to serve as a stand - alone commission without requiring services of other bodies in the performance of its functions.

CHAPTER FIVE

SUMMARY OF THE DISCUSSION, RECOMMENDATIONS AND THE FINAL CONCLUSION

5.0 SUMMARY OF THE DISCUSSION

The fight against terrorism is complex and delicate.³⁹⁷ This study has established that there has been mass violation of human rights in the process of counter terrorism.³⁹⁸ Specifically, the research has found that the national security agencies have violated human rights provisions in the constitution, ICCPR, UDHR, UNCAT and ACHPR by committing; -torture; cruel, inhuman and degrading punishment; enforced disappearances; and extra judicial killings.³⁹⁹ The KNCHR being the constitutional commission mandated to protect and enhance the respect of Human Rights in Kenya has a critical role to play in the mitigation of these violations.⁴⁰⁰

The research suggests that the solution to the conflict between the process of counter terrorism and the preservation of human rights is the allegiance to human rights law as provided for in the various instruments.⁴⁰¹ However, this allegiance can only be attained by a combined multi agency effort including the following agencies - The KNCHR, The presidency, The Independent Policing Oversight Authority (IPOA), Directorate of Public Prosecutions, The office of The Inspector General of Police, The Chief of Kenya Defence Forces and The Parliamentary Committees on Defense and National security.⁴⁰²

³⁹⁷ I. Prezelj *The Fight Against Terrorism and Crisis Management in the Western Balkans* (IOS Press, 6 Feb 2008)

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³⁹⁸ Victor V. Ramraj, Michael Hor, Kent Roach, George Williams *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 12 Jan 2012) 589

³⁹⁹ Estados Unidos. Department of State *Country Reports on Human Rights Practices for 2009 Volume 1 Africa, East Asia and The Pacific* (112th Congress 2d Session Joint Committee Print, 2012) 340 ; Peter Onyango, 'Kenya Entangled in Proscribed Crimes of Terrorism and violations of the Human Rights Law' [2015] 3(1) *Sociology and Anthropology* 1-5

⁴⁰⁰ *Supra n..*

⁴⁰¹ *Supra n*

⁴⁰² *Supra n*

KNCHR has played a vital role in the mitigation of the violation of human rights in the process of counter-terrorism. For example, the commission has; - engaged in capacity building of security agencies ; it has also engaged in monitoring the outcome of human rights compliance for institutions trained on human rights; it has also commenced the implementation of two key projects that has specifically targeted human rights defenders; it has also established The Integrated Public Complaints and Referral Mechanism; the commission has also made successful interventions for example the Lanbib Investigations; and it has also carried out public interest litigation cases. These activities have had a direct impact in the protection of human rights in the face of counterterrorism.⁴⁰³

In carrying out its mandate, KNCHR has experienced a number of challenges. A number of these challenges, for example, **inability to directly prosecute and a limited investigative** role emanate from the statutory limitations to the Commission's roles and powers.⁴⁰⁴ To function optimally, the study ultimately finds that the functions and powers of the commission have to be reviewed and amended.

5.1 CONCLUSION

The research sought to study the process of counter terrorism in Kenya and specifically the role of the KNCHR in preservation of human rights during the process of counter-terrorism. This study makes the following two concrete conclusions; - that human rights in Kenya continue to be violated in the process of counter – terrorism. The study also concludes that the KNCHR is not entirely a toothless dog. However, it has no canniness. It can only buck very loudly and perhaps chase the prey, and maybe catch it. Where it catches it, it may not kill it. Where it kills it, it may

⁴⁰³Supra n

⁴⁰⁴Supra n

not eat it. Where it eats it, it may not swallow it. From the above inference, if at all the preservation of human rights is to be achieved in the process of counter - terrorism; the commission's canniness should be subjected to legal surgery as recommended below.

5.2 RECOMMENDATIONS

This study proposes that the below reforms be undertaken to cure the deficiencies in KNCHR and to enhance the efficiency of the commission in its work and ultimately to boost the preservation of human rights in the process of counter – terrorism. The recommendations below have been informed by the fact that the commission has experienced a number of challenges in effecting its functions as enumerated in its constitutive Act. As a result of those challenges discussed in the research, this study proposes a number of reforms meant to enhance the efficacy of the commission as a tool of human rights protection in the process of counter - terrorism.

The study found out that in order to enable the commission to carry out its work well, there ought to be legislative reforms on the investigative power of the commission to curb continuous gross abuse of human rights and fundamental freedoms. Other reforms necessary reform discussed include those on - the legislative process and those that address the issuance of directives by the executive. Similarly, reforms to expand scope of powers of KNCHR's function have also been discussed.

From the above thematic areas of reform, this study enumerates the specific recommendations below;

Powers relating to investigations under section 28 (1) KNCHR Act ought to be amended to read “The Commission shall have an investigative arm that shall freely, *suo moto* or vide a complaint conduct its investigations.” Section 28(1) KNCHR Act suggests that the Commission may, for the purpose of conducting any investigation pertaining to an inquiry, employ the services of any public officer or investigation agency of the Government at the expense of the Commission. This section ought to be amended to specifically empower the commission to conduct its investigations through its internal structures – not through a ‘hired investigator’ as the Act suggests. The challenge with employing the services of any public officer or investigation agency of the Government is that it may compromise the investigation process as it is a violation of the *nemo iudex in causa sua* principle which states that a person cannot be a judge in his own cause. The presumption here is that the government agencies themselves have been the perpetrators of human rights injustices. By requiring them to investigate their own cases might thus compromise investigations.

Section 28 (2)KNCHR Act should also be amended to read “The commission shall hire on need basis an independent body whose mandate shall be to aid the investigative arm of the commission in its investigations.” The inference of S.28 (2) KNCHR Act as it is suggests that the ‘investigative officer’ or agency hired by the commission may be under control of the commission. However, vide S.28 (1) KNCHR Act as it is, the officer hired must be a public officer or investigation agency of the Government. This raises an issue of conflict of interest more so where the violating agency is a government agency.

Part 4 of The Constitution on procedures for enacting legislation should be amended to introduce a ‘check panel.’ The function of this panel will be to check and verify that the bills passed by parliament meet the constitutional threshold before assent. The design of this panel is that it be

structured to carry out the checks and verification process immediately after the passage of a bill and just before the assent of the bill by the president. Unconstitutional bills will thus be returned back to the house for review. This will ensure that unconstitutional and conspired laws that have a detriment on human rights are not enacted. This proposal not only appears to overlap the functions of the Attorney General who vide art.152 (4) is the principal legal adviser to the Government, it indeed does overlap. However, the Attorney General is an appointee of the President and a servant of the government. Where violating actions of the government are on focus, the Attorney General may naturally fail to offer candid advices. This has been evidenced by the blatant enactment of unconstitutional laws such as the Security Laws Amendment Acts of 2016. The recommendation here is simple – introduce a parallel ‘check panel’ to specifically check and balance the constitutionality of legislation affecting human rights.

The Statutory Instruments Act should be amended to among other things dictate the process of formulations, issuance and operation of executive orders and presidential directives. This will help tame professional misconduct like the issuance of un-thought through roadside/ market-place presidential orders/directives. This process of formulation of the directives/ orders equally ought to be subjected through the ‘checks and verification’ process discussed above to ensure that the directives/ orders comply with the constitution and formal law making process. This proposal is made in the pretext that because executive orders have the force of law, they equally need to be subjected to law making procedures.

Section 27 of the KNCHR Act should be amended to provide the commission with real powers of a court not ‘fictitious powers’ under section 27. This section prima facie portrays a ‘raw picture’ to the reader that the Commission has powers of a court. This is not the case. By giving the Commission powers of a court does not connote that it opens an avenue of conflict with

official courts as the Commission will only be the forum of first instance in hearing human rights violations. Further appeals can be lodged at the human rights division of the High Court. This proposal is premised on the fact that human rights violations in counter – terrorism are usually massive, complex and difficult both to investigate and prosecute. Even where they are successfully prosecuted, the cases take excessively longer time to complete. By clothing the commission with powers of court, the main purpose will be to expedite the cases and enhance ultimate accountability.

The KNCHR Act has in fact reduced the commission to an investigator. It's also amazing that this investigation role is in fact relegated to a government agency under Section.28 (1) KNCHR Act. The net sum of the role of the commission is that it is an evaluator of the investigations conducted by that agency under section.28 KNCHR Act. After such evaluation, the commission is also clothed with some flower roles like making recommendations and referrals under section 41 of the Act. Surprisingly, section 30 limits the jurisdiction of the Commission by requiring that any matter for the time being under investigation by any other person or Commission established under the Constitution or any other written law shall not be investigated by the Commission. What this means is that where a government agency violates human rights, it may tactically estop the commission from investigating on the matter by colluding with a government investigative agency to commence the investigations. This is unfortunate for the simple reason that most violations are often committed by the police who are in fact the state's investigators.

From the above, an average mind will indeed believe that the commission's chief role is 'consultancy on human rights observance.' In order to empower the commission, section 28 of the KNCHR Act should be amended to give the commission real and not fictitious investigative powers. Section 30(g) limiting its investigative powers to matters only not under investigation

should be deleted. Ultimately, section.27 on the powers of a court should be amended to include investigations, prosecution and delivering of judgments on matters brought before it. At face value, this proposal appears outrageous for the reason that it appears to suffocate the commission with all the roles in the justice system. However, this is not the case, tools must follow roles given. In short, owing to the delicate nature of its duties, the commission ought to be a self-contained body.

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