

UNIVERSITY OF NAIROBI

INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES

COUNTER TERRORISM AND HUMAN RIGHTS NEXUS: THE CASE STUDY OF KENYA

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**A Research Project submitted in partial fulfillment of The Degree of Master of Arts in
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Declaration

I, Peter Otieno Onyango, hereby declare that this research project is my original work and has not been presented for a degree in any other University;

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List of Abbreviations and Acronyms

9/11	September 11, 2001
ASEAN	Association of South-East Asian Nations
ATPU	Ant-Terrorism Police Unit
AU	African Union
CID	Criminal Investigations Department
CTC	(UN Security Council's) Counter Terrorism Committee
CTITF	Counter Terrorism Implementation Task Force
EU	The European Union
FRC	Financial Reporting Center
GWOT	Global War on Terrorism
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
ICSR	International Centre for the Study of Radicalisation and Political Violence
IED	Improvised Explosive Devices
IGAD	Inter-Governmental Authority on Development
KDF	Kenya Defence Forces
NCTC	National Counter Terrorism Center
NEP	(the former) North Eastern Province
NIS	National Intelligence Service
POTA	Prevention of Terrorism Act
OAU	Organization of the African Unity
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-operation in Europe
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
US	United States of America
VBIED	Vehicle Borne Improvised Explosive Device

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Abstract

This study explores the counter terrorism and human rights nexus. It analyses the counter terrorism strategies in Kenya and their impacts on human rights. The case study of Kenya, a country in the East African region which has been a frequent target of terrorist attacks, is taken to illustrate how a democratic regime can respond terrorism without violating the human rights of its citizens.

There is no one overarching theory to theorize counter terrorism, but this study mostly uses the concept of the balancing counter terrorism theory to reconcile counter terrorism and human rights. Through qualitative research and analysis of data from various academic scholars, journals, publications and other academic works, the study investigates the strategies and approaches used by the Kenyan government in countering terrorism and their implications on human rights. The study looks at observance of human rights when fighting terrorism as a threat to Kenya's national security, emphasizing preventive counter terrorism policy as a viable option, and analyzing the trends, opportunities and challenges posed by the Kenyan counter terrorism legislations. The study also examined the roles played by other institutions and stakeholders in counter terrorism and their contributions to promotion of human rights. These include the roles played by the judiciary, the regional organizations, the community, the private sector, intelligence agency, the evolving technologies and the NCTC amongst others.

A frequent concern in the counter terrorism measures in Kenya has been its respect for (or lack of) human rights. The study shows that there exists structures within the national and international laws that require states to provide security to its citizens and safeguard their rights. Concerns have been raised by the civil societies and human rights activists on counter terrorism laws and their implementations in Kenya. But this study concludes that if all the concerned institutions and stakeholders come together against terrorism, then terrorism is not only going to be defeated, but also the fight would respect the rights of every citizen. For this to succeed, then countering terrorism should be led by the intelligence service, through the National Counter Terrorism Centre, with the support and convergence of the other security agencies. Therefore, intelligence led preventive counter terrorism, is not only more effective in countering terrorism, but is also a lesser violator of human rights.

The study concludes that a balanced approach struck between counter terrorism and human rights is not only at the core for the wellbeing of this nation, but is also the most effective way of countering terrorism.

CHAPTER 1: INTRODUCTION AND BACKGROUND OF THE STUDY

An American philosopher, Benjamin Franklin, once said that “*Any society that would give up a little liberty to gain a little security deserves neither and lose both*”¹ This expression may no longer be precise in the contemporary world as states, their political leaders, scholars and other stakeholders have been grappling with questions of how to protect fundamental freedoms in times of national crisis, especially after the 11 September 2001 (9/11) terrorist attacks in the United States of America (US). Whereas counter terrorism policies in several countries have led to human rights violations well before 2001, there had been world-wide repercussions when the US launched the ‘global war on terror’ (GWOT) in the wake of the 9/11 attacks. It has undermined the rule of law and international standards and posed significant challenges to the protection of human rights worldwide in numerous countries of the world today. Hence in the context of the current conflicts in Afghanistan, Libya, Nigeria and Iraq, there have been grave concerns about the multitude of ways that crucial human rights and humanitarian laws have been undermined and violated by both terrorists and governments, with the latter expressly or implicitly using national security as a pretext or an excuse for doing so. But there is need for states to use a balancing act between granting human rights to its citizens while at the same time preserving state security to guarantee human security.

1.1 The Background of the Research Study

While terrorism affects most African states, the East and Horn of African region has experienced sustained terrorist attacks in the past and has the potential to experience even more

¹ The quote is attributed to Benjamin Franklin (1709 – 1790), an American philosopher, writer, diplomat and statesman, in his contribution in the Pennsylvanian Assembly’s reply to the Governor in 1775. The phrase was also the motto in *Historical Review of Pennsylvania*.

terrorist attacks due to its proximity to countries and regions that sponsor and harbour terrorist organizations, such as countries in the Middle-East and Somalia. Notable terrorist attacks in East Africa are the August 1998 twin US Embassies attacks in Dar es Salam and Nairobi, and the July 2010 World Cup attacks in Uganda.

Kenya has been a victim of several terror attacks mostly in Nairobi and Mombasa since 1975, on an OTC Bus destined for Mombasa; and subsequently in 1981, at the Norfolk Hotel, which was targeting Israeli interests. The most significant terrorist attacks occurred when in August 1998 the US embassy in Nairobi was attacked; and in 2002 when the Paradise Hotel in Kikambala, Mombasa was also attacked, both by suspected Al Qaida terrorists. These attacks mainly targeted US and Israeli interests. Lately, the attacks do not necessarily target foreign interests only, but are also targeted on Kenyan interests because of her perceived support of the US declared “war on terror” and her contribution to the African Mission to Somalia (AMISOM). These include the September 2013 Westgate Mall attack, the June 2014 Mpeketoni attacks, and lately, the November/December 2014 Mandera dual attacks.

Following the 9/11 attacks and subsequent UN resolutions (1373/01, 1377/01 and 1624/2005), the Kenyan government adopted counter terrorism strategies that included legislative reforms, institutional building, trainings, and bilateral and multilateral collaborations with friendly states such as the US and the United Kingdom (UK). The collaborations with foreign governments, creation of Anti-Terrorism Police Unit (ATPU) in 1998, and the National Counter Terrorism Center (NCTC) in 2003 have all raised eyebrows in some sectors of the society on Kenya’s commitment to human rights in her counter terrorism activities.

Throughout human history, perceived national security threats provided the political basis for governments to suppress civil liberties and to surpass their boundaries at the expense of freedom for its citizens.² It is only logical that Kenyan security agencies have to engage in counter terrorism in deterring future terrorist acts by applying policies and actions to increase human security in society against terrorist's attacks. Use of these preventive measure may have a number of actions which undermine human rights.

1.2 Definition of Terms

Terrorism: According to the Office of the United Nations High Commissioner for Human Rights (OHCHR), terrorism refers to acts of violence that target civilians in the pursuit of political or ideological aims.³ This research paper assumes the OHCHR definition.

Counter Terrorism: Are offensive measures taken to prevent, deter, preempt and respond to terrorism actions, taken directly against terrorist networks and indirectly to influence and render global and regional environments inhospitable to terrorist networks.⁴ There is no universally applicable counter terrorism policy for democracies because every conflict involving terrorism has its own unique characteristics.⁵

Human Rights: As set out in the Universal Declaration of Human Rights of 1948, these are universal values and legal guarantees that protect individuals and groups against actions and

² Institute of Justice & International Studies, *Papers from the March 2003: Counter-Terrorism & Civil Liberties Conference* (Warrensburg, USA: The Institute of Justice & International Studies, Central Missouri State University, 2003), 121

³ Office of the United Nations High Commissioner for Human Rights, *Human Rights, Terrorism and Counter-terrorism: Fact Sheet 32* (Geneva, Switzerland: OHCHR, 2008), 5

⁴ Office of the Secretary Of Defense, *Report of the Defense Science Board Task Force on Defense Intelligence: Counterinsurgency, Intelligence, Surveillance, and Reconnaissance Operations*, February 2011 (Washington DC: Department of Defense, 2011), 24

⁵ Paul Wilkinson, *Terrorism Versus Democracy: The Liberal State Response* (New York: Routledge, 2006), 203.

omissions primarily by State agents that interfere with fundamental freedoms, entitlements and human dignity.⁶ Human rights are universal, i.e. they belong inherently to all human beings, are interdependent and indivisible.

1.3 Objectives of the Research

Although the Kenyan Government has on various occasions defended its stand on protecting its national security when countering terrorist activities, many international and local human rights defenders and organizations have faulted its position and called for adoption of different strategies that would minimize the tendency of human rights violations. Therefore, the main objective of this research is to demonstrate that there are possibilities for the Kenyan government's security agencies to operate within the United Nations human rights standards while countering terrorism. This can be achieved by exploring the following objectives:

- i) To explore alternative strategies, such as the proactive counter terrorism approach, in preventing attacks; thus minimizing human rights violations by both state and terrorists.
- ii) To assess the Kenyan anti-terrorism laws, their conformity to the Constitution and international laws serving as the referent points by guiding the government's counter terrorism policy choices, and their effectiveness in reducing terrorists' activities.
- iii) To explore if counter terrorism measures and the protection of human rights are conflicting or complementary and mutually reinforcing.

⁶ Ibid, OHCHR, "Human Rights, Terrorism and Counter-terrorism" (2008), 3

1.4 Problem Statement

It is the duty of every state to guarantee security and protection of those under its jurisdiction by enhancing its national security through effective laws and policies that uphold their fundamental rights. Also, individuals, groups and states have a duty to respect the human rights of others for the rule of law to prevail. But there have been conflicts between these strategies, i.e. laws and policies used by states to fight terrorism and the states' adherence to the fundamental rights and civil liberties of its citizen. This happens when one side (security or human rights) is given more prominence in implementation than the other. This study will examine the possibility of reconciling Kenya's security agencies' counter terrorism activities and their observation of human rights. The dilemma is: can the Kenyan government prevent terrorism activities in the country without violating the rights of suspects, victims and other citizens?

1.5 Justification of the Problem

One of the side effects of terrorism and the international response to it has been the tendency to pit the ideas of freedom and security against each other. The concept of human rights protection has often been presented as being in conflict with protection from terrorism. Nothing could be further from the truth. The UN human rights standards were, in part, created to deal with the ravages of political extremism, violence and war of the 1930's and 1940's.⁷ The international human rights framework is therefore applicable in dealing with the terrorist threat; from addressing its causes, to dealing with its perpetrators, protecting its victims, and limiting its consequences.

⁷ Jonathan Cooper, *Countering Terrorism, Protecting Human Rights: A Manual* (Warsaw: OSCE Office for Democratic Institutions and Human Rights, 2007), 15.

States have an obligation to provide protection against terrorism, and human rights standards impose positive obligations on states to ensure the right to life, protection from torture, and other human rights and freedoms. An effective counter terrorism strategy can therefore be a part of a state's human rights obligations. Unfortunately, there are insufficient studies and outcomes on implications of counter terrorism measures on human rights in Africa, especially in Kenya. The importance of finding a balance between counter terrorism activities undertaken by Kenya's security agencies and safeguarding human rights cannot be overstated. Also, not much has been written on the nexus between human rights and counter terrorism in the East African region; especially in Kenya. This study seeks to fill this gap.

1.6 Scope and Limitation of the Study

The scope of this research paper is to primarily find a balance between Kenya's offensive counter terrorism measures and human rights. While it does not purport to pioneer thinking in this area, it builds on previous studies on some of the issues raised. It, however, seeks new ways to achieve this much needed balance. It covers the periods between 1998 and 2014.

This paper is limited and restricted to usage of secondary data available from published reports, journals and books available online and from libraries. This is because of the security implications and clearance on collection of primary data, which might take longer than the time available for writing this paper. Another limitation is associated with the procurement of reliable and accurate data from the Kenyan Government that cover the cases of human rights abuses with respect to the anti-terrorism security agents.

1.7 Reviewing Literature on Human Rights and Counter Terrorism Relationship

Issues of counter terrorism and its impacts on human rights and civil liberties have elicited a lot of interest world over. Scholars have variously discussed subjects of terrorism, counter terrorism, and national security and human rights. However, literature on these issues and how it affects Africa have not been as extensive, balanced and in-depth as it should be.

1.7.1 The Global Overview of Counter Terrorism Strategies

Currently, global terrorism is the new face of terrorism manifestation as it transforms itself from a local subject to global issue.⁸ The modern global terrorism uses the instruments of globalization, such as modern banking services for transfer of funds to support terrorist cells and use of new communication techniques to plan and direct terrorist activities from anywhere in the globe. This calls for global partnership on countering terrorism.

The OHCHR notes that terrorism attacks the values lying at the heart of the UN Charter and other international instruments, namely: respect for human rights; the rule of law; rules governing armed conflict and the protection of civilians; tolerance among peoples and nations; and the peaceful resolution of conflict.⁹ According to Ben Saul (2008), the rationale for criminalization of terrorism emerges from the threat it presents to international peace and security, friendly relations among states, international cooperation, state security or UN principles and purposes.¹⁰

⁸ Ibid, Institute of Justice & International Studies, "Papers from the March 2003," (2003), 121.

⁹ OHCHR, Human Rights, Terrorism and Counter-terrorism," (2008), 7.

¹⁰ Ben Saul, "Defining 'Terrorism' to Protect Human Rights," *The University of Sydney Law School. Legal Studies Research Paper*, No. 08/125 (October 2008), 5.

The UN General Assembly and UN Commission on Human Rights, according to Ben Golder and George Williams (2006), passed Resolution 1373 (September 2001), seeking to influence national law and practice in requiring particular domestic action, including legislative measures.¹¹ It established a committee of the Security Council, the Counter-Terrorism Committee (CTC), to monitor its compliance and execution. Sarthak Behera (2014) argues that Resolution 1373 gave very little attention to human rights and the Security Council later adopted Resolution 1456 (January 2003), which requires states to ensure that any measures taken to combat terrorism should comply with all their obligations under international law; in particular, international human rights, refugee, and humanitarian laws.¹² Therefore, there is an obligation to ensure that all domestic counter terrorism measures are human rights compliant.

The Group of Eight (G8) industrialized countries' heads of state and government meeting in June 2003, writes Sally Ramage (2007), created a Counter Terrorism Action group (CTAG) to support the UN's CTC for capacity building.¹³ It was to identify relevant international best practices, codes and standards in combating terrorism and to work with international financial institutions to strengthen counter terrorism strategies. This was to prevent, disrupt and pre-empt terrorist activities while giving due regard to civil liberties and fundamental principles of law.

In the US, according to Thomas Rossler (2003), the unprecedented 9/11 terrorist attacks represented a turning point and brought new challenges, not only to her justice system, but also

¹¹ Ben Golder and George Williams, "Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism," *Journal of Comparative Policy Analysis*, Vol. 8, No. 1. March 2006 (Taylor & Francis, 2006), 46

¹² Sarthak Behera, "Counter Terrorism," *Academike: Lawctopus' Law Journal Knowledge Center* (December 19, 2014), Accessed February 15, 2015, url: <http://www.lawctopus.com/academike/counter-terrorism/>

¹³ Sally Ramage, *Privacy-Law of Civil Liberties* (Lincoln, USA: iUniverse, 2007), 31 & 32

her foreign policy.¹⁴ The new strategies for detecting, apprehending, and prosecuting terrorist actors, differed greatly from traditional models of American criminal justice. It led to a great deal of legislative efforts being expended to close holes in national security. The centerpiece of these efforts was the US PATRIOT Act,¹⁵ which provided a number of changes for the legal environment, most notably loosening search warrant and wiretap requirements. A 2003 Human Rights Watch (HRW) briefing paper noted that many of the measures adopted by the US government after the 9/11 attacks violated fundamental provisions of international human rights and humanitarian law.¹⁶

1.7.2 Examining Regional Organizations' Counter Terrorism Approaches

Regional inter-governmental organizations have also committed themselves to defeating acts of terrorism. Despite their roles in promoting anti-terrorism policies and legislations, Beth Whitaker (2007) argues that the US is clearly perceived to be the driving force behind such regional laws and policies.¹⁷ There have been protests or angry editorials against enactment of anti-terrorism laws in some countries, where people view these measures as requirements imposed by the US administration and leaders see them as a way to win favour with the US.

From the OHCHR 2008 Factsheet, the inter-governmental organizations that have imposed anti-terrorism legislations include: Organization for Security and Co-operation in

¹⁴ Thomas Rossler, "A New Mission and New Challenges: Law Enforcement and Intelligence after the USA Patriot Act," in *Papers from the March 2003 Counter-Terrorism & Civil Liberties Conference*, ed. Institute of Justice & International Studies (Warrensburg, Missouri: Central Missouri State University, 2003), 65

¹⁵ The USA PATRIOT Act means: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism. It was Signed into law by President Bush on October 26, 2001

¹⁶ Human Rights Watch, "In the Name of Counter Terrorism: Human Rights Abuses Worldwide," *A Human Rights Watch Briefing Paper for the 59th Session of the United Nations Commission on Human Rights*, March 25, 2003. (New York, 2003), 22.

¹⁷ Beth Elise Whitaker, "Exporting the Patriot Act? Democracy and the 'war on terror' in the Third World," *Third World Quarterly*, Vol. 28, No. 5, 2007 (London, UK: Routledge, 2007), 1017 – 1032 at 1021

Europe (OSCE); League of Arab States' Arab Convention on the Suppression of Terrorism (1998); Convention of the Organization of the Islamic Conference on Combating International Terrorism (1999); African Union's Convention on the Prevention and Combating of Terrorism (1999); and South Asian Association for Regional Cooperation's Regional Convention on Suppression of Terrorism (1987), among others.¹⁸

The OSCE, according to Jonathan Cooper (2007), is concerned principally with joint security and has made a number of politically binding commitments on counter terrorism.¹⁹ According to OSCE's Practical Manual for Law Enforcement Officers, human rights form an integral element of all security operations and is essential for any successful investigation, including terrorist related crimes.²⁰ Thus, respect for human rights during counter terrorism investigations and prosecution is the cornerstone of law enforcement efforts to counter terrorism and also a pre-condition to effectively prevent terrorism. Thus failure to respect and protect human rights is one of the conditions conducive to terrorism; human rights-compliant investigations are, therefore, key in any effort to counter this security threat. Majority of OSCE participating States are also members of the Council of Europe, hence the Council's legal mechanisms (both hard and soft law) are especially relevant.²¹

Much literature has been written about the European Union's (EU) embrace of the "GWOT" launched by the US after the 9/11 attacks. But as argued by Ben Hayes and Chris Jones (2013), these literatures focus primarily on the legal effects of domestic EU measures, their affiliation to national law, their effects on fundamental rights and civil liberties, and their

¹⁸ Ibid, OHCHR, *Human Rights, Terrorism and Counter-terrorism*, (2008), 19

¹⁹ Ibid, Cooper, "Countering Terrorism, Protecting Human Rights," (2007), 39

²⁰ Office for Democratic Institutions and Human Rights, *Human Rights In Counter-Terrorism Investigations: A Practical Manual For Law Enforcement Officers* (Warsaw, Poland: OSCE, 2013), 13

²¹ Ibid, Cooper, "Countering Terrorism, Protecting Human Rights," (2007), 40

transformative impacts on the activities and operations of European police forces and security agencies.²² In addition, numerous EU bodies and agencies have been given the mandate to implement or coordinate EU counter terrorism policies. However, Raphael Bossong (2013) observes that some scholars have been critical of EU's response to 9/11, arguing that EU has been turned to a 'paper tiger' whereby one cannot identify a well-developed theoretical and historical debate on EU's fight against terrorism.²³ From this angle, Raphael argues that the fight against terrorism is dangerously invoked to advance various repressive policies that would normally fail in democratic discussions.

Within the Association of South-East Asian Nations (ASEAN), a wealth of literature exists about the threats posed by terrorism, but few provide insights into the regional mechanisms and measures to deal with the threats and assess their adequacy and efficacy. Tatik Hafidz (2009) posits that whilst regional cooperation on counter terrorism had been initiated in response to the American GWOT, the fact that terrorism in South-East Asia is both a local and global phenomenon makes it imperative for ASEAN to strategically redefine its counter terrorism policy, so as to maintain its sustainability in the light of changing global security environment.²⁴ This is supported by David Whittaker (2013), who noted that ASEAN's diverse membership of fledgling democracies, communist countries and military dictatorships, has made decisions on some issues hard going.²⁵ Whittaker adds that these nations have been keen to

²² Ben Hayes and Chris Jones, *Catalogue of EU Counter-Terrorism Measures Adopted since 11 September 2001* (SECILE, 2013), 16, accessed February 25, 2015, url <http://www.statewatch.org/news/2013/dec/secile-catalogue-of-EU-counter-terrorism-measures.pdf>

²³ Raphael Bossong, *The Evolution of EU Counter-Terrorism: European Security Policy after 9/11* (New York: Routledge, 2013), 3-4

²⁴ Tatik S Hafidz, "A Long Row to Hoe: A Critical Assessment of ASEAN Cooperation on Counter- Terrorism," *Kyoto Review of Southeast Asia* Issue 11 (December 2009), accessed March 12, 2015 url: <http://kyotoreview.org/issue-11/a-long-row-to-hoe-a-critical-assessment-of-asean-cooperation-on-counter-terrorism/>

²⁵ David J. Whittaker, *Counter Terrorism and Human Rights* (New York, USA: Routledge, 2013), 58

subscribe to the enumeration and observance of Human Rights Charter and careful monitoring of its provisions.

Because of their support for the GWOT, significant human rights violations have been noted and largely ignored, taking second place to tactical, logistical priorities. As Hafidz notes, this was after the American-led GWOT and the Bush administration's framing of Southeast Asia as its "second front" providing an impetus for a concerted regional response to address its implications.²⁶

An example is Indonesia, which is home to half of the region's radical Islamist groups and the site of a number of terrorist attacks (e.g. Bali in October, 2002). The patchy democracy in Indonesia, which with its ability to share dependable intelligence with the US, is seen by the US as worth more than what might be a rather shallow maintenance of human rights. Also, Malaysia's capacity for hunting for dissident cells has led to its receiving both plaudits and dollars and a long standing secondment of a US security task force. The situations in Indonesia and Malaysia, posits Louise Doswald-Beck (2011), have revealed the complex interaction between domestic and international factors in the areas of security, democratization and human rights in Southeast Asia where both regional and national structures for protecting human rights are fragile and permeable to internal and foreign pressures.²⁷

This proves the magnitude to which the promotion of human rights in the region depends not only on the political will of elected leaders, but also the weaknesses of current regional structures in Southeast Asia and the crucial role played by certain international actors. This has

²⁶ Ibid, Hafidz, "A Long Row to Hoe" (2009)

²⁷ Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (New York, USA: Oxford University Press, 2011), 131

made ASEAN set in place protocols and treaties to be observed by its members while countering terrorism compelling them to safeguard and protect human rights, adds Doswald-Beck.²⁸

1.7.3 Analysis on Africa's Counter Terrorism Strategies

The human cost of terrorism has been felt in virtually every corner of the globe, and Africa has not been left behind since terror acts were put on the African map during the August 1998 American Embassy attacks and the American 9/11 terror attacks, writes Martin Ewi and Kwesi Aning (2006).²⁹ Therefore, African states, under the auspices of the Organization of African Unity (OAU) and subsequently, the African Union (AU), have taken steps on combating the phenomenon of terrorism with a number of resolutions and declarations being passed.

According to Lina Saidia and Samuel Opoku-Agyemang (2015), African states are know that terrorism is a grave violation of human rights, cannot be justified and consequently, should be fought in all its forms and manifestations.³⁰ John Akokpari (2007) adds that the AU's anti-terrorism activities, spelt out in its Constitutive Act (Article 4(0)), calls for "respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities". The Peace and Security Council works with the African Commission on Human and Peoples' Rights to support member states' efforts to enhance respect for human rights and international humanitarian law during their counter terrorism activities.³¹

²⁸ Doswald-Beck, "Human Rights in Times of Conflict and Terrorism," (2011), 131

²⁹ Martin Ewi and Kwesi Aning, "Assessing the role of the African Union in preventing and combating terrorism in Africa," *Institute for Security Studies: African Security Review* No. 15.3 (2006), 33 & 34

³⁰ Lina Saidia and Samuel Opoku-Agyemang, "Counter-Terrorism and Human Rights Protection in Africa: Preventing Wrongs without Violating Rights," *African Leadership Academy Model Africa Union (ALAMAU)*, 18 – 22 March 2015 (2015), accessed March 12, 2015, url: <http://www.alamau.org/psc/>

³¹ Institute of Security Studies, "Peace and Security Council Report, AU member states urged to implement PSC anti-terrorism measures," (22 September 2014), accessed March 12, 2015, url: <http://www.issafrika.org/pscreport/addis-insights/au-member-states-urged-to-implement-psc-anti-terrorism-measures>

According to Ramage (2007), the AU (formerly OAU) released a convention in 2002 to promote criminalization of terrorist acts.³² But the convention did not only contain controversial concepts with respect to civil liberties, it was also far from being unique considering the developments in recent years compared to such conventions as the Council of European Convention on Terrorism. The AU's Convention on the Prevention and Combating of Terrorism (the 1999 Algiers Convention), established specific links between the fight against terrorism and human rights, which is based on the principle that nothing can justify terrorist acts. But Marceau Sivieude (2007) argues that many sub-Saharan States have incorporated into their domestic law provisions similar to the Algiers Convention, but with the potentially negative consequences on civil liberties.³³ This is supported by Ana Salinas de Frias et al (2012), who observed that while AU had advocated human rights considerations in the development and implementation of counter terrorism measures, it has not been translated into concrete state practice.³⁴ Consequently, human rights concerns are absent from most states' counter terrorism legislations, and most of these laws have led to limited civil rights and freedoms; used to harass, intimidate, imprison and crackdown on political opponents.

In Southern Africa, according to Thabani Masuku (2002), the post-apartheid South Africa's approach to terrorism has been designed to respond to the various instances of urban terrorism.³⁵ Political calls for the suspension of constitutional guarantees such as: the right of a suspect to remain silent; release after 48 hours if not charged; and legal representation during

³² Ibid, Ramage, "Privacy-Law of Civil Liberties," (2007), 30.

³³ Marceau Sivieude, "Counter-Terrorism Measures and Human Rights: Keys for Compatibility Human rights Violations in Sub-Saharan African Countries in the Name of Counter-Terrorism: A High Risks Situation," *The International Federation for Human Rights (FIDH)*, No 483/2, November 2007 (Paris, France: 2007), 6.

³⁴ Ana Salinas de Frias, Katja Samuel and Nigel White, *Counter-Terrorism: International Law and Practice* (New York, USA: Oxford University Press, 2012), 1015

³⁵ Thabani Masuku, "Reflections on South Africa's Approach to Terrorism," *CHRI News, February 2002* (Cape Town: the Institute for Democracy in South Africa, 2002)

detention, were not adopted by the Government. This was not only because of possible illegality of such action, but also because amending the Constitution would result in undermining the fundamental rights guaranteed by the Constitution. Instead, creative and constitutionally compliant legislative and policy approaches to terror-related crimes were conceived, and existing mechanisms strengthened to guarantee the rule of law and the protection of human rights whilst tackling terrorism, unless under a state of emergency. However, much more is needed, so that South Africa can successfully handle threats without compromising human rights protection.

1.7.4 Analysis of East and Horn of Africa Regions' Responses to Terrorism

Eastern Africa, as discussed by Jonathan Horowitz, is the most vulnerable region to terrorism of all the regions in sub-Saharan Africa, and has emerged as a centre of both terrorist activities and Western-supported counter terrorism operations.³⁶ This fact is also supported by Victor Ramraj et al (2012).³⁷ Currently, the US and other donors are channelling counter terrorism assistance to East African countries to fight terrorism in the region and to dislodge the al-Qaeda leaning Somalia based *Harakat al-Shabaab al-Mujaahidiin* (al-Shabaab), which targets Israeli, European and US interests in the region. J. K. Murrey and H. K. Kipkurui (2014) note there is a shift from international terrorists towards greater recruitment and the use of local participants in planning and execution of the attacks.³⁸ This has encouraged the growth of extremism and the emergence of home-grown terrorism. This suggests that current and future threats of terrorism in the sub-region will increasingly emanate from well integrated citizens.

³⁶ Jonathan Horowitz, "Counterterrorism and Human Rights Abuses in Kenya and Uganda: The World Cup Bombing and Beyond," *The Open Society Foundations* (2012), 8, accessed February 25, 2015, url: <http://reliefweb.int/sites/reliefweb.int/files/resources/counterterrorism-human-rights-abuses-kenya-uganda-20121127.pdf>

³⁷ Victor V. Ramraj, Michael Hor, Kent Roach, George William (eds) *Global Anti-Terrorism Law and Policy* (New York, USA: Cambridge University Press, 2012), 588

³⁸ J.K. Murrey and H. K. Kipkurui, "Contemporary Security in Africa," *Journal of the National Defence College, Kenya*, Vol 2 No 1 (March 2014), 119.

Lauren Ploch (2010) posits that human rights advocates and US State Department officials have been raising concerns over human rights abuses committed under several East African governments that receive US counter terrorism assistance.³⁹ The State Department mentioned reports of unlawful killings, torture, abuse, and excessive force by security forces in Burundi, Ethiopia, Kenya, Sudan, and Uganda.

Monica Juma (2007) writes that the Inter-Governmental Authority on Development (IGAD) countries are cooperating on terrorism fight by focusing on individual country capabilities on dealing with terrorism rather than multilateral action.⁴⁰ The level of terrorism threats compared to capacity created indicate that the region remains a soft underbelly in Africa. Addressing this challenge entails building protective and preventive strategies that aim to deny terrorists chances to exploit current weaknesses and investing in changes that strengthen national institutions in ways that reduce the weaknesses being exploited by terrorists. In this regard, adds Ana de Frias et al (2012), IGAD has taken a number of measures in the region to address the threat of terrorism and fully implement both the AU and universal counter terrorism instruments, which include setting up of an IGAD Capacity-Building Program against Terrorism (ICPAT).⁴¹

Ethiopia, which is a Marxist-Leninist regime, has practiced governmental terrorism since the overthrow of Emperor Haile Selassie in 1974, writes David Shinn (2003).⁴² It has faced

³⁹ US Congressional Research Service (CRS), *Countering Terrorism in East Africa: The U.S. Response*, by Lauren Ploch (Washington DC: CRS, 2010), 41.

⁴⁰ Monica Kathina Juma, "Role of the Inter-Governmental Authority on Development on Counter Terrorism," in *African Counter Terrorism Cooperation: Assessing Regional and Sub-regional Initiatives*, ed. Andre Le Sag (Washington DC: Potomac Books, 2007), 75.

⁴¹ Ana Maria Salinas de Frias, Katja Samuel and Nigel Whilte, *Counter-Terrorism: International Law and Practice* (Oxford: Oxford University Press, 2012)

⁴² David Shinn, "Ethiopia and Combating Terrorism: An Important Ally with Its Own Priorities," in *Assessing Terrorism in the Horn of Africa: Threats and Responses*, Special Report No. 113 January 2004 (Washington DC: United States Institute of Peace, 2003), 5.

mainly indigenous revolts, but appears to have remained free of terrorist attacks instigated by al-Qaeda and other Middle East terrorist groups. It is the misuse of the Ethiopian anti-terrorism law that concerns most human rights defenders, with most defenders calling on the government to stop misusing anti-terrorism legislation to curb freedom of expression and association in the country.⁴³ They alleged that the anti-terrorism law was being used to target journalists, bloggers, human rights defenders and opposition politicians in Ethiopia under the pretext of countering terrorism. This fact was also supported by the 2014 Human Rights Watch Report (HRW), which noted that the late Prime Minister Meles Zenawi's death in August 2012 did not yield tangible policy change towards human rights violations by the government.⁴⁴ Another HRW report (2012) gave an example of an Ethiopian federal court, which in January 2012 convicted three local journalists and two political opposition members of conspiracy to commit terrorist acts and participation in a terrorist organization.⁴⁵ They were denied access to counsel during the pre-trial detention and failed to investigate torture allegations. These actions violated well-established rights under international law to due process, free expression, or privacy.

The Uganda situation, as discussed by Victor Ramraj et al (2012), is that the Joint Anti-Terrorism Task Force (JATT) has been accused by the HRW of abuse and misconduct in a systematic human rights abuses, including incommunicado detention of suspects and routine use of torture during interrogations in their safe houses.⁴⁶ The detainees were not allowed access to lawyers, family or relatives. This is supported by another HRW report, which reports of having obtained information on several cases in which JATT personnel have been implicated in

⁴³ ICJ, "Counter-Terrorism and Human Rights," *ICJ E-Bulletin* No. 86 (September 2014), accessed on February 25, 2015, url: <http://www.icj.org/september-ici-e-bulletin-on-counter-terrorism-and-human-rights-no-86/>

⁴⁴ HRW, *World Report 2014: Events of 2013* (New York, USA: Seven Stories Press, 2014), 116.

⁴⁵ HRW, *In the Name of Security Counterterrorism Laws Worldwide since September 11* (New York: Human Rights Watch, 2012), 22

⁴⁶ *Ibid*, Ramraj, "Global Anti-Terrorism Law and Policy," (2012), 590.

extrajudicial killings, enforced disappearances and prolonged incommunicado detention of terrorism and treason suspects at its headquarters.⁴⁷ These practices violate basic human rights.

1.7.5 A Brief Review of the Kenyan Situation

A systemic viewpoint conceptualizes the fight against terrorism at four levels, namely: national, regional, international and global. The supremacy of the state remains unchallenged and central in combating terrorism at all these four levels. Analysis by Patrick Kimunguyi (2011) deduces that Kenya has been on the forefront of counter terrorism activities within the country and also regionally, which has made her to be a target of various terrorist attacks even before the 2001 GWOT was declared by the US.⁴⁸ These attacks have either been carried out by and against Kenyan nationals for a domestic cause or they focused on 'extra-national' or 'extra-regional' targets, such as Western targets located in the country.

Between October 2011 and August 2014, about 370 people had been killed and over 1,075 maimed in terrorist attacks, according to an analysis by Paul Wafula (2014).⁴⁹ This gives a glimpse into the human cost of the war against terror. The sad part is that most investigations on terror charges have remained unresolved, with police blaming loopholes on the law and judges for returning suspects to the streets due to weak investigations and inconclusive evidence. The security organs have been more reactive than proactive, leading to several cases of human rights violations. Dennis Kabatto (2012) argues that Kenya must realize that fighting terrorism through

⁴⁷ Human Rights Watch, *Open Secret Illegal Detention and Torture by the Joint Anti-terrorism Task Force in Uganda* (New York, USA: Human Rights Watch, 2009), 34

⁴⁸ Patrick Kimunguyi, "Terrorism and Counter terrorism in East Africa," (Nairobi, Kenya: 2011), 1, accessed February 25, 2015, url: <http://artsonline.monash.edu.au/radicalisation/files/2013/03/conference-2010-terrorism-counter-terrorism-eafrica-pk.pdf>

⁴⁹ Paul Wafula, "Kenya has experienced 100 terror related attacks in three years" *The Standard Digital*, Monday, August 18, 2014, accessed February 25, 2015, url: <http://www.standardmedia.co.ke/article/2000131848/370-killed-in-terror-attacks-in-kenya-since-2011?>

human rights violations is counterproductive as this creates more enemies for the government and inflames the situation.⁵⁰ Secondly, rather than ignoring the law and using brute force, the fight against terrorism may be won by placing greater importance on professionalizing the security forces, respecting the due process and rights of suspects, and building community relationships based on mutual respect. There have been several attempts to come up with anti-terrorism legislations, according to Marceau Sivieude (2007), most of which have not succeeded due to their incompatibility with the Kenyan Constitution and other international laws.⁵¹

1.8 Theoretical Framework

Alex Schmid (2011) describes theory in social sciences as a heuristic procedure; a simplification of reality illustrating the dynamics of a relationship with certain inputs and their outcomes.⁵² Theories of terrorism should be general enough to address a wide range of subjects since it covers international relations, political science, history, psychology, sociology criminology, and law among other subjects. There are no overarching theories, but there can be several empirical generalizations. The 9/11 attack represented such dilemma and contributed in redefining and exacerbating existing political and ideological divergences on the terrorism subject. Benedertta Berti (2009), agrees that the post-9/11 resulted in a paradigm shift in the way security and human rights are perceived and dealt with in the international arena.⁵³

⁵⁰ Dennis Kabatto, "Counter-Terrorism and Human Rights Abuses in Kenya and Uganda, Says New Report," *Newtime Africa*, (December 9, 2012) accessed February 25, 2015 url: <http://www.newtimeafrica.com/archives/30017>

⁵¹ Ibid, Sivieude, "Counter-Terrorism Measures and Human Rights," (2007) 14.

⁵² Alex P. Schmid, ed., *Routledge Handbook of Terrorism Research* (Abingdon, Oxon, UK: Routledge, 2011)

⁵³ Benedertta Berti, "Escaping the Prisoner's Dilemma: Securing a Role for human Rights in Counter Terrorism," in *Effectively Countering Terrorism: The Challenges of Prevention, Preparedness and Response*, eds. Cornelia Beyer and Michael Bauer (Brighton, England: Sussex Academic Pres, 2009), 80

Several approaches and theories are relevant in the Kenyan context, amongst them being: Legalist Approach; the Principle of Just War Theory; the Proactive Counter terrorism Approach; and the Balancing Theory. The approaches taken by the government each time differ both strategically and operationally depending on the situation.

The legalist counter terrorism approach upholds the importance of the rule of law. According to Antony Lang (2008), the approach clarifies the incoherence on punishments meted out on non-state agents, such as terrorist organizations, and offer suggestions on how to make the punishment more just.⁵⁴ But Joan Fitzpatrick (2003) posits that the human rights regime adopts a legalist approach to limit the harm the powerful may inflict on the vulnerable.⁵⁵ The 9/11 attacks and the ensuing GWOT test the limits of the legalist approach. She concludes that human rights constrain state responses to terrorism more directly than they govern the conduct of terrorists.

The Just-War Theory, which originated from Christian theology, is attributed St. Augustine, who offered a theory on war and justice referring to the Bible that some wars are necessary to amend evil.⁵⁶ St. Thomas Aquinas revised this theory, creating three creterias for war, namely: the war needed to be waged by a legitimate authority, have a just cause, and have the right intentions. Just war theory tries to perceive of how war might be restrained, made more civilized, and eventually focused towards the aim of founding permanent peace and justice. On the other hand, the war model is a coercive approach to counter terrorism. It depends on the state's monopoly on the use of violence, i.e., the exercise of hard power, defines a terrorist attack

⁵⁴ Anthony F. Lang Jr., *Punishment, Justice and International Relations: Ethics and Order After the Cold War* (New York: Routledge, 2008), 3

⁵⁵ Joan Fitzpatrick, "Speaking Law to Power: The War Against Terrorism and Human Rights", *EJIL*, Vol. 14 No. 2 (2003), 241

⁵⁶ Brian Orend, "War Theory and Principles of Just War," in *Stanford Encyclopedia of Philosophy*, Last Modified on July 28, 2005, accessed on March 12, 2015, url: <http://plato.stanford.edu/entries/war/>

as an act of war. In times of emergency, the theory rejects the subject of due process, rule of law and individual human rights and assumes that the only way to deal with terrorism is to destroy it with a military force on the assumption that, according to Paul Wilkinson (2008).⁵⁷

According to Crelinsten (2009), proactive (or preventive) counter terrorism approach aims to avert acts of terror before they happen.⁵⁸ He adds that preventive counter terrorism is an intelligence function where information is gathered not for evidentiary, but for intelligence purposes. Wilkinson emphasizes the use of proactive policing and intelligence strategies, thus, by gaining advanced warning of terrorist plans, their mode of operation, weaponry, personnel, finances and financiers, communication systems, it becomes feasible to pre-empt their attacks, crack their cells and bring their members to trial.⁵⁹ Unfortunately, this approach may be prone to abuse by the security agents acting with impunity during their investigations/information gathering thereby violating the same rights they are meant to safeguard.

1.8.1 The Balancing Theory

The Balancing theory, advanced by Simon Bronitt (2008), is an important approach that tries to capture the debates about counter terrorism and human rights.⁶⁰ It tries to strike a balance between security and liberty in the post-9/11 debates when states are expanding their power to combat terrorism. 'The balancing theory' is when security is reconciled with the fundamental liberal rights and values. Laura Donohue (2008) describes this model as 'a trade-off between security and human rights; because both are valuable goods that contribute to social welfare,

⁵⁷ Paul Wilkinson, "Liberal State Responses to Terrorism and Their Limits," in *Counterterrorism: Democracy's Challenge*, eds. Andrea Bianchi and Alexis Keller (Oxford, UK: Hart Publishing, 2008), 88-89.

⁵⁸ Ibid, Crelinsten, "Counterterrorism" (2009)

⁵⁹ Paul Wilkinson, *Terrorism Versus Democracy: The Liberal State Response* (London: Frank Cass, 2001), 94

⁶⁰ Simon Bronitt, "Security and Liberty: Critical Perspectives on Terrorism Law Reform," in *Fresh Perspectives on the 'War on Terror'*, eds. Miriam Gani and Penelope Mathew (Canberra, Australia: ANU Press, 2008), 65-84

neither should be maximized without regard to the other.’⁶¹ Alexis Keller (2008) argue that an ideal world is full of trade-offs and in the fight against terrorism, the citizens must accept the costs associated with their protection from terrorism and the impacts on individual rights.⁶²

The debate on search for a middle ground and the balancing act between human rights and counter terrorism, according to Berti, shifted the international community’s discourse towards a ‘security perspective’.⁶³ The debate on the role of human rights in counter terrorism addresses the inherent difficulty of balancing human rights compliance and effective counter terrorism measures. Berti adds that accommodating these apparently contrasting values has been one of the most difficult challenges, especially for countries founded upon democracy and the rule of law. The above scholars are in support of making a balance between security and human rights (or civil liberties). These scholars believe that in some circumstances, sensible policy makers can increase security at no cost to human rights; or increase human rights at no cost to national security. What they observed was that an appreciable increase in security would require some decrease in civil liberties, and vice-versa.

In essence of the context of counter terrorism measures, governments should not in any circumstance undervalue the importance the rights and liberties, not only of the victims of terrorism, but even those of the terror suspects.⁶⁴ The government’s task would be to recognize the trade-offs by preserving security without compromising the basic rights and liberties of its

⁶¹ Laura K. Donohue, *The Cost of Counterterrorism: Power, Politics and Liberty* (London: Cambridge University Press, 2008), 4

⁶² Alexis Keller, “Constitutionalising Emergency Powers in Modern Europe: The English and the Roman Model,” in *Counterterrorism: Democracy’s Challenge*, eds. Andrea Bianchi and Alexis Keller (Oxford, UK: Hart Publishing, 2008), 43

⁶³ Ibid, Berti, ‘Escaping the Prisoner’s Dilemma’, (2009), 92

⁶⁴ David Cole, “No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint,” *The University of Chicago Law Review*, Research Paper No. 1272206, (October 2010), 1333.

citizens. This underlies the theory that higher level of human rights protection will necessarily impede the effectiveness of enforcement of the anti-terror laws. An example cited by Bronitt is the Australian Law Reform Commission's review of sedition, which approached the process of reform as one of 'balancing anti-terrorism strategies with human rights'. A similar approach also illustrates the legal counter terrorism policies in the United Kingdom and the US.⁶⁵

Although a pervasive counter terrorism feature of public policy, the balancing theory has been subject to significant academic criticism. Its critics maintain that when conflicting interests are said to be balanced, there should be a self-evident weighting for priority among them. A recurrent problem with this theory is that there is no indication of the relative weight that should be attached to the competing interests; thus, the concept should be subjected to a careful analytical and empirical scrutiny in the context of counter terrorism measures.⁶⁶ Keller contends that the balancing theory has been criticized of being too idealistic by scholars who opposed it believing that it promotes consequentialism in which "the end justifies the means", a calculus in which individual interests are sacrificed for community gains.⁶⁷ He also argue that security and human rights are inversely related; thus an improvement of security leads to a decrease in the protection of liberties and rights, and vice versa. Thus, balancing is presented as zero-sum game in which more of one necessarily means less of the other. The question is how these two societal 'goods' in contention (i.e. security and liberty) should be justly distributed.

The main counter approach used in this research paper to analyze Kenyan strategies in countering terrorism while respecting human rights of the citizens is the balancing theory.

⁶⁵ Ibid, Bronitt, "Security and Liberty," (2008), 66

⁶⁶ Ibid, Bronitt, "Security and Liberty," (2008), 66

⁶⁷ Ibid, Keller, "Constitutionalising Emergency Powers in Modern Europe," (2008), 66

1.9 Research Hypotheses

Although this research paper is exclusively qualitative, the following three hypotheses are going to be tested using the available substantive data from various scholars, journals, published books and reports among other academic works.

- i) A country's counter terrorism policy informs its choice of strategy. Therefore, aligning counter terrorism strategies to embrace more of preventive than reactive approaches lowers the risk of human rights violations.
- ii) Formulation and implementation of national counter terrorism laws have a direct impact on a country's respect for human rights.
- iii) There should be no conflict between counter terrorism and human rights if the government implements its counter terrorism policies with focus on human rights.

1.10 Research Methodology

Since this research paper is qualitative, it will use deductive method of logical reasoning where conclusion will follow logically from theoretical premises. Data collection method will be documentary; thus, secondary data will be sourced, analyzed and presented qualitatively. Data sources targeted include; both authored and edited academic writings and text books, the Internet (online academic research websites and journals), international and local journals, (Kenya, US, UK, Australian, etc), government publications and communiques, published reports from human rights groups and defenders, the UN, and other various organizations interested in the problem; newspapers as well as other electronic media reports on issues pertaining to terrorism and human rights.

The choice of the methodology for this research is influenced by the securitized and ideological nature of the topic, and the sensitivities surrounding it; thus rendering the usage of empirical study unsuitable. Also, if another research method was chosen, many of the affected and the concerned government institutions might not be available to freely provide vital information needed for this this research due to various security restrictions and concerns. This method would be important because they make the research paper accurate, objective while minimizing opinions.

1.11 Chapter Outline

This research paper is divided into five chapters. The first chapter deals with introduction to the research problem, its justification, objectives, the theoretical model, and review of the relevant literatures. **Chapter 2** analyzes counter terrorism strategies and their relationship with human rights. It has a bias on the intelligence led preventive counter terrorism. **Chapter 3** concentrates on the value of counter terrorism legislation in addressing human rights in Kenya, focusing on the trends, opportunities and the challenges of the anti-terrorism laws and relating them with the international laws. **Chapter 4** focuses on the counter terrorism and the human rights nexus. It develops a theoretical model on the ways Kenya can bridge the existing lacuna between counter terrorism policies and human rights and come up with a single decision-making policy framework. Finally, **Chapter 5** is a conclusion of above the chapters and check if the objectives in Chapter 1 have been achieved. It also give a recommendation and the way forward pertaining to this research problem.

CHAPTER 2: CRITICAL ANALYSIS OF COUNTER TERRORISM STRATEGIES

2.1 Introduction

Counter terrorism author, Francesco Ragazzi (2015), identifies two counter terrorism strategies; reactive and preventive.⁶⁸ He explains that while reactive counter terrorism focuses on bringing to justice terror suspect in regards to the law, preventive counter terrorism is geared towards anticipating and preventing terrorism acts from happening. These measures ensure that states fulfil their duty to protect people within their jurisdiction. However, states should ensure that this is done within the framework set out by international human rights law. This chapter analyses both reactive (or coercive) and preventive (or proactive) counter terrorism strategies, with emphasis on preventive counter terrorism.

2.1.1 Reactive Counter Terrorism Strategy

Reactive (or coercive) counter terrorism applies a set of standard procedures after a terrorist attack has been committed.⁶⁹ According to Ronald Crelinsten (2009), it involves arrests of suspects and the ensuing investigations focus on gathering evidence that can be used in a law court, i.e. crime solving.⁷⁰ This aggressive enforcement is credited to a state's authoritarian tendencies or its political and popular dividends of cracking down on dissidents.⁷¹ This is because coercive counter terrorism relies on the state's monopoly on the use of violence, i.e., the

⁶⁸ Francesco Ragazzi, "Policed Multiculturalism? The Impact of Counter-Terrorism and Counter-Radicalization and the 'end' of Multiculturalism," in *Counter-Radicalization: Practical Perspectives*, eds, Christopher Kaker-Beall, Charlotte Heath-Kelly and Lee Jarvis (New York: Routledge, 2015), 158

⁶⁹ Office for Democratic Institutions and Human Rights, *Human Rights In Counter-Terrorism Investigations: A Practical Manual For Law Enforcement Officers* (Warsaw, Poland: OSCE, 2013), 9

⁷⁰ Ronald Crelinsten, *Counter terrorism* (Cambridge, UK: Polity Press, 2009), chapter 3.

⁷¹ Robert Muggah, "Once we were Warriors: Critical Reflections on Refugee and IDP Militarisation and Human Security," in *Human Security and Non-Citizens: Law, Policy and International Affairs*, eds Alice Edwards and Carla Ferstman (New York: Cambridge University Press, 2009), 186

exercise of hard power. Strict limits have to be placed on this since its abuse and use outside the rule of law, whether national or international, amounts to criminal acts and human rights violation.⁷² Thus, this strategy has to operate within the criminal justice and the war models.

The Criminal Justice Model treats acts of terrorism as a crime, fights it without recourse to special legislation, and relies on the police. By criminalizing the acts that terrorists commit, emphasis is placed on their criminal nature and not on their political or ideological motive.⁷³ While the criminal justice model can achieve some important goals in terms of deterrence, retribution, education, incapacitation and rehabilitation, these benefits are largely dependent upon how the system is used, how fair it is seen to be used by others, and how committed individuals are to terrorist violence either as a means to other goals or as an end in itself. Its key advantage is that it delegitimizes terrorism, and its main drawback is that the law doesn't always keep up with terrorist planning and targeting.

The War Model of counter terrorism treats terrorism as an act of war or insurgency.⁷⁴ Although its fundamental element is the use of maximal force to overpower the enemy, the conduct of war should follow the laid down rules of war as per the 1949 Geneva Conventions. The model defines success in terms of victory or defeat of the terrorist. It is considered quick, effective and suited to the new kinds of threats posed by decentralized, ideologically driven terrorist networks whose adherents are not deterred by traditional criminal justice.⁷⁵ But the model invites retaliation by terrorists, elicits sympathy for them, and also becomes increasingly antidemocratic, as the excuse of a national emergency leads to government excesses.

⁷² Ronald Crelinsten *Perspectives on Counterterrorism: From Stovepipes to a Comprehensive Approach*, *Perspectives on Counterterrorism* Vol 8, No 1, February 2014, (2014)

⁷³ Ibid, Crelinsten, "Perspectives on Counterterrorism," (2014).

⁷⁴ Ibid, Crelinsten, "Perspectives on Counterterrorism," (2014).

⁷⁵ Ibid, Crelinsten, "Perspectives on Counterterrorism," (2014).

Therefore, counter terrorism cannot be merely reactive or coercive, it must also be proactive or preventive by considering long term measures even as it acts in the short term to respond to attacks and outwit terrorist planning and targeting. It must go beyond legal and military approaches, to include political, social, cultural, and economic initiatives aimed at undermining the spread of radicalization and violent extremist ideas that fuel the use of terrorism in social and political life. This can be realized through preventive counter terrorism strategy.

2.1.2 Proactive counter terrorism strategy and its impacts on human rights

Proactive (also known as preventive) counter terrorism mostly deals with preventing terrorists from taking action in the first place. Quirine Eijkman and Bart Schuurman (2011) note that this is a complex and multifaceted strategy that encompasses a host of different approaches whose central purpose is devising methods and policies to cause non state groups (i.e. terrorist) to cease achieving their political goals.⁷⁶ Paraphrasing Alex Schmid, Eijkman and Schuurman write that it is possible to divide these methods and policies into two broad categories namely; efforts that fight the manifestations of terrorism and those attempting to address the conditions conducive to the spread of terrorism. They stress that while a preventive approach to counter terrorism is to be lauded for its emphasis on averting violence rather than responding to it, the manner in which such policies are currently being implemented by various countries and international organisations raise significant human rights questions.⁷⁷ But the most obvious advantage of preventive counter terrorism policy is its ability to avert death and injuries to civilians who might otherwise have fallen victim to a terror attack.

⁷⁶ Quirine Eijkman & Bart Schuurman, *Preventive Counter-terrorism and Non-discrimination in the European Union: A call for systematic evaluation* (The Hague, Netherlands: ICCT), 2011), 2.

⁷⁷ Ibid, Eijkman & Schuurman, "Preventive Counter-terrorism and Non-discrimination," (2011), 2.

In her contribution to the Memorial Institute for the Prevention of Terrorism's (MIPT's) report, Martha Crenshaw (2007) urges governments to think beyond conventional measures when considering counter terrorism policies because there is no one consistent model of terrorism.⁷⁸ She maintains that among the most essential measures democratic governments can take in countering terrorism is understanding the motivations and processes of radicalization. Accepting that the threat cannot be entirely eliminated, is an important in developing counter terrorism strategies. Eradicating terrorism as a method is simply not possible as this requires a massive military response that creates as many or more terrorists than it removes.⁷⁹ Therefore, a more realistic goal is a reduction in the size of terrorist organizations as well as a concomitant reduction in the ideological appeal of extremist philosophies. Among the strategies that are aimed pre-empting terrorism through disruption, restriction and incapacitation are: compulsory questioning, extended detention without charge, criminalizing membership of organizations deemed to be terrorist organizations and criminalization of any association with them, freezing of assets and the criminalization of a wide range of conduct, not necessarily linked to any violent act, but deemed nevertheless to be terrorist-related.

2.1.3 Underlying causes of terrorism in Kenya

One of the most effective actions in fighting terrorism is to identify the factors that are related to its formation and determine the conditions that enable terrorist groups to operate and find support for their activities. It should be noted that there is no single cause of terrorism, nor a single set of causes or combination of factors that would apply to all conflicts in which terrorism occurs. This is what is applicable in the Kenyan context.

⁷⁸ Martha Crenshaw, "The Organization of Terrorism" in *Terrorism: What's Coming The Mutating Threat*, ed. James O Ellis (Oklahoma: MIPT, 2007), 25 – 27.

⁷⁹ Randi L. Buros, "Realism vs. Liberalism in the Development of Counterterrorism Strategy," *Small Wars Journal Article*, (October 16, 2011), 2& 3

A number of factors explain why Kenya has been a victim of past terrorist attacks. The main factors, according to Hared Adan (2005), are geography, ethnic composition, political stability, poverty, Islamic fundamentalism and lax law enforcement.⁸⁰ Geographically, Kenya has unstable neighbours, such as Somalia, where much of its terror war emanates from.⁸¹ The government of Somalia collapsed in 1991 creating a lawless state flourishing with crime and radical ideologies. With this came the influx of refugees into the northern Kenya refugee camps. These camps are suspected to be harbouring terror suspects.⁸²

According to the Kenya Defence Forces, the increasing numbers of terrorist attacks in Kenya have been carried out by local citizens, many of whom are recent converts recruited and trained mainly by Somalia-oriented terrorist groups.⁸³ The roles that marginalization and poverty play among vulnerable people, who at the end invite sectarian and inter-ethnic strife, despair, and anti-western resentment.⁸⁴ Intra-ethnic and clan conflicts also play a major role in the perpetuation of terrorism in the country. This is especially when some of the clans and ethnic groups host terrorists as has been the case with refugees in Dadaab who have been blamed for instigating terror activities in Kenya.

Religious doctrine is a 'tool of mobilization' and a justification for terrorism rather than a direct cause. Religion is not a cause of political radicalism, but is often combined with other

⁸⁰ Hared Hassan Adan, "Combating Transnational Terrorism in Kenya" (Master Thesis, U.S. Army Command and General Staff College Fort Leavenworth, Kansas, US, 2005)

⁸¹ Samuel L. Aronson, "Kenya and the Global War on Terror: Neglecting History and Geopolitics in Approaches to Counterterrorism," *African Journal of Criminology and Justice Studies*, Vol.7, Nos.1 &2 November 2013 (The London School of Economics, 2013), 28

⁸² Edward Mogire and Kennedy Mkutu Agade, "Counter-terrorism in Kenya," *Journal of Contemporary African Studies*, Vol. 29, No. 4 (October 2011)

⁸³ Ibid, Mogire and Agade, "Counter-terrorism in Kenya," (2011).

⁸⁴ Kurt M. Campbell and Michele A. Flournoy, *To Prevail: An America Strategy for the Campaign Against Terrorism* (Washington, DC: Center for Strategic and International Studies, 2001)

political goals, such as nationalism or self-determination.⁸⁵ Al-Shabab's attacks in Kenya have a dual purpose: not only seeking to persuade Kenya to withdraw its troops from the Somalia, but also fomenting religious divides within Kenya.⁸⁶ During the 2014 Mandera massacres, some accounts suggested that Muslims were separated from Christians and allowed to flee.⁸⁷

Much, if not all, of the international terrorism threat in Kenya is based on Islamic fundamentalism.⁸⁸ While a detailed history of Muslim alienation is not provided in this paper, the current state and extent of Islamic extremism is necessary in understanding the existence, or lack, of terrorism in Kenya. Much of the radical Islam originates in Somalia and due to the porous border, makes its way into Kenya. The Somali Islamist militant group, al-Shabaab, while seeking some specific goals in Somalia, operates to some extent in Kenya.

Lax law enforcement has made Kenya easily accessible by terrorist networks. The weak terrorism laws in Kenya and their lax enforcement, have made Kenya easily accessible by terrorist networks. The Kenyan definition of terrorism as anti-state violent activities undertaken by non-state entities which are motivated by religious goals neglects terrorism based on political, ideological, and criminal rationales is vague and places an unfair target on the minority religion in Kenya.⁸⁹ Al-Shabab is having a field day in Kenya because of serious failures in the country's security apparatus and governance.⁹⁰

⁸⁵ Paul Pillar, *Terrorism and U.S. Foreign Policy* (Washington, DC: Brookings Institution Press, 2001)

⁸⁶ Adam Taylor, "What's behind the return of al-Shabab, the terror group that killed at least 147 people in Kenya?," *The Washington Post*, April 3, 2015, accessed April 27, 2015, url: <http://www.washingtonpost.com/blogs/worldviews/wp/2015/04/03/whats-behind-the-return-of-al-shabab-the-terror-group-that-killed-at-least-147-people-in-kenya/>

⁸⁷ Ibid, Taylor, "What's behind the return of al-Shabab"

⁸⁸ Ibid, Aronson, "Kenya and the Global War on Terror", 29

⁸⁹ Ibid, Mogire and Agade, "Counter-terrorism in Kenya," (2011).

⁹⁰ Harry Misiko, "How Kenya made itself vulnerable to terror," *The Washington Post*, June 17, 2014, accessed April 27, 2015, url: <http://www.washingtonpost.com/blogs/worldviews/wp/2014/06/17/how-kenya-made-itself-vulnerable-to-terror/>

2.2 The role of the intelligence agencies in preventive counter terrorism

Ronald Crelinsten (2014) sees proactive counter terrorism as focusing on terrorism prevention through integration of internal and external security, the mandates of domestic police, security intelligence agencies, and border and customs officials.⁹¹ They all coalesce around the problem of tracking the movement of people, goods and money through intrusive techniques. Bekir Cinar (2010) acknowledges that there have been problems in researching for literature about the role of intelligence in preventing terrorism because of the difficulties in reaching the primary sources.⁹² Because of the practical difficulties of obtaining enough information on the secretive subject of intelligence and terrorism, and the legal difficulties associated with researching and publishing on the subject, the author notes that only a few researchers, such as Paul Wilkinson, have tried to clarify the link between the terrorism and intelligence.

The increased focus on proactive counter terrorism has implications on some institutions. This includes the intelligence agency, which deals with proactive and intelligence-led policing, increasing use of agents and informers, more reliance on preventive detention, and early arrests to disrupt plots.⁹³ Intelligence focuses on surveillance, identification and profiling of suspects, focus on radicalization to violence, counter radicalization, and terrorist financing and fund-raising. Criminal law concentrates on criminalizing membership to terrorist organizations, and offences aimed at terrorism fundraising, recruitment and training. In the military realm, it means intervention in failed and failing states, such as the 2011 Kenya intervention in Somalia, and even pre-emptive war, such as the 2003 US invasion of Iraq.

⁹¹ Ibid, Crelinsten, "Perspectives on Counterterrorism," (2014)

⁹² Bekir Cinar, *Can Terrorism be Prevented?: Combating Terrorism in a Liberal Democracy* (Tirana, Albania: EuroWorld Pub, 2010), 39.

⁹³ Ibid, Cinar, "Can Terrorism be Prevented?" (2010), 40.

2.2.1 Intelligence as counter terrorist measure

According to the Office for Democratic Institutions and Human Rights (ODIHR), any piece of information that is evaluated, collated with other information about the same subject and analysed, becomes intelligence that may be sufficiently concrete and important to justify an operation, either against known individuals or focussing on a specific location or event.⁹⁴ Since intelligence is usually incomplete, an operation aims at either confirming or denying the arising assumptions and suspicions. It often entails physical and technical surveillance of suspects, communication monitoring, and personal information about them and the people with whom they associate and come into contact. Therefore, intelligence plays an indispensable role in identifying, understanding and analyzing terrorist threats, in providing important hints and leads for criminal investigations and in developing effective strategies to counter terrorism.⁹⁵

The ODIHR notes that the receipt, processing, storage and use of intelligence, which is usually a specialist task, is related to some important human rights concerns, largely surrounding respect for privacy, and covering the use of information obtained by torture and ill-treatment.⁹⁶ The sophisticated natures of terrorism triggers more sophisticated intelligence counter terrorism measures.⁹⁷ Thus, there is a need to find the balance between the protection of human rights and efficient functioning of state institutions responsible for security and intelligence. This is because many states have, as a consequence of the 9/11 attack, provided their national intelligence

⁹⁴ ODIHR, *Human Rights In Counter-Terrorism Investigations*, (2013), 18

⁹⁵ ICJ, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (Geneva, Switzerland: International Commission of Jurists, 2009), 67

⁹⁶ Ibid, ODIHR, "Human Rights In Counter-Terrorism Investigations," (2013), 18.

⁹⁷ The European Union, *The Role of National Human Rights Structures as regards anti-terrorists measures* (Padua, Italy: Council of Europe, 2009), 25

services with extended powers, including sophisticated surveillance techniques, which may pose a serious threat to the individual's right to privacy.⁹⁸

2.2.2 The implications of radicalization and extremism in counter terrorism strategies

Radicalization and violent extremism are terms that are sometimes used interchangeably but do not mean the same thing. Some scholars use the term to link extremist beliefs to violent action by defining radicalization as the process of adopting an extremist belief system, including the willingness to use, support, or facilitate violence, as a method to effect societal change. Jerome Bjelopera (2013) defines radicalization as the exposure of individuals to ideological messages and the movement of those individuals from mainstream beliefs to extremist viewpoints.⁹⁹ Thus, the important distinction between the "radicalization" and "violent extremism" is that the former describes the process of acquiring and holding radical, extremist, or jihadist beliefs, while the latter describes violent action taken on the basis of radical or extremist beliefs.¹⁰⁰ For many, this term is synonymous with "violent jihadist".

For Margarita Bizina and David Gray (2014), counter radicalization refers to a package of policies and measures designed and implemented by a country to prevent youth or most vulnerable groups and communities from becoming radicalized in their home country.¹⁰¹ Instead of targeting terrorists, which is the focus of the counter terrorism policy, counter radicalization targets communities that are themselves targeted by violent extremists for recruitment, sympathy

⁹⁸ Ida Søholm and Peter Vedel Kessing, *Practical Guidance Paper on Counter-terrorism and Human Rights*, (Copenhagen: Danish Institute for Human Rights, 2012), 18

⁹⁹ Jerome P. Bjelopera, "American Jihadist Terrorism: Combating a Complex Threat," *Congressional Research Service Report*, January 23, 2013 (2013), 11

¹⁰⁰ Ibid, Bjelopera, "American Jihadist Terrorism", (2013), 12.

¹⁰¹ Margarita Bizina and David H. Gray, "Radicalization of Youth as a Growing Concern for Counter-Terrorism Policy," *Global Security Studies*, Volume 5, Issue 1 (Winter 2014), 73.

or any form of support. De-radicalization, on the other hand, refers to a package of policies and measures designed and implemented by authorities to normalize and convince groups and individuals who are already radicalized or violent extremists, to repent and disengage from violence. Measures that could counter these vices include religious reforms, rehabilitation, education and political reforms, vocational training, social training, family programs, and post-care or release programs to facilitate the reintegration of released detainees.

According to Lauren Ploch (2010), US counter terrorism programs in East Africa are influenced by a range of studies on radicalization and methodologies for countering the phenomenon.¹⁰² Its development assistance to East Africa has a counter extremism component that seeks to address what the Obama Administration refers to as the “upstream” factors of radicalization, aiming to foster conditions that counter ideological support for terrorism.¹⁰³

Many states have taken steps in rehabilitating former radicals and averting radicalization through a combination of outreach, engagement, and aftercare by increasing social and political confidence and knowledge, and focusing on the role of religion.¹⁰⁴ Certain anti-radicalization measures may potentially conflict with human rights, for instance, the case of a government focusing its measures solely on certain groups (e.g. according to their religious or political beliefs), thus acting contrary to the principle of non-discrimination. However, proactive intelligence and counter violent extremism are critical to preventing such events from ever occurring.¹⁰⁵

¹⁰² Lauren Ploch, “Countering Terrorism in East Africa: The U.S. Response,” *Congressional Research Service Report*, (November 3, 2010), 15&16

¹⁰³ Ibid, Ploch, “Countering Terrorism in East Africa”, (2010), 17

¹⁰⁴ Ibid, Søholm and Kessing, “Practical Guidance Paper on Counter-terrorism and Human Rights,” (2012), 12.

¹⁰⁵ David Inserra, Steven Bucci, James Jay Carafano, and Peter Brookes, “Kenya Attack Reminds the U.S. of the Need to Maintain Effective Domestic Counterterrorism Programs,” *Issue Brief*, No. 4058 (September 30, 2013), 1-3,

Radicalization not only happens within an alienated community, as Peter Neumann (2010) points out, prisons have become new a breeding ground for radicalization.¹⁰⁶ This should not be surprising since they are ‘places of vulnerability’, which produce ‘identity seekers’, ‘protection seekers’ and ‘rebels’ in greater numbers than other environments. Prisons provide near-perfect conditions in which radical, religiously framed ideologies can flourish. In the Kenyan context, over-crowding and under-staffing of these corrective facilities amplify the conditions that lend themselves to radicalization.

Given the preeminent role of schools and other educational establishments in development of a resilient community that upholds values of nonviolence and peaceful coexistence, education features strongly in the counter radicalization programmes developed by some states, according to the Counter terrorism Implementation Task Force (CTITF).¹⁰⁷ In the United Kingdom, authorities work closely with education providers at all levels to make schools and universities, better equipped to resist the influence and ideology of violent extremism. This has resulted in the teaching in schools of subjects that promote intercultural understanding and citizenship.

What drives radicalization and creation of terrorists remains open to debate; poverty, alienation, brainwashing, or personal humiliation, usually seen as the driving factors of radicalization and terrorism, may not play significant roles.¹⁰⁸ Others critical factors are family ties and socialization, and the moral outrage or perceptions that the West is harming the global

accessed May 10, 2015, url: <http://www.heritage.org/research/reports/2013/09/lessons-from-kenya-attack-and-us-counterterrorism-programs>

¹⁰⁶ Peter R. Neumann, *Prisons and Terrorism: Radicalisation and De-radicalisation in 15 Countries* (London, UK: ICSR, 2010), 7

¹⁰⁷ CTITF, *First Report of the Working Group on Radicalisation and Extremism that Lead to Terrorism: Inventory of State Programmes* (September, 2006), 6, accessed on May 10, 2015, url:

<http://www.un.org/en/terrorism/pdfs/radicalization.pdf>

¹⁰⁸ Ibid, Bjelopera, “American Jihadist Terrorism,” (2013), 13.

community of Muslims (the *Ummah*), or fighting it. Traveling to regions featuring terrorist activity and religious conversion play a key role in the radicalization of some individuals.

Kenya is home to approximately 4.3 million Muslims, i.e. about 9-10% of the population, who predominately live in (former) North Eastern (NEP) and Coast provinces.¹⁰⁹ As a product of these repeated conflicts, NEP as well as parts of the former Coast Province, lack basic services such roads, schools and hospitals. These regions suffer from poverty, high youth unemployment, rapid population growth and general insecurity. Resentment toward the government is high, and extremists are able to exploit these factors. High youth unemployment, for example, makes al-Shabab's promise of limited income attractive. The emergence of the Islamic Courts Union (ICU) and then al-Shabab in 2006 contributed to radicalization in Kenya.

By engaging in dialogue with radicals or organisations and addressing their grievances, the government can achieve long-term resolution of a conflict and diminish the appeal to resort to terrorism (known as counter or de-radicalization).¹¹⁰ From this perspective, preventive counter terrorism measures have an impressive potential.

2.2.3 The influence of persuasive counter terrorism

Persuasive counter terrorism, in the words of Crelinsten, is also known as 'propaganda' and 'hearts and minds' aspects of counter terrorism.¹¹¹ It discusses psychological operations, classified according to whether they promote or prevent certain opinions and attitudes, or they are directed against the terrorists and their constituencies. The use of deliberate communication

¹⁰⁹ Fredrick Nzes, "Terrorist Attacks In Kenya Reveal Domestic Radicalization," *Combating Terrorism Centre*, (October 2012), accessed April 27, 2015, url: <https://www.ctc.usma.edu/posts/terrorist-attacks-in-kenya-reveal-domestic-radicalization>

¹¹⁰ Ibid, Eijkman and Schuurman, *Preventive Counter-terrorism and Non-discrimination*, (2011), 2.

¹¹¹ Ibid, Crelinsten, "Counterterrorism," (2009).

efforts (also known as public diplomacy) target a variety of audiences, including “key influencers” such as community and religious leaders, and vulnerable populations.¹¹² They are implemented discretely or indirectly, aiming to counter victimization narratives and communicate respect and indigenous customs. The Internet, particularly, play an increasingly important role in establishing a sense of community among a widely dispersed alienated youth.¹¹³ Terrorist communiqués, ideological writings, hate speech and internet propaganda should not go unanswered, but be responded to by well-reasoned counter-argumentation.

Much of the root causes of terrorism, such as social deprivation and alienation, pertain to human psychology.¹¹⁴ This is relayed through storytelling, which is fundamental in structuring human thought. It provides a basis for developing an emotionally compelling ideology that manipulates and influences the vulnerability of a population. One of al Qaeda’s early myths involves the antagonistic narrative that “The West” is its first and greatest enemy. Disrupting such a myth involves development of a counter-narrative that both undermines the original story and offers an alternative “better story” than that presented by the terrorist organization. A vital instrument for such an initiative is the use of mass media as it shapes public opinion.

2.2.4 Terrorist Financing

All terrorist groups (or cells) require some degree of funding, though this is relatively a low-cost form of warfare. Thus, the cost of maintaining a terrorist network and, in particular, the

¹¹² Ibid, Ploch, “Countering Terrorism in East Africa”, (2010), 17.

¹¹³ Jerrold M. Post, “Psychology,” in *Addressing the Causes of Terrorism*, ed. Peter R. Neumann (Madrid, Spain: Club de Madrid, 2005), 10

¹¹⁴ Walter Casebeer and James Russell, “Storytelling and Terrorism: Towards a Comprehensive ‘Counter-Narrative Strategy’,” *Strategic Insights*, Vol. 4, No. 3 (2005) 1-16

cost of carrying out a terrorist attack, is relatively small.¹¹⁵ The amount needed by each group depends on the scale and length of the campaign, size of the group, types of weapons used, intensity of its activity, need for travel, accommodation, documents and bribes, and the degree of support provided to families of the group members. Terrorists funding may be provided by its sympathizers, local fundraising, external supporters such as foreign governments, by a range of criminal activities (e.g. piracy, robbery, extortion, kidnapping for ransom, narcotics trafficking), and even by investment in legitimate businesses. With the exception of local fundraising and criminal activities, the use of banks to launder and transfer funds is not unusual.

A 2013 report by the US Department of State Publication on Terrorism, Kenya is a member of the Eastern and Southern Africa Anti-Money Laundering Group, which is a Financial Action Task Force (FATF) regional body.¹¹⁶ In October 2013, FATF recognized Kenya for its progress in improving its Anti-Money Laundering/Countering the Financing of Terrorism (AML/CFT) regime. At that time, Kenyan Parliament had passed the 2013 Finance Act containing amendments to the 2012 Prevention of Terrorism Act (POTA). Kenya's Financial Reporting Center (FRC) reported no significant prosecutions or seizures and remained hampered by lack of essential resources including electronic reporting system for suspicious transactions.¹¹⁷ It addressed the formal financial system and expanded the number of reporting entities that it would serve, those efforts did not include informal money/value transfer services (e.g. hawalas) and exchange houses. It monitored mobile money transactions to a degree, especially the popular Safaricom M-Pesa service, but did not engage with NGOs to file suspicious transaction reports.

¹¹⁵ Richard H. Ward, "The Economics of Terrorism," in *Forum on Crime and Society*, ed. Alex P. Schmid (New York: United Nations Office On Drugs And Crime, 2005), 24

¹¹⁶ United States Department of State Publication, *Country Reports on Terrorism 2013* (Washington DC: Bureau of Counterterrorism, 2014), 12

¹¹⁷ *Ibid*, United States Department of State Publication, *Country Reports*, (2014), 21

2.3 The NCTC as a convergence of security agencies focusing on counter terrorism

Responding to the growing terror threat in Kenya, the government established the National Counter Terrorism Centre (NCTC) in 2004 under the then National Security Intelligence Service (NSIS). It was responsible for developing and coordinating counter terrorism strategies in the Horn of Africa and the eastern African regions.¹¹⁸ In the 2014 Security Laws Amendment Act (SLAA), the NCTC was created through amendment to the POTA by inserting Section 40A.¹¹⁹ The Centre became the top organ in direct charge of wide ranging preventive counter terrorism efforts, as specified in Section 40B of POTA. In addition to developing a sustainable counter terrorism strategy, the center is also to investigate money laundering, narcotics trafficking and proliferation of illicit arms.

The mandate of the NCTC includes the co-ordination of national counter terrorism efforts in order to detect, deter and disrupt terrorism acts.¹²⁰ According to the Ministry of Interior and Coordination of National Government, the NCTC also has the mandate to collate, analyze and disseminate counter terrorism information and intelligence for the purpose of detecting, disrupting, destroying and prosecuting those behind acts of terror. This is to be realized through: establishing databases to assist law enforcement agencies, conducting awareness on prevention of terrorism and developing strategies such as counter and de-radicalization. In Section 40C, the centre is expected to liaise, rely on and to co-opt private citizens as well as all government bodies in its counter terrorism efforts.¹²¹ This is mainly concerned with preventive counter terrorism.

¹¹⁸ Stephen Mbogo, Counter-Terrorism Center Established in Kenya, *Crosswalk.com*, 29 January 2004, accessed April 27, 2015, url: <http://www.crosswalk.com/1243518/>

¹¹⁹ The Security Laws (Amendment) Act 2014, Section 40A

¹²⁰ Ibid, SLAA (2014), Section 40B

¹²¹ Ibid, SLAA (2014), Section 40C

2.3.1 The importance of information sharing

The US National Prevention Framework stresses that intelligence and information sharing capability involves the effective implementation of the intelligence cycle and information integration process at all levels of the state (from local to central government), intelligence entities, the private sector, the public, and international partners, as appropriate. This is meant to develop situational awareness on the actor(s), method(s), means, weapon(s), or target(s) related to an imminent terrorist threat within the country.¹²² This is informed by the notion that no single agency, department, or level of government can independently complete a threat picture of all terrorism and national security threats. According to a 2006 CTITF report, generating and sharing information among all officials involved in counter terrorism and counter radicalization and between them and the public is probably the most effective yet difficult aspect of counter terrorism.¹²³ Information sharing and dissemination is state specific, thus, some have established specialized units purely for this purpose, such as NCTC in the Kenyan context.

The transnational nature of the contemporary terrorist threats mean that intelligence agencies increasingly liaise with their foreign counterparts.¹²⁴ At times, national security agencies often depend on information from other foreign intelligence services, since many targeted terrorist networks are based in other countries. The fact is that the information shared might be of a personal and very sensitive nature and, once shared, might then be used for different purposes than those for which they have been gathered, shared with third parties, or

¹²² Department of Homeland Security, *National Prevention Framework* (Washington DC: Homeland Security, 2013), 11

¹²³ *Ibid*, CTITF, "First Report of the Working Group on Radicalisation and Extremism," (2006), 19.

¹²⁴ *Ibid*, ICJ, "Assessing Damage, Urging Action," (2009), 79

otherwise misused.¹²⁵ In some cases, information sharing pose very serious consequences on individuals and their families, hence infringing on the human rights of the individuals. Therefore, there is need to ensure that, while it is useful to share information where there are genuine reasons of national security, the need should be documented and safeguards have to be in place.

2.4 The evolving strategies in counter terrorism

Terrorism is a very dynamic phenomena which evolves all the time. New tactics are adopted not after a long time, therefore, counter terrorism agencies should be dynamic enough to stay “two steps ahead”. Among the strategies discussed here are the involvement of non-security actors in the community, such as the community opinion leaders and private investors.

2.4.1 Community involvement in countering terrorism

As stated earlier, the state alone does not have all the resources necessary to counter terrorism, therefore, it needs partners to carry out this task and can involve civil society and local communities to bring to a range of tools and resources not available to governments.¹²⁶ Working with communities and civil societies enhance trust and transparency, and strengthens social cohesion since they can reach segments of society that governments may have difficulties to engage. They can help counter extremist ideologies and promote peaceful dialogue.

Preventive counter terrorism strategies targeting communities can be divided in to two forms, namely, ‘hard’ and ‘soft’ approaches.¹²⁷ A ‘hard’ approach implies the use of the full coercive powers of the state in obtaining information and monitoring community through all

¹²⁵ Ibid, ICJ, “Assessing Damage, Urging Action,” (2009), 71

¹²⁶ Ibid, CTITF, “First Report of the Working Group on Radicalisation and Extremism,” (2006), 6.

¹²⁷ Ibid, “Ragazzi, Policed Multiculturalism?” (2015), 158.

necessary means, while a 'soft' approach envisages a consensual collaboration between security forces and communities as equal partners. In this case, trust and mutual respect ensures a permanent 'flow of information' that eventually allows for the prevention of terrorism. This generates the idea of community policing, which can be understood as a soft approach to policing and has a much broader scope than counter terrorism.¹²⁸

Researches on the link between community policing and counter terrorism have noted a real mistrust amongst the young people towards police officers.¹²⁹ Therefore, there is need for security agencies to work and engage people from within communities who can reach out to these young people. Embedding Muslim youth who are at risk of becoming violently extremist within these communities might prevent their drift towards violence as a means of action.

The benefits of community policing is reporting of clues such as suspicious behaviour, arrival of unknown persons and the activities of religious youths in the neighbourhoods, which trickles down from the community to the police.¹³⁰ Another benefit is that the community members are involved in the very tasks of counter terrorism. This gives the minority community a sense of entitlement and partnership in the fight against terrorism rather than being only in the receiving end of repressive measures.

After the Westgate Mall attack, the Interior Ministry assured the country that a major countrywide community policing programme was in the pipeline as part of a series of strategies

¹²⁸ Ibid, "Ragazzi, Policed Multiculturalism?" (2015), 164.

¹²⁹ Basia Spalek, *Terror Crime Prevention with Communities* (London, UK: Bloomsbury Publishing Plc, 2013), 154
Chapter: Governing Terror: "Top-down" and "Bottom-up" approaches to Counter-Terrorism.

¹³⁰ Ibid, Ragazzi, "Policed Multiculturalism?" (2015), 164.

to ensure that a similar attack does not recur.¹³¹ It mentioned that poor working relations between the police and the community is partly to blame for the problem as individuals hold back crucial information from security officers, making intelligence gathering difficult. This is despite Article 244 (e) of the Kenyan Constitution, which directs police officers to foster and promote relationships with the society. The Ministry added that the government and its development partners had recognized that to succeed in fighting terror not only in Kenya but also the East African region, it must involve the community. Therefore, the government is keen to make the concept a key pillar of the policing strategy as directed by President Uhuru Kenyatta.¹³² It can also be noted that human rights is an important component of community policing and the use of tactics that violate the rights of the targeted community only fuel alienation, resentment and recruitment to the extremists' cause.¹³³ Integrating the "Nyumba Kumi" initiative into the community policing concept can ensure that the current system of villages under an elder are restructured into ten (10) household units.

2.4.2 Exploring possibilities for public-private sector counter terrorism partnerships

Private sector entities operate in all sectors of business, commerce, universities, and industry that support the global trade systems. It can assist in terrorism prevention by identifying and reporting potential terrorism related information to law enforcement agents. Given their greater resources, its contributions across the industry sectors provide value-added knowledge to

¹³¹ Jeff Otieno, "After Westgate: Community policing strategy in the works," *the East African*, September 20, 2014. Accessed April 2, 2015, url: <http://www.theeastafrican.co.ke/news/After-Westgate-Community-policing-strategy-in-the-works-/2558/2459950/-/id8mex/-/index.html>

¹³² Joseph Muraya, "Kaguthi to spearhead Nyumba Kumi initiative," *Capital News*, October 25, 2013, accessed May 10, 2015, url: <http://www.capitalfm.co.ke/news/2013/10/kaguthi-to-spearhead-nyumba-kumi-initiative/>

¹³³ Ibid, Muraya, "Kaguthi to spearhead Nyumba Kumi initiative," (2013).

the global counter terrorism efforts.¹³⁴ Unfortunately, systematic and comprehensive ways to integrate the private sector into information sharing efforts do not exist.

The private sector plays a big role in counter terrorism because it outpaces government initiatives in technologically innovative arenas, such as critical infrastructure protection and cyber-security.¹³⁵ For this reason, some level of coordination between government officials and private sector actors has been initiated. Examples include public-private collaboration with financial entities against terror financing, and several communications service providers on technical surveillance and data retention.

In Kenya, systematic and comprehensive ways to integrate the private sector into information-sharing efforts are still non-existent, or are informal. Although private sector officials have an obligation to share terror threat information, concern over the process is widespread. This was recently captured in the Security Laws (Amendment) Bill where a proposed amendment (21A) to Cap. 296 tried to have landlords keep records of their tenants, such as their name, ID number, email address and telephone number, and provide them upon demand from law enforcement officers. This was generally good for target profiling, record keeping and locating criminals, but the amendment was withdrawn when the SLAA was passed.

2.5 Role of Diplomacy in Preventing Terrorism

The roles of diplomacy are to represent, negotiate for, protect interests, and inform its country. Along with traditional political relations, diplomatic activities also include economic, cultural, scientific, military, and other relations. Modern diplomacy, in addition to these

¹³⁴ Amy Bakke and Margo Schneider, "Implementation of the UN Global Counterterrorism Strategy", during *42nd Conference on the United Nations of the Next Decade, June 8-13, 2007* (Iowa, US: Stanley Foundation, 2007), 5.

¹³⁵ Ibid, Bakke and Schneider, "Implementation of the UN Global Counterterrorism Strategy", (2007), 28.

traditional tasks, also deals with; human rights, illegal migration, environmental protection, organized crime, and the fight against terrorism. Therefore, this section opens up diplomacy's role in the fight against terrorism, which is significant and irreplaceable in contemporary counter terrorism.¹³⁶ In this case, diplomacy does not relate only to professional diplomats working with their counterparts in governments abroad, but also to all officials performing other tasks specialized for and related to the fight against terrorism.

Political and diplomatic anti-terrorist measures are capable of resolving intractable conflicts through public dialogue and secret diplomacy. Engaging in dialogue with radical individuals and groups before they turn to violence and using negotiations or concessions to remove the sources of contention could be seen as the political strand of prevention.¹³⁷ Partial or conditional amnesty, safe surrender, or reduction of sentences for previous offence, can be granted to the members of some terrorist groups that are seen to be in need of leaving the group and reforming to productive life. The purpose of these settlements is to reduce the number of terrorists and weaken their network

Counter terrorism promotes cooperation with friendly nations with mutual interests, hence building capacity that bolsters the capabilities of the allies.¹³⁸ Therefore, diplomacy takes the war to the terrorists, cutting off the resources they need and depend upon to survive. Regional organizations, such as the North Atlantic Treaty Organization (NATO), the European Union

¹³⁶ Haris Pesto, "The Role of Diplomacy in the Fight Against Terrorism," *Partnership for Peace Consortium Quarterly Journal* (Garmisch-Partenkirchen, Germany: PfPC, Winter 2000)

¹³⁷ Ibid, Eijkman and Schuurman, "Preventive Counter terrorism and Non discrimination," (2011), 2.

¹³⁸ J. Cofer Black, "Diplomacy and the War Against Terrorism," during *Testimony Before the Senate Foreign Relations Committee, March 18, 2003* (Washington, DC: US Department of State, 2003), accessed on May 4, 2015, url: <http://2001-2009.state.gov/s/ct/rls/rm/2003/18795.htm>

(EU), and the African Union (AU), play an important role in counter terrorism as they use the influence and soft power, which has more leverages in counter terrorism than pressure.¹³⁹

2.6 Conclusion

This chapter discusses counter terrorism's strategies and their impacts on human rights. It concludes that preventive counter terrorism, which is mainly intelligence-led, is a viable deterrence option compared to coercive counter terrorism. Intelligence plays a very crucial part in the war against terror since the war cannot entirely be won militarily. Still, the key question is what safeguards are necessary to ensure that the human rights violations mentioned above are avoided. Since intelligence agencies rely on the culture of secrecy, and most of their intelligence gathering techniques are classified as secret, there may be some of the difficulties in ensuring human rights are observed. It should then be encouraged that genuinely accountable intelligence agencies are essential if UN Member states are to comply with their duties under international law (and relevant Security Council Resolutions) to fight terrorism and uphold human rights.

The chapter also concludes that there exist a clear distinction between the roles of intelligence and law enforcement in the Kenyan context; thus, the intelligence service does not perform the function of the law enforcement agency and, in particular, does not have the powers to arrest and detain suspects, i.e. the Kenyan intelligence agents do not have coercive powers. The tasks of arresting, detaining, prosecuting, and interrogating terrorism suspects for evidentiary purposes are the mandate of the Anti-Terrorism Police Unit (ATPU) under the National Police Service's (NPS) Criminal Investigations Department (CID). The role of the

¹³⁹ Raphael F. Perl, "Enhancing Diplomatic Effectiveness in Combating Terrorism: an Alliance of Regional Organizations?" Remarks before *The Center on Global Counterterrorism Cooperation's conference on "Building Stronger Partnerships to Prevent Terrorism"* Washington, 8 October 2009 (Washington DC: OSCE, 2009), 2

intelligence agents in relation to an arrested and detained terrorism suspect is to interview the suspect with the intention of gathering information that can be used for deterrent, disruption and preventing future planned terror attacks.

Another observation in this chapter is that the convergence of security agencies at the NCTC level and several interagency relationships amongst the security agencies at both the domestic and international levels tend to moderate Kenya's counter terrorism strategies into a more long-term approach of attempting to fix the core problems that cause people to resort to violent extremism in the first place, and to terrorism. It is the work of the NCTC, with the support of the intelligence agencies, to make terrorism less appealing by countering violent extremism through counter and de-radicalization, disruption of terrorist financing, countering terrorism propaganda, exploring the levels of security and private sector relationships, and advice the policy makers on the possibility of diplomatic intervention in the anti-terrorism war. With the establishment of the NCTC via the amendments to the POTA, the practice of finger pointing and blame game between the NIS, the Police, and other agencies whenever a terrorist attack happens was addressed because these agencies now have the platform to share information.

Finally, from the analysis in this chapter, preventive counter terrorism strategies have been proved to be more useful than reactive counter terrorism in dealing with terrorism related crimes since it results in less casualties. Its violation of human rights is "lesser" compared to reactive counter terrorism.

CHAPTER 3: COUNTER TERRORISM LEGISLATIONS IN KENYA: TRENDS, OPPORTUNITIES AND CHALLENGES

3.1 Introduction

Safeguarding human rights in the fight against terrorism, according to the United Nations Office of Drug and Crime (UNODC), is not only a strategic and policy imperative, but also a legal requirement binding all UN member states.¹⁴⁰ Ben Golder and George Williams (2006) note that, for many western nations, a first-order response to the “Global War on Terror” (GWOT) has been to make new laws or expand the laws which were existing prior to the September 11, 2001 (9/11) attacks.¹⁴¹ These new laws provided wide-ranging regulatory systems dealing with the problem of terrorism, such as its definition, criminalizing its acts and expanding the powers of intelligence and law enforcements agents in dealing with terrorism. In some countries, this new body of law has often qualified, and even departed from, accepted understandings of basic legal principles such as the rule of law, as well as the human rights that underlie liberal democracies.

This chapter addresses the conceptual dilemma of how the new counter terrorism legislations in Kenya are being implemented, especially in regard to human rights and public law values. It will focus on: the enactment of counter terrorism laws in Kenya; the role that the courts play in the fight against terrorism; and how the regional legal frameworks have contributed in countering terrorism and the protection of human rights. All these are aimed at bringing local and transnational terrorism suspects to justice.

¹⁴⁰ UNODC, *Human Rights and Criminal Justice Responses to Terrorism* (New York,: United Nations, 2014), 7

¹⁴¹ Ben Golder and George Williams, “Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism,” *Journal of Comparative Policy Analysis*, Vol. 8, No. 1, March 2006 (Routledge, 2006), 44

3.2 The role of the judiciary in counter terrorism

Courts of law play a pivotal role in promoting the rule of law, thus the necessity to protect the independence of the judiciary. The right to be tried before a competent, independent and impartial tribunal is articulated in Article 10 of the Universal Declaration on Human Rights (UDHR) and Article 14 of the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) as well as in regional treaties and conventions, are central to the international human rights framework.¹⁴² Fair trial guarantees, which are a fundamental principle of all human rights instruments, recognize the right of any human being to a fair trial in public by independent and impartial court, previously established by the law, within a reasonable timeframe.¹⁴³ However, in many countries, alleged acts of terrorism still fall under the jurisdiction of special or military tribunals. Such proceedings stand in complete contradiction with the principle of independence and impartiality of the judiciary, as the UN Committee on Human Rights points out.

3.2.1 The weaknesses of the Kenyan anti-terrorism legislations

There are several legislation gaps, which are exploited by terror suspects during their trials to defeat justice. The Kenyan constitution (2010) lacks a direct provision for terrorism, but it embodies the principles that are contained in the various international human rights conventions. This is contained in Articles 5 and 6, which provides for ratifications of treaties that provide provisions for terrorism, which form part of the Kenyan law. Thus, the Constitution ensures all legislative and administrative measures taken must not be contrary or ultra vires to its provisions, like the Bill of Rights which protects fundamental rights and freedom of each individual.

¹⁴² Ibid, UNODC, "Human Rights and Criminal Justice Responses to Terrorism," (2014), 8

¹⁴³ Ibid, FIDH, "Human rights Violations in Sub-Saharan African Countries," (2007), 15

One of the main legislations often cited by arrested terror suspects to get reprieve from the judicial process is the Constitution. Despite the constitutional guarantees, there are many problems, both in the law and in practice, regarding arrest and detention, especially for terrorism and capital offenders. Section 123 (1) and (4) of the CPC prohibits granting bail to suspects charged with the offences of murder, treason, or robbery with violence, but this is currently inconsistent with the Constitution on the rights of an arrested person.

Article 49(1) of the Constitution provides for the rights of arrested persons. Relevant to this paper, these rights include, but not limited to: the right to communicate with an advocate; the right not to be compelled to make any admission or confession; the right to be brought before a court as soon as reasonably possible but not later than 24 hours; and the right to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released. Bail jurisprudence, particularly in terrorism cases, more often than not conjure up emotions of security concerns about keeping criminals away from the society, though there is the cardinal principle of the presumption of innocence in criminal justice.¹⁴⁴

Article 49(1) (h) has been abused most of the time, as indicated earlier, by terrorism suspects who upon being granted bonds or cash bails, abscond them, fail to avail themselves for the trial, then flee the country and continue with their terror related activities.¹⁴⁵ With the foregoing wide latitude of discretion left in its hands, the judiciary has lamented the lack of detailed legislative guidelines on the question of granting bail, particularly at the pre-trial stage where, in principle, the accused person is presumed innocent. As was observed by Justice Fred

¹⁴⁴ Elisha Zebedee Ongoya, "Legal and Policy Dilemma in the Fight Against Terrorism: The Bail Question in Terrorism Cases in Kenya," *Kenya Law*, August, 25, 2014, accessed May 3, URL:

<http://kenyalaw.org/kenyalawblog/legal-and-policy-dilemma-bail-question-in-terrorism-cases-in-kenya/>

¹⁴⁵ Article 49 (1) An arrested person has the right- (h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

Ochieng during the trial of Aboud Rogo Mohammed & Another Vs Republic, Nairobi High Court Criminal Case Number 793 of 2010; “unfortunately, in Kenya, there are no legislative guidelines on bail. The court is left with an unfettered discretion to determine the issue.” What amounts to compelling reasons as envisaged in Article 49(1) (h) of the Constitution is a matter of judicial discretion. Kenya does not have statutory guidelines to govern the granting of bail.

3.2.2 Implications of granting *Habeas Corpus* for terrorism suspects

Personal freedom is the cornerstone of any society based on the rule of law, requiring that no person shall be arrested or detained by the state without legitimate reason, i.e., arbitrarily. In case that a person has been detained, the person shall have the right to challenge the lawfulness of his/her detention according to the principle known as *Habeas Corpus*.¹⁴⁶ Article 9(3) of the ICCPR requires detainees to be brought before a judge promptly. In any case, Article 51(2) of the Kenyan Constitution provides that “a person who is detained or held in custody is entitled to petition for an order of *habeas corpus*.” The obligation is particularly strict because of the potential for abuse of state power and the overriding importance of the right to liberty and security of person and the presumption of innocence.¹⁴⁷

An order of *habeas corpus* is granted to any person deprived of his/her liberty by arrest or detention, and is granted the right to take proceedings before a court, in order that that court may decide on the lawfulness of his detention and order his release if it is not lawful. Several countries have extended the detention period of a terrorism suspect by the police prior to being brought before a judge or charged with a crime. The laws also differ on when and whether a

¹⁴⁶ Ibid, “FIDH, Human rights Violations in Sub-Saharan African Countries,” (2007), 13

¹⁴⁷ Reprieve and Redress, *Kenya and Counter Terrorism: A Time for Change*, February 2009, accessed May 31, 2015, url: www.redress.org/.../Kenya%20and%20Counter-Terrorism%205%20Feb%2009.pdf

judicial authority must give prior approval for the detention.¹⁴⁸ Prolonged pre-charge detention, when not authorized by a judge, may also violate the right to liberty under international law.

A few counter terrorism laws permit or encourage incommunicado detention during pre-charge custody, restricting detainees' right to receive visits by legal counsel, family members, and other interested third parties.¹⁴⁹ These restrictions are usually for a specified period of time, but in some cases, it also limits the kinds of communication detainees may have with their counsel, family members, or other third parties. However, where incommunicado detention does not involve the complete isolation of a detainee, regardless of the legal safeguards for its application, it facilitates the commission of acts of torture and ill-treatment.

3.2.3 Using Special and Specialized Courts to try terrorism suspects

It is important to distinguish between "specialized courts" and "special courts". The UNODC notes that there is no definition of what constitutes a "special court", but the term often refers to courts constituted ad hoc, or with a different composition of regular courts with lesser procedural safeguards.¹⁵⁰ In some countries, terrorism prosecutions and trials are centralized in one or a few courts, which may be staffed with particularly experienced prosecutors and judges specializing in terrorism cases. Typically, a court of higher instance (based in the capital city) is given exclusive jurisdiction over terrorist offences committed anywhere in the country.¹⁵¹ Such specialized courts, or specialized sections of ordinary courts, do not generally raise the same concerns as do special courts as long as there is no limitation of fair trial guarantees. At times,

¹⁴⁸ HRW, *In the Name of Security: Counterterrorism Laws Worldwide since September 11* (Washington DC: Human Rights Watch, 2012), 62

¹⁴⁹ Ibid, HRW, *In the Name of Security*, (2012), 72

¹⁵⁰ UNODC, "Human Rights and Criminal Justice Responses to Terrorism," (2014), 147

¹⁵¹ ICJ, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (Geneva: International Commission of Jurists, 2009), 141

there are provisions to establish courts with special jurisdictions on terrorist cases.¹⁵² Where national criminal procedures allows for some adaptations without establishing special courts, then regular courts have sometimes been given a special jurisdiction or mandate greatly shaped by the nature of the crimes to be prosecuted. But such courts tend to see their role as enforcing “state security” rather than adjudicating impartially between state and citizens.¹⁵³

As suggested by the Human Rights Watch (HRW), these special counter terrorism courts should meet international standards for independence and impartiality.¹⁵⁴ But HRW opposes setting up special courts for national security crimes because they can easily be used to try peaceful dissidents on politically motivated charges. They also fall far short of international human rights standards in terms of due process in protections of suspects and evidentiary standards. The trial of civilians, including those accused of terrorism or national security offences, by special or military courts is generally impermissible under international human rights law and can only be used in special situations as a last resort.¹⁵⁵

An example of a country trying terrorism suspect by specialized courts is Saudi Arabia. In Saudi Arabia, terrorism suspects are tried by a Specialized Criminal Court that has been in existence without any authorizing law.¹⁵⁶ The court is allowed to hear witnesses and experts without the presence of the accused or their lawyer, who only receive a notice of the contents of what was said without revealing the identity of the witnesses, making it difficult to challenge the veracity or validity of the testimony.

¹⁵² Ibid, UNODC, “Human Rights and Criminal Justice Responses to Terrorism,” (2014), 92

¹⁵³ Ibid, ICJ, “Assessing Damage, Urging Action,” (2009), 34

¹⁵⁴ Ibid, HRW, “In the Name of Security,” (2012), 83

¹⁵⁵ Ibid, UNODC, *Human Rights and Criminal Justice Responses to Terrorism*, (2014), 147

¹⁵⁶ Ibid, HRW, “In the Name of Security,” (2012), 62

In the Kenyan context, the presiding judge of the High Court ruling on the SLAA argued that Clause 16 on disclosure of evidence was against the rights of an accused person.¹⁵⁷ The disclosure of evidence enables the accused person to prepare his/her defence, and failure to disclose evidence would lead to trial by ambush. The same applies to cross-examining witnesses by the defence, which is not granted by the Saudi Arabian specialized court.

3.2.4 Secret evidence and its admissibility in terrorism related trials

The clandestine nature of terrorist plots, their activities, and modes of operation require specialized investigation methods often referred to as “Special Investigation Techniques” (SITs). Law enforcement agencies have a wide array of investigative techniques at their disposal when combating terrorism due to the developments in modern technology.¹⁵⁸ These may include technologically enabled covert surveillance and/or human intelligence, whether informants or undercover agents, planted by law enforcement agencies to infiltrate terrorist groups.¹⁵⁹ This is a common method used by intelligence agencies to collect information that can be used in preventing, detecting and prosecuting acts of terrorism. UN Convention against Transnational Organized Crime (UNTOC) encourages state parties to make use of undercover agents and participating informants in the investigation of organized crime organizations.¹⁶⁰

There has been confusion on the use of intelligence information in criminal court cases, especially intelligence collected on terrorism suspects. In exceptional circumstances, gathered intelligence can be forwarded to and acted upon by law enforcement agencies; it may trigger a

¹⁵⁷ Peter Kagwanja, “Ruling on anti-terrorism law a triumph for Kenya’s Judiciary,” *Sunday Nation*, March 1, 215, accessed March 4, 2015, url: <http://www.nation.co.ke/oped/Opinion/Security-Laws-High-Court-Ruling-Terrorism/-/440808/2638706/-/105k8hf/-/index.html>

¹⁵⁸ Ibid, UNODC, “Human Rights and Criminal Justice Responses to Terrorism,” (2014), 88 & 89

¹⁵⁹ Ibid, UNODC, “Human Rights and Criminal Justice Responses to Terrorism,” (2014), 90

¹⁶⁰ Ibid, UNODC, “Human Rights and Criminal Justice Responses to Terrorism,” (2014), 90

criminal investigation e.g. in a foiled terrorist plot or, be used as 'secret' evidence in court.¹⁶¹ When national security requires it, court proceedings to determine whether assertedly secret evidence is privileged should be closed to the public and open only to the government or persons with appropriate security clearance.¹⁶² Making the evidence public or inadvertently releasing state secrets would harm national security. In cases where the secret evidence cannot be used, an injustice may go unpunished. The use of intelligence as 'secret' evidence for prosecution of terrorism suspects implies that sources and their modus operandi are kept secret for state security purposes. Thus, witnesses may be granted anonymity in order to prevent their identification.¹⁶³ The Eminent Jurists Panel report on terrorism, counter terrorism and human rights, notes that the use of intelligence by its very nature, poses particular problems for the principle of fair trial.¹⁶⁴

In terrorism cases in the US, neither the prosecution nor the defense have used classified information directly as evidence at trial.¹⁶⁵ Classified information are declassified prior to trial and then used as evidence, and they have also been replaced with unclassified substitutions. However, it is probable that in future, it may be imperative to maintain the confidentiality of sensitive information, such as the identity of a witness. Restricting the public's access to such information is one way to address these concerns.

¹⁶¹ Quirine Eijkman & Bibi van Ginkel, "Compatible or Incompatible? Intelligence And Human Rights in Terrorist Trials," *Amsterdam Law Forum* Vol. 3:4 (2011), 5

¹⁶² Justin Florence and Mathew Gerke, "National Security Issues in Civil Litigation: A Blueprint for Reform," in *Legislating the War on Terror: An Agenda for Reform*, ed. Benjamin Witte (Washington DC: The Brookings Institution Press, 2009), 268

¹⁶³ Ibid, UNODC, "Human Rights and Criminal Justice Responses to Terrorism," (2014), 45

¹⁶⁴ Ibid, UNODC, "Human Rights and Criminal Justice Responses to Terrorism," (2014), 91

¹⁶⁵ Stephen J. Schulhofer, "Prosecuting Suspected Terrorists: The Role of the Civilian Courts," *The Journal of the ACS Issue Groups* (2005), 67

3.3 The Importance of regional legal frameworks in combating terrorism

The UNODC notes that effective international cooperation constitutes the cornerstone of criminal justice response to international terrorism.¹⁶⁶ The international community recognizes the challenges domestic authorities are facing when confronted with criminals and terrorists conducting their illegal activities in locations in which national borders serve as insulation from investigation and prosecution.¹⁶⁷ The duty to bring international terrorists to justice rests solely with domestic courts, as there are no international tribunals to try them. Because counter terrorism operations, are often transnational in character and scope, they require investigators and prosecutors to liaise with their counterparts in other countries to collect evidence.

The universal instruments against terrorism provide essential tools for extradition and Mutual Legal Assistance (MLA) that enable national authorities to cooperate with each other to ensure that there are no safe havens for terrorist suspects protecting them from prosecution and extradition.¹⁶⁸ The UN Global Counter Terrorism Strategy expresses the international community's resolution to unite fully in the fight against terrorism, in accordance with its obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle of extradite or prosecute, any supporter, facilitator in the financing, planning, preparation or perpetration of terrorist acts. UNODC's office in Nairobi provides technical support for counter terrorism activities within 13 states in the sub-region.¹⁶⁹ The program is mainly concerned with law enforcement and legal capacity building in accordance with international instruments and conventions. It has developed model statutes, disseminated a

¹⁶⁶ Ibid, UNODC, "Human Rights and Criminal Justice Responses to Terrorism," (2014), 15

¹⁶⁷ Ibid, UNODC, "Human Rights and Criminal Justice Responses to Terrorism," (2014), 15

¹⁶⁸ Ibid, UNODC, "Human Rights and Criminal Justice Responses to Terrorism," (2014), 15

¹⁶⁹ Center on Global Counterterrorism Cooperation and IGAD Security Sector Program, *Fighting Terror Through Justice: Implementing the IGAD Framework for Legal Cooperation Against Terrorism*. (Addis Ababa, Center on Global Counterterrorism Cooperation, 2012), 15

compendium of international instruments against terrorism, and promoted joint training of prosecutors, judicial officers, and investigators, all as part of its efforts to promote legal cooperation.

The main regional legal framework in counter terrorism, applying to sub-Saharan Africa, was developed by the African Union (AU), formerly the Organization of African Unity (OAU).¹⁷⁰ Its two main instruments are the *OAU Convention on the Prevention and Combating of Terrorism* (the Algiers Convention) and its *Additional Protocol*. The Convention establishes specific links between the fight against terrorism and human rights. A safeguard clause, Article 22, is fundamental given that some of the Convention's provisions might be invoked by states to justify human rights violations.¹⁷¹ The Convention is based on the principle of *aut dedere aut judicare* and contains several extradition causes. The underlying idea is to implement the principle of systematic extradition to the state where the terrorist act was committed and to ensure that political crimes are not invoked to justify a refusal of extradition.

No single member state of the Inter-Governmental Authority on Development (IGAD) can single-handedly be able to deal effectively with terrorism threats.¹⁷² The IGAD Security Strategy adopted in December 2010 stresses that effective cooperation is crucial to winning the fight against terrorism. IGAD member states currently share a perception that al-Shabaab represents a common threat to all their interests, meriting the establishment of strategies for a closer legal cooperation against terrorism and related transnational crime.¹⁷³ Yet, the challenge

¹⁷⁰ Ibid, FIDH, "Human rights Violations in Sub-Saharan African Countries," (2007), 6

¹⁷¹ Article 22 of the Algiers Convention states that: "*Nothing in this Convention shall be interpreted as derogating from the general principles of international law, in particular the principles of international humanitarian law, as well as the African Charter on Human and Peoples' Rights*".

¹⁷² Ibid, Center on Global Counterterrorism Cooperation and IGAD Security Sector, "Fighting Terror," (2012), 1

¹⁷³ Ibid, Center on Global Counterterrorism Cooperation and IGAD Security Sector, "Fighting Terror," (2012), 1

facing IGAD is ensuring that this cooperation against terrorism strengthens the rule of law. This has resulted in informal cooperation based on personal initiatives between political authorities and operational agencies, which is seen increasingly as counter-productive as it is unreliable and unpredictable, eroding support for state action against terrorism by failing adequately to protect human rights. Acting on a need to implement the UN Global Counter Terrorism Strategy in this region, IGAD adopted conventions in 2009, one on extradition, and the other on MLA and extradition.¹⁷⁴ The conventions provide a reinforced legal collaboration against terrorism in the sub-region, which has a record of limited interstate trust and weak legal and judicial systems.

Kenya has relied notably on informal forms of cooperation such as police-to-police cooperation, especially under the auspices of East African Police Chiefs Cooperation Organization (EAPCCO) and Interpol.¹⁷⁵ It is also an active member of the East African Community (EAC), which is currently improving its cooperation arrangements in the security sector. The Peace and Security Protocol currently addresses issues on capacity building, counter terrorism, information sharing, and border management between the member states. The EAC is also establishing a Regional Defence Counter Terrorism Centre in Nairobi to provide a common platform for sharing military intelligence related to terrorism. Kenya has entered into a number of bilateral, regional, and multilateral agreements as platforms for sharing information and evidence related to criminal investigations and prosecutions. It has ratified 14 universal instruments against terrorism (the UN conventions) and the OAU convention on terrorism (Table 1 in the Appendix). Within IGAD, Kenya is yet to ratify the IGAD mutual legal assistance and Extradition Conventions, pending passage of the ratification bill by the assembly.

¹⁷⁴ Ibid, Center on Global Counterterrorism Cooperation and IGAD Security Sector, "Fighting Terror," (2012), 2

¹⁷⁵ Ibid, Center on Global Counterterrorism Cooperation and IGAD Security Sector, "Fighting Terror," (2012), 8

3.4 Kenyan counter terrorism legislations' trends, opportunities and challenges

The UNODC stresses on the fundamental principle of criminal justice of “no punishment without law”, which is an essential safeguard against arbitrary trial, conviction and punishment.¹⁷⁶ This is because it is only the law that can define a crime and prescribe a penalty. The other importance of this aspect is the prohibition of retroactive criminal laws. In light of this, new laws had been enacted by the Kenyan Parliament to deal with various aspects of terrorism, among them: Proceeds of Crime and Anti-Money Laundering Act, 2009; the Prevention of Organized Crime Act, 2011; and the Prevention of Terrorism Act (POTA), 2012. The latest legislation is the controversial Security Laws Amendments Act (SLAA), 2014, which amended several Acts dealing with security. Some of the clauses amended by the SLAA were suspended by the High Court in January 2015 as they were against the Constitution and/or the international laws. In addition to these legislations, the Constitution, promulgated in 2010, establishes that all treaties ratified (before 2010) by Kenya form part of the laws of Kenya (Article 2(6)¹⁷⁷), and also requires the implementation of rights and fundamental freedoms (Article 21(4)¹⁷⁸). With these, Kenya is a signatory of several UN human rights treaties, among them, and relevant to this article, are the ICCPR and ICESCR as shown in tables Appendix 1 and Appendix 2.

3.4.1 Counter terrorism law enforcement approach

According to Richard Erickson (1989), international law offers two approaches to international terrorism, namely; law enforcement or armed conflict approaches.¹⁷⁹ The aim is to deter terrorists, but failing that, to manage them effectively through arrest, prosecution, and

¹⁷⁶ Ibid, UNODC, “Human Rights and Criminal Justice Responses to Terrorism,” (2014), 33

¹⁷⁷ Art. 2(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

¹⁷⁸ Art. 21(4) The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.

¹⁷⁹ Richard J. Erickson, *Legitimate use of Military Force Against State-Sponsored International Terrorism* (Alabama: Air University Press, 1989), 46

imprisonment. Consequently, this approach seeks to improve law enforcement by enacting national laws, promoting international treaties and cooperation among nations. Therefore, terrorists are viewed as ordinary criminals and not as engaging in combats. In special circumstances when the use of military force is necessary, it occurs in the context of a response to a peacetime crisis. On the other hand, the law of armed conflict approach considers terrorism as primarily a military concern, and they are viewed as combatants engaging in warlike activity.¹⁸⁰ As such, terrorists are criminals whose arrest, prosecution, and imprisonment are universal obligations of all states in accordance with the 1949 Geneva conventions.

International Humanitarian Law outlaws armed conflicts, but does not provide clear guidance on how states can deal with terror attacks. Thus, individual states are expected to apply own anti-terror strategies and laws. Maud Kadye (2013) observes that Kenya has an anti-terror acts, among them, the POTA, which has been in force since 2012.¹⁸¹ At the same time, not only is terrorism and its related activities criminalized, but the law gives the government the power to ban membership of designated terrorist groups.¹⁸² The counter terrorism laws seek to isolate and freeze the assets of terrorist groups and also give the police and other security agencies expanded investigative, surveillance and enforcement powers with respect to terrorism. Terrorism related crimes are prosecuted in the domestic courts in accordance with domestic laws.¹⁸³

3.4.2 Kenya's counter terrorism legislations and their human rights implications

Prior to the enactment of the Prevention of Organized Crimes Act, 2011 and the Prevention of Terrorism Act, 2012, all counter terrorism measures and strategies were done

¹⁸⁰ Ibid, Erickson, "Legitimate use of Military Force," (1989), 47

¹⁸¹ Maud Kadye, "Nairobi Attacks: Kenya's Anti-Terrorism Laws," *The Student Lawyer*, October 7, 2013, accessed on May 13, 2015, url: <http://thestudentlawyer.com/2013/10/07/fifth-in-the-humanitarian-series-nairobi-attacks/>

¹⁸² Ibid, Golder and Williams, "Balancing National Security and Human Rights," (2006), 47

¹⁸³ Ibid, Erickson, "Legitimate use of Military Force," (1989), 53 – 57

outside any legislative framework, hence making them extra-legal. According to the International Federation for Human Rights (FIDH) 2007 report, the government of Kenya published the *Suppression of Terrorism Bill*, in 2003, which, would have allowed the police to arrest terrorism suspects and carry out searches without authorization from the courts.¹⁸⁴ The Bill provided for several actions that could have had serious violations of human rights, including lengthy detention of presumed suspects, and exemption of security agents from prosecution if they were considered to have used “reasonable” force in their fight against terrorism. After widespread criticism by civil societies and a section of parliamentarians, the government withdrew the Bill in February 2004. Thereafter, the government, through the security agencies, embarked on robust counter terrorism measures including the establishment of the National Counter Terrorism Centre (NCTC) and the Anti-Terrorism Police Unit (ATPU).

In May 2006, a new Bill, the *Anti-Terrorism Bill (2006)*, was presented to the Parliament by the government.¹⁸⁵ The new legislation permitted the use of indefinite detention and automatic disbanding of political groups on request by the Internal Security Cabinet Secretary. In June 2006, the Parliamentary Committee on administration of justice and legal affairs strongly denounced the Bill’s violation of the rights guaranteed by the Kenyan Constitution. The Bill was also withdrawn by the government.

The POTA, before its enactment in October 2012, had been a subject of heated debate and controversy. *The Standard* newspaper then reported that a section of Muslim community, led by the current Mandera Senator, Billow Kerrow, were opposed to sections of the Bill, which they claimed to be offensive, went against the Bill of Rights and mainly targeted their (Muslim/

¹⁸⁴ FIDH, “Human rights Violations in Sub-Saharan African Countries in the Name of Counter-Terrorism: A High Risks Situation,” *International Federation for Human Rights*, No. 483/2 (November 2007), 13

¹⁸⁵ *Ibid*, FIDH, “Human rights Violations in Sub-Saharan African Countries,” (2007), 13.

Somali) community.¹⁸⁶ The newspaper quotes the director general of the Association of Muslim Organizations in Kenya (Amok), Fazul Mohamed, who was opposed to the Bill's definition of terrorism, terming it too general while the definition should be specific.

3.4.3 Human rights concerns in the administration of Kenya's counter terrorism laws

Human rights activists have registered concerns on the execution of the POTA, and most recently, the enactment of the SLAA. Section 3 of the POTA gives the Inspector-General of Police (IGP) powers to recommend to the Interior Cabinet Secretary to declare an entity a "specified entity". According to the deputy director of the HRW, Leslie Lefkow, "specified entities" are equated with "terrorist groups", and membership to a terrorist group is punishable by up to 30 years' imprisonment.¹⁸⁷ He notes that the POTA does not offer a mechanism for appealing the IGP and the Cabinet Secretary's choice. This may violate Article 47 of the Kenyan constitution, which provides for fair administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. Also, international law prohibits the imposition of government sanctions without adequate due process.

A number of the provisions in the SLAA were found by the High Court to be in conflict with the provisions of the Constitution and/or international law, or the will in implementation of the SLAA resulted in limitation of the rights provided for in the Constitution and/or international law. The legislations were intended to safeguard national security. But Article 238 of the Constitution provides that national security shall be pursued in compliance with the law and utmost respect for the rule of law, democracy, human rights and fundamental freedoms. This is

¹⁸⁶ Standard Reporter, "Kibaki signs historic Anti- terrorism Bill," *Standard on Sunday*, October 14, 2012, accessed on May 27, 2015, url: <http://www.standardmedia.co.ke/article/2000068354/kibaki-signs-historic-anti-terrorism-bill>

¹⁸⁷ Leslie Lefkow, "Kenya: Ensure Due Process on 'Terrorism List': Review Inclusion of Human Rights Organizations," *Human Rights Watch*, April 13, 2015, accessed on May 23, 2015, url: <http://www.hrw.org/news/2015/04/12/kenya-ensure-due-process-terrorism-list>

an absolute requirement and not subject to the exercise of discretion. In this light, eight clauses in the Act that were suspended for inconsistency with superior statutes. The inconsistencies cited by the honourable judge and which are of interest to this paper include:

- Clause 16 of the SLAA, which inserted Section 42A of the Criminal Procedure Code, and Clause 26, which inserted section 20A to the Evidence Act violated the access to justice and rights of arrested persons, in contravention of Article 50(2) of the Constitution.¹⁸⁸
- Clause 48 of the SLAA, which inserted section 16A to The Refugees Act violated the principle of non-refoulment as recognized under the UN Convention of the Status of Refugees (1951), the ICCPR (1966), the UN Universal Declaration of Human Rights (1948), and the African Charter on Human and Peoples Rights.¹⁸⁹
- Clause 56 of the SLAA introduced new Part V to the NIS Act, giving it the authority in dealing with “covert operations”, which are meant to neutralize threats against national security. The presiding judge felt that this Clause is against the spirit of the new Constitution and should be reviewed by a Constitutional Court to determine its susceptibility to abuse.¹⁹⁰

The High Court judgement that set aside 8 clauses of the SLAA was immediately challenged by the government, through the Attorney General in his application dated January 6, 2015. He filed a Memorandum of Appeal and an urgent application to have the order suspended, arguing that under Article 23 of the Constitution, the court could not suspend an enacted law but can only declare it invalid as a final determination in proceedings.¹⁹¹ In their judgement

¹⁸⁸ George Odunga, *Petition 628 and 630 of 2014* (Nairobi: High Court of Kenya, Constitutional and Human Rights Division, 2015), 99

¹⁸⁹ Ibid, Odunga, *Petition 628 and 630 of 2014*, 100

¹⁹⁰ Ibid, Odunga, *Petition 628 and 630 of 2014*, 101

¹⁹¹ Wahome Thuku, “AG Githu Muigai appeals against suspension of security law clauses”, *The Standard*, Wednesday, January 7, 2015, url: <http://www.standardmedia.co.ke/article/2000146918/ag-githu-muigai-appeals-against-suspension-of-security-law-clauses>

delivered on January 23, 2015, the Court of Appeal judges, justices Daniel Musinga, Patrick Kiage and Agnes Murgor declined to reinstate the eight clauses in the new security laws that had been suspended by the High Court.¹⁹² The judges ruled that Attorney General had not proved that the suspension of the clauses had created a vacuum in fighting terrorism. They argued that apart from the eight clauses whose operationalization had been temporary suspended, other counter terrorism laws were still in full operation. Therefore, security agents and law enforcement organs could still make full use of the existing laws to counter terrorism.¹⁹³

3.4.4 Analyzing the opportunities created by the Kenyan anti-terrorism laws

Kenya operated without a substantive anti-terrorism law for nearly a decade after the withdrawals of the 2003 and later, 2006 Bills. In 2012, the POTA was passed by Parliament and enacted into law. As a result, the new Act includes ample protections for the rights of persons and entities affected in the process of combating terrorism, and also maintaining security. The POTA, unlike the Suppression of Terrorism Bill (2003) defined “acts of terrorism” as opposed to defining “terrorism,” which is subject to many definitions. Besides, the Act leaves out religious, ideological, and ethnic motives that are usually linked to terrorism.¹⁹⁴ It simply means that regardless of the motive (religious, ethnic, ideological or political) as long as the perpetrators intend to cause harm, the act will still be regarded as terrorism. Unlike in other countries where anti-terrorism laws are used to suppress opposition, the POTA qualifies what should and should

¹⁹² The Nation Reporter, “Court of Appeal declines to reinstate contentious clauses in security laws,” *The Daily Nation*, Friday, January 23, 2015, accessed July 30, 2015, url: <http://mobile.nation.co.ke/news/Appeal-court-declines-to-reinstate-security-clauses/-/1950946/2599576/-/format/xhtml/-/pic5i2/-/index.html>

¹⁹³ Daniel Musinga, Patrick Kiage and Agnes Murgor, Civil Application No. NAI 2 OF 2015, UR 2/2015, (Nairobi: The Court of Appeal, 2015), 34

¹⁹⁴ Charles Lenjo Mwazighe, “Legal Responses to Terrorism: Case Study of The Republic of Kenya” (Master of Arts Thesis, Naval Postgraduate School, California, US, 2012), 74

not be classified as a terror act and expressly excludes acts of protest, demonstration, or industrial action from being regarded as terrorist acts.

The Kenyan courts, while observing Article 49(1&2) of the Constitution, have released terror suspects who later engage in terror attacks. Section 33 and Clause 15, which inserted Section 36A into the Criminal Procedure Code (CPC) extended the time police can hold terror suspects up to 90 days.¹⁹⁵ The new security and anti-terrorism laws allow these suspects to be detained as more investigations are conducted. This gives the investigators time to build a concrete case against the suspects. Through the SLAA, the government of Kenya is aiming at curbing terrorism and radicalization, two threats on the country's national security.¹⁹⁶ Clause 62 amended the POTA by inserting Section 12D, which outlaws radicalization and extremism. These threats had not been addressed and a penalty set by earlier laws. The security and anti-terrorism laws have recommended stiff penalties in the offences, thus reflecting the gravity of the terror related offences. The penalties include punishment of public officials involved in corruption and persons found promoting ideology based on violence to advance political, religious or social change.¹⁹⁷ These stiff penalties serve as deterrence to would be culprits and those convicted would be out for a long time.

Interception is a law enforcement tool acceptable in most jurisdictions and countries. Clause 36 of the SLAA allows security agencies to intercept communications, subject to approval of the regulations on the same that would be presented to the National Assembly by the

¹⁹⁵ Aljazeera, "Kenya president signs tough 'anti-terror' law," *Aljazeera*, December 19, 2014, accessed on May 28, 2015, url: <http://www.aljazeera.com/news/africa/2014/12/kenya-passes-divisive-anti-terror-law-2014121974313523159.html>

¹⁹⁶ Intelligence Briefs, "Kenya New Laws to Curb Terror & Radicalization," *Intelligence Briefs*, December 16, 2014, accessed May 28, 2015, url: <http://www.intelligencebriefs.com/kenya-new-laws-to-curb-terror-radicalization/>

¹⁹⁷ British Broadcasting Corporation, "Kenya anti-terror law challenged in Nairobi court," *BBC Africa News*, December 23, 2014, accessed May 28, 2015, url: <http://www.bbc.com/news/world-africa-30592083>

Internal Cabinet Secretary. Clause 56 of the SLAA, which repealed Part V of the NIS Act (2012), also gives powers to the Director General, National Intelligence Service (NIS) to conduct covert operations, such as monitoring communication and electronic information collection among others. These provisions are necessary because terrorism is a complex phenomenon often involving a chain of events and players at different stages. The provision is intended to make law enforcement agencies proactive hence avert terrorists' plans. However, the power to intercept is subject to administrative and judicial oversight in the Act, which is intended to prevent the abuse of the intercepts. Thus, the covert action shall be specific and accompanied by a High Court warrant for a specific period. The resultant information collected from these provisions should now be used in a court of law to form part of evidence to sustain conviction of a terror suspect.

3.5 Conclusion

This chapter has addressed the conceptual question of how, as a matter of first principles legal analysis, the counter terrorism legislations should be assessed, especially in regard to human rights and public law values. The key legislations related to this chapter, which were analyzed, include the SLAA (2014), the POTA (2012), the Constitution (2010) and several international and regional laws. The counter terrorism laws may not be perfect in the fight against terrorism and safeguarding human rights, but can also provide opportunities which can be exploited to combat terrorism. In the Kenyan context, there have been much opposition to the SLAA and POTA legislation, especially in addressing human rights, but it should be noted that terrorism will never be curtailed if a state entirely relies on the methods recommended by human rights activists. As observed by Yvonne Owino-Wamari, an effective counter terrorism strategy can only succeed if both civil society and the government work closely together, by supporting

state and non-state actors' programs to counter violent extremism.¹⁹⁸ The criticism is despite the fact that it took Kenya almost a decade from the first attempt to legislate an anti-terror law, until finally, the POTA was enacted in 2012.

Due to the current situation in the country, where al-Shabab have been carrying out frequent, uncoordinated attacks, it was prudent for the government to repeal several laws, through the SLAA, to safeguard national security. Some of the amendments might have been draconian, and they were suspended by the High Court. But Kenyans have to accept that for the country to fight terrorism effectively, it must not rely on lax laws, and still, it does not need to curtail the rights of its citizens. Therefore, Kenyans have to cede some of their rights to realize effective security and address the insecurity brought about by terrorists. It is also better for the Kenyan security agencies to operate within a legal framework instead of operating on assumed, extralegal powers, which might lead to more human rights abuses.

The international and regional legal frameworks also help in shaping the Kenyan anti-terrorism laws. Compared to its neighbours, Kenya has more liberal anti-terrorism laws. The contributing factors to this may include Kenya's ratifications of the various international and regional human rights laws, protocols, and conventions. The regional co-operations, both formal and informal, has also helped Kenya in their fight against terrorism, especially extradition of suspects to the countries where the crimes were committed.

For democracies, terrorism is fought within the legal and judicial frameworks, hence the need for legislating statutes dealing with counter terrorism as well as judicial structures to try

¹⁹⁸ Yvonne Owino-Wamari, "Freezing of Human Rights Groups' Accounts in Kenya," *The National Coalition for Human Rights Defenders-Kenya (NCHRD-K)*, April 9, 2015, accessed on May 27, 2015, url: <http://nchrk.org/freezing-of-human-rights-groups-accounts-in-kenya/>

terrorism suspects, and at times, act as the oversight authority. The judiciary can only grant what has been legislated and are within their powers, otherwise, it would be deemed not to be fair and independent. But due to some legal loopholes, especially within the Constitution, terrorism suspects had been exploiting the same to gain freedom through bail system (Article 49(1) (h)) and abscond. The SLAA and the POTA both provided a solution to Article 51(2) of the Constitution on granting *Habeas Corpus* for pre-trial detention by granting the security agencies 90 days detention period to finalize their investigations. A way should be found on how to deal with Article 49 of the Constitution to reconsider granting bail to capital offenders, such as terrorism suspects.

Some terrorism suspects have been released by the courts due to lack of sufficient evidence. This might not be the right position since the state's intelligence agency may be having information to indict the suspects, but the same may not be used before a court of law due to the clandestine nature of their collection. These information may be presented before a presiding judge, but only as secret evidence. This may greatly help in conviction, but only if it is a special or specialized counter terrorism court. In this case, the court, with controlled procedures, classified information can be used as evidence. It can also call classified persons, such as intelligence agents, experts, and undercover agents and informants, to give evidence before it. This cannot and should not be allowed to happen before an open court.

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CHAPTER 4: THE COUNTER TERRORISM – HUMAN RIGHTS NEXUS: ENSURING HUMAN RIGHTS PROTECTION IN THE AGE OF COUNTER TERRORISM

4.1 Introduction

This chapter mainly focuses on balancing of Kenya's counter terrorism strategies against protection of the fundamental rights of every citizen. This is a balancing act that has been a challenge to most democratic states, especially after the US declared Global War on Terror (GWOT). Since states, according to the realist school of thought, tend to believe that they possess the monopoly of violence (war), it is a challenge when mostly non-state actors (in this case, terrorist) wage war against a state. Since the state has the duty to protect its territorial integrity and its citizens, it uses any means possible to fight terrorism. But according to international agreements and protocols, the fight against terrorism should, at the same time, respect the fundamental rights of both the innocent citizens and the suspected terrorists.

4.2 Terrorism as a threat to State Sovereignty, Security and Responsibility

Since the 1648 Peace of Westphalia, according to Amichai Magen (2011), state sovereignty has been the organizing principle of the international system.¹⁹⁹ He adds that the fundamental rule of state sovereignty is that each state has the right to determine its own domestic authority structure; that outsiders must not interfere in their domestic affairs (the principle of non-intervention); and that in the international system, states are like individuals in society, i.e. they are equal and have rights and responsibilities including being accountable for threats emanating from their territory. But currently, this may be a challenge since there are

¹⁹⁹ Amichai Magen, "Towards Responsible Sovereignty," *BESA Center Perspectives*, Paper No. 142, May 29, 2011 (Greg Rosshandler, 2011), accessed February 28, 2015, url: <http://www.biu.ac.il/SOC/besa/docs/perspectives142.pdf>

several failed and weak states. An example is Kenya's neighbouring country, Somalia, which has for a long time ceased to internally function, thus becoming a breeding ground for international threats. The Somalia government is not wholly responsible and legally obliged to ensuring basic standards of security, freedom and welfare for her citizens as well as actively preventing the export of security threats from within her territory. This is what Amichai Magen calls "responsible sovereignty", which entails security obligations and duties both to a state's own citizens and to other sovereign states.²⁰⁰ It demands basic state effectiveness and legitimacy as conditions for recognizing a state as sovereign and for the state's enjoyment of the privileges of sovereignty and does not condone state failure.

Acts of terror threatens respective state's national security, its responsibility to protect its citizens and territory, and also undermines the state's sovereignty. Therefore, it's the obligation of the state to use any tool within its power to defeat terrorism.

4.2.1 Terrorism as a threat to Kenya's national security

According Marcus King (2011), Barry Buzan's definition of national security as 'the absence of threats or danger to society's survival and acquired values', is the most appealing.²⁰¹ Thus, guarding national security enables its citizens continue their affairs in safety.²⁰² In addition to maintaining the ability to deter or repel external threats, national security can also be taken as the realization of national interests including basic survival, protecting the health and prosperity of the citizens. Article 238 of the Kenyan Constitution defines national security as the protection

²⁰⁰ Ibid, Magen, "Towards Responsible Sovereignty," (2011).

²⁰¹ Marcus Dubois King, "Factoring Environmental Security Issues into National Security Threat Assessments: The Case of Global Warming. Fletcher School of Law and Diplomacy" (PHD Thesis, Fletcher School of Law and Diplomacy, Tufts University, Massachusetts, US, 2011), 5.

²⁰² Craig Forcese, "A Distinction with a Legal Difference: The Consequences of Non-Citizenship in the 'War On Terror'," in *Human Security and Non-Citizens: Law, Policy and International Affairs*, eds. Alice Edwards and Carla Ferstman (Cambridge, UK: Cambridge University Press 2009), 421.

against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability.²⁰³ It is promoted and guaranteed in accordance with the utmost respect for the rule of law, human rights and fundamental freedoms.²⁰⁴

Acts of terror infringe on Kenya's national security, and it has to take the necessary actions, within the law, to preserve her national security. Acts of terrorism is, above all, an attack on the state and its exclusive right to the legitimate use of violence.²⁰⁵ Unlike a murderer, the terrorists do not just kill: they claim legitimacy. With its national security strategy, the government examines threats, how to prevent them, and what to do if a disaster occurs.²⁰⁶ Beth Whitaker observed in 2010 that most Kenyans are more concerned about security threats in their daily lives (e.g. car-jacking, theft) than they were about the threat of another terrorist attack.²⁰⁷ But currently, Kenyans are more concerned about terrorism threats because of the sustained sporadic suicides, gun, Improvised Explosive Devices (IEDs), Vehicle Borne IEDs (VBIED), and grenade attacks. These imminent attacks have greatly changed the daily lives of most Kenyans, and taken a toll on the Kenyan national security, its economy and even the environment.

4.2.2 Kenyan border security and territorial scope

Security issues in Somalia and between Kenya and Somalia pose the most serious threat to Kenya's territorial integrity.²⁰⁸ This, at times, has led to closure of the Kenya-Somalia border,

²⁰³ The Constitution of Kenya, Chapter 14, Article 238 (1).

²⁰⁴ Ibid, The Constitution of Kenya, Chapter 14, Article 238 (2).

²⁰⁵ Desmond Manderson, "Another Modest Proposal: In Defence of the Prohibition against Torture," in *Fresh Perspectives on the 'War on Terror'*, eds. Miriam Gani & Penelope Mathew (Canberra, Australia: ANU E Press), 28

²⁰⁶ "Crisis, national security and terrorism," The Government of Netherlands, url: <http://www.government.nl/issues/crisis-national-security-and-terrorism/national-security>

²⁰⁷ Beth Elise Whitaker, "Compliance among weak states: Africa and the counter-terrorism regime," *British International Studies Association. Review of International Studies*, Vol 36, Issue 03, (July, 2010), 658

²⁰⁸ Think Security Africa, "National Security Profile for the Republic of Kenya," (August, 2014), 7, Accessed on

March 10, 2015, <http://www.thinksecurityafrica.org>

the first which took place in 2007, and in 2009, the Kenya government ordered indefinite closure of the Kenya-Somalia border, including movement of people from Somalia into Kenya.²⁰⁹ This was because of the spillover of the conflict in Somalia, in addition to which Kenya had become a source of al-Shabab recruitment as well as a transit point for fighters from across the world seeking to enter Somalia. On the Kenyan side of the border, there were key lapses that created opportunities for movements of criminals crossing the border. This included issuance of Kenyan identity cards and passports to Somalis.

Prior to the 2011 Kenya Defence Forces (KDF) incursion into Somalia, al-Shabab and other groups within Somalia confined their attacks to the Kenya – Somali border, until a series of kidnappings in Lamu and Manda Island in late 2011 (Appendix 3). The Kenyan military was given mandate to protect the country from al-Shabab attacks in October 2011. Within the KDF was a civilian component to this operation that was working with the local allies to create administrations in the ‘liberated’ territory.²¹⁰ In the region, Kenya is a central partner in the East African Counter Terrorism Initiative (EACTI) announced by the US President, George Bush, in 2003, with a view to strengthening capacity of East African countries to fight terrorism.²¹¹ This included joint military training in maritime and coastal border security.

Another important aspect of border control is the Export Control and Related Border Security Assistance project that had received substantial funding by the US. In this project, the Kenyan government is provided with funds to improve border controls to prevent transfer of weapons of mass destruction through the country’s borders.

²⁰⁹ Ibid, Think Security Africa, “National Security Profile for the Republic of Kenya,” (2014), 15

²¹⁰ Ibid, Think Security Africa, “National Security Profile for the Republic of Kenya,” (2014), 16

²¹¹ Raymond Muhula, “Kenya and the Global War on Terrorism: Searching for a New Role in a New War,” in *Africa and the War on Terrorism*, ed. John Davis (Hampshire, UK: Ashgate Publishing, 2007), 55-56

4.2.3 Human rights implications on rendition, deportation and refolements

In a 2009 report by Redress and Reprieve, it is noted that in 2006 and early 2007, approximately 150 individuals were rounded up and detained in Kenya on suspicion of *involvement in terrorist acts*.²¹² The majority of these individuals were refugees who had crossed the border into Kenya fleeing from the ongoing Ethiopian invasion of Somalia. The Human Rights Watch 2008 report alleges that some of these individuals were from more than eighteen different nations, some as young as seven months.²¹³ What followed was an extraordinary rendition of nearly one hundred of those who fled Somalia, along with others apprehended elsewhere in Kenya. It also revealed the depth of Kenya-US counter terrorism cooperation, where American security agents helped their Kenyan counterparts in interrogating these suspects before rendition. Most of them were transferred to Somalia, en-route to Ethiopia, where they underwent several months of interrogation and confinement without access to any form of communication, nor access to lawyers and family members, thus violating their rights.

A remarkable case of extraordinary rendition was that of Kenyan national, Mohamed Abdulmalik, who is now detained by the US military at Camp Delta, Guantánamo Bay.²¹⁴ He was suspected of playing a role in the 2002 Paradise Hotel attack and was planning another terrorist attack during the 2007 World Cross-Country Championship in Mombasa, both in Kenya. He was never charged with a crime and no evidence was ever recovered after extensive interrogations. More recently, in the wake of the July 2010 bombings in Kampala, Kenyan security services assisted Uganda by extraditing six Kenyan suspects to Uganda, who were held

²¹² Lorna McGregor, *Kenya and Counterterrorism: A Time for Change*, (London: REDRESS and REPRIEVE, 2009), 1, accessed on March 12, 2015, <http://www.redress.org/downloads/publications/Kenya%20and%20Counter-Terrorism%205%20Feb%2009.pdf>

²¹³ Human Rights Watch, *World Report 2008: Events of 2007* (New York, US: Human Rights Watch, 2008), 128

²¹⁴ Ibid, Prestholdt, "Kenya, the United States, and Counterterrorism," (2011), 17

incommunicado. This was despite *habeas Corpus* proceedings at the Kenyan High Court, a situation that sparked outrage in the Kenyan human rights community.²¹⁵

The UNODC describes the principle of non-refoulement as fundamental in international law which has its origin in refugee law.²¹⁶ It obliges states not to extradite, expel or otherwise remove a person to another state where that person faces a real risk of being subjected to arbitrary killing, torture or other serious violations of his or her human rights. The non-refoulement principle is contained in international refugee law (section 7.3.1), in international human rights law (section 7.3.2) and also in the universal counter terrorism legal instruments (section 7.3.3). It was for this reason that the Kenyan High Court, in January 2015, outlawed Clause 48 of the SLAA, which had introduced Section 18A to the Refugee Act, 2006. The clause was unconstitutional for violating principle of *non-refoulement* as recognized under the 1951 United Nations Convention on the Status of the Refugees, which is part of the laws of Kenya in Article 2(5) and (6) of the Constitution.²¹⁷

4.2.4 Kenya's self-defence: Operation Linda Nchi

Article 241 of the Constitution of Kenya establishes the Kenya Defence Forces (KDF) and gives it the responsibility to defend and protect the sovereignty and territorial integrity of the Republic of Kenya.²¹⁸ In the wake of the 9/11 attacks, reinforcing powers of the state sovereignty immediately shot to the top of counter terrorism agendas internationally. This was exemplified

²¹⁵ Muthoni Wanyeki, "World Cup bomb suspects and human rights defenders: Kimathi's arrest renders Kampala trials a farce," *Pan-Africa Postcard* 2010-09-29, Issue 498 (2010), accessed on March 12, 2015, url: <http://www.namhazuka.net/en/category.php/panafrican/67330>

²¹⁶ United Nations Office on Drugs and Crime, *Counter-Terrorism Legal Training Curriculum Module 4: Human Rights and Criminal Justice Responses to Terrorism*, (New York: United Nations, 2014).

²¹⁷ The High Court of Kenya, Constitutional and Human Rights Division. Petition No. 628 of 2014 consolidated with Petition No. 630 of 2015 and Petition No. 12 of 2015 (Nairobi: 2015), 228.

²¹⁸ The Constitution of Kenya, Article 241(1) a

by US President George W. Bush, who declared a 'national emergency' and activated hundreds of legal powers allowing exceptional powers that led to exceptional measures.²¹⁹ In the Kenyan case, a military intervention in Somalia was in the works, but the timeline was accelerated by a string of cross-border kidnapping attacks targeting Western tourists on the Kenyan coast and aid workers in the Dadaab refugee camp.²²⁰ KDF was called upon to defend the country from these foreign attacks in an operation commonly known as *Operation Linda Nchi*. The Kenyan government invoked Kenya's right to self-defence against terrorism under Article 51 of the UN Charter to justify the entry of its forces into Somalia to pursue and fight the Islamist force controlling a substantial part of the country.²²¹ The UN Charter's Article 51 authorizes anticipatory self-defence if a state is faced by 'imminent' armed attacks.²²²

Alex Houen (2014) cites Lindsay Moir's argument that in preventive armed attacks, neither of the security strategies makes an attempt to fit in with the existing 'just war' (*jus ad bellum*) framework for resorting to war.²²³ Since the 1648 Peace of Westphalia treaties, the 'just war' tradition has centred on the mutual recognition of state sovereignty and territorial integrity in order to uphold the principle of non-interference. Consequently, some countries may be seen as having less sovereignty and statehood than others, which raises the corollary that carrying out military operations in such states counts less as an intervention in sovereign territory.²²⁴ This

²¹⁹ Alex Houen, "Introduction: States at War and Modes of War Since 9/11," in *States of War Since 9/11: Terrorism, Sovereignty and the War on Terror*, ed. Alex Houen (New York: Routledge, 2014), 4.

²²⁰ The International Crisis Group, "The Kenyan Military Intervention in Somalia," *Crisis Group Africa Report* No. 184 (15 February 2012), accessed on March 12, 2015, <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/kenya/184%20-%20The%20Kenyan%20Military%20Intervention%20in%20Somalia.pdf>

²²¹ Conor Gearty, *Liberty and Security*, (Cambridge, UK: Polity Press, 2013), 1961

²²² Article 51 of the UN Charter states that: Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

²²³ Ibid, Houen, "Introduction: States at War," (2014), 5

²²⁴ Ibid, Houen, "Introduction: States at War," (2014), 7

notion of 'contingent sovereignty' gained currency in post-9/11 and has roots in the thinking about humanitarian intervention as well as categories of 'weak', 'failed' and 'rogue' states.

There are concern that the KDF's involvement in Somalia is exposing Kenya to an aggressive terrorist campaign. There is definitely a correlation between the onset of more widespread terrorist attacks and Kenya's military involvement in Somalia.²²⁵ However, Kenya's withdrawal from Somalia is unlikely to contain current violence as al-Shabab's influence is now established within Kenyan society.

Operation Linda Nchi resulted in sustained grenade and gun attacks against Kenya by al-Shabab militias in Nairobi, Mombasa and the former North Easter Province (NEP) leading to another operation, *Usalama Watch*. In this operation, security officers were deployed to Nairobi's Eastleigh and South C neighbourhoods and Mombasa to arrest foreign nationals who were in the country unlawfully and anyone suspected of terrorist links. This operation mostly affected Somalis, ethnic Kenyan Somalis, Ethiopians, South Sudanese, Muslim populations.²²⁶ In the Nairobi operation, detainees were held for screening to determine their lawful presence in Kenya and those who lacked the legal documents were either charged with unlawful presence, deported, released, or ordered to relocate to refugee camps.²²⁷ The HRW reports that the United Nations High Commissioner for Refugees (UNHCR) was denied access to the detainees being held by the Kenyan authorities to identify registered refugees and asylum seekers or people who wish to claim asylum because they fear serious harm in Somalia.²²⁸

²²⁵ Ibid, Think Security Africa, "National Security Profile for the Republic of Kenya," (2014).

²²⁶ Human Rights Watch, *Kenya: End Abusive Round-Ups*, (May 13, 2014) Accessed March 12, 2015, url:

<http://www.hrw.org/es/node/125470>

²²⁷ Ibid, HRW, "Kenya: End Abusive Round-Ups," (2014).

²²⁸ Ibid, HRW, "Kenya: End Abusive Round-Ups," (2014).

4.3 Human rights violations in the context of counter terrorism strategies

Striking the right balance between national security and human rights is critical for both the realization of the Kenyan counter terrorism strategies, and the maintenance of tolerance and democratic principles of this multicultural country. But with the passage of the Security Laws Amendment Act, 2014 (SLAA), some disturbing factors try to undermine compatibility between the counter terrorism legislation with the protection of human rights as enshrined in the Kenyan Constitution and the Universal Declaration of Human Rights (UDHR). The UDHR, which was adopted and proclaimed in 1948 in the wake of the genocidal horrors of the Second World War, was as a result of disregard and contempt for human rights.²²⁹ This is the simplest explanation for considering an inter-relationship between human rights and security.

The 1999 preliminary report of the Commission on Human Rights, *Terrorism and Human Rights*, noted that states had to give attention to the link between terrorism and human rights.²³⁰ This is supported by the UN Global Counter Terrorism Strategy (A/RES/60/288) adopted by the General Assembly in 2006 where UN member states unanimously restated that “effective counter terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing”.²³¹ It also explains that safeguarding human rights in counter terrorism is essential to all aspects of counter terrorism, not only in criminal justice. Therefore, Kenya is expected to observe human rights in its counter terrorism strategies as spelt out in the human rights law, which is a subset of international laws that deal with the obligations

²²⁹ International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, (Geneva, Switzerland: ICJ, 2009), 16.

²³⁰ Adam Duchemann, “Defining Terrorism in International Law so as to Foster the Protection of Human Rights,” *Droit International: La Revue Juridique de l’Océan Indien (RJOI)*, No. 16 (2013), 8, accessed February 22, 2015, url: https://www.academia.edu/2912017/Defining_Terrorism_in_International_Law_so_as_to_Foster_the_Protection_of_Human_Rights

²³¹ *Ibid*, United Nations Office on Drugs and Crime, “Counter-Terrorism Legal Training Curriculum,” (2014), 5.

of states with respect to the observance and guarantee of fundamental rights of individuals.²³² In its classical conception, only states are subjects of this law, but individuals are the beneficiaries. Under its terms, individuals should have remedies for violation of these legal obligations.

In the post-9/11, protection of human rights was obliterated by the generalized fear for security. This implied that the main concern of the state was to protect its security at the expense of the protection of human rights, which was then considered a luxury. Kenya has faced similar predicaments when terrorist attacks are executed, targeting government institutions, civilian establishments and businesses, and even places of worship. The aftermath of the attacks resulted in derogation of some fundamental human rights in order for the Kenyan security agents to investigate and apprehend the suspects behind the attacks. This was not unilateral, but is captured in Article 4(1) of the International Covenant on Civil and Political Rights (ICCPR), which imposes limitations on some rights in times of public emergency.²³³

4.3.1 Conceptualizing 'Terrorism' in relation to human rights

When studying terrorism, it may be important to find out how different scholars, states, and international organizations conceptualize the word "terrorism" in their writings or documents. Ben Saul (2006) notes that the many attempts to define terrorism in international law

²³² Dinah Pokempner, "Terrorism and Human Rights: The Legal Framework," in *Proceedings of independent experts on Terrorism and International Law: Challenges and Responses. Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law*, Sanremo, 30 May - 1 June 2002 (Sanremo, Italy: George C. Marshall Center, 2003), 19.

²³³ Article 4 (1) of the International Covenant on Civil and Political Rights: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

for the purposes of prohibition/criminalization since the 1920s have all ended in failure.²³⁴ Thus the international community attaches great importance to definition. Therefore, conceptualizing terrorism and its components makes it easy to come up with counter terrorism strategies that are compliant with human rights. But terrorism is undeservingly notorious for its supposed difficulty to be plainly defined.²³⁵ In practicality, the quest for a satisfactory definition of terrorism is difficult since various institutions compete for the most appropriate definition. Thus, it can be conceptualized from variable viewpoints of law, politics, culture and public opinion, and the sciences. In any one discipline of the sciences, a plurality of definitions is developed from a multitude of theoretical perspectives. Underlying these approaches, however, are certain recurring elements that can be put forward to develop a minimal definition of terrorism.

The modern definition of terrorism is still controversial that even the UN, for example, is yet to accept a universal definition of terrorism.²³⁶ For Omar Lizardo (2008), constructing a definition of terrorism that would be satisfactory for everyone is an impossible undertaking.²³⁷ But it can be easier to point out the flaws in extant conceptions and usages of the term than to come up with a definition that would be free of those same faults, while being comprehensive enough to be both acceptable and useful for the conduct of academic research on the subject.

Adam Duchemann (2013) writes that a study of the theoretical approach to defining terrorism is interesting because not only does it highlight the intertwining of terrorism and

²³⁴ Ben Saul, *Defining Terrorism in International Law* (New York, US: Oxford University Press, 2006), 58.

²³⁵ Mathieu Deflem, "Terrorism," in *21st Century Criminology: A Reference Book*, ed. J. Mitchell Miller (Thousand Oak, California: Sage Publication, 2009): 533.

²³⁶ Imran Awan, "The Problem with Defining Terrorism and the Impact on Civil Liberties – Britain is Beginning to Create a Monster with Large Claws, Sharp Teeth and a Fierce Temper?," *Journal of Politics and Law* Vol. 1, No. 2 June, 2008 (Wolverhampton, UK: University of Wolverhampton School of Legal Studies, 2008), 2.

²³⁷ Omar Lizardo, "Defining and Theorizing Terrorism: A Global Actor-Centered Approach," *Journal of World-Systems Research*, Vol XIV, No. 2. (2008), 91.

human rights, but also because it sets the framework for a study of the shortcomings of legal definitions of terrorism.²³⁸ Duchemann cites Geoffrey Levitt's book, *'Is "Terrorism" Worth Defining?'*, which identified two different ways of conceptualizing terrorism, namely: deductive and inductive methods.²³⁹ Thus, while inductive method aims at defining what a terrorist act is, deductive method tries to answer the broader question of what terrorism is. The substantive element almost always refers to the use of violence and force. The international community has endorsed the inductive method by focusing merely on the substantive and jurisdictional element. This resulted in the adoption of sectoral conventions on terrorism.

Legal definitions of terrorism differ from theoretical conceptualizations in the sense that they are confronted with reality. While theoretical conceptualizations are driven by the scholars' own ideologies, a states' political interests drive national (legal) definitions.²⁴⁰ The different legal definitions adopted by states reflect their conceptualization of terrorism and the political issues at stake. This multiplicity of national interests is even more consequential on the international attempts at defining terrorism. Unlike international law where the lack of a comprehensive and clear definition is not fatal, a domestic anti-terrorism law must provide a precise definition of terrorism.²⁴¹

States all over the world define terrorism to suit their domestic security issues. Even at this point, there is little agreement on what constitutes and who practices terrorism even among academics, the myriad of intelligence agencies, militaries, judicial systems and government

²³⁸ Ibid, Duchemann, "Defining Terrorism in International Law," (2013), 3.

²³⁹ Ibid, Duchemann, "Defining Terrorism in International Law," (2013), 4.

²⁴⁰ Ibid. Duchemann, "Defining Terrorism in International Law," (2013), 16.

²⁴¹ Reuven Young, "Defining Terrorism: The Evolution of Terrorism as a Legal Concept," *Boston College International & Comparative Law Review* Vol 29, Issue 1, Article 3, 12/1/2006 (Boston, US: Boston College Law School, 2006), 68.

decision making bodies that deal with the subject.²⁴² Richard Erickson (1989) quoted Dutch political scientist, Alex Schmid, who noted the frequent terrorism elements, as violence or force, political purpose, terror or fear, threat, and anticipated psychological effects or reactions by third parties.²⁴³ He adds that the five frequently identified purposes or functions of terrorism are to: terrorize or put the public to fear, provoke indiscriminate repression or counter measures by established authorities, mobilize the forces of terrorism or immobilize the forces of the established authorities, affect public opinion in a positive or negative way, and seize the political power or overthrow regimes.²⁴⁴ The review offered by Schmid is very accurate as almost all the contemporary terrorist organizations the world over use violent or forceful strategies in carrying out various attacks including: suicide attacks, open fire confrontations, kidnappings, road side detonations of IEDs, and more recently in Kenya, detonations of VBIEDs within or in close proximity to targeted buildings.

An example of a comprehensive definition of terrorism is the one that was adopted by the European Union's Council Framework Decision on Combating Terrorism (CFDCT).²⁴⁵ It has the farthest-reaching regional effort towards the protection of human rights while combating terrorism. The CFDCT provides a uniform legal context for prosecuting terrorist deeds by instituting a mutual definition of terrorist crimes, as well as rules of competence and of legal collaboration between Member States for the prosecution terrorist suspects.²⁴⁶ For an act to

²⁴² William G. Cunningham, "Terrorism Definitions and Typologies," in *Terrorism: Concepts, Causes, and Conflict Resolution*, ed. Working Group on War, Violence and Terrorism (Fort Belvoir, Virginia: Defense Threat Reduction Agency, 2003), 5.

²⁴³ Richard J. Erickson, *Legitimate Use of Military Force Against State-Sponsored International Terrorism*, (Maxwell Air Force Base, Alabama: Air University Press, 1989), 20.

²⁴⁴ Ibid, Erickson, "Legitimate Use of Military Force," (1989), 20

²⁴⁵ The Council of the European Union, *Council Framework Decision of 13 June 2002 on Combating Terrorism – 2002/475/JHA* (Luxembourg: The European Union, 2002)

²⁴⁶ Ibid, Duchemann, "Defining Terrorism in International Law," (2013), 24

qualify as a terrorist offence under the Framework Decision, three conditions must be met, thus: the act at stake has to be incriminated under national law; the attack has to be directed against a population, a country or an international organization (jurisdictional element); and the offense must have been committed with the intent of violating either the latter, the former or both.

4.3.2 The importance of an accepted definition of terrorism

Ben Saul (2008) observes that a combination of reasonable and ethical arguments supports the case for defining terrorism in international law.²⁴⁷ The practice of states, evidenced through UN organs and other international organizations, provides a number of grounds for defining and criminalizing terrorism.²⁴⁸ While there are conceptual problems with each of these arguments, on the whole they provide rational and principled reasons for defining terrorism, in order to protect vital international community values and interests. Saul adds that there are incidental benefits which flow from criminalizing terrorism, which provide subsidiary justifications for its definition.²⁴⁹ Definition encourages harmonization of national criminal laws, reducing 'differences in legal treatment' between states. Definition assists in filling the double criminality rule in extradition requests, and in establishing and fulfilling a 'prosecute or extradite' regime for terrorist crimes desirable by the international community.

4.3.4 Kenya's counter terrorism strategies and their impacts on human rights

This paper is basically concerned with how states implement international human rights standards within their counter terrorism strategies. Since Kenya is a democratic country, its

²⁴⁷ Ben Saul, "Defining 'Terrorism' to Protect Human Rights," *The University of Sydney Law School. Legal Studies Research Paper*, No. 08/125 (October 2008), 1

²⁴⁸ Ibid, Saul, "Defining 'Terrorism'," (2008), 2.

²⁴⁹ Ibid, Saul, "Defining 'Terrorism'," (2008), 7

counter terrorism strategies have to be fair and just. The establishment of monitoring bodies and mechanisms to oversee government enhances public confidence in the integrity and suitability of government's activities. These include the ombudsman and human rights commissions, which are especially effective when they have a dispute resolution function.

Because of the state's strategies, the war on terrorism might not be won by terrorist groups, but is likely to be lost by the states fighting it.²⁵⁰ The policies, strategies and tactics that these states use to combat terrorism and deal with its consequences are referred to as counter terrorism. These can be carried out by law enforcement, security, and other government departmental agencies. States can respond to terrorism with a range of approaches, and this also depends on the type of the regime. In democracies, the measures would usually be found within the criminal justice system. The most common states' approaches on countering terrorism, include: introduction of counter terrorism laws; creation of specialist counter terrorism units within the security organs; use of repression; military intervention and reprisals; introduction of special incarnation and detention policies; media management; and negotiated settlements.²⁵¹ Kenya, being a democratic country as earlier pointed out, at times faces considerable challenges in determining the best combination of approaches it can use to tackle terrorism.

Kenya's last three respective regimes have handled counter terrorism measures differently, mainly due to their control of the Parliament. Because of its majority in Parliament, President Uhuru Kenyatta' government was able to pass the SLAA, which had implications on Kenya's counter terrorism policies and human rights protection. The President, during the 2013 Westgate terrorist attack, activated military intervention leading to allegations that the success of the militants was a direct result of ineffective law enforcement and counter terrorism strategies,

²⁵⁰ Andrew Silke, "The Psychology of counter-terrorism: Critical Issues and Challenges," in *The Psychology of Counter-Terrorism*, ed. Andrew Silke (New York: Routledge, 2011)

²⁵¹ Ibid, Silke, "The Psychology of counter-terrorism," (2011)

according to Samuel Aronson.²⁵² Consequently, Kenya detained and later released numerous Kenyan Muslims due to lack of evidence. The Daniel arap Moi's administration took exception to the view that Kenya was a "breeding ground" for terrorism.²⁵³ While the Mwai Kibaki's administration took a different tact by pursuing a vigorous counter terrorism agenda, which allegedly focused on coastal Muslim communities.²⁵⁴ This is the duration which the Parliament attempted to pass two counter terrorism Bills without success, mainly due to its lack of control of Parliament and the human rights implications of the Bills. A notable development was the creation of the Anti-Terrorism Police Unit (ATPU), the National Counter Terrorism Centre (NCTC) and the National Security Advisory Committee (NSAC) in 2003.²⁵⁵

It can also be noted that during these regimes, it has been clear to academics and policy experts that Kenya is still heavily reliant on Western countries for its security resources.²⁵⁶ This may not be surprising for a developing democracy still dealing with critical levels of poverty and corruption. Further, counter terrorism operations have often flouted domestic laws.

4.4 Counter terrorism and principles of equality and non-discrimination

Some scholars have identified specific human rights as significant casualties in the war against terrorism. This includes the notion of 'equality of esteem', which goes to the heart of all human rights, which is threatened as a result of judging people not by the fact that they simply

²⁵² Samuel L. Aronson, "Kenya and the Global War on Terror: Neglecting History and Geopolitics in Approaches to Counterterrorism," *African Journal of Criminology and Justice Studies: AJCJS*, Vol.7, #s1 &2 November 2013 (The London School of Economics, 2013), 32.

²⁵³ Jeremy Prestholdt, "Kenya, the United States, and Counterterrorism," *Africa Today*, No.57, 06/27/11. (San Diego: University of California, 2011), 10.

²⁵⁴ Ibid, Prestholdt, "Kenya, the United States, and Counterterrorism," (2011), 10

²⁵⁵ Ibid, Prestholdt, "Kenya, the United States, and Counterterrorism," (2011), 11

²⁵⁶ Ibid, Aronson, "Kenya and the Global War on Terror," (2013), 24 – 34

are, but by where they are from and by which culture or faith they belong to.²⁵⁷ The concept of non-discrimination is imperative in many aspects of counter terrorism operations.²⁵⁸ The powers of criminal justice officials, such as search and seizure, surveillance or arrest, must be exercised in a non-discriminatory manner. Without objective justification, however, the differential treatment of different groups of people in the use of investigative powers is likely to be incompatible with the principle of non-discrimination. Therefore, discriminatory use of law enforcement powers in counter terrorism efforts, particularly where persons are considered “suspect” for the sole reason of belonging to certain ethnic or religious communities, not only violates human rights, but also risks having a severe negative impact on the prevention and investigation of terrorist offences.

In Kenya, the domestic anti-terrorism forces regularly act on minimal evidence and violate domestic and international laws.²⁵⁹ Thus, the government of Kenya’s anti-terrorism initiatives have compounded an already deep sense of alienation among those most severely affected by these measures, namely, the Kenyan Muslims, particularly those of Arab and Somali ancestry. This should not be used to victimize Muslims because not all who profess the Islamic faith are terrorist, but there may be some radicals within them.

4.4.1 Counter terrorism and non-derogable human rights

According to the UNHCR, all rights are universal, indivisible, interdependent and interrelated. While international human rights law allows for non-discriminatory legitimate limitations, derogations and reservations, certain absolute human rights must apply at all

²⁵⁷ Alex P. Schmid, “Terrorism and Human Rights: A Perspective from the United Nations,” in *Terrorism and Human Rights*, eds. Magnus Ranstorp, Paul Wilkinson (New York: Routledge, 2008), 16 – 25

²⁵⁸ Ibid. UNODC, “Counter-Terrorism Legal Training Curriculum,” (2014).

²⁵⁹ Ibid, Prestholdt, “Kenya, the United States, and Counterterrorism,” (2011), 4.

times.²⁶⁰ Also known as *non-derogable* human rights, these rights are considered so important that they cannot be limited or suspended under any circumstances. They are protected under the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR), and enshrined in major international and regional human rights structures.²⁶¹ These include: right to life; prohibition from torture, cruel, inhuman and degrading treatment; recognition everywhere as a person before the law; and freedom of thought, conscience and religion, among others.²⁶²

However, the fact that some provisions of the ICCPR have been listed in Article 4(2) as non-derogable does not mean that other articles in the Covenant may be subjected to derogations at will even when there is no threat to national security. The HRW World Report 2015 notes that Kenya's counter terrorism efforts have been marred by serious violations of these non-derogable human rights, including extrajudicial killings, arbitrary detentions, and torture by the security forces.²⁶³ Leslie Lefkow, the HRW Africa deputy director, adds that Kenyan authorities need to find lawful ways to address the country's growing security problems, but the tactics the security agencies use undermine the rule of law and public confidence.²⁶⁴ Reuters Africa Edition also alleges "strong evidence" of extrajudicial killings, enforced disappearances and ill-treatment of detained suspects by the ATPU, which Kenyan authorities had failed to

²⁶⁰ United Nations Human Rights, Office of the Commissioner, *Core Human Rights in the Two Covenants* (Geneva, Switzerland: OHCHR, Rule of Law and Democracy Section, 2013)

²⁶¹ Ibid. UNODC, "Counter-Terrorism Legal Training Curriculum," (2014), 74

²⁶² Article 4 (1) of the ICCPR: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

²⁶³ HRW, *World Report, 2015: Events of 2014* (New York, US: Seven Stories Press, 2015), 331 - 340

²⁶⁴ Ibid, HRW, "World Report, 2015," 331 - 340

investigate or prosecute the Unit's abuses, even with a civilian oversight, the Independent Policing Oversight Authority (IPOA), in place.²⁶⁵

Though terrorism is a serious threat to human life, it is also the main cause of violation of human rights. Therefore, while governments have to protect their people by protective policies and measures to keep peace and security, they must ensure that their enforcement officers' actions do not undermine human rights law during counter terrorism measures. This may become tricky in times of imminent danger where a balancing act is required. A controversial example is the right to life and freedom from torture, where unless a suspect is tortured, the information necessary to protect another's right to life will not be available. Hence, it can be argued that the law should authorize the torture of terrorist suspects to protect the lives of innocent terrorism victims in an impending attack. This is the notion that the Kenyan ATPU might be using.

4.4.2 The connection between Somali refugees and terrorism in Kenya

The flow of refugees from Somalia into Kenya long predates the contagion of conflict and other forms violence from Somalia into Kenya. According to UNHCR Global Trends 2013, there were about 534,938, mostly Somali people, seeking refuge in Kenya in 2013, mostly based in the NEP region refugee complexes.²⁶⁶ Among the problems being created by this influx of refugees include environmental degradation, and deterioration of local security, especially their alleged involvements in terrorism activities. The insecurity created by these refugees, especially within their camps and those who leave the camps for the city, cannot be underestimated.²⁶⁷ It is very easy for terror suspects and arms to access the country through these camps. Also, a large

²⁶⁵ Katy Migiro, "Divided Kenyans disagree over strategy to end 'terror' attacks," *Reuters Africa Edition*, December 17, 2014, accessed March 12, 2015, url: <http://www.reuters.com/article/2014/12/17/us-peace-kenya-alshabaab-idUSKBN0JV1T620141217>

²⁶⁶ UN High Commissioner for Refugees, *UNHCR Global Trends 2013* (Geneva, Switzerland: UNHCR, 2014)

²⁶⁷ Ibid, Think Security Africa, "National Security Profile for the Republic of Kenya," (2014), 17

number of these refugees have illegally obtained Kenyan papers, making it difficult to distinguish between Kenyan Somalis and other Somalis, but easier for these refugees to move into Nairobi and Mombasa. This is why Kenya wanted its Refugee Act amended in the SLAA.

Clause 48 of the SLAA had proposed to amend the Refugee Act and limit the number of refugees and asylum seekers permitted to stay in Kenya to 150, 000 persons.²⁶⁸ If implemented, this amendment would directly impact on Kenya's commitments at the regional and international level. This is because a key principle of refugee protection is the principle of non-refoulement, which protects asylum seekers and refugees from being returned to places where their lives or freedoms could be threatened. Kenya is a signatory to the UN refugee convention, which bars forced return of refugees. Sending refugees back would be no solution to the difficulties that plague Somalia and created the refugee situation in the first place. Kenya should note that the rules on treatment of non-nationals predate international human rights law.²⁶⁹

4.5 Use of technology and its impact on the right to privacy.

Article 17 of the ICCPR,²⁷⁰ the European Convention on Human Rights, and the American Convention on Human Rights all emphasize the right to privacy. This right consists of prohibition of illegal interferences, house searches, body searches, wire-tapping, telephone recording, surveillance of correspondence, telegraphic and other forms of communication interceptions, and collection and dissemination of individual and private information.²⁷¹ These

²⁶⁸ Acts No. 19, The Security Laws (Amendment) Act, 2014, 11th Kenyan Parliament, 2014 (Assented to on 19th December, 2014), Laws of Kenya, Clause 48, 16A(1)

²⁶⁹ Ibid, Craig, "A Distinction with a Legal Difference," (2009), 426.

²⁷⁰ ICCPR, Article 17 provides that: (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation; and (2) Everyone has the right to the protection of the law against such interference or attacks.

²⁷¹ Jonathan Cooper, *Countering Terrorism, Protecting Human Rights: A Manual*, (Warsaw: OSCE Office for Democratic Institutions and Human Rights, 2007), 204

are methods and procedures that involve serious interference with an individual's privacy rights, normally through covert practices on the part of law-enforcement agencies.²⁷²

Though the right to privacy has been guaranteed in most constitutional laws of states, most states and their enforcement officers violate the same in pretext of fighting terrorism. Security agencies collect vast amounts of personal information in records pertaining to personal data and activities. These are then processed, analyzed and converted into actionable intelligence and disseminated as appropriate and in a timely manner.²⁷³ This poses new challenges for the protection of privacy. Information privacy involves the collection, use, and disclosure of such personal information.²⁷⁴ In this age of globalization, privacy intrusion has become very easy.

4.5.1 Comparing Kenya's SLAA to the USA PATRIOT Act on the right to privacy

Since the US declared the Global War on Terror (GWOT) in 2001, many countries have adopted anti-terrorism laws that limit civil liberties and expand law enforcement powers in the name of national security. Beth Elise Whitaker posits that these anti-terrorism legislations were being promoted through several international channels, most notably the United Nations Counter Terrorism Committee, but the US was clearly seen as the driving force.²⁷⁵

Kenya has on several occasions tried to pass anti-terrorism laws, with the first two instances ending in failure. The 2003 and 2006 Bills faced stiff opposition, both within

²⁷² Ibid, Cooper, "Countering Terrorism, Protecting Human Rights," (2007), 204

²⁷³ Robert L. Pop, David Allen & Claudio Cioffi-Revilla, "Utilizing Information and Social Science Technology to Understand and Counter the Twenty-First Century Strategic Threat," in *Emergent Information Technologies and Enabling Policies for Counter-Terrorism*, eds. Robert L. Popp and John Yen (Hoboken, New Jersey: John Wiley & Sons, 2006), 4

²⁷⁴ Daniel J. Solove, Marc Rotenberg and Paul M. Schwartz. *Privacy, Information, and Technology* (New York: Aspen Publishers Inc, 2006), 1.

²⁷⁵ Beth Elise Whitaker, "Exporting the Patriot Act? Democracy and the 'War on Terror' in the Third World," *Third World Quarterly*, Vol. 28, No. 5, 2007 (London, UK: Routledge, 2007), 1017

Parliament and human rights activists, forcing the government to withdraw them. Their reason was that the Bills were promoted by the US government.²⁷⁶ The US diplomats had indeed pushed Kenyan leaders to adopt domestic laws necessary to investigate and prosecute terrorist groups. But Kenyans widely perceived this as the US way of forcing anti-terrorism legislation on the country with the opponents happily reinforcing this view.

It can be noted that both the USA PATRIOT Act of 2001 and the SLAA were responses to terrorist attacks of major proportions within their respective homelands.²⁷⁷ Both Acts were passed within a month of the trigger attacks, namely; 9/11 attacks for the US, and Mandera attacks for Kenya. Both Acts exploited the resulting public emotion and contained amendments to other public laws, aiming at strengthening measures against terrorism.

The most controversial of these laws included the authorization of wiretapping of private communications, and access to records and databases among other provisions as provided for in Part-V (Special Operations) of the SLAA, Clause 42(3)c.²⁷⁸ All these, however, require a warrant or order from a judicial officer before they can take place, in both cases. Clause 42(2) has serious impacts on the right to privacy as it eliminates the need for the National Intelligence Service (NIS) to seek a warrant from court. This means NIS officers are able to carry out their functions without due regard to the law and respect for human rights, contrary to Article 238 of the Constitution. Like the defunct Special Branch, the Bill seeks to give the NIS powers to arrest suspects, which are powers and functions outside its constitutional mandate.

²⁷⁶ Ibid, Whitaker, "Exporting the Patriot Act?", (2007), 1024

²⁷⁷ Regina Njogu, "Kenya can learn what to do and what not to do from the US statutes on terrorism" *Sunday Nation newspaper*, December 28, 2014, accessed on March 12, 2015, url: <http://www.nation.co.ke/oped/Opinion/Kenya-can-learn-what-to-do-from-US-statutes-on-terrorism/-/440808/2571478/-/oprp74/-/index.html>

²⁷⁸ Ibid, Njogu, "Kenya can learn what to do and what not to do from the US statutes on terrorism," (2014).

4.5.2 Surveillance and the right to privacy

The UN General Assembly, on December 18, 2013, unanimously adopted a resolution titled "*Right to privacy in the digital age*".²⁷⁹ The resolution stresses that unlawful or arbitrary surveillance and/or interception of communications, as well as unlawful or arbitrary gathering of personal data, as highly intrusive acts which violate the rights to privacy and freedom of expression and are against the rules of a democratic society. It notes "that while concerns about public security may justify the gathering and protection of certain sensitive information, states must ensure full compliance with their obligations under international human rights law". The General Assembly directed states to ensure that any measures taken to combat terrorism complies with their obligations under international human rights law.

In terrorism prevention and investigation of suspects, there is little doubt that acquisition, analysis and use of information on terrorist groups by monitoring communications and other means of electronic surveillance are vital tools to pursue a legitimate and essential objective: the protection of lives and national security. Equally well-established are concerns about the impact such measures have on the enjoyment of human rights, i.e. the right to privacy.²⁸⁰

But a system of secret surveillance for the protection of national security may undermine or even destroy democracy under the cover of defending it, hence the need to build the necessary safeguards.²⁸¹ Clause 69 of the SLAA amends the Prevention of Terrorism Act (POTA) by introducing Section 36A, which provides that 'National Security Organs may intercept communication for the purposes of detecting, deterring and disrupting terrorism in accordance

²⁷⁹ Ibid, UNODC, "Counter-Terrorism Legal Training Curriculum," (2014), 94
²⁸⁰ Ibid, UNODC, "Human Rights and Criminal Justice Responses to Terrorism," (2014), 94
²⁸¹ Ibid, ICJ, "Assessing Damage, Urging Action," (2009), 69

with procedures to be prescribed by the Cabinet Secretary'.²⁸² These surveillance powers are undefined and incomprehensibly broad.²⁸³ The implementation and definition of these powers are left to the Cabinet Secretary with no oversight role, thus effectively laying the ground for abuse. It is therefore in breach of international standards on the right to privacy.

4.6 Conclusion

This chapter discusses the subject areas that have created discrepancies between Kenya's counter terrorism strategies and human rights prevention. From the different sources analyzed, it can be noted that the Kenyan human rights record has not been one of the best for a democratic country. For human rights activists and observers, the trade-off between security and human rights seems to be an easy one, but Alan Dershowitz argues for trading some civil liberty for protection against terrorism.²⁸⁴ Therefore, if Kenyans want to have far greater protection against terrorism, they should be willing to have their rights violated in order to get such protection. This argument is supported by the realist school of thought, which Kenya identifies with. The realists appreciate the need for tough counter terrorism measures and accuses those who are concerned about balancing of human rights to counter terrorism laws of defending terrorists or failing to take the threat of terrorism seriously.²⁸⁵ From the analysis in this chapter, this seems to be Kenya's position.

²⁸² Acts No. 19, "The Security Laws (Amendment) Act, 2014," Clause 69, 3A

²⁸³ Article 19, "Kenya: Concerns with Security Laws (Amendment) Bill," *Article 19*, December 17, 2014 (Farringdon Road, London: Free Word Centre, 2015), accessed on March 12, 2015, url: <http://www.article19.org/resources.php/resource/37800/en/kenya-concerns-with-security-laws-%28amendment%29-hill>

²⁸⁴ Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002).

²⁸⁵ Louis Klarevas, "Political Realism: A Culprit for the 9/11 Attacks," *Harvard International Review*, Vol. 26:3 (2004), 19.

The realism paradigm informed Kenya's incursion into Somalia in 2011, which has failed to reduce the terrorist attacks within the country.²⁸⁶ Latest al-Shabab attacks have mostly targeted Kenyan civilian population and other soft targets with a clear message to the Kenyan government to withdraw her troops from Somalia. It can be concluded that Kenya cannot defeat al-Shabaab by (military) force alone; it is high time Kenya tackles al-Shabab's radical Islamic ideology. This is one of the counter terrorism preventive strategies.

It was found that definition of terrorism has an impact on balancing counter terrorism policies and human rights. The Kenyan definition of terrorism acts as "anti-state violent activities undertaken by non-state entities which are motivated by religious goals" neglects terrorism based on political, ideological, and criminal rationales, and places an unfair target on Islam.²⁸⁷ Its definition of terrorism acts as "anti-state violent activities undertaken by non-state entities which are motivated by religious goals" neglects terrorism based on political, ideological, and criminal rationales, and places an unfair target on Islam. The SLAA did not rectify this either; it went further to curtail the rights enjoyed by the citizens, one of them being the right to privacy.

Finally, electronic surveillance, and data retention and sharing by communication service providers are vital in technical profiling, accurate identification, and information collection of terrorism suspects. But they can have a huge impact on the right to privacy of the citizens, unless there are proper control and oversight, something that was not addressed by the SLAA.

²⁸⁶ Simon Allison, "How not to counter terrorism: the Kenyan edition," *Daily Maveric, Africa*, August 28, 2014, accessed March 12, 2015, url: <http://www.dailymaveric.co.ke/article/2014-08-28-how-not-to-counter-terrorism-the-kenyan-edition/#.VRJ0vymUfK8>

²⁸⁷ Edward Mogire and Kennedy Mkutu Agade, "Counter-terrorism in Kenya," *Journal of Contemporary African Studies*, Vol. 29, No. 4 (October 2011) 473-491.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This study analyzed the compatibility of the Kenyan counter terrorism strategies with the respect for human rights; how the implementation of counter terrorism policies by the security agencies are impacting on human rights. Since terrorist activities also violate human rights and compromise national security, Kenya has an obligation to safeguard the security of its citizens. But this should not be done at the expense of human rights. In fact, observing human rights and freedoms while countering terrorism improves the fight against terrorism. Therefore, countering terrorism should complement human rights. However, counter terrorism strategies in Kenya, as in most countries, have involved limitations of human rights protection in numerous ways, including the civil liberties enshrined in the Kenyan Constitution and various international laws.

Several theories and approaches can be used in dealing with terrorism, which has become a threat to the international community. Also, there are several methods that states may implement to counter terrorism and safeguard security within its jurisdiction. Among the approaches discussed in this study were: the military approach, the intelligence led preventive approach, and legal and judicial processes. A combination of these approaches, implemented within the realms of national and international laws, may not eradicate terror activities in Kenya, but would greatly reduce its negative impacts on the Kenyan society.

5.2 Conclusions

Chapter two of this paper interrogated viability of the intelligence led preventive counter terrorism strategy being a better alternative compared to the law enforcement led reactive strategies. It found out that if terror activities are denied a fertile ground to germinate, it is likely

not to take-off. Thus; if the root causes of terrorism, radicalization and violent extremism are addressed; terrorists' propagandas are countered; terrorists' finances are followed and stopped; information on terrorism is shared, then terror activities would eventually slow down.

Other areas explored are newer avenues in countering terrorism such as community involvement and the input that may be brought in by the private sector if they partner with the security agencies. The study found out that if these are achieved, then the hard-power method of countering terrorism is reduced to soft-power approach. Comparing the two, soft-power may be considered as a milder human rights violator than the traditional hard-power approach. Thus, confirming the second hypothesis, preventive approach may violate some civil liberties and rights, but not at the scale that the reactive approach may do it, i.e. reforming counter terrorism strategies to embrace more of preventive than reactive approaches lowers the risk of human rights violations. This also satisfies objective two that sought to explore alternative (i.e. preventive) trends, besides reactive and coercive strategies, which could minimize human rights violations by both the state and terrorists.

Also in the analysis of Chapter three, it was established that diplomacy may not be the best alternative in the Kenyan situation, but it can thrive well in state sponsored terrorism. It was also be proven that the intelligence agency in Kenya may be privy to some incriminating information that the other law enforcement agencies may not be aware of, but this has not been exploited to prosecute terrorism suspects because of lack of liaison between the NIS and other law enforcement agencies.

Chapter three of this study found out that the anti-terrorism statues in Kenya exhibit preference for national security at the expense of the protection of human rights of the suspects

and persons accused of terrorism activities. Therefore, not all the laws are in conformity with the Constitution and international laws. Though there are challenges in the Kenyan statutes, there are also opportunities within these statutes, which could be exploited for the common good of the Kenyan society. A case in point is the Security Laws Amendment Act (2014), which had some of the best thought out clauses (such as the creation of the NCTC) to guide policy makers on counter terrorism strategies, but at the same time, it had some authoritarian clauses that if they were to be implemented, could run against the Constitution and the international laws. Implementation of these clauses could create a fertile terrorist recruitment areas, which confirms the third hypothesis of this paper.

It was also established that good laws should be backed up by an independent judiciary, which should be able to understand the dynamics of terror related evidence. This paper considered the role of special and specialized courts within the judiciary, something that had not been fully implemented in Kenya. These are the courts that can consider the subject of secret evidence, which if implemented within the confines of the laws, may revolutionize the fight against terrorism through the judicial process. The chapter also found out that Kenya's ratifications of international and regional laws allows for investigative and judicial liaison that is beneficial both for the fight against terrorism and the respect of human rights as envisaged in the ratified treaties and conventions.

Chapter four of the study focused on the nexus between counter terrorism strategies and the respect for human rights. It was established that the absence of a universally agreed definition of terrorism made some states to take advantage of the same to come up with repressive, political definition to oppress the opposition, hence a human rights threat. Though terrorism is transnational, every sovereign state has responsibility to protect its national security and

interests. The chapter also analyzed a number of strategies that the Kenyan government has implemented to fight terrorism within its jurisdiction and in the neighbouring Somalia. It found that the strategies may have negative impacts on the rights of citizens and non-citizens, such as: the renditions were discriminatory; the re-foulments were against the international laws. It can also be concluded that though Somalia refugees may be a cause of insecurity in the northern Kenya region, it is not prudent to relocate them back to their country, which is still politically unstable as this is against the international refugee laws, as well as limiting the number of refugees in the country. With proper border policing, the refugee problem cannot arise.

The chapter established that privacy rights through the use of technical surveillance, such as wiretaps in the USA PATRIOT Act and special operations in the Security Laws Amendment Act are some of the special investigative techniques used by most countries around the world, and Kenya was bold enough to legislate the same so that the operations can be regulated through an oversight authority and not shrouded in secrecy. Implementing the special operations in secrecy is likely to lead to more human rights violations than legislating the same. Considering the analysis in this chapter, it can be concluded that the methods used by a state to fight terror has a direct impact on its human rights record. Kenya being a democratic country, its counter terrorism measures and the protection of human rights are complementary and both have mutually reinforcing purposes (meeting objective one of this study). It also proves right hypothesis one, thus: countering terrorism while respecting human rights has a positive impact on the ability to combat it.

Finally, as this study has demonstrated, a more balanced approach must be struck between human rights and counter terrorism because both of them are paramount for the wellbeing of this nation. The best and most effective way of fighting terrorism is through

immediate executive action, which is unhampered by judicial processes and legislative oversight. Implementation of these measures need to be done within the human rights framework in order for them to achieve their ultimate objective of preventing terrorism. Furthermore, Kenya's movement from autocracy to democracy has been gigantic.

5.3 Areas for Further Research

As discussed earlier in Chapter three of this research paper, Bekir Cinar (2010) acknowledges that there is limited literature and publications on the subject of involvement of intelligence agencies in preventing terrorism.²⁸⁸ There is need for further research in this field because, as shown in this paper, human rights violations in preventive counter terrorism are less severe than in coercive counter terrorism. Also, loss of life is minimized when preventive counter terrorism measures are administered well in advance than waiting for a terror act to occur before acting; thus the old saying: "prevention is better than cure". More research on the link between terrorism and intelligence would also unmask the secrecy behind intelligence operations and enhance the use of intelligence information to prosecute terrorism suspects.

There exist inconsistencies between national anti-terrorism and the international laws. There is need to harmonize these two sources of statutes so that they cannot be exploited by terrorism suspects to defeat the justice system. Harmonization of these laws is another area that should be considered for further research by legal experts. The research should also focus on the possibility of criminalizing transnational terror acts under the international laws.

²⁸⁸ Bekir Cinar, *Can Terrorism be Prevented?: Combating Terrorism in a Liberal Democracy* (Tirana, Albania: EuroWorld Pub, 2010)

5.4 Recommendations

For Kenya to fulfill its national security obligations, this paper offers the following recommendations that the government may consider in its fight against terrorism, while at the same time respecting the rights and liberties of the citizens residing within its borders.

As regards to radicalization and extremism, Kenya should develop and implement both medium and long term strategies to counter the same. These strategies should embrace human security, social justice and development dimensions. These should help communities, especially the youth, redefine their identities, their purpose in life, help them refocus their energies and greatly reduce their chances of joining radical religious groups. To be successful, counter radicalization and extremism activities may need to be spearheaded by the NCTC and incorporate community leaders, religious leaders, youth leaders, the civil society, and to some extent, the political leaders in the targeted communities. Since educational institutions have also been targets for recruitments into the radical groups, such as the al-Shabab and the ISIS, the government should focus on these institutions, from an early stage, to inject a sense of patriotism, i.e. both early and higher formal education and other informal education systems, such as the madrassas. There is also need for the government to focus on radicalization within the prison system.

Much of the recruitments into the jihadi groups happen through the Internet, especially, the social media. This is mainly through propaganda spread by the groups to create hatred to a specific group of people (mainly Western countries) and brainwash their targeted recruits. The government may consider persuasive counter terrorism strategies to counter the propaganda being spread by the jihadists. The government may also consider using moderate preachers to

counter the preaching of radical preachers. Further, Kenya may consider copying Jordan and legislate laws on preaching whereby those found preaching religious fundamentalism are punished within the Kenyan laws.

The pace at which technology changes is enormous, and it may be challenging for a bureaucratic government, like Kenya, to keep pace. There is need for the government, through an empowered NCTC, to liaise with the private sector to technologically support its war against terrorism. This can be through data mining and retention, and creation of a database, which are very helpful in creating and understanding target profiles as well as watch listing and list dissemination. This will also help in tracking the movements of terror suspects. Parliament may need to legislate laws on data retention for service providers (telecommunication, Internet, housing/landlords amongst other). This should happen within legal frameworks, respect for the right to privacy, and also a proper oversight, preferably, by the judiciary. It is also important to share information with the private sector/investors especially on threats targeting them. This way, the government may help them set up security measures to safeguard their investments. If this is done, fatalities and casualties are avoided.

Most terrorism acquittals happen due to lack of sufficient evidence to sustain a conviction. The National Intelligence Service (NIS) may be privy to some information, which led to the arrests of the suspects in the first place. The government should make use of this type of information, especially through the use of secret evidence, before specialized or special courts, and led by specially trained prosecutors. The government should offer judicial officers, i.e. judges and magistrates, counter terrorism training to enable them understand the dynamics of international terrorism, but they should at the same time remain non-partisan.

The judiciary, in conjunction with the other two arms of the government, should spearhead revision of the bail system for capital offences, including terrorism. The maximum 90 days duration that is available to the security agents to detain a terrorism suspect should be sufficient to conclude a case, but in granting bail to the suspects, some considerations need to be taken into account, such as the capability of honouring the bail terms. During detention, the accused persons ought to be subjected to human rights standards, including their entitlement to challenge the lawfulness of detention (habeas corpus), they should be notified for the reasons for their detention and their rights, and allowed access to legal counsel.

Considering that no one was born a militant and that some of the al-Shabab militants targeting Kenya are sons and daughters of Kenyans, the government should open a communication with them. The government may consider granting amnesty to the militants to surrender. This should be spearheaded by the NCTC, the civil society and community leaders. Involving the mainstream security agencies may have negative effects because of the stigma and fear associated with the Kenyan security forces. The surrender should be to the religious leaders and the civil societies. The surrendered militants should be made to go through rehabilitation to re-integrate them into the society. Later on, the government may consider vocational training for those without sufficient education to make them productive members of the society.

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Appendix

Appendix 1: AU Human Rights Treaties Ratified by Kenya

African Union Human Rights Treaties

Treaty	Signed
AU African Youth Charter (2006)	Ratified 2008
Protocol on the Rights of Women in Africa (2005)	Signature only (2003)
Protocol on the establishment of an African court on Human and People's Rights (1997)	Signature only (2003)
African Charter on the Rights and Welfare of the Child (1990)	Acceded 2000
African Charter on Human and Peoples' Rights (ACHPR, Banjul, 1981)	Ratified 1992
Convention on specific aspects of refugee problems in Africa (1969)	Ratified 1992
AU Cultural Charter for Africa (1976)	Ratified 1981

Source: Kenya Human Rights Commission, *Towards Equality and Anti-Discrimination: An Overview of International and Domestic Law on Anti-Discrimination in Kenya* (Nairobi: KHRC, 2010)

Appendix 2: Core Human Rights and Treaties Ratified by Kenya

INTERNATIONAL LAW

Core United Nations Human Rights Treaties

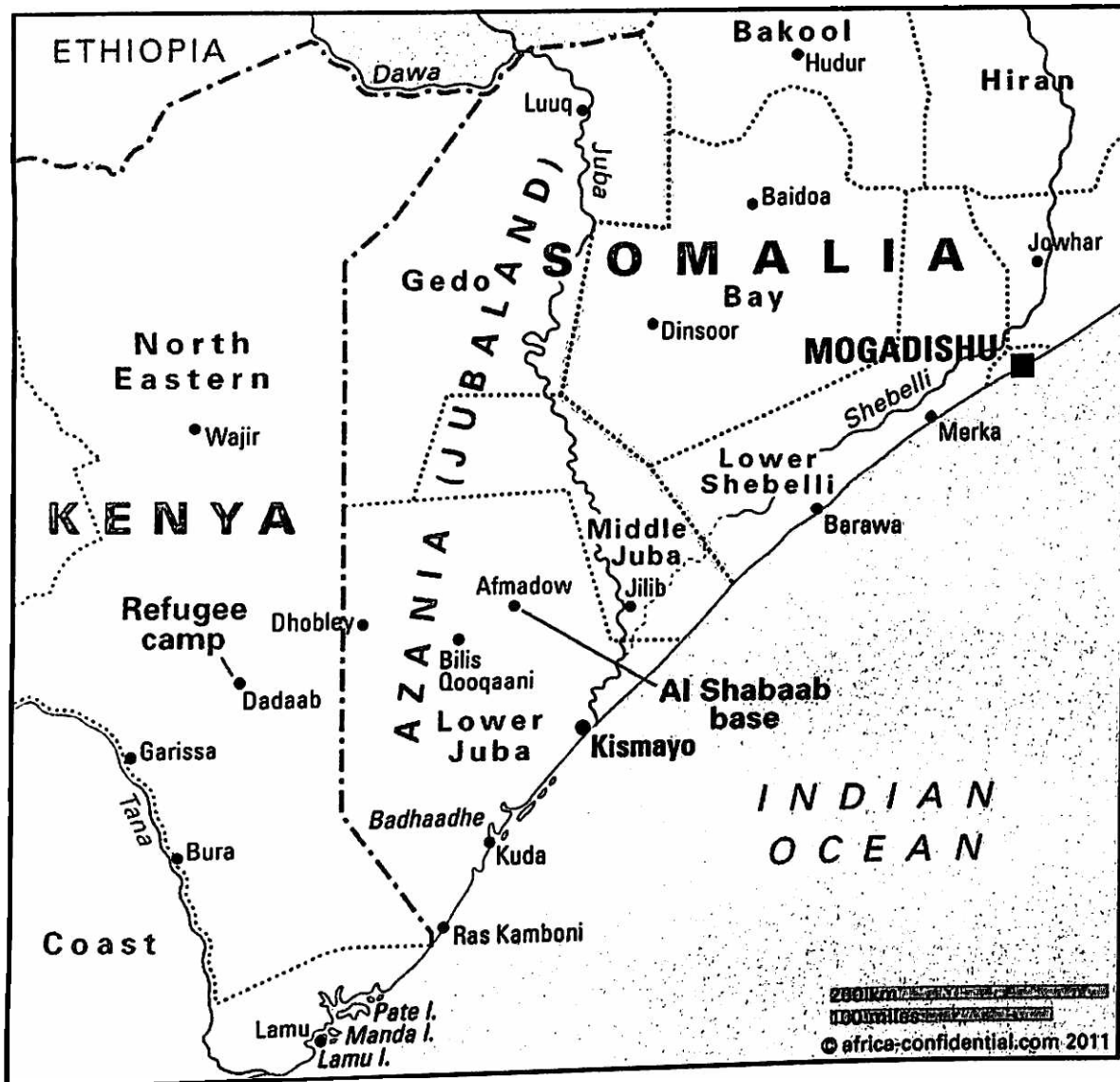
In general, Kenya has a strong record of ratifying major international and regional human rights instruments. It is a party to six of the seven core UN human rights treaties, with the exception being the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

United Nations Treaties

Treaty	Signed	Date
International Covenant on Civil and Political Rights (1966)	YES	1972
<i>Optional Protocol I to the International Covenant Civil and Political Rights (1976)</i>	YES	1972
International Covenant on Economic, Social and Cultural Rights (1966)	YES	1972
<i>Optional Protocol I to the International Covenant on Economic, Social and Cultural Rights (2008)</i>	NO	
Convention on the Elimination of all forms of Racial Discrimination (1965)	YES	2001
<i>Declaration under Article 14 allowing individual complaints</i>	YES	2001
Convention on the Elimination of all forms of Discrimination against Women (1979)	YES	1984
<i>Optional Protocol to the Convention on the Elimination of all forms of Discrimination against Women (1999)</i>	NO	
Convention on the Rights of persons with Disabilities (2006)	YES	2008
<i>Optional Protocol to the Convention on the Rights of persons with Disabilities (2006)</i>	YES	2008
Convention on the Rights of the Child (1989)	YES	1990
<i>Optional Protocol I to the Convention on the Rights of the Child (2000)</i>	YES	2002
<i>Optional Protocol II to the Convention on the Rights of the Child (2000)</i>	NO	
Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)	NO	

Source: Kenya Human Rights Commission, *Towards Equality and Anti-Discrimination: An Overview of International and Domestic Law on Anti-Discrimination in Kenya* (Nairobi: KHRC, 2010)

Appendix 3: Map of Kenya – Somalia Border



Source: UNHCR, url: <http://www.refworld.org/docid/506ec97c2.html>