UNIVERSITY OF NAIROBI

INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES

COUNTER-TERRORISM AND HUMAN RIGHTS IN KENYA

BY

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A RESEARCH PROPOSAL SUBMITTED IN PARTIAL FULFILLMENT OF THE AWARD OF A DEGREE OF MASTER OF ARTS IN INTERNATIONAL STUDIES

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2017

DECLARATION

I declare that, this research proposal is my original work and to the best of my knowledge has not been presented to any other university for any purpose of examination.

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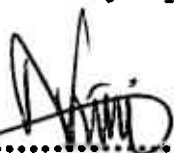
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ACKNOWLEDGEMENT

I wish to thank God the Almighty for giving me the strength and determination. I wish to acknowledge the guidance and wise council of my supervisor, Dr. Mumo Nzau throughout the journey to completion of my thesis. I also wish to express my gratitude to my family who contributed immensely in many ways. Without their support, the journey would not have been a success.

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LIST OF ABBREVIATIONS

AD	Ann Dominion
ATA	Anti-Terrorism Assistance
ATPU	Anti-Terrorism Police Unit
AU:	African Union
CJTF-HOA	Combined Joint Task Force – Horn of Africa
COMESA	Common Market for Eastern and Southern Africa
CTC	Counter-Terrorism Committee
CTITF	Counter Terrorism Implementation Task Force
EACTI	East Africa Counter-Terrorism Initiative
GTD	Global Terrorism Database
GTI	Global Terrorism Index
HRW	Humans Right Watch
ICD	International Crimes Division
IEP	Institute for Economics and Peace
JTTF	Joint Terrorism Task Force
KDF	Kenya Defense Forces
KNCHR	Kenya National Commission on Human Rights
KPTJ	Kenyan's for Peace with Truth and Justice
NCTC	National Counter-Terrorism Center
TIP	Terrorist Interdiction Program
U.S	Unites States
UK	United Kingdom
WMD	Weapons of Mass Destruction

ABSTRACT

The Republic of Kenya has experienced four major terror attacks. Kenyan Government took it upon its responsibility to act decisively against terrorists within its borders and in Somalia after the offensive terror attacks. Nevertheless, counter-terrorism continues to pose great challenges for human rights. In Kenya, the potency of the debate is aggravated by reports of human rights abuses, extrajudicial killings as well as illegal extraditions. The main objective of the study will be to examine the effects of counter-terrorism strategies on human rights in Kenya. The study examines the challenges facing counter-terrorism strategies in Kenya, the impact of counter terrorism on human rights in Kenya and the prospects for favorable counter terrorism-human rights outlook in Kenya. The study is qualitative in nature. The target population comprises of governmental and non-governmental institution dealing with human rights and counter terrorism issues in Kenya. The study uses purposive sampling to select the respondents. The study collects both primary and secondary data. The study concluded that counter terrorism measures used in Kenya often violate human rights. The main counter terrorism measures applied in Kenya include security operations, legislative reforms, institutional building, trainings and bilateral and multilateral collaborations. The military and police operations against terrorism and terrorist suspects have led to human right violations such as holding suspects incommunicado, denial of legal representation, illegal deportation, extrajudicial killings and ethnic and religious profiling. Torture of the arrested and detained persons has been a violation of human rights rules. Human rights have also been violated through the rendition program and infringement on the right to be brought promptly before a judge or other judicial officer. The study recommends that Kenya need to facilitate adherence to human righting the fight against terrorism by ensuring that initiatives and institutions undertaken respect human rights; Kenya and international community should advocate for financial and human resources committed to addressing social and economic challenges in Somalia; Kenya should review laws governing counter terrorism. Counter-terror laws should deter use of excessive force and violation of human rights when dealing with suspected terrorists.

CHAPTER ONE

INTRODUCTION

1.1 Background of the Study

Literature has varied definitions of the term terrorism. The term terrorism refer to the threatened or actual use of illegal force and violence by a non-state actor to attain a political, economic, religious, or social goal through fear, coercion, or intimidation.[1] This definition recognizes that terrorism is not only the physical act of an attack, but also the psychological impact it has on a society for many years after.

Globally, from 2013 to 2014 the number of deaths from terrorism increased by 14,574, which represents an 80 per cent increase.[2] For the past three consecutive decades Kenya has been a continuous victim of terrorist attacks. In the year 1980 the Norfolk hotel in Nairobi was bombed. Later on in the year 1998 the United States Embassy in Nairobi was bombed, a plaque has been put in place in memory of the victims of this attack. In the year 2002 a missile attack on an Israel plane missed and hit paradise hotel. Between the year 2011 and 2014 small scale grenade attacks occurred on churches, buses stations and bars. The Somali based terrorist group Al-Shabaab has been responsible for many terrorist attacks in Kenya. This includes the Westgate shopping mall attack in September 2013 which resulted in 67 deaths and 175 injuries and the 2 April 2015 massacre at Garissa University where gunmen stormed a university and killed 147 people.[3] Al-

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[1] Duffy, H. (2005). *The 'War on Terror' and the Framework of International Law*. Cambridge: Cambridge University Press.
[2] Hyslop, D and Morgan, T. (2014). Measuring terrorism with the global terrorism index, *in Raul Caruso, Andrea Locatelli (ed.) Understanding Terrorism (Contributions to Conflict Management, Peace Economics and Development, Volume 22)*. Emerald Group Publishing Limited, pp.97 – 114.
[3] Ibid, pp. 27.

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Shabaab continues to attract foreign fighters, particularly in Kenya. Radicalization is in part due to perceptions by Muslim youth of mistreatment by the Kenyan government.[4]

Human rights concerns have arisen through the creation of counter-terrorism measures. For instance, the counter-terrorist policies adopted to combat terrorism in the U.S. in response to September 11th terrorist attack at World Trade Center circumvent international conventions and treaties in the form of torture and political imprisonment.[5] The likelihood of human rights violations (e.g., torture, extrajudicial killings) increases in the face of terrorist threats.[6] Even some civil liberties may be constrained in consequence. Apart from the impacts of security measures on citizens' rights in terror target countries, the impacts of aggressive counter-terrorism measures in terror host countries have been found to terrorize innocent citizens. Sometime detainees alleged infringement of human rights through torture and detention without trial.[7]

The war on terror has made the infringement of human rights in Kenya quite prevalent instead of protecting the citizens it subjects them to harassment.[8] Some former detainees claim to have allegedly been subjected to torture and conditions were of cruel and inhuman treatment in Kenya or deported to their country of origin. They were first held in Kenya for several weeks without being charged, they were declined access to a lawyer, consular assistance, the ability to challenge the legality of their detention or the consideration of their potential refugee status. The

[4] Botha, A. (2014). 'Radicalisation in Kenya', Institute for Security Studies Paper 265, September 2014.
[5] Goderis, B. and M. Versteeg (2008). "Human Rights Violations after 9/11 and the Role of Institutional Constraints." Paper presented at the Second Workshop of the Network for the Economics Analysis of Terrorism (NEAT), September 22, 2008, Brussels.
[6] Dreher, A., M. Gassebner and L.-H.R. Siemers (2007). "Does Terror Threaten Human Rights? Evidence from Panel Data." Journal of Law and Economics, 27(2): 107-114.
[7] Brysk, A. and Shafir, G. (2006). National Insecurity and Human Rights: Democracies Debate Counterterrorism. London: Global, Area, and International Archive University of California Press.
[8] McGregor, L. (2009). Kenya & Counterterrorism: A Time for Change. London : Reprieve and Redress. Available at: www.redress.org/smartweb/africa/kenya.

common thread of these cases is the invocation of national security and the threat of terrorist attacks to justify the detentions and removals.

All States have a duty and an obligation to protect individuals within their jurisdiction from terrorists.[9] While counter-terrorist measures are essential for States to maintain national security and ensure safety for all individuals, these measures must not circumvent international law or violate human rights. In implementing counterterrorism measures, democratic governments must balance legitimate national security considerations with equally legitimate civil rights. Furthermore, democratic governments cannot allow themselves the luxury of forgetting that terrorists have rights. Should this principle be laid aside, then the question of "what are democratic regimes fighting to protect" may legitimately be raised.[10]

Nzau[11] investigate the impact of international human rights regimes on domestic political change in the context of democratization. The study established that ratification of international human rights regimes is likely to introduce reforms leading to increases in a country's overall level of democracy. that party states to the international human rights regimes tend to experience democratization after ratification and that their overall adoption of reforms for increasing political competition are more rapid when compared to states not party to the convention. The study finding suggests that different human rights conventions may attract states for different reasons. In the context of this study, the human right issues are investigated in the context of counter-terrorism strategies adopted by a state.

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[9] Guiora, A. N. (2005). Counter-terrorism and the Rule of Law. Case Western Reserve University School of Law. Case Research Paper Series in Legal Studies Working Paper 05-15, pp. 1.
[10] Ibid, Guiora, pp. 1.
[11] Nzau, M. (2015). Reassessing the Impact of International Human Rights Regimes on Democratization. *International Journal of Scientific Research and Innovative Technology* ISSN: 2313-3759 Vol. 3 No. 10; 45-60.

As terrorism continues to escalate in Africa, states are putting in place strategies and policies to counter this menace. Counter terror operations in Kenya, Nigeria, and Tunisia among other countries have subsequently ignored human rights principles. The line between national security and protection of the citizens' rights have been extensively abused by many states and to this end, counter terrorism strategies have become unpopular.

1.1.1 National Strategy to Counter Violent Extremism in Kenya

Kenya has a national strategy used in counter terrorism.[12] The strategy outlines operations and particularly counter-radicalization at the general, specific and individual level. The strategy address the psychosocial needs of individuals who have been radicalized and even gone as far as joining violent extremist networks or groups. Education pillar in the strategy address radicalization in learning institutions from elementary, tertiary to higher education levels. The aim of the security pillar is to ensure that radicalization is met with the full force of law whenever and wherever possible. The strategy also targets other areas such as political, faith based organizations, arts and culture, laws and policy frameworks, media, training and capacity building.

The strategy targets those that are radicalized and on the brink of joining violent extremist organizations; members of violent extremist organizations who have not committed or facilitated violent attacks in Kenya or abroad, or for whom there is no evidence of such crimes; individuals who have voluntarily left violent extremist and terrorist organizations with the wish to no longer support violence or radicalization; individuals convicted of terrorist- related crimes and who pose a risk of radicalizing fellow inmates or who voluntarily seek to assist de-radicalization efforts

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[12] Republic of Kenya (2016). National Strategy to Counter Violent Extremism. Printed By The Government Printer, Nairobi. Available at: file:///C:/Users/Maureen/Downloads/National%20Strategy%20To%20Counter%20Violent%20Extremism.pdf.

while serving their sentences and individuals ordered by courts or given adjusted sentences to participate in rehabilitation efforts.[13]

1.2 Statement of the Research Problem

Every Government has a mandate to ensure national security from threats emanating from both within and outside its borders. Terrorism has been one of the major threats to National Security for most states. The nature of terrorism and its tactics continue to pose challenge to the various actors and processes of countering it. Governments have been accused of abusing human rights in their bid to counter terrorism. Some counter-terrorism strategies used by the government agencies such as use of excess military or police force in combatting terrorism, illegal arrests and detentions have been alleged to violate human rights. Though many governments deny such transgressions, on the whole, the counter terrorism-human rights nexus remains a highly contested and problematic issue. Against this background, this study seeks to examine the influence of counter terrorism processes and the state of human rights in Kenya.

1.3 Objectives of the Study

1.3.1 Overall Objective

To examine the effects of counter-terrorism strategies on human rights in Kenya.

1.3.2 Other Objectives

This study seek to:

i. Examine the challenges encountered in the fight against terrorism in Kenya

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[13] Ibid, Republic of Kenya (2016).

ii.   Assess the impact of counter terrorism on human rights in Kenya

iii.   Determine the prospects for favorable counter terrorism-human rights outlook in Kenya

1.4 Literature Review

This section review literature pertinent to counter terrorism and human right issues that emerge in the fight against terrorism. The chapter reviews literature on challenges facing counter terrorism, impact of counter-terror strategies on human rights and the prospects for favorable counter terrorism-human rights outlook.

1.4.1 Challenges Facing Counter Terrorism

The approaches used to counter-terrorism across the world are faced with various challenges. Some governments use discriminatory measures during anti-radicalization leading to stigmatization of certain groups in a society thus the counter-terrorism strategies used by government become counter-productive in terms of inclusion and integration programmes.[14] Targeted sanctions can have great impact on the individual's basic human rights, without the individual having the possibility of a proper hearing of the case, including compliance with the principle of contradiction i.e. the right to be heard. Modern methods of surveillance open up for possibly quite severe interference with the right to a private life. Modern methods of surveillance mean very large amounts of data need to be stored, which requires a well-developed data storage strategy in order to keep private data confidential. An overweighting of one particular group of

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[14] Søholm, I., and Kessing, P.V. (2012). Practical Guidance Paper on Counter-terrorism and Human Rights. Danish Institute for Human Rights. Strandgade 56, Copenhagen.

people being subject to control orders may lead to issues of discrimination, and a rising tension amongst specific groups of persons in a society.[15]

Counter terrorism involves facilities, technologies, networks and processes aimed at preventing terrorist attacks, limiting the damage caused by such attacks or addressing the consequences of such attacks, including measures to investigate and apprehend those responsible through law enforcement. Security infrastructure involves the combination of physical and network security, as well as its use and implementation by intelligence agencies, law enforcement officials and contracted civilians to provide a security framework and advances that protect and promote human rights while countering terrorism is both an obligation of States and a condition for an effective counter-terrorism strategy.[16]

States have a right and a duty to take effective counter-terrorism measures, to prevent and deter future terrorist attacks and to prosecute those that are responsible for carrying out such acts.[17] At the same time, the countering of terrorism poses grave challenges to the protection and promotion of human rights. Counter terrorisms faces challenges such as the lack of rule of law, failure to limit and check powers given to the police in the fight against terrorism, ethnic, national and religious discrimination, political exclusion, and socio-economic marginalization.

Counter-terrorism measures directed towards global extremist networks such as Al-Queda and Islamic State have been misconstrued as targets to the Muslim community. Counter terrorisms operations carried out in Muslim dominated areas and mosques have contributed to a wider sense

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[15] Ibid, Søholm and Kessing (2012), p 16.
[16] Brysk, A. and Shafir, G. (2006). *National Insecurity and Human Rights: Democracies Debate Counterterrorism.* London: Global, Area, and International Archive University of California Press.
[17] Gautam, A. (2015). Human Rights and Terrorism: An Overview. International Journal of Multidisciplinary Research and Development, 2 (10), 422.

among Muslims that they are being treated as a 'suspect community' and targeted by authorities simply because of their religion.[18] Many participants, while not referring to specific laws or policies, felt that counter-terrorism law and policy generally was contributing towards hostility to Muslims by treating Muslims as a 'suspect group', and creating a climate of fear and suspicion towards them. Muslims had strong perceptions of the impact of counter-terrorism measures on their lives, particularly when those measures seemed to target people on the basis of religion, rather than any form of immediate threat or suspicion.

The newly heightened security environment after 9/11 puts at risk a number of fundamental rights and freedoms, including the rights to a fair trial, to privacy, and the freedoms of association and of religion or belief. The UN Special Rapporteur on Torture has also challenged the use of "stress and duress" techniques during interrogation and in particular subjecting detainees to prolonged standing or kneeling, hooding, blindfolding with spray-painted goggles, sleep deprivation and 24-hour lighting, and also the keeping of detainees in painful or awkward positions.[19] Even in the context of interrogation and investigations into acts of terrorism, there can be no necessity defense for subjecting a suspect to torture or inhuman or degrading treatment.

There are several infringements on human rights common to counterterrorist measures which include: expanded search and arrest powers, increased periods of detention, proscription of terrorist organizations, and expanded deportation of powers.[20] However, given the apparent resilience of democracies in the face of terrorism, and the success in countering terrorist attacks,

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[18] Choudhury, T., and Fenwick, H. (2011). 'The impact of counter-terrorism measures on Muslim communities.' Project Rep ort. Equality and Human Rights Commission, Manchester.
[19] Report of the UN Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Theo van Boven, doc. E/CN.4/2004/56/Add.1, para. 1813.
[20] Charters David A. (1994). *The Deadly Sin of Terrorism: It's Effect on Democracy and Civil Liberty in Six Countries*. Westport, CT: Greenwood Press.

Charters argues that it is possible for governments to balance the security requirements with protection of human rights in countering terrorism. The protection of human rights in counter-terrorism is essential to all aspects of counter-terrorism, not only criminal justice, but also to name just a few national security, military operations, inclusive social and economic policies, treatment of national and ethnic minorities, and migration.[21]

The Anti-terror Police Unit (ATPU) in Kenya has been accused of violating human rights laws. The Anti-Terror Police Unit officers harassed, intimidated, beat suspects and detained them for long periods without judicial review or the opportunity to oppose to extension of their detention periods.[22] Under Kenyan law, suspects are to be brought before a court within 24 hours period and have the right to be present when a court decides whether to extend their detention. This clearly shows a violation of human rights norms and the application of unapproved methods of dealing with human beings.

The Universal Declaration of Human Rights[23] consists of a preamble asserting the dignity of human beings and 30 articles representing specific rights such as freedom from torture, security, fair trial and due process, right to own property, freedom to and from discrimination, freedom to marry, the right to work and religious freedom. Governments therefore have not only the right, but also the duty under international law, to protect their nationals and others against terrorist attacks and to bring the perpetrators of such acts to justice.

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[21] Rosand, E., Millar, A., & Ipe, J. (2009). *Implementing the UN Global Counter-Terrorism Strategy in East Africa.* Center on Global Counterterrorism Cooperation. Routledge.
[22] Howden, D. (2013). *Kenya rights group accuses anti-terror police of unlawful killings.* Retrieved July 29, 2016, from The Guardian: www.theguardian.com/world/2013/nov/2019/kenya-rights-group-accuses-anti-terror-police-of-unlawful-killings/
[23] UN General Assembly in its Resolution on Human Rights and Terrorism, UNGAA/RES/29/185, para 6.

However as counter-terrorism efforts are conducted they do have a significant effect on overall respect for human rights. In response to terrorism, states are under an obligation to take steps to protect the lives and physical integrity of people within their jurisdiction against terrorist attacks. Where an attack has taken place, the state according to human rights law is required to review the adequacy of the legal measures in place to protect people from terrorist attacks and bring the perpetrators to justice. Also it should take such measures as are identified as being necessary to provide adequate protection. This is the first of the human rights implications of the attacks themselves.[24]

1.4.2 Impact of Counter-Terror Strategies on Human Rights

The need to worry about human rights and preserve human rights in the face of those who show disregard and contempt for human rights such as terrorists stems from the need for the state to maintain the moral and ethical high ground. The rationale behind this argument is largely informed by the fact that terrorism is an ideologically and politically motivated assault on the democratic rights and freedoms that the state holds dear. In this regard, the essential strategy in countering the extremism that breeds terrorism is to win 'the contest of ideas' by rigorously defending the basic human rights and freedoms which form 'the bedrock of dignity and democracy that make a society worth protecting.[25]

Closely related to the principle of humanity is that of impartiality, requiring that no discrimination be made on the basis of nationality, race, religion or other similar criteria. In

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[24] Bekink, B. (2005). A Dilemma of the Twenty-First Century State: Questions on the Balance between Democracy and Security, African Human Rights Law Journal, 406 at 410.
[25] Doussa, J. V. (2006). *Reconciling Human Rights and Counter-Terrorism: A Crucial Challenge.* Retrieved from Australian Human Rights Commission: https://www.humanrights.gov.au/news/speeches/reconciling-human-rights-and-counter-terrorism-crucial-challenge.

addition, assistance and protection be given only in proportion to need. Additionally there are principles of neutrality between the parties to an armed conflict and independence from political agendas, both of which enable the other core principles to be translated into action on the ground. The legal framework and these humanitarian principles require humanitarian actors to treat state and non-state parties to an armed conflict on an equal basis and to respond to all victims in proportion to their needs, without consideration of political or other factors. This approach can clash with that of counter-terrorism which designates certain armed actors as terrorist, and therefore criminal, and may impose liability for engaging with them even for humanitarian purposes.[26]

There are specific human rights violated when law enforcement embarks on counter-terrorism operations. The first is the right to life. It is the duty of the state to protect the rights of individuals under their authority. The Office of the United Nations High Commissioner for Human Rights clearly points out in the thirty second Human Rights, Terrorism and Counter Terrorism fact sheet that States constantly present challenges to this right while conducting counter terrorism operations. Law enforcers executed targeted killings to terror suspects. Such arbitrary killings eventually increase the insurgence and result into counterproductive antiterrorism strategies. The second law that is profoundly challenges by counter terrorism strategies is the prohibition of torture and other cruel, inhumane and degrading treatment. Various alleged terror suspects report to have been subjected to torture in order to elicit information that was later on used against them in legal proceedings even though it is prohibited to utilize evidence elicited by such means in the court of law. Independent detention monitoring bodies can be employed to prohibit violation of this right.

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[26] Mackintosh, K., and Duplat, P. (2013). Study of the Impact of Donor Counter Terrorism Measures on Principled Humanitarian Action. Geneva: Office for the Coordination of Humanitarian Affairs.

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Detention and transfer of terror suspects should be conducted by the State according to lawful set procedures. Detainment and transfer of suspects that is not conducted according the law, such as use of secret detention, results into abuse of human rights the the process. The third human right that is significantly challenged by the liberty and security of the person. This human rigths is also applicable to criminal suspect.Most recently many States have adopted policies that jeopardize this right such as the amendment of the security laws bill in the year 2014 in Kenya. This amendment introduced harsher penalties that threaten the human rights of terror suspects. Other rights under jeopardy include due process and the right to a fair trial, the principle of legality and the definition of terrorism, freedom of expression and the prohibition of incitement to terrorism, freedom of association and right to privacy.

Human rights activists have been critiquing the Nigerian government for violation of human rights in the right against Extremist Islamic group Boko Haram.[27] The Nigerian security forces have continuously been increasing their efforts towards curbing the insurgency of Boko Haram. The extrajudicial killing of Mohammed Yusuf , Boko Haram founder while in police custody in the year 2009 was a clear indication of how Nigerian security forces self-justify the infringement of human rights in their fight against terrorism. The government lacked a well-established body to monitor the activities of its armed forces as a result the governments counter terrorisms efforts are eventually counterproductive since such unlawfulness against civilians result into attacks of terrorism.

State counter-terrorist measures implicate numerous fundamental human rights, including the right to life through targeted killings, the prohibition against torture, liberty interests through

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[27] Limited, A. I. (2015). 'Our Job is to Shoot, Slaughter and Kill' Boko Haram's Reign of Terror in North-East Nigeria. London: Limited, Amnesty International Charity.

arbitrary detention, racial and ethnic profiling, the right to due process, freedom of speech and association, the right to privacy, and many other social, economic, and cultural rights.[28] The importance of protecting human rights in creating effective counter-terrorism measures cannot be minimized. Significantly, failure to comply with international law and human rights norms may actually result in promotion of terrorism. The use of "discriminatory and stigmatizing measures affect the rights of entire communities, and may lead to further marginalization and possibly radicalization within those communities. Therefore, transparency and judicial oversight of State counter-terrorist measures must be promoted to ensure State compliance with international human rights.[29]

1.4.3 The Prospects for Favorable Counter Terrorism-Human Rights Outlook

Counter-terrorism strategies have impacted on human rights in a number of countries triggering debates both within and without the academia. In Australia for instance, the crucial challenge has been how to effectively respond to the threat of terrorism without abandoning the fundamental human rights principles that are the hallmark of free and democratic societies[30]. The rationale behind this challenge is largely due to the fact that striking the right balance between national security and human rights is crucial for both the success of our counter-terrorism strategies and to maintain the tolerant and democratic ideals of our multicultural country. Indeed, terrorism is a gross violation of fundamental human rights. In this regard, it is the duty of the government to take action to protect its citizens. However, the threat of terrorism doesn't justify the wholesale

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[28] Virostko, L., and Newman, F. C. (2013). Counter-terrorism and the Protection of Human Rights. Human Rights Council 13th Session, Agenda Item 3: Countering Terrorism. Human Rights Advocates, Berkeley, CA 94705 USA.
[29] Ibid, Virostko and Newman (2013), p. 6.
[30] The National Human Rights Commission was established in Nigeria to act as an extra-judicial means for ensuring human rights are not violated.

abandonment of the democratic rights and freedoms embedded in the legal system. To this effect, there's a need to consistently balance counter-terrorism laws with human rights.[31]

It is widely accepted that the respect for human rights and the rule of law must be the bedrock of the global fight against terrorism. This requires the development of national counter-terrorism strategies that seek to prevent acts of terrorism, prosecute those responsible for such criminal acts, and promote and protect human rights and the rule of law. It implies measures to address the conditions conducive to the spread of terrorism, including the lack of rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, and socio-economic marginalization; to foster the active participation and leadership of civil society; to condemn human rights violations, prohibit them in national law, promptly investigate and prosecute them, and prevent them; and to give due attention to the rights of victims of human rights violations, for instance through restitution and compensation.[32]

The relationship between human rights and terrorism and in particular the impact of counter terrorism measures on human rights has been given considerable attention at the international arena since 9/11 terrorist attack in United States of America in 2001. Nevertheless, human right concern in the fight against terrorism existed before the terrorist attack in United States.[33]

Terrorism being a great threat and violation of human rights is not disputed but protection of these rights during counter terrorism operations is also most relevant and requires discussion,

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[31] Doussa, J. V. (2006). *Reconciling Human Rights and Counter-Terrorism: A Crucial Challenge.* Retrieved from Australian Human Rights Commission: https://www.humanrights.gov.au/news/speeches/reconciling-human-rights-and-counter-terrorism-crucial-challenge.
[32] Gautam, A. (2015). Human Rights and Terrorism: An Overview. *International Journal of Multidisciplinary Research and Development*, Volume: 2, Issue: 10, 421-424.
[33] Flynn, E. J. (2005). '*Counter Terrorism and Human Rights: The View from the United Nations.*' European Human Rights Law Review, 3(5), 29.

because abuses have been reported in the recent history regarding the violations of human rights during the conduct of counter terrorism operations and abuse of process on the pretext of counter terrorism measures.[34] The violations committed during counter terrorism operations are as much serious in nature as the acts of terrorism themselves and make no difference between the acts of terrorists and those who claim to be acting against them for elimination of the same. The violation of human rights including that of suspects of terrorism and accused persons should be protected.[35]

1.5 Theoretical Framework

The study adopts Sjoberg's Theory of Human Rights. Sjoberg constructed a nuanced, ambitious, multifaceted conceptual sociological model of human rights, based in large part on empirical cases and drawing on scholars in a wide range of fields (sociology, philosophy, law, political science, anthropology, and others). Human rights are claims made by persons in diverse social and cultural systems upon 'organized power relationships' in order to advance the dignity of (or, more concretely, equal respect and concern for) human beings.[36] The theory proposed the human rights tradition as the best means for constructing some moral accountability to address the key social problem of powerful bureaucratic organizations. The most two distinctive features of Sjoberg's theory of human rights is an over-riding focus on both the bureaucracy / complex organizations and the role of human agency in relation to it, linking social structure with human agency. His human rights writings include overview of the key features of bureaucracy, such as

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[34] Jawad, S. (2015). Terrorism and Human Rights. Sociology and Anthropology 3(2): 104 -115.
[35] Ibid, Jawad. (2015).
[36] Sjoberg, G., Gill, E., and Norma W. (2001). "A Sociology of Human Rights." Social Problems, vol. 48, no. 1: 11-47.

hierarchy, the division of labor (as both constraining and enabling individuals), standardization, rules and regulations.[37]

Sjoberg's theory of human rights propose that human agents and bureaucracies are closely linked in an asymmetrical, dialectical relationship, with bureaucracies (and managerial elites) holding the dominant position while at the same being dependent on individuals and their labor and expertise to do their bidding. Sjoberg 2009. Sjoberg's theory of human rights argue that individuals are able to engage in critical reflection, envision alternative social arrangements and to seek change in bureaucratic structures. Such reflection and change-seeking has been instrumental in raising the prospect of an admittedly difficult route leading to public accountability for bureaucracies (both governmental and corporate) for their human rights violations, sometimes leading to significant reforms or more drastic sanctions, particularly in cases of gross human rights violations such as post-Apartheid South Africa and post-WWII and Holocaust Germany.[38]

Moreover, the ability to "take the role of the other", especially multiple, divergent others, is central to recognizing and promoting human rights.[39]. This conceptualization of the social structure-human agency stands apart in its clarity in specifying how they are related and in what ways human agents are both constrained by yet able to seek change in complex organizations that make up the foundation of social structure, thereby opening the conceptual door to establishing public, moral accountability of organizations (state and corporate) and their elites that violate human rights.

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[37] Sjoberg, G,. Vaughan, T. R., and Norma W. (1984). "Bureaucracy as a Moral Issue." Journal of Applied Behavi.oral Science, Vol. 20, no. 4, pp. 441-453.
[38] Sjoberg, G. (2009). "Corporations and Human Rights." In Interpreting Human Rights: Social Science Perspectives. Rhiannon Morgan and Bryan S. Turner (editors). New York: Routledge. Pp. 157-176.
[39] Sjoberg, G. (1996). "The Human Rights Challenge to Communitarianism: Formal Organizations and Race and Ethnicity." in Macro Socio-Economics. David Sciulli (ed). Armonk, N.Y.: M.E. Sharpe. Pp.273-297.

Features of Sjoberg's work that bear special attention include his focus on bureaucratic secrecy as well as his preoccupation with the impact of bureaucracy in inequality, especially the most vulnerable groups. First, bureaucratic secrecy always looms large in his view of powerful organizations, both as means for reinforcing organizational and elite power and a tool for human agency. While he is mindful (and critical) of bureaucratic secrecy as a way organizations and their leadership establish greater control and power (to fend off external scrutiny and so on), also notes that those in the lower ranks of the hierarchy and in specialized areas of the division of labor also use secrecy, particularly the informal variety, to protect themselves from abuses of power by the higher-ups. However, Sjoberg's theory of human rights emphasize the role of formal secrecy of organizations and their elites in enhancing their power and as having the gravest impacts on human rights, particularly on less powerful and disadvantaged groups and individuals –e.g., assassination and torture programs, genocide, politicide, banking and finance scandals, hidden medical experiments and toxic waste exposure, the monitoring of dissident groups, etc.[40] This focus on bureaucratic secrecy is a vital in the understanding of human rights, given of the prominence of the issue in human rights cases in the empirical world, and remarkably that it has been largely neglected by other scholars.

The other prominent remaining theme in Sjoberg's theory of human rights is a concern with the way bureaucratic power structures reinforce and exacerbate social inequality, particularly to the detriment of disadvantaged and subordinated groups, even undermining their human rights. He proposes that powerful bureaucracies tend to tend to sacrifice the well-being of the most disadvantaged groups under the rationale of "efficiency." More specifically, he proposes that the

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[40] Sjoberg, G. (1996). "The Human Rights Challenge to Communitarianism: Formal Organizations and Race and Ethnicity." in Macro Socio-Economics. David Sciulli (ed). Armonk, N.Y.: M.E. Sharpe. Pp.273-297.

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most subordinated, "truly disadvantaged" groups (particularly the very poor among minority groups) are left in their distressed state by the normal operations of bureaucratic power structures that write off their well as well as quashing dissent being because adequately meeting their needs would be "inefficient" in a cost-benefit sense, requiring unacceptable "sacrifices" by privileged elites that control or otherwise benefit from such organizations.[41]

The notion of "social triage" builds off the notion that bureaucracy plays a key role in perpetuating and furthering the social stratification process, particularly in subordinating disadvantaged groups, particularly racial and ethnic minorities as well as lower classes.[42] Bureaucracy also benefits managerial elites, especially in corporations.[43] The theory focuses on corporate malfeasance (such as accounting scandals, market manipulation of all types, and mercenary security firms) and its impact on human rights, to advance the notion of moral accountability of these ever more powerful organizations. This study examines the effects of counter-terrorism strategies on human rights in Kenya.

1.6 Justification of the Study

1.6.1 Academic Justification

This study seeks to contribute to both academic and policy perspectives. It will contribute to the literature regarding counter terror and human rights. This, it is envisaged, will serve to deepen the understanding by counter terrorism strategies and human rights in the fight against

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[41] Sjoberg, G. (1999). "Some Observation on Bureaucratic Capitalism: Knowledge about What and Why?" In Sociology for the Twenty-first Century: Continuities and Cutting Edges. Janet L. Abu-Lughod (editor). Chicago: University of Chicago Press. Pp. 43-64.
[42] Sjoberg, G. (1996). "The Human Rights Challenge to Communitarianism: Formal Organizations and Race and Ethnicity." in Macro Socio-Economics. David Sciulli (ed). Armonk, N.Y.: M.E. Sharpe. Pp.273-297.
[43] Sjoberg, G. (2009). "Corporations and Human Rights." In Interpreting Human Rights: Social Science Perspectives. Rhiannon Morgan and Bryan S. Turner (editors). New York: Routledge. Pp. 157-176.

terrorism. In particular, the study will ultimately generate results that will enable scholars and practitioners in the social sciences to comprehend and have an in-depth understanding of the pertinent intellectual and practical issues on the subject matter.

1.6.2 Policy Justification

The research seeks to look into the infringement of human rights by counter terrorism strategies. It will provide a basis for further reflection and analysis on counter terrorism strategies and human rights in the fight against terrorism using Kenya as a case study.[44] On a policy front, this study will be key in aiding policy makers strike a balance between human rights and counter terrorism. On the policy dimension, the study will seek to recommend actions that may be of critical regarding the subject matter. Policy recommendations will be important for especially in the formulating and reformulating of counter terrorism strategies that adhere to human rights in order to bolster the fight against terror.

1.7 Hypotheses

The study was guided by the following null hypothesis:

H_a: *Counter-terrorism strategies used in Kenya have no effect on human rights.*

H_b: *There are no prospects for favorable counter terrorism-human rights outlook in Kenya.*

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[44] In 2010 human rights in Kenya experienced positive developments however currently Amnesty International is highly concerned of how the developments are deteriorating based on current activities of the law enforcement.

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1.8 Methodology of study

1.8.1 Research Design

The design of a study defines the study type of the research such as descriptive, correlational, semi-experimental, experimental, review, meta-analytic and sub-type such as a case study.[45] The study adopts a case study research design. The research will be a case study of Kenya as a country with a view to establish the effects of counter-terrorism strategies on human rights.

In a case study, the researcher selects a specific organization or situation to profile because the subjects offer critical, extreme or unusual situations. The researcher also has an opportunity to explore the situation from various data sources and use multiple subjects. This enables the issue to be reviewed from multiple perspectives and ensures better and indepth understanding.[46]

1.8.2 Target Population

The target population was governmental and non-governmental institution dealing with human rights and counter terrorism issues in Kenya. Specifically, the study targeted the following organization:

1. Kenya Police Service

2. Ministry of Interior and Coordination of National Government

3. National Counter Terrorism Centre

4. Anti-Terror Police Unit

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[45] Creswell, J.W. (2012). *Educational research: Planning, conducting, and evaluating quantitative and qualitative research.* Upper Saddle River, NJ: Prentice Hall.
[46] Baxter, P & Jack, S (2008). Qualitative Case Study Methodology: Study Design and Implementation for Novice Researchers. *The Qualitative Report,* 13 (4), 96-98.

5. Kenya National Commission on Human Rights (KNCHR)

6. The Judiciary

1.8.3 Sampling Technique

The study will use purposive sampling to select the respondents. The purposive sampling technique is a type of non-probability sampling that is most effective when one needs to study a certain cultural domain with knowledgeable experts within.[47] Purposive sampling is appropriate when the key informants have a specific type of knowledge or skill required in the study when the researcher has adopted a case study research design and when the population is too small for a random sample.

The study will purposively select officials who are knowledgeable on counter-terrorism measures taken by the government and the human rights issues that emerge in the fight against terrorism. The use of non-probability sampling procedures will ensure that the study capture the required information from the key informants.

1.8.4 Data Collection Methods

The study collected both primary and secondary data. Primary data was collected from one key informants from Kenya Police Service, Ministry of Interior and Coordination of National Government, National Counter Terrorism Centre, Anti-Terror Police Unit, Kenya National Commission on Human Rights (KNCHR) and the Judiciary. An interview guide (appendix 1) was used to collect data from the key informants.

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[47] Tongco, D. C. (2007). Purposive Sampling as a Tool for Informant Selection, *Ethnobotany Research & Applications* 5:147-158.

The study collected secondary data using a desktop research. Desk research involved collection of data from published reports on the effects of counter-terrorism strategies on human rights in Kenya. The process of data collection involved review of published documents both in the internet, library and government publication and non-governmental organizations dealing with human rights.

1.8.5 Data Analysis

The data collected was qualitative and was analyzed using content analysis. According to Baulcomb,[48] content analysis uses a set of categorization for making valid and replicable inferences from data to their context. The data was broken down into the different themes. This offered a systematic and qualitative description of the objectives of the study. The information was presented in prose form.

1.9 Scope and Limitations

The study was carried out in Kenya. Kenya was chosen because it had encountered incidents of terrorism perpetrated by extremist group Al-shabaab. The increased number of terrorist attacks prompted the government of Kenya to counter terrorism through measures such as military action against Al-shabaab bases in Somalia, deradicalization programs targeting youth, improved intelligence gathering, collaboration with other nations in the fight against terrorism, improved security along the boarders and marine boundaries. The study examined the effects of counter-terrorism strategies on human rights in Kenya. The target population was governmental and non-governmental institution dealing with human rights and counter terrorism issues in Kenya. Data

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[48] Baulcomb, J. (2003). Management of change through force field analysis. *Journal of Nursing Management*; 11: 4, 275-280.

was be collected using desk research method and key informant interview and analyzed using content analysis.

1.10 Chapter Outline

Chapter one introduces the study. The chapter covers background of the study, statement of the research problem, objectives of the study, literature review, theoretical framework, justification of the study, hypotheses, methodology, scope and limitations.

Chapter two discuses counter-terrorism strategies. The chapter is organized into global counter terrorism strategies, counter-terrorism strategies in Africa, and counter-terrorism in Kenya.

Chapter three discusses the link between human rights and counter-terrorism. The chapter is organized into the nexus between human rights and counter-terrorism, human rights and counter-terrorism at the United Nations, state obligations in countering terrorism and the specific human rights challenges in the context of counter-terrorism.

Chapter four presents the findings on the effects of counter-terrorism strategies on human rights in Kenya. The chapter is organized into the strategies being used in counter-terrorism in Kenya, human right issues that emerge from counter terror strategies in Kenya, and the mitigatory responses towards addressing human rights in counter terror operations.

Chapter five present summary of the study findings, conclusions and recommendations.

CHAPTER TWO

COUNTER-TERRORISM STRATEGIES

2.1 Introduction

This chapter discuses counter-terrorism strategies. The chapter is organized into global counter terrorism strategies, counter-terrorism strategies in Africa, and counter-terrorism in Kenya.

2.2 Global Counter Terrorism Strategies

Following terrorist incidents, there is often a swelling approval of tough lines of action by responsible authority. A strategy planned by a state to expedite counter-terrorism is approved, if not always applauded at the outset. Tactics incorporating surveillance (direct and indirect), disputed detention, arrest, the vagaries of charging procedure, premature extradition, the transfer and transport of suspects, their treatment on interrogation and the imprisonment of those not too carefully indicted, all eventually lead to widespread questioning, fierce controversy, even anger at the loss for human rights. In so many instances, a state's stratagem of bringing terrorists to justice as swiftly as possible needs reappraisal of the fundamental issues at stake by the liberal-minded. It is in the area of government strategies to counter-terrorism that the issues of a state's responsibilities and citizens' human rights meet and frequently collide.[49]

One of the strategies used in counter-terrorism is detention. Ordinarily states only detain individuals involuntarily for reasons associated with pretrial custody, post-conviction punishment, or the protection of individuals.[50] In these cases detention is primarily punitive or protective and

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[49] Whittake, J. (2013). *Counter-terrorism and human rights*. Routledge, 711 Third Avenue, New York, NY 10017, USA.
[50] de Londras, F. (2014). Counter-Terrorist Detention and International Human Rights Law. Available at SSRN: https://ssrn.com/abstract=2399477

only rarely or incidentally preventive. Counter-terrorist detention, the detention of suspected terrorists as opposed to those convicted of terrorism offences, has a radically different character inasmuch as its purpose is primarily preventive.[51] On a purely utilitarian level, suspected terrorists are detained to both prevent their own further engagement in terrorist activity and to acquire information or intelligence that might disrupt the involvement of others in terrorism. On a semantic level, however, suspected terrorists may be detained to manifest the coercive capacity of the threatened state. Particularly where the detention in question takes place in a manner that seems to challenge established elements of the rule of law, it may also aim to communicate clearly a state's willingness to do what it considers necessary to protect its polity and not 'merely' to do what is legally permissible.[52]

In the context of counter-terrorist detention, as in many other contexts, international human rights law has to walk a tight line between protecting rights on the one hand and keeping states on board on the other. Indeed, both the flexibility afforded to states in contexts of terrorist violence and the derogations system itself are reflections of international human rights law's commitment.[53]

The key to a true assessment of how well human rights law protects individual liberty in the counter-terrorist context is the capacity of a detainee to challenge the lawfulness of detention.[54] It is this capacity, and the provision of a rigorous process to facilitate it, that provides the core safeguard from arbitrary counter-terrorist detention. Thus, most international human rights law

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[51] de Londras, F. (2013). 'Prevention, detention and extraordinariness' in F ní Aoláin and O Gross (eds), Guantánamo Bay and Beyond Exceptional Courts and Military Commissions In Comparative and Policy Perspective (CUP, 2013).
[52] Ben Saul, B. (2014). Research Handbook on International Law and Terrorism (2014; Edward Elgar). Available at SSRN: https://ssrn.com/abstract=2399477
[53] Gross, O., and Ní Aoláin, F. (2006). Law in Times of Crisis: Emergency Powers in Theory and Practice (CUP 2006), Ch 7.
[54] ICCPR, art 9(2), (4); ECHR, art 5(4); ACHR, art 7(4), (6).

instruments require that individuals who are subjected to detention are informed of the basis of their detention and have the capacity to challenge its lawfulness. International human rights law requires that a judge or court is able to assess compliance with procedural requirements in domestic law, the reasonableness of the suspicion that forms the basis for the detention, and the legitimacy of the purpose of detention.[55]

In cases where states design and execute their counter-terrorist detention policy in a declared emergency context, the international human rights law regime that applies is altered. An emergency that threatens the life of the nation can be declared, leading to derogation from the detention provisions of the relevant instrument.[56] Derogation permits a reduced level of rights protection and enhances the state's capacity to take actions oriented at confronting the perceived threat. Where a state derogates, the right to be free from arbitrary detention can be varied but it cannot be entirely suspended; as outlined below protections against arbitrariness remain, including the right to challenge the lawfulness of detention. Thus, a state may be permitted to hold people suspected of involvement in terrorism for a longer period of time prior to charge or trial than normal, or on a lower standard of proof than would usually be expected. However, conscious of the vulnerabilities that are experienced in detention, international institutions have required that the right to challenge the lawfulness of one's detention remains in force even when a state has derogated.[57]

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[55] Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms, adopted 26 May 1995 (entered into force 11 August 1998), art 5(3).
[56] ICCPR, art 4; ECHR, art 15; ACHR, art 27.
[57] UN Human Rights Committee, Alegre v Peru, Communication No 1126/2002, UN Doc CCPR/C/85/D/1126/2002 (17 November 2005)

2.3 Counter-Terrorism Strategies in Africa

The bombing of US embassies in Nairobi and Da res-Salaam on 7 August 1998 and the foiling of another planned attack on the US embassy in Kampala pushed the Horn of Africa to new levels of insecurity. Some 263 lives (among them 240 Kenyans, 11 Tanzanians and 12 Americans) were lost while 5,000 Kenyans and 86 Tanzanians were injured in the attacks.[58]

The US-led 'war on terror' dramatically changed America's security strategy towards Africa.[59] But more fundamentally, it threw the Horn of Africa on the center stage of global counter-terrorism. A double-edged blade, counter-terrorism has at once catalyzed peace processes and intensified insecurity, with Islamic radicalism at the core of the regional storm. Governments utilized the threat of terrorism for political ends, defending old security paradigms that prioritized regime stability over human security. Africa integrated counter-terrorism into its emerging security agenda, but insufficient funds, operational constraints and poor coordination with international initiatives have hampered meaningful progress. Washington, laudably, launched a robust counter-terrorist campaign, but its high-handed military-heavy style put fragile democracies at risk while lapses in its overall policy risk triggering proxy wars.[60]

Insecurity in the Horn has deep roots in the political use of terror by state and non-state actors. As such, liberation movements, guerrillas, bandits, criminal gangs, cattle rustlers, pirates and vigilantes, as well as state terror, have long been included in the nomenclature of terrorism. But the spread of Islamic radicalism in the 1990s gave 'terrorism' an indelibly Muslim face in the

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[58] Op cit, Barkan, pp 87–100.
[59] Kagwanja, P. (2006). Counter-terrorism in the Horn of Africa: New security frontiers, old Strategies. African Security Review, Volume 15, Issue 3, 72-86.
[60] Ibid, Kagwanja (2006).

Horn. As observed by de Waal,[61] Islamism has transformed the Horn into a veritable arena of conflict between jihadists and their enemies evoking the Huntingtonian[62] 'clash of civilizations' between the West and the rest in the reordering of global security and power relations. A medley of endemic poverty, chronic underdevelopment and a deep sense of marginalization, in the light of the negative forces of economic globalization, proximity to and historical linkages with the Middle East, have transformed the region into an incubator of radical Islamists ideas and local cells of international terrorist networks.[63]

But counter-terrorism has had a mixed impact on the security situation in the Horn of Africa. Broadly, efforts against terrorism opened new security frontiers, engendering a re-ordering of priorities and a fundamental rethinking about security in the Horn of Africa.[64] The dynamics of 'the war on terrorism' catalyzed peace deals in Somalia and Sudan, but also fostered restrictive security paradigms which have perpetuated conflicts and stoked civil wars in the region. The campaign against terrorism also gave new impetus to old security perspectives that privileged state stability, enabling regimes to instrumentally utilize terrorism for political ends. On their part, local extremist groups, redefined as 'terrorists', formed strategic alliances with Islamists aimed at securing aid and sanctuary and imported into the local theatres of war tactics of jihadists such as beheading victims.

Responses to terrorism by African governments threatened the stability of fragile states with hastily introduced counter-terrorist laws that threatened human rights and widened religious

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[61] de Waal, A. (2004). *'Islamism and its enemies in the Horn of Africa (ed).'* Shama Books, Addis Ababa, Ethiopia.
[62] Huntington, S. (1996). *'The clash of civilizations and the remaking of world order.'* Simon & Schuster, New York.
[63] de Coning, C. (2004). Poverty and terrorism: The root cause debate? *Conflict Trends*, 3, 2004, pp 20-29.
[64] Tadese, M. (2004). 'New security frontiers in the Horn of Africa,' *Friedrich-Ebert-Stiftung, briefing paper*, June 2004, p 5.

fissures. Disaffection with the US's blanket definition of terrorism within Africa has resulted in poor coordination between regional and international counter-terrorist initiatives, making counter-terrorism one of the weakest links of Africa's peace and security agenda which has emerged in the aegis of the African Union (AU) from 2002.

In line with the increased focus on Africa in the US security strategy, the Horn was redefined as a particularly risky region that became a focus of Washington's counter-efforts against terrorism, including the East Africa Counter-Terrorism Initiative (EACTI) and the Combined Joint Task Force – Horn of Africa (CJTF-HOA). But United States of America's high-handed approach to counter-terrorism has imperiled fragile democracies in countries like Kenya.[65] Its policy lapses in backing warlords as a counter-terrorist strategy in Somalia have also escalated insecurity and heightened the risk of a full-scale war and further terrorist attacks against the neighboring countries.[66]

2.4 Counter-Terrorism in Kenya

The terrorism threat continues to be an intractable problem for the international community and Kenya in particular due to its negative effect on peace, stability and security.[67] The problem continues to grow and acquiring sophisticated dimensions tandem with technological revolution in the international system. As a result, the government has instituted measures to deal with the vice including: setting up of a counter-terrorism center, improving economic conditions, enhancement of security, and increasing its diplomatic involvement. However, despite the above

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[65] Barkan, J. (2004). Kenya after Moi. *Foreign Affairs*, 83(1), pp 87–100.
[66] International Crisis Group (ICG) (2006). Can the Somali crisis be contained? Africa Report No 116, 10 August 2006.
[67] Masese, H. M. (2007). An analysis of the phenomenon of terrorism and Kenya's counter-terrorism strategy, 2000-2007 . Masters Dissertations, University of Nairobi. Available athttp://erepository.uonbi.ac.ke:8080/xmlui/handle/123456789/20969

measures, the threat of terrorism still remains real within the country due to its location, socio-economic factors, internal cleavages and the international political climate. The challenge is for the government to evolve new and better methods of dealing with the vice including increasing its diplomatic engagement, involvement of the public and private sector enhancing the capabilities of the security forces and being proactive in anti-terrorism matters.[68]

Munyao[69] examined the phenomenon of terrorism, its development through time (1980 to 2005) and counter-terrorism measures at global, regional and national (Kenyan) levels. The study established that Kenya's performance on counter terrorism regionally emerges to be above average even though the country is yet to show total commitment in her counter-terrorism campaign by enacting an anti-terror law. International cooperation emerges as the way to go to win the war as the phenomenon is transnational and respects no boundaries nor is there anyone state able single handedly to fight it. Munyao[70] identified domestic politics, corruption, lack of an anti-terrorism law, and inefficient institutions as some of the major challenges facing counter-terrorism efforts in Kenya. States' national interests, independence, and sovereignty also emerge as hurdles to be surmounted before the war on terror is finally won.

The initial denial based on self-perception as victims rather than hosts to terrorist that characterized Africa's initial response to terrorism has gradually given way to some bold steps to curb terrorism.[71] In February 2003, Kenya formed a special counter-terrorist unit consisting of officers picked from the police force. The unit teamed up with the US Federal Bureau of

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[68] Ibid, Masese (2007).
[69] Munyao, A. K. (2006). Analysis of Kenya's responses to international terrorism, 1980 – 2005. Masters Dissertations, University of Nairobi. Available at http://erepository.uonbi.ac.ke:8080/xmlui/handle/123456789/20994.
[70] Ibid, Munyao (2006).
[71] Mbugua, K. (2004). 'East Africa: A haven or hapless victim of international terrorism,' *Conflict Trends*, 3, pp 31-37.

Investigation (FBI) and Interpol to unearth and eliminate the cell set up by Osama bin Laden's secretary, Wadi el-Hage, in 1994.[72]

Kenya stationed two army battalions along the common border with Somalia from May 2003. But insufficient boats and personnel to patrol the Indian Ocean coastline and ports has given a free hand to terrorists and pirates to continue making forays into the region. Since 1991, Somalia has no coast guard or navy, making its coastal ports ideal entry points for al-Qaeda agents. Piracy targeting passenger and cargo vessels for ransom or loot has sharply increased from two attacks in 2004 to 35 in 2005.[73]

A plan to boost the capacity of the Kenya Navy to patrol the Indian Ocean coastline is yet to get off the ground. Kenya also established an inter-ministerial task force focusing on Anti-Money Laundering and Combating the Financing of Terrorism. The task force reviewed existing legislation and recommended ways of formulating a national policy shutting down channels of financing of terrorism.

2.4.1 Operational and Legislative Responses to Counter Terrorism in Kenya

In 2003, Kenya invoked the NGO Co-ordination Act of 1990 to deregister an array of Muslim NGOs accused of having linkages with terrorist groups. These included al - Haramain Islamic Foundation, the al-Muntada al-Islami (which funded several madrassas and health facilities at the Kenya coast), the World Assembly of Muslim Youth, the al-Ibrahim Foundation, Wakalatul-Rahmah offices, and the al-Najah Islamic Centre in northern Kenya.41 The High Court

[72] Njoroge, K. (2004). Arm that responds to terror threats, East African Standard, 26 February 2004.
[73] Cited in Mohamed Olad Hassan, Somalis rally in support of prime minister, <www.chron.com/dis/ story.mpl/ap/word/4083621.html>.

threw out petitions to reverse the decision while the government deported al-Haramain's Sudanese director, Sheikh Muawiya Hussein in January 2004.

Governments also hastily introduced counter-terrorism legislations as curbs against terrorist incursions. In 2002, Tanzania ratified seven of the twelve international counter-terrorism instruments and passed the Prevention of Terrorism Act which criminalized support for terrorist groups operating within its territory amid fierce protests by human rights activists and opposition parties.[74] Uganda ratified all the twelve international conventions and protocols on terrorism and enacted the Anti-Terrorism Act (formerly known as the Suppression of Terrorism Act) in May 2003. While the legislation imposed a mandatory death penalty for terrorists and potential death penalty for their sponsors and supporters, it has been accused of prioritizing local rebellion over the international terrorist threat. The newly elected government of Mwai Kibaki ratified all the twelve international counter-terrorism conventions and protocols and published the Suppression of Terrorism Bill on 30 April 2003. But parliament shelved the law due to strong resistance from Muslim lobbies and human rights groups who, eager to fiercely defend their newly won civil liberties, criticized the draft bill as a breach to the Bill of Rights. However, Kenya enacted the Witness Protection Bill in September 2004 to protect witnesses in terrorist cases.[75] Largely driven by the need to be on the right side of the Bush Administration's 'war on terror', most of these laws failed to effectively resolve the palpable tension between the values of democracy and the imperatives of counter-terrorism.[76]

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[74] Tanzania's Muslims fight terror bill, <www.news.bbc.co.uk/1/hi/world/africa/2482199.stm>.
[75] Daily Nation (Kenya), 24 September 2004.
[76] Tadesse, M. (2002). 'Al-Ittihad: Political Islam and black economy in Somalia,' Addis Ababa, p. 5.

CHAPTER THREE

HUMAN RIGHT CHALLENGES ENCOUNTERED IN COUNTER-TERRORISM INITIATIVES

3.1 Introduction

This chapter discusses the human rights challenges encountered in and counter-terrorism initiatives. The chapter is organized into the nexus between human rights and counter-terrorism, human rights and counter-terrorism at the United Nations, state obligations in countering terrorism and the specific human rights challenges in the context of counter-terrorism.

3.2 The Nexus between Human Rights and Counter-Terrorism

The role of human rights as the ethical lynchpin of international affairs has been undisputed for generations.[77] Placed on its throne above politics by the Universal Declaration of Human Rights in 1948, we have all long become familiar with the idea that states need to be seen to be accommodating themselves to the imperatives of international human rights law. This global development has been mirrored at the regional and local levels, with conventions on human rights and national constitutions protecting human or civil rights embedding themselves across nations. It is true that the priorities within this multi-faceted framework of human rights have been disputed and that the departures from it have been many and frequent, but neither of these facts has caused the idea to be deprived of its privileged status. The challenges have been covert not overt, the

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[77] Gearty, C. (2007). Human rights, civil society and the challenge of terrorism. A Centre for the Study of Human Rights report Centre for the Study of Human Rights, London School of Economics and Political Science, Houghton Street, London.

maneuvering around human rights evidence not of its redundancy but of its supremacy: rights have long been so much a given that they have been something to be evaded rather than simply rejected.

Terrorism has a direct impact on the enjoyment of a number of human rights, in particular the rights to life, liberty and physical integrity. Terrorist acts can destabilize Governments, undermine civil society, jeopardize peace and security, threaten social and economic development, and may especially negatively affect certain groups. All of these have a direct impact on the enjoyment of fundamental human rights. Just as terrorism impacts on human rights and the functioning of society, so too can measures adopted by States to counter terrorism. As mentioned above, because terrorism has a serious impact on a range of fundamental human rights, States have not only a right but a duty to take effective counter-terrorism measures. Effective counter-terrorism measures and the protection of human rights are complementary and mutually reinforcing objectives which must be pursued together as part of States' duty to protect individuals within their jurisdiction.[78]

The international community has committed to adopting measures that ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism, through the adoption of the United Nations Global Counter-Terrorism Strategy by the General Assembly in its resolution 60/288. Member States have resolved to take measures aimed at addressing the conditions conducive to the spread of terrorism, including lack of rule of law and violations of human rights, and ensure that any measures taken to counter terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law.

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[78] Office of the United Nations High Commissioner for Human Rights Human Rights, Terrorism and Counter -terrorism Fact Sheet No. 32. Available at http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf.

The United Nations also considered the question of respect for human rights while countering terrorism and argue that international cooperation to fight terrorism must be conducted in conformity with international law, including the Charter of the United Nations and relevant international conventions and protocols. The General Assembly and the Commission on Human Rights have emphasized that States must ensure that any measures taken to combat terrorism comply with their obligations under international human rights law, refugee law and international humanitarian law.

The Security Council has done the same, starting with the declaration set out in its resolution 1456 (2003), in which the Security Council, meeting at the level of Ministers for Foreign Affairs, stated that "States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law." This position was reaffirmed in Security Council resolution 1624 (2005). In his 2006 report "Uniting against terrorism: recommendations for a global counter-terrorism strategy" (A/60/825), the United Nations Secretary-General described human rights as essential to the fulfilment of all aspects of a counter-terrorism strategy and emphasized that effective counter-terrorism measures and the protection of human rights were not conflicting goals, but complementary and mutually reinforcing ones. Universal and regional treaty-based bodies have likewise frequently observed that the lawfulness of counter-terrorism measures depends on their conformity with international human rights law.[79]

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[79] Annual Report of the Inter-American Commission on Human Rights 1990–1991, chap. V, sect. II

The United Nations Global Counter-Terrorism Strategy reaffirms the inextricable links between human rights and security, and places respect for the rule of law and human rights at the core of national and international counter-terrorism efforts. Through the Strategy, Member States have committed to ensuring respect for human rights and the rule of law as the fundamental basis of the fight against terrorism. To be effective, this should include the development of national counter-terrorism strategies that seek to prevent acts of terrorism and address the conditions conducive to their spread; to prosecute or lawfully extradite those responsible for such criminal acts; to foster the active participation and leadership of civil society; and to give due attention to the rights of all victims of human rights violations. Not only is the promotion and protection of human rights essential to the countering of terrorism, but States have to ensure that any counter-terrorism measures they adopt also comply with their international human rights obligations.

The General Assembly has adopted a series of resolutions concerning terrorism since December 1972, addressing measures to eliminate international terrorism as well as the relationship between terrorism and human rights. It has emphasized that States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular international human rights, refugee and humanitarian law. 32

There has been a proliferation of security and counter-terrorism legislation and policy throughout the world since the adoption of Security Council resolution 1373 (2001), much of which has an impact on the enjoyment of human rights. Most countries, when meeting their obligations to counter terrorism by rushing through legislative and practical measures, have created negative consequences for civil liberties and fundamental human rights.

Counter-terrorism, security, human rights and law enforcement are not mutually exclusive. In the context of the threat of terrorism, they should be designed to work together. In most circumstances, they cannot work effectively independently of each other. Counter-terrorism measures need human rights standards to ensure that their implementation does not under-mine their very purpose, which is to protect and maintain a democratic society. At the same time, human rights standards may need counter-terrorism measures to ensure that human rights can thrive. What is certain is that human rights are not an optional extra or luxury to any counter-terrorism strategy; human rights must be at the core of that strategy.

In November 2001, a joint statement by the OSCE's Office for Democratic Institutions and Human Rights (ODIHR), the UN High Commissioner for Human Rights, and the Council of Europe reminded governments that:

> While we recognize that the threat of terrorism requires specific measures, we call on all governments to refrain from any excessive steps which would violate fundamental freedoms and undermine legitimate dissent. In pursuing the objective of eradicating terrorism, it is essential that States strictly adhere to their international obligations to uphold human rights and fundamental freedoms.[80]

Acts of terrorism can be countered in ways that uphold human rights standards. In 2005, UN Secretary General, Kofi Annan emphasized that:

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[80] Joint statement by Mary Robinson, UN High Commissioner for Human Rights, Walter Schwimmer, Secretary General of the Council of Europe, and Ambassador Gérard Stoudmann, Director of the OSCE Office for Demo-cratic Institutions and Human Rights, 29 November 2001, at http://www.unhchr.ch/huricane/huricane.nsf/view01/4E59333FFC5341A7C1256B13004C58F5.

Human rights law makes ample provision for counter-terrorist action, even in the most exceptional circumstances. But compromising human rights cannot serve the struggle against terrorism. On the contrary, it facilitates achievement of the terrorist's objective — by ceding to him the moral high ground, and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is most likely to find recruits. Upholding human rights is not merely compatible with successful counter-terrorism strategy. It is an essential element.[81]

Combating and ultimately overcoming terrorism will not succeed if the means to secure that society are not consistent with human rights standards. Counter-terrorism tactics that do not comply with human rights law may ultimately be declared unlawful, resulting in failed prosecutions or overturned convictions.[82] Counter-terrorism tools that do not comply with human rights are therefore liable to be ineffective. From the case law of international courts and tribunals, as well as domestic courts, and the work of UN mechanisms, some counter-terrorism measures have resulted in: prolonged detention without charge; denial of the right to challenge the lawfulness of detention; denial of access to legal representation; monitoring of conversations with lawyers; incommunicado detention; and ill-treatment, even torture, of detainees as well as inhuman and degrading conditions of detention.

The impact of this bombardment of US objectives around the world including Kenya and Tanzania created need to have counter terrorism measures agreed and adopted by the members

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[81] UN (former) Secretary General Kofi Annan, "A Global Strategy for Fighting Terrorism", Keynote address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security, 8-11 March 2005, Madrid, available at http://summit.clubmadrid.org/keynotes.
[82] Cooper, J. (2007). Countering Terrorism, Protecting Human Rights: A Manual. OSCE Office for Democratic Institutions and Human Rights (ODIHR), Warsaw, Poland.

of the United Nations.[83] The UN Commission of Human Rights could not come up with the right measures. US had to carry out its operations to bring the suspects to justice considering kill some of them and detaining others. As counter-terrorism reactions and counter-actions, the administration of Bill Clinton allegedly ordered Operation Infinite Reach cruise missile attacks on Sudan and Afghanistan.[84] The United Nation Security Council passed Resolution 1189 condemning the attacks on the embassies and this is the time the Republic of Kenya officially engaged in Counter-Terrorism measures with the Western support. Even after the resolution of the United Nations Security Council, The United Nations was still none committal in the unfolding crime of terrorism. US officially launched an attack against Afghanistan with the help of some EU allies to deal with terrorist organization Al-Qaeda under the leadership of Osama Bin Laden and hosted by the government of the Talibans. In what was seen as another human rights tragedy, the international community remained undecided on whether to support the war or condemn it.[85]

With US unilaterally declaring the two wars and creating massive violations of human rights, the world public opinion was divided and America lost its historical diplomatic reputation in what was evident as the war on human rights. The hunt for Osama Bin Laden was not completed, Saddam Hussein and his regime were attacked by the United States of America for allegations of Weapons of Mass Destruction (WMD), acclamation which never was and George W. Bush was brandished as a terrorist and violator of human rights by protesters.

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[83] Onyoyo, P. O. (Human Rights and the Genesis of Counter- Terrorism Practice in Kenya. Journal Article, University of Nairobi Research Archives, pp. 1-18. Available at http://hdl.handle.net/11295/73556
[84] http://en.wikipedia.org/wiki/1998_United_States_embassy_bombings#Aftermath_and_international_response research carried out on 18/05/2014.
[85] Gearty, C. (2001). Counter-Terrorism and Human Rights Act, p. 2.

As President Obama came into power with the same conviction of fighting enemies of the United States of America and he promised to bring the world diplomatic relations back to normalcy, an act that earned him Nobel Peace Prize immediately as he got into power in 2009. His administration embraced both defence and offence as the best counter-terror approach.

Terrorist networks were spreading systematically with Al-Qaeda threatening America and its chief allies such as the UK and other members of the European Union. UK was attacked, Spain the same, Russia and other pro-US allies. The network of Al-Qaeda started to spread out with fundamentalist and extremist Muslims emerging in Yemen, and Somalia. New terrorist organizations such as Al-Shabaab in Somalia, Boko Haram in Nigeria and terrorist groups in other individual countries around the world started to emerge with similar agenda, to destroy the infidel, meaning Christians and their governments. Radicalization process of Muslim communities has been witnessed as a perceived threat to individuals and government securities. The war on terror as counter-terrorism measures and impacts on Muslim communities in general have only moved the situation from substantive to severe.[86]

Alleged killing of Osama Bin Laden on May 2, 2011, by President Obama's administration spelled out another episode and turn of affairs in the war against terrorism or counter terrorism measures.[87] The CIA lead operation has been found in the wrong side of human rights by some human rights activists. In the philosophy of human rights Osama

[86] Choudhury, T., and Fenwick, H. (2011). 'The impact of counter-terrorism measures on Muslim communities,' The International Review of Law, Computers & Technology, Vol. 25, No. 3, 151–181.
[87] Onyoyo, P. O. (Human Rights and the Genesis of Counter- Terrorism Practice in Kenya. Journal Article, University of Nairobi Research Archives, pp. 1-18. Available at http://hdl.handle.net/11295/73556
http://en.wikipedia.org/wiki/1998_United_States_embassy_bombings#Aftermath_and_international_response
research carried out on 18/05/2014.

Bin Laden was also a holder of human rights and he was entitled to principles of being born free and equal and with dignity as any other member of human community. He is a bearer of human rights, natural rights and deserves full protection of law to this effect. Taking away his life is the same as extra-judicial killing. In the due process and fair trial principles prosecution was to be done within the law and in respect to human rights before executing the suspect. He was not given time to defend himself in a fair trial process and was not heard. So, his killing by the American forces, US Navy Seals was also a violation of human rights law and one of the blunders of the US military option as counter terrorism security measures. In what has been termed as war against terrorism, it turns to be counter-terrorism measures that tend to profile Islamic and some ethnic groups around the world[88] resulting into religious fundamentalism, extremism and radicalization.[89]

Governments in many parts of the world are increasingly devising and employing protective strategies against terrorism.[90] There are now clear, vociferous calls in many lands for tighter controls where rights may be downgraded against principles of enhanced collective security. Implementation of protective programmes to offset terrorism puts into focus an array of critical issues to do with maintenance of security and the assurance of fundamental human rights. Many of the ethical issues raised in regard to freedom of person, speech, association and movement arouse widespread anxiety, controversy, protest and some anger, if they appear compromised or reduced. Protest soon begins to focus on the state's resort to surveillance, arrest, criminal charge, detention and deportation. Liberal-minded people and lawyers everywhere are unhappy about

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[88] Olivier de Schuttern, O., and Ringelheim, J. (2010). "Ethnic Profiling: A Rising Challenge for European Human Rights Law", in The Modern Law Review, Published by Blackwell Publishing,9600 Garsington Road, Oxford OX4 2DQ, UK and 350 Main Street, Malden, MA 02148, USA, p. 1.

[89] Op. Cit. Gearty (2001).

[90] Whittake, J. (2013). *Counter-terrorism and human rights*. Routledge, 711 Third Avenue, New York, NY 10017, USA.

many prescriptive measures, their purpose and tactical application. States wrestle more and more with uncertainties and contradictions. Countering terrorism needs policy articulated, strengthened and enforced through legislation.

3.3 Human Rights and Counter-Terrorism at the United Nations

There have been additional developments from a human rights perspective within the UN structure.[91] For example, since 1998, the Sub-Commission on the Promotion and Protection of Human Rights has appointed an expert on human rights and counter-terrorism. In 2005, a United Nations Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism was appointed. His term runs for three years. Since 11 September 2001, resolutions have been adopted by the General Assembly and Com-mission on Human Rights explicitly calling on the relevant United Nations human rights mechanisms "to consider, within their mandates, the protection of human rights and fundamental freedoms in the context of measures to combat terrorism and to coordinate their efforts, as appropriate, in order to promote a consistent approach on this subject. Since the Human Rights Council came into being in June 2006, it has endorsed the approach of the now defunct Commission for Human Rights in these respects.

The High Commissioner for Human Rights is required to take an active role in examining the issue, and in particular, to make general recommendations and to provide relevant as -sistance

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[91] UN General Assembly, Resolution 58/187 of 22 March 2004, doc. A/RES/58/187, para. 7, and UN Commission on Human Rights, Resolution 2004/87, 21 April 2004, para. 6.

and advice to states, upon their request.[92] In April 2004 the Commission approved the appointment of an independent expert to assist the High Commissioner in implementing the resolution.[93]

The UN Sub-Commission on the Promotion and Protection of Human Rights has also produced a study on the question of terrorism and human rights.[94] The Sub-Commission decided to establish a working group with the mandate to elaborate detailed principles and guidelines, with relevant commentary, concerning the promotion and protection of human rights when combating terrorism. These draft guidelines have not yet been approved but will provide an assessment of counter-terror-ism measures, human rights standards and international humanitarian law.[95]

Most significant, perhaps, in relation to the UN commitment to countering terrorism from a multi-disciplinary perspective is the launching of its Global Strategy for Fighting Terrorism.[96] The main elements of that strategy, and the role of the United Nations within it are: first, to dissuade disaffected groups from choosing terrorism as a tactic to achieve their goals; second, to deny terrorists the means to carry out their attacks; third, to deter states from supporting terrorists; fourth, to develop state capacity to prevent terrorism; and fifth, to defend human rights in the struggle against terrorism. The then UN Secretary General Kofi Annan, in launching the strategy, emphasized the importance of human rights in combating terrorism. He regretted that

[92] The Report of the High Commissioner for Human Rights to the 58th session of the Commission on Human Rights, "Human Rights: A Uniting Framework", doc. E/CN.4/2002/18, 27 February 2002; the Digest of Jurisprudence of the United Nations and regional Organizations on the protection of human rights while Countering terrorism , doc. HR/PUB/03/1 (New York and Geneva, 2003)
[93] UN Resolution 2004/87, para. 10.
[94] Sub-Commission on the Promotion and Protection of Human Rights, Decision 2004/109 of 12 August 2004, doc. E/CN.4/Sub.2/DEC/2004/109, para. (a).
[95] Kalliopi K. K. (2006). "Updated framework draft of principles and guidelines concerning human rights and terrorism", Expanded Working Paper, UN Sub-Commission on Human Rights, doc. A/HRC/Sub.1/58/30*, 3 August 2006.
[96] UN (former) Secretary General Kofi Annan, "A Global Strategy for Fighting Terrorism", Keynote address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security, 8-11 March 2005, Madrid, available at http://summit.clubmadrid.org/keynotes .

"... international human rights experts, including those of the UN system, are unanimous in finding that many measures which States are currently adopting to counter-terrorism infringe on human rights and fundamental freedoms.[97]

UN member states subsequently endorsed a global counter-terrorism strategy in the form of a resolution. An annexed plan of action includes a section on the importance of ensuring respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism.[98] The significance of the strategy is that it is the first time that all member states have agreed to a common strategic approach to fighting terrorism, not only sending a clear message that terrorism is unacceptable in all its forms and manifestations, but also resolving to take practical steps individually and collectively to ensure that human rights for all and the rule of law are at the heart of combating and preventing terrorism.

3.3.1 Counter-Terrorism Committee at the UN

The Counter-Terrorism Committee (CTC) is composed of the members of the Security Council and is mandated to review measures taken by states to prevent and to punish acts of terrorism. The Security Council is not a human rights body, but as an organ of the UN it is required to act compatibly with the UN Charter and human rights standards. Resolution1373 gave very little attention to human rights.[99] However, Security Council Resolution 1456, adopted eighteen months later, requires that "States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in

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[97] Ibid, Kofi Annan, "A Global Strategy for Fighting Terrorism".
[98] UN General Assembly, Resolution 60/288 of 20 September 2006, doc. A/RES/60/288; see also http://www.un.org/terrorism/strategy-counter-terrorism.html.
[99] Security Council Resolution 1373, para. 3(f).

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accordance with international law, in particular international human rights, refugee, and humanitarian law."[100]

There is therefore an obligation to ensure that all domestic counter-terrorism measures are human rights compliant. There are doubts that this obligation is being met. For example, the High Commissioner for Human Rights has expressed "profound concern at the multiplication of policies, legislations and practices increasingly being adopted by many countries in the name of the fight against terrorism, which negatively affect the enjoyment of virtually all human rights – civil, cultural, economic, political and social."[101]

As part of the CTC's efforts to ensure that human rights are taken seriously by states when implementing Security Council Resolution 1373, the Committee has now created an executive directorate. That Directorate, which includes human rights experts, liaises directly with the High Commissioner for Human Rights. The executive directorate is also required to ensure that the CTC incorporates human rights into its work, as appropriate, noting the importance of states ensuring that counter-terrorism measures are consistent with their obligations under international law, in particular human rights law, refugee law and humanitarian law.

3.4 State Obligations in Countering Terrorism

After the adoption of the United Nations Global Counter-Terrorism Strategy by the General Assembly in its resolution 60/288[102] the World community has started adopting measures towards

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[100] UN Security Council Resolution 1456 of 20 January 2003, doc. S/RES/1456 (2003), para. 6.
[101] Report of the United Nations High Commissioner for Human Rights and follow-up to the World Conference on Human Rights: effective Functioning of human rights Mechanisms , doc. E/CN.4/2004/4, 5 August 2003, p. 22
[102] UN Security Council Resolution 60/288

the protection of human rights in the fight against terrorism.[103] They have pledged to ensure that all the measures being taken in the fight against terrorism are in accordance with their general obligations under international law. This was further discussed in the World Summit Outcome, adopted by the General Assembly in 2005, and respect of human rights during fight against terrorism was emphasized, and particularly human rights relevant to refugee law, international criminal law and international humanitarian law.[104]

At the domestic level one may criticize the other states, but at the international level it is rarely seen that human rights abuses committed by a state outside its own territory are criticized or noticed by the international community. But in the present scenario certain rules have been developed under which concept of state responsibility has been realized.[105] At various occasions Security Council also criticized states on promoting terrorism.[106]

After September 11, although the USA has taken steps against terrorism, but the USA administration failed to understand that in what manner international law can be applied to the situation. Therefore on the one hand where to fight terrorism is an obligation under international law in the same way respect and to ensure of the protection of human rights is also an equal obligation of the states under international human rights law.[107]

[103] Office of the United Nations High Commissioner for Human Rights Human Rights, Terrorism and Counter - terrorism Fact Sheet No. 32. Available at   http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf, accessed on 10 -09-2011.
[104] Ibid
[105] Gibney, M., Tomaševski, K., and Hansen, J. V. (2011). Transnational State Responsibility for Violations of Human Rights, Harvard Human Rights Journal, http://www.law.harvard.edu/students/orgs/hrj/iss12/gibney.shtml, accessed on 13 -09 -2011.
[106] Tayler, W. (2005). Notes on the Human Rights Movement and the Issue of Terrorism, International Council on Human Rights Policy. Available at
http://www.ichrp.org/files/papers/78/129_Notes_on_the_Human_Rights_Movement_and_the_Issue_of_Terrorism_ Tayler__Wilder__2005.pdf, accessed on 25 -09-2011.
[107] Office of the United Nations High Commissioner for Human Rights Human Rights, Terrorism and Counter - terrorism Fact Sheet No. 32. Available at http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf.

However keeping in view the circumstances of the case and all the international human rights instruments, states can limit certain human rights for a specific time period. For instance right to freedom of expression, the right to freedom of association and assembly, the right to freedom of movement, and the right to respect for one's private and family life, but in doing so every state should observe a number of conditions, in order to restrict abuse of this authority.[108]

3.5 Specific Human Rights Challenges in the Context of Counter-Terrorism

3.5.1 The right to life

Human rights violations are committed by different groups and non-state actors during terrorism, but states are also seen involved in the commission of the violations of human rights, and that is primarily based on lack of accountability and transparency.[109] Right to life is a fundamental human right, in absence of which one will not be able to enjoy any further human right. In counter terrorism policy although states are obliged to take appropriate measures against terrorism but they have endangered the life of citizens, especially with regard to targeted killings as alternative to their arrest and trials. Carpet bombing and targeted bombing is also a practice which has been adopted by the states on the pretext of countering terrorism, as the former has been witnessed in tribal areas by Pakistani armed forces, and the later has been seen in the s hape of drone attacks by the USA.[110]

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[108] Ibid
[109] Wilson J. and Ramana, P. V. (2007). Terrorism and Human Rights. ORF policy brief, February 2007. Available at http://www.observerindia.com/cms/export/orfonline/modules/policybrief/attachments/trs_1171547246121.pdf
[110] Office of the United Nations High Commissioner for Human Rights Human Rights, Terrorism and Counter - terrorism Fact Sheet No. 32. Available at http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf.

3.5.2 The absolute prohibition against torture

Torture is a serious human rights violation under the international law.[111] The prohibition of torture and other cruel, inhuman or degrading treatment or punishment is a norm of customary international law. Convention against torture strictly prohibits such a like practice by the states and especially with regard to extracting information or confessional statements by the suspects, which has often been noted being committed by the states who claim that they are fighting terrorism.[112]

3.5.3 Transfer of individuals suspected of terrorist activity

All the suspects of terrorism should be dealt with in accordance with the provisions of international law, and no detention, arrest, or transfer of suspects should be based without due process of law. But unfortunately especially after 9 -11, the practice of the states goes against these principles. Suspects of terrorists were extradited, transferred and deported even some of them were asylum seekers. All this was done in violation of the principle of non-refoulment. Moreover forced disappearance is also prohibited under Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance, and also recognized in article 7 of the International Covenant on Civil and Political Rights.[113]

3.5.4 Liberty and security of the person

Some states have introduced new provisions in their criminal law procedure to effectively counter terrorism, but these steps may be in violation of worldly recognized norms of human rights

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[111] Torture, Inhuman or Degrading Treatment, http://www.hrea.org/index.php?doc_id=265, accessed on 10 -10 - 2011.
[112] Office of the United Nations High Commissioner for Human Rights Human Rights, Terrorism and Counter - terrorism Fact Sheet No. 32. Available at http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf.
[113] Jawad, S. (2015). 'Terrorism and Human Rights,' *Sociology and Anthropology*, 3(2): 104 -115.

and without due process of law.[114] These provisions include inclusion of provisions regarding the bail, remand and arrest of these suspects. For instance, pretrial detention which can be effected before any specific charge, administrative detention, to prevent a person from committing or associating in commission of any offence, control orders, to control a situation while keeping a person in detention, and compulsory hearings, which allows authorities compulsory questioning and gathering information from the suspects may be cited in this context.[115]

3.5.5 State Violations

Human rights violations are committed by the states in various situations. For instance, during search operations, encounters, which are sometimes genuine and at other times fake, especially with regard to Pakistan Police, opening fire in crowded areas, during detention and interrogation even if the accused has been detained without following any legal order. These violations of human rights result for a number of reasons, for instance, lack of transparency and accountability, inadequate training and education among security personnel in observing human rights, lack of scientific investigation skills and tools among the police, deficient information to, and investigation by, the police, and a moribund judicial system. Sometimes people raise their voice on these violations being committed as state terrorism.[116]

[114] Ibid, Jawad, pp.109.
[115] Office of the United Nations High Commissioner for Human Rights Human Rights, Terrorism and Counter - terrorism Fact Sheet No. 32. Available at http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf.
[116] Wilson J. and Ramana, P. V. (2007). *Terrorism and Human Rights*. ORF policy brief, February 2007. Available at http://www.observerindia.com/cms/export/orfonline/modules/policybrief/attachments/trs_1171547246121.pdf

CHAPTER FOUR

COUNTER-TERRORISM AND HUMAN RIGHTS IN OF KENYA

This chapter presents the findings of the study in line with the objectives of the study. The main objective of the study was to examine the effects of counter-terrorism strategies on human rights in Kenya. Specifically, the study examined the strategies being used in counter-terrorism in Kenya, human right issues that emerge from counter terror strategies in Kenya, and the mitigatory responses towards addressing human rights in counter terror operations.

4.1 Strategies being used in Counter-terrorism in Kenya

The Republic of Kenya has been the victim of four major terror attacks. The first major attack was the US embassy bombing of 1998 in Nairobi. Since then, Al-Shabaab spread into Kenya and declaring retaliation attacks and reprisals against Kenya brings a new turn of events in the act of terrorism. Somali based terrorists networks spilled into Kenya as they declared war against Kenya first as the main American ally in the African region and second, as the Government that decided to enter Somalia and give military support to the Somali Government through AMISOM. The same threat of terrorist attack has been received both in Uganda and Burundi whose armed forces are helping peace in Somalia.

Al-Shabaab abducted a French tourist in the coasts of Mombasa. The old and frailly French citizen died later in Somalia after the failure to save her life. In the counter terrorism operations Kenya has decided to get rid of elements of terrorists from its territorial jurisdiction. Suspects, and illegal immigrants have been arraigned in law courts, some sent to the refugee camps and some forcefully sent back to Somalia through evictions and expulsions. Given this background story it is now in order to ascertain that terrorism is a real international crime but it is also true that most

of the counter terror mechanisms adopted by Governments are likewise abhorrent and violating international standards of universal human rights principles.

Kenyan Government took it upon its responsibility to act decisively against terrorists within its borders and in Somalia after the offensive attacks from presumed terrorists starting from the time the US embassy was attacked in the Kenyan jurisdiction. Government policy on dealing with national security opted for military option both in Somalia and in Kenya. As a member of the United Nations and trusted ally of the United States and the Western powers, Kenya had the support to deal decisively with terrorism within its territorial space but needed legal framework to be able to do so without landing into problem with international law.[117]

Lacking credible legal framework and strong institutions to deal with terrorism perpetrators and suspects of terrorism would be sent to the United States of America to face justice as had happened with Somali suspects of piracy in the High Sea and Somali waters. The failure to have proper and sufficient legislation and well-founded jurisprudence on terrorism, most of the counter-terrorism attacks have taken military option and use of violence to deal with the presumed suspects of terror, a reality that has been condemned by both mainstream and none mainstream human rights watch-dogs especially the Amnesty International and Human Rights Watch blaming Kenya for extrajudicial killings and breach of fundamental freedoms of individuals and associations.[118]

[117] Mogire, E., and Agade, K. M. (2011). Counter - terrorism in Kenya, Journal of Contemporary African Studies, vol. 29, no.4, p. 473
[118] Ibid, Mogire and Agade (2011), p 474.

The need to come up with Anti-Terrorism Legislations has been growing calling for more law reform, preparedness mechanism, better trained intelligence gathering bodies, and judicial authority, despite strong opposition especially from Muslim legislators that argue that such law would only target the human rights and fundamental freedoms of their community members other than taming terrorism.[119]

Political and legislative failure to come up with proper statutes and poor case law on the crimes of terrorism puts the judiciary in a rather awkward position to deal with terror suspects in Kenya. International criminal jurisprudence is at its premature stage in the Kenyan legal system making it somehow cumbersome for the courts to come up with acceptable rulings on terrorism and counter terrorism policies. International Crimes Act 2008, and Prevention of Terrorism Act, 2012 in Kenya including the Constitution of 2010 are all legal measures to deal with terrorism in a manner that would respect human rights and avoid pejoration of the security.

Using special anti-terrorist section of the police to deal with the suspects in Nairobi and Mombasa, getting into religious places to fight terrorists, and going into residential houses to identify terrorists are all measures that Kenya has adopted to deal with terror.

According to Mutave,[120] the government responses to combat terrorism include formulating local legislation on counter-terrorism bill, establishment of specialized forces to carry out investigations and deterring any terrorist activities in its territory.

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[119] Op cit, Mogire and Agade (2011), p 474.
[120] Mutave, N. M. (2005). Terrorism: challenges facing Kenya's national security and national responses to terrorism, 1981-2003. Masters Dissertations, University of Nairobi. Available at http://erepository.uonbi.ac.ke:8080/xmlui/handle/123456789/19590

Following the 11th September 2001 bombings and subsequent UN actions and resolutions including UN resolutions 1373/01, 1377/01 and 1624/2005 constrained the Kenyan government to adopt counterterrorism strategies that included, legislative reforms, institutional building, trainings and bilateral and multilateral collaboration with like-minded states including the US and UK on the actions. Kenya expressed its unequivocal support during the UN General Assembly 56th Session, general debate, calling for intensified and comprehensive international cooperation in the fight against the scourge.[121]

Kenya affirmed its commitment to the eleven existing international treaties and conventions it had previously signed and ratified, in relation to counter-terrorism and signed and ratified two subsequent conventions in 2002 and 2005,[122] at the African Union level, Kenya has ratified the Convention on the Prevention and Combating of Terrorism 1999 and its 2002 Protocol.[123] it has further prioritized implementation of structural and practical actions to counter terrorism. The key factors contributing to this prioritization include Kenya's general international counter terrorism obligations pursuant to the relevant UN Security Council resolutions; its geographical proximity to Somalia and previous terrorist attacks on US and Israeli interests in Kenya; and the identification of Kenya as a key strategic partner in the implementation of the US-led war on terror.[124]

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[121] Reprieve and Redress (February 20, 2009). Kenya and Counter Terrorism: A Time for Change, pp 2. Available at;
www.redress.org/.../Kenya%20and%20Counter-Terrorism%205%20Feb%2009.pdf
[122] UN Security Council, Letter dated 2002/09/29 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning Counter-terrorism addressed to the President of the Security Council, 31st July 2002, S/2002/856, available at:
http://odsddsny.un.org/doc/UNDOC/GEN/N02/517/02/IMG/N0251702.pdf?OpenElement
[123] Reprieve and Redress (February 20, 2009). Kenya and Counter Terrorism: A Time for Change, pp 34. Available at;
www.redress.org/.../Kenya%20and%20Counter-Terrorism%205%20Feb%2009.pdf
[124] Ibid, pp. 31.

Since 2002 Kenya has taken following legislative and executive measures to ensure compliance with Security Council Resolution 1373 of 2001;enactment on Act no 9 of 2009 Proceed of Crime and Money Laundering Act, the most Contentious was an attempt of specific counter terrorism legislation which as Assamoah[125] observes;

Pursuant to Kenya's introduction of the Suppression of Terrorism Bill in 2003, certain provisions - including those that sought to make it an offence for one to wear or use items associated with terrorists - was perceived as an attack on the Muslim community and their mode of dressing. Together with provisions that proposed to impose the duty to provide evidence to the contrary once the prosecution had established a certain threshold of evidence that tended to suggest the guilt of the person, many felt that the counterterrorism agenda of the country sought to promote religious and ethnic prejudices or, at best, was based on religious and ethnic prejudices. This led to stiff opposition from certain elements in Kenya, among which was the Muslim community.[126]

Other Arguments in opposition to the Counter terrorism legislation as observed by Nzamba Kitonga included:

The bill was seen as a threat to personal liberties and human rights; As arbitrary and therefore prone to abuse by agents of the state even when there is no threat of terrorism; As religiously and racially discriminatory; As an imposition by The United States of America and Western Nations; The definitions of terrorism, terrorist organizations, terrorist property in the bill are so wide that being drunk and disorderly or in possession of

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[125] Asamoah, A. A. (2008). Counter-Terrorism and the National Security of African States: Points of Convergence and Departure,' *Journal of Security Sector Management.* Vol. 6(1), 1-10
[126] Ibid

a pen knife can fit the definition; The police and the courts had been given too much ex-parte power which imperils the due process of law and the right to a fair hearing; and The purported description of a —uniforml in the Bill can include any form of clothing including an ordinary suit or a 'kanzu'.[127]

Despite the failure by Kenya to enact specific counter-terrorism legislation, it has sought to fight terrorism in several other ways,[128] including the establishment of the National Security Intelligence Service with support from the U.S. Anti-Terrorism Assistance (ATA) Program; creation of the Anti-Terrorism Police Unit (ATPU) in1998, a Joint Terrorism Task Force (JTTF) and the National Counter-Terrorism Center (NCTC) in 2003; and the National Security Advisory Committee (NSAC) in 2004 which has since been scrapped. Additional measures include participation in the U.S. Terrorist Interdiction Program (TIP), which provides technology to screen travelers arriving at airports and border crossings.[129]

As a result of the attacks against US interests in Kenya and its geographical proximity to Somalia, the US has identified Kenya as a key strategic ally in its war on terror,[130] this has endeared Both the US and UK in bilateral and multilateral collaborations in counter terrorism initiatives benefiting Kenya in the nature of military trainings, equipment, and multiple grants. On the other

[127] Kitonga, N. ('The Fight Against Terrorism in East Africa: Comments and Observations' East Africa Law Society, PP 2-3
. Available at http://www.ealawsociety.org/Joomla/UserFiles/File/fight_Nzamba.pdf
[128] Omutola, J. S. (2008). Accord, 'Assessing Counter terrorism Measures in Africa', Conflict Trends Issue no 2 of 2008 PP 45. Available at http://www.accord.org.za/downloads/ct/ct_2008_2.pd
[129] Combating Terrorism Center, 'Al-Qaida's Mis-Adventures in the Horn of Africa Case Study Kenya," pp11.
Available at http://www.ctc.usma.edu/aq/pdf/Harmony%20II%20Chapter%204%20Kenya.pdf
[130] Reprieve and Redress (February 20, 2009). Kenya and Counter Terrorism: A Time for Change, pp 44. Available at; www.redress.org/.../Kenya%20and%20Counter-Terrorism%205%20Feb%2009.pdf

hand Kenya is a country of dubious human rights record, impunity reigns creating a fertile ground for counter terrorism actions to be abused infringing human rights.[131]

Legislative Framework

The legislative framework that Kenya relies on in counter terrorism include the International Crimes Act, 2008, Constitution of the Republic of Kenya, 2010 and Prevention of Terrorism Act, 2012. International Crimes Division (ICD) in the High Court was launched on 13th December 2013 to enable the judiciary to deal efficiently and effectively with international crimes, terrorism, and elections related violence in Kenya. Though this is in its early stage the fact is that the judiciary has now a Division in place to deal with terrorism to bring meaningful justice.[132]

Even if there is no much jurisprudence on terrorism in Kenya and the courts rely heavily on international judicial reviews and other legal instruments, it is real that there is increasing need to cultivate academic and researched analysis of what would be the Kenyan approach respecting human rights standards.

The absence of a strong legislative framework to regulate the counter terrorism action coupled with impunity by the well-endowed state officials engaged in the action has resulted in outright violations or rights leaving victims of such violations without any judicial remedies of redress. The peculiarity of Kenya, its geo-political positioning brings to the fore the need vigilance

[131] Combating Terrorism Center, 'Al-Qaida"s Mis-Adventures in the Horn of Africa Case Study Kenya,' pp. 6. Available at http://www.ctc.usma.edu/aq/pdf/Harmony%20II%20Chapter%204%20Kenya.pd[Accessed on 4th May 2010]
[132] http://www.vrwg.org/ACCESS/ENG-22Ongeso.pdf; https://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-Prosecutions-2013.pdf;

against potential terror attacks but any such actions pursuant to the relevant UN Security council resolution must be implemented with respect to all internationally accepted human rights

4.2 Human Rights Challenges in Counter-Terrorism in Kenya

It is a unfolding reality that governments including the GoK are engaged in counter terrorism operations. It is also a fact that so many innocent lives of civilians are being lost in what is called terrorist attacks. Such attacks do not aim or target military objectives but civilians that are defenseless and unprotected. Terrorist attacks violate human rights of individuals as it destroys lives, limits freedom, destroys property and maims individuals and property.

Counter-terrorism measures adopted by various States and organizations have been accused of lacking human rights standards and threshold of international law.[133] Anti-terrorism operations in themselves may be about good sense of self-defense response and state obligations to guarantee security and safety to its people within territorial jurisdiction according to the international law. Matters get worsened as most of the application measures adopted in such operations lack to meet the threshold of international human rights law.

International terrorism, trans-boundary terrorism and national terrorism still operate under quasi-judicial assumptions without proper legal interpretation as of what is the definition of terrorism and how best to legislate it. As this failure comes from both international systems, regional systems and national legal systems, the question of bringing justice to presumed terror criminals is left to the discretion of the judiciary which often feel obliged to take cognizance of human rights and international standards whenever they have to deal with

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[133] Onyoyo, P. O. (Human Rights and the Genesis of Counter- Terrorism Practice in Kenya. Journal Article, University of Nairobi Research Archives, pp. 1-18. Available at http://hdl.handle.net/11295/73556

terrorism and counter terrorism measures adopted by the government. In this case there is a situation of hands-off terrorism or leaving for powerful nations especially the USA of America to carry the cross.

The government of Kenya, by sending Kenya Defense Forces (KDF) and *Linda Inchi* sections of the military into Somalia and allowing them to deal militarily with the terrorism, has been alleged of not respecting critical human rights standards and universal principles. Military option aims to prevent, protect, secure, deter and pursue in counter-terrorism operations.

While noting the rising incidents of terrorist attacks in the State party and the establishment of an Anti-Terrorism Unit in the police service, human rights agencies are concerned at the lack of a legal framework that clearly sets out the human rights that must be respected in the fight against terrorism. The Committee is also concerned at allegations of the State party's involvement in extraordinary renditions and the refoulement of individuals suspected of being involved in terrorist acts to countries where they are likely to be tortured or face serious human rights violations.

Extrajudicial killings in connection with terrorists have been accused of lacking human rights standards. Torture of the arrested and detained persons has been a violation of human rights rules and lacks the authorized standards. Shoot to kill bill has been criticized by the human rights activists and declaring war on terrorism are not compatible with human rights rules. This includes the use of drone to eliminate targeted persons which end up killing civilians. It is all the same an extra-judicial killing meant to deter terrorists or others from venturing into the atrocities and crimes of aggression.

In respect to human rights law even the arrests of perpetrators of terror must be done within the law. Proper procedures must be followed while arresting any suspect. Before the police is ordered to launch swoop on a community in search for suspect of terrorist attack, proper procedures respecting human rights must be carefully observed by law enforcers. Allegedly this has not been the case in the Kenyan operations.

Counter-terrorism measures taken by the Republic of Kenya have been alleged as targeting members of Islam and Somali community, an allegation that has taken political turn. Closing down of Musa Jahid Mosque in Mombasa created a lot of heat in the political arena claiming that Muslims are targeted by the Government.29 Killing of Mr. Rogo, Mr. Makaburi in Mombasa has been seen as extra-judicial killing based on Islam, an allegation that has created some division of opinions. The Government of Kenya has since denied any involvement in the alleged arbitrary killings while some section of public opinion still hold that the

Following the failed attempt at specific counter terrorism legislation the Kenyan government embarked on its action without the color of law whilst arguing that the existing legal regime was capable of prosecuting offences envisioned by the international treaties and conventions on counter terrorism.16 The counter terrorism actions in Kenya has been concentrated on predominantly Muslim areas in North Eastern province on the border with Somalia and the Coastal strip that is inhabited with predominant Muslim Arab-Swahili communities bringing to the fore allegations of discrimination on the basis of race, ethnicity and religion in the operations, It was the view in some communities that people were suspected, stopped, searched, arrested and held in custody solely because of their ethnic, racial or religious origins.[134]

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[134] Amnesty International (23 March 2005). Kenya: The Impact of Anti-Terrorism Operations on Human Rights, AFR 32/002/2005, pp. 9. Available at: http://www.unhcr.org/refworld/docid/42ae982b0.html.

As part of the response to terrorism, extensive arbitrary arrests were carried out throughout most of 2003 and 2004 in coastal towns, as well as in Nairobi with allegations of human rights violations.[135] The extralegal operations were conducted with impunity; in fact a Kenyan Judge Justice Waki, as he then was, sitting at the High Court in Mombasa held that:

"There cold silence from the respondents in this matter about what laws, if any that were used in seeking information ad interrogating the applicant. There is indeed a concession that the FBI has no legal basis in operating in this country........I am not as a court of Law to imagine that the Respondent had good and valid reasons for their action. The police is at liberty and has the constitutional mandate to investigate crime and bring criminals to book. But there are clear laws governing this country and they must be shown to be complied with; particularly by all law enforcement of whatever description.[136]

The following human rights concerns or deprivations occasioned by the counterterrorism agencies. Arbitrary arrests, searches without warrants on predominant Muslim communities on alleged suspicion of terrorism. In 2006 and early 2007, reports emerged that approximately 150 individuals had been rounded up and detained in Kenya on suspicion of involvement in terrorist acts. The majority of these individuals were picked up at the Kenya/Somali border. Incommunicado detention through denial of access to family members and frequent transfer of detainees from police station to police stations without availing the information too family members. On 13 February 2007, Mohamed Abdulmalik, a Kenyan citizen was arrested by the Anti-Terrorism Police Unit in a café in Mombasa and held incommunicado until 13 days later when the US ambassador

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[135] Ibid. pp. 8.
[136] Ali Mahfoudh Salim V Federal Bureau of Investigations (FBI)' and Another [1999] eKLR pp 12.

in Kenya announced that Mr.Abdul Malic was in Guantanamo bay facility.[137] Denial of the right to legal counsel and denial of consular visits for the non-nationals arrested.

Information received by Amnesty International[138] indicated that the ability of detainees to maintain contact with the outside world was a persistent problem, extending beyond the initial period of detention (in police custody). Access to and by family members while on remand at Kamiti Maximum Security Prison was an issue for all. There was torture and other cruel, inhuman or degrading treatment or punishment especially outsourced through the rendition program, infringement on the right to be brought promptly before a judge or other judicial officer (*habeas corpus*). Judicial complacency has been witnessed especially where the state has disregarded judicial process of *habeas corpus* and proceeded to re-foul expel or deport Kenyans and non-citizens arrested in Kenya during pendency of judicial process.[139]

Moreover, Kenya has experienced violation of the right to challenge the lawfulness of detention, the right to trial within a reasonable time or to release from detention. In December 2006 and January and February 2007, at least 150 people, including children from 21 nationalities were arbitrarily detained in Kenya. Many were fleeing to Kenya from the conflict in Somalia. The individuals were first held in Kenya for several weeks without charge. The majority were denied access to a lawyer, consular assistance, the ability to challenge the legality of their detention or consideration of their potential refugee status.[140] There has been violations of the rights of refugees

[137] Reprieve and Redress (February 20, 2009), 'Kenya and Counter Terrorism: A Time for Change,' pp. 8. Available at www.redress.org/.../Kenya%20and%20Counter-Terrorism%205%20Feb%2009.pdf
[138] Amnesty International (23 March 2005). Kenya: The Impact of Anti-Terrorism Operations on Human Rights, AFR 32/002/2005, pp. 286. Available at: http://www.unhcr.org/refworld/docid/42ae982b0.html.
[139] UN Committee against Torture (December 2008). Alternative Report by IMLU, Para 85. Available at http://daccess-ddsny.un.org/doc/UNDOC/GEN/G09/403/11/PDF/G0940312.pdf?OpenElement
[140] Reprieve and Redress (February 20, 2009), 'Kenya and Counter Terrorism: A Time for Change,' pp. 4. Available at www.redress.org/.../Kenya%20and%20Counter-Terrorism%205%20Feb%2009.pdf

and asylum-seekers and their relatives.[141] Kenya closed its boarder in December 2006 and January 2007 to prevent refugees fleeing war in Somalia entering the country while invoking Article 1F of the refugee convention without putting in place any judicial mechanism of establishing the persons being denied entry were criminals as envisioned by the convention.[142] Moreover, there was systematic mass torture of communities in North Eastern province and western Kenya during joint Military and police operations in Mandera 2008, Mt Elgon 2008 where the 20 Para battalion was heavily involved.[143]

4.3 The Mitigatory responses towards Addressing Human Rights in Counter Terror operations

Coordination between national, regional and international counter-terrorist initiatives is needed to ensure that these initiatives do not undermine an already fragile security situation in the Horn of Africa. Governments in the region must re-commit themselves to counter-terrorism by strengthening counter-terrorism laws, police and intelligence, tightening border controls, coastline surveillance and anti-money laundering measures to detect, deter and diffuse terrorist threats, but strike a healthy balance between these measures and the values of democracy and human rights. Governments should also refrain from underhand manipulation of terrorism in ways that undermine peace processes.

African institutions, particularly the AU, IGAD and the Common Market for Eastern and Southern Africa (COMESA), must unwaveringly pursue a counter-terrorism campaign within the

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[141] UN Security Council, Letter dated 2004/03/17 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning Counter-terrorism addressed to the President of the Security Council, 25 March 2003, S/2004/384, pp 14. Available at:
http://odsddsny.un.org/doc/UNDOC/GEN/N03/310/11/IMG/N0331011.pdf?OpenElement.
[142] Reprieve and Redress (February 20, 2009), 'Kenya and Counter Terrorism: A Time for Change,' pp20-21.
Available at www.redress.org/.../Kenya%20and%20Counter-Terrorism%205%20Feb%2009.pdf
[143] Ibid

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broader framework of the emerging continental peace and security agenda. They should work with international partners to boost regional abilities to deal effectively with the security threats posed by terrorism, always ensuring greater coordination between African efforts and those of international players like the US. Otherwise, the parameters of the war on terror will continue to be set by the imperatives of global insecurity with little attention to local security realities.

4.3.21 Humanitarian Option

Fight poverty in Somalia in order to quell acts of Al-Shabaab and their attacks. Offer them basic needs and ensure that they do not use poverty to recruit your jobless and unemployed youth into the militia group. This option is rare and not convincing as one of the best counter terrorism measures, though the safest under human rights perspective. The government should extend its regional network and cooperation to effectively gather intelligence for adequate response to suppress terrorism.

4.3.2 Diplomatic Option

Encourage and contribute to the Statehood in Somalia by supporting and backing the government in place and its policies. The reason is, terrorism thrive very fast in a situation in which there is no proper government or law and policies. In other words, the state such as Somalia must have law and order and take control over its population. In such diplomatic move it is possible to prevent the spread of terrorist attacks. This option is used often by civilized states as more friendly but less effective to quell terrorism since terrorists rarely operate under State authority except in the Lockerbie case. This option couples with international cooperation and venturing into diplomatic discussions in a manner to strike a deal. The expected

result is to win hearts and minds of those who are engaged in terrorism or those who may become terrorists.

4.3.3 Legal Option

Suspects of terrorist groups and criminal units must be brought to justice. This is the rule of law as opposed to the rule of people or police. Use of excessive force to deal with terrorists is also a violation to human rights standards. Proportionality and respect of a person should always be observed by the government and the judicial authorities.

The rule of law meaning that suspects must be brought to court process and guaranteed respect to their persona is the basis of all this. Allowing the suspects to have their legal defense at their own choice, ensuring that they can contact their lawyer and family members and ensure that the suspect is kept in an environment required for their human dignity. Legal option as counter terrorism approach is the only way out to deal with terrorism in a manner that would take into account most of the human rights principles and standards. Establishing reliable evidence is another challenge since proofs and alibi in such cases become technically difficult. It requires forensic know-how to ascertain facts by the law court. The whole process requires training of the judicial community including the investigators.

4.3.4 Targeting Terrorists' Infrastructure

The interception of terrorist financing has received a lot of attention not only due to the dependence of terrorist organizations on financial assets to implement their activities but also due to the possibility of detecting terrorist activity by tracing the money trail in the system. Proactive policies include measures such as employing intelligence and surveillance technologies to detect

terrorist activity and capture perpetrators, the obstruction of terrorist financial flows and weapons supplies, as well as pre-emptive attacks. Beyond physical measures they can also include the tightening of legislation and curbing of citizen rights to increase difficulties for terrorists to organize, disseminate their information, recruit members, and so forth. In short, pre-emptive measures aim at starving terrorists of their (financial, human, physical, technological) resources, o as to disrupt their activities.

CHAPTER FIVE

SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

This chapter present summary of the study findings, conclusions and recommendations. The chapter has been presented in lie with the study objectives which were to examine the strategies being used in counter-terrorism in Kenya, human right issues that emerge from counter terror strategies in Kenya, and the mitigatory responses towards addressing human rights in counter terror operations.

5.1 Summary

5.1.1 Strategies being used in Counter-terrorism in Kenya

The first objective of the study was to examine the strategies being used in counter-terrorism in Kenya. The study established that Kenya has experienced rise in terrorist attacks particularly from Al-Shabaab. In this regard, the country has come up with measures to counter terrorism. The Kenyan government adopted counterterrorism strategies that included security operations, legislative reforms, institutional building, trainings and bilateral and multilateral collaboration with like-minded nations.

One of the major counter terrorism measures taken by Kenya was military operation which saw Kenya Defense Forces attack Al-Shabaab territories in Somalia. The operation was backed by regional forces under AMISOM. Kenya remains resolute to get rid of elements of terrorists from its territorial jurisdiction. Suspects, and illegal immigrants have been arraigned in law courts, some sent to the refugee camps and some forcefully sent back to Somalia through evictions and expulsions. Kenya has a special anti-terrorist section of the police to deal with terror suspects.

The study established that Kenya counter terrorism through legislation. The legislative framework upon which Kenya counters terrorism comprise of the International Crimes Act, 2008, Constitution of the Republic of Kenya, 2010 and Prevention of Terrorism Act, 2012. Kenya enacted Proceed of Crime and Money Laundering Act no 9 of 2009 and Suppression of Terrorism Bill in 2003 in compliance with Security Council Resolution 1373 of 2001. Kenya ratified the Convention on the Prevention and Combating of Terrorism 1999 and its 2002 Protocol.

Kenya has institutions mandated to implement counter terrorism measures. The institutions include the ministry of interior affairs, Kenya Police Service, Kenya Defensed Forces, Directorate of Criminal Investigation and the Judiciary. Kenya established the National Security Intelligence Service, Anti-Terrorism Assistance Program, Anti-Terrorism Police Unit in1998, a Joint Terrorism Task Force and the National Counter-Terrorism Center in 2003, and the National Security Advisory Committee in 2004. Kenya also participate in the U.S. Terrorist Interdiction Program which provides technology to screen travelers arriving at airports and border crossings.

5.1.2 Human Rights Challenges in Counter-Terrorism in Kenya

The second objective of the study was to examine human right issues that emerge from counter terror strategies in Kenya. The study established that some of the counter-terrorism measures adopted by Kenya have been accused of lacking human rights standards and threshold of international law. The military and police operations by the government of Kenya against terrorist in the country and across the borders in Somali have been alleged of not respecting critical human rights standards and universal principles.

The study established that Kenya lack a legal framework that clearly sets out the human rights that must be respected in the fight against terrorism. There have been allegations of the state

involvement in extraordinary renditions and the refoulement of individuals suspected of being involved in terrorist acts to countries where they are likely to be tortured or face serious human rights violations. Torture of the arrested and detained persons has been a violation of human rights rules and lacks the authorized standards.

Kenyan security forces have been accused of extrajudicial killings in the fight against homegrown and external terrorists. The extra-judicial killings are meant to deter terrorists or others from venturing into the atrocities and crimes of aggression. The shoot to kill orders particularly against the outlawed sects such as Mungiki were criticized by the human rights activists.

Kenya police came under criticism following operations targeting terrorist among Somali communities in Eastleigh estate in Nairobi and Nothern part of the country. Counter-terrorism measures taken by the Republic of Kenya have been alleged as targeting members of Islam and Somali community, an allegation that took political turn when opposition parties criticized the operation. The closing down of mosques in the coastal region and the killing of Muslim clerics such as Mr. Rogo and Mr. Makaburi in Mombasa were viewed as extra-judicial killing based on Islam. The focus of counter terrorism actions on predominantly Muslim areas in North Eastern province on the border with Somalia and the Coastal strip that is inhabited with predominant Muslim Arab-Swahili communities elicited allegations of discrimination on the basis of race, ethnicity and religion in the operations. There were allegations that people were suspected, stopped, searched, arrested and held in custody solely because of their ethnic, racial or religious origins.

Another area of violation of human rights in the fight against terrorism is the infringement of rights of terrorist suspects in police custody. The study established that terrorism suspects were held incommunicado especially the denial of the right to legal counsel and denial of consular visits for the non-nationals arrested. The study established that the ability of detainees to maintain contact with the outside world was a persistent problem, extending beyond the initial period of detention in police custody. Access to and by family members while in police custody is also a human rights violation issues in the fight against terrorism in Kenya. Other areas of concern were inhuman or degrading treatment or punishment through the rendition program and infringement on the right to be brought promptly before a judge or other judicial officer.

5.1.3 Prospects for favorable counter terrorism-human rights outlook in Kenya

The third objective of the study was to come up with the prospects for favorable counter terrorism-human rights outlook in Kenya. The study established that in order for Kenya to enhance adherence to human right in her counter terrorism efforts, there is a need for Closer Corporation among national, regional and international counter-terrorist agencies to prevent violation of human rights. There is a need for review of counter-terrorism strategies to ensure that counter-terrorism laws, police and intelligence, border controls, surveillance and anti-money laundering measures uphold human rights.

Human rights challenges associated with counter terrorism efforts can be eradicated or minimized through humanitarian, diplomatic and legal options. The humanitarian option in the fight against terrorism is ensuring that Kenya and international communities help alleviate poverty in Somalia in order to quell acts of Al-Shabaab and their attacks. The diplomatic option involves supporting and backing the government in Somalia in order to destroy safe havens for terrorists

In reference to the legal option, Kenya should ensure that suspect in terrorism are brought to justice as opposed to police operations. Another mitigatory measure in the fight against terrorism is destruction of infrastructure upon which tourists operate. Proactive policies include measures such as employing intelligence and surveillance technologies to detect terrorist activity and obstruct terrorist financial flows and weapons supplies as well as pre-emptive attacks. These activities help in countering terrorism and at the same time uphold human rights.

5.2 Conclusion

The study concludes that counter terrorism measures used in Kenya often violate human rights. The main counter terrorism measures applied in Kenya include security operations, legislative reforms, institutional building, trainings and bilateral and multilateral collaborations. The military and police operations against terrorism and terrorist suspects have led to human right violations such as holding suspects incommunicado, denial of legal representation, illegal deportation, extrajudicial killings and ethnic and religious profiling. Torture of the arrested and detained persons has been a violation of human rights rules. Human rights have also been violated through the rendition program and infringement on the right to be brought promptly before a judge or other judicial officer.

Counter terrorism measures must be balanced and must always consider the protection of the human dignity. In respect to human rights law even the arrests of perpetrators of terror must be done within the law. Proper procedures must be followed while arresting any suspect. Before the police is ordered to launch swoop on a community in search for suspect of terrorist attack, proper procedures respecting human rights must be carefully observed by law enforcers. Allegedly this has not been the case in the Kenyan operations.

5.3 Recommendations

The study recommends that Kenya need to facilitate adherence to human rights in the fight against terrorism by ensuring that initiatives and institutions undertake to respect human rights. Particularly, the security agencies should come up with programs to train personnel involved in counter terrorism on the importance of human rights in the success of counter terrorism strategies.

The study recommends that Kenya and international community should advocate for financial and human resources committed to addressing social and economic challenges in Somalia. This will enable reduction of poverty and social injustices that provide a conducive environment where terrorist operate.

The study recommends strengthening of diplomatic engagements as a means to ensure that human rights are observed in the fight against terrorism. The diplomatic engagements should support and strengthen Somali government and the rule of law thus deterring terrorists. Terrorism thrive very fast in a situation in which there is no proper government or law and policies.

The study recommends that Kenya should review laws governing counter terrorism. Counter-terror laws should deter use of excessive force and violation of human rights when dealing with suspected terrorists. The laws should bar activities such as torture, extrajudicial killings, ethnic and religious profiling and denial of legal representation during counter terrorism.

REFERENCES

Asamoah, A. A. (2008). Counter-Terrorism and the National Security of African States: Points of Convergence and Departure. *Journal of Security Sector Management*, 6(1), 1-10.

Barkan, J. (2004). Kenya after Moi. *Foreign Affairs*, 83(1), 87–100.

Baulcomb, J. (2003). Management of change through force field analysis. *Journal of Nursing Management*, 11: 4, 275-280.

Baxter, P & Jack, S (2008). Qualitative Case Study Methodology: Study Design and Implementation for Novice Researchers. *The Qualitative Report*, 13 (4), 96-98.

Bekink, B. (2005). A Dilemma of the Twenty-First Century State: Questions on the Balance between Democracy and Security. *African Human Rights Law Journal*, 406 at 410.

Ben Saul, B. (2014). *Research Handbook on International Law and Terrorism* (Edward Elgar). Available at SSRN: https://ssrn.com/abstract=2399477.

Botha, A. (2014). 'Radicalization in Kenya', *Institute for Security Studies Paper 265*, September 2014.

Brysk, A. and Shafir, G. (2006). *National Insecurity and Human Rights: Democracies Debate Counterterrorism*. London: Global, Area, and International Archive University of California Press.

Charters D. A. (1994). *The Deadly Sin of Terrorism: It's Effect on Democracy and Civil Liberty in Six Countries*. Westport, CT: Greenwood Press.

Choudhury, T., and Fenwick, H. (2011). 'The impact of counter-terrorism measures on Muslim communities,' *The International Review of Law, Computers & Technology*, 25 (3), 151–181.

Cooper, J. (2007). *Countering Terrorism, Protecting Human Rights: A Manual*. OSCE Office for Democratic Institutions and Human Rights (ODIHR), Warsaw, Poland.

Creswell, J.W. (2012). *Educational research: Planning, conducting, and evaluating quantitative and qualitative research*. Upper Saddle River, NJ: Prentice Hall.

de Coning, C. (2004). Poverty and terrorism: The root cause debate? *Conflict Trends*, 3, pp 20-29.

de Londras, F. (2013). 'Prevention, detention and extraordinariness' *in F ní Aoláin and O Gross (eds), Guantánamo Bay and Beyond Exceptional Courts and Military Commissions, Comparative and Policy Perspective* (CUP, 2013).

de Londras, F. (2014). *Counter-Terrorist Detention and International Human Rights Law.* Available at SSRN: https://ssrn.com/abstract=2399477

de Waal, A. (2004). '*Islamism and its enemies in the Horn of Africa* (ed).' Shama Books, Addis Ababa, Ethiopia.

Doussa, J. V. (2006). *Reconciling Human Rights and Counter-Terrorism: A Crucial Challenge.* Retrieved from Australian Human Rights Commission: https://www.humanrights.gov.au/news/speeches/reconciling-human-rights-and-counter-terrorism-crucial-challenge.

Dreher, A., Gassebner, M. and Siemers L.-H.R. (2007). "Does Terror Threaten Human Rights? Evidence from Panel Data." *Journal of Law and Economics,* 27(2): 107-114.

Duffy, H. (2005). *The 'War on Terror' and the Framework of International Law.* Cambridge: Cambridge University Press.

Flynn, E. J. (2005). 'Counter Terrorism and Human Rights: The View from the United Nations.' *European Human Rights Law Review,* 3(5), 29.

Gautam, A. (2015). Human Rights and Terrorism: An Overview. *International Journal of Multidisciplinary Research and Development,* 2, (10), 421-424.

Gearty, C. (2007). *Human rights, civil society and the challenge of terrorism.* A Centre for the Study of Human Rights report Centre for the Study of Human Rights, London School of Economics and Political Science, Houghton Street, London.

Gibney, M., Tomaševski, K., and Hansen, J. V. (2011). Transnational State Responsibility for Violations of Human Rights. *Harvard Human Rights Journal,* 12 (6) 254-257.

Goderis, B. and M. Versteeg (2008). "*Human Rights Violations after 9/11 and the Role of Institutional Constraints.*" Paper presented at the Second Workshop of the Network for the Economics Analysis of Terrorism (NEAT), September 22, 2008, Brussels.

Guiora, A. N. (2005). Counter-terrorism and the Rule of Law. Case Western Reserve University School of Law. *Case Research Paper Series in Legal Studies Working Paper* 05-15, pp. 1.

Howden, D. (2013). *Kenya rights group accuses anti-terror police of unlawful killings.* Retrieved July 29, 2016, from The Guardian: www.theguardian.com/world/2013/nov/2019/kenya-rights-group-accuses-anti-terror-police-of-unlawful-killings/

Huntington, S. (1996). '*The clash of civilizations and the remaking of world order.*' Simon & Schuster, New York.

Hyslop, D and Morgan, T. (2014). Measuring terrorism with the global terrorism index, *in Raul Caruso, Andrea Locatelli (ed.) Understanding Terrorism (Contributions to Conflict Management, Peace Economics and Development, Volume 22. Emerald Group Publishing Limited*, pp.97 – 114.

Jawad, S. (2015). 'Terrorism and Human Rights,' *Sociology and Anthropology*, 3(2): 104 -115.

Kagwanja, P. (2006). Counter-terrorism in the Horn of Africa: New security frontiers, old Strategies. *African Security Review*, Volume 15, Issue 3, 72-86.

Kalliopi K. K. (2006). "Updated framework draft of principles and guidelines concerning human rights and terrorism", Expanded Working Paper, UN Sub-Commission on Human Rights, doc. A/HRC/Sub.1/58/30*, 3 August 2006.

Limited, A. I. (2015). *'Our Job is to Shoot, Slaughter and Kill' Boko Haram's Reign of Terror in North-East Nigeria*. London: Limited, Amnesty International Charity.

Mackintosh, K., and Duplat, P. (2013). *Study of the Impact of Donor Counter Terrorism Measures on Principled Humanitarian Action*. Geneva: Office for the Coordination of Humanitarian Affairs.

Masese, H. M. (2007). *An analysis of the phenomenon of terrorism and Kenya's counter-terrorism strategy, 2000-2007*. Masters Dissertations, University of Nairobi. Available athttp://erepository.uonbi.ac.ke:8080/xmlui/handle/123456789/20969

Mbugua, K. (2004). 'East Africa: A haven or hapless victim of international terrorism,' *Conflict Trends*, 3, pp 31-37.

McGregor, L. (2009). *Kenya & Counterterrorism: A Time for Change*. London: Reprieve and Redress. Available at: www.redress.org/smartweb/africa/kenya.

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

Munyao, A. K. (2006). *Analysis of Kenya's responses to international terrorism, 1980 – 2005*. Masters Dissertations, University of Nairobi. Available at http://erepository.uonbi.ac.ke:8080/xmlui/handle/123456789/20994.

Mutave, N. M. (2005). *Terrorism: challenges facing Kenya's national security and national responses to terrorism, 1981-2003*. Masters Dissertations, University of Nairobi. Available at http://erepository.uonbi.ac.ke:8080/xmlui/handle/123456789/19590

Njoroge, K. (2004). *Arm that responds to terror threats*, East African Standard, 26 February 2004.

Nzau, M. (2015). Reassessing the Impact of International Human Rights Regimes on Democratization. *International Journal of Scientific Research and Innovative Technology* 3 (10) 45-60.

Olivier de Schuttern, O., and Ringelheim, J. (2010). *"Ethnic Profiling: A Rising Challenge for European Human Rights Law"*, in *The Modern Law Review*, Published by Blackwell Publishing,9600 Garsington Road, Oxford OX4 2DQ, UK and 350 Main Street, Malden, MA 02148, USA, p. 1.

Omutola, J. S. (2008). *Accord, 'Assessing Counter terrorism Measures in Africa'*, Conflict Trends Issue no 2 of 2008 PP 45. Available at http://www.accord.org.za/downloads/ct/ct_2008_2.pd

Republic of Kenya (2016). *National Strategy to Counter Violent Extremism.* Printed By The Government Printer, Nairobi. Available at: file:///C:/Users/Maureen/Downloads/National%20Strategy%20To%20Counter%20Violent%20Extremism.pdf.

Rosand, E., Millar, A., & Ipe, J. (2009). *Implementing the UN Global Counter-Terrorism Strategy in East Africa.* Center on Global Counterterrorism Cooperation. Routledge.

Sjoberg, G,. Vaughan, T. R., and Norma W. (1984). "Bureaucracy as a Moral Issue." *Journal of Applied Behavioral Science*, 20 (4), 441-453.

Sjoberg, G. (1996). "The Human Rights Challenge to Communitarianism: Formal Organizations and Race and Ethnicity." *in Macro Socio-Economics. David Sciulli (ed).* Armonk, N.Y.: M.E. Sharpe. Pp.273-297.

Sjoberg, G. (1999). "Some Observation on Bureaucratic Capitalism: Knowledge about What and Why?" *In Sociology for the Twenty-first Century: Continuities and Cutting Edges. Janet L. Abu-Lughod (editor).* Chicago: University of Chicago Press. Pp. 43-64.

Sjoberg, G. (2009). "Corporations and Human Rights." *In Interpreting Human Rights: Social Science Perspectives. Rhiannon Morgan and Bryan S. Turner (editors).* New York: Routledge. Pp. 157-176.

Sjoberg. G., Gill, E., and Norma W. (2001). "A Sociology of Human Rights." *Social Problems*, 48 (1), 11-47.

Søholm, I., and Kessing, P.V. (2012). Practical Guidance Paper on Counter-terrorism and Human Rights. Danish Institute for Human Rights. Strandgade 56, Copenhagen.

Tadese, M. (2004). *'New security frontiers in the Horn of Africa,'* Friedrich-Ebert-Stiftung, briefing paper, June 2004, p 5.

Tadesse, M. (2002). 'Al-Ittihad: Political Islam and black economy in Somalia,' Addis Ababa, p. 5.

Tayler, W. (2005). Notes on the Human Rights Movement and the Issue of Terrorism, International Council on Human Rights Policy. Available at http://www.ichrp.org/files/papers/78/129_Notes_on_the_Human_Rights_Movement_and _the_Issue_of_Terrorism_Tayler__Wilder__2005.pdf, accessed on 25 -09-2011.

Tongco, D. C. (2007). Purposive Sampling as a Tool for Informant Selection, Ethnobotany Research & Applications 5:147-158.

Virostko, L., and Newman, F. C. (2013). Counter-terrorism and the Protection of Human Rights. Human Rights Council 13th Session, Agenda Item 3: Countering Terrorism. Human Rights Advocates, Berkeley, CA 94705 USA.

Whittake, J. (2013). Counter-terrorism and human rights. Routledge, 711 Third Avenue, New York, NY 10017, USA.

Wilson J. and Ramana, P. V. (2007). Terrorism and Human Rights. ORF policy brief, February 2007. Available at http://www.observerindia.com/cms/export/orfonline/modules/policybrief/attachments/trs _1171547246121.pdf

Statutes and Conventions

Ali Mahfoudh Salim V Federal Bureau of Investigations (FBI), and Another [1999] eKLR pp 12.

Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms, adopted 26 May 1995 (entered into force 11 August 1998), art 5(3).

ICCPR, art 4

ECHR, art 15

ACHR, art 27.

ICCPR, art 9(2), (4)

ECHR, art 5(4)

ACHR, art 7(4), (6).

Security Council Resolution 1373, para. 3(f).

UN General Assembly in its Resolution on Human Rights and Terrorism, UNGAA/RES/29/185, para 6.

UN General Assembly, Resolution 58/187 of 22 March 2004, doc. A/RES/58/187, para. 7, and UN Commission on Human Rights, Resolution 2004/87, 21 April 2004, para. 6.

UN General Assembly, Resolution 60/288 of 20 September 2006, doc. A/RES/60/288; see also http://www.un.org/terrorism/strategy-counter-terrorism.html.

UN Human Rights Committee, Alegre v Peru, Communication No 1126/2002, UN Doc CCPR/C/85/D/1126/2002 (17 November 2005)

UN Resolution 2004/87, para. 10.

UN Security Council Resolution 1456 of 20 January 2003, doc. S/RES/1456 (2003), para. 6.

UN Security Council Resolution 60/288

UN Security Council, Letter dated 2002/09/29 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning Counter-terrorism addressed to the President of the Security Council, 31st July 2002, S/2002/856, available at: http://odsddsny.un.org/doc/UNDOC/GEN/N02/517/02/IMG/N0251702.pdf?OpenElemen t

UN Security Council, Letter dated 2004/03/17 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning Counter-terrorism addressed to the President of the Security Council, 25 March 2003, S/2004/384, pp 14. Available at: http://odsddsny.un.org/doc/UNDOC/GEN/N03/310/11/IMG/N0331011.pdf?OpenElemen t.

Reports

Annual Report of the Inter-American Commission on Human Rights 1990–1991, chap. V, sect. II

International Crisis Group (ICG) (2006). Can the Somali crisis be contained? Africa Report No 116, 10 August 2006.

Sub-Commission on the Promotion and Protection of Human Rights, Decision 2004/109 of 12 August 2004, doc. E/CN.4/Sub.2/DEC/2004/109, para. (a).

Combating Terrorism Center, 'Al-Qaida's Mis-Adventures in the Horn of Africa Case Study Kenya," pp11. Available at http://www.ctc.usma.edu/aq/pdf/Harmony%20II%20Chapter%204%20Kenya.pdf

Joint statement by Mary Robinson, UN High Commissioner for Human Rights, Walter Schwimmer, Secretary General of the Council of Europe, and Ambassador Gérard Stoudmann, Director of the OSCE Office for Demo-cratic Institutions and Human Rights, 29 November 2001, at http://www.unhchr.ch/huricane/huricane.nsf/view01/4E59333FFC5341A7C1256B13004 C58F5

Office of the United Nations High Commissioner for Human Rights Human Rights, Terrorism and Counter -terrorism Fact Sheet No. 32. Available at http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf, accessed on 10 -09-2011.

Report of the UN Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Theo van Boven, doc. E/CN.4/2004/56/Add.1, para. 1813.

Report of the United Nations High Commissioner for Human Rights and follow-up to the World Conference on Human Rights: effective Functioning of human rights Mechanisms, doc. E/CN.4/2004/4, 5 August 2003, p. 22

The Report of the High Commissioner for Human Rights to the 58th session of the Commission on Human Rights, "Human Rights: A Uniting Framework", doc. E/CN.4/2002/18, 27 February 2002; the Digest of Jurisprudence of the United Nations and regional Organizations on the protection of human rights while Countering terrorism , doc. HR/PUB/03/1 (New York and Geneva, 2003)

Amnesty International (23 March 2005). Kenya: The Impact of Anti-Terrorism Operations on Human Rights, AFR 32/002/2005, pp. 9. Available at: http://www.unhcr.org/refworld/docid/42ae982b0.html.

Amnesty International (23 March 2005). Kenya: The Impact of Anti-Terrorism Operations on Human Rights, AFR 32/002/2005, pp. 286. Available at: http://www.unhcr.org/refworld/docid/42ae982b0.html.

UN Committee against Torture (December 2008). Alternative Report by IMLU, Para 85. Available at http://daccess-ddsny.un.org/doc/UNDOC/GEN/G09/403/11/PDF/G0940312.pdf?OpenElement

Reprieve and Redress (February 20, 2009), 'Kenya and Counter Terrorism: A Time for Change,' pp. 8. Available at www.redress.org/.../Kenya%20and%20Counter-Terrorism%205%20Feb%2009.pdf

APPENDIX I: INTERVIEW GUIDE

A. Counter terrorism strategies in Kenya

1. Which international collaborative initiatives have Kenya adopted in the fight against terrorism?

2. Which legislative and political strategies have been adopted by Kenya in the fight against terrorism?

3. Which military measures have been adopted by Kenya in the fight against terrorism?

4. Which governance measures have been adopted by Kenya in the fight against terrorism?

5. Which other counter terrorism strategies have been adopted by Kenya in the fight against terrorism

B. Human right challenges encountered in the fight against terrorism in Kenya

1. Has the fight against terrorism in Kenya encountered human right challenges in the following aspects (briefly explain the response):

    a) Unlawful procedures of arrests of suspects

    b) Unlawful detention of suspects

    c) Torture by security agencies

    d) Lack of legal representation

    e) Unlawful deportation of suspects

2. Which other challenges do Kenya face in the fight against terrorism?

C. The prospects for favorable counter terrorism-human rights outlook in Kenya

1. Which mitigatory responses can Kenya adopt in the following areas towards addressing human rights challenges in the fight against terrorism?

    a) Humanitarian option

b) Diplomatic option

c) Legal option

d) Targeting infrastructure used by terrorists

2. Which other mitigatory responses can Kenya adopt towards addressing human rights challenges in the fight against terrorism?