

**UNIVERSITY OF NAIROBI**  
**DEPARTMENT OF POLITICAL SCIENCE AND PUBLIC ADMINISTRATION**

**DISCOURSES AND REALITIES OF JUDICIAL ROLE IN INTERNATIONAL  
SECURITY RELATIONS: THE CASE OF THE KENYAN JUDICIARY AND THE WAR  
ON TERROR (2006 - 2016)**

**BY**

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**A RESEARCH REPORT SUBMITTED IN FULFILLMENT FOR THE AWARD OF A  
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**DECLARATION**

**This research report is my original work and has not been presented for examination in any university.**

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Signed.......... Date...August 17 - 2020.....

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## **DEDICATION**

To Dale and Syl

## **ACKNOWLEDGEMENT**

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Judith Agade, I was constantly perturbed by your insights in matters terrorism. Thank you for your altruistic support.

## **ABSTRACT**

The discourses and realities of judicial institutional behavior in the adjudication of terrorism cases is the subject of this study between 2006 and 2016. A convergence of Buzan's conception of security and the Lockean prerogative of power anchoring international legal institutionalism, provide a conceptual framework of analysis for this study. The global escalation in the number and intensity of terror attacks and the subsequent resolutions passed by the UNSC, animated the need for international judicial cooperation. The ratification of these resolutions by Kenya, parallel to national security imperatives enhanced the judicial role function in the fight against terror.

This study analyses and examines differentiated actor discourses and realities of judicial role function in the fight against terrorism. The study also interrogates how judicial adjudication of terrorism cases mediates Kenya's international security relations. This study further proffers research based policy options geared towards positively enhancing the role of the judiciary in the global security agenda.

This study is centered on the contention that in the fight against terrorism in Kenya, the executive is determined to use its prerogative of power in apparent disregard of the law in a bid to root out terrorism. This is countered by the judicial role function, which, seeks to bring all measures taken by the executive within the ambit of the law. The foregoing leads to differentiated actor discourses when judicial adjudication overrules executive measures for being in contravention of the law.

## **ABBREVIATIONS**

<b>AG</b>	-	<b>Attorney General</b>
<b>ATPU</b>	-	<b>Anti Terrorism Police Unit</b>
<b>CIA</b>	-	<b>Central Intelligence Agency</b>
<b>CLCF</b>	-	<b>Christian Leaders Consultative Forum</b>
<b>FISA</b>	-	<b>Foreign Intelligence Surveillance Act</b>
<b>HCCA</b>	-	<b>High Court Criminal Appeal</b>
<b>ICCPR</b>	-	<b>International Covenant on Civil and Political Rights</b>
<b>ICU</b>	-	<b>Islamic Courts Union</b>
<b>IED</b>	-	<b>Improvised Explosive device</b>
<b>IGP</b>	-	<b>Inspector General of Police</b>
<b>IMF</b>	-	<b>International Monetary Fund</b>
<b>KADU</b>	-	<b>Kenya African Democratic Union</b>
<b>KANU</b>	-	<b>Kenya African National Union</b>
<b>KDF</b>	-	<b>Kenya Defense Forces</b>
<b>KLR</b>	-	<b>Kenya Law Reports</b>
<b>KNCHR</b>	-	<b>Kenya National Commission of Human Rights</b>
<b>KPU</b>	-	<b>Kenya Peoples Party</b>
<b>NCC</b>	-	<b>National Council of Churches</b>
<b>MP</b>	-	<b>Member of Parliament</b>
<b>MRC</b>	-	<b>Mombasa Republican Council</b>
<b>OAU</b>	-	<b>Organization of African Union</b>
<b>ODPP</b>	-	<b>Office of the Director of Public prosecutions</b>
<b>RCK</b>	-	<b>Refugee Consortium of Kenya</b>
<b>UN</b>	-	<b>United Nations</b>
<b>UNSC</b>	-	<b>United nations Security Council</b>
<b>UNHCR</b>	-	<b>United Nations High Commission for Refugees</b>
<b>UK</b>	-	<b>United Kingdom</b>
<b>US</b>	-	<b>United States</b>

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## CHAPTER ONE

### JUDICIAL ROLE IN KENYA'S INTERNATIONAL SECURITY RELATIONS

#### 1.0 Background of the study

Historically, the executive played the primary role in matters of security.<sup>1</sup> The identification of threats to security, the framing and enforcement of policies was the responsibility of the political branch.<sup>2</sup> Constitutions did not provide for judicial role function in matters of security. Such role was abstract and largely ambiguous.<sup>3</sup> Judicial misgivings were premised on the consequences of adjudicating upon matters that tended to impinge on the interests of a state.<sup>4</sup> However, constitutions empowered courts to decline the enforcement of unconstitutional laws and policies.<sup>5</sup> Such power is what is referred to as judicial review in current constitutions and it effectively roped in judicial function in matters of security to the extent of adjudicating upon the constitutionality of such laws and policies.

The threat of global terrorism shifted perspectives. The UNSC adopted binding resolutions in the fight against terror.<sup>6</sup> International judicial cooperation was a prerequisite to the enforcement of such resolutions within states. Judiciaries were viewed as mechanisms that would enable a strategy of war confined in the law. This is because in times of emergency like the one created by terrorism, those in charge of public security tended to overreact and take measures that did

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<sup>1</sup>Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1 (2004)

<sup>2</sup> Ibid

<sup>3</sup> Yigal Mersel, *Judicial Review Of Counter-Terrorism measures: The Israeli Model For The role Of The Judiciary During The Terror Era*

<sup>4</sup> Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts',

4 EJIL (1993) 1S9. See also *infra*. Pan IL

<sup>5</sup> John C. Yoo, *Judicial review and the War on Terrorism*, HeinOnline -- 72 Geo. Wash. L. Rev. 427 2003-2004

<sup>6</sup> Resolution 1373 (2001) Adopted by the United Nations Security Council at its meeting, on 28 September 2001 adopted under Chapter VII of the UN Charter.

not necessarily embrace the rule of law.<sup>7</sup> The requirement for judicial cooperation enhanced the judicial role function in the formal adjudication of mechanisms of terrorism cases and by extension matters of security.

In Kenya, the regimes of Jomo Kenyatta and Moi dominated the conduct of security, judicial review was uncommon. These regimes personalized and centralized power within the purview of the executive and subjugated the judicial role function to affirm executive dominance.<sup>8</sup> The adoption of the 2010 constitution in Kenya reinforced the impetus in fostering the role of the judiciary out of the boundaries of subjugation.<sup>9</sup> Judicial review in the new constitution enabled the examination of executive measures arising from policies, directives and the general conduct of the war on terrorism. Further, article 2(6) of the 2010 constitution formerly incorporated all treaties and conventions ratified by Kenya as part of the Kenyan law. The international and domestic legal framework effectively made the judiciary an actor in matters of national and international security.

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<sup>7</sup> John Ip, *The Supreme Court and House of Lords in the War on Terror: Inter Arma Silent Leges?* Michigan State Journal of International Law, [Vol. 19:1] available at <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1033&context=ilr>

<sup>8</sup> Korwa G. Adar and Isaac M Munyae, *Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978-2001*, African Studies Quarterly | Volume 5, Issue 1 | Winter 2001 pg 1

<sup>9</sup> Article 160 of the 2010 Kenyan Constitution provided for judicial independence from control and direction of any authority.

## 1.1 Statement of the Problem

In Kenya, security matters were traditionally perceived to be the sole responsibility of the executive.<sup>10</sup> Judicial involvement was limited to its ability to instrumentalize the executive's efforts in suppressing dissent.<sup>11</sup> This perception spanned to international terrorism matters, where antiterrorism measures involved the executive's decisions implemented through the security organs.<sup>12</sup> Particular discourses often suggested that in the fight against terror, the executive must reserve the discretion to make decisions without recourse to the legislature or the judiciary.<sup>13</sup> These discourses seemed to respond to a number of perceived special circumstances that were most vociferous in the context of the war on terror.<sup>14</sup>

The terror attacks in the US on September 11, seemed to engender a shift in the policy. In response to this attack, the UNSC unanimously adopted Resolution 1373 (2001).<sup>15</sup> This Resolution unequivocally reaffirmed its condemnation of terrorism. Further, the Resolution obligated all UN member states, to enact individual state legislation to prevent, suppress and criminalize terrorism. The enactment of states' legislation required individual states domestic enforcement machineries, where international judicial cooperation was key.<sup>16</sup> The net result was that it seemed to enhance the role of judiciaries in matters of antiterrorism within member states.

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<sup>10</sup> Matters of national security were perceived within the sole purview of executive power, it was qualified as a non-justiciable issue as held in *Reg v. SSHD, ex parte Cheblak* [1991] 1 W.L.R. 890, 902

<sup>11</sup> *Drew Days III ET AL., Justice Enjoined: The State of the Judiciary in Kenya* 4 (1992) [a publication of the Robert F. Kennedy Memorial Center for Human Rights.

<sup>12</sup> The first major attack on the US Embassy in Nairobi saw the arrest of four defendants for conspiring in the attack and they were rendition to the US to face terror charges in New York before the US Judiciary. See Iriana Zill, *The U.S. Embassy Bombing Trial – A Summary in the Frontline* available at <http://www.nbs.org/wgbh/pages/frontline/shows/binladen/bombings/bombings.html>

<sup>13</sup> *Jenkins D* (2011). *The Lockean Constitution: Separation of Powers and the Limits of Prerogative*, *McGill Law Journal* Volume 56, (3), 543-589.

<sup>14</sup> *Ibid*

<sup>15</sup> *Ibid* Note 7

<sup>16</sup> *Bianchi, Andrea, Security Council's Anti-Terror Resolutions and Their Implementation by Member States: An Overview* (November 2006). *Journal of International Criminal Justice*, Vol. 4, Issue 5, pp. 1044-1073, 2006. Available at SSRN: <https://ssrn.com/abstract=1147489>.

Consequently, the efficacy of the actions undertaken at the international level, was dependent on the willingness and actual capacity of nation state judiciaries to incorporate international standards in their domestic legal systems and to subject the same to their adjudication and enforcement procedures.<sup>17</sup> The enactment of the Prevention of Terrorism Act (PTA) in Kenya followed the said Resolution. The new law expanded the Criminal Law in Kenya to include new conducts related to terrorism<sup>18</sup> while effectively giving the judiciary a key role in the fight against terrorism and by extension the states' international security relations.

The 2010 Constitution in Kenya, affirmed the UN resolution by incorporating all international treaties and conventions ratified by Kenya as part of the Kenyan Law and therefore within the purview of the judiciary. The increase in number and intensity of terror attacks,<sup>19</sup> spawned international aid support worth millions of dollars from states like the US and UK to develop Kenya's capacity and capabilities in the fight against terror.<sup>20</sup> This support was accompanied by pressure exerted on the executive to compel it to act and reign in terror. In turn, the executive turned the pressure on the judiciary to convict and detain terror suspects.<sup>21</sup>

The pressure from the executive was not well received by many judicial actors in Kenya, who posited to the principle of impartiality.<sup>22</sup> This is the position of justice where judges play an

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<sup>17</sup> Ibid

<sup>18</sup> Part III of the Prevention of Terrorism Act No. 30 of 2012 provides for offences related to terrorism.

<sup>19</sup> According to the Bureau of Counterterrorism and Countering Violent Extremism, Country Reports on Terrorism 2016, United States Department of State Publication of June 2, 2016 Kenya had experienced 440 terrorist attacks: 76 attacks in Nairobi, Garissa 53 attacks, Mandera 50 attacks, Mombasa 27 attacks, Wajir 23 attacks and Dadaab reported 17 attacks<sup>19</sup>.

<sup>20</sup> In 2012 EAC got the approval of the US Congress to fund the fight against al-Qaeda. Kenya was also allocated an additional \$40 million together with an allotment of raven drones for use in surveillance.

<sup>21</sup> In June 2, 2014 the judiciary was criticized its leniency towards terrorism suspects the CJ Dr. Willy Mutunga responded to such criticism by affirming that judicial officers would rely on evidence and not emotion in granting terror suspects bail or bond. Business Daily; Bid to deny terrorism suspects bail meets stiff competition, on Monday June 2, 2014 available at [www.businessdailyafrica.com](http://www.businessdailyafrica.com)

<sup>22</sup> Ibid

impartial role in times of war and in peace times.<sup>23</sup> Judges are tasked to interpret the law to the best of their ability, in consistency with their mandate under the constitution disregarding all pressure.<sup>24</sup> The judiciary implements the law through a process of fairness irrespective of the nature of the case.

The Kenyan judiciary operated in an environment where, security organs take reference from political actors in blatant ignorance of the law and in violation of human rights. The arbitrary arrest of terror suspects and subsequent mistreatment while in detention, coupled with extrajudicial killings and or forced disappearances and unlawful renditions were rampant<sup>25</sup> in this regime. The judiciary on its part referencing the post 2010 constitutional dispensation accorded terror suspects their full rights through release on bond and acquittals. Such judicial decisions were met with criticism from the executive. A case in point followed the terror attacks on commuter assets along Thika Road on May 4, 2014. The attack engendered bitter accusations leveled against the judiciary by the Deputy President the Hon. William Samoei Ruto. According to him, the judiciary was not a strong partner in the war against terrorism.<sup>26</sup> Underpinning this discourse was the strongly held view by the executive that the judiciary by the fiat of its decisions, was in aberration and fact abetting terrorism.<sup>27</sup>

Stung by this critique, the Chief Registrar of the Judiciary called for dialogue with the executive. According to her, dialogue would afford the two arms of government an invaluable forum to

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<sup>23</sup> Stephen Reinhardt, The Judicial Role in National Security Boston University Law Review [Vol. 86:1309 2006]

<sup>24</sup> Ibid

<sup>25</sup> Ibid

<sup>26</sup> Jamaicaobserver Tuesday May 6, 2014 available at [www.jamaicaobserver.com](http://www.jamaicaobserver.com)

<sup>27</sup> David Goldman, Kenya Judiciary Blamed for Terror by Government, dated May 5, 2014 available at [www.intelligencebriefs.com](http://www.intelligencebriefs.com) accessed on July 15, 2017

share perspectives on the critical issue of public interest.<sup>28</sup> The pressure on the judiciary was double dynamic; on one hand a push from the executive to convict terrorists and on the other a pull from the public and civil society to reign in on executive excesses.<sup>29</sup>

The foregoing points to apparent differentiated perspectives. What external actors, the executive and the Kenyan public perceive as the role function of the judiciary in the war on terror and by inference, its actual role as an actor in Kenya's international security relations. These differentiated perspectives of how actors think and talk about a phenomenon is what Carta defines as discourses.<sup>30</sup> This study is interested in this apparent gap between discourses and realities and its impact on institutional behavior. In specific terms, this study seeks to respond to the three questions; what explains these differentiated actor discourses and the realities of judicial institutional behavior in the war against terror? How does judicial adjudication of terror cases mediate Kenya's international security relations and how best can this role in security provision be positively enhanced?

## 1.2 Objectives of the Study

This study examines the discourses and realities of judicial role in Kenya's international security relations and the war on terror. More particularly, this study seeks: -

- i. To examine and analyze factors underpinning differentiated actor discourses and realities of judicial institutional behavior in the war against terror;

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<sup>28</sup> Cyprian Ombati, Standard Digital of May 7<sup>th</sup> 2014 available at [www.standardmedia.co.ke](http://www.standardmedia.co.ke)

<sup>29</sup> Republic of Kenya, report of the Sub Committee on Ethics and Governance of the Judiciary 2005, 164

<sup>30</sup> Caterina Carta, Discourse Analysis and International Relations: What for? Italian Political Science 15/06/2014 available as <https://italianpoliticalscience.com/2014/06/15/discourse-analysis-and-international-relations-what-for/>



- ii. To analyze how judicial adjudication of terrorism cases mediate Kenya's international security relations; and
- iii. To proffer research based policy options geared towards positively enhancing the role of the judiciary in the international security agenda.

### **1.3 Justification for the Study**

This study finds justification on both policy and academic levels. Kenya has a fully functioning judiciary as established under Chapter 10 of the Constitution. The enactment of the PTA, the ratification of international instruments passed by the UN are all indicators that there are sufficient legal mechanisms to fight terrorism.

Authors have trumpeted the importance of the judicial role function in the fight against terrorism. They consider the judiciary as an effective deterrent to terrorism, which minimizes the risk of violations of fundamental human rights.<sup>31</sup> Richard Clutter identifies a clear strategy in the actions of terrorists when it comes to the judicial system, which is an apparent instrumentalization of the process in favour of the terrorist agenda.<sup>32</sup> For him, the process can be used at a tactical level to intimidate juries and witnesses to achieve the strategic ends animated by the operationalization of the notion that affirms the discourse that the government is repressive; fodder for terrorism recruitment. To escape this entrapment, he posits the need to enhance judicial systems that are fair and just to terror suspects.<sup>33</sup>

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<sup>31</sup> Ibid

<sup>32</sup> Clutter Richard. 1990. *Terrorism and Guerilla Warfare*. London; Routledge. p. 77

<sup>33</sup> Ibid

The laws as enacted and the preference of the judicial process as the best means to fight terrorism seem to have addressed the demand side, since institutions have been mandated by the law and by policy. The supply side is what this paper seeks to contribute since there is an obvious gap founded in the implementation of these laws. There are apparent differentiated discourses among the different actors that are far removed from the reality. History will show that the executive in Kenya has been the main repository in matters of national security. Terrorism roped the judiciary into matters of security through the implementation of both domestic and international laws. The judicial role function is therefore founded in the law however discourses abound that impinge on this role function. This study therefore contends that executive discourses impinges upon the judicial role function.

Further, judicial role function is directly tied to the sufficiency of the role played by other actors. The investigation, efficacy of the charges and the prosecution of terror cases is in the ambit of the security institutions and their perception and conduct of terrorism cases impacts on and ultimately determines judicial outcome which in turn impacts the reality. While acknowledging these challenges, this study seeks to examine the underpinning factors that animate the lack of synergy among these actors and how the judiciary by its actions can become an agent of securitization in counterterrorism.

#### **1.4 Scope and Limitation of the Study**

This study reviewed terror attacks and discourses inherent in executive responses to the said terror attacks in the period from 2006 to 2016. Further the study reviewed the reality of judicial institutional behavior in adjudication of the terror attacks and subsequent executive responses.

The period of study was informed by the fact that Kenya came under increased terror attacks during this period. Most terror attacks were followed by executive responses outlining the nature of such attacks and the planned response. The period of study is also advised by the fact that the arrest of terror suspects in connection with some of the attacks was prevalent. The said suspects were subsequently arraigned in court and the role function of the judiciary was invoked in the adjudication of terrorism cases.

### **1.5 Definitions of Concepts**

**Counterterrorism** - The Army Field Manual for the US gives a definition of counterterrorism in terms of its operations, which include the measures taken to effectively ensure the prevention, deterrence, preempting, and responding to the threat of terrorism.<sup>34</sup> The applicability of this definition in this study stems from its wide application to include everything done before and in response to terrorism.

**Discourse** - This concept is borrowed from Carta's Discourse Analysis and International Relations as a medium within which sense can be made leading to reality.<sup>35</sup> This definition is most applicable as it expresses the medium to most highlight the explanations given by institutions to diffuse difference in expectations and outcomes of adjudication of terrorism cases.

**Judicial Role Function** - In this study the concept of judicial role function refers to how judges approach decision making in individual cases.<sup>36</sup> This study is interested in what

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<sup>34</sup> Quoted in the US Army Field Manual, 2006, p. 4.

<sup>35</sup> Ibid Note 30

<sup>36</sup> Erin F. Delaney and Rosalind Dixon, Comparative Judicial Review, Edward Elgar Publishing Limited UK P. 144

Shapiro defines as the functional role of adjudication that courts play<sup>37</sup> in the fight against terrorism.

**Judicial Power** - In this paper, judicial authority is construed in accordance with the Law Dictionary as authority, which is both legal and constitutional. Such authority is vested in judges who preside over cases in court and then render their respective judgment to either affirm the constitution and the law or in other cases void the same when disputes arise.<sup>38</sup> In addition to this definition, this study relies on the operation of judicial power as provided in article 159 of the Kenyan constitution that contains provisions on how judicial authority is to be exercised. These definitions are preferred because of their broad meaning and appreciation of the diversity and uniformity of such power.

**Realities** - In this study, reality consists of a collection of ideas or opinions that are constructed and communicated with confidence to represent a reasonable explanation of the way things are.<sup>39</sup> Its acknowledgement must be discovered or reasoned and the possibility of falsification is apparent.

**Terrorism** - The study adopts the definition in the cases decided by the Kenya judiciary. The use of calculated violence or threat of violence to instill fear; whose intention is to pressurize or scare authorities and the public to achieve political, religious and ideological goals.<sup>40</sup> This definition is most relevant to this study because it is construed by the institution that this study is interested in and further this definition looks at the ideology of terrorism as purposeful and calculated towards the achievement of a certain goal.

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<sup>37</sup> Shapiro Martin, *Court: A Comparative and political Analysis*. University of Chicago Press 1992 p. 179.

<sup>38</sup> The Law Dictionary Free Online Legal Dictionary 2nd Ed available at <http://thelawdictionary.org/judicial-power/>

<sup>39</sup> *Jamia Millia Islamia*. Department of Geography New Delhi, India Honorary Professor

<sup>40</sup> Justice M. J. ANYARA EMUKULE in *Muhuri & another v IGP & 4 others* [2015] eKLR

**Trial by Installment** - According to the Kenya Judiciary Guidelines Relating to Active Case Management of Criminal Cases the word trial is defined to include any hearing at which evidence is adduced, plea, pre-trial conference, sentencing and other consequential hearings thereto. This study borrows that definition to conceptualize a trial that takes place over a period of time and that is not continuous. In this case plea, pretrial conference and evidence production are staggered over time.

## **1.6 Literature Review**

This Literature Review examines the perception gap between two arms of government; the judiciary on one hand and the executive on the other in the fight against terror. Where the executive seeks to direct the judiciary on how to play its role since judicial adjudication of terrorism cases has an impact on Kenya's international security relations. This literature examines how institutions in the criminal justice system have perceived terrorism in different ways and how their respective perceptions have shaped their response to the threat. The literature also addresses the different discourses in the application and implementation of legal mechanisms in the fight against terrorism. How institutions involved in the war on terror, struggle to sort out complications that inevitably arise from the policies put in place to fight terrorism.

The Literature review is organized in three sections. The first section will focus on the institutional differentiated actor discourses that shape the reality in the war on terror. The second section will discuss the impact of judicial adjudication on Kenya's International security

relations and the last section will analyze how the judicial role function can positively be enhanced to benefit the global security agenda.

### **1.6.1 Differentiated Actor Discourses and Reality in the Fight against Terrorism.**

Following the terrorist attack of 9/11 in the US, a strategy of war was adopted inherent in the 'war on terror'. This strategy was first adopted by the Bush administration and their choice of terminology in 'war' was most purposeful. According to David Ryan, it was a strategic choice to use the word 'war'. A choice that was more unifying for the US as it had a sense of nationalism and conferred a greater purpose more than what a narrative founded in criminal justice could have.<sup>41</sup> Adam Hodges underscores the similarity of the 9/11 attack to Pearl Harbor in the justification for war.<sup>42</sup> The former US President George Bush also pointed to the similarity between terrorists and the likes of Lenin and Hitler when comparing what the terrorists had indicated in their statements. In making such a comparison, President Bush's intention was to relate terrorists with the US's old enemies so as to have a clear picture of what the US was dealing with and justify before the public, the measures that his administration would take.<sup>43</sup> Applying the analogy of war generally paved the way for the discourse that terrorism was a genre of war.<sup>44</sup> There was an undeniably growing common ground between the terrorists who executed the 9/11 attack and the so called 'war on terror'. The commonality was evident in the way the US looked to revenge as their mode of justice.<sup>45</sup>

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<sup>41</sup> David Ryan, *Frustrated Empire: U.S. Foreign Policy, 9/11 to Iraq* (London: Pluto Press, 2007), 33.

<sup>42</sup> Adam Hodges. *The "War on Terror" Narrative: Discourse and Intertextuality in the Construction and Contestation of Sociopolitical Reality* (New York: Oxford University, 2011), 3.

<sup>43</sup> *Ibid*

<sup>44</sup> *Ibid*

<sup>45</sup> Mahmood Mamdani, *Good Muslim, Bad Muslim: America, the Cold War and the Roots of Terror*, Doubleday 2004.

Stephen D. Schwinn in 2016 described the 15 years since 9/11, as years constrained by government policies that were intended to eliminate international terrorists, disrupt networks, and prevent a repeat of those attacks. According to him, such policies were never straightforward; they evolved and took shape in time as they were oscillated around the three branches of government.<sup>46</sup> Measures like the enactment of the Patriots Act and Guantanamo Bay created friction between the three branches of government. According to Cecilia M. Bailliet, the legality of counter-terrorism measures depended on the rule of law in compliance with international human rights law. Adequate measures like judicial review, were purposed to guard against the arbitrary exercise of discretionary powers.<sup>47</sup> The Federal Courts in the US provided checks and balances on the legislative and the executive branches of its government by declaring provisions of the Patriot Act as unconstitutional.<sup>48</sup>

Reading this literature, the obvious discourse propagated was that terrorism was war and what followed were equivalent measures to combat the vice. State implemented policies some of which were outside the purview of the law.<sup>49</sup> The questions then becomes, why would they declare terrorism as war and fight it accordingly and at the same time come before the courts to fight terrorism as a crime? Why would the executive fail to foresee that the judiciary will definitely stop it from implementing policies that contradict the law? The dynamics that necessitated the executive to contradict itself, and have its own judiciary point out that

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<sup>46</sup> Steven D. Schwinn, *Lessons on the Law: The Separation of Powers and 15 Years of Anti-Terrorism Policies Since 9/11*, *Social Education* 80(4), pp 214–218, 223 ©2016 National Council for the Social Studies available at [https://www.americanbar.org/content/dam/aba/images/public\\_education/publications/September2016\\_Sept11at15.pdf](https://www.americanbar.org/content/dam/aba/images/public_education/publications/September2016_Sept11at15.pdf) accessed on July 26, 2017

<sup>47</sup> Cecilia M. Bailliet *Human Rights and Counter Terrorism* available at <http://www.uio.no/studier/emner/ius/humanrights/JUS5503/h15/teaching-materials/human-rights-counter-terrorism.pdf> accessed on August 26, 2017

<sup>48</sup> The decision was made in the case of Brandon Mayfield an Attorney from Portland, Oregon who was arrested on the allegation that he was involved in the terrorist attack that happened in Madrid on a train in 2004.

<sup>49</sup> Some provisions of the Patriots Act in the US was declared unconstitutional in the case of *American Civil Liberties Union v. Ashcroft* filed April 9, 2004 in the United States

contradiction is not explained by this literature. This study therefore seeks to address the gap in knowledge, to find the reasons for the blatant disregard of the law.

### **1.6.2 Judicial Mediation of Kenya's International Security Relations**

Judges have a critical role to play in their interpretation of the various measures put in place to counter terrorism.<sup>50</sup> Judges also determine and promote those measures which are within the legal framework and similarly respect human rights.<sup>51</sup> The US judiciary has ascertained that even when arms clash, their laws will not be silenced, they may be amended from time to time, but they will always speak similar language during war as in peacetime.<sup>52</sup> Judges are respecters of persons and they are the custodians of the rights of the people and will always stand in the way of those who try to encroach on peoples' liberty regardless of who they are.<sup>53</sup> Judges are always conscious to regulate coercive action by the executive, which must find justification in law.<sup>54</sup>

Namibia's judiciary pronounced itself on the matter, affirming the influence of the law and the impact of their decisions on the society. The Namibian Judiciary hoisted its constitution to a position above everything else. It spelt its constitution as something more than a statute.<sup>55</sup> For them, the constitution goes beyond the mere definition of government structures and the relations between the governed and their government.<sup>56</sup> A state's constitution reflects a nation's soul and mirrors the ideals and aspirations of a people.<sup>57</sup> Constitutions articulate the values that bind

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<sup>50</sup> UN Chef de Cabinet Edmond Mulet said in his opening statement at an event, entitled "The Effective Adjudication of Terrorism Cases." The event was a meeting of several justices of the Supreme Courts of various countries who came gathered to discuss the handling of terrorism cases in their respective jurisdictions on 10 March 2016

<sup>51</sup> Ibid

<sup>52</sup> *Liversidge v Anderson* [1942] AC 206. [1942] AC 206 at 244

<sup>53</sup> Ibid

<sup>54</sup> Ibid

<sup>55</sup> *S. vs Acheson*, 1991 (2) S.A. 805 (at p.813)

<sup>56</sup> Ibid

<sup>57</sup> Ibid



people in a state and controls how those people are governed.<sup>58</sup> This is what makes the constitution a distinct and core element in any state. Presiding over and permeating the processes of judicial interpretation and judicial discretion<sup>59</sup> and hence must be respected and adhered to.

Provisions in any constitution may vary given it is one document that contains all aspects of a state. In Uganda, the judiciary in recognition of this fact has come out to provide guidelines in its interpretation of the Constitution. They read their constitution as one whole, where one provision sustains the other as opposed to destroying the other.<sup>60</sup> The many provisions are read together and interpreted in a common meaning.

The judiciary in Kenya has sought to respect the exercise of power by co-branches and in so doing examine the acts of the legislature or the executive. The judiciary has provided checks and balances on the constitutional efficacy of what is done under the authority of the same Constitution.<sup>61</sup> The literature in these decisions, point to an apparent judicial influence in the state matters. This literature does not however extend to the omissions, the matters that are not legislated upon where the judiciary does not get to pronounce itself upon. Certain aspects of counterterrorism measures that should ideally be in the ambit of the judiciary but are nevertheless not, because they have not been so presented. Matters relating to violations of constitutional rights that are evident in Human Rights Reports that the executive nevertheless denies and are never presented before the courts. So how can the judiciary influence such

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<sup>58</sup> Ibid

<sup>59</sup> Ibid

<sup>60</sup> Constitutional Petition No. 1 of 1997 *Tinyefuza vs AG Constitutional* (1997 UGCC 3)

<sup>61</sup> Petition NO.628 OF 2014 [2015] eKLR

matters? This study grapples with these matters and seeks to bring them within the ambit of the judiciary.

### **1.6.3 Enhancing Judicial Role in Global Security Agenda**

In the 20<sup>th</sup> Century, judicial role function in matters concerning global security paints a gloomy picture. The Judiciary has tended to recuse its role in security, as opposed to adjudication against the executive violating the rule of law.<sup>62</sup> This stance finds credence in the notion of power separation.<sup>63</sup> The exercise of power by one branch needs to be balanced and checked by the other branches.<sup>64</sup> This idea systematically distributes political power between the three branches of government. A balance is achieved when natural rights are preserved in so far as they converge with the security of all, at the same time accommodate balanced executive power. This is why national security was preserved as the purview of the executive, it was a non-justiciable question.<sup>65</sup> The judicial process was viewed with ineptness to deal with the sort of complexity of national security.<sup>66</sup> National security acquired a mystical significance in the courts who failed to confront its concerns.<sup>67</sup>

In the age of terrorism, a real threat to state security, there has been a slow but nevertheless significant change in this view and judiciaries now have a distinct role to play in national security. Senator Rand Paul (R. Ky.) once asked, whether the President of the US had the

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<sup>62</sup> Kavanagh Aileen, *Constitutionalism, Counterterrorism, and the Court: Changes in the British Constitutional Landscape*, Oxford University Press and NYU School of Law, 2011.

<sup>63</sup> Waldron Jeremy, *Separation of Power in Thought and Practice*, 54 B.C.L. Rev. 433 (2013), <http://lawdigitalcommons.ab.edu/bclr/vol54/iss2/2>

<sup>64</sup> Ibid

<sup>65</sup> Ibid

<sup>66</sup> Ibid

<sup>67</sup> Sen. Rand Paul's filibuster on March 6, 2013, that started on the floor of the Senate floor and he extended the same to twitter. He pointed an accusing finger at President Barack Obama for what he called "advocating a drone strike program in America". Rand Paul wanted the official response from the Obama administration available at <http://www.politifact.com/truth-o-meter/statements/2013/mar/07/rand-paul/sen-rand-paul-says-obama-advocating-drone-strike-p/>

authority to order the assassination of an American on American soil especially when such a citizen was not at that moment an imminent threat to the national security.<sup>68</sup> There was no immediate clear answer to the question and after many and arguably evasive answers, the AG finally answered ‘No’ to that question.<sup>69</sup> This question was triggered by advocacy to provide limits on the president’s power to order drone strikes. At the time the official figures from the administration of President Barrack Obama, indicated that 2,436 people had been killed by the US in 473 strikes from 2009 to 2015 mainly in Somalia, Pakistan, Libya and Yemen. Some of the strikes were non-combative in fact, between 64 and 116 were non-combatants.<sup>70</sup> It was a situation where US citizens were killed in drone strikes, without being accorded their right to the due process of law.<sup>71</sup> That means the state would have easily arrested these non-combatants and took them through the criminal justice system. Why use the drones to strike them dead when you can easily try them in court?

The Obama administration, argued that once an American citizen makes the decision to join al-Qaeda and then target Americans, the administration is legally justified in taking whatever measures to stop further terrorism plots.<sup>72</sup> Still arresting them and putting them in jail would be another legal way of stopping them from carrying out plots.

These discussions fall right into the words of William G. O’Neill who contends that matters of security should not just be left to the executive. He proposes for a review of the mechanisms put

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<sup>68</sup> Ibid

<sup>69</sup> Letter dated March 7, 2013 from the Attorney General to Hon. Rand Paul of US Senate, available at <http://www.weeklystandard.com/holders-letter-to-rand-paul-no-the-u.s.-cant-use-drone-to-kill-citizen-not-engaged-in-combat-on-u.s.-soil/article/706587>

<sup>70</sup> Ibid

<sup>71</sup> Ibid

<sup>72</sup> Ibid

in place by the executive.<sup>73</sup> The preferred institution to proffer such review is the judiciary through the courts. Where a scrutiny of the assessment of threats is done to ensure the threats as assessed are genuine and free of any erroneous evaluation that can have a colossal impact on rights protection.<sup>74</sup> The purpose of such scrutiny is not to discredit the executive, neither does it put the exercise of power by institutions in a crisis. Scrutiny of the executive does not necessary put the judiciary in a quandary. It vitiates judicial deference giving the judiciary room to offer another perspective in the assessment of threats to ensure the protection of rights and freedom that would be ignored by the arbitrary concerns for security.<sup>75</sup> The suitable position of the judiciary as an impartial arbiter allows for balanced assessments of threats and the application of suitable and appropriate measures to counter such threats. Even though power is not delegated to judges electorally like it happens for the legislature and the executive, judicial authority emanates from the people<sup>76</sup> and therefore has a republican quality.<sup>77</sup> This gives judiciaries a role equivalent to the other two branches.

This point is further buttressed by Kofi Annan, according to him; you cannot trade off human rights on the claim that you are effectively taking action to combat terrorism. He advocated for a policy that protects human rights, democracy and social justice as the best deterrence against terrorism<sup>78</sup> where the law of human right must also benefit the terrorist.

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<sup>73</sup> William G. O'Neill, Human Rights, the UN and the Struggle against Terrorism, IPA, CIO Columbia University, 7 NOVEMBER 2003 NY

<sup>74</sup> Ibid

<sup>75</sup> Ibid

<sup>76</sup> Article 159 of the Kenyan Constitution.

<sup>77</sup> Jenkins D (2011). The Lockean Constitution: Separation of Powers and the Limits of Prerogative, McGill Law Journal Volume 56, (3), 543-589. <https://doi.org/10.7202/1005132ar>

<sup>78</sup> Kofi Annan, SG - UN, Speech to the members of the Security Council on 18 January 2002

These authors proffer the demand side of policy where the role of the judiciary in matters of security is preferred. They however fail to advocate for the supply side, the practicability of how such a role can be played by judiciaries as well as the proclivity of judiciaries to contribute to securitization.

Judge Posner and Youcef Yousfi advocate for training of judges and prosecutors in matters of security and in particular, terrorism. Justice Posner recommends examination and clarification of the role of the judiciary in counterterrorism.<sup>79</sup> He agrees that the judicial role is not in doubt, but he takes issue with the fact that such a role has never been clearly established or even systematically examined. He also argues that the judiciary as an institution has never been assessed to determine whether it possess the operational capability to play such a role.<sup>80</sup> Judge Posner has described the attempts to articulate the role and responsibility of the judiciary in counterterrorism, as incoherent at best.<sup>81</sup> He states that judicial officers lack the overall judicial and administrative responsibility necessary to review counterterrorism measures. That judges do not even have security clearance, education, training or experience in national security matters to inform or advice their decisions.<sup>82</sup> Youcef Yousfi follows closely to recommend the training of prosecutors and judges to enhance their knowledge and legal skills and arsenal to handle and respond to terrorism.<sup>83</sup>

These authors contend that the judiciary is incapable of dealing with securitization based on their education. This study seeks proffer an alternative view on the basis that the judiciary is an

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<sup>79</sup> Richard A. Posner, *How Judges Think*, Harvard University Press, 2008.

<sup>80</sup> *Ibid*

<sup>81</sup> *Ibid*

<sup>82</sup> *Ibid*

<sup>83</sup> Address at the Africa-America Institute An AAI symposium – February 17, 2006 available at <https://www.aaionline.org/wp-content/uploads/2013/03/FullReportTerrorismSymposium2006.pdf> accessed on September 1, 2017

institution made of experts. That expertise is in law; they do not need training in security in order to adjudicate cases. Evaluation of threats to security is a fact based issue to certain prevailing vulnerabilities both internal and external that are found in the short and long term National Security Policy. This study seeks to highlight how the judiciary can be involved *a priori* and contribute to the enactment of measures to combat such threats that are well within the legal means. This study will go ahead and proffer solutions that will avoid the inevitable backlash that follows when the judiciary annuls executive measures and plunders the institutions into a discourse that is removed from reality.

### 1.7 Conceptual Framework

Two perspectives provide an analytical framework for this study. First, Barry Buzan offers the potency of examining a state's national security in an expanded scope; the triage of security.<sup>84</sup> He conceptualizes security as states' capacity to maintain independent functional probity against hostility through the process of securitization.<sup>85</sup> The overarching nature of security provides this study with the basis of analyzing Kenya's security relations. This conceptualization is however state centric and does not delve into interstate security relations and the judicial role function in matters of security, which is the focus of this study.

That brings us to the second perspective; Locke's prerogative of power. Political systems always trumpet their commitment to the rule of law.<sup>86</sup> Citizens are better off with established rules for all to follow as opposed to arbitrary rule or a state of anarchy.<sup>87</sup> The recognition of courts as

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<sup>84</sup> Barry Buzan, "New Patterns of Global Security in the Twenty-first Century" *International Affairs*, 67.3 (1991), pp. 432-433

<sup>85</sup> *Ibid*

<sup>86</sup> Barros Robert, *Dictatorship and the Rule of Law: Rules and Military Power in Pinochet's Chile*. in Maravallad Przeworski. eds, *Democracy and the Rule of Law* Cambridge 2003.

<sup>87</sup> *Ibid*

political institutions is widely accepted as a formal mechanism with significant delegated powers to resolve political, social and economic conflicts within society. A government that entrusts legal experts with the duty to interpret and enforce its laws is a government that has agreed to abide by those same laws. In that sense, the courts can then go ahead and rule against the executive and sustain the law of the land.<sup>88</sup> Locke is of particular interest to this study since the fight against terrorism has revealed that sometimes extraordinary response is required on the part of the state, where extralegal means are employed. Those who acknowledge the legitimacy of extralegal action in whatever circumstance, do so at the very expense of trampling on the belief that legitimacy only emanates from and accords with the law. Locke precisely takes this stand. Locke argues that the prince reserves a right to do what is good for his society. This is a right that the prince has by the common law of nature. That the prince can exercise this right without the sanction of law and even against the law.<sup>89</sup> This position is backed by those who see a need for the executive to retain some discretionary power that allows it to act outside the law. This is the power that allows the discretion to deny citizens some of their liberties. The power that is needed to ensure security and therefore derogating from some freedoms is a small price to pay for such security.<sup>90</sup>

In this paper a possible justification for the executive's choice to ignore its own law in the fight against terrorism finds credence from John Locke's prerogative of power. Such power essentially handles instances where adhering to the rule of law would result in adverse harm to the society.<sup>91</sup>

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<sup>88</sup> John Ferejohn, Frances Rosenbuth, and Charles Shipan, *Comparative Judicial Politics* 2004 p. 1 available at [www.leitner.yale.edu](http://www.leitner.yale.edu)

<sup>89</sup> All parenthetical references are to the *Two Treatises of Government*, cited by treatise and section.

<sup>90</sup> Transnational terrorism security and the Rule of Law, *The Ethical Justness of European Counterterrorism Measures*, December 19, 2008, p. 7.

<sup>91</sup> John Locke, *Second Treatise of Government* (Gutenberg eBook, 2005) available at <http://Gutenberg.org/files/7370/7370-h/7370-h.ht>

Prerogative of power permits extralegal measures by governments provided such measures are executed for the common good of the society.<sup>92</sup>

Locke's prerogative argues the inadequacy of law, where the law is incapable of providing for everything. Legislation requires foresight, and those who have the duty to legislate lack total foresight and are unable to provide for everything that is useful to the society through legislation. That prediction of a good number of things is achievable and hence legislation and regulation can be put in place however this cannot be for everything, only what is foreseeable. The fact that it is almost impossible to reduce everything to the application of law is what weakens the rule of law because that would necessitate a near-total capacity to foresee the future. The fact that terrorism found all the countries in the world unprepared points to a lack of total foresight. Most laws relating to terrorism were enacted after major terrorist attacks like September 11. The PTA in Kenya came into force in 2012 yet terrorism existed many decades before that and Kenya had no law to fight it. This argument broadens the necessity for Locke's prerogative of power to remedy to the legal deficiencies.

According to Justice Murphy, compelling factors must exist that expose the incompatibility of right with public safety before such right are temporarily suspended.<sup>93</sup> Justice Murphy seems to recognize despotic tendencies that invoke real and imagined threats to public welfare to justify needless abrogation of rights. Governments fall in the trap of terrorism demonstrated by conduct that ignores constitutional and legal checks and violating rights. Since terrorism is a war of

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<sup>92</sup> *Ibid*

<sup>93</sup> Michael J. Kelly in his article *Executive Excesses V. Judicial Process: American Judicial Responses to the Government's War of Terror* available at [www.mckinneylaw.iu.edu](http://www.mckinneylaw.iu.edu)



ideology based on values, arbitrary actions by governments, act as a catalyst to recruitment. This marks an entry point for weakness in the Lockean prerogative.

An obvious critique of prerogative power would be limiting such power to what is good, ostensibly eliminating an outright abuse of such power.<sup>94</sup> The one who executes the prerogative must obey the law of nature just like the rule of law. Neither can act in a manner forbidden by the law of nature. This study seeks to amalgamate prerogative of power in explaining executive ignorance of the law and demonstrate that in fact prerogative power does no good in the fight against terror. Acting outside the purview of the law only seeks to breed more grievances and act as a recruitment tool and the critical role played by the judiciary stands as a guardian of the law against executive excesses.

Therefore, the fusion of Buzan's triage of security and Locke's prerogative of power, provide a conceptual framework that defines security and analyses institutional behavior and the place of the law in the fight against terrorism. This framework is variant to international cooperation that allows for individual, state and international security under the law.

### **1.8 Research Hypotheses**

**H<sub>1</sub>:** That underlying differentiated perspectives, is the executive's determination to use its prerogative of power in apparent disregard of the law and the courts in a bid to root out terrorism.

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<sup>94</sup>Ibid Note 91

**H<sub>2</sub>:** That judicial intervention in the war against terrorism in Kenya is proactive, through pronouncements that seek to bring all measures taken by the state within the ambit and operations of the law.

## **1.9 Methodology**

### **1.9.1 Research Design**

This study relied on longitudinal research design, specifically the employment of continuous measures to follow particular individuals over a prolonged period.<sup>95</sup> In particular, the study collected data on the role of two institutions; the executive and the judiciary in Kenya's International Security Relations over a continuous period of ten years; from 2006 to 2016. The data collected was used to continuously measure behavioral aspects particularly in how the two institutions responded to terror attacks. Retrospective studies were carried out mainly to observe the outcomes of judicial adjudication of terror attacks as well as executive responses to terrorism. Retrospective studies enabled this study to clearly show a temporal sequence between terror attacks, executive response to terrorism and the outcome of the judicial adjudication of such responses. Retrospective studies further allowed the study to examine the discourses and realities judicial role function inherent in the outcomes of judicial adjudication of terrorism cases.

### **1.9.2 Sampling Procedures**

This study purposively sampled data where selection was based on incidents of terror attacks that had corresponding executive discourse and resultant judicial adjudication with three primary strands. The first strand sought reported terror incidents, through cataloguing online databases.

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<sup>95</sup> Caruana, E. J., Roman, M., Hernández-Sánchez, J., & Solli, P. (2015). Longitudinal studies. *Journal of thoracic disease*, 7(11), E537–E540. <https://doi.org/10.3978/j.issn.2072-1439.2015.10.63>

The second strand targeted executive response to such terror attacks from available press releases, online news websites as well as the Kenya Gazette. The Final strand focused on judicial adjudication of the terror attacks as well as the executive responses available at Kenya Law Reports.

This study therefore sampled twenty terror attacks out of fifty-eight terror attacks in the period under study. The twenty attacks sampled had ten corresponding executive's responses to such attacks, some of the responses were applicable to more than one terror attack and that explains the disparity between the attacks and the responses sampled. The study further sampled eighteen cases that were adjudicated upon by the judiciary emanating from the sampled terror attacks and executive's responses to the attacks. This sampling strategy enabled the study access most relevant information.

### **1.9.3 Data Collection Methods**

This study relied on secondary sources of data obtained from the Kenya Gazette, Kenya Law Reports and online sources. The reliance on secondary sources of data had impetus and was advised by the retrospective nature of the study. Primary data was negated since the study was interested in past terror attacks followed by an analysis of the nuances inherent in executive decisions and judicial discourses appertaining in the determination of the said decisions.

#### **1.9.4 Data Analysis**

The study used content analysis, which is the study of recorded information<sup>96</sup>. Content analysis was most suitable given its flexibility and unobtrusive nature that enabled data collection and analysis without the direct involvement of participants.<sup>97</sup> The study was interested in terror attacks that were followed up with executive responses and resultant judicial adjudication of the attacks and or the executive responses. The study was able to review reported terror attacks that had corresponding executive responses and judicial adjudication of matters related to the attack or the executive response. An analysis of the variables particularly discourses inherent in the executive's response was juxtaposed against judicial discourses as contained in the judicial findings. The study cumulatively put incidences together and identified perceptions gaps. The study then identified and analyzed variables that underpinned the differentiation in institutional discourses.

#### **1.9.5 Validity and Reliability of Techniques**

Test retest reliability was employed to validate the techniques used in study. The techniques used yielded similar results over the entire period of the study. A double dynamic thereat on one hand the study noted that the executive consistently attempted to dominate matters of security at the exclusion of the judiciary in response to terror attacks. On the other hand, the judiciary discourse in its adjudication, consistently sought to bring all measures taken by the executive in the fight against terrorism within the ambit of the law.

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<sup>96</sup> Klaus Krippendorff, *Content Analysis: An Introduction to Its Methodology*, Sage Publications Inc, 2<sup>nd</sup> Ed. pg. 146.

<sup>97</sup> Ibid

## **1.10 Chapter Outline**

This study contains five chapters. The foregoing is the first chapter; whose components lay the background for the rest of the chapters.

Chapter Two outlines a historical analysis of the problem statement in Chapter One. It discusses the conception of regime security and the variables that underpinned judicial inaction in matters of security in Kenya. It analyses instances of executive dominance that resulted in legal amendments that instrumentalized the judiciary to affirm executive's decisions in matters of security. The chapter analyses how the subjective conception of insecurity and the failure to invoke the judicial role function in security matters led to violation of human rights exacerbating regime insecurity. The discussions in the chapter anchors the subsequent discussions in chapter three on the judicial role function in matters of security when terrorism was a matter of national security in Kenya.

Chapter Three responds to the first of question of the study. It examines the factors that explain differentiated actor discourses and the realities of judicial institutional behavior in the war against terror. It examines the political factors underpinning executive responses and the legal adjudication of the said responses and well as terrorism cases. Specifically, chapter three looks at the executive's use of its power and its interpretation of the law and the judicial examination of such power in the fight against terrorism.

The subject of Chapter Four is to respond to the second question of the study; the judicial adjudication of terror cases and how it mediates Kenya's international security relations. It

specifically analyses judicial adjudication of renditions and the enforcement of Kenya's international legal obligations in the fight against terror. It contends that the judicial discourse seeks to bring all measures taken by the executive in the fight against terrorism in the ambit of the law. The results of such adjudication, fosters and affirms a judicial role function in matters of national and international security.

Chapter Five concludes and recapitulates on the study by specifically responding to four tasks. The first task is a recapitulation of the core objectives of this study with a view to evaluate the extent to which each tasks have been met. The second task is a recapitulation of the hypotheses of the study. The third task anchors the conclusion of the study and the fourth task outlines policy recommendations for enhancing the judicial role function in the security agenda.

## CHAPTER TWO

### KENYA'S JUDICIARY AND REGIME SECURITY

#### 2.0 Introduction

Thomas Hobbes advocated for a Leviathan that could compel the society to do right.<sup>98</sup> John Locke, attributed to a society in a self-regulating state of nature.<sup>99</sup> The contrast between these two worldviews led to different ideas; authoritarianism in the former and liberal in the later.<sup>100</sup> Upon attainment of independence in Kenya, the executive's conduct of national security, lent itself to reflect the Hobesian perspective of authoritarianism.

Authoritarianism is conceptualized by Buzan's idea of the use of exceptional measures including force to combat significant threats to security to ensure survival.<sup>101</sup> Buzan looks at the multiplicity of security to address the various aspects within the society and how they are constructed or securitized.<sup>102</sup> The conceptualization and operationalisation of Buzan's perspectives in the conduct of national security in Kenya accorded with survival of the political regime. The conception of threats to national security, signified threats on the political regime. The government's response to such threats included the use of force to clamp down on political dissidents, indicative of authoritarianism.

At the same time, the 1963 Constitution had created an independence and impartial judiciary whose purpose was to administer the rule of law. However, given the subjective conception of

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<sup>98</sup> Thomas Hobbes, *Leviathan*, 1651

<sup>99</sup> *Ibid* Note 91

<sup>100</sup> Nico Tuk, *Hobbes Versus Locke- Redefining the War on Terror*, available at [https://learn.saylor.org/pluginfile.php/425505/mod\\_resource/content/1/HobbesVersusLocke.pdf](https://learn.saylor.org/pluginfile.php/425505/mod_resource/content/1/HobbesVersusLocke.pdf)

<sup>101</sup> *Ibid* Note 84, pp. 432-433.

<sup>102</sup> *Ibid*

threats to national security, the judiciary tended to defer to executive views in such matters.<sup>103</sup> The notion of judicial deference accorded with the discourse that the executive was constitutionally charged and structurally better suited to make such decision.<sup>104</sup> The role function of the courts was therefore deeply modest in rubberstamping the executive's national security decisions.<sup>105</sup> This made the executive, the main repository of decision making in matters of national security.

This chapter analyzes these perspectives, by recapitulating historical discourses that morphed judicial deference by responding to the question; what factors underpinned judicial inaction in matters of national security? Its objective is to show the subjective manner in which the executive perceived threats to national security, thereby usurping the judicial role function leading to its suppression of dissent, thereby exacerbating regime insecurity. The core argument is that the executive instrumentalized the judicial role function to reaffirm its centrality as a lone actor in matters of national security. Underpinning the organization of this chapter; the first section reviews the executive's dominance in matters of national security during the Jomo Kenyatta Regime from 1963 to 1978 relegating the judicial role function. The second section analyzes characteristics of judicial subservience in the Moi regime of 1978 to 2001 that preceded rights violations. The last section reviews the change in perception of threats to national security in the Kibaki regime from 2002 to 2005.

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<sup>103</sup> Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 *Fordham L. Rev.* 827 (2013). Available at: <http://ir.lawnet.fordham.edu/flr/vol82/iss2/16>

<sup>104</sup> *Ibid*

<sup>105</sup> *ibid*



## **2.1 Executive Dominance of National Security during Jomo Kenyatta Regime**

Upon attainment of independence, the government of Jomo Kenyatta established a nascent Africanized state.<sup>106</sup> In this government, the judiciary occupied a constitutional status, envisaged as an independent institution, capable of determining the constitutional confines of state action.<sup>107</sup> The constitution created an institution that was potentially powerful, however; the judiciary was a conservative institution,<sup>108</sup> favoring executive supremacy and limiting judicial review of executive decisions to egregious cases of improper administrative action. This was envisaged by the courts inaction and acquiescence to the executive's suppression of political dissent and human rights violations as discussed hereunder.

### **2.1(a) The Suppression of Political Dissent**

The inception of an autocratic executive started in 1964, when Moi's KADU, willfully dissolved, joined KANU that was at the time headed by the president Jomo Kenyatta.<sup>109</sup> This amalgamation unified Kenya into one party state even though parliamentary democracy was constitutional.<sup>110</sup> In the absence of opposition, Jomo Kenyatta's political monopoly resulted in oppressive policies leading to political and ideological differences with his Vice President Oginga Odinga who faulted Kenyatta's policies that generally oppressed the common man.<sup>111</sup> The ideological gap was widened following the murder of Pio Gama Pinto in 1965 a close associate of Oginga Odinga.<sup>112</sup> Apprehensive of Odinga and his supporters, Jomo Kenyatta weakened Odinga's

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<sup>106</sup> Nzau, Mumo and Guyo, Mohammed (2018) "The Challenge of Securing Kenya: Past Experience, Present Challenges and Future Prospects," *The Journal of Social Encounters*: Vol. 2: Iss. 1, 37-59.

<sup>107</sup> T. P Ghai, "Judicial Protection Against the Executive", National Reports, New York, 1969

<sup>108</sup> Ibid

<sup>109</sup> Mutua, Makau wa. "Human Rights and State Despotism in Kenya: Institutional Problems." *Africa Today*, vol. 41, no. 4, 1994, pp. 50-56. JSTOR, [www.jstor.org/stable/4187016](http://www.jstor.org/stable/4187016).

<sup>110</sup> Ibid

<sup>111</sup> Sandra Obi, Abigael Kenelwa Ayiro, and Kennedy Ochieng' Aketch. *Jaramogi Oginga Odinga and the Rise of Opposition Politics in Kisumu: From KANU to the FORD-K*, 2014 available at <https://maclcki.org/stories>.

<sup>112</sup> Ibid

position in KANU by splitting the Vice President's power and sharing out among eight other leaders in KANU. This prompted the resignation of Oginga Odinga from KANU and he subsequently formed KPU.<sup>113</sup> In response, Kenyatta banned KPU, and detained some of its leaders under the detention-without-trial laws,<sup>114</sup> others were exiled, and some assassinated.<sup>115</sup>

Jomo Kenyatta's harsh response was conceived in his perception of insecurity; in terms of political dissent. The executive securitized political dissent, elevating regime survival to the status of national security.<sup>116</sup> The net effect of this equivalence as Buzan notes the tendency to equate political threats with military threats.<sup>117</sup> Such consideration in turn provides a rationale for a military response. Political dissident in Kenya sought to widen the democratic space as opposed to weakening the state. The executive response was militaristic geared towards demobilizing popular forces and nationalist movements that questioned the executive.<sup>118</sup> Further Kenyatta instrumentalised the security machinery to deal with the political opposition.<sup>119</sup> Regime survival more often than not superseded all other national security concerns. What followed was the consolidation of power, carried out to the exclusion of other Kenyans with diverse opinions.

Kenyatta's authoritarianism ensured Kenya remained a one party state for all practical reasons. When subjects accept the use of power by their leaders, that acceptance legitimizes that power.<sup>120</sup> In this case, Kenyatta's legalization of one party state, it was accepted and was not challenged before the judiciary despite clear constitutional backing the judiciary had power to uphold.

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<sup>113</sup> Ibid

<sup>114</sup> Ibid Note 106 pp. 50–56.

<sup>115</sup> They include Pio Gama Pinto assassinated on February 25, 1965, Tom Mboya assassinated on July 5, 1969 in Nairobi, Josiah Mwangi Kariuki assassinated on March 2, 1975

<sup>116</sup> Ibid Note 106.

<sup>117</sup> Ibid Note 84.

<sup>118</sup> Ibid Note 106

<sup>119</sup> Ibid

<sup>120</sup> Weber Max, *Law in Economy and Society*, 1954 New York: Simon & Schuster.

Weber rightly argued that authoritarian power tended to be irrational or inconsistent<sup>121</sup> and Kenyatta's ban of opposition against the law was irrational. In the end, the subjective perception of insecurity in terms of political dissent, created inequalities and a direct link between the executive's policies and insecurity in Kenya.

The 1971 attempted coup against Kenyatta's political monopoly was a natural reaction to such irrationality. His response sought to further his authoritarianism through a perfected and legalized repression of those involved in plotting the coup. Only this time, using the judiciary to banish them to detention.<sup>122</sup> Twelve men were arraigned before Hon. S K Sachdeva, Magistrate who sentenced them to between 7 and 9 years in prison depending on their culpability.<sup>123</sup> They included Joseph Daniel Owino, Gideon Mutiso, Joseph Ben Ouma Muga, Apollo Abraham Wakiaga, Juvenalis Benedict Aoko, Joshua Omoth Ooko, Christopher Okech Oduor, Eliud Kipserem arap Some Langat, Eric Kimtai Chepuony, Elijah Mukaya Sabwe, Japhetha Oyangi Mbaya and Ahmed Abdi Aden.<sup>124</sup> Notably Major General Joseph Ndolo who had led Kenya's military since independence and Chief Justice Kitili Mwendwa, the first Kenyan Chief Justice, were also arrested alongside a coterie of politicians allied to opposition leader Oginga Odinga and placed under political detention.<sup>125</sup> Kenyatta had succeeded in making himself an imperial president and emasculated the judiciary only invoking its role function to punish the very opponents he had created with his political monopoly.

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<sup>121</sup> Ibid

<sup>122</sup> Article by Ndungu wa Gathua available at <http://google.com/amp/s/hivisasa.com/posts/the-12-men-who-wanted-Kenyatta-out-of-power>

<sup>123</sup> Ibid

<sup>124</sup> Ibid

<sup>125</sup> Standard reporter, Blast from the Past: Intrigues that led to the first coup attempt in Kenya, reported on Feb 12 2017

Cognizant of the fragility of his government, Jomo Kenyatta ensured the formulation and implementation of national security policies remained the preserve of the presidency.<sup>126</sup> All security-related ministries and specialized departments fell under his office. Kenyatta initiated legal amendments that abolished constitutional safeguards of devolution, parliament and judicial independence, as well as office tenure for judges.<sup>127</sup> The 1966 amendment in Act No. 18: withdrew parliamentary exercise of powers in emergency, vesting the same in the president, who could forthwith order detention without trial.<sup>128</sup> Kenyatta's interests were to have a tight and exclusive control over the security system to protect his regime.<sup>129</sup> When a terror attack was carried out in 1975 at OTC Bus Station in Nairobi, no one claimed responsibility for the same and the police declined to speculate on the identity and motive of the bomber.<sup>130</sup> This was the first terror attack on the Republic of Kenya and the executive ignored the same since insecurity at the time was perceived in terms of political dissent while terrorism was a non-issue.

Kenyatta continued to wield extra-legal authority against the backdrop of the repressive policies and repeatedly contended Kenya's unpreparedness for liberal democracy.<sup>131</sup> Kenyatta took every step to hobble the opposition and steal elections. In the 1974, Paul Ngei, Kenyatta's ally was found guilty of committing an election offence. The court led by the Chief Justice James Wicks barred Ngei from contesting any poll for five years as the law dictated.<sup>132</sup> To save his ally, Kenyatta initiated an amendment to extend his power to pardon election offenders. While

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<sup>126</sup> Ibid Note 106

<sup>127</sup> Okoth-Ogendo, *The Politics of Constitutional Change in Kenya since Independence, 1963-69.* African Affairs, vol. 71, no. 282, 1972, pp. 9-34. JSTOR, [www.jstor.org/stable/720361](http://www.jstor.org/stable/720361).

<sup>128</sup> Ibid Note 106

<sup>129</sup> Ibid

<sup>130</sup> The OCT terror attack claimed 27 lives, the attacks took place in a lavatory at the Starlight Nightclub, the Information Bureau and at the OTC Bus station according to the KNA available at

[http://info.mzalendo.com/media\\_root/file\\_archive/REPORT\\_OF\\_THE\\_COMMITTEE\\_ON\\_WESTGATE\\_ATTACK\\_-\\_4.pdf](http://info.mzalendo.com/media_root/file_archive/REPORT_OF_THE_COMMITTEE_ON_WESTGATE_ATTACK_-_4.pdf)

<sup>131</sup> Ibid Note 106

<sup>132</sup> Election Petition No. 16 of 1974

contributing to debate on the Bill, Vice President, Daniel Arap Moi supported the amendments and asserted that the President was above the law and should have all powers since they belonged to him.<sup>133</sup>

Charles Njonjo the AG at the time published the Bill, it was tabled in Parliament and passed in a single afternoon. The following day, Kenyatta signed it into law<sup>134</sup> and Ngei received his pardon. The audacity of the president mirrored little regard for the law and the courts. The pardon by Kenyatta demonstrated the danger of unchecked benign executive power to act in total disregard of the court. A reflection of the non-authoritative nature of the judiciary. Presidential constitutional pardon is a generous power used to correct systemic injustices without which it would be imperfect and deficient for the executive's political morality.<sup>135</sup> Kenyatta's use of this power in Ngei's case is what Bentham's jargon described as, "from pardon power unrestricted, comes impunity."<sup>136</sup> Kenyatta gifted Ngei with impunity, trumpeting his dominance over the judiciary, entrenching the discourse that the president was above the law. In reality however, the executive and the judiciary were co-equal institutions in the same government.

### **2.1(b) Preservation of Security Acts and Human Right Violations**

The Preservation of Public Security Act was a colonial relic that Jomo Kenyatta retained in the independence constitution allowing him to rule under emergency powers.<sup>137</sup> In 1966, the law was amended and parliament could only review emergency powers after eight months.<sup>138</sup> All that was

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<sup>133</sup> Ibid

<sup>134</sup> Ibid

<sup>135</sup> James D. Barnett, Grounds of Pardon, *The. 17 Am. Inst. Crim. L. & Criminology* 490 (1926-1927)

<sup>136</sup> Jeremy Bentham, *Theory of Legislation*, Atkins' ed., vol. 2, pp. 171-2; F. Lieber, *Political Ethics*, 2nd ed., vol. 2, pp. 397-8

(1874).

<sup>137</sup> Section 85 of Kenya's Independence Constitution recognized the Preservation of Public Security Act.

<sup>138</sup> Act No. 18/1966 Kenya House of representatives Official Reports, v.9 Part 1 (1966) Government Printer, Nairobi 278-279.

required to invoke this law, was for the president to think there was an emergency, or a threat of one. The power permitted the detention of persons without trial, imposition of curfews, control of aliens, censorship, and prohibition of assembly and acquisition of property.<sup>139</sup> This law gave the president immense powers that could be invoked in the name of security limiting individual rights and freedoms.<sup>140</sup> A further amendment removed the requirement for reasonable justification for derogation, allowing for use of such powers on a whim by the President or delegated Minister for Home Affairs.<sup>141</sup> Parliament willfully passed the amendments despite the constitutional protections individuals had under Chapter V of the Constitution that provided for extensive civil and political rights of Kenya's people. In particular section 72(1) disallowed derogation from the right to liberty making the amendments difficult and confusing and above all unconstitutional.

Political dissenters were detained under this law; in 1967, John Keen was detained for his criticism of the government.<sup>142</sup> In 1975, following the murder of MP J.M. Kariuki,<sup>143</sup> two vocal MPs were detained for accusing the government of cover up in the murder.<sup>144</sup> President Kenyatta made the government's stand on detention without trial clear in a 1975 address to the National Assembly by warning that dissidents would not be tolerated and that similar action would be taken against any MP who did not support the government or tried to obstruct it.<sup>145</sup>

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<sup>139</sup> Ibid

<sup>140</sup> Section 76, 79, 80 and 81 of the Constitution were amended to allow for derogation.

<sup>141</sup> Ibid

<sup>142</sup> Uche, *Human Rights and the Kenya National Assembly 1970-1975*, 16-17 (1976)(unpublished paper; sponsored by the Institute of Public Administration, Dublin, Ireland)

<sup>143</sup> *The Times* (London), Mar. 12, 1975, at 9, col. h and Mar. 13, 1975, at 7, col. c. 28, 1977

<sup>144</sup> Ibid

<sup>145</sup> Ibid

The judiciary upheld the validity of the actions of the president under this law. In *Ouko v Republic*, the court declined to interrogate the grounds for his detention holding its lack of jurisdiction.<sup>146</sup> This holding was a continuum of judicial subservience to the executive.

Judiciaries are essential guardians of the rule of law in constitutional democracies, upon which the scheme of checks and balances is assured.<sup>147</sup> Judicial insulation from political control is the hallmark of the legal system.<sup>148</sup> Judiciaries are not accountable to the electorate, insulating them from the political process.<sup>149</sup> This allows judiciaries to stand as the ultimate custodians of fundamental rights.<sup>150</sup> For the judiciary to act in continuum to the executive's disregard of the rule of the law is tragedy for any such democracy. The Kenyan judiciary failed in its role function showing no inclination to uphold the rule of law. The failure by the judiciary set Jomo Kenyatta on a trajectory of legal disobedience.<sup>151</sup> The lack of legal constraints created hostile political environment, exacerbating insecurity.

The marginalization of the Northern frontier is a legacy that Jomo Kenyatta inherited from the colonial government. He reinforced his government's discriminatory development policies and illegal instrumentalization of provincial administration directives.<sup>152</sup> Such policies included discrimination on individual basis, marginalization and underdevelopment.<sup>153</sup> This marginalization sparked off pro-secession demonstrations known as the Shifta Wars.<sup>154</sup> The

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<sup>146</sup> HCCC no. 1159 of 1966 (unreported)

<sup>147</sup> Mutua, Makau. "Justice under Siege: The Rule of Law and Judicial Subservience in Kenya." *Human Rights Quarterly*, vol. 23, no. 1. 2001, pp. 96–118. JSTOR, [www.jstor.org/stable/4489325](http://www.jstor.org/stable/4489325).

<sup>148</sup> *Ibid*

<sup>149</sup> *Ibid*

<sup>150</sup> *Ibid*

<sup>151</sup> *Ibid* Note 106

<sup>152</sup> TJRC, *The Final Report (2013)* available at <http://digitalcommons.law.seattleu.edu/tjrc/7>.

<sup>153</sup> *Ibid* Note 106

<sup>154</sup> *Ibid* Note 103

Jomo Kenyatta's government responded to the demonstrations quite violently by declaring a state of emergency.<sup>155</sup> This measure allowed security forces to detain people without trial, confiscate property and restrict the right to assembly and movement.<sup>156</sup> In 1967, the state launched an operation by invading the Waso Boran community where civilians were confined to camps.<sup>157</sup>

Arthur M. Schlesinger Jr, criticized presidential aggrandizement, he described the imperial president as defective, a 'Frankenstein monster.'<sup>158</sup> Jomo Kenyatta's extensive assertions of presidential authority appeared to fulfill Schlesinger's prediction. Vice President Moi's description of Kenyatta as a 'above the law', signified patriotic reverence and idolatry. This description isolated the president from the company of lesser breeds, including the judiciary, an institution of equal value to the executive.

Judicial independence is the cynosure of governance, of democracy and its failure in Kenya led to a state of insecurity. This exacerbated civil disobedience that skyrocketed even as the number of killings increased. This was mass punishment of entire communities and yet no one was prosecuted for perpetrating such injustices. This was a discourse of state leadership acting contrary to its role as the leviathan, the provider of security, having muzzled its own judiciary into subservience.

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<sup>155</sup> Legal Notice No. 43 of 1967 cited as the Public Security (Control of Movement) Regulations

<sup>156</sup> Ibid

<sup>157</sup> The Final Report of the Truth Justice and Reconciliation Commission of Kenya (2013) available at <https://www.jfjustice.net/downloads/1460970274.pdf>

<sup>158</sup> Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Boston: Houghton Mifflin, 1973), ix.



## 2.2 Instrumentalization and Centralization of Power in the Moi Regime

President Moi inspired a wide spread expectation of a democratic and human rights oriented administration.<sup>159</sup> This perception was affirmed by the actions and promises Moi made upon ascension to the presidency. The release of political detainees,<sup>160</sup> the assurance of security<sup>161</sup> and the forced resignation of civil servants implicated in corruption including the Police Commissioner, Bernard Hinga,<sup>162</sup> were all actions indicative of positive change. However, the changes were short lived since Moi slipped back to his predecessor's political and economic policies by pledging to follow Kenyatta's *nyayo*.<sup>163</sup> Judicial subservience was entrenched at the behest of executive dominance, more particularly, the dominance of the ruling party KANU under the leadership of one man as discussed below.

### 2.2(a) Consolidation of Executive Power through Legal Amendment

Legal amendments provided for the consolidation of power. In December of 1978, Moi rushed a bill through parliament stripping it of its emergency powers and arrogated the same to the presidency.<sup>164</sup> It is pursuant to this law that Charles Rubia, Raila Odinga, Kenneth Matiba and George Anyona faced detained without trial following their arrest in the clamor for multiparty democracy.<sup>165</sup> Moi insured his grip on power by methodologically expropriating the role functions of the other branches of government, thereby eroding the principle of the separation of powers that became ineffectual.

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<sup>159</sup> Ibid Note 6

<sup>160</sup> Ibid

<sup>161</sup> Haugerud, Angelique, *The Culture of Politics in Modern Kenya*. 1995, Cambridge: Cambridge University Press, p. 82

<sup>162</sup> Ibid Note 6

<sup>163</sup> Swahili for footsteps

<sup>164</sup> Constitution of Kenya (Amendment) Act No. 18 of 1966:

<sup>165</sup> KAACR, The Cradle, ICJ, Kenya Section, COVAW, OMTIC, "State Violence in Kenya", available at

[www.reliefweb.int/sites/reliefweb.int/files/resources/F99E41A580CBD14DC1256FE300372D90-omct-ken-28feb.pdf](http://www.reliefweb.int/sites/reliefweb.int/files/resources/F99E41A580CBD14DC1256FE300372D90-omct-ken-28feb.pdf)

Early into Moi's presidency. a terror attack at the Norfolk Hotel in 1980, left 20 people dead and more than 80 wounded.<sup>166</sup> The security agents in Kenya identified the bomber as Quddura Mohammad Abdel-el-Hamid alias Muradi Alkali.<sup>167</sup> The PFLP denied the allegation that the movement was responsible for the attack given Quddura was their member.<sup>168</sup> No further investigations and or legislative measures were taken after this attack. The Kenyan government never took the initiative to prosecute those mentioned as responsible for the attack. There was no attempt to invoke the judicial role function in dealing with the terror attack. Moi's response mirrored the response by Jomo Kenyatta to the earlier attack in 1975 at OTC Bus stage - inaction. Terrorism remained a non-issue.

In juxtaposition, an attempted coup was a matter of national security. Moi's response to the August 1982 coup attempt by military officers from was stern and brutal.<sup>169</sup> The judiciary was bypassed in favour of the torture and court martial of the mutineers.<sup>170</sup> In addition, Moi introduced section 2A of the Constitution transforming Kenya into a de jure one-party state.<sup>171</sup> Laws were enacted that served to limit judicial independence.<sup>172</sup> The Chief Justice and puisne judges became presidential appointees and their security of tenure was subsequently removed.<sup>173</sup> Parliament failed to stand in the way of the legal amendments, given the control by the executive. The president was in a position to manipulate and exploit parliament and the judiciary

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<sup>166</sup> Kiruga Morris (2013, September). 20 Killed in Bomb attack on Norfolk. Available at <http://mobile.nation.co.ke/lifestyle/1950774-1993444-format-xhtml-tt6skxz/index.html> accessed on July 28, 2017

<sup>167</sup> According to Data compiled by JULIET ATELLAH, the Elephant - Speaking Truth to Power available at: <https://www.theelephant.info/data-stories/2019/03/04/an-aftermath-of-terror-attacks-in-kenya-since-1975/>.

<sup>168</sup> Associated Press, "Arab Guerillas Deny Accusation by Kenya on Bombing of a Hotel", 9 January 1981. Available on the web: <http://query.nytimes.com>. Accessed on June 12, 2013.

<sup>169</sup> Kamau Mutunga, Moment of Bravado that Changed Kenya, in the article an estimated 600 to 1,800 lives were lost to quell the coup available at <https://www.nation.co.ke/lifestyle/dp2/How-1982-coup-changed-Kenya/957860-1467488-13v142az/index.html>

<sup>170</sup> Ibid

<sup>171</sup> Amendment Act No. 7 of 1982

<sup>172</sup> The 1986 Act No. 14 and 1988 by Act No.4 Laws of Kenya

<sup>173</sup> Amendments to sections 61(1) and (2) of the Constitution

for his own ends.<sup>174</sup> In this setting, parliament and judiciary lacked the muscle to check executive excesses.<sup>175</sup> Moi was the paramount leader with no limitation to his personal authority.

The doctrine of separation of power was officially repealed through the enactment of Act No. 14 in 1988 and Act No. 2 of 1988.<sup>176</sup> Alexis de Tocqueville observed, "Without the judiciary, the Constitution would be a dead letter."<sup>177</sup> De Tocqueville anticipated the potential of a judiciary that could inexorably be drawn into political conflicts, yet not politically accountable.<sup>178</sup> A judiciary that would only be persuaded by reasonability and reliant on the opinion of the public and the collaboration of other political institutions.<sup>179</sup> In the Moi regime, the judiciary was a dormant institution that was bypassed in the resolution of political disputes and national security and denied the cooperation of other political institutions.

## **2.2(b) Police Brutality**

In 1987, Amnesty International reported the torture of political dissidents by the police who were forced into submission.<sup>180</sup> The judiciary was accused of ignoring protests about such police brutality, even when detainees had visible wounds.<sup>181</sup> Torture is one aspect that defined Kenya's political environment and it was directly under the purview of the judiciary, but the judiciary failed and or ignored to adjudicate.<sup>182</sup> Kenyan judiciary often eluded the mandate to protect individual rights. The courts presided over cases of victims of torture and remained mum when

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<sup>174</sup> Ibid Note 6 at page 4

<sup>175</sup> Ibid

<sup>176</sup> Article 61 and 62 of the Constitution 1963 as Amended by Act No. 4 of 1988.

<sup>177</sup> A. De Tocqueville, *Democracy in America* 151 (P. Bradley ed. 1945).

<sup>178</sup> Ibid

<sup>179</sup> John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* Harvard University Press, Cambridge, Mass., 1980. Pp.

viii, 268

<sup>180</sup> Amnesty International, *Kenya, Torture, Political Detention and Unfair Trials*. AI Index AFR 32/17/87, 1987

<sup>181</sup> Ibid

<sup>182</sup> Ibid Note 11

the executive instrumentalised the law for political repression.<sup>183</sup> Political persecution disguised as treason and sedition took place under the watchful eye of the judiciary without any consideration of the constitutional values at risk.<sup>184</sup>

Drew Days acknowledged political interference with the judiciary.<sup>185</sup> Judicial power, inherent in judicial precedents and opinions has greater weight in the complex structure of law and democracy.<sup>186</sup> It is important for the judiciary to pay due attention to the interests of those who are vulnerable to abuse and discrimination.<sup>187</sup> The alternative provides a conducive environment for insecurity to permeate. In the Kenyan context, massacres executed by the state against Kenyans in the Northern Eastern Province accounted for the worst security atrocities. The discourse by the state in defense of the massacres was based on insecurity in the form of cattle rustling, disarmament and territorial protection against those who were at the time pushing for secession from Kenya.<sup>188</sup> The massacres committed included; the Bulla Karatasi Massacre in Garissa in November 1980<sup>189</sup> and the Wagalla Massacre in 1984.<sup>190</sup> In the latter men from the Degodiya clan were skirted in an operation purportedly to disarm them. The men were stripped naked and forced to lie on the Wagalla airstrip for several days as security agents torturing them.<sup>191</sup> Hundreds of men died on that airstrip.<sup>192</sup> The Lotirir Massacre in West Pokot District

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<sup>183</sup> Ibid

<sup>184</sup> Ibid

<sup>185</sup> Ibid

<sup>186</sup> Cordeid, Supporting Primary Justice in Insecure Contexts, Strategy Document: Policy And Programming Recommendations South Sudan And Afghanistan October 2016 available at <https://www.cordaid.org/en/wp-content/uploads/sites/3/2016/11/STRATEGY-DOCUMENT-FINAL-7-11-2016.pdf>

<sup>187</sup> Ibid

<sup>188</sup> Ibid Note 154

<sup>189</sup> Ibid

<sup>190</sup> Ibid.

<sup>191</sup> Ibid

<sup>192</sup> It is estimated that 2,000 – 5000 men died and their identification documents were destroyed by police, making it difficult to identify the dead bodies. Africa Watch, Taking Liberties, p. 274.

witnessed torture and sexual violence burning of houses and looting of property.<sup>193</sup> The attacks were systematic against civilians and thus qualified as crimes against humanity.<sup>194</sup> Assuming that indeed the state had a case against these people, natural justice and the laws in Kenya dictated that they be arraigned before the judiciary and charged accordingly. That was not the case.

Contextually, Hannah Arendt posits that terror has existed alongside states, revolutions, tyrants and despots.<sup>195</sup> The Kenyan massacres underpins that notion. The insecurity perpetrated by Kenya's security agents against its own people during the massacres, was terrorism. Using calculated violence to instill fear. Such terror went against the oldest justification for citizens giving up arm to the government who in turn ensures security for all from violence in Thomas Hobbes' state, protecting the individuals from each other and from foreign threats.<sup>196</sup> Unending insecurity is therefore without a government and without law and order. The Kenyan government acted contrary to the justification for its existence; turned against its own citizens and unleashed terror, ultimately failing in protection. Judicial inaction stemming from a judiciary that was too weak and so dependent on the executive's direction and therefore complacent in all executive's violations. Such a judiciary was incapable of dealing with matters of national security.

### **2.2(c) Rights Violation and the Rise of Popular Pressure from 1991 to 2001**

Moi had succeeded in systematically and effectively rendering the judiciary impotent.<sup>197</sup> Beginning in the early 1990s, demands and struggles for constitutional reform spread throughout

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<sup>193</sup> Ibid Note 154

<sup>194</sup> Ibid

<sup>195</sup> Hannah Arendt (1976) *The origins of totalitarianism*. New York, Harcourt Brace & Co., 440 (hereafter cited as OT)

<sup>196</sup> Thomas Hobbes, *Leviathan* 176-79, 250 (J.C.A. Gaskin ed., Oxford Univ. Press 1996) (1651).

<sup>197</sup> G.B.M Kariuki, 'The 23<sup>rd</sup> Biennial Conference of the International Bar Association', in the *Nairobi Law monthly*, 29, 1991 pp. 25-7

the country.<sup>198</sup> This followed a string of rights violations by the executive and the judiciary provided no refuge for those whose rights had been violated. The high court passed on its jurisdiction to enforce rights. This was in the case of *Kamau Kuria V. AG*<sup>199</sup> and the subsequently case of *Maina Mbacha* citing the absence of procedural rules.<sup>200</sup> *Simpsons CJ* upheld executive's power not only to detain but also determine the duration of such detention until service of a Detention Order.<sup>201</sup> He further discharged the executive from liability in the violation of rights.<sup>202</sup> These cases marked a departure from the historical role of the judiciary;<sup>203</sup> as a guardian of the constitution, and therefore destined to controversy.<sup>204</sup> The judiciary in Kenya operated in a mundane environment, it was no longer the guardian of the constitution and therefore far removed from controversy.

Consequently, popular pressures for change exerted by pro-reform forces came from within and outside the country. Coincidentally, IMF and World Bank imposed political and economic conditionalities to the grant of aid.<sup>205</sup> The political conditionalities related to respect for human rights, multiparty, accountability and transparency in governance.<sup>206</sup> The international and domestic pressure forced ruling party to act. In 1990, amendment No. 2 restored tenure of judges. Section 2A was repealed to allow for multiparty politics vide amendment No. 12.

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<sup>198</sup> Ibid

<sup>199</sup> Ibid

<sup>200</sup> Ibid

<sup>201</sup> *R v Commissioner of Prisons ex-parte Kamonye and Others* the Nairobi Law Monthly, April/May 1991, p. 16

<sup>202</sup> Ibid

<sup>203</sup> *Raila Odinga v. Attorney General* (1988) 10 Nairobi Law Monthly 31

<sup>204</sup> Ibid Note 183

<sup>205</sup> Swamy, Gurushri; DEC; Swamy, Gurushri\*DEC. 1994. Structural adjustment in the 1980s available at <http://documents.worldbank.org/curated/en/771151468774952469/Structural-adjustment-in-the-1980s-Kenya>

<sup>206</sup> Ibid

However, as the norm would have it, these positive changes were just short-lived. The regime continued to compromise the prosecution and the judiciary. For instance Mwakenya, a political movement that was perceived as a threat by the government,<sup>207</sup> had its members treated unfairly. They were prosecuted, convicted and sentenced by the DPP Bernard Chunga and the judiciary outside official working hours.<sup>208</sup> Further the judiciary denied bail to suspects even though it was a right guaranteed by the constitution. Suspects stayed in the cells for long periods even up to six months.<sup>209</sup> Appeals were futile because the appellate judges always ruled in favour of the prosecution.<sup>210</sup> Gitobu Imanyara, a lawyer found himself in detention when he won a case against a banning order in Kenya.<sup>211</sup> He was arrested severally and denied bail, even though he was sick and was released after three months due to international pressure.<sup>212</sup> Other lawyers who faced detention without trial included Willy Mutunga, John Khaminwa, Mohammed Ibrahim and Gibson Kamau Kuria.<sup>213</sup> They faced charges of treason and sedition and pressure placed on their clients to withdraw instructions.<sup>214</sup>

Conclusively, parliament and judiciary served to rubber stamp the executive's policies. British judges continued to serve on the Kenyan bench and were more susceptible to manipulation given their contractual basis of employment whose renewal depended on Moi's discretion. Judge Eugene Contan contended that pressure from the government was common in cases that the president had a direct interest.<sup>215</sup> Two other expatriate judges, Justices Derek Schofield and

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<sup>207</sup> Ibid Note 166

<sup>208</sup> Ibid

<sup>209</sup> Lucy Hannan, *Sedition by Edition*, in *Africa Report* (New York), 36, 3, May-June 1991, p. 49

<sup>210</sup> Ibid

<sup>211</sup> Ibid

<sup>212</sup> *The New York Times*, 5 May 1991, Imanyara's poor health presented a difficult problem for senior government officials who control the judiciary and in effect decided to grant bail.

<sup>213</sup> Stanley D Ross Ibid note 6 at page 435.

<sup>214</sup> Ibid

<sup>215</sup> Ibid

Patrick O'Connor, resigned due to such undue influence in blatantly contravention by the executive.<sup>216</sup>

Judicial authority was just a fallacy, for instance when a US Marine was found guilty of murder, he was sentenced to pay Kshs. 500.00 or serve one year on probation.<sup>217</sup> When the issue of leniency in sentencing came up for discussion in parliament, the AG James B. Karugu criticized the judge and he lost his job for such criticism.<sup>218</sup> In 1987, a habeas corpus application was made before Justice Schofield in respect of Stephen Mbaraka Karanja who had been arrested earlier.<sup>219</sup> The Judge ordered the CID to produce him in court but CID informed the judge that Karanja died in a shoot-out while escaping legal custody and his body was buried in Eldoret at a public cemetery. The judge ordered for exhumation, but the police informed the judge that the body could not be found. That explanation was deemed insufficient leading to contempt of court proceedings. The Chief Justice, Miller CJ, informed Justice Schofield of the president's interest in the matter and that his insistence that his orders must be complied with would jeopardize the renewal of his employment contract.<sup>220</sup> When Justice Schofield insisted on proceeding with the hearing on contempt, the file was taken before another judge prompting Justice Schofield to resign from the judiciary.

Judicial conduct of political cases faced constant interference in the late 1990s.<sup>221</sup> Executive overreach and predatory tendencies upon the other arms remained common place.<sup>222</sup> Control

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<sup>216</sup> Ibid

<sup>217</sup> Maina, W., "Constitutional Crisis I Kenya: An Inquiry into the Origins, Nature and Prospects of Reform". Paper Presented to the IPAR Project on Constitution-Making in Kenya, November/December 1996, p. 67

<sup>218</sup> Ibid

<sup>219</sup> Mumbi Ngugi, "A Matter of Moral Courage: A Chat with Chief Justice Schofield" (2004) 68 The Law-yer p.11.

<sup>220</sup> Ibid

<sup>221</sup> Ibid



over the judiciary was open and apparent. In October 1991, foreign governments; UK, US, Denmark and the World Bank, reviewed aid assistance to Moi's government downwards.<sup>223</sup> The issues at stake included, the independence of the judiciary and a multi-party system.<sup>224</sup> The donor pressured the executive to reform its political and economic policies, observe its respect for human rights, failure to which drastic measures would be taken,<sup>225</sup> contrary to traditional international legal theory that elevates sovereignty above human rights.<sup>226</sup> However sovereignty has no moral legitimacy if unjustly exercised and it is this discourse is what informed the pressure from donor states. Internal and external pressures however proved futile and insufficient to force Moi to restore respect for the rule of law. Human rights abuses, detention without trial and political assassinations were the means of dealing with perceived security threats in Kenya. The security and survival of Moi and his executive prevailed above all else.

During this period, a terror attack shook Kenya to the core in 1998, August 7, when the US Embassy in Kenya and Tanzania were bombed simultaneously. The attack in Nairobi claimed 214 lives and more than 4,000 others were injured in the explosion.<sup>227</sup> The response to this attack had many firsts; for the very first time President Moi committed to pursue the terrorists and bring the masterminds of the attack to justice.<sup>228</sup> The judiciary for the first time played its adjudication role to punish the perpetrators. The judiciary in this case was not the Kenyan judiciary, but the American Judiciary in New York. Those who were arrested for conspiring in these attacks were

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<sup>222</sup> International Commission of Jurists, *Democratization and the Rule of Law In Kenya 11* (1997)

<sup>223</sup> Jane Perlez, 'Kenya Leader Ousts Aide tied of Killing', in the New York Times, 21 October 1991.

<sup>224</sup> *Ibid*

<sup>225</sup> *Ibid*

<sup>226</sup> *Ibid*

<sup>227</sup> *Ibid*

<sup>228</sup> Agence France Presse. "Kenya has Clues to Bombing: Moi" 9 August 1998. Available on the internet at: <http://global.factiva.com/ha/default.aspx>

rendition to the US to face trial. Four defendants were tried and sentenced to life imprisonment in May of 2001.<sup>229</sup>

This attack signified a major security threat to Kenya; the presence of al-Qaeda cells within the Kenyan border. At the same time the discourse largely portrayed Kenya as a victim, a peace loving nation that did not harbour terrorists. Evidence however unveiled during the trial in New York revealed that weak immigration and security laws had allowed terror networks to take root in Kenya.<sup>230</sup> Recruitment agents from Somalia, Pakistan, and the Comoro Islands had assimilated themselves and were gradually recruiting Kenyans at the Coastal region.<sup>231</sup> The executive however did not make any efforts to initiate a broader national counter terrorism strategy. The executive also failed to work with its allies in formulating programs to counter terrorism.

### **2.3 Terrorism and National Security in the Kibaki Regime from 2002 to 2006**

From the onset, president Kibaki sought to be guided by the rule of law and not through individual directives.<sup>232</sup> The president cautioned the judges to get in line with the new administration or go home.<sup>233</sup> Notably the deniability of terrorism as a security threat, had waned and terrorism was commonplace in Kenya. In 2002, November 28, Paradise Hotel in Kikambala, owned by an Israeli was attacked and 12 Kenyans and 3 Israelis were killed in the attack while a dozen others were wounded.<sup>234</sup> Missiles were fired at Israeli airplane in Mombasa airport but

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<sup>229</sup> Iriana Zill, The U.S. Embassy Bombing Trial – A Summary in the Frontline available at <http://www.nbs.org/wgbl/pages/frontline/shows/binladen/bombings/bombings.html>

<sup>230</sup> Ibid

<sup>231</sup> Ibid

<sup>232</sup> Njeru Rugene, The rule of law is what will guide us – Kibaki, Daily Nation of Tuesday November 19 2002 available at <https://www.nation.co.ke/news/1056-302544-1caca7z/index.html>

<sup>233</sup> Ibid

<sup>234</sup> Ibid

missed.<sup>235</sup> A militant group in Palestine claimed responsibility for the attacks perpetrated as revenge against the decision by the UN to partition Palestine in November 29, 1947.<sup>236</sup>

For the first time in Kenya, four persons were arrested and arraigned in court charged with several counts of murder following the Kikambala attack.<sup>237</sup> It is worthy to note that at this time, Kenya did not have a specific legislation on terrorism and therefore relied on the Penal Code to adjudicate the crimes committed during the attack. Four persons were charged before the High Court at Nairobi.<sup>238</sup> As opposed to the convictions in the New York trial, the trial in Kenya ended with a dismal performance by the prosecution. The court dismissed the case after the prosecution failed to prove the same.<sup>239</sup>

As terrorism continued to take shape in Kenya, there was need to use the judiciary to punish the perpetrators given the relentless nature of terrorism. There was little option but to change the discourse and move towards looking at Kenya as a source of international terrorism rather than a victim of the same. This view was however blinded by many factors; poor governance policies, weak enforcement mechanisms and institutions. Most attacks happened without the prior intelligence and even when foreign intelligence agencies warned of imminent attacks, the attacks were never foiled. In Kenya, the threat of terrorism was so imminent and grave that a strategy to fight it was necessary. That fight is what became apparent in the period between 2006 and 2016 that is the focus of the next chapter.

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<sup>235</sup> Ibid

<sup>236</sup> Ibid

<sup>237</sup> Criminal Case 91 of 2003 [2005] eKLR

<sup>238</sup> Ibid

<sup>239</sup> Ibid

In concluding this chapter, it is notable from the foregoing that the judiciary in the Jomo Kenyatta and Moi regimes did not anchor its role in securitization. The inevitable result of unchecked executive authority destroyed the independence of the courts and made the judiciary impotent. There was a total departure from the historical and constitutionally mandated role of the judiciary. The executive and the legislature systematically limited and or eliminated the judicial role function. The judiciary failed in its duty in securitization and that explains the resultant regime insecurity that plagued Kenya.

## CHAPTER THREE

### INSTITUTIONAL DISCOURSES AND REALITIES IN THE WAR AGAINST TERROR

#### 3.0 Introduction

**“As guardians of the constitution, the court was destined for controversy.”<sup>240</sup> John Hart Ely**

For Thomas Hobbes, the core reason for the establishment of Leviathan is the assurance of security.<sup>241</sup> This is consequent to the Leviathan’s establishment of monopoly over the instruments of violence.<sup>242</sup> This leads to societal surrender of its rights to self-defense, through a social contract thus engendering security.<sup>243</sup> Embodied in this perspective, Weber adds the variable of legitimacy over the deployment of violence by the state.<sup>244</sup> Accordingly, the state has to ensure and sustain its capacity to effect monopoly.

Hobbes construction leads us to discern discourses and realities of institutional roles and behavior in the context of the war on terror. The broad assumption here is that the Leviathan embodied by the sovereign, assumes the prerogative of power, where security is what the sovereign says it is. This position is countered by Locke who advances limitations on the population and the government.<sup>245</sup> The Lockean prerogative, obligates the government to ensure societal security against all forms of violence, including its own. The implementation of this notion anchors government institutions of core equals, inherent in the notion of separation of power among; the legislature, the judiciary and the executive.<sup>246</sup> As a core branch, while the

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<sup>240</sup> Ibid Note 176

<sup>241</sup> Hobbes, T., Tuck, R., Geuss, R., & Skinner, Q. (1996). Hobbes: "Leviathan". Cambridge: Cambridge University Press, pp. 88-89.

<sup>242</sup> Ibid

<sup>243</sup> Ibid

<sup>244</sup> Ibid Note 117

<sup>245</sup> Ibid Note 91

<sup>246</sup> Ibid

judiciary may not have the original functions of assuring security, its role function of adjudicating actions of the other two branches, then automatically bestows on it, roles in matters of security. Lord Acton affirms this notion in his contention that absolute power corrupts absolutely.<sup>247</sup> In its discourse of power, the judiciary seeks to check the executive action through judicial review and by inference ensure the exercise of Locke's prerogative of power is done within the ambit of the law. Hannah Arendt also affirms this view in her conception of the functionality of power in its non-violent strength.<sup>248</sup> Here, power is tempered by the notion of checks and balances to mediate against abuse. This should happen when terrorism is conceived as an offence punishable within the rubrics of the law and this is the discourse of the judiciary.<sup>249</sup> The reality is however underpinned by counter accusations from other branches of government.

These perspectives have been animated in Kenya by the phenomenon of terror violence mediated by non-state actors. The executive's orientation accords with Hobbes prerogative to use executive authority to do whatever it takes to fight the vice with or without the sanction of the law. This chapter discusses these different perspectives by responding to the question; what explains differentiated actor discourses and the realities of judicial institutional behavior in the war against terror?

The chapter examines and analyzes factors underpinning discourses and the realities of judicial institutional behavior in the war against terror, according itself with the foregoing perspectives. It is assumed that discourses have the power to foster particular kinds of institutional and actor

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<sup>247</sup> Lord Acton, "Power tends to corrupt and absolute power corrupts absolutely" (1887) available at <https://oll.libertyfund.org/quotes/214>

<sup>248</sup> Hannah Arendt, *On Violence*, New York: Harcourt, Brace, Jovanovitch, 1970. p. 35

<sup>249</sup> *Ibid* Note 7

behavior patterns to suit certain interests in converse to the reality. The core argument is that underlying differentiated perspective, is the executive's, determination to use its prerogative of power in apparent disregard of the law and the courts in a bid to root out terrorism. This chapter is organized into two sections. The first section examines political factors that underpin executive's discourses and expectations upon the judicial role function. The second section addresses legal factors in the adjudication of terrorism cases and the reality of the judicial role function. Chapter Two has laid the historical background of judicial role in matters of security that this chapter seeks to discuss particularly in the context of the fight against terrorism.

### **3.1 The Politics of Security and the War on Terror.**

Buzan conceives the state as made up of physical base and institutions, whereas securitization is anchored on the protection of the physical base as well as the institutions.<sup>250</sup> The protection of the physical base and institutions in Kenya was necessitated following an increase in the number and intensity of terror attacks during the period under study. At least 440 terrorist attacks occurred, in several parts of the country.<sup>251</sup> There was local pressure on the executive government to act and reign in terror. Internationally Kenya was perceived as a terror hub for instance in 2015 when the then president of the US was planning to visit Kenya, CNN reported that president Obama was heading to the hotbed of terror.<sup>252</sup> Western embassies also issued travel advisories giving details of perceived terror risks for visiting Kenya.<sup>253</sup>

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<sup>250</sup> Barry Buzan, *People, State and fear: The National security Problem in International Relations*. London Sussex Reinner Publishers 1998.

<sup>251</sup> The Bureau of Counterterrorism and Countering Violent Extremism, Country Reports on Terrorism 2016, US DOS Publication June 2, 2016

<sup>252</sup> Ibid

<sup>253</sup> USA, UK, and Germany are some the allies that issued travel advisory. *The daily nation Newspaper*, (Thursday, June 26, 2003)

Travel advisories sought to provide security to travelers against the high threat from terrorism in Kenya. Travel advisories portrayed Kenya as dangerous and that portrayal carried a negative effect on the country. Tourism is one sector that was negatively affected by travel advisories.<sup>254</sup> Such pressure culminated in deployment of the KDF to Somalia in October 2011 to suppress the Al-shabab terror network.<sup>255</sup> Such deployment was premised on the protection of Kenya's physical base from terror attacks whose survival according to Buzan forms the basis of security as it is the most important component of a state.<sup>256</sup>

According to Ole Waeber, a security problem is what the elites declare it to be,<sup>257</sup> the elites in this case is was the executive since the idea of terrorists taking up arms within the state is tantamount to usurping executive power, paving way for the executive's response. Barry Buzan's conceptualization of political threats as a constant concern for the state manifests in the executive's response to such threats.<sup>258</sup> Buzan posits that political security is interlinked with societal security and manifest in the form of attacks on the nation itself arising from foreign alternative.<sup>259</sup> Accordingly, the executive initiated a raft of measures intended to contain the threat of terrorism including the seclusion of refugees and police operations whose legality was adjudicated upon by the judiciary as discussed below.

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<sup>254</sup> Kenya mostly relies on international tourists and projections put Kenya's direct GDP contribution from tourism in 2007, a drop in 2008, a slight increase in 2009 and then a continued drop in the following years due to continuing political risks and insecurity linked to terrorism. According to World Bank publication, Kenya's Tourism: Polishing the Gem, available at [http://siteresources.worldbank.org/KENYAEXTN/Resources/Tourism\\_Report-ESW\\_Kenya\\_Final\\_May\\_2010.pdf](http://siteresources.worldbank.org/KENYAEXTN/Resources/Tourism_Report-ESW_Kenya_Final_May_2010.pdf)

<sup>255</sup> Report of KNCHR investigations on Operation Usalama Watch July 2014 available at <https://www.knchr.org/Portals/0/CivilAndPoliticalReports/Report%20of%20KNCHR%20investigations%20on%20O>

<sup>256</sup> Ibid Note 249

<sup>257</sup> Ole Waeber, "Securitization and Desecuritization", On Security, Ed by Ronnie Lipschutz, New York, Columbia University Press, 1998, p. 6.

<sup>258</sup> Barry Buzan, People, State and fear: The National security Problem in International Relations. London Sussex Reinner Publishers 1998.

<sup>259</sup> Ibid



### 3.1 (a) Refugees, Terrorism and the Dilemma of Amalgamation

On March 23, 2014, terrorists attacked a church in Likoni targeting worshippers.<sup>260</sup> In response to this attack, the executive ordered the immediate restriction of all refugees to the Kakuma and Daadab camps respectively. Further, all refugee registration centers in urban centers were closed.<sup>261</sup> Kenyans were requested to report refugees found outside the jurisdiction of the camps, more security agents were deployed in major towns to maintain security and surveillance.<sup>262</sup> A gazette notice followed the directive, effectively designating refugee centers in Dagahaley, Hagardera, Kambioos and Kakuma.<sup>263</sup> The directive and the gazette notice were executive measures taken to arrest the spiraling threat of terrorism in Kenya.<sup>264</sup>

On March 31, 2014, another terror attack at Eastleigh estate left 11 people dead and many others injured.<sup>265</sup> The executive responded by launching another measure christened operation '*Usalama Watch*.'<sup>266</sup> Additional 6000 security officers were deployed in the said estate with instructions to arrest unlawful foreign nationals and anyone suspected of terrorism.<sup>267</sup> The focus of the operation sought to flush out foreigners associated with terrorism.<sup>268</sup>

Operation *Usalama Watch* spread from Nairobi's Eastleigh area to other parts of Nairobi and later to Mombasa, and other places suspected to be havens for illegal immigrants.<sup>269</sup> The search

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<sup>260</sup> The attack happened on 23/03/2014 targeting worshippers in a church in Likoni.

<sup>261</sup> Human Rights Watch, Kenya: Plan to Force 50,000 Refugees Into Camps, 26 March 2014, available at: <https://www.refworld.org/docid/533ac6734.html> [accessed 7 November 2019]

<sup>262</sup> Ibid

<sup>263</sup> Pursuant to The Refugees Act (No. 3 of 2006, L.N 64 of 2007) Kenya Gazette Vol. CXVI – No. 39 Gazette Notice No.c1927 dated 28, March 2014 titled; Designation of Areas as Refugee Camps available at [www.kenyalaw.org](http://www.kenyalaw.org)

<sup>264</sup> <https://www.aljazeera.com/news/africa/2014/03/kenya-confine-all-refugees-two-camps-2014325211245266713.html>

<sup>265</sup> The attack occurred on March 31, 2014 targeting customers in several food cafes in Eastleigh Estate

<sup>266</sup> Usalama in English means Security launched on April 5, 2014

<sup>267</sup> Human Rights Watch, Deaths and Disappearances – Abuses in Counterterrorism Operations in Nairobi and in Northeastern Kenya 2016.

<sup>268</sup> Ibid

<sup>269</sup> Ibid

extended to weapons, IEDs and explosives used in terror attacks.<sup>270</sup> At least 4000 people were arrested in the operation,<sup>271</sup> out of which some were detained and others of Somali ethnicity were deported to Mogadishu.<sup>272</sup> The then IGP contended that the operation was premised on the detection of illegal immigrants, the arrest and prosecution of terror suspects and the general prevention of lawlessness.<sup>273</sup>

The underlying discourse inherent in operation *Usalama Watch*, sought to draw a link between illegal immigrants and terrorism ostensibly Somalis. It was expected that security agents would arrest suspects and collect evidence for the courts to use in the conviction of the suspects. In reality, the operation ended without the prosecution of any suspect of terrorism related offences.<sup>274</sup> The fact that no resultant charges of terrorism followed the arrests is an indication of false amalgamation of refugees and terrorism.<sup>275</sup> Instead, civilians reported that their rights had been violated by security agents who also breached the law. The holding of suspects incommunicado, in overcrowded cells at the Kasarani Stadium beyond the constitutional stipulated period of 24 hours was also reported.<sup>276</sup> Sexual violence, assault, intimidation by security forces engaged in search operations were rampant.<sup>277</sup> A monitoring exercise conducted by KNHRC noted the following:-

“Virtually all persons who spoke to the KNCHR majority of whom were of Somali origin complained of having been indiscriminately arrested by police officers who had been deployed in large contingents in the operation areas. In Eastleigh Estate, the police officers randomly stopped people on the streets and

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<sup>270</sup> IPOA, Report on “Usalama Watch” dated 14<sup>th</sup> July 2014 p. 7

<sup>271</sup> *Ibid*

<sup>272</sup> *Ibid*

<sup>273</sup> Reported by Noel Omukubi in the *Jamhuri Magazine* available at <http://iamhurimagazine.com/index.php/kenya/4676-operation-usalama-watch.html>

<sup>274</sup> IPOA, Independent Policing Oversight Authority, Monitoring Report on Operation Sanitization Eastleigh Publically Known as “Usalama Watch” dated 14<sup>th</sup> July 2014 p. 7

<sup>275</sup> Report of KNCHR Investigations on Operation Usalama Watch July 2014

<sup>276</sup> *Ibid*

<sup>277</sup> *Ibid*

demanding that they produce their National Identity Cards failure to which they were instantly arrested and bundled on waiting police vehicles. In numerous instances the police arrested persons who had valid identification documents and demanded bribes in exchange for their release. Majority of those taken to police stations were not booked in the formal police register (OB) which not only hindered accountability for the detainees but also provided opportunity extortion and other malfeasance by the security agencies. The police raided people's homes and confiscated money and valuables before arresting the residents. Some victims told the KNCHR that they were arrested without being asked to produce their identification documents and taken to police custody where they spent several days before they were successfully screened and released. Others complained that the police confiscated their valid documents which, rendered them vulnerable to repeat arrests in subsequent swoops.<sup>278</sup>

The executive's directive and the mode of conduct of the operation roped in the judicial role function of adjudication through a case challenging their legality. The RCK and a Congolese national registered as a refugee in Kenya filed the case on behalf of 48 minors separated from their parents during the operation.<sup>279</sup> Petitioners informed the court of the arrest of the parents of children, their detention, and forceful transfer to Daadab Refugee Camp leaving the children behind.<sup>280</sup> The AG argued that the directive and the Gazette Notice were legal purposed on streamlining refugee management and emerging security challenges.<sup>281</sup> The judge ruled in favour of the refugees and ordered a reunion of the refugees with their children. The judge found sufficient evidence to show that the executive's directive infringed upon the rights of the children to parental care as well as education.<sup>282</sup>

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<sup>278</sup> Ibid

<sup>279</sup> Refugee Consortium of Kenya & another v AG & 2 others [2015] eKLR

<sup>280</sup> Ibid

<sup>281</sup> Ibid

<sup>282</sup> Ibid

Consequently, the Judge nullified the directive for its contravention of the constitution. The finding was based on the fact that no evidence was adduced to prove a nexus between refugees and security challenges, contrary to executive discourse in court of public opinion.<sup>283</sup>

On one hand, the directive and operation *Usalama Watch* were premised on reasons of national security. The reality of their implementation however, witnessed security agents brutalizing, terrorizing and violating the rights of innocent civilians. The greater risk with this response is that security agents lost sight of their mission; there was no difference between the actions of terrorists and the actions of the police. The brutal actions by security agents mirrored the terrorism they sought out to fight. The use of counter violence by the security agents threatened the very security they set out to preserve. Police harassment and corruption was the modus operandi inherent in the operation. The discourse by the judiciary on the other hand sought to entrench legality into executive's action guided by the constitution. For the conduct of national security to comply with the rule of law, democratic principles, and respect human rights.<sup>284</sup> The judicial role function determined the unconstitutional nature of the executive's directive, effectively checking executive excesses by protecting human rights.

Buzan's political and societal security concept helps us conceptualize the executive's directives in the failed attempt to link refugees from Somalia to the threat of terrorism in Kenya. Societal security is about identity and balance or the lack of it.<sup>285</sup> Refugees from Somalia come from the bedrock of al Shabaab, a terrorist organization that has plunged Somalia in a state of insecurity. These refugees have their separate and distinct identity from native Kenyans and the failure to

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<sup>283</sup> Ibid

<sup>284</sup> Article 238(2)b of the Constitution.

<sup>285</sup> Ibid Note 258

reconcile these separate identities, paved the way for a discourse on the possibility of a spillover of the insecurity from Somalia into the Kenyan territory with the influx of refugees. Such a discourse led to politics of discrimination and exclusion of Somali refugees as Buzan points out<sup>286</sup> and as evidenced in the aftermath of *Usalama Watch*. The judicial role function debunked this discourse since in reality no evidence was availed to support the discourse.

### **3.1 (b) Lamu and Tana River Attacks; the Drive towards Identity Polarization.**

The Lamu and Tana River terror attacks, were carried out from 14 June until July 19, 2014 in several locations.<sup>287</sup> The attackers were armed and they moved in groups shooting at victims, or slitting their throats while forcing others to watch.<sup>288</sup> The villages attacked included Mpeketoni,<sup>289</sup> Poromoko and Mapenya,<sup>290</sup> Kakate, Hindi and Gamba Police Station in Lamu and Pandanguo village.<sup>291</sup> Tahmeed a popular bus was also attacked along Malindi-Lamu highway, at Pangani forest.<sup>292</sup> Non-Muslims were a target of the attacks.<sup>293</sup>

Varied statement from the executive created confusion on who was responsible for the attack. President Kenyatta claimed the attacks were motivated by ethnic and political violence against a certain Kenyan community.<sup>294</sup> The President's address to the nation eliminated Al Shabaab as a

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<sup>286</sup> Ibid

<sup>287</sup> Human Rights Watch, *Insult to Injury: The 2014 Lamu and Tana River Attacks and Kenya's Abusive Response*, 2015.

<sup>288</sup> Ibid p. 17

<sup>289</sup> Ibid Note 287

<sup>290</sup> Ibid

<sup>291</sup> Ibid

<sup>292</sup> Ibid

<sup>293</sup> Ibid

<sup>294</sup> Edmund Blair, Duncan Miriri, *President says Kenyan politics not Islamists behind attacks*, Reuters *World News* June 17, 2014 / 9:29 AM / 5 years ago available at <https://www.reuters.com/article/us-kenya-attacks/president-says-kenyan-politics-not-islamists-behind-attacks-idUSKBN0ES0HE20140617>

possible perpetrator since according to him, intelligence reports traced the planning and execution of the heinous crimes to political networks.<sup>295</sup>

Similarly, Ole Lenku, a cabinet minister referred to the attackers as bandits that security agents chased north across the Somalia border.<sup>296</sup> The deputy IGP claimed MRC a local secessionist group was responsible for the attacks.<sup>297</sup> This claim was refuted by MRC who termed it as a decoy for the police to target of its members.<sup>298</sup> A joint statement by KDF and NIS blamed the attacks on Al-Shabaab.<sup>299</sup> The Al Shabaab militant group corroborated this press release, and accepted responsibility.<sup>300</sup>

The executive discourse sought to politicize the attacks as ethnic violence. This discourse presupposed that the executive had intelligence on the nature and intention of the perpetrators. The police were expected to arrest the perpetrators and arraign them in court since ethnic violence is still a crime in Kenya.<sup>301</sup> In reality however, no case related to ethnic violence was filed in court.<sup>302</sup> The executive was facing strong criticism about its failure to effectively deal with the menace of insecurity and the threat of terrorism from Al Shabaab. The attacks lasted for an entire month, as the attackers moved from village to village, causing havoc and the fact that police officers and police stations were casualties' leads to the conclusion that the security agents were not prepared to respond to the attacks. The failure to promptly combat and insulate villages

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<sup>295</sup> Ibid

<sup>296</sup> Ibid

<sup>297</sup> Ibid

<sup>298</sup> Ibid

<sup>299</sup> Ibid

<sup>300</sup> Joseph Akwiri. Gunmen kill at least 29 in latest raids on Kenyan coast available at <https://www.reuters.com/article/us-kenya-attacks/gunmen-kill-at-least-29-in-latest-raids-on-kenyan-coast-idUSKBN0FB05R20140706>

<sup>301</sup> Assault, murder, malicious damage to property, creating disturbance are some of the possible offences that such suspects would be charged with under the Penal Code.

<sup>302</sup> IPOA report following the Mpeketoni attack, redacted version, sections 5.0.1 and section 5.0.2," September 2014

from impending threat of recurrent violence is an indication of executive failure. The contradiction by high-level executive officials on who was responsible for the attack is an indication of intelligence failure. This confusion impinged the capacity and ability of security agencies to holistically investigate the attacks<sup>303</sup> because they just did not know who to investigate. Such failure is the reality the executive was not willing to publicly contend with.

The police arrested forty-one people and detained them at Mpeketoni Police Station in dingy and murky cells for periods ranging between three days to two week.<sup>304</sup> Some detainees were subsequently released by the Police without charge and those charged had their cases withdrawn because the prosecutors lacked evidence to take the cases to trial.<sup>305</sup> The police had failed to gather evidence left by attackers, the quality of the police investigations were poor,<sup>306</sup> failure to interview witnesses to the attacks underscored the poor investigations, effectively undermining criminal charges.<sup>307</sup>

The judicial function would have been an effective mechanism to handle those connected to the attack. However, lack of evidence eliminated the effective use of the judicial role function. The prosecution of terrorists is at the core of counterterrorism yet following this attack, the government of Kenyan passed on the opportunity for its judiciary to administer justice by sticking to a political discourse averse to reality. It may not be possible for every case taken before the judiciary to result in conviction, however discourses by security agents must at the

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<sup>303</sup> Ibid

<sup>304</sup> Ibid Note 287

<sup>305</sup> Except for two persons who were charged with several counts of murder; Mahadi Swaleh Mahadi and Diana Sulciman and their case is pending before the High Court in Mombasa Republic Vs. Mahadi Swaleh Mahadi CR Case No. 23 of 2014.

<sup>306</sup> Ibid

<sup>307</sup> IPOA report, section 5.0.13.

very least demonstrate genuine efforts made to prosecute perpetrators involved in the commission of a crime.

KNCHR issued a scathing indictment on the conduct of security agents in their response to the attack. They noted that the response by security forces was obtuse, exposing villages to the wrath of the attackers. In some instances police protection was discriminatory since they assaulted, detained and forcefully appropriated personal property from persons who professed the Islamic religion and those of Somali descent.<sup>308</sup> Instead of ameliorating the situation, the security agents exacerbated insecurity.

### **3.1 (c) Religious Discourses in Response to Garissa University Terror Attacks**

Terrorists are well versed in the mobilization and indoctrination through the advancement of radical, extremist ideologies.<sup>309</sup> Ideologies and discourses surrounding them, have greater power in parts of the ethnic or religious community that terrorists claim to speak for.<sup>310</sup> However, the ideologies of nation states, inherent in government discourses have more power than the radical ideologies of non-state actors like terrorists.<sup>311</sup> The political discourses surrounding the Garissa University attack on 2, April 2015 involved an ideological warfare. Gunmen stormed the University, killing at least 147 people, mostly students and injured 79 people before detonating

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<sup>308</sup> Ibid Note 287

<sup>309</sup> Ekaterina Stepanova, *Terrorism in Asymmetrical Conflict; Ideological and Structural Aspects*. SIPRI Research Report No. 23, Oxford University Press 2008

<sup>310</sup> Ibid

<sup>311</sup> Ibid



suicide vests when cornered by security forces.<sup>312</sup> The Somalia-based militant Islamist group, Al-Shabaab, claimed responsibility, saying it was retaliating against KDF incursions in Somalia.<sup>313</sup>

In response to the attack, security officers raided residential and business premises in search of terror suspects.<sup>314</sup> The police applied excessive force, arbitrarily arresting people from their homes and detaining many without trial within Garissa, Wajir and Mandera counties.<sup>315</sup> Among the scores who were arrested, five suspects were arraigned in court charged with terrorism related offences and three of them were convicted as members of a terrorist group who carried out the attack.<sup>316</sup> Allegations of disappearances and summary executions by the police who were accused of carrying out reprisal attacks against communities in response to attacks abound.<sup>317</sup>

The political discourse that emerged from the response by the security agents is that Muslims and the Somali community, were affected by the police operations and they contended the apparent marginalization for being unfairly targeted.<sup>318</sup> This discourse fed into the politics of belonging where since independence, the citizenship of Somalis in Kenya has been ambivalent based on racial and cultural dimensions.<sup>319</sup> Further, the political interests that the executive

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<sup>312</sup> BBC News, Kenya attack: 147 dead in Garissa University assault 3 April 2015 available at <https://www.bbc.com/news/world-africa-32169080>

<sup>313</sup> Ibid

<sup>314</sup> Human Rights Watch, Report Titled Deaths and Disappearances – Abuses in Counterterrorism Operations in Nairobi and in Northeastern Kenya Human Rights Watch 2016

<sup>315</sup> Ibid

<sup>316</sup> Garissa University attack: Tanzanian and Kenyans get long sentences, available at <https://www.bbc.com/news/world-africa-48859937>

<sup>317</sup> Ibid note 314

<sup>318</sup> Otsieno Namwaya and Najma Abdi, Wounds of Garissa Attack, Four Years On: Kenya Should Review Counter-Terror Tactics to Address Abuse, Human Rights Watch available at <https://www.hrw.org/news/2019/04/08/wounds-garissa-attack-four-years>

<sup>319</sup> Tabea Scharrer. 2019. 'Ethnic Neighborhoods' and/or Cosmopolitanism? The Art of Living Together. Refugees and Forced Migrants in Africa and the EU, pages 129-150.

sought to protect was its involvement in Somalia, through 'Operation Linda Nchi'.<sup>320</sup> This initiative was launched after attacks and kidnappings by Al Shabaab.<sup>321</sup> The discourse behind the deployment of KDF in Somalia was the executive's reigning in terror on the homeland by securing peace in Somalia but in reality attacks on the homeland continued.<sup>322</sup>

In the wake of the attack on Garissa University, some church leaders accused Muslim cleric of halfhearted condemnation of radicalization.<sup>323</sup> Their rhetoric statement read, 'we have no more cheeks to turn' representing their frustration with terror attacks which they perceived as incessant and well planned campaign against Christians.<sup>324</sup> A joint statement issued by National Council of Churches in Kenya read as follows:-

"The attack was committed by people professing the Islamic faith but we have noted a marked difference by the Muslim leadership to addressing challenged of Islamic radicalization in the country in a forthright manner."<sup>325</sup>

Christian Leaders Consultative Forum also released their statement describing the so-called terrorism in Kenya as jihad against Christians.<sup>326</sup> The net effect of these discourses by Christian leaders coupled with security agents harassment of Muslims was an attempt to frame Islam as a violent religion and therefore move towards less accommodating interreligious relations between Muslims and Christians. On 4 April 2015, the IGP, issued a gazette notice recognizing Al Shabaab as a terrorist organization together with a list of persons and entities suspected to be

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<sup>320</sup> Kenya launched Operation Linda Nchi. Swahili for "protect the nation." At the outset of the operation, Kenya's objective, according to a government spokesman, was to dismantle the al Qaeda-affiliated Harakat al-Shabaab al-Mujahideen

<sup>321</sup> A Briton tourist was kidnapped on September 11, 2011 at Lamu Island and a French tourist was kidnapped on October 1, 2011 at Manda Island.

<sup>322</sup> In 2013 al shabaab laid a deadly siege on the Westgate shopping mall and killed

<sup>323</sup> Gordon L. Heath, David K. Tarus, Christian Responses to Terrorism: The Kenyan Experience, Wipf and Stock Publishers, 2017 P. 113

<sup>324</sup> Ibid

<sup>325</sup> Bishop Julius Wanyoike, Anglican Church of Kenya, quoted in Wachira Kigotho, Churches Accuse Muslim Scholars of 'Inaction' available at <https://www.universityworldnews.com/post.php?story-20150423163242805>

<sup>326</sup> Ibid

associates of terror groups.<sup>327</sup> Human rights organizations that were vocal in fighting against security agencies brutality in the war against terror made it to the list. The government froze their bank accounts, halting their operations without notice.<sup>328</sup> Two organizations; Muslims for Human rights (MUHURI) and HAKI Africa petitioned High Court, challenging the gazette notice and freezing of their bank accounts.<sup>329</sup> They were joined by KNCHR and their plea sought for the gazette notice to be quashed for contravening the law and for their bank accounts to be unfrozen. They argued that the government did not give them a right to be heard before taking such administrative action and therefore the same was unlawful, capricious and whimsical. In his judgment, Justice Emukule agreed with the Petitioners and declared the actions by the IGP as *ultra vires*. The Judge ruled that: -

“... Gazette Notice was tainted with procedural impropriety for failure to afford the Petitioners fair administrative process hence the Gazette Notice is null and void ab initio. Being null and void, no action can be based upon it and cannot lie or stand.”<sup>330</sup>

With this discourse, it was expected that the executive had intelligence that these organizations were involved in terror related activities. The PTA encompasses definitions of acts of terrorism, which these organizations would have been validly charged under. In reality, this was not the case as no charges were ever preferred against these organizations. Counterterrorism efforts that accord with the rule of law objectify the prevention of victimization. The idea of designating an individual as a terrorist may appear innocuous; however, the consequences of such a tag may cause irreparable damage necessitating a prior judicial determination without which, the designation may be invalidated, and that was the reality in this case.

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<sup>327</sup> Gazette Notice No. 2326 of 2015

<sup>328</sup> Treasury announcement on 8<sup>th</sup> April 2015 available at <https://www.nation.co.ke/news/1056-2679382-180hahz/index.html>.

<sup>329</sup> Petition No. 19 of 2015 [2015] eKLR

<sup>330</sup> Ibid judgment delivered on 12/11/15 by Justice Anyara Emukule at Mombasa Law Court.

An analysis of the responses by the executive government in response to the above terror attacks largely limited the judicial role function. The measures gleaned ambivalent and proved counterproductive. The measures threatened to undermine security, weakened civil liberties, threatened democratic principles, and undermined the constitution all in the name of combating terrorism. The failure to prefer charges on those arrested as provided for in Kenyan constitution<sup>331</sup> highlighted the reality that arrests do not necessarily materialize into criminal charges. The high profile arrests and the vigor with which the security organs conducted the arrests, outpaced the quantity and even the quality of the subsequent prosecution.

The factors underpinning the response by the executive government on the terror attacks above find some formidable explanation in John Locke's prerogative of power. Extraordinary responses are a kin to the war on terrorism. The question that arises is whether prerogative is as per the law or outside the law? Constitutionalist argue that properly drafted constitutions meet the demands of any crisis and reserve the exercise of prerogative power to the political class.<sup>332</sup> If that is the case, how would we curtail executive excesses without the judiciary?

It is appreciated that the fight against terrorism requires of institutions to find and conquer an unspecified, and unidentified enemy.<sup>333</sup> By its very nature, terrorism burgeon in anxiety, fear and uneasiness from actual attacks and the threat whose form and nature can only be imagined.<sup>334</sup> While the impact of terror attacks is discerned from the reality of the aftermath, political

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<sup>331</sup> Article 49 of the Kenyan Constitution 2010

<sup>332</sup> Ross J. Corbett, The Extraconstitutionality of Lockean Prerogative, *The Review of Politics* Vol. 68, No. 3 (Summer, 2006), pp. 428-448 [Cambridge University Press](#)

<sup>333</sup> Sarah Perret and J. Peters Burgess, *The Fight Against Terrorism: the Rule of Uncertainty?*, Axa Research Fund website <https://www.axa-research.org>.

<sup>334</sup> *Ibid*

consequences of attacks are virtually uncertain fear.<sup>335</sup> The responses in the above attacks reveal that security organs thrive in fear and uncertainty by advancing discourses that the threat of terrorism takes precedence over any individual, including child or refugees. The threat assessment and veracity of terror attacks is always a matter of national security shrouded in secrecy. The executive responses were harsh minimizing the role of the judiciary in this fight against terror at best.<sup>336</sup> The executive seemed to ignore that it rules over a democracy and democracies operate under the auspices of the rule of law, which is a hierarchical structure of the legal system that conform all state institutions to the law.<sup>337</sup> The rule of law creates a balance between freedoms and security. John Locke's prerogative of power devolves democratic safeguards that are guaranteed by the rule of law, it subjects citizens to the executive's determination as it sees fit. Sacrificing the little known freedom of a few in the name of security destabilizes the rule of law especially when the judicial role function is excluded. The limited role of the judiciary in the cited cases broke ranks with John Locke and the executive, leading to a reality of differentiated perspectives.

### **3.2 Legal Factors in the Adjudication of Terrorism Cases**

According to Berger & Luckmann, institutionalization allows for the interaction of actors in a setting of shared concepts of reality.<sup>338</sup> This presupposes a connection between institutions, despite which, institutional discourses and behavior may vary from the reality. In Kenya institutions that constitute the criminal justice system are bound by the same substantive and procedural laws. Security organs are involved in arrests, ODPP drafts, files and prosecute cases

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<sup>335</sup> Ibid

<sup>336</sup> Deputy President the Hon. William Samoei Ruto at a public conference on 06/05/2014 reported in the Jamaicaobserver Tuesday May 6, 2014 available at [www.jamaicaobserver.com](http://www.jamaicaobserver.com)

<sup>337</sup> The Preamble to the 2010 Kenyan Constitution.

<sup>338</sup> Berger, P., & Luckmann, T. 1966. *The social construction of reality: A treatise in the sociology of knowledge*. London: Penguin Books.

in court, civil society organization also file and prosecute public interest litigation before the courts. The judicial institution is at the tail end as the determiner of cases filed through the process of adjudication in an adversarial system.<sup>339</sup> Criminal trials for terror suspects in Kenya have presented an unusual dynamic where the judiciary an erstwhile independent arbiter has been dragged into such a war and sometimes forced to defend its own decisions. Several cases have been discussed below:-

### 3.2 (a) Adjudication of Terrorism Cases

The discourse advanced by the security organs in terrorism cases through the ODPP often impute emotional security consideration about the bad man that must kept away from the streets.<sup>340</sup> This discourse tends to ignore the right of suspects to the presumptuous innocence in criminal justice.<sup>341</sup> This discourse also fails to inure with the constitutional provisions with regards to the right to a speedy trial as well as the right of bail for all arrested person regardless of the offence.<sup>342</sup>

Trial by installment is a practice adopted by the court and for terrorism cases, it starts with pre charge detention, plea taking, pretrial conference and the actual trial staggered over an inordinately long period of time. Security agents and the ODPP always apply for denial of bail or argue against the granting of bail in terror related cases without necessarily proffering compelling reasons for such denial as required by the law. A case that aptly describes this

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<sup>339</sup> W. Bradley Wendel, Wiley Online Library, 2013 <https://doi.org/10.1002/9781444367072.wbicc207>

<sup>340</sup> Elisha Zebedee Ongoya, Legal And Policy Dilemma In The Fight Against Terrorism: The Bail Question In Terrorism Cases In Kenya, available at <http://kenyalaw.org/kenyalawblog/legal-and-policy-dilemma-bail-question-in-terrorism-cases/>

<sup>341</sup> Ibid

<sup>342</sup> Article 49(h) of the Kenyan Constitution 2010 Edition available at [www.kenyalaw.org](http://www.kenyalaw.org)

dynamic was in Mombasa,<sup>343</sup> where four people had been charged with terrorisms offences.<sup>344</sup> In the first case, the trial Magistrate granted the accused persons bond despite opposition from the prosecution. The ODPP appealed against the grant of bail and the High Court declined to cancel the bond terms granted by the Magistrate prompting the ODPP to file the second case against the same persons and the Magistrate again granted the accused persons bond. Further, the Magistrate ruled that the two cases amounted to double jeopardy, as the offences in the two cases were similar and in respect of the same terror attacks of 27/03/15.<sup>345</sup> It is this ruling by the Magistrate that sparked a tussle between the Judiciary and the ODPP. The latter went before the High Court again, seeking a review of the Magistrate's ruling for purposes of satisfying its accuracy, legality or appropriateness. Before the High Court,<sup>346</sup> the ODPP sought to jealously guard her power to decide how to file charges in court. The High Court however disagreed with the ODPP and once again upheld the ruling by the Magistrate. The Higher Court held that there was nothing illegal, improper or irregular or incorrect about a magistrate granting accused persons bond.<sup>347</sup>

The Judge, further held that although the ODPP had the power to decide how to file charges, that power dissipated once the Magistrate was ceased with the matter and the Magistrate could decide how the charges could be filed.<sup>348</sup> Despite the clear orders by the judiciary, prison authorities refused to release the accused persons from custody. In his ruling, the judge described the actions by the ODPP as jinxing her own trial even before it begun.<sup>349</sup> The court called out the ODPP and

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<sup>343</sup> Criminal Case No. 2428 of 2015 Republic Vs. Ummulkheir Sadri Abdalla & 3 Others before Hon. Odenyo Senior Principal Magistrate sitting at Mombasa Chief Magistrate's Court

<sup>344</sup> Criminal Case No. 242/15 and Criminal Case No. 797/15 before Mombasa Magistrate Courts.

<sup>345</sup> Ibid ruling delivered on 26/01/2017 by Hon. Odenyo Senior Principal Magistrate

<sup>346</sup> Criminal Revision No. 169 of 2015 Republic Vs. Ummulkheir Sadri Abdalla & 3 Others [2015] eKLR

<sup>347</sup> Justice D. O Chepkwony in his ruling dated 22/10/15 in Criminal Revision No. 169 of 2015 Republic Vs. Ummulkheir Sadri Abdalla & 3 Others [2015] eKLR

<sup>348</sup> Section 135 (3) of the Criminal Procedure Code gives the Magistrate to direct how charges are to be filed.

<sup>349</sup> Justice D. O Chepkwony in his ruling dated 22/10/15 in Criminal Revision No. 169 of 2015 Republic Vs. Ummulkheir Sadri Abdalla & 3 Others [2015] eKLR

reminded her of her role as the protector to ensure fair administration of justice and the necessity to desist from abusing the court process.<sup>350</sup> In the end, two years lapsed with suspects in police custody with no trial due to institutional differentiation. Justice Chepkwony noted that the case demonstrated a tug of war between the ODPP and the courts.<sup>351</sup>

The executive through its security organs have always advanced the discourse that terrorism offences are unique and should be treated differently. This discourse presupposes that courts should deny terror suspects bail when all offences are subject to the same constitutional provisions that allow the grant of bail.<sup>352</sup> Compelling reasons must be disclosed and they play a persuasive role if a court is to deny a suspect bail. Security agents have been faced with a conundrum; to disclose or not. A challenge is presented when such disclosure simultaneously exposes intelligence data in the broader terrorism network. The security agents may therefore have sufficient information on a suspect to compel the courts to deny bail, however disclosing such information in an open court is likely to jeopardize the intelligence. Lack of disclosure ensures that courts acting without such information perceives terror suspects like any other suspect in criminal cases and therefore accords them their legal rights to bail to which the prosecution and security organs out rightly defy obedience.

When security organs defy court orders granting bail to terror suspects, they do so based on the intelligence held on the suspects, intelligence which the courts have no access to. Judiciary discourses that consider suspects innocent until proven guilty are then scorned upon by

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<sup>350</sup> As enshrined in Article 157(11) of the Constitution

<sup>351</sup> Criminal Revision No. 169 of 2015 Republic Vs. Ummulkheir Sadri Abdalla & 3 Others [2015] eKLR.

<sup>352</sup> Article 49 of the Kenyan Constitution.



executive, reserving the prerogative to act even in defiance of the law and the courts.<sup>353</sup> Such executive defiance ensures that when push comes to shove, the inherent executive authority can decline to open prison gates even when the courts says open. The ideal situation would require the executive share its intelligence with the judiciary and have the judiciary act on such information. In reality however the executive continues its dominance over matters of security and its preference to keep the judiciary in the dark, opting for extra judicial mechanisms.

In 2014, the judiciary succeeded in reining in on some executive excesses, following the enactment of the Security Laws Amendment Act of 2014. The amendments were in response to two terror attacks; on 21<sup>st</sup> of November, Al-Shabaab assailants intercepted a bus en-route to Nairobi and on 1<sup>st</sup> of December in Mandera County, a quarry was attacked.<sup>354</sup> Following the attacks, 64 people were killed on the basis on their religious inclinations.<sup>355</sup>

The executive hastily drafted amendments to the law that expanded the breadth and severity of the punishment in criminal offenses. The law imposed limit on the rights of persons under arrest as well as those charged in court. Restrictions on the freedoms of expression and assembly were also imposed.<sup>356</sup> The law sought to broaden the NIS Act by donating the powers of arrest, detention, search and seize of property upon mere suspicion, without a warrant.<sup>357</sup> The law further sought to give the police discretionary power to do whatever was necessary to preserve national security.<sup>358</sup> Further amendments enabled detention without charge of up to 90 days<sup>359</sup>

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<sup>353</sup> John Locke, *Second Treatise of Government* (Guteberg eBook, 2005) available at <http://Gutenberg.org/files/7370/7370-h/7370-h.ht>

<sup>354</sup> Ibid

<sup>355</sup> Ibid

<sup>356</sup> Security Laws (Amendment) Bill, 2014 available at [www.kenyalaw.org](http://www.kenyalaw.org)

<sup>357</sup> Ibid

<sup>358</sup> Ibid

and the prosecution were allowed not to disclose evidence to accused person.<sup>360</sup> The amendments also sought to seal the number of refugee influx in Kenya to only 150,000 restricted, strictly to designated camps.<sup>361</sup> The High Court however nullified the amendments to the extent of their unconstitutionality.<sup>362</sup>

The judiciary stood against executive defiance and audacity. Juxtaposed with the judiciary discussed in Chapter Two, the judiciary in this chapter undertook its adjudication role as a corrective measure against legislative impairments and refused to sanction measures that were ideally unconstitutional. The executive risked judicial disapproval when it sought to ignore the requirement for conditioned legitimacy in its measures, and proceeded without adequate legal basis.

### **3.2 (b) Judicial Role; the Discourse of Misplaced Sympathies**

Liberal societies define innate rights and freedoms necessary for communion, which is what terrorists aim at damaging.<sup>363</sup> One would argue that the obsession with detention of terror suspects without a just cause does the same thing and it has clouded prosecutors' perspective in terrorism related cases. In his ruling at the High Court in Nyeri, Justice Makhandia affirmed that the reformed judiciary could not condone actions that trampled on fundamental rights of citizens. That such decisions erode the judicial legacy where citizens lose faith in the institution. That the application of the law secures the protection of fundamental rights and freedoms of all

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<sup>359</sup> Ibid note 356 as section 18

<sup>360</sup> Ibid note 356 at section 19

<sup>361</sup> Ibid note 356 at section 58

<sup>362</sup> Petition Nos 628 & 630 of 2014 (Consolidated) [2015] eKLR.

<sup>363</sup> Sarah Perret and J. Peters Burgess, *The Fight Against Terrorism: the Rule of Uncertainty?*, Axa Research Fund website <https://www.axa-research.org>.

persons.<sup>364</sup>This is the whole mark of the institutional friction between the executive and the judiciary; while the former interprets the latter's strict application of the law as sympathy, the former interprets the latter's actions as extrajudicial. The judiciary has sought to debunk its supposed indifference to the threat posed by terrorism. In their landmark ruling, 5 judges expounded on the dangers of terrorism. They described terrorism as causing suffering and compromising national security. They took cognizance of the responsibility of the executive to respond to the threat however cautioned against derogation from human rights.<sup>365</sup>

Further Justice Emukule once sought to clarify that the judiciary had indeed taken judicial notice of the reality of terrorism and the actions of the designated terrorist groups.<sup>366</sup> This was a public interest litigation where the judge sought to set the record straight with regards to judicial role, that is concerned with the law and nothing else. Therefore, the fight against terrorism must be conducted in compliance with the letter of the law and within the confines of the constitution; the rule of law, for the law was made for man and not man for law.<sup>367</sup> This position accords with the sentiments of Reinhardt that the role of judges remains the same in war as in peace times.<sup>368</sup>The judiciary in Kenya has asserted its role in matters of security particularly, in the war against terrorism in the converse of whatever expectations may exist. The judiciary seeks to apply the law as it is, not as it is expected. This is audacious considering its history and the facts that judiciaries around the world are essentially conservative institutions.<sup>369</sup>

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<sup>364</sup> HCCC No. 12 of 2006 Republic Vs Amos Karuga Karatu available at [www.kenyalawreports.org](http://www.kenyalawreports.org)  
<sup>365</sup> Justices; Isaac Lenaola, Mumbi Ngugi, Hedwig Ong'udi, Hillary Chemitei and Joseph Louis Onguto in Petition NO.628 OF 2014

<sup>366</sup>Justice M. J Emukule in Petition No. 19 of 2015 Muslims for Human Rights (Muhuri) and another Vs. Inspector General of Police & 5 others [2015] eKLR

<sup>367</sup> Ibid  
<sup>368</sup> Stephen Reinhardt, The Judicial Role in National Security Boston University Law Review [Vol. 86:1309 2006]

<sup>369</sup> Ibid

## CHAPTER FOUR

### THE IMPACT OF JUDICIAL INTERVENTION ON KENYA'S INTERNATIONAL SECURITY RELATIONS

#### 4.0 Introduction

The September 11 terror attack on the US actioned the increased capacity of terror networks to acquire resources, move capital and tread agents across frontiers to create and exploit global connectivity.<sup>370</sup> It equally confirmed their ability to deploy access and modernize advanced communication systems. This setting challenged stand-alone states' capacity to deal with terrorism calling for enhanced state cooperation. The foregoing animated discourses that conceived terrorism as a global security phenomenon. Consequently, the UNSC unanimously adopted Resolution 1373 (2001).<sup>371</sup> This resolution obligated all UN member states, to enact individual state legislation to prevent, suppress and criminalize terrorism.<sup>372</sup> Its implementation was dependent on global judicial cooperation. This in turn enhanced the judicial function in the fight against terrorism. The net apparent consequent was a growth in domestic courts application of the rules promulgated at the international level. Kenya ratified the resolution,<sup>373</sup> and equally adopted the 2010 Constitution, which gave recognition to all ratified treaties and UN conventions to constitute the law in Kenya.<sup>374</sup> This inherent international obligation and the operationalization of international legal instruments, further enhanced the judicial role function in the adjudication of international security relations.

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<sup>370</sup> Carberry, Jacqueline Ann. "Terrorism: A Global Phenomenon Mandating a Unified International Response." *Indiana Journal of Global Legal Studies*, vol. 6, no. 2, 1999, pp. 685-719. JSTOR. [www.jstor.org/stable/20644713](http://www.jstor.org/stable/20644713).

<sup>371</sup> *Ibid* Note 7

<sup>372</sup> *Ibid*

<sup>373</sup> *Ibid*

<sup>374</sup> Article 2 (a) of the Kenyan Constitution 2010

Courts could adjudicate trials of foreign and local terror suspects. They could compel the state to accord with rule of law. They would also animate international security corporation within the rubrics of the law at one level. At another level, they could compel respect for human rights, critical to the value based fight against terrorism. The net consequence was the centrality of judiciary in anti-terrorism war through adjudication of terrorism cases and human rights protection which are interdependent and augmenting goals.<sup>375</sup>

International security relations are closely related to international order where the concept of collective security applies. This is based on the principle that an attack on one state is an attack on all states.<sup>376</sup> Richard Falk argued that state judiciaries are agents of international legal order.<sup>377</sup> The centrality of the judicial role in international security, underpins the rule of law and due process to collectively address international security concerns. This chapter recapitulates on this role, by responding to the question; how does judicial adjudication of terror cases mediate Kenya's international security relation? The core argument of this chapter is that judicial adjudication of terrorism cases in Kenya is proactive through pronouncements that permeate Kenya's international relations. To that end, this chapter is organized into three sections; the first section examines the impact of judicial adjudication of international renditions in the fight against terrorism. The second section analyzes judicial review in the enforcement of Kenya's international legal obligations and the last section examines how the judiciary mediates the conduct of Kenya's international obligations that have an impact on international security relations.

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<sup>375</sup> Tom Parker, "Rule of Law and Human Rights," in *Toward a Rule of Law Culture*, pp. 30–32, [https://www.usip.org/sites/default/files/Toward-a-Rule-of-Law-Culture\\_Practical-Guide\\_0.pdf](https://www.usip.org/sites/default/files/Toward-a-Rule-of-Law-Culture_Practical-Guide_0.pdf).

<sup>376</sup> Article 51 of the UN Charter.

<sup>377</sup> Richard A. Falk, *The Role of Domestic Courts in the International Legal Order* 72 (1964).

#### 4.1 Renditions and International Security Relations

The need to innovatively react to the threat posed by terror networks and suspects without legal constraints engendered a new strategy of rendition. This entailed a variety of tactics that animated the forcible interstate transfer of suspected terrorists.<sup>378</sup> It ensured their capture, transfer to friendly states where they could be tortured to reveal information before being transferred to Guantanamo Bay in Cuba.<sup>379</sup> The preference for rendition was based on several reasons; firstly, rendition have operational flexibility in enforcement following a veneer of quasi-legal respectability that does not acknowledge binding limits.<sup>380</sup> Secondly, rendition avoids the legal constraints of formal extradition process where suspects are covertly transferred across international borders even in the absence of extradition agreements between states.<sup>381</sup> Thirdly, at the minimum, the only consent required to rendition is the state holding the suspect.<sup>382</sup> Lastly, once suspects are in detention, they are interrogated by security agencies from different states and the information obtained is exchanged among foreign intelligence agents.<sup>383</sup>

Kenya's implementation of renditions was first acknowledged by the police spokesperson when he asserted that, rendition of terror suspects like any other criminals do not need to follow the extradition procedure.<sup>384</sup> Soon Kenyan security agents were conducting renditions under the auspices of the US counterterrorism strategy. This entailed reciprocated diplomatic comity and

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<sup>378</sup> Dana Priest and Barton Gellman, *US Decries Abuse but Defends Interrogations; 'Stress and Distress' Tactics Used on terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, at AL, Dec 26,2002, available at LEXIS, News Library, Majpap File.

<sup>379</sup> *Ibid*

<sup>380</sup> *Ibid*

<sup>381</sup> Geoff Gilbert, *Transnational Fugitive Offenders in International Law: Extradition and other Mechanisms* 337 (1998)

<sup>382</sup> *Ibid*

<sup>383</sup> *Ibid*

<sup>384</sup> Prestholdt, Jeremy. "Kenya, the United States, and Counterterrorism." *Africa Today*, vol. 57, no. 4, 2011, pp. 3–27. JSTOR. [www.istor.org/stable/10.2979/africatoday.57.4.3](http://www.istor.org/stable/10.2979/africatoday.57.4.3). See also Fred Oluoch, Julius Barigaba, Mike Mande and Adam Ihucha, "Exchange of Crime Suspects Within Region 'Normal,' Say Police Chiefs," *AllAfrica.com*, October 11, 2010:

[allafrica.com/stories/2010101112](http://allafrica.com/stories/2010101112)

incentives in aid.<sup>385</sup> Through this framework of cooperation, Kenya received security funding from the US to carry out such renditions<sup>386</sup> and the CIA began an aggressive program of interrogating suspected terrorists in secret locations.<sup>387</sup>

One hundred and fifty people were arbitrarily detained in Kenya from December 2006 to February 2007.<sup>388</sup> The detentions followed an operation orchestrated by the Kenyan government. Nearly one hundred people fleeing conflict in Somalia were rendition to Somalia and Ethiopia and then to Guantanamo Bay.<sup>389</sup> The rendition was anchored by a counterterrorism discourse that framed them as suspects of terrorist activities. While in detention, they were denied access to legal representation, consular assistance and refugee status.<sup>390</sup> In the end, one hundred and twenty individuals were rendition to Somalia and Ethiopia without following the legal process.<sup>391</sup> No one knows where the rest were taken, they remain victims of forced disappearance.<sup>392</sup>

The reality anchored Kenya's cooperation in the detention and rendition of suspects to Somalia, Ethiopia and Guantanamo Bay. This was in violation of a wide range of international obligations including, non-refoulement, forced disappearances, and the right to consular assistance and due process. In participating in these illegalities, the government undermined its credibility among communities whose cooperation it needed in the fight against terrorism. The government also undermined its foreign policy and international legal norms given the torture of suspects in

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<sup>385</sup> Ibid

<sup>386</sup> United States Department of State, The Anti-Terrorism Assistance Program: Report to Congress for Fiscal Year 2003, at [www.state.gov/documents/organization/35833.pdf](http://www.state.gov/documents/organization/35833.pdf).

<sup>387</sup> Ibid

<sup>388</sup> Ibid

<sup>389</sup> Human Rights Watch, Why Am I Still Here? The 2007 Horn of Africa Renditions and the Fate of those Still Missing. Available at [www.hrw.org/report/2008/10/01/why-am-i-still-here/2007-horn-africa-renditions-and-fate-those-still-missing](http://www.hrw.org/report/2008/10/01/why-am-i-still-here/2007-horn-africa-renditions-and-fate-those-still-missing)

<sup>390</sup> Ibid

<sup>391</sup> Ibid

<sup>392</sup> Ibid

custody. It surrendered the high moral ground and was instead accused of persecuting Muslims.<sup>393</sup> This served as a basis for mobilization and radicalization carried out by individuals like Makaburi in many parts of the Kenyan Coast.

In another case, eleven people; eight Kenyans and three Tanzanians who were arrested by Kenyan authorities and detained beyond the legal limit, and renditioned without due process sued the government of Kenya.<sup>394</sup> The Court found the Kenyan state liable in violating their rights. The court relied on the provisions of UNSC Resolution 1456.<sup>395</sup> The resolution obligates states to comply with international law in all measures taken to combat terrorism. The Judge observed that national security considerations did not preclude the requirement for due process in the transfer of suspects. That the right against subjection of torture was non derogable.<sup>396</sup> The judge termed the actions by the state to be callous and awarded the respondents damages ranging from Kshs. 2,000,000.00 to Kshs. 4,000,000.00.<sup>397</sup>

The judgment demonstrated the inclination of the Kenyan judiciary to oblige the executive to account for its misgivings in its conduct of its international relations. This decision effectively brought into focus Kenya's international security relations with Somalia, Ethiopia, USA and Tanzania. The judiciary entrenching its critical role of judicial review by impugning international cooperation in rendition as a violation of human rights. The Kenyan government was ordered to compensate foreign national from Tanzania reinforcing the ability of the courts to permeate and regulate the behavior of the executive beyond the national borders into the realm of foreign

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<sup>393</sup> Ibid

<sup>394</sup> Petition No. 822 of 2008 Salim Awadh Salim and 10 Others V Commissioner of Police and 3 Others.

<sup>395</sup> Security Council Resolution 1456 (2003) adopted at its 4688<sup>th</sup> High Level Meeting on 20 January 2003.

<sup>396</sup> Ibid Note 394 p. 29

<sup>397</sup> Ibid Page 30



relations.<sup>398</sup> The judiciary discourse defined the content and evolution of both democracy and human rights in this case that may have impinged upon the conduct of foreign relations.<sup>399</sup>

Similarly, following the twin terrorist bombings in Kampala on 11/7/2010 Mohamed Hamid Suleiman a Kenyan citizen was arrested by Kenyan authorities on 14/08/2010 and handed over to their Ugandan counterparts. When his wife moved to court, the High Court declared the arrest, incarceration and rendition of Mohamed to Uganda, a transgression of his fundamental right to liberty.<sup>400</sup> In disagreeing with police action, the judge held regardless of what one is suspected of they are not exempt from legal protection. That security agents must demonstrate the ability to fight terrorism within the ambit of the law.<sup>401</sup>

In the same attack, Mohammed Adan Abdow was arrested on 21/07/2010, transferred and handed over to the Ugandan authorities on 27/07/2010. Mohamed Hamid Suleiman was arrested on 13/08/2010 and handed over to the Ugandan authorities on 14/08/2010 while Yahya Suleiman Mbuthia was arrested on 25/08/2010 and handed over to the Ugandan authorities on 26/08/2010. While in Uganda, the three suspects were interrogated by American, Kenyan and Ugandan security agents about their involvement in the Kampala bombings before being taken to Nakawa Magistrates Court. On 30/11/2010, they were committed to stand trial for offences relating to the Kampala bombings. The court remanded them to Luzira Upper Prison in Kampala pending trial. They were subsequently tried by the High Court of Uganda, International Crimes Division.<sup>402</sup>

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<sup>398</sup> G. Born & D. Westin, *International Civil Litigation in United States Courts* Cambridge University Press 1989.

<sup>399</sup> *Ibid* Note 394

<sup>400</sup> *Zuhura Suleiman V The Commissioner Of Police & 3 Others* [2010] eKLR

<sup>401</sup> *Ibid*, Justice A.O Muchelule Ruling delivered on September 30, 2010.

<sup>402</sup> (Criminal Session Case No. 0001 of 2010).

During the trial, Abdow was discharged after the DPP entered a *nolle prosequi*. Suleiman and Mbuthia were both acquitted following the judgment delivered by the court.<sup>403</sup>

The three subsequently sued the government of Kenya for violation of their rights following the unlawful arrest, detention and the failure to be taken through extradition or any other judicial proceedings before being released to the Ugandan authorities. The court ruled in their favour and declared their removal from Kenya without due process as unconstitutional.<sup>404</sup> The judge further emphasized the importance of adherence to the Constitution even in the face of challenges to lawful authority by acts of terrorism.<sup>405</sup>

The rendition of Mohamed Aktar Kana was stopped by the court before he could be taken to Uganda for trial. The judge rebuked the security agents' tenacity to trivialize renditions based on an agreement by the East African states to transfer suspects within the region. The judge held that violation of the fundamental rights of individual could not be based on bilateral agreements. Such behavior was perceived by the judiciary to have serious ramification on Kenya emanating from the executive's willingness to breach with remarkable arrogance or ignorance, entrenching the judicial role as the protector of the rights and obligations of all parties involved.<sup>406</sup>

The practice of renditions highlighted above demonstrate the laxity of extradition laws peculiar to the fight against terrorism. The legal constraints envisaged in international treaties have failed to consider the uniqueness of the crime of terrorism. Renditions therefore offer escapism from

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<sup>403</sup> Ibid

<sup>404</sup> Petition No. 96 of 2011 eKLR

<sup>405</sup> Ibid

<sup>406</sup> Ruling by Justice Warsame delivered on 28/09/2010 in NRB Appl. No. 544 of 2010 [2010] eKLR

scrutiny by judiciaries and civil society organizations within states. The forced interstate transfer of individual suspects casts international legal norms in bad light. Even with the threat of terrorism, the judiciary in Kenya has entrenched the respect for the rule of law at the international level.

#### **4.2 The Political Economy of Judicial Enforcement of International Obligations.**

The natural law of nations binds states, united in political society and individuals. This is blended and confounded in international and regional treaties and conventions. The enhancement of international law relies on its enforcement by state judiciaries. The conduct of counterterrorism operations has tended to derail the executives' compliance with its international obligations particularly towards refugees inherent in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol as well as the 1969 OAU Convention. The judiciary has been called upon to adjudicate upon compliance with these obligations through judicial review of executive decisions affirming the judicial role in matters of international security.

The status of refugees in Kenya has been threatened twice by executive directives, based on a discourse of preservation of national security. In 2011, Somalis sought refugee status in Kenya to escape conflict in their homeland. Kenya granted them refugee status in designated Daadab and Kakuma Refugee camps as host.<sup>407</sup> However, DRA announced the closure of refugee reception and registration centers.<sup>408</sup>

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<sup>407</sup> Sanjula Weerasinghe, UNHCR Consultant, In Harm's Way: International Protection in the Context of Nexus Dynamics Between Conflict or Violence and Disaster or Climate Change, Division of International Protection, PPLA/2018/05 December 2018 p. 41. available at : [www.unhcr.org](http://www.unhcr.org)

<sup>408</sup> Kituo Cha Sheria & 8 others v AG [2013] eKLR

Subsequently, the executive put in place measures intended to confine all refugees to the two camps before transferring them to their countries. Kituo Cha Sheria together with some refugees moved the court to injunct the implementation of the government directive arguing there was no justification for such drastic measures against law abiding refugees.<sup>409</sup> They argued that the directive was blanket and failed to consider the different classes of refugees outside the camps; professionals, businesspeople, those married to Kenyan citizens, those undergoing medical treatment outside the camps and also students. The petitioners contended that the directive violated Kenya's international obligations in refugee matters.<sup>410</sup>

The judiciary quashed the government directive for its contravention of the law.<sup>411</sup> The decision by the court was less deferential following a factual basis of the legal implications of the executive's directive. The judiciary put the executive on the legal path by quashing its policies, and forcing compliance with specific legal policies crafted in the law, mandating the executive to protect the refugees under its care as a matter of law. This marked a judicial discourse entrenching legality into executive decisions. This was through the provision of an audience to deliberate, adjudicate upon and guide international security policies.

Three years after, the executive purported to stop the hosting refugees in Kenya through a directive based on security considerations.<sup>412</sup> The directive was to the effect that Kakuma and Daabad refugee camps would be closed.<sup>413</sup> Underpinning this decision was the discourse that sought to link terrorism to the two refugee camps. The executive contended that the camps were

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<sup>409</sup> Ibid

<sup>410</sup> Refugees Act, 2006 (No. 13 of 2006) and the International Convention on Civil and Political Rights (ICCPR).

<sup>411</sup> Kituo Cha Sheria & 8 others v Attorney General [2013] eKLR

<sup>412</sup> Dr. (Eng) Karanja Kibicho was at the time and to date the Principal Secretary, State Department of Interior, Government of Kenya.

<sup>413</sup> Ibid

havens for Al Shabaab, contraband trade and proliferation of illegal weapons.<sup>414</sup> That the threat of global terrorism, and niche terror tactics could not be overlooked given the executive's primary duty to ensure security.<sup>415</sup>

The executive further argued that the Garissa University terror attack was organized at Daadab refugee camp as well as the Westgate Mall attack in Nairobi in September 2013.<sup>416</sup> The Kenyan Government went ahead to launch the timeline of the repatriation plan of refugees from the camps.<sup>417</sup> What the executive declined to consider, was the looming crisis that would face refugees when sent back to Somalia. Given the insecurity in Somalia, refugees risked persecution while Kenya risked violating its obligations under international law.

The decision by the executive was challenged before the High Court. KNCHR and Kituo Cha Sheria moved the High Court to contest the directive.<sup>418</sup> The condemnation of refugees from Somalia as terrorists was contended to be discriminatory, especially with regards to individual culpability in criminal cases. Further, the decision to close registration centers failed to consider the asylum seekers who would be denied access in contravention of international obligations. During trial, the executive's defense was premised on the argument that the refugee camps were overcrowded, terror attacks were on the rise and there were huge economic costs that the Kenyan government was straining to meet. The executive further contended an increase in human trafficking, proliferation of arms within the camps, which had all strained government resources and exacerbated insecurity in Kenya.

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<sup>414</sup> Press statement on May 11, Interior Minister Joseph Nkaisserry.

<sup>415</sup> Ibid

<sup>416</sup> J. Stephen Morrison, Kenya's Dangerous, Vague Alchemy—Refugees and Terror, May 17, 2016, Center for Strategic and International Studies, 2016

<sup>417</sup> "National Taskforce on Repatriation of Refugees," Notice No. 3334, Kenya Gazette, May 11, 2016 .)

<sup>418</sup> Gazette Notice No. 46 dated May 10, 2016.

In his judgment, the Judge considered all the arguments advanced by the executive and observed that no refugee had been arrested or convicted in terror related matters.<sup>419</sup> In reminding the executive its obligations towards refugees from the broader international community, the judge upheld the principle of *non-refoulement*<sup>420</sup> and halted the executive's plan to return refugees to their home.<sup>421</sup>

These cases demonstrate how international law has taken primacy and has directly permeated within the Kenyan legal system. Although constitutionalists generally advocate for the political branch to implement international legal obligations,<sup>422</sup> the judicial role in Kenya has acted to control the implementation of international legal obligations. The judiciary has mediated and effectuated the executive's compliance with international treaties. This has been achieved through setting aside executive's administrative directives and decision, in order to enforce compliance with international obligations. The judiciary in these cases stayed true to the cause in compliance with the constitution and international legal order.

In effect, the judiciary acted against the executive's unilateral decisions, shaping Kenya's international security relations in line with the prevailing international legal framework. Richard Falk advocated the relevance of international law in an effort to liberate the discipline from a sense of its own futility.<sup>423</sup> The actions by the judiciary in Kenya, in making international legal rules and procedures more visible and effective are indicative that Falk's task appears to have

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<sup>419</sup> Constitutional Petition 227 of 2016 KNCHR & another v AGI & 3 others [2017] eKLR

<sup>420</sup> The principle of non-refoulement is enshrined in Article 33 of the 1951 Convention Relating to the Status of Refugees.

<sup>421</sup> Ibid

<sup>422</sup> Bradley, Curtis, The Federal Judicial Power and the International Legal Order. Supreme Court Review, 2007. Available at SSRN: <https://ssrn.com/abstract=960237>

<sup>423</sup> Ibid Note 377.

been accomplished. International organizations like the UN cannot accomplish everything and that is why domestic courts represent a significant repository in enforcement of states' compliance with international law. Just like judges study the theory of politics and the political theorists inquire into the substance of the law, the judiciary and the executive must complement one another.

The discourse that the executive is a lone actor in matters of international security relations is misleading. The reality necessitates the executive to recognize the judiciary as an actor and therefore accord with such a role. The judiciary in the post 2010 constitutional dispensation in Kenya has demonstrated a functioning monitoring power that readily declines to defer to the executive in the adjudication of Kenya's international security relations. The executive must error on the side that best achieves its interests in anticipation of judicial response. In which case, the executive retains the advantage to enact practical security policies with the sanction of the law that the judiciary applies. This will avoid judicial review in quashing such policies. Judicial involvement from the onset is not an option, in a setting that preserves the respective strengths of the judiciary and the executive as balanced strategic actors. Each actor recognizing and complementing the actions of the other while at the same time considering the predicated responses by the other in matters of security.<sup>424</sup>

FISA in the US established a court whose purview entailed integration of the legality of executive applications to intelligence from external threats to security.<sup>425</sup> The court is composed of judges drawn from among federal trial judges whose only mandate is to hear from the

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<sup>424</sup> William N. Eskridge, Jr. & Philip P. Frickey, Foreword: Law As Equilibrium, 108 HARV.L.REV. 26, 36 (1994)

<sup>425</sup> Ibid

government in closed proceedings and their decisions are classified.<sup>426</sup> In Kenya, FISA is similar *ex parte* proceedings where searches and seizure are conducted with the sanction of the law without reference to suspects during criminal investigations. Once the court grants the orders, the officers are able to obtain information from phone records, bank accounts and even seize suspected items without notice to the targets of such investigations even after the investigations are complete. Court orders are granted for narrow purposes based on factual basis of suspicion to mitigate concerns of executive excesses and at the same time maintain judicial checks on executive action to avoid jeopardizing the stricter standards that apply in resultant criminal cases. An equivalent of FISA is required in Kenya to buttress the judicial role in matters of security in line with the legal framework.

### 4.3 Judicial Purge of Foreign Terrorists

A democracy guided by law, prosecutes terrorists as the means to achieve open deterrence against the threat.<sup>427</sup> Foreign terrorists constitute a major threat to international peace and security.<sup>428</sup> UNSC resolution 2178 was adopted in response to the increasing number of foreign terrorists.<sup>429</sup> This resolution required UN member states to implement criminal justice measures to effectively prevent, deter and criminalize the travel of foreign terrorists and their related

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<sup>426</sup> Elizabeth Goitein and Faiza Patel, What Went Wrong With the FISA Court, Brennan Center for Justice at New York University School of Law, 2015 available at [https://www.brennancenter.org/sites/default/files/analysis/What\\_Went\\_%20Wrong\\_With\\_The\\_FISA\\_Court.pdf](https://www.brennancenter.org/sites/default/files/analysis/What_Went_%20Wrong_With_The_FISA_Court.pdf)

<sup>427</sup> Leah West, The Problem of "Relevance": Intelligence to Evidence Lessons from UK Terrorism Prosecutions. available at [http://themanitobalawjournal.com/wp-content/uploads/articles/MLJ\\_41\\_4/The%20Problem%20of%20Relevance%20Intelligence%20to%20Evidence%20Lessons%20from%20UK%20Terrorism%20Prosecutions.pdf](http://themanitobalawjournal.com/wp-content/uploads/articles/MLJ_41_4/The%20Problem%20of%20Relevance%20Intelligence%20to%20Evidence%20Lessons%20from%20UK%20Terrorism%20Prosecutions.pdf)

<sup>428</sup> Ibid

<sup>429</sup> Resolution 2178 (2014) Adopted by the Security Council at its 7272nd meeting, on 24 September 2014 available at [https://www.undocs.org/S/RES/2178%20\(2014\)](https://www.undocs.org/S/RES/2178%20(2014))



activities.<sup>430</sup> In Kenya, several foreigners have been convicted of terrorism related offences and sentenced accordingly.

In 2012, terror attacks were carried out or attempted against Israeli targets in Thailand, Georgia, and Azerbaijan.<sup>431</sup> A Quds Force plot against the Saudi ambassador in Washington was also thwarted and Iranian suspects and agents were identified in relation to the attacks.<sup>432</sup> In June of the same year, two Iranian nationals; Ahamad Abolfathi Mohammed and Sayed Mansour Mousav entered Kenya on a tourist/business survey visa. The duo was subsequently arrested in possession of 15kg (33 pounds) of the powerful explosive RDX, which they allegedly planned to use for a terror attack in Nairobi and Mombasa.<sup>433</sup> Soon after their arrest, Israeli Prime Minister Benjamin Netanyahu said the planned terror plot targeted Israel in Kenya like the previous attacks in Thailand, Georgia, Azerbaijan and Washington.<sup>434</sup>

A diplomatic and security dilemma started to unfold in Kenya when intelligence cycles described the two Iranians as members of Iran's secretive Quds corps tasked to revenge the killing of the country's nuclear scientists by Israel.<sup>435</sup> Their arrest came a month after the executive in Kenya had signed a memorandum of understanding with Iran, to import 80,000 tonnes of crude oil.<sup>436</sup> The arrest enmeshed Kenya between the political and security interests of three countries at war

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<sup>430</sup> Ibid

<sup>431</sup> <https://abcnews.go.com/Blotter/iranians-planned-attack-us-israeli-targets-kenya-officials/story?id=16699615>

<sup>432</sup> Ibid

<sup>433</sup> Zoe Flood, Kenyan Police Arrest Iranians Suspected of Terror Plot, The Telegraph 6:44PM BST 22 Jun 2012 available at <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/kenya/9350172/Kenyan-police-arrest-iranians-suspected-of-terror-plot.html>

<sup>434</sup> Ibid

<sup>435</sup> John Kamau, How Kenya is Caught up in Delicate Iran and Israel Drama, <https://www.nation.co.ke/news/How-Kenya-is-caught-up-in-fragile-iran--israel-drama/1056-4729286-10fiii8/index.html>

<sup>436</sup> Ibid

with each other; Iran, Israel and its ally US leading to the cancelation of the oil deal to avert US financial sanctions against Kenya for trading with Iran.<sup>437</sup>

What started as a diplomatic spat found its way to the judiciary when criminal charges were filed against the Iranians. They were tried by the Chief Magistrate Court in Nairobi and convicted and sentenced to life imprisonment.<sup>438</sup> The Magistrate's decision was appealed and Justice Kimaru of the High Court upheld the conviction but reviewed the prison sentence downwards to fifteen years.<sup>439</sup> Dissatisfied by this decision, the duo moved the Court of Appeal and this time the Iranian government sent two lawyers; Sayed Nasrollah Ebrahimi and Abdolhosein Gholi, to follow up on the matter.<sup>440</sup> The two arrived in Nairobi and visited the terrorists at the Kamiti Prison only to be arrested by ATPU after they were caught taking a video of the Israeli embassy in Milimani area in Nairobi.<sup>441</sup> The Iranian government interpreted the arrest to be the result of hostile intervention of a third party (Israel) intended to damage good Iran-Kenya relations.<sup>442</sup> The prosecution nevertheless charged the two lawyers with the offense of collecting information to use in a terrorist act.<sup>443</sup> However, the Iranian Foreign Affairs ministry and their Kenyan counterparts managed to settle the case through a negotiated settlement.<sup>444</sup> The charges were subsequently dropped and the lawyers were deported to Iran.<sup>445</sup>

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<sup>437</sup> Ibid

<sup>438</sup> Charges fell under Sections 231 and 308 of the Penal Code and Section 29 of the Explosives Act

<sup>439</sup> H.C.CR.A. Nos. 106 and 107 of 2013)

<sup>440</sup> Ibid Note 435

<sup>441</sup> Ibid

<sup>442</sup> <https://nairobi.news.nation.co.ke/news/iran-demands-release-of-its-lawyers-arrested-filming-israeli-embassy-in-nairobi/>

<sup>443</sup> [https://www.the-star.co.ke/news/2016/12/02/two-iranians-charged-after-taking-videos-of-israeli-embassy\\_c1466119](https://www.the-star.co.ke/news/2016/12/02/two-iranians-charged-after-taking-videos-of-israeli-embassy_c1466119)

<sup>444</sup> Ibid

<sup>445</sup> <https://www.ynetnews.com/articles/0,7340,L-4893087,00.html>

Meanwhile, the appellate court quashed the prison sentence for the convicted terrorists and ordered their repatriation to Iran.<sup>446</sup> The ODPP appealed against such release to the Supreme Court of Kenya and obtained orders of continued detention of the two since there was no extradition agreement between Kenya and Iran at the time.<sup>447</sup> The court allowed the application for stay of execution, the acquittal and repatriation of the Iranians pending the appeal before that court.<sup>448</sup>

The Iranian Government through its Kenyan Ambassador expressed their displeasure with what they termed as dissatisfaction with the unfair ruling.<sup>449</sup> In the end, the Supreme Court upheld the conviction by the Magistrate, and affirmed the High Court decision on sentence and ordered the Iranians to serve the remainder of their imprisonment term in Kenya.<sup>450</sup> The judiciary in this case extracted itself from the diplomatic charade, adjudicated upon the criminal charges facing the two Iranians and convicted them in the end. The courts in Kenya put state security interest first. The judiciary was the actor that determined what would otherwise have been a diplomatic row effectively protecting Kenya's allies from terror attacks by Iranian terrorism.

Abdul Harun Karim, a Tanzania citizen was arrested on May 9, 2016 in Lamu at Kiwayu Island as he was filming a video titled suicide bomber. Investigators informed the court that Karim was arrested in possession of explosives while en-route to Somalia, where he was going to be trained

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<sup>446</sup> CR App No. 135 OF 2016 Ahmad Abolfathi Mohammed & another v Republic [2018] eKLR

<sup>447</sup> CR App No. 2 Of 2018 Republic v Ahmad Abolfathi Mohammed & another [2018] eKLR

<sup>448</sup> Ibid

<sup>449</sup> Daily Nation of Mar 18, 2019, Iran takes on Kenya over its citizens lock-up in Nairobi, available at <https://mobile.nation.co.ke/news/iran-complains-to-kenya-over-detained-nationals/1950946-5029748-4liuyn/index.html>

<sup>450</sup> Petition No. 39 of 2018 Republic v Ahmad Abolfathi Mohammed & another [2019] eKLR

as a terrorist. Karim failed to proffer a defense in the matter and he faced the judicial purge with a prison sentence of 110 years.<sup>451</sup>

The conviction of persons accused of carrying out terror attack on Garissa University included two Kenyans; Mohamed Ali Abdikadir and Hassan Aden Hassan. The third convict was Rashid Charles Mberesero, a Tanzanian national. Although the trial was by installments from 2013 to 2019, the three accused persons were found guilty of conspiracy to commit the attack and the two Kenyans received a prison sentence of 41 years while the Tanzania national was sentenced to life imprisonment.

The conviction of terror suspects effectively labels them as terrorists; the criminal guilt of wrongdoing, of murder. Courts have the essential tools and are bound by rules, which aim to guarantee fair trial, respecting the suspect's constitutional right. The trial is a construction that justifies the resultant sentence, a lawful conviction emanating from a fair trial, is within the conceivable realm of acceptance by all fair-minded observers. Such convictions if enhanced can be a strategy in itself of a 'just war on terror.' The judiciary in its adjudication role has entrenched its legal claws to secure Kenya's value system as enshrined in the rule of law. It has shaped Kenya's international security relations by enforcing the compliance with international law as well as the conviction of foreigners in terror related charges.

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<sup>451</sup> Amenya Ochieng, a Tanzanian to serve 45 years conviction over terrorism. Available at <http://www.kenyanews.go.ke/tanzanian-to-serve-45-years-conviction-over-terrorism/>

## **CHAPTER FIVE**

### **SUMMARY RECAPITULATION, CONCLUSION AND RECOMMENDATION**

#### **5.0 Introduction**

This Chapter serves to anchor on, recapitulations, conclusion and recommendations of the study. It is specifically organized around four parts. The first part anchors the tasks of our two core objectives. Here the recapitulation seeks to demonstrate the extent to which the set out tasks have been met. The second part preoccupies itself with our two core hypotheses. We demonstrate the process of their validation. The third part anchors the conclusions and thesis of our dissertation. The fourth part responds to the task of our third objective by proffering research based recommendations of the study.

#### **5.1 Differentiated Actor Discourses and Realities in the War against Terror**

##### **5.1(a) Political Factors Underpinning Differentiated Actor Discourses in the War on Terror**

The first objective of the study examined and analyzed the factors underpinning differentiated actor discourses and the realities of judicial institutional behavior in the war against terrorism. To attain this objective, this study looked at two categories; political and legal factors in order to explain the differentiated actor discourses. The major argument advanced here was that underlying differentiated perspectives, is the executive's determination to use its prerogative of power in apparent disregard of the law and the courts in a bid to root out terrorism. The increase in the number and intensity of terror attacks led to pressure on the executive to act to reign in terror. The executive responded to such pressure by issuing certain directives and conducting certain operations. This study analyzed the discourses inherent in the executive's responses. The discourse linking refugees to terrorism advised on certain measures that were taken. The

confinement of refugees to camps and operation *Usalama Watch*, were ostensibly geared towards assurance of security.<sup>452</sup> In reality however, the responses did not result in prosecution of terrorist instead the security organs were accused of human rights violations. The executive was challenged before the judiciary who found the measures in contravention of the rights of refugees.<sup>453</sup>

The executive discourse in politicizing the Lamu and Tana River attacks as ethnic violence was geared towards linking the violence to the target of ethnic groups.<sup>454</sup> This discourse was debunked by the reality of executive failure to prosecute the said perpetrators of ethnic related violence. The police failed to appropriately respond to the attacks in time, apprehend suspects and collect sufficient evidence and prefer charges on the suspects in court. The cases that were filed in court were subsequently withdrawn since there was no evidence to pursue.<sup>455</sup> No one was held liable for the attacks instead cases of police brutality abound as investigated by KNCHR.<sup>456</sup>

This study also looked at the response to the Garissa University terror attack and the religious discourses that underpinned a gazette notice by the executive that sought to link some organizations to terrorism.<sup>457</sup> The judicial findings revealed that in fact there was no evidence

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<sup>452</sup> IPOA, Report on Operation Sanitization Eastleigh Publically Known as "Usalama Watch" dated 14<sup>th</sup> July 2014 p. 7

<sup>453</sup> Refugee Consortium of Kenya & another v Attorney General & 2 others [2015] eKLR

<sup>454</sup> <https://www.kenya-today.com/news/full-statement-president-uhuru-mpeketoni-attack>

<sup>455</sup> IPOA report on Mpeketoni attack, September 2014

<sup>456</sup> Human Rights Watch, Insult to Injury: the 2014 Lamu and Tana River Attacks and Kenya's Abusive Response, Human Rights Watch 2015

<sup>457</sup> Gazette Notice No. 2326 of 2015

linking the mentioned organizations to terrorism and such executive administrative action was declared *ultra vires*.<sup>458</sup>

Under the legal factors, this study looked at the adjudication of terrorism cases where state agents; the Police and ODPP prefer detention of terror suspects through applications for denial of bail and bond. The discourse tags terror suspects as the bad guy who must be taken off the streets.<sup>459</sup> This study found out that in reality, no compelling reasons are adduced by the said agencies to warrant such detention as required by the law.<sup>460</sup> The courts therefore release the suspects and an institutional tag of war ensues.

The discourse of misplaced sympathies in the judicial role analyzed the failed attempt by the executive to conjure up the judiciary into submissions. Blaming the judiciary for sympathizing with terrorism was revealed to be against the judiciary's stickler sense of law. Evidence available revealed that the judiciary only seeks to observe human rights of terror suspects and does not in fact sympathize with such suspects,<sup>461</sup> albeit, judicial pronouncements have taken judicial notice of the suffering at the behest terrorism.

### **5.1 (b) Judicial Mediation of Kenya's International Security Relations**

In the second objective, this study examined the impact of judicial adjudication of terrorism cases on Kenya's international security relations. The core argument was that judicial

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<sup>458</sup> Petition No. 19 of 2015 Muslims for Human rights (MUHURI) and Another Vs. Inspector General of Police and 4 Others [2015] eKLR

<sup>459</sup> Elisha Zebedee Ongoya. Legal And Policy Dilemma In The Fight Against Terrorism: The Bail Question In Terrorism Cases In Kenya, available at <http://kenyalaw.org>

<sup>460</sup> CR Case No. 2428 of 2015 Republic Vs. Ummulkheir Sadri Abdalla & 3 Others before Hon. Odenyo Senior Principal Magistrate sitting at Mombasa CM's Court

<sup>461</sup> High CR Case No. 12 of 2006 Republic Vs Amos Karuga Karatu available at [www.kenyalawreports.org](http://www.kenyalawreports.org)

intervention in the war against terror is proactive through pronouncements that seek to bring all measures taken by the state within the ambit and operation of the law. To achieve this objective, the study analyzed executive's conduct of renditions where the judiciary faulted such conduct for violating the rights of individuals arrested, renditioned and detained in foreign states.

The study looked at the renditions conducted in 2006 and 2007 in an operation orchestrated by the government of Kenya following the influx of refugees fleeing the conflict in Somalia. The study found out that arbitrary arrests, detentions and transfers were done by the Kenyan government against about 150 people.<sup>462</sup> The judiciary in Kenya found out that the suspects were tortured while in custody, cruel and inhuman treatment was visited against them.<sup>463</sup> The principles of *non refoulement*, prohibition of forced disappearances, right to liberty, and right to refugee status were some of Kenya's international legal obligations that the executive perpetrated against the individuals.

The study also looked at the renditions that followed the terror attacks in Kampala Uganda on 11/07/2010. Kenyan authorities' renditioned Kenyan citizens to Uganda to face terror related charges. Some of those renditioned included Mohammed Adan Abdow, Mohamed Hamid Suleiman, Yahya Suleiman Mbuthia. They were charged and acquitted by the Ugandan courts and they sued the Kenyan authorities for such rendition.<sup>464</sup> There was an element of execute defiance of extradition treaties that accords suspects due process, instead choosing renditions to escape legal constrains.

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<sup>462</sup> Human Rights Watch, *Why Am I Still Here? The 2007 Horn of Africa Renditions and the Fate of those Still Missing*. Available at [www.hrw.org/report/2008/10/01/why-am-i-still-here/2007-horn-africa-renditions-and-fate-those-still-missing](http://www.hrw.org/report/2008/10/01/why-am-i-still-here/2007-horn-africa-renditions-and-fate-those-still-missing)

<sup>463</sup> Petition No. 822 of 2008 Salim Awadh Salim and 10 Others V Commissioner of Police and 3 Others.

<sup>464</sup> *Ibid*



The study also looked at the political economy of judicial enforcement of international legal obligations. The executive directed the closure of Refugee camps in Kakuma and Daadab based on a discourse of national security since the camps were believed to be terrorist havens.<sup>465</sup> The judicial role function halted such closure since its implementation would jeopardize the country's legal obligations internationally.<sup>466</sup> The directive to close refugee registration centers was also stopped by the judiciary on the same reasoning.<sup>467</sup>

The judicial role function also saw the conviction of foreign suspects of terror related charges. Two Iranians Ahmad Abolfathi Mohammed and Sayed Mansour Mousav arrested in possession of 15kg (33 pounds) of the powerful explosive RDX, which they allegedly planned to use in a terror attack in Nairobi and Mombasa<sup>468</sup> faced the purge and are currently serving jail term in Kamiti Maximum Prison.<sup>469</sup>

Abdul Harun Karim, a Tanzania citizen was arrested on May 9, 2016 at Kiwayu Island in Lamu County while recording a video entitled "suicide bomber" was convicted to serve 110 years in custody.<sup>470</sup> Rashid Charles Mberesero, a Tanzanian national convicted in connection with the terror attack on Garissa University is also facing life imprisonment in Kenyan jail.<sup>471</sup>

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<sup>465</sup> Human Rights Watch, Kenya: Plan to Force 50,000 Refugees Into Camps, 26 March 2014, available at: <https://www.refworld.org/docid/533ac6734.html> [accessed 7 November 2019]

<sup>466</sup> Ibid Note 432

<sup>467</sup> Ibid

<sup>468</sup> Zoe Flood, Kenyan Police Arrest Iranians Suspected of Terror Plot, The Telegraph 6:44PM BST 22 Jun 2012 available at <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/kenya/9350172/Kenyan-police-arrest-iranians-suspected-of-terror-plot.html>

<sup>469</sup> Petition No. 39 of 2018 Republic v Ahmad Abolfathi Mohammed & another [2019] eKLR

<sup>470</sup> Willis Oketch, Man on terror charges jailed for 110 years available at <https://www.standardmedia.co.ke/article/2001326870/terrorist-jailed-for-110-years>

<sup>471</sup> Garissa University attack: Tanzanian and Kenyans get long sentences, available at <https://www.bbc.com/news/world-africa-48859937>

The evidence available revealed the judiciary annulled all executive measures that were in contravention of the law and at the same time convicted all suspects charged in connection with terrorism as per the law.

## 5.2 Recapitulation of the Hypothesis

This study had two hypotheses; the underlying differentiated perspectives, is the executive's, determination to use its prerogative of power in apparent disregard of the law and the courts in a bid to root out terrorism. The second hypothesis was that the judicial intervention in the war against terrorism is proactive through pronouncements that seek to bring all measures taken by the state within the ambit and operations of the law.

On the first hypothesis: terror attacks in Kenya were followed by a response from the executive. The study identified instances when such response was based on discourses that were found to be different from the reality. Operation *Usalama Watch* for instance where security agents raided homes, arrested civilians, detained some and repatriated others to Somalia were all acts against the letter of the law. Although the objective behind the operation sought to flush out Al-Shabaab adherents and illegal immigrants connected to terrorism, the operation did not achieve this objective. No such adherents were found, instead human rights violations were reported in the way the security agents abused innocent civilians.<sup>472</sup> The executive exerted its power using force even against the law and still failed to achieve its objective.

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<sup>472</sup>Ibid Note 268

In the second hypothesis: the reported cases cited in the study saw the judiciary correct all the wrongs done by the security agents. Daabab and Kakuma camps are still in place because the judiciary over turned the executive's decisions to close them. Refugee registration centers are open because the judiciary over turned the executive's decision to close them. Refugees in Kenya have the right of movement around the country because the judiciary over turned the executive's decision to contain refugees in refugee camps. The discourse by the judiciary remained that terrorism is just a crime like any other and must be dealt with in a fair trial. The cases where suspects were granted bail, cases where suspects were acquitted and convicted all followed a trend of fair trial. The end result was the executive and the judiciary at cross roads but nevertheless brought normally and legality into the fight against terrorism.

### **5.3 Conclusion**

This study has looked at the factors underpinning differentiated actor discourses and realities of judicial institutional behavior in the war against terror. The study has looked at politics as a factor. The politics that led to failed attempt to link refugees to terrorism in Kenya, and the failed attempt to link ethnic violence to the Lamu and Tana River terror attacks. The study also looked at the failed attempt to link the Muslim religion to the Garissa University attacks. The study looked at how the executive used politics to escape their responsibility to reign in terror by issuing directives against the law and have its own judiciary overturn its decisions and directives. The study also examined legal factors; upholding the rights of terror suspects and entrenching fair trial in the adjudication of terrorism cases.

The study also looked at how the judiciary has sought to mediate Kenya's international security relations through enforcement of international obligations as entrenched in international law. The judiciary has also contributed to the fight against terrorism through the trial and conviction of terror suspects both local and foreigners. In the end, one thing is clear, his study has revealed that through adjudication, the judicial role is critical in matters of national and international security.

In conclusion, therefore, this study notes the enforcement of the rule of law is a critical variable in the assurance of security particularly, the fight against terrorism.<sup>473</sup> The executive is not a lone actor in matters of security, the judiciary does have a role to play. A recognition of the judiciary as an actor will lead to these two institutions acting in complementary and mutually reinforcing roles to advance the discourse of security.

#### **5.4 Policy Recommendations**

Firstly, this study has shown that Kenya security agencies subvert the rule of law by conducting arbitrary covert operations against those suspected to be associated with terror attacks.<sup>474</sup> This *strategy feeds into the terrorist* discourse that aims at subverting the rule of law and instill change through violence and fear. Terrorists employ violence to terrorize people as legitimate forms of political action.<sup>475</sup> When security agents arrest people arbitrarily, detain people for long periods without charge, invade homes and confiscate property, engage in forced disappearances and seek

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<sup>471</sup> UN Global Counter-Terrorism Strategy (General Assembly resolution 60/288, annex)

<sup>474</sup> KNCHR, *The Error of Fighting Terror with Terror*, Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism September 2015 available at <http://www.knchr.org/Portals/0/CivilAndPoliticalReports/Final%20Disappearances%20report%20pdf.pdf>

<sup>475</sup> United States of America, *National Strategy for Combating Terrorism*, February 2003, available at [https://www.cia.gov/news-information/cia-the-war-on-terrorism/Counter\\_Terrorism\\_Strategy.pdf](https://www.cia.gov/news-information/cia-the-war-on-terrorism/Counter_Terrorism_Strategy.pdf)

bribes,<sup>476</sup> are actions, a replica to the terrorists playbook. The net effect is the failure to differentiate the terrorist and the police in uniform. Such a strategy has failed to achieve the desired results instead breeding more terrorist sympathies, an agent for recruitment. The judiciary in Kenya has entrenched the rule of law in the fight against terrorism and there is need to further empower it to continue and all other institutions to follow suit.

There is a need for democracies to be guided by the law. The fight against terrorisms is unique and that is why states are better trusting their institutions and sticking to their values. When justice and fairness is accorded to terror suspects, it denies them political grievances against validly elected regimes.

Secondly, as actors in the same course, state institutions must be at par with one another. This study has shown institutional actor discourses at par with the reality of judicial institutional behavior. This has led to protracted legal battles resulting in annulment, cancellation of executive administrative action and punitive measures taken against executive decisions found to be incongruent with the law. To address this variable, all institutions should be included in policy and decision making processes in matters of national and international security. At this stage, it is no longer tenable to argue against but for the judicial role function in matters of security. This study has shown that through adjudication, the judicial role play complements the discourse of security. This study has also shown that the judicial role function has been largely to prefect executive conduct, which should not be the case.

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<sup>476</sup> These actions were perpetrated by Kenyan security agents in operations like Usalama Watch with the sanction of the executive in response to terror attacks discussed in chapter 3

The judicial role function should be positive. Such a function should be entrenched in decisions that require the sanction of the law. This can be done through adoption of a law similar to the FISA of the US.<sup>477</sup> This will enable the sharing of intelligence data with the judiciary in closed proceedings giving the judiciary is made privy to the evidence necessary and the basis upon which certain decisions in matters of security can be made. When decisions are based on the law and not on political whim, they tend to serve their purpose aligned with the reality.

The guidelines developed by the Global Terrorism Forum (GCTF) on good practices in the adjudication of terrorism cases<sup>478</sup> as well as those developed by the International Institute for Justice and the Rule of Law (IIJRL)<sup>479</sup> should be domesticated to improve the trial process of terrorism cases. The former advocates for an independent judiciary that fairly and expeditiously adjudicates terrorism cases as an effective deterrent to terrorism.<sup>480</sup> Such a mechanism minimizes the risk of violations of fundamental human rights.<sup>481</sup> The guidelines point to the danger of trial by installments that leads to protracted processes that does not yield the desired results instead only breeds resentment against the government from the accused persons as well as the victims of the attacks.<sup>482</sup> The Garissa university attack took place in 2013 and the trial started the same year and ended in 2019. The victims of that attack had to wait or 6 years to get justice. This was

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<sup>477</sup> Ibid Note 448

<sup>478</sup> Global Counterterrorism Forum, the Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses Available at <https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/A/GCTF-The-Hague-Memorandum-ENG.pdf>

<sup>479</sup> The International Institute for Justice and the Rule of Law, Good Practices for the Judiciary in Adjudicating Terrorism Offenses in the Horn of Africa Region; Judicial Guidelines available at [https://theijl.org/wp-content/uploads/Judicial-Guidelines-on-Good-Practices-for-the-Adjudication-of-Terrorism-Offences\\_High-Res-1-1-2.pdf](https://theijl.org/wp-content/uploads/Judicial-Guidelines-on-Good-Practices-for-the-Adjudication-of-Terrorism-Offences_High-Res-1-1-2.pdf)

<sup>480</sup> Global Counterterrorism Forum, the Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses Available at <https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/A/GCTF-The-Hague-Memorandum-ENG.pdf>

<sup>481</sup> Ibid

<sup>482</sup> Ibid

delayed justice, which translates into denied justice. Continuous trial of cases ensures expedition where victims get their justice at the earliest opportunity.

IJRL guidelines recommend the use of pre-trial alternatives for terrorism suspects.<sup>483</sup> These alternatives include the expanded use of inchoate offenses or holding charges that allows for detention of suspects and prevents their travel or commission of terrorism acts.<sup>484</sup> Such charges can ensure the detention of suspects without the need to seek detention orders from the court where there are no charges. The adoption of these guidelines would enhance the judicial role function to have a greater impact in the fight against terrorism given its centrality.

Security agents need sensitization on the importance of handling the accused persons with fairness as provided for by the law. Illegal detentions, torture of accused persons, collection of evidence illegally are measures that should be avoided. The constitutional standards set by Kenya's as well as international standards of fairness must be adhered to from the point of arrest of terror suspects to the end of their cases.

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<sup>483</sup> The International Institute for Justice and the Rule of Law, Good Practices for the Judiciary in Adjudicating Terrorism Offenses in the Horn of Africa Region; Judicial Guidelines available at [https://theij.org/wp-content/uploads/Judicial-Guidelines-on-Good-Practices-for-the-Adjudication-of-Terrorism-Offences\\_High-Res-1-1-2.pdf](https://theij.org/wp-content/uploads/Judicial-Guidelines-on-Good-Practices-for-the-Adjudication-of-Terrorism-Offences_High-Res-1-1-2.pdf)

<sup>484</sup> GCTF's Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector. available at <https://theij.org/wp-content/uploads/English-Effective-Use-of-Appropriate-Alternatives.pdf>

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