

The Dilemma on Counter Terrorism Approaches and Human Rights Protection in Kenya¹

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Abstract: Internationally, terrorism is a major concern due to its very nature of causing physical destruction of human lives and property. Resultantly, suffering is experienced through economic loss, insecurity and generally social disorder in society whose effects cannot be emphasized enough. The situation is worsened by a lack of a universal definition of terrorism. Most countries in Sub-Saharan Africa are disturbed by civil conflicts and there has been a controversy on how to deal with the perpetrators of these conflicts. Kenya has remained peaceful for decades and hosted thousands of refugees fleeing neighboring countries which countries have been disturbed by terror.

However, since 1998, terrorism-related activities have been experienced in the country posing a major threat to national security and development. The scenery of terrorist activities in Kenya has been varying and growing in enormity, leaving many innocent citizens as victims, while in some incidences, the country has always been held at ransom by the terror groups. Even though Kenya has put up a concerted fight to combat terror, it has become an easy target for terror groups for close to twenty years. Kenya's counter-terrorism approaches have been a subject of criticism; however, the country has put a concerted effort to contain terror and ensure due process is followed in dealing with suspects.

This paper provides a descriptive analysis of the experiences, challenges, lessons learnt and the counter terrorism measures under taken by Kenya against this global menace. Despite efforts made by government and other agents to curb the threat, much is yet to be achieved in terms of the best approach to contain it without violating human rights. This paper concludes that despite the terror threats posed by terrorism, the Kenyan society generally seems to condemn the suspects of terror unheard. The security officers have been reiterating reactively rather than pro-actively. Hence violating either the terror suspects' or innocent citizens' human rights. The paper recommends that Kenya needs to re-examine its efforts in combating terrorism and terror-related activities from a human rights perspective.

Keywords: Dilemma Counter-terrorism, Approaches, Human Rights, protection, Human rights law.

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Introduction

Terrorism is one of the serious security threats facing governments of the world today. It is a transnational crime that reduces the State security to susceptibility. It has increasingly become a global problem that requires global intensive efforts.² This has not been easy to curb by the international community due to the difficulty in coming up with an agreed upon definition on terrorism.³ Despite the several treaties and conventions prohibiting acts which would constitute terrorism, not one deals specifically on terrorism.⁴ This being the position what is terrorism then?

Terrorism can be defined as:

*'acts of violence which target civilians in the pursuit of political or ideological aims. They are criminal acts against civilians committed with the intent to cause death or serious bodily injury'*⁵.

Kenya has attempted to give the meaning of terrorism, under The Prevention of Terrorism Act, as follows:

'an act or threat of an action which involves the use of violence against a person, endangers the life of a person other than the person committing the action and creates serious risk to the health or safety of public or a section of the public and results in serious damage to property'.⁶

Counter terrorism on the other hand means mechanisms, tactics and strategies that government, militaries and police departments adopt in response to frustrate terror attacks.⁷ Human rights on the other hand are rights that accrue to all human beings by dint of being human. It is the State's duty to protect all its subject against violation whether suspects or victims.⁸

History of Terrorism in Kenya

Terror attacks as seen from the above definition are human rights violation. Like most African countries Kenya has faced terror attacks since the 1960s. Factually, just like in the rest of Africa, the acts of terror can be traced back to the colonial period. The practices of attacking, raiding, capturing, and owning human beings, as well as the dispossession of their lands, due to the heinous nature of this activities have been baptized 'colonial terrorism'⁹ Terror related activities were used by the slavers and colonizers to force people to forsake their individual and group sovereignties in order to use them as commodities and to exploit

²Ganor B. (2002) Defining Terrorism: Is One Man's Terrorist another Man's Freedom Fighter? *Police Practice and Research* Vol.3 No.4 pp 287-304

³ A.B. Mongare , Terrorism as a global peril, the Kenyan Tactic, published by Ijstr vol 4, 2018

⁴ Higgins, (1997) "The General International law of terrorism" in Roslyn Higgins and Maurice Flory (eds), Terrorism and International law,

⁵The United Nation General Assembly's Declaration on Measures to Eliminate International Terrorism, set out in its resolution 49/60 adopted in 1994.

⁶ No 30 of 2012 Laws of Kenya Section 2 (1)

⁷ Neil Vogel, 'what is counter terrorism' (2004) <http://www.thoughtco.com/what-is-counterterrorism-3310298> accessed 26 June 2017

⁸Whittaker E. 2010: Compliance Among Weak States: Africa and the Counter-Terrorism Regime: *Review of International Studies* Vol.36 pp-639-662

⁹Asafa J. (2013). Colonial Terrorism, Global Capitalism and African Underdevelopment: 500 Years of Crimes against African Peoples. *The Journal of Pan African Studies*,5(9): 1-42.

their labor and economic resources. The violent activities included; warfare, trickery, banditry, kidnapping, burning villages, raping, torturing, dividing and destroying communities, facilitating civil war and destroying existing leaderships, cultures and institutions; such forms of social violence can be categorized as terrorism.¹⁰

In 1980, the Jewish-owned Norfolk hotel was attacked by the Popular Liberation Front of Palestine. In 1998 one of the deadliest terror attacks occurred when the United States (US) embassy in Nairobi was bombed. Suicide bombers in trucks full of explosives parked outside the embassy and the bombs went off leaving 213 people dead and 4,000 more wounded.¹¹ Four years later the Israeli-owned Paradise hotel in Kikambala, Mombasa was attacked leaving several people dead. In October 2011, a coordinated operation between the Somali military and the Kenyan military began an offensive against the Al-Shabaab group of insurgents in Southern Somalia after tourists had been kidnapped from Lamu, Mombasa. Since then, a series of explosions and bombings have rocked various parts of the country believed to have been retaliatory attacks by Al-Shabaab.¹²

In 2014, more than 70 people were killed in attacks in Mpeketoni in Lamu County. The attackers went door to door killing all non-Muslims. Al-Shabaab militants claimed responsibility and in furtherance of the attacks they went on a killing spree of non-Muslim, in police stations, hotels, restaurants and government offices. Lamu County has faced many terror attacks up to date with the latest one being the beheading of nine people in Pandanguo leading to a declaration of a curfew to enable the government to organize itself on how to counter terror without affecting the victims' human rights.¹³

On April 2015, gunmen stormed Garissa University College in what has been termed as one of the deadliest terror attacks in Kenya from Al-Shabaab militant group which took lives of 147 non-Muslim students.¹⁴ On 21st September 2013, four masked Al-Shabaab militia stormed West Gate mall and engaged the Kenyan security forces for four days killing 67 people and injured more than 175 people.¹⁵ Culminating with the Dusit two attack that has sent some ray of hope in the fight against terrorism vis-a-vis human rights.

Following the multiple attacks, there has been a lot of pressure by the opposition leaders and the civil society that Kenya withdraws its troops from Somalia, as a measure to mitigate the human rights violations seen in the country. Like Lawless Strong's argument against granting concessions to inform the government's decision, that withdrawal would be a big sign of defeat and surrender to the extremists. Most governments of the world hold the same view and this is where then the dilemma on counter terrorism and human rights begin.

¹⁰Falola, T., (2002). Key Events in African History: A Reference Guide. Westport, Conn: Green-wood Press.

¹¹ '1998 us embassies in Africa bombings fact sheet' <http://www.edition.cnn.com/2013/10/06/world/Africa/Africa-embassy-bombings-fast-facts/index.html> accessed 26th June 2017

¹²Aljazeera 'Witness' Video: Warriors from the North [http://www.aljazeera.com/programmes/witness/2015/08/warriors-north-150826083509182.html 26 Aug 2015] 14:51 GMT [Accessed 27 August 2017]

¹³ Legal notice number 107 the public order act made on 8th July 2017

¹⁴ Kenyan attack:147 dead in Garissa University attack, <http://www.bbc.com/news/world-africa-32169080> accessed 26th June 2017

¹⁵ Mongare A. B, Terrorism as a world peril a Kenyan tactic ijsstr

Analysis of the real issue on counter terrorism and protection of human rights

It is clear and precise to note that terror activities are a human rights violation. The State's main responsibility is to secure the human rights of all its citizens.¹⁶ However, the Kenyan government has allegedly undermined human rights when it comes to fighting terrorism due to pressure from the Kenyan community.¹⁷ Most counter terrorism mechanisms employed by the anti-terrorism police unit, a unit charged with countering terrorism, such as illegal detentions, enforced disappearances, and illegal renditions are illegal and go against the fundamental rights of an individual.¹⁸

Kenya has ratified many treaties which uphold human rights and it is very disturbing to see the Kenyan duty bearers go against the very same principles they have pledged to uphold.¹⁹ There is clearly a very big problem because the security organs are contravening the laws of Kenya, to wit the rule of law.²⁰ The paper seeks to examine the reasons responsible for this situation and thereby try to address the gap.

Objective

The main objective of this paper is to examine the challenges faced by the justice system when dealing with terrorism in relation to protection of human rights. Other objectives that the paper seeks to address includes: To determine the specific challenges faced by the justice system in fighting terrorism in Kenya: To reconcile the legal framework on terror and human rights and to determine whether there are any best practices on dealing with human rights without elsewhere with the aim of replicating the same in Kenya.

Methodology

The paper presents a peer reviewed literature from discourses on counter terrorism. It used desk top research, library and historical research and peer reviewed international law journals and publications. The rationale behind carrying out library and on-line research was due to the scarcity and rareness of quality data coupled with a poor response culture to questionnaires, that leaves those trying to write with no option to choose from. These seem to be remarkably in Africa's research widely and in return limits research and quest for knowledge.

Review of literature on counter-terrorism and human rights protection

Dinah Pokempner is one of the scholars that have discussed on counter terrorism and human rights protection, she stresses that counter terrorism, human rights and law enforcement must go hand in hand.²¹ Counter-terrorism measures must abide by human rights standards to ensure that their implementation does not undermine their very purpose, which is to protect

¹⁶ Mongare A. B. When the victim stings the Good Samaritan IJCIAR volume six accessed on 29 June 2019

¹⁷ Open society justice initiative, *We Are Tired Of Taking You To Court*, Human rights abuses by Kenya's Anti-terrorism police unit, open society foundation 224 west 57th street New York 10019 USA page 19-26

¹⁸ Open society justice initiative, *We Are Tired Of Taking You To Court*, Human rights abuses by Kenya's Anti-terrorism police unit, open society foundation 224 west 57th street New York 10019 USA page 24

¹⁹ Some examples of such treaties include: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which came into force in 1984, African charter on Humans and Peoples Rights which was adopted in 1988.

²⁰ Open society justice initiative, *We Are Tired Of Taking You To Court*, Human rights abuses by Kenya's Anti-terrorism police unit, open society foundation 224 west 57th street New York 10019 USA .

²¹ Dinah Pokempner is a general counsel of human rights watch. "*Terrorism and Human Rights: The Legal Framework*", *Terrorism and International Law: Challenges and Responses*

and maintain a democratic society.²² It should also be noted that human rights must be at the core of any counter terrorism strategy. The key points to be noted from her work in relation to counter terrorism and human rights include:

Human rights must never be compromised when fighting terrorism

Pokemper argues that in eradicating terrorism States must strictly adhere to their international obligations to uphold human rights and fundamental freedoms and that there should be no trade-off between human rights and counter terrorism mechanisms. It is also established that acts of terrorism can be countered in ways that uphold human rights standards.

It is also argued that compromising human rights cannot and has never helped the struggle against terrorism and that on the contrary, it facilitates achievement of the terrorist's objective which is to cause tension and backlash from the citizens towards their government.²³ This is very evident in Kenya especially in the coast and North Eastern region where the Muslim communities in the region are up in arms against the government for allegedly killing, torturing and discriminating them on suspicion of terrorism.²⁴ This in turn has benefited the Al-Shabaab militia as they have been able to recruit very many youths from those areas; the militia tends to capitalize on the ill treatment by the Anti-Terrorism Police Unit (ATPU) which is a government agency and acts on behalf of the government.

Human rights must be the foundation of any counter terrorism mechanism

Respect for human rights and the rule of law must be the base of the global fight against terrorism. This means that even before terrorism is eradicated human rights must be first understood and followed. All citizens irrespective of what they have been accused of have rights which they get as a result of being human and no one has the right to take that away from them. There should be a balance between security and human rights and none should be sacrificed to achieve the other. Counter-terrorism tactics that do not comply with human rights must be declared unlawful and ineffective.

Any officer who goes against human rights principles in the name of fighting terrorism must be punished

Pokempner is of the opinion that effective mechanisms of implementation and accountability both at the international and domestic level must be adhered to. Governments must put in place strict disciplinary measures so as to ensure anyone who violates human rights is held accountable before an independent and impartial court. Such officers who are suspected of human rights violations must be investigated and prosecuted immediately. This is however not the case in Kenya because security officers have faced very many allegations of human rights violations but nothing ever happens to them, in fact more and more people continue to disappear and die in the hands of security officers, the State has not shown much concern about alleged human rights violation by investigating reports by human rights organizations which give detailed accounts and evidence of police brutality.²⁵ Dinah's work, has been echoed by the Office for Democratic Institutions and Human Rights (ODIHR), the UN High Commissioner for Human Rights and the Council of Europe. They issued joint statements reminding governments that even though they recognize that the threat of terrorism requires

²² The balance between security and liberty , 'The effects of France's counter-terrorism action on individual rights' page 19

²³ Lawless M., (2010) 'Terrorism: An international crime' *Journal of international law*

²⁴ Kenya: killings ,disappearances by Anti-Terror police <https://www.hrw.org/news/2014/04/04/kenya-third-imama-killed-2-years> accessed 26th June 2017

²⁵ ibid

specific measures, all governments are called upon to refrain from any excessive steps which would violate fundamental freedoms and undermine legitimate dissent. Conversely, Lawless posits that the government should never give in to terrorist demands, this will portray the government as a failure.

Strategies employed to counter Terrorism in Kenya and challenges faced

Due to the numerous terror attacks by the Al-Shabbab in the country two measures were taken in 2003, the Anti-Terrorism Police Unit (ATPU) and the National Counter-Terrorism Centre (NCTC) were established possibly to eliminate terrorism. However, majority view the strategies adopted to counter the terror activities as a violation of human rights and laid down universal principles. Thus, posing serious challenges to human rights and the rule of law.²⁶ These institutions have had operational challenges, such as lack of a legal framework that clearly sets out the human rights that must be respected in the fight against terrorism and this has led to a total disregard of basic human rights.²⁷ ATPU and the government have been accused of terminating lives of terror suspects and extraditing them to countries where they are likely to be tortured and or to face serious human rights violations. A good example is a suspect of most terror attacks by the name Idris Magondu who was taken to Uganda.²⁸

ATPU approaches to counter terrorism have been criticized as being a violation of both victims and suspects of terror human rights, which said human rights abuses have been documented by various Human Rights organizations. For instance in November 2013, the Open Society Justice Initiative and a Mombasa-based non-governmental organization, Muslims for Human Rights (MUHURI), released a report which was titled '*We Are Tired of Taking You to Court*'²⁹ which documented extrajudicial killings, illegal detentions, renditions and disappearances of terror suspects in Mombasa connected to the unit since 2007. Almost all terrorism suspects who are arrested by the unit are never seen again, they end up disappearing without a trace.³⁰

The police have also been accused of discriminating people from the Muslim community and killing Islamic clerics all in the name of fighting terrorism.³¹ In December 2014, Kenyan Anti-Terrorism Police Unit officers confessed to an Al-Jazeera investigator that they were responsible for the death of 500 terrorist suspects in Kenya.

The Police went ahead and confessed to the assassination of Abubaker Shariff Ahmed alias "Makaburi", an Al-Shabaab associate from Kenya who was among 21 Muslim radicals allegedly murdered by the Kenyan police since 2012. According to the police, they resorted to killing after the Kenyan courts could not successfully prosecute terror suspects.³²

²⁶ Terror threat in the country situation report for 21/9/12 serial number 184/2012

²⁷ Such as right to life and freedom from torture

²⁸ Idris was working as a driver in Nairobi when on July 23, 2010, unidentified men stormed into his house in Nairobi's Kawangware estate and took him to Uganda, where he is currently facing criminal charges

²⁹ Open society justice initiative, 'Human Rights Abuses by Kenya's Anti-Terrorism Police Unit' 2013 57th Street New York.

³⁰ Open society justice initiative, *We Are Tired Of Taking You To Court*, Human rights abuses by Kenya's Anti-terrorism police unit, open society foundation 224 west 57th street New York 10019 USA .

³¹ Kenya: killings, disappearances by Anti-Terror police <https://www.hrw.org/news/2014/04/04/kenya-third-imama-killed-2-years> accessed 26th June 2017

³² The trap of insecurity: extrajudicial killings in Kenya <https://www.interactive.aljazeera.com/aje/kenyandethat squads> accessed 29 June 2017

Most ATPU officers allegedly accuse the government of aiding and abetting this heinous crime of killing terror suspects. The officers suggested that Western security agencies provide intelligence for the program, including the whereabouts and activities of government targets. They asserted that Britain supplied further logistics in the form of equipment and training. One Kenyan officer within the Council's General Service Unit also indicated that Israeli instructors taught them how to kill.³³ The head of the International Bar Association³⁴ cautioned that any such involvement by foreign nations would constitute a breach of international law. The United Kingdom and Israel have always denied their participation in the Kenyan National Security Council's reported death squads.

It is however, clear that the counter terrorism unit receives significant support and training from the United States and the United Kingdom. A 2013 report by the Congressional Research Service stated that the United States had provided US\$9 million in Anti-Terrorism assistance to Kenya in a year, part of which went to training of the ATPU. With all these allegations on human rights violation one would expect a major step taken by the donors, to say the least cut any assistance given to the officers. It is against this backdrop that this study is carried out.

Conceptualizing Natural Rights and Terrorism

This paper is based on classical liberalism theory that deals with natural rights. Natural rights are those fundamental rights that human beings have simply by virtue of being human beings; the proponents of this concept are of the opinion that all humans possess natural rights independent and anterior to the establishment of government. The State actions are limited by law if they violate human rights.³⁵

According to the proponents of this concept natural rights are fundamental to all human beings. Therefore, the government owes its citizens the obligation to respect, promote, protect and fulfill them.³⁶ The government ought to protect both the citizens and suspect of terror by not condemning any of them unheard. Human rights have characteristics that demand protection, fulfillment and respect from the duty bearers: that is they are universal and inalienable, universal means that they apply to all human beings at all times, not even the State can limit these rights. Some examples of these rights are the right to life, liberty and fair treatment before the law. Human rights being inalienable that is they cannot be taken away. They are interdependent and fundamental to all human beings in the universe. Everyone is entitled to these rights simply by virtue of being human.

Interrelated/ interdependence will hence mean that all rights are connected in that the improvement of one right facilitates advancement of the others.³⁷ It is also the same when it comes to abuses; abuses made towards one right may affect the others to the same extent. This can be seen with the right to security and the right to privacy. The state has the sole obligation of providing security to all citizens, on the other hand each citizen also has the right to privacy, which in some cases can be abused and tempered with by the State and

³³ ibid

³⁴ Mark Mills

³⁵ J Budziszewski, "Natural Rights." New Catholic Encyclopedia Supplement 2012-2013: Ethics and Philosophy Vol. 3

³⁶ According to Thomas Hobbes and John Locke classical liberalism theory

³⁷ Building human rights into practice 'A *Training Manual on International Human Rights Law* The Bingham Centre for the Rule of Law London, UK February 2012 p39

security entities while trying to ensure national security.³⁸ The question is on the basis of this concept has the Kenyan government in its fight against terrorism through the measures employed protected the basic rights of everyone?³⁹

Theoretical Framework

There are several theories that speak to protection of human rights but for the purpose of this paper **John Staurt Mills's** liberal school of thought will be examined.⁴⁰ He emphasizes on striking a balance between human rights and security. In a liberal democracy, one of the primary purposes of any state is to protect fundamental human rights, such as the right to life, freedom of speech, right to privacy, freedom from torture and the right to property. It is the respect for, and the protection of the rule of law and human rights in their entirety that leads to and helps to maintain national security. According to Staurt, human rights are minimum entitlements that every individual must have against the State or other public authority by virtue of being a member of the human family. However, in a more specific sense, human rights constitute those rights which one has by virtue of being a human.

Michael Freedon states that a human right is a conceptual device, which is connected with the protection of individuals from the excesses of State or authority in certain areas of their lives.⁴¹

He argues that the State security organs should strike an appropriate balance between, protection of the community and keep them safe, and on the other hand, the maintenance of fundamental human rights and freedoms.⁴² Additionally, Michael stresses that in discussions of security the only way to strike a balance between two things is to place them in equilibrium. He posits that we should "think in terms of a weighing scale, it is only balanced if whatever is on one scale weighs the same as whatever is on the other. If the scales are initially in equilibrium, and then more is put into one scale, an amount of equal weight has to be put into the other scale in order to restore equilibrium. Simply put, the government while attempting to stamp out terrorism it has to protect the human rights of the suspects and the community. Mills goes ahead and agrees with his fellow scholars by saying that it is very important for a country to ensure that the very mechanisms protecting the individuals from excessive State power do not hamper the government's ability to respond effectively to any security threat.⁴³

The Liberal school of thought is categorical that a policy that does not respect human rights in the first place, cannot legitimately claim to protect these rights against transnational security threats in times of emergency, it is wrong according to the liberalists for anyone to suggest that it is only after the government has created a 'secure environment' that we can

³⁸ Building human rights into practice 'A Training Manual on International Human Rights Law' The Bingham Centre for the Rule of Law London, UK February 2012

³⁹ Open society justice initiative, *We Are Tired Of Taking You To Court*, Human rights abuses by Kenya's Anti-terrorism police unit, open society foundation 224 west 57th street New York 10019 USA

⁴⁰ He was an English philosopher, political economist and one of the most influential thinkers of liberalism and a great contributor to the social theory.

⁴¹ A professor in charge of research at the department of politics and international studies at the school of Oriental and African Studies, University of London. He is also emeritus professional fellow at Mansfield College located in oxford.

⁴² *ibid*

⁴³ Richard A Posner, notes & dispatches 'the law :security versus civil liberties' (2001)

enjoy our civil liberties and human rights. Meaning human rights should be enjoyed by all even in the height of insecurity.⁴⁴

Impeding factors facing the Criminal Justice System in Kenya in the Fight Against Terrorism.

The criminal justice system in Kenya consists of the three major stakeholders the courts, police and the prison. The court is mandated with interpreting the law, the police and the prisons departments both are mandated with enforcement of the law.

The Kenyan police

The police are in charge of investigating and bringing suspects to court, they also play a big role in the presentation of evidence to court. The Kenya Police consists of; Administration Police (AP), the National Security Intelligence Service (NSIS) and the Kenyan Defense Forces (KDF) among others. The police force is a key player in the criminal justice system and plays a very important role in fighting terrorism. Their functions include “maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders, and the enforcement of all laws and regulations with which it is charged.”⁴⁵ The National Security Intelligence Service is important in the fight against terrorism as it is tasked with gathering information on threats to national security. The war on terror has not been an easy one because of a number of impediments. The criminal justice system today is faced with numerous challenges which have ended up derailing the fight against terrorism. This section seeks to examine the challenges faced by the justice system and how exactly they affect the fight against terrorism in Kenya.

Corruption

Corruption is the abuse of entrusted power for private gain.⁴⁶ It can also be defined as dishonest or fraudulent conduct by those in power which involves bribery. The business dictionary on the other hand states that corruption is any wrongdoing on the part of an authority or powerful party through means that are illegitimate, immoral or incompatible with ethical standards which is mostly associated with bribery.⁴⁷

Corruption is a major problem in Kenya which is traced back to the 1970s when smuggling of coffee from neighboring countries and grabbing of utility land came into public debate. This made Kenya to be the first country in Africa to ratify the United Nations Convention against Corruption on 9th December 2003⁴⁸ the causes of corruption in Kenya include: Poor terms and conditions of service; Greed; Inadequate or non-existent supervision of staff; Protection of corrupt officers by the government. Corruption in the criminal justice system in Kenya is very rampant in the justice systems.

The National Police Service is allegedly the most corrupt institution in Kenya⁴⁹ with an 81 percent rating⁵⁰ “bribes paid at the police service accounts for a third of all bribes reported in

⁴⁴ Burkhard Hirsch a former German justice minister.

⁴⁵ The police act chapter 84 laws of Kenya.

⁴⁶ What is corruption? <https://www.transparency.org/what-is-corruption/>

⁴⁷ Corruption; <http://www.businessdictionary.com/definition/corruption.html> accessed 26th June 2017

⁴⁸ Abraham Kipkoech Kemboi: criminal justice system response to the problem of corruption in Kenya.

⁴⁹ According to the East African Bribery Index which gave 68.8 percentage ratings for the level at which Kenyans give bribe to the Kenyan police.

⁵⁰ Corruption in Kenya, <https://www.culturalsurvival.org/news/campaign-update-kenya-police-courts-rank-most-corrupt-institutions-in-kenya> accessed 26th June 2017

the country.⁵¹ Bribery is the number one form of corruption in the police force.⁵² Bribery is the act of receiving, offering, giving or soliciting of any item or value to influence the action of an official or other person in charge of a public or legal duty.⁵³

The police in some cases have been accused of receiving huge sums of money from terror suspects for purposes of compromising investigations, a fact that has made some suspects to be set free without appearing in court. Other suspects after conviction by a court of law, tend to bribe the police to secure their release.⁵⁴ By doing this dangerous suspect are unduly released back to the streets and they continue engaging in terrorist acts therefore endangering the life of the public at large.

A local classic case showing suspicion in dealing with terror within the police force is that of Samantha Louise Lewthwaite⁵⁵ also known as the *white widow*. She is a well-known British terrorist who is wanted in most parts of the world. Samantha is said to be the mastermind behind Garrisa University attack that led to the death of 147 people and the west gate mall attack in Kenya that led to the death of 67 people.⁵⁶ Samantha and her husband were arrested in Kisauni in 2011 in Bilima ground where they were living. The two were taken to Kisauni police station where they are reported to have ‘escaped’.

The circumstances under which they escaped was very suspicious as many asked how two unarmed people could escape from a police station full of officers without being noticed by anyone. It would later emerge that the two bribed police officers at the police station who facilitated their escape.⁵⁷ It is very unfortunate that the said suspect who was set free went ahead to plan major terror attacks which led to the death of innocent Kenyans.

Corruption is said to be the “enabling technology” that makes many terrorist crimes possible⁵⁸. Many terrorists from Somalia have managed to sneak in from Somalia to Kenya; the suspects with the aid of rogue immigration officials managed to secure national identity cards. This fact has made it easier for the suspects to live in Kenya and plan terror attacks while in Kenya.⁵⁹ Illegal immigrants and foreigners pay more than 100,000 to buy the identification documents with the help of the police, local chiefs and village elders.⁶⁰ This unfortunate event has really affected the fight against terrorism in the country because

⁵¹ Corruption in the Kenyan police; <https://www.the-star.co.ke/news/2017/08/31/police-lands-ministry-and-judiciary-most-corrupt-in-kenya-bribery-c-1627065> accessed 26th June 2017

⁵² *ibid*

⁵³ Black’s law dictionary

⁵⁴ Police officers charged, <http://www.nairobinews.nation.co.ke/news/police-officers-suspected-of-taking-bribes-charged-in-court/> accessed 26th June 2017

⁵⁵ Samantha Lewthwaite is said to be in charge of more than 200 jihadists in Somalia.

⁵⁶ Wanted terrorist, <https://www.dailymail.co.uk/news/article-3087939/white-widow-samantha-lewthwaite-commands-army-200-jihadi-widow-spies-pretend-street-sellers-hotel-receptionists-call-mother-holy-war.html> accessed 26th June 2017

⁵⁷ Samantha Lewthwaite, <https://www.jambonewsspot.com/new/suspected-terrorist-was-freed-from-kenya-jail-after-uk-request/> accessed 26th June 2017

⁵⁸ Litunya Osaleh, TACKLING CORRUPTION IN KENYAN JUDICIARY & POLICE, The Hotel Comfort, Nairobi Kenya 2015

⁵⁹ Faud Abubakar and other wanted terrorist sneak back to Kenya, <http://www.nation.co.ke/news/terrorists-suspected-to-have-snuck-into-the-country/1056-3890588-8c6g3h/index.html> accessed 26th June 2017

⁶⁰ *ibid*

terrorists from other parts of the world end up having Kenyan identification documents.⁶¹ Rampant corruption in the border amongst immigration officers is the major impediment in the fight against terrorism in Kenya. Terrorism suspects in Kenya have at times without any problem have managed to sneak in illegal weapons from the neighboring Somalia, these weapons are later used by terrorists to kill innocent civilians.

Terrorist have largely benefited from corruption when it comes to financing their activities. The issue of corruption at the border has made it possible for the terrorists to smuggle illegal goods which are in turn sold in Kenya. The Al-Shabaab militia has been accused of smuggling sugar and charcoal with the help of the police. A smuggling racket consisting of the police and the terrorists was unearthed by the United Nations and some organizations.⁶² The goods in most cases pass through Garissa and the Port of Kismayu. The said goods are transported in trucks and pass all the police check points without being noticed. The trucks are later driven to Lamu and Mombasa where the goods are repackaged to look like locally manufactured products; all this goes on with the help of police.⁶³ These goods after being sold end up financing the activities of the terrorists. Most people end up buying these illicit goods because they are duty free and cheaper.⁶⁴

Outside our Kenyan borders; the Kenya defense forces under the African Union Mission in Somalia has been accused of engaging in charcoal business in Somalia instead of fighting the Al-Shabaab.⁶⁵ A report by the United Nations discovered that some officers of the Kenyan defense forces were acting as brokers in the illegal trade. It is estimated that 4.5 million bags each containing 25kg of charcoal are exported each year from Kismayu and the Kenyan borders to the United Arab Emirates.⁶⁶

The Judiciary in Kenya is a key player in the criminal justice system, one of its main function is the administration of justice; it does this by trying all criminal suspects with the aim of establishing their guilt or innocence. However, the judiciary has been accused of bribery, leading to withdrawal of cases touching on terrorism under unclear circumstances. Suspects allegedly end up paying judicial staff to rule in their favor and to destroy crucial evidence in the case of court prosecutors.⁶⁷ The release of these dangerous suspects into the community has led to an increase in the number of terrorist attacks and therefore posing a big challenge in the fight against terrorism in Kenya.

Provision of Bail and Bond

Bail can be defined as a process by which an accused person pays a set amount of money to be released from police custody, it serves as a guarantee of one's appearance to court. It is like a collateral left with the court to ensure that an accused person will attend all the court's sessions.⁶⁸ The issue of bail in terrorism cases has brought a lot of heated debate between the

⁶¹ Foreigners acquiring Kenyan ids, <http://www.standard.co.ke/article/2000093965/how-foreigners-give-hefty-bribes-to-acquire-kenya-s-ids> accessed 26th June 2017

⁶² A nonprofit group, the Nairobi-based Journalists For Justice (JFJ)

⁶³ According to a report prepared jointly by United Nations Environment Programme (UNEP) and Interpol

⁶⁴ A sour trade, <http://www.economist.com/news/middle-east-and-africa/21678914-army-denies-splitting-profit-400m-smuggling-industry-al-qaedeas> accessed 26th June 2017

⁶⁵ According to a report prepared jointly by United Nations Environment Programme (UNEP) and Interpol

⁶⁶ Illegal trading in Somalia, <https://www.ibitimes.co.uk/un-report-finds-kenya-still-funding-al-shaabab-terror-group-through-illegal-sugar-charcoal-trade-1590462> accessed 26th June 2017

⁶⁷ Kenya, corruption and terrorism <https://m.huffpost.com/us/entry/5505869> accessed 26th June 2017.

⁶⁸ Bail and bond, <https://www.justia.com/criminal/bail-bonds/> accessed 26th June 2017.

security organs and the courts. Article 49 of the constitution guarantees all arrested persons the right to be released on bond or bail. Security organs have argued that granting bail to terrorist suspects is very dangerous to the public as the suspects can end up perpetrating more and more attacks. One of the proposals from the organs has been to urge the Judiciary not to grant bail to terrorism suspects. The judiciary is left with the hardest task of balancing the right of arrested persons as provided for under the constitution on one hand and the security of the State on the other hand. The judiciary in its defense has always argued that the denial of bail is going against the principle of innocent until proven guilty.

The fight against terrorism in Kenya has faced problems because a number of terrorist suspects who are out on bail end up engaging in terror attacks after their release. According to a report by Mombasa based human right groups⁶⁹ titled 'WE ARE TIRED OF TAKING YOU TO COURT' the police in Mombasa resorted to killing terrorist suspects after their release from courts after bail. The words, "we are tired of taking you to court" were said by one police officer from the ATPU to a suspect who was released from the court; the police in question swore that taking suspects to court is a waste of time as they will only be given bail and be released. The decision of granting bail is purely discretionary because there are no guidelines set by law as it's upon the judge to decide whether or not to grant it. The courts in Kenya have dealt with the issue of bail differently as seen in the following cases:

*Hassan Mahat Omar & Another Vs Republic*⁷⁰ In this case, the applicants, a husband and wife were accused of being in possession of grenades allegedly recovered from their house, the trial magistrate had conducted a pre-trial hearing on an application for bail and the prosecution brought evidence to show that the first applicant had previously been charged with terrorism related offences. That the prosecution felt the suspect could not attend court sessions.

The magistrate considered the fact that the second applicant had never been charged with any offence before unlike the first applicant who had been arrested, charged and acquitted before on terrorism related wrongs, the prosecution's claim that most suspects in terrorism-related cases who are admitted to bail fail to avail themselves during trial was rejected as the magistrate stated that 'applicants cannot be punished for the misdeeds of other suspects who have skipped bail, nor will they be denied bail merely because other suspects in terrorism cases were granted bail and disappeared. Each case must be determined on its own circumstances. The court was of the view that a subjective approach is ideal in the circumstances.

*Abdikadir Aden Alias Tullu & Others Vs Republic*⁷¹ This was an appeal brought to the High Court after the applicants were denied bail by the trial court because they had engaged in terrorist acts; they were charged with an offence of possessing articles connected with a terrorism offence. They were also found with audio and visual material which could be used to influence people ideologically to commit terrorist acts. The judge in this case referred to article 19 (3) (a) of the Constitution which makes it very clear that the rights and fundamental freedoms in the Bill of Rights belong to each individual and they are for each individual to

⁶⁹ Open society justice initiative, *We Are Tired Of Taking You To Court*, Human rights abuses by Kenya's Anti-terrorism police unit, open society foundation 224 west 57th street New York 10019 USA .

⁷⁰ Nairobi High Court Criminal Revision No. 31 of 2013.

⁷¹ Meru high court criminal application no 16 of 2014.

enjoy and that the burden of proof lies with the prosecution to prove and to convince the court why an accused should not be granted bail.

The applicants in this case were granted a bond of KShs.3,000,000 each with a similar surety. From the above it is clear that the issue on bond and bail has become a big challenge in the fight on terrorism; despite the fact that it is a constitutional right, most terror suspects have abused it every time they appear in court. They are granted that right and they end up engaging in terror attacks all over again.

Lack of sufficient inter-agency cooperation

For the criminal justice system to be effective all agencies under the system must work together. In Kenya, the security organs and the judiciary have been trading accusations concerning the dismal conviction of terrorist suspects. The judiciary has times without number blamed the police for shoddy investigations; a factor that has made most suspects to be acquitted due to lack of evidence.⁷²The police on the hand continues to blame the courts for 'setting criminals free'

These accusations and counter accusations have brought challenges when it comes to fighting terrorism. All agencies must work together for the war on terror to be a success. The police should diligently carry out investigations and the courts on the other hand should use the evidence to try suspects. In conclusion it is evident that as a result of the two not working together many terror suspects have been acquitted⁷³

Backlog of cases in the judiciary

A lot of cases are pending in court, a fact that has derailed the dispensation of justice. This can be attributed to the number of judges and magistrates spread out all over the country, some litigants have to wait for many years before their case can come to an end. This in turn has affected cases that deal with terrorism as most of these cases tend to derail in court for some years. This in turn give suspects (who are in most cases out on bond) the opportunity to escape from Kenya and sneak back to Somalia and other parts of the world where they can easily plan terror attacks. The best way to ensure that terrorism is efficiently dealt with is by ensuring that there is a quick flow of cases in the judiciary.

Other Challenges that face Kenya in The Fight against Terrorism

Besides the above institutional challenges, the following under explained challenges inhibit the fight against terrorism. Thus affecting the human rights of the suspects and the innocent citizens

Poor Equipment/Strategy and Techniques

Terrorists all over the world are known to be sophisticated; they are skilled and have knowledge. The only way to counter this is by having proper equipment and technique too. Kenya lacks adequate experts in the field of countering terrorism as we rely on the Antiterrorism Police Unit solely to deal with terrorism.

⁷² Shoddy police investigations helping crooks evade justice
<https://www.standardmedia.co.ke/article/2000124712/shoddy-police-investigations-helping-crooks-evade-justice> accessed 29th June 2017

⁷³ Charles Lenjo Mwazighe, LEGAL RESPONSES TO TERRORISM: CASE STUDY OF THE REPUBLIC OF KENYA B.A., Nairobi University, 2006.

Kenya as a country lacks the required strategy and modern equipment. Terrorists have better equipment and strategy and this has led to lot of fatalities. A very good example is the Garissa University attack where only four militia attacked the school in the wee hours of the morning and stayed the whole day killing innocent students. The police and soldiers from the nearest army were unable to thwart the attack. It took the intervention of the fierce RECCE Squad all the way from Nairobi to end the day long siege. The special unit blamed their lateness on unavailability of a police chopper to transport them to the scene of the crime. The Al-Shabaab militia is so well equipped and strategic; they attacked an African Union camp in Somalia full of soldiers and ended up killing more than 100 soldiers. They had the nerve to attack an entire camp in Somalia. The attackers used powerful car bombs to gain access into the camp.⁷⁴

Inadequate Funding for Security Agencies

‘There is a general feeling that security agencies in Kenya are not adequately remunerated and are therefore de-motivated’⁷⁵. Lack of adequate funding of the police has bought a lot of challenges when it comes to dealing with terrorism. The police have been accused of conniving with smugglers who smuggle illicit goods so that they can get money⁷⁶. Inadequate funding makes it almost impossible for the agencies to procure the required equipment needed to fight terrorism. It is clear that the issue of funding is a challenge when it comes to fighting terrorism.

Porous Borders

A porous border means that the boundary between two countries is open and not properly sealed making it possible for anyone to cross easily from country A to B.⁷⁷ The boundary between Kenya and Somalia is very porous making it possible for anyone to cross from one side to another freely; there are no check points, no patrols and no security searches⁷⁸ a fact that has made it possible for terrorists to enter Kenya from Somalia.

The security forces have been unable to tackle terrorism in the northern part of Kenya due to the free movement of weapon and Al-Shabaab militia from Somalia to Kenya. The perpetrators of the Garissa University attack are believed to have entered Kenya through the porous borders. This unfortunate incident was the reason why the government decided to build a wall which would act as a separation barrier between Kenya and Somalia. Up-to date, the wall which was to be a 440-mile wall has never been built.

The porous border has also facilitated the movement of young boys who sneak to Somalia to join the terrorist groups, the boys while in Somalia are taken through military training in the Al-Shabaab camps and after they are done they sneak back to Kenya where they engage in terrorism activities. It is clear that the issue of a porous border along the Kenya Somalia border has made it impossible for the security agents to deal with terrorism because the terrorists are able to move freely in and out of Kenya.

⁷⁴ What happened when Al-Shabaab attacked a Kenyan base in Somalia? <https://www.bbc.co.uk/news/world-africa-35364593> accessed 1st September 2017

⁷⁵ Security for the highest bidder, <https://www.un.org/africarenewal/magazine/October-2009/security-highest-bidder> accessed 1st September 2017

⁷⁶ ibid

⁷⁷ Porous, <https://www.vocabulary.com/dictionary/porous> accessed 1st September 2017

⁷⁸ The back door to Kenya: security threat from porous Somali border <https://www.edition.cnn.com/2015/07/24/Africa/Kenya-back-door-porous-border-security-threat/index.html> accessed 1st September 2017

Reconciling the Legal Framework on Terror and Human Rights

This part explains what the law on terrorism and human rights say with regards to the protection of human rights when fighting terrorism and with regards to protection of human rights generally. Under this section the International and municipal laws on human rights and terrorism are reviewed, that is, International human rights instruments and Kenyan domestic laws.

United Nations

Today almost every independent nation in the world is a member of the United Nations. Member States are all signatories to the UN Charter which is a binding treaty to all members of UN. All member countries have an obligation to cooperate with the UN in achieving its primary purposes, one of which is to promote universal respect for human rights, and observance of human rights and fundamental freedoms without distinction as to race, sex, language, or religion.⁷⁹ Human rights emerged from the creation of the United Nations. UN was formed after the second world war where governments came together to form the entity so as to promote international peace, human rights and to prevent eruption of further war.⁸⁰ One of the main aims of UN was to prevent future generations from war and promote equality among everyone.

After the formation of UN, a Commission on Human Rights was established, which was charged with the task of submitting proposals on an International Bill of Rights.⁸¹ The Draft declaration was adopted by the General Assembly in 1948 and came to be known as the Universal Declaration of Human Rights (UDHR). This is a very significant instrument in the world as it has had a profound impact on the development of both regional and global standards for the protection of general and specific human rights. It is from this declaration that all other human rights treaties have emerged.

The Commission on human rights is responsible for the promotion and protection of all fundamental rights and freedoms throughout the world. The council does this by monitoring all human rights systems of countries and issuing recommendations. The UDHR is commonly referred to as 'the mother of human rights'

Universal Declaration of Human Rights⁸²

UDHR is the first human rights instrument to be adopted by a resolution of the United Nations General Assembly. It is the first human rights instrument to be adopted by the international community. It is from this instrument that two very important human right treaties were formed; The International Covenant on Economic, Social and Cultural Rights (ICESCR)⁸³ and the International Covenant on Civil and Political Rights (ICCPR). All other international human rights instruments always refer to UDHR as it proclaims that 'all human beings are born free and equal in dignity and rights'.⁸⁴ It is after this declaration that other

⁷⁹ Articles 55 and 56 of the UN charter.

⁸⁰ Eleanor Roosevelt spearheaded the formation of UN and UDHR which was adopted in Paris on December 10, 1948.

⁸¹ Now referred to as the universal declaration on human rights.

⁸² It is the cornerstone of international human rights as it was the first document in history to ever come up with civil, political, economic, social, and cultural rights that are important in the life of any human being; the declaration was adopted on December 10 1948. The declaration was adopted by representatives from all over the world.

⁸³ Also known as the international bill of rights.

⁸⁴ Article 1 of UDHR

human rights conventions that further define human rights within a legal context have emerged.

Most of these conventions are treaties made by a number of countries who voluntarily accept the human rights standards that are enforceable in international law.

Some of the rights that are provided for under the declaration include the right to life, liberty and security of person: The right to an adequate standard of living right to own property: Freedom of opinion and expression and right to education among other rights.

The declaration is not binding to states because it is not a treaty but it has inspired the formation of more than 10 major human rights instruments which together constitute an international standard of human rights. The declaration despite not being binding has come up with principles which are very fundamental and binding to all **States**. The human rights are divided into three generations for protection purposes

First generation

Under this type we have civil and political rights. These rights are individualistic and they deal with the liberty of an individual to participate in politics. These rights can be claimed by an individual against the state and they are provided for internationally,⁸⁵ examples of these rights include freedom from slavery, torture, arbitrary arrest and equality before the law. The terror suspects can hence comfortably invoke this provision when faced with human rights violation.

Second generation

Under this type we have social and economic rights. These types of rights guarantee equal conditions and treatment before the law. These types of rights constitute duties upon the government to respect and fulfill them.⁸⁶ Examples of these rights include: right to nutrition, shelter, health care, education fair wages and an adequate living standard.

Third generation

These are also referred to as development rights because they enhance the living standards of individuals.

International Covenant on Civil and Political Rights

This covenant falls under the international bill of rights and it deals with civil and political rights. This covenant was adopted by a special resolution of the UN General Assembly in 1966 and came into effect in 1976 when the required number of countries ratified it. The rights in the ICCPR take effect as soon as a state ratifies the Covenant. All rights found under this article apply to everybody equally without discrimination and may be limited in situations of public emergency where the life of the nation is under threat.⁸⁷ This hence means that the victims of terror and the aggressors have

This treaty provides for fundamental rights which must never be limited at any cost such as freedom from torture and other inhuman and degrading punishment, right to a fair trial and

⁸⁵ Articles 3 to 21 of the UDHR and in the 1966 International Covenant on Civil and Political Rights.

⁸⁶ Articles 22 to 27 of the UDHR and in the International Covenant on Economic, Social, and Cultural Rights.

⁸⁷ Article 4 (1) of ICCPR

the right to a habeas corpus. The suspects of terror should enjoy the presumption of innocence until proven guilty. They are to enjoy right to legal representation.

The right to life. The right to liberty and freedom of movement, The right to be treated equally before the law. The right to privacy and right of legal representation among other rights. It is important to note that the ICCPR forbids torture and inhuman or degrading treatment, slavery, arbitrary arrest and detention. It guarantees the rights of children and prohibits discrimination based on race, sex, color, national origin, or language. For purposes of ensuring that states parties comply with protection of human rights the Covenant has established a committee to monitor how states parties UN Human Rights Committee (HRC) are respecting and enforcing rights provided for in the covenant. Any aggrieved party present their petitions to the committee for consideration. The covenant is quite instrumental in human rights protection as it supplements the UDHR.

The 2010 Constitution of Kenya

The constitution is the supreme law of the land and it clearly provides for the protection of human rights.⁸⁸ The chapter on the Bill of Rights is the longest thus confirming its commitment to human rights. The Constitution provides for the Bill of Rights which is the framework for social, cultural and economic policies.⁸⁹ The protection of human rights and fundamental freedoms is very important in our country as it preserves the dignity of individuals and promotes social justice.⁹⁰ These rights belong to each individual, they are not granted by the State. The State obligation is to promote these rights.⁹¹ by putting in place laws and legislative policies to aid implementation. It can set standards that will lead to the progressive achievement of all rights⁹² Additionally the state can promote the rights by ensuring equality and not interfering with the enjoyment of these rights. The constitution explicitly provides for mechanism for Realization of the rights.⁹³

Any person whose rights have been denied or violated can institute court proceedings. These proceedings can also be instituted by association acting in the interest of its members or any person acting on behalf of another. The High Court has jurisdiction to hear and determine these types of cases. The court can grant various orders such as injunctions, compensation or a declaration of invalidity of any law that denies and violates a right under the bill of rights.

Fundamental Rights and Freedoms That May Not Be Limited⁹⁴

This is a very important aspect of the Constitution as it deals with derogable and non-derogable rights. Derogation is an extraordinary restriction of the right beyond what is normally allowed by its terms.⁹⁵ Under article 24 of the Constitution of Kenya 2010, provides for derogable rights.⁹⁶ That is, human beings are at all times entitled to human rights but we have some instances where these rights may be limited for the sake of the public at large. This

⁸⁸ Chapter four part 1 and 2 : The bill of rights article 19-24 , 25-41

⁸⁹ Article 19 (1)

⁹⁰ Article 19 (2)

⁹¹ Article 19 (3) and article 20

⁹² Article 21 (1) of the 2010 constitution of Kenya.

⁹³ Article 22 of the 2010 constitution of Kenya

⁹⁴ Article 25 of the 2010 constitution of Kenya

⁹⁵ Office of the United Nations High Commissioner for Human Rights Human rights, terrorism and Counter-terrorism Fact Sheet No. 32

⁹⁶ Article 24 of the 2010 constitution of Kenya.

can be in cases of public emergency which threatens the life of the nation.⁹⁷ States are in these exceptional circumstances allowed to take measures to derogate from certain human rights provisions.

The European Court of Human Rights has defined public emergency as:

*“an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed.”*⁹⁸

However, the derogation measures should be temporary and must be lifted as soon as the public emergency ceases to exist.⁹⁹ Some of the rights which can be limited include: freedom of movement, expression, peaceful assembly, association and privacy. For derogation to be effected, certain requirements must be present.¹⁰⁰ The security situation must be an extreme situation which constitutes a threat to the life of the nation and there should be no other method capable of saving the situation apart from derogation. There should be no discrimination when it comes to derogation of human rights.¹⁰¹ “Any derogation of rights in terms of emergency must not involve discrimination solely on the grounds of race, color, sex, language, religion or social origin.”¹⁰²

Derogation must comply strictly with the principles of necessity and proportionality¹⁰³

All derogation measures must be strictly required by the emergency. It is very important to note that derogations cannot be justified when the same aim could be achieved through less intrusive means which do not limit human rights. This means that derogation must always be the last option.

Under article 25 of the Constitution rights that can never be limited or ignored under any circumstances are provided for. Some rights are recognized as having a special status in international law and no derogation is allowed irrespective of any circumstances whatsoever.¹⁰⁴ They include: Freedom from torture, cruel, inhuman or degrading treatment and punishment,¹⁰⁵ Freedom from slavery or servitude; right to a fair trial.

The Prevention of Terrorism Act¹⁰⁶

This act defines terrorism to include acts which¹⁰⁷ “Involve the use of violence against a person: Endanger the life of a person other than the person who is committing the action: Create a serious risk to the health or safety of the public: Result to serious damage of property: Involve the release of any dangerous, hazardous, toxic substance into the environment: Interfere with the provision of essential or emergency services”

Acts of terrorism are committed with the aim of intimidating or causing fear among members of the public. Any person who carries out a terrorist attack is liable to imprisonment for a

⁹⁷ Article 4 of the international covenant on civil and political right.

⁹⁸ In case of lawless v Ireland (no 3) application no. 332/57 judgment of 1st July 1961 Para 28

⁹⁹ Article 4 (1) of the international Covenant on Civil and Political Rights.

¹⁰⁰ Article 4 (1) of the International Covenant on Civil and Political Rights.

¹⁰¹ Article 4 of the International Covenant on Civil and Political Rights.

¹⁰² Article 4 of the International Covenant on Civil and Political Rights.

¹⁰³ Article 5 of the International Covenant on Civil and Political Rights.

¹⁰⁴ Article 25 of the 2010 Constitution of Kenya

¹⁰⁵ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that under no circumstances should torture be justified.

¹⁰⁶ No 30 of 2012

¹⁰⁷ Section 2 (1) (a)

term not exceeding thirty years.¹⁰⁸ . Any person who supports any terrorist act is also liable for imprisonment for a term not exceeding twenty years. One can support terrorism by: harboring terrorist, encouraging the commission of terrorism, providing weapons and information to terrorists.

Prevention of Terrorism Act and human rights

Section 32 provides for the right to a fair trial¹⁰⁹ by stating that a suspect who has been arrested on suspicion of terrorism must be brought before a court of law within twenty four hours and in case this is not possible the officer in charge must apply to court for an extension.

Section 35 provides for the limitation of certain rights in cases where there is a need to prevent terrorist attacks. Examples of these rights include:

The right to privacy which can be limited by searching one's property and by monitoring one's communication. All this is done for the sake of preventing and investigating terror attacks. A police officer has the authority under the Prevention of Terrorism Act to seek for orders from the High Court to have a suspect's communication intercepted.¹¹⁰ The said officer has the power to seize any communication gadget to be used as evidence in a terrorism case.

Freedom of expression can be limited in cases where incitement is detected; this has applied in Kenya to clerics who have been accused of inciting young boys to join the 'holy war' in Somalia.

The right to property is limited under this act because the Inspector General has been given the power to seize any property when there is a reason to believe it's used for funding terrorism.¹¹¹

International Framework on Terrorism

The crime of terrorism goes way back; in the 1930s the League of Nations attempted to draft anti-terrorism conventions. This was however not successful but that was not the end of the struggle because the formation of UN gave life to legislations governing terrorism. The international community has not yet adopted a comprehensive definition of terrorism. The UN has come up with different treaties which deal with different aspects of terrorism. In 1994, then UN General Assembly's Declaration on Measures to Eliminate International Terrorism¹¹² defined terrorism as:

“criminal acts¹¹³ intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes” and that such acts “are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them.”

¹⁰⁸ Section 4 of the prevention of terrorism act.

¹⁰⁹ Article 25 (c) of the constitution of Kenya 2010

¹¹⁰ Section 36 (1) of the prevention of terrorism act.

¹¹¹ Section 37 of the prevention of terrorism act.

¹¹² set out in resolution 49/60

¹¹³ the Security Council of the UN, in its resolution 1566 (2004), referred to criminal acts as “acts against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons”

Examples of the international instruments and resolutions adopted by the UN to try and combat terrorism include:

- International Convention for the Suppression of Terrorist Bombings, 1997.
- International Convention for the Suppression of the Financing of Terrorism, 1999.
- Convention on the Suppression of Acts of Nuclear Terrorism, 2005.
- Security Council Resolution 1269 (1999), obligates states to co-operate to prevent and suppress terrorist attacks and to bring perpetrators to justice.
- Security Council Resolution 1373 (2001), obliging states to implement more effective Counter-terrorism measures at national level and to increase international co-operation in the struggle against terrorism, and creating a Counter-Terrorism Committee to monitor how countries are dealing with terrorism.
- Security Council Resolution 1456 (2003), obliging states to ensure that any measure taken to combat terrorism should comply with all human rights principles under international law.

It is important to note that all the above have one thing in common; they all advocate for the protection of human rights at all times even during the fight against terrorism¹¹⁴ and to ensure that human rights do not become the first casualty in the war against terrorism.

In Africa; the Peace and Security Council is a very instrumental body when it comes to the fight against terrorism. It was mandated with the responsibility of overseeing the implementation of the convention on the prevention and combating of terrorism. It was the force behind the formation of the Counter-Terrorism Committee. The Committee assists the Council in monitoring counter terrorism mechanisms used by African countries by ensuring they conform to human rights standards.

From the above stand point it is evident that both domestic and international legislation advocate for the protection of human rights at all times. It is therefore the responsibility of every government to ensure that proper human rights enforcement mechanism is put in place and followed strictly.

Borrowing from Britain's success story on counter terrorism

Human rights in most cases end up being the first victim when it comes to fighting terrorism in most countries. Some governments have argued that human rights are a hindrance to the war on terror; some countries on the other hand have done their best to protect human rights when fighting terrorism that Kenya can emulate.

The United Kingdom

United Kingdom has faced a series of terror attacks.¹¹⁵ It came up with a number of counter terrorism legislations to deal with the issue of terrorism. The legislation includes: The Anti-terrorism Crime and Security Act which was established to deal with terrorism.¹¹⁶ The act has since been replaced by the Counter-Terrorism and Security Act and the Terrorism Act which deal with terrorism related offences. These two pieces of legislation provide for the protection

¹¹⁴ This was echoed by the late Sergio Vieira de Mello, UN High Commissioner for Human Rights who said that "Our responses to terrorism as well as our efforts to thwart it and prevent it, should uphold the human rights that terrorists aim to destroy. Respect for human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism and not just privileges to be sacrificed at a time of tension."

¹¹⁵ Some of these attacks include the bombing in London on 7th July 2005; four suicide bombers with rucksacks full of explosives attacked an underground train killing 52 people and injuring hundreds. Another attack occurred when a suicide bomber forced his way inside the Manchester arena where many young people were having a concert, the bomb went off and killed dozens.

¹¹⁶ 2001

of human rights at all times, this has ensured that all counter terrorism mechanisms provided for are in strict conformity to human rights Principles. UK is a State party to a number of human rights conventions such as the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights. UK has strictly adhered to human rights principles provided for in the above treaties.

Another resolution binding the UK is the resolution of ministers which adopted a set of guidelines on counter terrorism:¹¹⁷ the guidelines specifically provide for the protection of human rights and emphasizes that no state while using their right to prevent terrorist activities should undermine human rights. Since the UK has no written constitution, case law forms a very important source of law and the best way to find out the best practice in the UK is by looking at cases decided in their courts. Some of the relevant cases are discussed below:

In the case of Chahal Vs Uk¹¹⁸

The applicant in this case was a Sikh terrorist from India who was in the UK. The UK authorities wanted to deport him to India. The terrorist presented evidence of having been tortured by Indian authorities previously. The court held that “Whenever substantial grounds have been shown for believing that an individual would face real risk of being subjected to torture, it is the responsibility of the contracting State to safeguard him against such treatment”. The court affirmed section 3 of ECHR which provides that ‘no one shall be subjected to torture or to inhuman or degrading treatment and punishment. Due to the absolute nature of the right to protection from torture’. The UK government was stopped from extraditing the suspect to India.

Under the Soering Vs Uk¹¹⁹

The applicant was a German national who was charged with terrorism in the UK. After serving his sentence in the UK, an order for his extradition was issued. There was a very big possibility that he would be tortured and killed in his home country. He argued that by extraditing him, the UK would be violating article 3 of ECHR which provides for prohibition of torture non-and other degrading punishment.

The court in its ruling established the principle that a State would be in violation of its human rights obligations if it extradited an individual to a State where that individual was likely to suffer inhuman, degrading treatment or torture. The extradition process was therefore halted.

Gillian and Quiton Vs Uk¹²⁰

In this case Mr. Gillian and Quiton who were protesting together with fellow journalists were subjected to a lengthy search and prevented from attending the demonstration. It emerged that the police had been given powers to stop and search anyone anywhere. The petitioners argued that there has to be a balance between private life and security. The court ruled that section 44 of the Terrorism Act 2000 which gave police the powers to stop and search anyone was against respect for private life as guaranteed under 8 of the ECHR. The court stated that the provision was unreasonable and emphasized that ‘the acts of searching were not subjected to adequate legal safeguards against abuse.’

¹¹⁷ Guidelines on human rights and the fight against terrorism, adopted on 11th July 2002. Adopted by European council of ministers.

¹¹⁸ EHRR 23 413 1966

¹¹⁹ 1989 11 (EHRR) 439 7th July 1989

¹²⁰ 2010 ECHR 28 12th January 2010

Kelly and Others Vs Uk¹²¹

This case involved the shoot to kill order used by security officers. In this case the applicant's next of kin were killed by police officers unjustifiably. Police after getting intelligence of a looming terror attack, went to the street and killed nine civilians who were unarmed, all this because of suspicion. The court in its ruling stated that 'killing of innocent and unarmed civilians is totally illegal'. In this case, the police in question were held liable for the murder of the deceased. The court also emphasized the provisions of article 2 and 13 of ECHR which provides that "In cases of the use of lethal force or suspicious deaths, the Court in addition to granting compensation must order a thorough and effective investigation." This is the case because the right to life is a fundamental right which must be respected.

Murray Vs Uk¹²²

The applicants in this case were all members of the same family. In June 1982, two out of the six relatives were convicted in the UK after being connected with the supply of weapons to terrorists. Mrs. Murray was arrested by the army and taken to their camp. On the way, she gave her name and she completely refused to give other details. She was photographed without her knowledge and consent and the photo was used to identify her as an international terrorist in all the newspapers. She brought an action some days later arguing that her arrest was illegal on a number of grounds; she argued that she had been arrested on mere suspicion. The trial court rejected her claim. She went ahead and appealed the decision stating that her arrest was a violation of article 5 and 8 of ECHR¹²³, the court in its ruling held that her arrest was a violation of article 5 as her right to liberty was interfered with for no reason.

Brogan VS. UK¹²⁴

The applicants in this case had been imprisoned and held without trial after being suspected of international terrorism, no criminal charges were brought against them and they remained in custody for days. The Court held that in all cases there should be a balance between the protection of an individual and the security interest of a country at large and in this case the applicant's request was granted since the arrest contravened article 5 of ECHR which guarantees the right to liberty of a person. In conclusion; it is important to note that the UK has not yet reached a hundred percent in the implementation of human rights it is however a best practice when compared to Kenya and most countries in the world which are still struggling with the implementation of human rights.

Summary and Discussion

In summary, terrorism is a major enemy to the global security, stability and development. Many countries in the world have been affected by terrorism; Britain, France, United States of America and Kenya have all been attacked by terrorists. Terrorism has a major impact on human rights of both the citizens and the suspects; rights such as right to life, freedom of movement and many other rights are affected by terrorism. Many countries in response to terrorism have ended up violating the same human rights violated by terrorists. Kenya is one such country; despite Kenya having ratified a number of international human rights treaties¹²⁵ and by virtue of this we are mandated to respect and uphold human rights. This is however

¹²¹ ECHR 30054/96 2001

¹²² ECHR 41/1994/488/570

¹²³ Article 5 provides for right to liberty and security of person and no one shall be deprived off his/her liberty.

¹²⁴ ECHR 145-B 1988

¹²⁵ Examples of these treaties include: the International Covenant on Economic, Social, and Cultural Rights, the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples Rights.

not the case at the ground because most counter-terrorism mechanisms used are against basic human rights principles such as right to life and freedom from torture, inhumane treatment and other degrading punishment whereby agencies created to deal with terrorism have ended up violating human rights. The police have been accused of torturing suspects, killing suspects and rendering terrorist suspects to countries where they face a real risk of torture. Some of suspects who have been arrested by the ATPU have never been seen again.¹²⁶ Citizens have been on the receiving end from both the suspects and the police when reactively countering terrorism.

Conclusion

In conclusion it is evident that acts of terrorism go against human rights because terrorists aim at killing civilians and destroying property. The government on the other hand in its effort to counter terrorism has ended up violating the same rights violated by the terrorists.¹²⁷ It is therefore clear that counter-terrorism mechanisms must abide by human rights principles for them to be effective. If indeed the measures adopted by the ATPU were effective, we would not be having frequent terror attacks as experience at the moment in the counter.

Recommendations

Ensure that the police comply with human rights principles

The Kenya police is the leading institution in Kenya when it comes to the violation of human rights. They have been accused of using excessive force, killing and maiming suspects. The Anti-Terrorism Police Unit was formed to deal with terrorism; the formation of this unit has come with a lot of challenges especially when it comes to human rights. The unit has totally disregarded human rights principles. The inspector general should ensure that the ATPU “complies with domestic, regional, and international human rights standards, in particular the prohibitions on extrajudicial killings; torture and other ill-treatment; excessive use of force; disappearances; and other forms of arbitrary detention, renditions, and transfers to torture and other serious human rights violations”¹²⁸.

Carry out independent investigations on allegations of human rights violations

The civil society and other human rights organizations in the country have times without number accused the police of violating human rights principles. These groups have even in some cases written detailed reports¹²⁹ on the respective abuses; in some cases they have even provided documentary and electronic evidence of such abuses. The police force on its part has done nothing when it comes to investigating these claims. The police should therefore use these reports (some of these reports even provide the identity of the officers involved) to carry out independent investigations. These investigations are very important as they will ensure all perpetrators are brought to book and punished for violating human rights.

The ATPU should also be compelled to report any deaths and serious injuries to the police oversight authority. Apart from punishing the would be offenders this act of investigating would act as deterrence on other officers.

¹²⁶ Open society justice initiative, *We Are Tired Of Taking You To Court*, Human rights abuses by Kenya’s Anti-terrorism police unit, open society foundation 224 west 57th street New York 10019 USA .

¹²⁷ ibid

¹²⁸ ibid

¹²⁹ ibid

Secure complainants and witnesses of human rights abuses

Many victims of human rights abuses by the police are afraid of coming out to complain because of threats of violence and intimidation by the police.¹³⁰ The same is the case with witnesses of these abuses. Once witness protection is provided to such victims, they will come out and proper investigation will be carried out.

Amend the Prevention of Terrorism Act of 2012

The Prevention of Terrorism Act of Kenya does not expressly provide for the protection of human rights when it comes to countering terrorism, a fact that has encouraged the ATPU every time they are faced with suspicion of terrorism, they go against human rights. Parliament should amend this act and ensure that all counter terrorism mechanisms provided for under the act go in line with international human rights standards and principles.

Draft a law which will prohibit deportation and rendition of terrorist suspects to other countries

Some Kenyan suspects who have been charged with terrorism related offences have been extradited to Uganda, Somalia and Ethiopia without the knowledge of their families¹³¹. These individuals are in some cases innocent and yet they end up being tortured in the respective countries. The Kenyan parliament should urgently draft an act which will make it illegal for the police to extradite suspects.

Strict observance of international human rights obligations

The UN should take more stern action to ensure that Kenya's counterterrorism strategies comply with its international human rights obligations, Since Kenya is a member of the UN, it should strictly adhere to principles laid down by the counter terrorism Committee on human rights. After being questioned by the UN, the Kenyan government will have no option but to strictly adhere to international human rights principles. Strict observation of the principals of criminal law that one is presumed innocent until proven guilty and elements of criminal law to apply.

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¹³⁰ One of the witnesses of the Garissa attack alleged that he had read the leaflets dropped by the terror suspects written in Arabic but could not disclose because of the reaction of the police of treating them as first suspects.

¹³¹ After the world cup bombings 2010 in Uganda, a lot of people were arrested in Mombasa and detained for days without trial, Idris Magondu, Mohammed Ahmed Abdow, and Hussein Hassan Agade are among suspects who were rendered to Uganda. Unidentified men broke into their house in Kawangware and arrested them. They were taken to various police stations before being handed over to Ugandan authorities. In 2007, it is reported that Kenya rendered to Somalia at least 85 people, who were then rendered to Ethiopia.