

UNIVERSITY OF NAIROBI

DEPARTMENT OF POLITICAL SCIENCE AND PUBLIC ADMINISTRATION

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

BY

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

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

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DEDICATION

To my children Dale and Syl, for the evenings and weekends that mum had to leave you behind to go do her research and write this Project, away from your inquisition.

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I am grateful for the support of my Lecturers at the Department of Political Science and Public Administration at the University of Nairobi. I am especially appreciative of the support of my Supervisor Prof. Katumanga who had the patience to review a plethora of manuscripts to arrive at this project. Your counsel, dedication and encouragement made it possible for me to stand tall.

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To my sister Judith Agade, I was perturbed by your insights in matters terrorism. You would never let me give up even when the going got tough. Thank you so much.

Despite the invaluable contribution I received from the aforementioned, this study remains my personal work and any limitations are equally personal.

ABSTRACT

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

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

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

ABBREVIATIONS

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

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CHAPTER ONE

JUDICIAL ROLE IN KENYA'S INTERNATIONAL SECURITY RELATIONS

1.0 Background of the study

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

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

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

² Ibid

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

⁴ Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts', 4 EJIL (1993) 1S9. See also *infra*. Pan IL

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

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

that did not necessarily reflect the rule of law.⁷ The requirement for judicial cooperation enhanced the judicial role function in the formal adjudication of mechanisms of terrorism cases and by extension matters of security.

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

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

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

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

1.1 Statement of the Problem

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

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

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

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

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

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

¹⁴ *Ibid*

¹⁵ *Ibid* Note 7

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

Underlying this is the contention that, the efficacy of the actions undertaken at the international level, was dependent on the willingness and actual capacity of nation state judiciaries to incorporate international standards in their domestic legal system and to subject the same to their adjudication and enforcement procedures.¹⁷ The enactment of the Prevention of Terrorism Act (PTA) in Kenya followed the said Resolution. The new law expanded the Criminal Law in Kenya to include new conducts related to terrorism¹⁸ while effectively giving the judiciary a key role in the fight against terrorism and by extension the states' international security relations.

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

The pressure from the executive was not well received by many judicial actors in Kenya. Many posited to the principle of impartiality.²² This is the position of justice where judges should play

¹⁷ Ibid

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

¹⁹ According to the Bureau of Counterterrorism and Countering Violent Extremism, Country Reports on Terrorism 2016, United States Department of State Publication of June 2, 2016 Kenya had experienced 440 terrorist attacks: 76 attacks in Nairobi, Garissa 53 attacks, Mandera 50 attacks, Mombasa 27 attacks, Wajir 23 attacks and Dadaab reported 17 attacks¹⁹.

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

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

²² Ibid

an impartial role in times of war and in peace times.²³ Judges are tasked to interpret the law to the best of their ability, in consistency with their mandate under the constitution disregarding all pressure.²⁴ The judiciary implements the law through a process of fairness irrespective of the nature of the case. Security organs take reference from political actors in blatant ignorance of the law and in violation of human rights. The arbitrary arrest of terror suspects and subsequent mistreatment while in detention, coupled with extrajudicial killings and or forced disappearances and unlawful renditions were rampant²⁵ in this regime. The judiciary on its part referencing the post 2010 constitutional dispensation accord terror suspects their full rights through release on bond and acquittals, such judicial decisions were met with criticism from the executive. A case in point followed the terrorist attacks on commuter assets along Thika Road on May 4, 2014. The attack engendered bitter accusations leveled on the judiciary by the Deputy President the Hon. William Samoei Ruto. According to him, the judiciary was not a strong partner in the war against terrorism.²⁶ Underpinning this discourse was the strongly held view by the executive that the judiciary by the fiat of its decisions, was in fact abetting terrorism.²⁷

Stung by this critique, the Chief Registrar of the Judiciary called for dialogue with the executive. According to her, dialogue would afford the two arms of government an invaluable forum to share perspectives on the critical issue of public interest.²⁸ The pressure on the judiciary also

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

²⁴ Ibid

²⁵ Ibid

²⁶ Jamaicaobserver Tuesday May 6, 2014 available at www.jamaicaobserver.com

²⁷ David Goldman, Kenya Judiciary Blamed for Terror by Government, dated May 5, 2014 available at www.intelligencebriefs.com accessed on July 15, 2017

²⁸ Cyprian Ombati, Standard Digital of May 7th 2014 available at www.standardmedia.co.ke

came from the public and civil society, where human rights organizations blamed the judiciary for not dealing with executive excesses.²⁹

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

1.2 Objectives of the Study

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

- i. To examine and analyze factors underpinning differentiated actor discourses and realities of judicial institutional behavior in the war against terror;
- ii. To analyze how judicial adjudication of terrorism cases mediate Kenya's international security relations; and

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

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

- iii. To proffer research based policy options geared towards positively enhancing the role of the judiciary in the international security agenda.

1.3 Justification for the Study

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

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

The laws as enacted and the preference of the judicial process as the best means to fight terrorism seem to have addressed the demand side, since institutions have been mandated by the law and by policy. The supply side is what this paper seeks to contribute since there is an

³¹ Ibid

³² Clutter Richard. 1990. *Terrorism and Guerilla Warfare*. London; Routledge. p. 77

³³ Ibid

obvious gap founded in the implementation of these laws. There are apparent differentiated discourses among the different actors that are far removed from the reality. History will show that the executive in Kenya has been the main repository in matters of national security. Terrorism roped the judiciary into matters of security through the implementation of both domestic and international laws. The judicial role function is therefore founded in the law however discourses abound that impinge on this role function. This study contends that executive discourses impinge upon the judicial role function.

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

1.4 Scope and Limitation of the Study

This study reviewed discourses inherent in executive responses to terror attacks in the period from 2006 to 2016 and the reality of judicial institutional behavior in adjudication of such responses. The period of study was informed by the fact that Kenya came under increased terror attacks during this period. Most terror attacks were followed by executive responses outlining the nature of such attacks and the planned response. The period of study is also advised by the fact that the arrest of terror suspects in connection with some of the attacks was prevalent. The said

suspects were subsequently arraigned in court and the role function of the judiciary was invoked in the adjudication of terrorism cases.

1.5 Definitions of Concepts

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

Discourse - This concept is borrowed from Carta's Discourse Analysis and International Relations as a medium within which sense can be made leading to reality.³⁵ This definition is most applicable as it expresses the medium to most highlight the difference in expectations and outcomes more especially the disparity in the number of arrests and convictions in terrorism related cases.

Judicial Role Function - In this study the concept of judicial role function refers to how judges approach decision making in individual cases.³⁶ This study is interested in what Shapiro defines as the functional role of adjudication that courts play³⁷ in the fight against terrorism.

Judicial Power - In this paper, judicial authority is construed in accordance with the Law Dictionary as authority, which is both legal and constitutional. Such authority is vested in judges who preside over cases in court and then render their respective judgment to either affirm

³⁴ Quoted in the US Army Field Manual, 2006, p. 4.

³⁵ Ibid Note 30

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

³⁷ Shapiro Martin, Court: A Comparative and political Analysis. University of Chicago Press 1992 p. 179.

the constitution and the law or in other cases void the same when disputes arise.³⁸ In addition to this definition, this study relies on the operation of judicial power as provided in article 159 of the Kenyan constitution that contains provisions on how judicial authority is to be exercised. These definitions are preferred because of their broad meaning and appreciation of the diversity and uniformity of such power.

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

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

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

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

³⁹ [Jamia Millia Islamia, Department of Geography](#) New Delhi, India Honorary Professor

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

1.6 Literature Review

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

The Literature review is organized in three sections. The first section will focus on the institutional differentiated actor discourses that shape the reality in the war on terror. The second section will discuss the impact of judicial adjudication on Kenya's International security relations and the last section will analyze how the judicial role function can positively be enhanced to benefit the global security agenda.

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

Following the terrorist attack of 9/11, a strategy of war was adopted inherent in the 'war on terror'. This strategy was first adopted by the Bush administration and their choice of terminology in 'war' was most purposeful. According to David Ryan, it was a strategic choice to use the word 'war'. A choice that was more unifying for the US as it had a sense of nationalism

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

Stephen D. Schwinn in 2016 described the 15 years since September 11, as years constrained by government policies that were intended to eliminate international terrorists, disrupt networks, and prevent a repeat of those attacks. According to him, such policies were never straightforward; they evolved and took shape in time as they were oscillated around the three branches of government.⁴⁶ Measures like the enactment of the Patriots Act and Guantanamo Bay created friction between the three branches of government. According to Cecilia M. Bailliet, the legality of counter-terrorism measures depended on the rule of law in compliance with

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

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

⁴³ Ibid

⁴⁴ Ibid

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

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

international human rights law. Adequate measures like judicial review, were purposed to guard against the arbitrary exercise of discretionary powers.⁴⁷ The Federal Courts in the US provided checks and balances on the legislative and the executive branches of its government by declaring provisions of the Patriot Act as unconstitutional.⁴⁸

Reading this literature, the obvious discourse propagated was that terrorism was war and what followed were equivalent measures to combat the vice. State implemented policies some of which were outside the purview of the law.⁴⁹ The questions then becomes, why would they still want to fight terrorism as a crime? Why would the executive fail to foresee that the judiciary will definitely stop it from implementing policies that contradict the law? The dynamics that necessitated the executive to contradict itself, and have its own judiciary point out that contradiction is not explained by this literature. This study therefore seeks to address the gap in knowledge, to find the reasons for the blatant disregard of the law.

1.6.2 Judicial Mediation of Kenya's International Security Relations

Judges have a critical role to play in their interpretation of the various measures put in place to counter terrorism.⁵⁰ Judges also determine and promote those measures which are within the legal framework and similarly respect human rights.⁵¹ The US judiciary has ascertained that even when arms clash, their laws will not be silenced, they may be amended from time to time, but

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

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

⁴⁹ Some provisions of the Patriots Act in the US was declared unconstitutional in the case of American Civil Liberties Union v. Ashcroft filed April 9, 2004 in the [United States](#)

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

⁵¹ Ibid

they will always speak similar language during war as in peacetime.⁵² Judges respect persons and they are the custodians of the rights of the people and will always stand in the way of those who try to encroach on peoples' liberty regardless of who they are.⁵³ Judges are always conscious to regulate coercive action by the executive, which must find justification in law.⁵⁴

In the case of Africa, the Namibia's judiciary pronounced itself on the matter, affirming the influence of the law and the impact of their decisions on the society. The Namibian Judiciary hoisted its constitution to a position above everything else. It spelt its constitution as something more than a statute.⁵⁵ For them, the constitution goes beyond the mere definition of government structures and the relations between the governed and their government.⁵⁶ A state's constitution reflects a nation's soul and mirrors the ideals and aspirations of a people.⁵⁷ Constitutions articulate the values that bind people in a state and controls how those people are governed.⁵⁸ This is what makes the constitution a distinct and core element in any state. Presiding over and permeating the processes of judicial interpretation and judicial discretion⁵⁹ and hence must be respected and adhered to.

Provisions in any constitution may vary given it is one document that contains all aspects of a state. In Uganda, the judiciary in recognition of this fact has come out to provide guidelines in its interpretation of the Constitution. They read their constitution as one whole, where one provision

⁵² *Liversidge v Anderson* [1942] AC 206. [1942] AC 206 at 244

⁵³ *Ibid*

⁵⁴ *Ibid*

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

⁵⁶ *Ibid*

⁵⁷ *Ibid*

⁵⁸ *Ibid*

⁵⁹ *Ibid*

sustains the other as opposed to destroying the other.⁶⁰ The many provisions are read together and interpreted in a common meaning.

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

1.6.3 Enhancing Judicial Role in Global Security Agenda

In the 20th Century, judicial role function in matters concerning global security paints a gloom picture. The Judiciary has tended to recuse its role in security, as opposed to adjudication against the executive violating the rule of law.⁶² This stance finds credence in the notion of power

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

⁶¹ Petition NO.628 OF 2014 [2015] eKLR

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

separation.⁶³ The exercise of power by one branch needs to be balanced and checked by the other branches.⁶⁴ This idea systematically distributes political power between the three branches of government. A balance is achieved when natural rights are preserved in so far as they converge with the security of all, at the same time accommodate balanced executive power. This is why national security was preserved as the purview of the executive, it was a non-justiciable question.⁶⁵ The judicial process was viewed with ineptness to deal with the sort of complexity of national security.⁶⁶ National security acquired a mystical significance in the courts who failed to confront its concerns.⁶⁷

In the age of terrorism, a real threat to state security, there has been a slow but nevertheless significant change in this view and judiciaries now have a distinct role to play in national security. Senator Rand Paul (R. Ky.) once asked, whether the President of the US had the authority to order the assassination of an American on American soil especially when such a citizen was not at that moment an imminent threat to the national security.⁶⁸ There was no immediate clear answer to the question and after many and arguably evasive answers, the AG finally answered 'No' to that question.⁶⁹ This question was triggered by advocacy to provide limits on the president's power to order drone strikes. At the time the official figures from the administration of President Barack Obama, indicated that 2,436 people had been killed by the

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

⁶⁴ Ibid

⁶⁵ Ibid

⁶⁶ Ibid

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

⁶⁸ Ibid

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

US in 473 strikes from 2009 to 2015 mainly in Somalia, Pakistan, Libya and Yemen. Some of the strikes were non-combative in fact, between 64 and 116 were non-combatants.⁷⁰ It was a situation where US citizens were killed in drone strikes, without being accorded their right to the due process of law.⁷¹ That means the state would have easily arrested these non-combatants and took them through the criminal justice system. Why use the drones to strike them dead when you can easily try them in court?

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

These discussions fall right into the words of William G. O'Neill who contends that matters of security should not just be left to the executive. He proposes for a review of the mechanisms put in place by the executive.⁷³ The preferred institution to proffer such review is the judiciary through the courts. Where a scrutiny of the assessment of threats is done to ensure the threats as assessed are genuine and free of any erroneous evaluation that can have a colossal impact on rights protection.⁷⁴ The purpose of such scrutiny is not to discredit the executive, neither does it put the exercise of power by institutions in a crisis. Scrutiny of the executive does not necessary put the judiciary in a quandary. It vitiates judicial deference giving the judiciary room to offer another perspective in the assessment of threats to ensure the protection of rights and freedom

⁷⁰ Ibid

⁷¹ Ibid

⁷² Ibid

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

⁷⁴ Ibid

that would be ignored by the arbitrary concerns for security.⁷⁵ The suitable position of the judiciary as an impartial arbiter allows for balanced assessments of threats and the application of suitable and appropriate measures to counter such threats. Even though power is not delegated to judges electorally like it happens for the legislature and the executive, judicial authority emanates from the people⁷⁶ and therefore has a republican quality.⁷⁷ This gives judiciaries a role equivalent to the other two branches.

This point is further buttressed by Kofi Annan, according to him; you cannot trade off human rights on the claim that you are effectively taking action to combat terrorism. He advocated for a policy that protects human rights, democracy and social justice as the best deterrence against terrorism⁷⁸ where the law of human right must also benefit the terrorist.

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

Judge Posner and Youcef Yousfi advocate for training of judges and prosecutors in matters of security and in particular, terrorism. Justice Posner recommends examination and clarification of the role of the judiciary in counterterrorism.⁷⁹ He agrees that the judicial role is not in doubt, but he takes issue with the fact that such a role has never been clearly established or even

⁷⁵Ibid

⁷⁶ Article 159 of the Kenyan Constitution.

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

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

⁷⁹ Richard A. Posner, How Judges Think, Harvard University Press, 2008.

systematically examined. He also argues that the judiciary as an institution has never been assessed to determine whether it possess the operational capability to play such a role.⁸⁰ Judge Posner has described the attempts to articulate the role and responsibility of the judiciary in counterterrorism, as incoherent at best.⁸¹ He states that judicial officers lack the overall judicial and administrative responsibility necessary to review counterterrorism measures. That judges do not even have security clearance, education, training or experience in national security matters to inform or advice their decisions.⁸² Youcef Yousfi follows closely to recommend the training of prosecutors and judges to enhance their knowledge and legal skills and arsenal to handle and respond to terrorism.⁸³

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

⁸⁰ Ibid

⁸¹ Ibid

⁸² Ibid

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

1.7 Conceptual Framework

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

The second perspective looks at Locke's prerogative of power. Political systems always trumpet their commitment to the rule of law.⁸⁶ Citizens are better off with established rules for all to follow as opposed to arbitrary rule or a state of anarchy.⁸⁷ The recognition of courts as political institutions is widely accepted as a formal mechanism with significant delegated powers to resolve political, social and economic conflicts within society. A government that entrusts legal experts with the duty to interpret and enforce its laws is a government that has agreed to abide by those same laws. In that sense, the courts can then go ahead and rule against the executive and sustain the law of the land.⁸⁸ Locke is of particular interest to this study since the fight against terrorism has revealed that sometimes extraordinary response is required on the part of the state, where extralegal means are employed. Those who acknowledge the legitimacy of extralegal action in whatever circumstance, do so at the very expense of trampling on the belief that

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

⁸⁵ *Ibid*

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

⁸⁷ *Ibid*

⁸⁸ John Ferejohn, Frances Rosenbuth, and Charles Shipan, *Comparative Judicial Politics* 2004 p. 1 available at www.leitner.yale.edu

legitimacy only emanates from and accords with the law. Locke precisely takes this stand. Locke argues that the prince reserves a right to do what is good for his society. This is a right that the prince has by the common law of nature. That the prince can exercise this right without the sanction of law and even against the law.⁸⁹ This position is backed by those who see a need for the executive to retain some discretionary power that allows it to act outside the law. This is the power that allows the discretion to deny citizens some of their liberties. The power that is needed to ensure security and therefore derogating from some freedoms is a small price to pay for such security.⁹⁰

In this paper a possible justification for the executive's choice to ignore its own law in the fight against terrorism finds credence from John Locke's prerogative of power. Such power essentially handles instances where adhering to the rule of law would result in adverse harm to the society.⁹¹ Prerogative of power permits extralegal measures by governments provided such measures are executed for the common good of the society.⁹²

Locke's prerogative argues the inadequacy of law, where the law is incapable of providing for everything. Legislation requires foresight, and those who have the duty to legislate lack total foresight and are unable to provide for everything that is useful to the society through legislation. That prediction of a good number of things is achievable and hence legislation and regulation can be put in place however this cannot be for everything, only what is foreseeable. The fact that it is almost impossible to reduce everything to the application of law is what weakens the rule of

⁸⁹ All parenthetical references are to the Two Treatises of Government, cited by treatise and section.

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

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

⁹² Ibid

law because that would necessitate a near-total capacity to foresee the future. The fact that terrorism found all the countries in the world unprepared points to a lack of total foresight. Most laws relating to terrorism were enacted after major terrorist attacks like September 11. The PTA in Kenya came into force in 2012 yet terrorism existed many decades before that and Kenya had no law to fight it. This argument broadens the necessity for Locke's prerogative of power to remedy to the legal deficiencies.

According to Justice Murphy, compelling factors must exist that expose the incompatibility of right with public safety before such right are temporarily suspended.⁹³ Justice Murphy seems to recognize despotic tendencies that invoke real and imagined threats to public welfare to justify needless abrogation rights. Government fall in the trap of terrorism demonstrated by conduct that ignores constitutional and legal checks when possible and violating rights. Since terrorism is a war of ideology based on values, arbitrary actions by governments, act as a catalyst to recruitment. This marks an entry point for weakness in the Lockean prerogative.

An obvious critique of prerogative power would be limiting such power to what is good, ostensibly eliminating an outright abuse of such power.⁹⁴ The one who executes the prerogative must obey the law of nature just like the rule of law. Neither can act in a manner forbidden by the law of nature. This study seeks to respond to this weakness by showing that in fact prerogative power does no good in the fight against terror. Acting outside the purview of the law only seeks to breed more grievances and act as a recruitment tool.

⁹³ Michael J. Kelly in his article Executive Excesses V. Judicial Process: American Judicial Responses to the Government's War of Terror available at www.mckinneylaw.iu.edu

⁹⁴Ibid Note 91

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

1.8 Research Hypotheses

H₁: That underlying differentiated perspectives, is the executive's determination to use its prerogative of power in apparent disregard of the law and the courts in a bid to root out terrorism.

H₂: That judicial intervention in the war against terrorism in Kenya is proactive, through pronouncements that seek to bring all measures taken by the state within the ambit and operations of the law.

1.9 Methodology

1.9.1 Research Design

This study employed longitudinal research design by looking at variables over an extended period of ten years from 2006 to 2016. The study analyzed terror attacks during the period and the response from the executive that was followed by judicial adjudication.

1.9.2 Data Collection Methods

This study relied on secondary sources of data. This is mainly because the nature of the study sought to analyze the gaps inherent in what has been done so far. Secondary data enabled a review of the reported terror attacks that had corresponding response from the executive and judicial adjudication of matters related to the attack or the executive response. An analysis of the

discourses inherent in the executive's response was juxtaposed against judicial discourses as contained in the judicial findings.

The data used in this case was obtained from Kenya Gazette, Law Reports and online news websites and sources. The study cumulatively put incidences together and identified differentiation in the discourses by the executive and those by the judiciary. The study then identified variables that underpinned the differentiated actor discourses.

The major challenges in collecting this data was getting specific responses for each and every attack and only those attacks that had a response from the executive was analyzed.

1.9.3 Sampling

Secondary data was purposively sampled with three primary strands; the first sought reported terror incidents, through cataloguing online databases. The second strand targeted executive response to such terror attacks available press release in online news websites as well Kenya Gazette. The Final strand focused on judicial adjudication of the terror attacks as well as the executive responses all available in on the website of Kenya Law reports. While this study was not statistically representative, the sampling strategy assisted us to access information that was relevant to the study.

1.9.4 Data Analysis

The study used content analysis where variables were collated and subjected to theoretical interrogation and the study's conceptual framework. This enabled the study to highlight what constitutes institutional behavior in the war against terrorism.

1.9.5 Validity of Data

The study intercourse criterion related validity test and content validity test to indicate the degree to which the observations made and the data collected from secondary sources were valid. The application of generalities about the data collected on factors underpinning differentiated actor discourses in the war against terrorism and the resultant judicial determinations. The reliability of secondary sources of data collected from the judiciary was reinforced by the fact they are public records stored pursuant to the legal framework and therefore tamper free.

1.10 Chapter Outline

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

Chapter Two outlines a historical analysis of the problem statement in Chapter One. It discusses the conception of regime security and the variables that underpinned judicial inaction in matters of security in Kenya. It analyses instances of executive dominance that resulted in legal amendments that instrumentalized the judiciary to affirm executive's decisions in matters of security. The chapter analyses how the subjective conception of insecurity and the failure to

invoke the judicial role function in security matters led to violation of human rights exacerbating regime insecurity. The discussions in the chapter anchors the subsequent discussions in chapter three on the judicial role function in matters of security when terrorism was a matter of national security in Kenya.

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

The subject of Chapter Four is to respond to the second question of the study; the judicial adjudication of terror cases and how it mediates Kenya's international security relations. It specifically analyses judicial adjudication of renditions and the enforcement of Kenya's international legal obligations in the fight against terror. It contends that the judicial discourse seeks to bring all measures taken by the executive in the fight against terrorism in the ambit of the law. The results of such adjudication, fosters and affirms a judicial role function in matters of national and international security.

Chapter Five concludes and recapitulates on the study by specifically responding to four tasks. The first task is a recapitulation of the core objectives of this study with a view to evaluate the extent to which each tasks have been met. The second task is a recapitulation of the hypotheses

of the study. The third task anchors the conclusion of the study and the fourth task outlines policy recommendations for enhancing the judicial role function in the security agenda.

CHAPTER TWO

KENYA'S JUDICIARY AND REGIME SECURITY

2.0 Introduction

Thomas Hobbes advocated for a Leviathan that could compel the society to do right.⁹⁵ John Locke, attributed to a society in a self-regulating state of nature.⁹⁶ The contrast between these two worldviews led to different ideas; authoritarianism in the case of the former and liberal in the case of the later.⁹⁷ Upon attainment of independence in Kenya, the executive's conduct of national security, lent itself to reflect the Hobbesian perspective of authoritarianism.

Authoritarianism is conceptualized by Buzan's idea of the use of exceptional measures including force to combat significant threats to security to ensure survival.⁹⁸ Buzan looks at the multiplicity of security to address the various aspects within the society and how they are constructed or securitized.⁹⁹ The conceptualization and operationalisation of Buzan's perspectives in the conduct of national security in Kenya accorded with survival of the political regime. The conception of threats to national security, signified threats on the political regime. The government's response to such threats included the use of force to clamp down on political dissidents, indicative of authoritarianism.

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

⁹⁵ Thomas Hobbes, *Leviathan*, 1651

⁹⁶ *Ibid* Note 91

⁹⁷ Nico Tuk, *Hobbes Versus Locke- Redefining the War on Terror*, available at https://learn.saylor.org/pluginfile.php/425505/mod_resource/content/1/HobbesVersusLocke.pdf

⁹⁸ *Ibid* Note 84, pp. 432-433.

⁹⁹ *Ibid*

threats to national security, the judiciary tended to defer to executive views in such matters.¹⁰⁰ The notion of judicial deference accorded with the discourse that the executive was constitutionally charged and structurally better suited to make such decision.¹⁰¹ The role function of the courts was therefore deeply modest in rubberstamping the executive's national security decisions.¹⁰² This made the executive, the main repository of decision making in matters of national security.

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

¹⁰⁰ Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 *Fordham L. Rev.* 827 (2013). Available at: <http://ir.lawnet.fordham.edu/flr/vol82/iss2/16>

¹⁰¹ *Ibid*

¹⁰² *Ibid*

2.1 Executive Dominance of National Security during Jomo Kenyatta Regime

Upon attainment of independence, the government of Jomo Kenyatta established a nascent Africanized state.¹⁰³ In this government, the judiciary occupied a constitutional status, envisaged as an independent institution, capable of determining the constitutional confines of state action.¹⁰⁴ The constitution created an institution that was potentially powerful, however; the judiciary was a conservative institution,¹⁰⁵ favoring executive supremacy and limiting judicial review of executive decisions to egregious cases of improper administrative action. This was envisaged by the courts inaction and acquiescence to the executive's suppression of political dissent and human rights violations as discussed hereunder:-

2.1(a) The Suppression of Political Dissent

The inception of an autocratic executive started in 1964, when Moi's KADU, willfully dissolved, joined KANU that was at the time headed by the president Jomo Kenyatta.¹⁰⁶ This amalgamation unified Kenya into one party even though parliamentary democracy was constitutional.¹⁰⁷ In the absence of opposition, Jomo Kenyatta's political monopoly resulted in oppressive policies leading to political and ideological differences with his Vice President Oginga Odinga who faulted Kenyatta's policies that generally oppressed the common man.¹⁰⁸ The ideological gap was widened following the murder of Pio Gama Pinto in 1965 a close associate of Oginga Odinga.¹⁰⁹ Apprehensive of Odinga and his supporters, Jomo Kenyatta weakened Odinga's

¹⁰³ Nzau, Mumo and Guyo, Mohammed (2018) "The Challenge of Securing Kenya: Past Experience, Present Challenges and Future Prospects," *The Journal of Social Encounters*: Vol. 2: Iss. 1, 37-59.

¹⁰⁴ T. P Ghai, "Judicial Protection Against the Executive", National Reports, New York, 1969

¹⁰⁵ Ibid

¹⁰⁶ Mutua, Makau wa. "Human Rights and State Despotism in Kenya: Institutional Problems." *Africa Today*, vol. 41, no. 4, 1994, pp. 50–56. JSTOR, www.jstor.org/stable/4187016.

¹⁰⁷ Ibid

¹⁰⁸ Sandra Obi, Abigael Kenelwa Ayiro, and Kennedy Ochieng' Aketch, Jaramogi Oginga Odinga and the Rise of Opposition Politics in Kisumu; From KANU to the FORD-K, 2014 available at <https://macleki.org/stories>.

¹⁰⁹ Ibid

position in KANU by splitting the Vice President's power and sharing out among eight other leaders in KANU. This prompted the resignation of Oginga Odinga from KANU and he subsequently formed KPU.¹¹⁰ In response, Kenyatta banned KPU, and detained some of its leaders under the detention-without-trial laws,¹¹¹ others were exiled, and some assassinated.¹¹²

Jomo Kenyatta's harsh response was conceived in his perception of insecurity; in terms of political dissent. The executive securitized political dissent, elevating regime survival to the status of national security.¹¹³ The net effect of this equivalence as Buzan notes the tendency to equate political threats with military threats.¹¹⁴ Such consideration in turn provides a rationale for a military response. Political dissident in Kenya sought to widen the democratic space as opposed to weakening the state. The executive response was militaristic geared towards demobilizing popular forces and nationalist movements that questioned the executive.¹¹⁵ Further Kenyatta instrumentalised the security machinery to deal with the political opposition.¹¹⁶ Regime survival more often than not superseded all other national security concerns. What followed was the consolidation of power, carried out to the exclusion of other Kenyans with diverse opinions.

Kenyatta's authoritarianism ensured Kenya remained a one party state for all practical reasons. When subjects accept the use of power by their leaders, that acceptance legitimizes that power.¹¹⁷ In this case, Kenyatta's legalization of one party state was accepted and was not challenged before the judiciary given the clear constitutional backing the judiciary had power to uphold.

¹¹⁰ Ibid

¹¹¹ Ibid Note 106 pp. 50–56.

¹¹² They include Pio Gama Pinto assassinated on February 25, 1965, Tom Mboya assassinated on July 5, 1969 in Nairobi, Josiah Mwangi Kariuki assassinated on March 2, 1975

¹¹³ Ibid Note 106.

¹¹⁴ Ibid Note 84.

¹¹⁵ Ibid Note 106

¹¹⁶ Ibid

¹¹⁷ Weber Max, *Law in Economy and Society*, 1954 New York: Simon & Schuster.

Weber also argued that such power tended to be irrational or inconsistent¹¹⁸ just as Kenyatta irrationally banned the opposition against the law, preserving such power to his ruling class. In the end, the subjectivity, created inequalities and a direct link between the executive's policies and insecurity in Kenya.

Kenyatta's political monopoly resulted in an attempted coup in 1971. His response was a perfected and legalized repression of those involved in plotting the coup, using the judiciary to banish them to detention.¹¹⁹ Following the coup, twelve men were arraigned before Hon. S K Sachdeva, Magistrate who sentenced them to between 7 and 9 years in prison depending on their culpability.¹²⁰ They included Joseph Daniel Owino, Gideon Mutiso, Joseph Ben Ouma Muga, Apollo Abraham Wakiaga, Juvenalis Benedict Aoko, Joshua Omoth Ooko, Christopher Okech Oduor, Eliud Kipserem arap Some Langat, Eric Kimtai Chepuony, Elijah Mukaya Sabwe, Japhetha Oyangi Mbaya and Ahmed Abdi Aden.¹²¹ Notably Major General Joseph Ndolo who had led Kenya's military since independence and Chief Justice Kitili Mwendwa, the first Kenyan Chief Justice, were also arrested alongside a coterie of politicians allied to opposition leader Oginga Odinga and placed under political detention.¹²² Kenyatta had succeeded in making himself an imperial president and emasculated the judiciary only invoking its role function to punish the very opponents he had created with his political monopoly.

¹¹⁸ Ibid

¹¹⁹ Article by Ndungu wa Gathua available at <http://google.com/amp/s/hivisasa.com.posts/the-12-men-who-wanted-Kenyatta-out-of-power>

¹²⁰ Ibid

¹²¹ Ibid

¹²² Standard reporter, Blast from the Past: Intrigues that led to the first coup attempt in Kenya, reported on Feb 12 2017

Cognizant of the fragility of his government, Jomo Kenyatta ensured the formulation and implementation of national security policies remained the preserve of the presidency.¹²³ All security-related ministries and specialized departments fell under his office. Kenyatta initiated legal amendments that abolished constitutional safeguards of devolution, parliament and judicial independence, as well as office tenure for judges.¹²⁴ The 1966 amendment in Act No. 18: withdrew parliamentary exercise of powers in emergency, vesting the same in the president, who could forthwith order detention without trial.¹²⁵ Kenyatta's interests were to have a tight and exclusive control over the security system to protect his regime.¹²⁶ When a terror attack was carried out in 1975 at OTC Bus Station in Nairobi, no one claimed responsibility for the same and the police declined to speculate on the identity and motive of the bomber.¹²⁷ This was the first terror attack on the Republic of Kenya and the executive ignored the same since insecurity at the time was perceived in terms of political dissent while terrorism was a non-issue.

Kenyatta continued to wield extra-legal authority against the backdrop of the repressive policies and repeatedly contended Kenya's unpreparedness for liberal democracy.¹²⁸ Kenyatta took every step to hobble the opposition and steal elections. In the 1974, Paul Ngei, Kenyatta's ally was found guilty of committing an election offence. The court led by the Chief Justice James Wicks barred Ngei from contesting any poll for five years as the law dictated.¹²⁹ To save his ally, Kenyatta initiated an amendment to extend the power to pardon election offenders. While

¹²³ Ibid Note 106

¹²⁴ Okoth-Ogendo, 'The Politics of Constitutional Change in Kenya since Independence, 1963-69.' *African Affairs*, vol. 71, no. 282, 1972, pp. 9-34. JSTOR, www.jstor.org/stable/720361.

¹²⁵ Ibid Note 106

¹²⁶ Ibid

¹²⁷ The OCT terror attack claimed 27 lives, the attacks took place in a lavatory at the Starlight Nightclub, the Information Bureau and at the OTC Bus station according to the KNA available at

http://info.mzalendo.com/media_root/file_archive/REPORT_OF_THE_COMMITTEE_ON_WESTGATE_ATTACK_-_4.pdf

¹²⁸ Ibid Note 106

¹²⁹ Election Petition No. 16 of 1974

contributing to debate on the Bill, Vice President, Daniel Arap Moi supported the amendments and asserted that the President is above the law and should have all powers since they belonged to him.¹³⁰

Charles Njonjo the AG at the time published the Bill, it was tabled in Parliament and passed in a single afternoon. The following day, Kenyatta signed it into law¹³¹ and Ngei received his pardon. The audacity of the president mirrored little regard for the law and the courts. The pardon by Kenyatta demonstrated the danger of unchecked benign executive power to act in total disregard of the court. A reflection of the non-authoritative nature of the judiciary. Presidential constitutional pardon is a generous power used to correct systemic injustices without which it would be imperfect and deficient for the executive's political morality.¹³² Kenyatta's use of this power in Ngei's case is what Bentham's jargon described as, "from pardon power unrestricted, comes impunity."¹³³ Kenyatta gifted Ngei with impunity, trumpeting his dominance over the judiciary, entrenching the discourse that the president was above the law. In reality however, the executive and the judiciary were co-equal institutions in the same government.

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

The Preservation of Public Security Act was a colonial relic that Jomo Kenyatta retained in the independence constitution allowing him to rule under emergency powers.¹³⁴ In 1966, the law was amended and parliament could only review emergency powers after eight months.¹³⁵ All that was

¹³⁰ Ibid

¹³¹ Ibid

¹³² James D. Barnett, Grounds of Pardon, The, 17 Am. Inst. Crim. L. & Criminology 490 (1926-1927)

¹³³ Jeremy Bentham, Theory of Legislation, Atkins' ed., vol. 2, pp. 171-2; F. Lieber, Political Ethics, 2nd ed., vol. 2, pp. 397-8 (1874).

¹³⁴ Section 85 of Kenya's Independence Constitution recognized the Preservation of Public Security Act.

¹³⁵ Act No. 18/1966 Kenya House of representatives Official Reports, v.9 Part 1 (1966) Government Printer, Nairobi 278-279.

required to invoke this law, was for the president to think there was an emergency, or a threat of one. The power permitted the detention of persons without trial, imposition of curfews, control of aliens, censorship, and prohibition of assembly and acquisition of property.¹³⁶ This law gave the president immense powers that could be invoked in the name of security limiting individual rights and freedoms.¹³⁷ A further amendment removed the requirement for reasonable justification for derogation, allowing for use of such powers on a whim by the President or delegated Minister for Home Affairs.¹³⁸ Parliament willfully passed the amendments despite the constitutional protections individuals had under Chapter V of the Constitution that provided for extensive civil and political rights of Kenya's people. In particular section 72(1) disallowed derogation from the right to liberty making the amendments difficult and confusing and above all unconstitutional.

Political dissenters were detained under this law; in 1967, John Keen was detained for his criticism of the government.¹³⁹ In 1975, following the murder of MP J.M. Kariuki,¹⁴⁰ two vocal MPs were detained for accusing the government of cover up in the murder.¹⁴¹ President Kenyatta made the government's stand on detention without trial clear in a 1975 address to the National Assembly by warning that dissidents would not be tolerated and that similar action would be taken against any MP who did not support the government or tried to obstruct it.¹⁴²

¹³⁶ Ibid

¹³⁷ Section 76, 79, 80 and 81 of the Constitution were amended to allow for derogation.

¹³⁸ Ibid

¹³⁹ Uche, Human Rights and the Kenya National Assembly 1970-1975, 16-17 (1976)(unpublished paper; sponsored by the Institute of Public Administration, Dublin, Ireland)

¹⁴⁰ The Times (London), Mar. 12, 1975, at 9, col. h and Mar. 13, 1975, at 7, col. c. 28, 1977

¹⁴¹ Ibid

¹⁴² Ibid

The judiciary upheld the validity of the actions of the president under this law. In *Ouko v Republic*, the court declined to interrogate the grounds for his detention holding its lack of jurisdiction.¹⁴³ This holding was a continuum of judicial subservience to the executive.

Judiciaries are essential guardians of the rule of law in constitutional democracies, upon which the scheme of checks and balances is assured.¹⁴⁴ Judicial insulation from political control is the hallmark of the legal system.¹⁴⁵ Judiciaries are not accountable to the electorate, insulating them from the political process.¹⁴⁶ This allows judiciaries to stand as the ultimate custodians of fundamental rights.¹⁴⁷ For the judiciary to act in continuum to the executive's disregard of the rule of the law is tragedy for any such democracy. The Kenyan judiciary failed in its role function showing no inclination to uphold the rule of law. The failure by the judiciary set Jomo Kenyatta on a trajectory of legal disobedience.¹⁴⁸ The lack of legal constraints created hostile political environment, exacerbating insecurity.

The marginalization of the Northern frontier is a legacy that Jomo Kenyatta inherited from the colonial government. He reinforced his government's discriminatory development policies and illegal instrumentalization of provincial administration directives.¹⁴⁹ Such policies included discrimination on individual basis, marginalization and underdevelopment.¹⁵⁰ This marginalization sparked off pro-secession demonstrations known as the Shifta Wars.¹⁵¹ The

¹⁴³ HCCC no. 1159 of 1966 (unreported)

¹⁴⁴ Mutua, Makau. "Justice under Siege: The Rule of Law and Judicial Subservience in Kenya." *Human Rights Quarterly*, vol. 23, no. 1, 2001, pp. 96–118. JSTOR, www.jstor.org/stable/4489325.

¹⁴⁵ *Ibid*

¹⁴⁶ *Ibid*

¹⁴⁷ *Ibid*

¹⁴⁸ *Ibid* Note 106

¹⁴⁹ TJRC, *The Final Report* (2013) available at <http://digitalcommons.law.seattleu.edu/tjrc/7>.

¹⁵⁰ *Ibid* Note 106

¹⁵¹ *Ibid* Note 103

Jomo Kenyatta's government responded to the demonstrations quite violently by declaring a state of emergency.¹⁵² This measure allowed security forces to detain people without trial, confiscate property and restrict the right to assembly and movement.¹⁵³ In 1967, the state launched an operation by invading the Waso Boran community where civilians were confined to camps.¹⁵⁴

Arthur M. Schlesinger Jr, criticized presidential aggrandizement, he described the imperial president as defective, a 'Frankenstein monster.'¹⁵⁵ Jomo Kenyatta's extensive assertions of presidential authority appeared to fulfill Schlesinger's prediction. Vice President Moi's description of Kenyatta as a 'above the law', signified patriotic reverence and idolatry. This description isolated the president from the company of lesser breeds, including the judiciary, an institution of equal value to the executive.

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

¹⁵² Legal Notice No. 43 of 1967 cited as the Public Security (Control of Movement) Regulations

¹⁵³ Ibid

¹⁵⁴ The Final Report of the Truth Justice and Reconciliation Commission of Kenya (2013) available at <https://www.jfjustice.net/downloads/1460970274.pdf>

¹⁵⁵ Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Boston: Houghton Mifflin, 1973), ix.

2.2 Instrumentalization and Centralization of Power in the Moi Regime

President Moi inspired a wide spread expectation of a democratic and human rights oriented administration.¹⁵⁶ This perception was affirmed by the actions and promises Moi made upon ascension to the presidency. The release of political detainees,¹⁵⁷ the assurance of security¹⁵⁸ and the forced resignation of civil servants implicated in corruption including the Police Commissioner, Bernard Hinga,¹⁵⁹ were all actions indicative of positive change. However, the changes were short lived since Moi slipped back to his predecessor's political and economic policies by pledging to follow Kenyatta's *nyayo*.¹⁶⁰ Judicial subservience was entrenched at the behest of executive dominance, more particularly, the dominance of the ruling party KANU under the leadership of one man as discussed below.

2.2(a) Consolidation of Executive Power through Legal Amendment

Legal amendments provided for the consolidation of power. In December of 1978, Moi rushed a bill through parliament stripping it of its emergency powers and arrogated the same to the presidency.¹⁶¹ It is pursuant to this law that Charles Rubia, Raila Odinga, Kenneth Matiba and George Anyona faced detained without trial following their arrest in the clamor for multiparty democracy.¹⁶² Moi insured his grip on power by methodologically expropriating the role functions of the other branches of government, thereby eroding the principle of the separation of powers that became ineffectual.

¹⁵⁶ Ibid Note 6

¹⁵⁷ Ibid

¹⁵⁸ Haugerud, Angeliq, *The Culture of Politics in Modern Kenya*. 1995, Cambridge: Cambridge University Press, p. 82

¹⁵⁹ Ibid Note 6

¹⁶⁰ Swahili for footsteps

¹⁶¹ Constitution of Kenya (Amendment) Act No. 18 of 1966:

¹⁶² KAACR, *The Cradle*, ICJ, Kenya Section, COVAW, OMTTC, "State Violence in Kenya", available at www.reliefweb.int/sites/reliefweb.int/files/resources/F99E41A580CBD14DC1256FE300372D90-omct-ken-28feb.pdf.

Early into Moi's presidency, a terror attack at the Norfolk Hotel in 1980, left 20 people dead and more than 80 wounded.¹⁶³ The security agents in Kenya identified the bomber as Quddura Mohammad Abdel-el-Hamid alias Muradi Alkali.¹⁶⁴ The PFLP denied the allegation that the movement was responsible for the attack given Quddura was their member.¹⁶⁵ No further investigations and or legislative measures were taken after this attack. The Kenyan government never took the initiative to prosecute those mentioned as responsible for the attack. There was no attempt to invoke the judicial role function in dealing with the terror attack. Moi's response mirrored the response by Jomo Kenyatta to the earlier attack in 1975 at OTC Bus stage - inaction. Terrorism remained a non-issue.

In juxtaposition, an attempted coup was a matter of national security. Moi's response to the August 1982 coup attempt by military officers from was stern and brutal.¹⁶⁶ The judiciary was bypassed in favour of the torture and court martial of the mutineers.¹⁶⁷ In addition, Moi introduced section 2A of the Constitution transforming Kenya into a de jure one-party state.¹⁶⁸ Laws were enacted that served to limit judicial independence.¹⁶⁹ The Chief Justice and puisne judges became presidential appointees and their security of tenure was subsequently removed.¹⁷⁰ Parliament failed to stand in the way of the legal amendments, given the control by the executive. The president was in a position to manipulate and exploit parliament and the judiciary

¹⁶³ Kiruga Morris (2013, September). 20 Killed in Bomb attack on Norfolk. Available at <http://mobile.nation.co.ke/lifestyle/1950774-1993444-format-xhtml-tt6skxz/index.html> accessed on July 28, 2017

¹⁶⁴ According to Data compiled by JULIET ATELLAH, the Elephant - Speaking Truth to Power available at: <https://www.theelephant.info/data-stories/2019/03/04/an-aftermath-of-terror-attacks-in-kenya-since-1975/>.

¹⁶⁵ Associated Press, "Arab Guerillas Deny Accusation by Kenya on Bombing of a Hotel", 9 January 1981. Available on the web: <http://query.nytimes.com>. Accessed on June 12, 2013.

¹⁶⁶ Kamau Mutunga, Moment of Bravado that Changed Kenya, in the article an estimated 600 to 1,800 lives were lost to quell the coup available at <https://www.nation.co.ke/lifestyle/dn2/How-1982-coup-changed-Kenya/957860-1467488-13v142az/index.html>

¹⁶⁷ Ibid

¹⁶⁸ Amendment Act No. 7 of 1982

¹⁶⁹ The 1986 Act No. 14 and 1988 by Act No.4 Laws of Kenya

¹⁷⁰ Amendments to sections 61(1) and (2) of the Constitution

for his own ends.¹⁷¹ In this setting, parliament and judiciary lacked the muscle to check executive excesses.¹⁷² Moi was the paramount leader with no limitation to his personal authority.

The doctrine of separation of power was officially repealed through the enactment of Act No. 14 in 1988 and Act No. 2 of 1988.¹⁷³ Alexis de Tocqueville observed, "Without the judiciary, the Constitution would be a dead letter."¹⁷⁴ De Tocqueville anticipated the potential of a judiciary that could inexorably be drawn into political conflicts, yet not politically accountable.¹⁷⁵ A judiciary that would only be persuaded by reasonability and reliant on the opinion of the public and the collaboration of other political institutions.¹⁷⁶ In the Moi regime, the judiciary was a dormant institution that was bypassed in the resolution of political disputes and national security and denied the cooperation of other political institutions.

2.2(b) Police Brutality

In 1987, Amnesty International reported the torture of political dissidents by the police who were forced into submission.¹⁷⁷ The judiciary was accused of ignoring protests about such police brutality, even when detainees had visible wounds.¹⁷⁸ Torture is one aspect that defined Kenya's political environment and it was directly under the purview of the judiciary, but the judiciary failed and or ignored to adjudicate.¹⁷⁹ Kenyan judiciary often eluded the mandate to protect individual rights. The courts presided over cases of victims of torture and remained mum when

¹⁷¹ Ibid Note 6 at page 4

¹⁷² Ibid

¹⁷³ Article 61 and 62 of the Constitution 1963 as Amended by Act No. 4 of 1988.

¹⁷⁴ A. De Tocqueville, *Democracy in America* 151 (P. Bradley ed. 1945).

¹⁷⁵ Ibid

¹⁷⁶ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* Harvard University Press, Cambridge, Mass., 1980. Pp. viii,268

¹⁷⁷ Amnesty International, *Kenya, Torture, Political Detention and Unfair Trials*. AI Index AFR 32/17/87, 1987

¹⁷⁸ Ibid

¹⁷⁹ Ibid Note 11

the executive instrumentalised the law for political repression.¹⁸⁰ Political persecution disguised as treason and sedition took place under the watchful eye of the judiciary without any consideration of the constitutional values at risk.¹⁸¹

Drew Days acknowledged political interference with the judiciary.¹⁸² Judicial power, inherent in judicial precedents and opinions has greater weight in the complex structure of law and democracy.¹⁸³ It is important for the judiciary to pay due attention to the interests of those who are vulnerable to abuse and discrimination.¹⁸⁴ The alternative provides a conducive environment for insecurity to permeate.

Massacres executed by the state against Kenyans in the Northern Eastern Province accounted for the worst security atrocities. The discourse by the state in defense of the massacres was based on insecurity in the form of cattle rustling, disarmament and territorial protection against those who were at the time pushing for secession from Kenya.¹⁸⁵ The massacres committed included; the Bulla Karatasi Massacre in Garissa in November 1980¹⁸⁶ and the Wagalla Massacre in 1984.¹⁸⁷ In the latter men from the Degodiya clan were skirted in an operation purportedly to disarm them. The men were stripped naked and forced to lie on the Wagalla airstrip for several days as security agents torturing them.¹⁸⁸ Hundreds of men died on that airstrip.¹⁸⁹ The Lotirir Massacre

¹⁸⁰ Ibid

¹⁸¹ Ibid

¹⁸² Ibid

¹⁸³ Cordeid, Supporting Primary Justice in Insecure Contexts, Strategy Document: Policy And Programming Recommendations South Sudan And Afghanistan October 2016 available at <https://www.cordaid.org/en/wp-content/uploads/sites/3/2016/11/STRATEGY-DOCUMENT-FINAL-7-11-2016.pdf>

¹⁸⁴ Ibid

¹⁸⁵ Ibid Note 154

¹⁸⁶ Ibid

¹⁸⁷ Ibid.

¹⁸⁸ Ibid

¹⁸⁹ It is estimated that 2,000 – 5000 men died and their identification documents were destroyed by police, making it difficult to identify the dead bodies. Africa Watch, Taking Liberties, p. 274.

in West Pokot District witnessed torture and sexual violence burning of houses and looting of property.¹⁹⁰ The attacks were systematic against civilians and thus qualified as crimes against humanity.¹⁹¹ Assuming that indeed the state had a case against these people, natural justice and the laws in Kenya dictated that they be arraigned before the judiciary and charged accordingly. That was not the case.

Hannah Arendt posits that terror has existed alongside states, revolutions, tyrants and despots.¹⁹² The foregoing underpins that notion. The insecurity perpetrated by Kenya's security agents against its own people during the massacres, was terrorism. Using calculated violence to instill fear. Such terror went against the oldest justification for citizens giving up arm to the government who in turn ensures security for all from violence. Thomas Hobbes world of unending insecurity is without a government and without law and order, protecting the individuals from each other and from foreign threats.¹⁹³ In the case of Kenya, the government turned against its own citizens and failed to protect them and instead unleashed violence. Judicial inaction stemming from a judiciary that was too weak and so dependent on the executive's direction and therefore complacent in all executive's violations. Such a judiciary was incapable of dealing with matters of national security.

¹⁹⁰ Ibid Note 154

¹⁹¹ Ibid

¹⁹² Hannah Arendt (1976) *The origins of totalitarianism*. New York, Harcourt Brace & Co., 440 (hereafter cited as OT)

¹⁹³ Thomas Hobbes, *Leviathan* 176-79, 250 (J.C.A. Gaskin ed., Oxford Univ. Press 1996) (1651).

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

Moi had succeeded in systematically and effectively rendering the judiciary impotent.¹⁹⁴ Beginning in the early 1990s, demands and struggles for constitutional reform spread throughout the country.¹⁹⁵ This followed a string of rights violations by the executive and the judiciary provided no refuge for those whose rights had been violated. The high court passed on its jurisdiction to enforce rights. This was in the case of Kamau Kuria V. AG¹⁹⁶ and the subsequently case of Maina Mbacha citing the absence of procedural rules.¹⁹⁷ Simpsons CJ upheld the power of detaining authority to decide the duration of such detention until service of a Detention Order.¹⁹⁸ He discharged the executive from liability in the violation of rights.¹⁹⁹

These cases marked a departure from the historical role of the judiciary.²⁰⁰ As a guardian of the constitution, the judiciary was destined to controversy²⁰¹ but the judiciary in Kenya was no longer the guardian of the constitution and therefore far removed from controversy.

Consequently, popular pressures for change exerted by pro-reform forces came from within and outside the country. This pressure also came from IMF and World Bank that imposed political and economic conditionalities to the grant of aid.²⁰² The political conditionalities related to respect for human rights, multiparty, accountability and transparency in governance.²⁰³ The

¹⁹⁴ G.B.M Kariuki, 'The 23rd Biennial Conference of the International Bar Association', in the Nairobi Law monthly, 29, 1991 pp. 25-7

¹⁹⁵ Ibid

¹⁹⁶ Ibid

¹⁹⁷ Ibid

¹⁹⁸ R v Commissioner of Prisons ex-parte Kamonye and Others the Nairobi Law Monthly, April/May 1991, p. 16

¹⁹⁹ Ibid

²⁰⁰ Raila Odinga v. Attorney General (1988) 10 Nairobi Law Monthly 31

²⁰¹ Ibid Note 183

²⁰² Swamy, Gurushri; DEC; Swamy, Gurushri*DEC. 1994. Structural adjustment in the 1980s available at <http://documents.worldbank.org/curated/en/771151468774952469/Structural-adjustment-in-the-1980s-Kenya>

²⁰³ Ibid

international and domestic pressure forced ruling party to act. In 1990, amendment No. 2 restored tenure of judges. Section 2A was repealed to allow for multiparty politics vide amendment No. 12. As the norm would have it, these positive changes were just short-lived. The regime continued to compromise the prosecution and the judiciary. For instance Mwakenya, a political movement that was perceived as a threat by the government.²⁰⁴ Had its members treated unfairly. They were prosecuted, convicted and sentenced by the DPP Bernard Chunga and the judiciary outside official working hours.²⁰⁵

The judiciary denied bail to suspects even though it was a right guaranteed by the constitution. Suspects stayed in the cells for long periods even up to six months.²⁰⁶ Appeals were futile because the appellate judges always ruled in favour of the prosecution.²⁰⁷ Gitobu Imanyara, a lawyer found himself in detention when he won a case against a banning order in Kenya.²⁰⁸ He was arrested severally and denied bail, even though he was sick and was released after three months due to international pressure.²⁰⁹ Other lawyers who faced detention without trial included Willy Mutunga, John Khaminwa, Mohammed Ibrahim and Gibson Kamau Kuria.²¹⁰ They faced charges of treason and sedition and pressure placed on their clients to withdraw instructions.²¹¹

Conclusively, parliament and judiciary served to rubber stamp the executive's policies. British judges continued to serve on the Kenyan bench and were more susceptible to manipulation given their contractual basis of employment whose renewal depended on Moi's discretion. Judge

²⁰⁴ Ibid Note 166

²⁰⁵ Ibid

²⁰⁶ Lucy Hannan, *Sedition by Edition*, in *Africa Report* (New York), 36, 3, May-June 1991, p. 49

²⁰⁷ Ibid

²⁰⁸ Ibid

²⁰⁹ The New York Times, 5 May 1991, Imanyara's poor health presented a difficult problem for senior government officials who control the judiciary and in effect decided to grant bail.

²¹⁰ Stanley D Ross Ibid note 6 at page 435.

²¹¹ Ibid

Eugene Contan contended that pressure from the government was common in cases that the president had a direct interest.²¹² Two other expatriate judges, Justices Derek Schofield and Patrick O'Connor, resigned due to such undue influence in blatant contravention by the executive.²¹³

Judicial authority was just a fallacy, for instance when a US Marine was found guilty of murder, he was sentenced to pay Kshs. 500 and serve one year on probation.²¹⁴ When the issue of leniency in sentencing came up for discussion in parliament, the AG James B. Karugu criticized the judge and he lost his job for such criticism.²¹⁵ In 1987, a habeas corpus application was made before Justice Schofield in respect of Stephen Mbaraka Karanja who had been arrested earlier.²¹⁶ The Judge ordered the CID to produce him in court but CID informed the judge that Karanja died in a shoot-out while escaping legal custody and his body was buried in Eldoret at a public cemetery. The judge ordered for exhumation, but the police informed the judge that the body could not be found. That explanation was deemed insufficient leading to contempt of court proceedings. The Chief Justice, Miller CJ, informed Justice Schofield of the president's interest in the matter and that his insistence that his orders must be complied with would jeopardize the renewal of his employment contract.²¹⁷ When Justice Schofield insisted on proceeding with the hearing on contempt, the file was taken before another judge prompting Justice Schofield to resign from the judiciary.

²¹² Ibid

²¹³ Ibid

²¹⁴ Maina, W., "Constitutional Crisis I Kenya: An Inquiry into the Origins, Nature and Prospects of Reform", Paper Presented to the IPAR Project on Constitution-Making in Kenya, November/December 1996, p. 67

²¹⁵ Ibid

²¹⁶ Mumbi Ngugi, "A Matter of Moral Courage: A Chat with Chief Justice Schofield" (2004) 68 The Law-yer p.11.

²¹⁷ Ibid

Judicial conduct of political cases faced constant interference in the late 1990s.²¹⁸ Executive overreach and predatory tendencies upon the other arms remained common place.²¹⁹ Control over the judiciary was open and apparent. In October 1991, foreign governments; UK, US, Denmark and the World Bank, reviewed aid assistance to Moi's government downwards.²²⁰ The issues at stake included, the independence of the judiciary and a multi-party system.²²¹ The donor pressured the executive to reform its political and economic policies, observe its respect for human rights, failure to which drastic measures would be taken.²²² Traditional international legal theory elevates sovereignty above human rights.²²³ However, the justification for the existence of government is the protection of human rights.²²⁴ Citizens lay down their arms and delegate power to the government in a moral sense to ensure the security necessary for the realistic successful social cooperation.²²⁵ Sovereignty has no moral legitimacy if unjustly exercised. This discourse is what informed the pressure from donor states but the internal and external pressures proved insufficient to force Moi to restore respect for the rule of law. Human rights abuses, detention without trial and political assassinations were the means of dealing with perceived security threats in Kenya. The security and survival of Moi and his executive prevailed above all else.

During this period, a terror attack shook Kenya to the core in 1998, August 7, when the US Embassy in Kenya and Tanzania were bombed simultaneously. The attack in Nairobi claimed

²¹⁸ Ibid

²¹⁹ International Commission of Jurists, *Democratization and the Rule of Law In Kenya* 11 (1997)

²²⁰ Jane Perlez, 'Kenya Leader Ousts Aide tied of Killing', in the New York Times, 21 October 1991.

²²¹ Ibid

²²² Ibid

²²³ Ibid

²²⁴ F.R Tenson, 'International Obligation and the Theory of hypothetical Consent,' *Yale Journal of International Law* (New Haven, CT), 15, 1990, p. 114.

²²⁵ Ibid

214 lives and more than 4,000 others were injured in the explosion.²²⁶ This attack had many firsts; for the very first time President Moi committed to pursue the terrorists and bring the masterminds of the attack to justice.²²⁷ The judiciary for the first time played its adjudication role to punish the perpetrators. The judiciary in this case was not the Kenyan judiciary, but the American Judiciary in New York. Those who were arrested for conspiring in these attacks were rendition to the US to face trial. Four defendants were tried and sentenced to life imprisonment in May of 2001.²²⁸

This attack signified a major security threat to Kenya; the presence of al-Qaeda cells within the Kenyan border. At the same time the discourse largely portrayed Kenya as a victim, a peace loving nation that did not harbour terrorists. Evidence however unveiled during the trial in New York revealed that weak immigration and security laws had allowed terror networks to take root in Kenya.²²⁹ Recruitment agents from Somalia, Pakistan, and the Comoro Islands had assimilated themselves and were gradually recruiting Kenyans at the Coastal region.²³⁰ The executive however did not make any efforts to initiate a broader national counter terrorism strategy. The executive also failed to work with its allies in formulating programs to counter terrorism.

²²⁶ Ibid

²²⁷ Agence France Presse, "Kenya has Clues to Bombing: Moi" 9 August 1998. Available on the internet at: <http://global.factiva.com/ha/default.aspx>

²²⁸ Iriana Zill, The U.S. Embassy Bombing Trial – A Summary in the Frontline available at <http://www.pbs.org/wgbh/pages/frontline/shows/binladen/bombings/bombings.html>

²²⁹ Ibid

²³⁰ Ibid

2.3 Terrorism and national Security in the Kibaki Regime from 2002 to 2006

From the onset, president Kibaki sought to be guided by the rule of law and not through individual directives.²³¹ The president cautioned the judges to get in line with the new administration or go home.²³² Notably the deniability of terrorism as a security threat, had waned and terrorism was commonplace in Kenya. In 2002, November 28, Paradise Hotel in Kikambala, owned by an Israeli was attacked and 12 Kenyans and 3 Israelis were killed in the attack while a dozen others were wounded.²³³ Missiles were fired at Israeli airplane in Mombasa airport but missed.²³⁴ A militant group in Palestine claimed responsibility for the attacks perpetrated as revenge against the decision by the UN to partition Palestine in November 29, 1947.²³⁵

For the first time in Kenya, four persons were arrested and arraigned in court charged with several counts of murder following the Kikambala attack.²³⁶ It is worthy to note that at this time, Kenya did not have a specific legislation on terrorism and therefore relied on the Penal Code to adjudicate the crimes committed during the attack. Four persons were charged before the High Court at Nairobi.²³⁷ As opposed to the convictions in the New York trial, the trial in Kenya ended with a dismal performance by the prosecution. The court dismissed the case after the prosecution failed to prove the same.²³⁸

As terrorism continued to take shape in Kenya, there was need to use the judiciary to punish the perpetrators given the relentless nature of terrorism. There was little option but to change the

²³¹ Njeru Rugene, The rule of law is what will guide us – Kibaki, Daily Nation of Tuesday November 19 2002 available at <https://www.nation.co.ke/news/1056-302544-lcaca7z/index.html>

²³² Ibid

²³³ Ibid

²³⁴ Ibid

²³⁵ Ibid

²³⁶ Criminal Case 91 of 2003 [2005] eKLR

²³⁷ Ibid

²³⁸ Ibid

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

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

CHAPTER THREE

INSTITUTIONAL DISCOURSES AND REALITIES IN THE WAR AGAINST TERROR

3.0 Introduction

“As guardians of the constitution, the court was destined for controversy.”²³⁹ John Hart Ely

For Thomas Hobbes, the core reason for the establishment of Leviathan is the assurance of security.²⁴⁰ This is consequent to the Leviathan’s establishment of monopoly over the instruments of violence.²⁴¹ This leads to societal surrender of its rights to self-defense, through a social contract thus engendering security.²⁴² Embodied in this perspective, Weber adds the variable of legitimacy over the deployment of violence by the state.²⁴³ Accordingly, the state has to ensure and sustain its capacity to effect monopoly.

Hobbes construction leads us to discern discourses and realities of institutional roles and behavior in the context of the war on terror. The broad assumption here is that the Leviathan embodied by the sovereign, assumes the prerogative of power, where security is what the sovereign says it is. This position is countered by Locke who advances limitations on the population and the government.²⁴⁴ The Lockean prerogative, obligates the government to ensure societal security against all forms of violence, including its own. The implementation of this notion anchors government institutions of core equals, inherent in the notion of separation of power among; the legislature, the judiciary and the executive.²⁴⁵ As a core branch, while the

²³⁹ Ibid Note 176

²⁴⁰ Hobbes, T., Tuck, R., Geuss, R., & Skinner, Q. (1996). Hobbes: "Leviathan". Cambridge: Cambridge University Press, pp. 88-89.

²⁴¹ Ibid

²⁴² Ibid

²⁴³ Ibid Note 117

²⁴⁴ Ibid Note 91

²⁴⁵ Ibid

judiciary may not have the original functions of assuring security, its role function of adjudicating actions of the other two branches, then automatically bestows on it, roles in matters of security. Lord Acton affirms this notion in his contention that absolute power corrupts absolutely.²⁴⁶ In its discourse of power, the judiciary seeks to check the executive action through judicial review and by inference ensure Locke's prerogative of power and security within the ambit of the law. Hannah Arendt affirms this view in her conception of the functionality of power in its non-violent strength.²⁴⁷ Here, power is tempered by the notion of checks and balances to mediate against abuse. This should happen when terrorism is conceived as an offence punishable within the rubrics of the law and this is the discourse of the judiciary.²⁴⁸ The reality is however underpinned by counter accusations from other branches of government.

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

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

²⁴⁶ Lord Acton, "power tends to corrupt and absolute power corrupts absolutely" (1887) available at <https://oll.libertyfund.org/quotes/214>

²⁴⁷ Hannah Arendt, *On Violence*, New York: Harcourt, Brace, Jovanovitch, 1970. p. 35

²⁴⁸ *Ibid* Note 7

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

3.1 The Politics of Security and the War on Terror.

Buzan conceives the state as made up of institutions, the idea of the state and the physical base.²⁴⁹ Securitization is anchored on the protection of the physical base and the institutions.²⁵⁰ The protection of the physical base and institutions in Kenya was necessitated following an increase in the number and intensity of terror attacks during the period under study. At least 440 terrorist attacks occurred, in several parts of the country.²⁵¹ The escalation of terrorist activities spiraled following the deployment of the KDF to Somalia in October 2011 to suppress the Al-shabab terror network.²⁵² Buzan posits that the physical base is the most important component whose survival forms the basis of security.²⁵³ The threat of terrorism led to public desperation and outcry putting pressure on the executive government to act and reign in terror. The pressure also emanated from the international arena when western embassies issued travel advisories

²⁴⁹ Barry Buzan, *People, State and fear: The National security Problem in International Relations*. London Sussex Reinner Publishers 1998.

²⁵⁰ Ibid

²⁵¹ The Bureau of Counterterrorism and Countering Violent Extremism, [Country Reports on Terrorism 2016](#), US DOS Publication June 2, 2016

²⁵² Report of KNCHR investigations on Operation Usalama Watch July 2014 available at <https://www.knchr.org/Portals/0/CivilAndPoliticalReports/Report%20of%20KNCHR%20investigations%20on%20>

²⁵³ Ibid Note 249

giving details of perceived terror risks for visiting Kenya.²⁵⁴ In 2015 when the then president of the US was planning to visit Kenya, CNN reported that president Obama was heading to the hotbed of terror.²⁵⁵

Travel advisories sought to provide security to travelers against the high threat from terrorism in Kenya. Travel advisories portrayed Kenya as dangerous and that portrayal carried a negative effect on the country. Tourism is one sector that was negatively affected by travel advisories.²⁵⁶ According to Ole Waever, a security problem is what the elites declare it to be,²⁵⁷ the elites in this case is was the executive since the idea of terrorists taking up arms within the state is tantamount to usurping executive power, paving way for the executive's response. Barry Buzan's conceptualization of political threats as a constant concern for the state manifests in the executive's response to such threats.²⁵⁸ Buzan posits that political security is interlinked with societal security and manifest in the form of attacks on the nation itself arising from foreign alternative.²⁵⁹ The executive initiated a raft of measures intended to contain the threat of terrorism including the seclusion of refugees and police operations whose legality was adjudicated upon by the judiciary as discussed below.

²⁵⁴ USA, UK, and Germany are some the allies that issued travel advisory. The daily nation Newspaper, (Thursday, June 26, 2003)

²⁵⁵ Ibid

²⁵⁶ Kenya mostly relies on international tourists and projections put Kenya's direct GDP contribution from tourism in 2007, a drop in 2008, a slight increase in 2009 and then a continued drop in the following years due to continuing political risks and insecurity linked to terrorism. According to World Bank publication, Kenya's Tourism: Polishing the Gem, available at http://siteresources.worldbank.org/KENYAEXTN/Resources/Tourism_Report-ESW_Kenya_Final_May_2010.pdf

²⁵⁷ Ole Waever, "Securitization and Desecuritization", On Security, Ed by Ronnie Lipschutz, New York, Columbia University Press, 1998, p. 6.

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

²⁵⁹ Ibid

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

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

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

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

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

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

²⁶² Ibid

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

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

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

²⁶⁶ Usalama in English means Security launched on April 5, 2014

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

²⁶⁸ Ibid

²⁶⁹ Ibid

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

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

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

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

²⁷¹ Ibid

²⁷² Ibid

²⁷³ Reported by [Noel Omukubi](http://jamhurimagazine.com/index.php/kenya/4676-operation-usalama-watch.html) in the Jamhuri Magazine available at <http://jamhurimagazine.com/index.php/kenya/4676-operation-usalama-watch.html>

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

²⁷⁵ Report of KNCHR Investigations on Operation Usalama Watch July 2014

²⁷⁶ Ibid

²⁷⁷ Ibid

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

The executive's directive and the mode of conduct of the operation roped in the judicial role function of adjudication through a case challenging their legality. The RCK and a Congolese national registered as a refugee in Kenya filed the case on behalf of 48 minors separated from their parents during the operation.²⁷⁹ Petitioners informed the court of the arrest of the parents of children, their detention, and forceful transfer to Daadab Refugee Camp without their children.²⁸⁰ The AG argued that the directive and the Gazette Notice were legal purposed on streamlining refugee management and emerging security challenges.²⁸¹ The judge ruled in favour of the refugees and ordered a reunion of the refugees with their children. The judge found sufficient evidence to show that the executive's directive infringed upon the rights of the children to parental care as well as education.²⁸²

²⁷⁸ Ibid

²⁷⁹ Refugee Consortium of Kenya & another v AG & 2 others [2015] eKLR

²⁸⁰ Ibid

²⁸¹ Ibid

²⁸² Ibid

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

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

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

²⁸³ Ibid

²⁸⁴ Article 238(2)b of the Constitution.

²⁸⁵ Ibid Note 258

reconcile these separate identities, paved the way for a discourse on the possibility of a spillover of the insecurity from Somalia into the Kenyan territory with the influx of refugees. Such a discourse led to politics of discrimination and exclusion of Somali refugees as Buzan points out²⁸⁶ and as evidenced in the aftermath of *Usalama Watch*. The judicial role function debunked this discourse since in reality no evidence was availed to support the discourse.

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

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

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

²⁸⁶ Ibid

²⁸⁷ Human Rights Watch, *Insult to Injury; The 2014 Lamu and Tana River Attacks and Kenya's Abusive Response*, 2015.

²⁸⁸ Ibid p. 17

²⁸⁹ Ibid Note 287

²⁹⁰ Ibid

²⁹¹ Ibid

²⁹² Ibid

²⁹³ Ibid

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

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

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

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

²⁹⁵ Ibid

²⁹⁶ Ibid

²⁹⁷ Ibid

²⁹⁸ Ibid

²⁹⁹ Ibid

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

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

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

from impending threat of recurrent violence is an indication of executive failure. The contradiction by high-level executive officials on who was responsible for the attack is an indication of intelligence failure. This confusion impinged the capacity and ability of security agencies to holistically investigate the attacks³⁰³ because they just did not know who to investigate. Such failure is the reality the executive was not willing to publicly contend with.

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

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

³⁰³ Ibid

³⁰⁴ Ibid Note 287

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

³⁰⁶ Ibid

³⁰⁷ IPOA report, section 5.0.13.

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

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

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

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

³⁰⁸ Ibid Note 287

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

³¹⁰ Ibid

³¹¹ Ibid

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

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

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

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

³¹³ Ibid

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

³¹⁵ Ibid

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

³¹⁷ Ibid note 314

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

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

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

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

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

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

³²⁰ Kenya launched Operation Linda Nchi, Swahili for “protect the nation.” At the outset of the operation, Kenya’s objective, according to a government spokesman, was to dismantle the al Qaeda–affiliated Harakat al-Shabaab al-Mujahideen

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

³²² In 2013 al shabaab laid a [deadly siege](#) on the Westgate shopping mall and killed

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

³²⁴ Ibid

³²⁵ Bishop Julius Wanyoike, Anglican Church of Kenya, quoted in [Wachira Kigotho](#), Churches Accuse Muslim Scholars of ‘Inaction’ available at <https://www.universityworldnews.com/post.php?story=20150423163242805>

³²⁶ Ibid

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

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

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

³²⁷ Gazette Notice No. 2326 of 2015

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

³²⁹ Petition No. 19 of 2015 [2015] eKLR

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

An analysis of the responses by the executive government in response to the above terror attacks largely limited the judicial role function. The measures gleaned ambivalent and proved counterproductive. The measures threatened to undermined security, weakened civil liberties, threatened democratic principles, and undermined the constitution all in the name of combating terrorism. The failure to prefer charges on those arrested as provided for in Kenyan constitution³³¹ highlighted the reality that arrests do not necessarily materialize into criminal charges. The high profile arrests and the vigor with which the security organs conducted the arrests, outpaced the quantity and even the quality of the subsequent prosecution.

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

It is appreciated that the fight against terrorism requires of institutions to find and conquer an unspecified, and unidentified enemy.³³³ By its very nature, terrorism burgeon in anxiety, fear and uneasiness from actual attacks and the threat whose form and nature can only be imagined.³³⁴

While the impact of terror attacks is discerned from the reality of the aftermath, political

³³¹ Article 49 of the Kenyan Constitution 2010

³³² Ross J. Corbett , The Extraconstitutionality of Lockean Prerogative, *The Review of Politics* Vol. 68, No. 3 (Summer, 2006), pp. 428-448 [Cambridge University Press](https://doi.org/10.1017/S0034216506000000)

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

³³⁴ Ibid

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

3.2 Legal Factors in the Adjudication of Terrorism Cases

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

³³⁵ Ibid

³³⁶ Deputy President the Hon. William Samoei Ruto at a public conference on 06/05/2014 reported in the Jamaicaobserver Tuesday May 6, 2014 available at www.jamaicaobserver.com

³³⁷ The Preamble to the 2010 Kenyan Constitution.

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

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

3.2 (a) Adjudication of Terrorism Cases

The discourse advanced by the security organs in terrorism cases through the ODPP often impute emotional security consideration about the bad man that must kept away from the streets.³⁴⁰ This discourse tends to ignore the reality of presumptuous innocence in criminal justice.³⁴¹ This discourse also fails to inure with the constitutional provisions with regards to the right to a speedy trial as well as the right of bail for all arrested person regardless of the offence³⁴² and only compelling reasons may necessitate denial of bail or bond.

In reality, trial by installment starts with pre charge detention, plea taking, pre trial conference and the actual trial staggered over an inordinately long period of time. Security agents and the ODPP always apply for denial of bail or argue against the granting of bail in terror related cases without revealing compelling reasons for such denial. A case that aptly describes this dynamic was in Mombasa,³⁴³ where four people had been charged with terrorisms offences in two

³³⁹ [W. Bradley Wendel](https://doi.org/10.1002/9781444367072.wbiee207), Wiley Online Library, 2013 <https://doi.org/10.1002/9781444367072.wbiee207>

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

³⁴¹ Ibid

³⁴² Article 49(h) of the Kenyan Constitution 2010 Edition available at www.kenyalaw.org

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

cases.³⁴⁴ The trial Magistrate granted the accused persons bond despite opposition from the ODPP in the first case. The ODPP appealed and the High Court declined to cancel the bond granted by the Magistrate prompting the ODPP to file the second case against the same persons and the Magistrate again granted the accused persons bond. Further, the Magistrate ruled that the two cases amounted to double jeopardy as the offences in the two cases were similar and in respect of the same terror attacks of 27/03/15.³⁴⁵ It is this ruling by the Magistrate that sparked a tussle between the Judiciary and the ODPP. The latter went before the High Court again, seeking a review for purposes of satisfying the accuracy, legality or appropriateness of the ruling delivered by the Magistrate. Before the High Court,³⁴⁶ the ODPP sought to jealously guard her power to decide how to file the charges in court. The High Court however disagreed with the ODPP and upheld the ruling by the Magistrate. The Higher Court held that there was nothing illegal, improper or irregular or incorrect about a magistrate granting accused persons bond.³⁴⁷

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

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

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

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

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

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

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

desist from abusing the court process.³⁵⁰ In the end, two years lapsed with suspects in police custody with no trial due to institutional differentiation. Justice Chepkwony noted that the case demonstrated a tug of war between the ODPP and the courts.³⁵¹

The executive through its security organs have always advanced the discourse that terrorism offences are unique and should be treated differently. This discourse by the executive fails to answer whether courts can deny suspects bail when all offences are subject to the same constitutional provisions that allow the grant of bail for all suspects.³⁵² Compelling reasons must be disclosed to deny bail, which presents the challenge of how to enforce the rights of suspects without simultaneously exposing intelligence data. Intelligence data may contain compelling reasons to necessitate the denial of bail, however disclosing such information in an open court is likely to jeopardize the intelligence. The judiciary without such information perceives terror suspects like any other suspect in criminal cases and accords them their legal right. In reality, the ODPP may have compelling reasons to move the judiciary to detain a suspect however, greater risks lie in the disclosure of such information and that is what leads to differentiated actor discourses applying the same law.

This may find possible explanation in Locke's prerogative where the reality of intelligence held would explain the willingness of the security agents and the ODPP acknowledging the legitimacy of extralegal action, which discourses like innocent until proven guilty, would never allow. Reserving the prerogative to act even in disregard the law³⁵³ ensures that when push

³⁵⁰ As enshrined in Article 157(11) of the Constitution

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

³⁵² Article 49 of the Kenyan Constitution.

³⁵³ John Locke, Second Treatise of Government (Gutenberg eBook, 2005) available at <http://Gutenberg.org/files/7370/73/70-h/7370-h.ht>

comes to shove, the inherent executive authority can decline to open prison gates even when the courts says open.

Proposed legal amendments in 2014 fostered the judicial role function in the fight against terrorism. This was in response to two terror attacks; on 21st of November, Al-Shabaab assailants intercepted a bus en-route to Nairobi and on 1st of December in Mandera County, a quarry was attacked.³⁵⁴ Following the attacks, 64 people were killed on the basis on their religious inclinations.³⁵⁵

The executive hastily drafted amendments to the law that expanded the breadth and severity of the punishment in criminal offenses. The law imposed limit the rights of persons under arrest as well as those charged in court. Restrictions on the freedoms of expression and assembly were also imposed.³⁵⁶ The law sought to broaden the NIS Act by donating the powers of arrest, detention, and search and seize property upon mere suspicion, without a warrant.³⁵⁷ The law further sought to give the police discretionary power to do whatever was necessary to preserve national security.³⁵⁸ Further amendments enabled detention without charge of up to 90 days.³⁵⁹ Prosecution none disclosure of evidence to accused person was permitted.³⁶⁰ This law sealed the number of refugee influx in Kenya to only 150,000 restricted to designated camps.³⁶¹ The High Court however nullified provisions of the law to the extent of their unconstitutionality.³⁶²

³⁵⁴ Ibid

³⁵⁵ Ibid

³⁵⁶ Security Laws (Amendment) Bill, 2014 available at www.kenyalaw.org

³⁵⁷ Ibid

³⁵⁸ Ibid

³⁵⁹ Ibid note 356 as section 18

³⁶⁰ Ibid note 356 at section 19

³⁶¹ Ibid note 356 at section 58

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

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

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

Liberal societies define innate rights and freedoms necessary for communion, which is what terrorists aim at damaging.³⁶³ One would argue that the obsession with detention of terror suspects without a just cause does the same thing and it has clouded prosecutors' perspective in terrorism related cases. In his ruling at the High Court in Nyeri, Justice Makhandia affirmed that the reformed judiciary could not condone actions that trampled on fundamental rights of citizens. That such decisions erode the judicial legacy and citizens lose faith in the institution. That the application of the law secures the protection of fundamental rights and freedoms of all persons.³⁶⁴

This is the whole mark of the institutional friction between these institutions. The judiciary has however sought to debunk its supposed indifference to the threat posed by terrorism. In their landmark ruling, 5 judges expounded on the dangers of terrorism. They described terrorism as causing suffering and compromising national security. They took cognizance of the

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

³⁶⁴ HCCC No. 12 of 2006 Republic Vs Amos Karuga Karatu available at www.kenyalawreports.org

responsibility of the executive to respond to the threat however cautioned against derogation from human rights.³⁶⁵

Further Justice Emukule once sought to clarify that the judiciary had indeed taken judicial notice of the reality of terrorism and the actions of the designated terrorist groups.³⁶⁶ This was a public interest litigation where the judge sought to set the record straight with regards to judicial role function that is concerned with the law and nothing else. Therefore, the fight against terrorism must be conducted in compliance with the latter of the law and within the confines of the constitution; the rule of law, for the law was made for man and not man for law.³⁶⁷ This position accords with the sentiments of Reinhardt that the role of judges remains the same in war the same as in peace times.³⁶⁸

The judiciary in Kenya has asserted this reality of its role in the war against terrorism in the converse of whatever expectations may exist. The judiciary seeks to apply the law as it is and as it is, not as expected to suit the circumstances or the expectations of other institutions. It is not surprising that the Kenyan judiciary asserts itself in such a manner, because judiciaries around the world are essentially conservative institutions.³⁶⁹

³⁶⁵ Justices; Isaac Lenaola, Mumbi Ngugi, Hedwig Ong'udi, Hillary Chemitei and Joseph Louis Onguto in Petition NO.628 OF 2014

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

³⁶⁷ Ibid

³⁶⁸ Stephen Reinhardt, The Judicial Role in National Security Boston University Law Review [Vol. 86:1309 2006]

³⁶⁹ Ibid

CHAPTER FOUR

**THE IMPACT OF JUDICIAL INTERVENTION ON KENYA’S INTERNATIONAL
SECURITY RELATIONS**

4.0 Introduction

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

³⁷⁰ Carberry, Jacqueline Ann. “Terrorism: A Global Phenomenon Mandating a Unified International Response.” *Indiana Journal of Global Legal Studies*, vol. 6, no. 2, 1999, pp. 685–719. JSTOR, www.jstor.org/stable/20644713.

³⁷¹ *Ibid* Note 7

³⁷² *Ibid*

³⁷³ *Ibid*

³⁷⁴ Article 2 (a) of the Kenyan Constitution 2010

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

International security relations are closely related to international order where the concept of collective security applies. This is based on the principle that an attack on one state is an attack on all states.³⁷⁶ Richard Falk argued that state judiciaries are agents of international legal order.³⁷⁷ The centrality of the judicial role function in international security, underpins the rule of law and due process to collectively address international security concerns. This chapter recapitulates on this role, by responding to the question; how do judicial interventions determine and shape Kenya's state relations with other actors in the fight against terrorism? The chapter interrogates the impact of judicial decisions on Kenya's international security relations. The core argument of this chapter is that judicial adjudication of terrorism cases in Kenya is proactive through pronouncements that seek to bring all measures taken by the state within the ambit and operations of the law. To that end, this chapter is organized into three sections; the first section examines the impact of judicial adjudication of international renditions in the fight against terrorism. The second section analyzes judicial review in the enforcement of Kenya's international legal obligations and the last section examines how the judiciary mediates the

³⁷⁵ Tom Parker, "Rule of Law and Human Rights," in *Toward a Rule of Law Culture*, pp. 30–32, https://www.usip.org/sites/default/files/Toward-a-Rule-of-Law-Culture_Practical-Guide_0.pdf.

³⁷⁶ Article 51 of the UN Charter.

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

conduct of Kenya's international obligations that have an impact on international security relations.

4.1 Renditions and International Security Relations

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

Kenya's implementation of renditions was first acknowledged by the police spokesperson when he asserted that, rendition of terror suspects like any other criminals do not need to follow the

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

³⁷⁹ Ibid

³⁸⁰ Ibid

³⁸¹ Geoff Gilbert, Transnational Fugitive Offenders in International Law: Extradition and other Mechanisms 337 (1998)

³⁸² Ibid

³⁸³ Ibid

extradition procedure.³⁸⁴ Soon Kenyan security agents were conducting renditions under the auspices of the US counterterrorism strategy. This entailed reciprocated diplomatic comity and incentives in aid.³⁸⁵ Through this framework of cooperation, Kenya received security funding from the US to carry out such renditions³⁸⁶ and the CIA began an aggressive program of interrogating suspected terrorists in secret locations.³⁸⁷

One hundred and fifty people were arbitrarily detained in Kenya from December 2006 to February 2007.³⁸⁸ The detentions followed an operation orchestrated by the Kenyan government. Nearly one hundred people fleeing conflict in Somalia were rendition to Somalia and Ethiopia and Guantanamo Bay.³⁸⁹ This process was anchored by a counterterrorism discourse that framed them as suspects of terrorist activities. Prior to the renditions, those detained were said to have been denied access to legal representation, consular assistance and refugee status.³⁹⁰ In the end, some of the individuals were freed from custody and others were deported to their home countries. One hundred and twenty individuals were rendition to Somalia and Ethiopia without following the legal process.³⁹¹ No one knows where the rest were taken, they remain victims of forced disappearance.³⁹²

³⁸⁴ Prestholdt, Jeremy. "Kenya, the United States, and Counterterrorism." *Africa Today*, vol. 57, no. 4, 2011, pp. 3–27. JSTOR, www.jstor.org/stable/10.2979/africatoday.57.4.3. See also Fred Oluoch, Julius Barigaba, Mike Mande and Adam Ihucha, "Exchange of Crime Suspects Within Region 'Normal,' Say Police Chiefs," *AllAfrica.com*, October 11, 2010; allafrica.com/stories/2010101112

³⁸⁵ Ibid

³⁸⁶ United States Department of State, *The Anti-Terrorism Assistance Program: Report to Congress for Fiscal Year 2003*, at www.state.gov/documents/organization/35833.pdf.

³⁸⁷ Ibid

³⁸⁸ Ibid

³⁸⁹ Human Rights Watch, *Why Am I Still Here? The 2007 Horn of Africa Renditions and the Fate of those Still Missing*.

Available at www.hrw.org/report/2008/10/01/why-am-i-still-here/2007-horn-africa-renditions-and-fate-those-still-missing

³⁹⁰ Ibid

³⁹¹ Ibid

³⁹² Ibid

The reality anchored Kenya's cooperation in the detention and rendition of suspects to Somalia, Ethiopia and Guantánamo Bay. This was in violation of a wide range of international obligations including, non-refoulement, forced disappearances, and the right to consular assistance and due process. In participating in these illegalities, the government undermined its credibility among communities whose cooperation it needed in the fights against terrorism. The government also undermined its foreign policy and international legal norms given the torture of suspects in custody. It surrendered the high moral ground and was instead accused of persecuting Muslims.³⁹³ This in turn served as a basis for mobilization and radicalization by people like Makaburi in many parts of the Kenyan Coast.

Eleven people; eight Kenyans and three Tanzanians arrested by Kenyan authorities and detained beyond the legal limit, and renditioned without due process sued the government of Kenya.³⁹⁴ The Court found the Kenyan state liable in violating their rights. The court relied on the provisions of UNSC Resolution 1456.³⁹⁵ The resolution obligates states to comply with international law in all measures taken to combat terrorism. The Judge observed that national security considerations did not preclude the requirement for due process in the transfer of suspects. That the right against subjection of torture was non derogable.³⁹⁶ The judge termed the actions by the state to be callous and awarded the respondents damages ranging from Kshs. 2,000,000.00 to Kshs. 4,000,000.00.³⁹⁷

³⁹³ Ibid

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

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

³⁹⁶ Ibid Note 394 p. 29

³⁹⁷ Ibid Page 30

The judgment demonstrated the inclination of the Kenyan judiciary to oblige the executive to account for its misgivings in its conduct of national security and counterterrorism. This decision effectively shaped Kenya's international security relations with Somalia, Ethiopia and Tanzania by entrenching the critical role of the judiciary in judicial review of executive decision in the fight against international terrorism. The Kenyan government was ordered to compensate foreign national from Tanzania reinforcing the ability of the courts to permeate and regulate the behavior of the executive beyond the national borders into the realm of foreign relations.³⁹⁸ The judiciary defined the content and evolution of both democracy and human rights in this case that may have impinged upon the conduct of foreign relations.³⁹⁹

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

Following the same attack, Mohammed Adan Abdow was arrested on 21/07/2010, transferred and handed over to the Ugandan authorities on 27/07/2010. Mohamed Hamid Suleiman was arrested on 13/08/2010 and handed over to the Ugandan authorities on 14/08/2010 while Yahya

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

³⁹⁹ *Ibid* Note 394

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

⁴⁰¹ *Ibid*, Justice A.O Muchelule Ruling delivered on September 30, 2010.

Suleiman Mbuthia was arrested on 25/08/2010 and handed over to the Ugandan authorities on 26/08/2010. While in Uganda, the three suspects were interrogated by American, Kenyan and Ugandan security agents about their involvement in the Kampala bombings before being taken to Nakawa Magistrates Court. On 30/11/2010, they were committed to stand trial for offences relating to the Kampala bombings. The court remanded them to Luzira Upper Prison in Kampala pending trial. They were subsequently tried by the High Court of Uganda, International Crimes Division.⁴⁰² During the trial, Abdow was discharged after the DPP entered a *nolle prosequi*. Suleiman and Mbuthia were both acquitted following the judgment delivered by the court.⁴⁰³

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

The rendition of Mohamed Aktar Kana was stopped by the court before he could be taken to Uganda for trial. The judge rebuked the security agents' tenacity to trivialize renditions based on an agreement by the East African states to transfer suspects within the region. The judge held that violation of the fundamental rights of individual could not be based on bilateral agreements. Such behavior was perceived by the judiciary to have serious ramification on Kenya emanating

⁴⁰² (Criminal Session Case No. 0001 of 2010).

⁴⁰³ Ibid

⁴⁰⁴ Petition No. 96 of 2011 eKLR

⁴⁰⁵ Ibid

from the executive's willingness to breach with remarkable arrogance or ignorance, entrenching the judicial role function as the protector of the rights and obligations of all parties involved.⁴⁰⁶

The practice of renditions highlights the laxity of extradition laws peculiar to the fight against terrorism. The legal constraints envisaged in international treaties have failed to consider the uniqueness of the crime of terrorism. Renditions therefore offer escapism from scrutiny by judiciaries and civil society organizations within states. The forced interstate transfer of individual suspects casts international legal norms in bad light. Even with the threat of terrorism, the judiciary in Kenya has entrenched the respect for the rule of law, which must be obeyed.

4.2 The Political Economy of Judicial Enforcement of International Obligations.

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

The status of refugees in Kenya has been threatened twice, by executive directives, based on a discourse of preservation of national security. In 2011, Somalis sought refugee status in Kenya to escape conflict in their homeland. Kenya granted them refugee status in designated Daadab and

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

Kakuma Refugee camps as host.⁴⁰⁷ However, DRA announced the closure of refugee reception and registration centers.⁴⁰⁸

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

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

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

⁴⁰⁸ Kituo Cha Sheria & 8 others v AG [2013] eKLR

⁴⁰⁹ Ibid

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

⁴¹¹ Kituo Cha Sheria & 8 others v Attorney General [2013] eKLR

Three years after, the executive purported to stop the hosting refugees in Kenya through a directive based reasons of security considerations.⁴¹² The directive was to the effect that Kakuma and Daabad refugee camps would be closed.⁴¹³ Underpinning this decision was the discourse that sought to link terrorism to the two refugee camps. The executive contended that the camps were havens for Al Shabaab, contraband trade and proliferation of illegal weapons.⁴¹⁴ That the threat of global terrorism, and niche terror tactics could not be overlooked given the executive's primary duty to ensure security.⁴¹⁵

The executive further argued that the Garissa University was organized at Daadab refugee camp as well as the Westgate Mall attack in Nairobi in September 2013.⁴¹⁶ The Kenyan Government went ahead to launch the timeline of the repatriation plan.⁴¹⁷ What the executive declined to consider, was the looming crisis that would face refugees when sent back to Somalia. Given the insecurity in Somalia, refugee risked persecution while Kenya risked violating its obligations under international law.

The decision by the executive was challenged before the High Court. KNCHR and Kituo Cha Sheria moved the High Court to contest the directive.⁴¹⁸ The condemnation of refugees from Somalia as terrorists was contended to be discriminatory, especially with regards to individual culpability in criminal cases. Further, the decision to close registration centers failed to consider

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

⁴¹³ Ibid

⁴¹⁴ Press statement on May 11, Interior Minister Joseph Nkaisserry.

⁴¹⁵ Ibid

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

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

⁴¹⁸ Gazette Notice No. 46 dated May 10, 2016.

the asylum seekers who would be denied access in contravention of international obligations. During trial, the executive's defense was premised on the argument that the refugee camps were overcrowded, terror attacks were on the rise and there were huge economic costs that the Kenyan government was straining to meet. The executive further contended an increase in human trafficking, proliferation of arms within the camps, which had all strained government resources and exacerbated insecurity in Kenya.

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

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

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

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

⁴²¹ Ibid

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

In effect, the judiciary acted against the executive's unilateral decisions, shaping Kenya's international security relations in line with the prevailing international legal framework. Richard Falk advocated the relevance of international law in an effort to liberate the discipline from a sense of its own futility.⁴²³ The actions by the judiciary in Kenya, in making international legal rules and procedures more visible and effective are indicative that Falk's task appears to have been accomplished. International organizations like the UN cannot accomplish everything and that is why domestic courts represent a significant repository in enforcement of states' compliance with international law. Just like judges study the theory of politics and the political theorists inquire into the substance of the law, the judiciary and the executive must complement one another.

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

⁴²³ Ibid Note 377.

complementing the actions of the other while at the same time considering the predicated responses by the other in matters of security.⁴²⁴

FISA in the US established a court whose purview entailed integration of the legality of executive's applications to intelligence from external threats to security.⁴²⁵ The court is composed of judges drawn from among federal trial judges whose only mandate is to hear from the government in closed proceedings and their decisions are classified.⁴²⁶ In Kenya, FISA is similar to cases where investigating officers seek search warrants from the courts in *ex parte* proceedings during criminal investigations. Once the court grants the orders, the officers are able to obtain information from phone records, bank accounts and even seize suspected items without notice to the targets of such investigations even after the investigations are complete. Court orders are granted for narrow purposes based on factual basis of suspicion to mitigate concerns of executive excesses and at the same time maintain judicial checks on executive action to avoid jeopardizing the stricter standards that apply in resultant criminal cases. An equivalent of FISA is required in Kenya to buttress the judicial role function in matters of security to aid the executive decision making in line with the legal framework.

4.3 Judicial Purge of Foreign Terrorists

A democracy guided by law, prosecutes terrorists as the means to achieve open deterrence against the threat.⁴²⁷ Foreign terrorists constitute a major threat to international peace and

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

⁴²⁵ Ibid

⁴²⁶ Elizabeth Goitein and Faiza Patel, What Went Wrong With the FISA Court, Brennan Center for Justice at New York University School of Law, 2015 available at https://www.brennancenter.org/sites/default/files/analysis/What_Went_%20Wrong_With_The_FISA_Court.pdf

⁴²⁷ Leah West, The Problem of "Relevance": Intelligence to Evidence Lessons from UK Terrorism Prosecutions. available at <http://themanitobalawjournal.com/wp->

security.⁴²⁸ UNSC resolution 2178 was adopted in response to the increasing number of foreign terrorists.⁴²⁹ This resolution required UN member states to implement criminal justice measures to effectively prevent, deter and criminalize the travel of foreign terrorists and their related activities.⁴³⁰ In Kenya, several foreigners have been convicted of terrorism related offences and sentenced accordingly.

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

A diplomatic and security dilemma started to unfold in Kenya when intelligence cycles described the two Iranians as members of Iran's secretive Quds corps tasked to revenge the killing of the

content/uploads/articles/MLJ_41.4/The%20Problem%20of%20Relevance%20Intelligence%20to%20Evidence%20Lessons%20from%20UK%20Terrorism%20Prosecutions.pdf

⁴²⁸ Ibid

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

⁴³⁰ Ibid

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

⁴³² Ibid

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

⁴³⁴ Ibid

country's nuclear scientists by Israel.⁴³⁵ Their arrest came a month after the executive in Kenya had signed a memorandum of understanding with Iran, to import 80,000 tonnes of crude oil.⁴³⁶ The arrest enmeshed Kenya between the political and security interests of three countries at war with each other; Iran, Israel and its ally US leading to the cancelation of the oil deal to avert US financial sanctions against Kenya for trading with Iran.⁴³⁷

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

⁴³⁵ John Kamau, How Kenya is Caught up in Delicate Iran and Israel Drama, <https://www.nation.co.ke/news/How-Kenya-is-caught-up-in-fragile-Iran--Israel-drama/1056-4729286-10fjji8/index.html>

⁴³⁶ Ibid

⁴³⁷ Ibid

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

⁴³⁹ H.C.CR.A. Nos. 106 and 107 of 2013)

⁴⁴⁰ Ibid Note 435

⁴⁴¹ Ibid

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

⁴⁴³ https://www.the-star.co.ke/news/2016/12/02/two-iranians-charged-after-taking-videos-of-israeli-embassy_c1466119

counterparts managed to settle the case through a negotiated settlement.⁴⁴⁴ The charges were subsequently dropped and the lawyers were deported to Iran.⁴⁴⁵

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

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

⁴⁴⁴ Ibid

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

⁴⁴⁶ CR App No. 135 OF 2016 Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR

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

⁴⁴⁸ Ibid

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

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

Abdul Harun Karim, a Tanzania citizen was arrested on May 9, 2016 in Lamu at Kiwayu Island as he was filming a video titled suicide bomber. Investigators informed the court that Karim was arrested in possession of explosives while en-route to Somalia, where he was going to be trained as a terrorist. Karim failed to proffer a defense in the matter and he faced the judicial purge with a prison sentence of 110 years.⁴⁵¹

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

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

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

CHAPTER FIVE

SUMMARY RECAPITULATION, CONCLUSION AND RECOMMENDATION

5.0 Introduction

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

5.1 Differentiated Actor Discourses and Realities in the War against Terror

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

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

confinement of refugees to camps and operation *Usalama Watch*, were ostensibly geared towards assurance of security.⁴⁵² In reality however, the responses resulted in human rights violations. They were challenged before the judiciary and deemed to be in contravention of the rights of refugees.⁴⁵³

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

This study also looked at the response to the Garissa University terror attack and the religious discourses that underpinned a gazette notice by the executive that declared some organizations to be linked to terrorism.⁴⁵⁷ The judicial findings revealed that in fact there was no evidence linking the organizations to terrorism and such executive administrative action was declared *ultra vires*.⁴⁵⁸

⁴⁵² IPOA, Report on Operation Sanitization Eastleigh Publically Known as “Usalama Watch” dated 14th July 2014 p. 7

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

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

⁴⁵⁵ IPOA report on Mpeketoni attack, September 2014

⁴⁵⁶ Human Rights Watch, Insult to Injury; the 2014 Lamu and Tana River Attacks and Kenya’s Abusive Response, Human Rights Watch 2015

⁴⁵⁷ Gazette Notice No. 2326 of 2015

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

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

The discourse of misplaced sympathies in the judicial role function analyzed the failed attempt by the executive to conjure up the judiciary into submissions. Blaming the judiciary for sympathizing with terrorism was revealed to be against the judiciary's stickler sense of law. Evidence available revealed that the judiciary only seeks to observe human rights of terror suspects and does not in fact sympathize with such suspects.⁴⁶¹

5.1 (b) Judicial Mediation of Kenya's International Security Relation

In the second objective, this study examined the impact of judicial adjudication of terrorism cases on Kenya's international security relations. The core argument is that judicial intervention in the war against terror is proactive through pronouncements that seek to bring all measures taken by the state within the ambit and operation of the law. To achieve this objective, the study analyzed executive's conduct of renditions where the judicial role function faulted such conduct for violating the rights of individuals arrested, renditioned and detained in foreign states.

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

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

⁴⁶¹ High CR Case No. 12 of 2006 Republic Vs Amos Karuga Karatu available at www.kenyalawreports.org

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

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

The study also looked at the political economy of judicial enforcement of international legal obligations. The executive directed the closure of Refugee camps in Kakuma and Daadab based on a discourse of national security since the camps were believed to be terrorist havens.⁴⁶⁵ The judicial role function halted such closure since its implementation would jeopardize the country's

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

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

⁴⁶⁴ Ibid

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

legal obligations internationally.⁴⁶⁶ The directive to close refugee registration centers was also stopped by the judiciary on the same reasoning.⁴⁶⁷

The judicial role function also saw the conviction of foreign suspects of terror related charges. Two Iranians Ahmad Abolfathi Mohammed and Sayed Mansour Mousav arrested in possession of 15kg (33 pounds) of the powerful explosive RDX, which they allegedly planned to use in a terror attack in Nairobi and Mombasa⁴⁶⁸ faced the purge and are currently serving jail term in Kamiti Maximum Prison.⁴⁶⁹

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

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

⁴⁶⁶ Ibid Note 432

⁴⁶⁷ Ibid

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

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

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

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

5.2 Recapitulation of the Hypothesis

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

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

In the second hypothesis: the reported cases cited in the study saw the judiciary correct all the wrongs done by the security agents. Daabab and Kakuma camps are still in place because the judiciary over turned the executive's decisions to close them. Refugee registration centers are open because the judiciary over turned the executive's decision to close them. Refugees in Kenya have the right of movement around the country because the judiciary over turned the executive's decision to contain refugees in refugee camps. The discourse by the judiciary

⁴⁷²Ibid Note 268

remained that terrorism is just a crime like any other and must be dealt with in a fair trial. The cases where suspects were granted bail, cases where suspects were acquitted and convicted all followed a trend of fair trial. The end result was the executive and the judiciary at cross roads but nevertheless brought normally and legality into the fight against terrorism.

5.3 Conclusion

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

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

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

5.4 Policy Recommendations

Firstly, this study has shown that Kenya security agencies subvert the rule of law by conducting arbitrary covert operations against those suspected to be associated with terror attacks.⁴⁷⁴ This strategy feeds into the terrorist discourse that aims at subverting the rule of law and instill change through violence and fear. Terrorists employ violence to terrorize people as legitimate forms of political action.⁴⁷⁵ When security agents arrest people arbitrarily, detain people for long periods without charge, invade homes and confiscate property, engage in forced disappearances and seek bribes,⁴⁷⁶ are actions, a replica to the terrorists playbook. The net effect is the failure to differentiate the terrorist and the police in uniform. Such a strategy has failed to achieve the desired results instead breeding more terrorist sympathies, an agent for recruitment. The judiciary in Kenya has entrenched the rule of law in the fight against terrorism and there is need to further empower it to continue and all other institutions to follow suit.

⁴⁷³ UN Global Counter-Terrorism Strategy (General Assembly resolution 60/288, annex)

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

⁴⁷⁵ United States of America, National Strategy for Combating Terrorism, February 2003, available at https://www.cia.gov/news-information/cia-the-war-on-terrorism/Counter_Terrorism_Strategy.pdf

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

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

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

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

⁴⁷⁷ Ibid Note 448

The guidelines developed by the Global Terrorism Forum (GCTF) on good practices in the adjudication of terrorism cases⁴⁷⁸ as well as those developed by the International Institute for Justice and the Rule of Law (IIJRL)⁴⁷⁹ should be domesticated to improve the trial process of terrorism cases. The former advocates for an independent judiciary that fairly and expeditiously adjudicates terrorism cases as an effective deterrent to terrorism.⁴⁸⁰ Such a mechanism minimizes the risk of violations of fundamental human rights.⁴⁸¹ The guidelines point to the danger of trial by installments that leads to protracted processes that does not yield the desired results instead only breeds resentment against the government from the accused persons as well as the victims of the attacks.⁴⁸² The Garissa university attack took place in 2013 and the trial started the same year and ended in 2019. The victims of that attack had to wait for 6 years to get justice. This was delayed justice, which translates into denied justice. Continuous trial of cases ensures expedition where victims get their justice at the earliest opportunity.

IIJRL guidelines recommend the use of pre-trial alternatives for terrorism suspects.⁴⁸³ These alternatives include the expanded use of inchoate offenses or holding charges that allows for detention of suspects and prevents their travel or commission of terrorism acts.⁴⁸⁴ Such charges can ensure the detention of suspects without the need to seek detention orders from the court

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

⁴⁷⁹ The International Institute for Justice and the Rule of Law, Good Practices for the Judiciary in Adjudicating Terrorism Offenses in the Horn of Africa Region; Judicial Guidelines available at https://theij.org/wp-content/uploads/Judicial-Guidelines-on-Good-Practices-for-the-Adjudication-of-Terrorism-Offences_High-Res-1-1-2.pdf

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

⁴⁸¹ Ibid

⁴⁸² Ibid

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

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

where there are no charges. The adoption of these guidelines would enhance the judicial role function to have a greater impact in the fight against terrorism given its centrality.

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

REFERENCES

Books

- A. De Tocqueville, *Democracy in America* 151 (P. Bradley ed. 1945).
- Aileen Kavanagh, *Constitutionalism, Counterterrorism, and the Court: Changes in the British Constitutional Landscape*, Oxford University Press and New York University School of Law, 2
- Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Boston: Houghton Mifflin, 1973), ix.
- Barros Robert, *Dictatorship and the Rule of Law: Rules and Military Power in Pinochet's Chile*, in Maravallad Przeworski, eds, *Democracy and the Rule of Law* Cambridge 2003.
- Barry Buzan, "New Patterns of Global Security in the Twenty-first Century" *International Affairs*, 67.3 (1991)
- Barry Buzan, *People, State and fear: The National security Problem in International Relations*. London Sussex Reinner Publishers 1998
- Berger, P., & Luckmann, T. 1966. *The social construction of reality: A treatise in the sociology of knowledge*. London:Penguin Books.
- Clutter Richard. 1990. *Terrorism and Guerilla Warfare*. London; Routledge.
- David Ryan, *Frustrated Empire: U.S. Foreign Policy, 9/11 to Iraq* (London: Pluto Press, 2007), 33.
- Erin F. Delaney and Rosalind Dixon, *Comparative Judicial Review*, Edward Elgar Publishing Limited UK
- G. Born & D. Westin, *International Civil Litigation in United States Courts* Cambridge University Press 1989.
- Gordon L. Heath, David K. Tarus, *Christian Responses to Terrorism: The Kenyan Experience*, Wipf and Stock Publishers, 2017
- Hannah Arendt, *On Violence*, New York: Harcourt, Brace, Jovanovitch, 1970. p. 35
- Hannah Arendt (1994) *Mankind and terror*, in: Jerome Kohn (Ed.), *Essays in understanding, 1930-1954*. New York, Harcourt Brace and Company, 298. Cf. Hannah Arendt (1976) *The origins of totalitarianism*. New York, Harcourt Brace & Co., 440 (hereafter cited as OT)
- Haugerud, Angelique, *The Culture of Politics in Modern Kenya*. 1995, Cambridge: Cambridge University Press,
- James D. Barnett, *Grounds of Pardon, The*, 17 *Am. Inst. Crim. L. & Criminology* 490 (1926-1927)
- Jeremy Bentham, *Theory of Legislation*, Boston : Weeks, Jordan, & Co., 1840.

John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* Harvard University Press, Cambridge, Mass.

John Locke, *Second Treatise of Government* (Gutenberg eBook, 2005) available at <http://Gutenberg.org/files/7370/73/70-h/7370-h.ht>

Leonard, David, *African Successes: Four Public Managers of Kenyan Rural Development* .1991, Berkeley: University of California Press,

Mahmood Mamdani, *Good Muslim, Bad Muslim: America, the Cold War and the Roots of Terror*, Doubleday 2004.

Montesquieu, 1748, *The Spirit of the Laws*, Anne Cohler, Basia Miller, and Harold Stone (trans. and eds.), Cambridge: Cambridge University Press, 1989.

Richard A. Posner, *How Judges Think*, Harvard University Press, 2008.

Shapiro Martin, *Court: A Comparative and political Analysis*. University of Chicago Press 1992

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

Weber, Max (1946). "Politics as a Vocation." In *From Max Weber: Essays in Sociology*, translated by H. H. Gerth and C. Wright Mills. Oxford University Press.

Weber, Max (1954) *Max Weber on Law in Economy and Society*, translated by E. Shils and Max Rheinstein, New York: Simon & Schuster

Wendt, Alexander. (1992). Anarchy is what States make of it: The Social Construction of Power Politics. *International Organization*. 46(2)

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

Case Law

Constitutional Petition 227 of 2016 Kenya National Commission on Human Rights & another v Attorney General & 3 others [2017] eKLR

Criminal Appeal No. 135 OF 2016 Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR

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

CR Rev No. 169 of 2015 Republic Vs. Ummulkheir Sadri Abdalla & 3 Others [2015] eKLR

CR Rev No. 169 of 2015 Justice D. O Chepkwomy

CR Re No. 169 of 2015 Republic Vs. Ummulkheir Sadri Abdalla & 3 Others [2015] eKLR

CR Case 91 of 2003; Aboud Rogo Mohamed & 3 others v Republic [2005] eKLR

CR Application No. 2 Of 2018 Republic v Ahmad Abolfathi Mohammed & another [2018] eKLR

CR Case No. 242/15 and CR Case No. 797/15 before Mombasa Magistrate Courts.

HCCC no. 1159 of 1966 (unreported)

HCCC No. 23 of 2014 Republic Vs. Mahadi Swaleh Mahadi Mahadi Swaleh Mahadi

HCCC No. 12 of 2006 Republic Vs Amos Karuga Karatu available at

Kituo Cha Sheria & 8 others v AG [2013] eKLR

Liversidge v Anderson [1942] AC 206. [1942] AC 206 at 244

Petition No. 19 of 2015 Muhuri and another Vs. IGP & 5 others [2015] eKLR

Petition No. 39 of 2018 Republic v Ahmad Abolfathi Mohammed & another [2019] eKLR

Petition No. 96 of 2011 Allio Somo Abdi on behalf of the subject Mohamed Adan Abdow & 2 others
v Minister of State for Provincial Administration and Internal Security & 3 others [2019] eKLR

Petition Nos 628 & 630 of 2014 CORD & another v Republic of Kenya & another [2015] eKLR.

Petition No. 822 of 2008 Salim Awadh Salim and 10 Others V Commissioner of Police and 3 Others.

Raila Odinga v. AG (1988) 10 Nairobi Law Monthly 31

Raphael S K Mbondo V L D Galgalo & Paul Joseph Ngei Election Petition No. 16 of 1974

Refugee Consortium of Kenya & another v AG & 2 others [2015] eKLR

Reg v. Secretary of State for the Home Department, ex parte Cheblak [1991] 1 W.L.R. 890, 902

S. vs Acheson, 1991 (2) S.A. 805 (at p.813)

Tinyefuza vs AG Constitutional Petition No. 1 of 1997 (1997 UGCC

Zuhura Suleiman V The Commissioner Of Police & 3 Others [2010] eKLR

Draft Manuscript

Barry Buzan, The Implications of September 11 for the Study of International relations, Draft manuscript, conference on the “Research Agenda in International Politics in the Aftermath of September 11, 2002.

Uche, Human Rights and the Kenya National Assembly 1970-1975, 16-17 (1976)(unpublished paper presented at the Third International Conference on Legislative Development, Dublin, Ireland; jointly sponsored by the Comparative Development Studies Center of the State University of New York, Albany, New York and the Institute of Public Administration, Dublin, Ireland)

Journals and Periodical

Adam Hodges, The “War on Terror” Narrative: Discourse and Intertextuality in the Construction and Contestation of Sociopolitical Reality (New York: Oxford University, 2011), 3.

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

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

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

Burak Kurkcu, “How to Study terrorism: Comparison of Constructivism with Traditional IR Theories” Middle East Technical University p. 20

Carberry, Jacqueline Ann. “Terrorism: A Global Phenomenon Mandating a Unified International Response.” *Indiana Journal of Global Legal Studies*, vol. 6, no. 2, 1999, pp. 685–719. *JSTOR*, www.jstor.org/stable/20644713.

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

Cecilia M. Bailliet HUMAN RIGHTS & COUNTER TERRORISM available at <http://www.uio.no/studier/emner/jus/humanrights/JUS5503/h15/teaching-materials/human-rights-counter-terrorism.pdf>

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

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

- Elizabeth Goitein and Faiza Patel, What Went Wrong With the FISA Court, Brennan Center for Justice at New York University School of Law, 2015 available at https://www.brennancenter.org/sites/default/files/analysis/What_Went_%20Wrong_With_The_FISA_Court.pdf
- G.B.M Kariuki, 'The 23rd Biennial Conference of the International Bar Association', in the Nairobi Law monthly, 29, 1991 pp. 25-7
- Geoff Gilbert, Transnational Fugitive Offenders in International Law: Extradition and other Mechanisms 337 (1998)
- Gilbert Khadiagalla, "Kenya: Haven or Helpless Victim of Terrorism," in United States Institute of Peace, Terrorism in the Horn of Africa, (p.2) Washington DC: USIP.
- F.R Tenson, 'International Obligation and the Theory of hypothetical Consent,' Yale Journal of International Law (New Haven, CT), 15, 1990
- International Commission of Jurists, Democratization and the Rule of Law In Kenya 11 (1997)
- Jenkins D (2011). The Lockean Constitution: Separation of Powers and the Limits of Prerogative, McGill Law Journal Volume 56, (3), 543-589. <https://doi.org/10.7202/1005132ar>
- John Ferejohn, Frances Rosenbuth, and Charles Shipan, Comparative Judicial Politics 2004 p. 1 available at www.leitner.yale.edu
- Johnie Carson, "Kenya: The Struggle Against Terrorism," in Battling terrorism in the Horn of Africa, ed. Robert I. Rotberg (Washington, D.C.: Brookings Institution Press, 2005), 180
- Kimondo, G.K. "The Bill of Rights" in the Citizen and the Constitution. K Kibwana, G.K Kimondo and J.T. Gathii, 1996 Nairobi Claripress
- Korwa G. Adar and Isaac M Munyae, Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978-2001, African Studies Quarterly | Volume 5, Issue 1 | Winter 2001 pg 1
- Leah West, The Problem of "Relevance": Intelligence to Evidence Lessons from UK Terrorism Prosecutions. available at http://themanitobalawjournal.com/wp-content/uploads/articles/MLJ_41.4/The%20Problem%20of%20Relevance%20Intelligence%20to%20Evidence%20Lessons%20from%20UK%20Terrorism%20Prosecutions.pdf
- Maina, W., "Constitutional Crisis I Kenya: An Inquiry into the Origins, Nature and Prospects of Reform", Paper Presented to the IPAR Project on Constitution-Making in Kenya, November/December 1996, p. 67
- Michael J. Kelly in his article Executive Excesses V. Judicial Process: American Judicial Responses to the Government's War of Terror available at www.mckinneylaw.iu.edu

- Mutua, Makau wa. "Human Rights and State Despotism in Kenya: Institutional Problems." *Africa Today*, vol. 41, no. 4, 1994, pp. 50–56. *JSTOR*, www.jstor.org/stable/4187016.
- Mutua, Makau. "Justice under Siege: The Rule of Law and Judicial Subservience in Kenya." *Human Rights Quarterly*, vol. 23, no. 1, 2001, pp. 96–118. *JSTOR*, www.jstor.org/stable/4489325.
- Ndungu wa Gathua available at <http://google.com/amp/s/hivisasa.com.posts/the-12-men-who-wanted-Kenyatta-out-of-power>
- Nico Tuk, Hobbes Versus Locke- Redefining the War on Terror, available at https://learn.saylor.org/pluginfile.php/425505/mod_resource/content/1/HobbesVersusLocke.pdf
- Nzau, Mumo and Guyo, Mohammed (2018) "The Challenge of Securing Kenya: Past Experience, Present Challenges and Future Prospects, "The Journal of Social Encounters: Vol. 2: Iss. 1, 37-59. Available at: https://digitalcommons.csbsju.edu/social_encounters/vol2/iss1/4
- Okoth-Ogendo, H. W. O. "The Politics of Constitutional Change in Kenya since Independence, 1963-69." *African Affairs*, vol. 71, no. 282, 1972, pp. 9–34. *JSTOR*, www.jstor.org/stable/720361.
- Paul N. Cox, John Hart Ely, Democracy and Distrust: A Theory of Judicial Review, 15 Val. U. L. Rev. 637 (1981). Available at: <http://scholar.valpo.edu/vulr/vol15/iss3/6>
- Prestholdt, Jeremy. "Kenya, the United States, and Counterterrorism." *Africa Today*, vol. 57, no. 4, 2011, pp. 3–27. *JSTOR*, www.jstor.org/stable/10.2979/africatoday.57.4.3. See also
- Richard M. Falk, The relevance of Political Context to the Nature and Functioning of International Law: An intermediate View, in *The Relevance of International Law* 133, 142 (Karl W. Deutsch & Stanley Hoffman eds., 1968)
- Rosenberg, Gerald N. "Judicial Independence and the Reality of Political Power." *The Review of Politics*, vol. 54, no. 3, 1992, pp. 369–398. *JSTOR*, www.jstor.org/stable/1407797.
- Richard A. Falk, The Role of Domestic Courts in the International Legal Order 72 (1964).
- Ross J. Corbett, The Extraconstitutionality of Lockean Prerogative, *The Review of Politics* Vol. 68, No. 3 (Summer, 2006), [Cambridge University Press](http://www.cambridge.org/9780521875223)
- Sanjula Weerasinghe, UNHCR Consultant, In Harm's Way; International Protection in the Context of Nexus Dynamics Between Conflict or Violence and Disaster or Climate Change, Division of International Protection, PPLA/2018/05 December 2018 p. 41. available at : www.unhcr.org
- Stephen Reinhardt, The Judicial Role in National Security Boston University Law Review [Vol. 86:1309 2006]
- Steven D. Schwinn, Lessons on the Law; The Separation of Powers and 15 Years of Anti-Terrorism Policies Since 9/11, *Social Education* 80(4), pp 214–218, 223 ©2016 National Council for the

Social Studies available at
https://www.americanbar.org/content/dam/aba/images/public_education/publications/September_2016_Sept11at15.pdf

The Bureau of Counterterrorism and Countering Violent Extremism, Country Reports on Terrorism 2016, United States Department of State Publication June 2, 2016

Transnational terrorism security and the Rule of Law, The Ethical Justness of European Counterterrorism Measures, December 19, 2008, p. 7.

William G. O'Neill, Human Rights, the United Nations and the Struggle Against Terrorism, International Peace Academy, Center on International Organization, Columbia University, 7 NOVEMBER 2003 NEW YORK CITY

Yehuda, Ben. N. (1993). Political Assassinations by Jews. Albany: State Univ. New York Press.

Reports and Manuals

Africa Watch, Kenya: Taking Liberties Washington D.C.: An African Watch Report, p. 151. July 1991. "Hannan Lucy, Bias and Judicial Outrage". New Law Journal (London) 141(1991): 900-901 and "Constitutional Law According to Mr. Justice Dugdale" Nairobi Law Monthly, 34 (1991): 151-152).

Amnesty International, Kenya, Torture, Political Detention and Unfair Trials. AI Index AFR 32/17/87, 1987

Bureau of Counterterrorism and Countering Violent Extremism, Country Reports on Terrorism 2016, United States Department of State Publication of June 2, 2016

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

Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the S. Comm. on the Judiciary, 107th Cong. 162 (2002)

Ekaterina Stepanova, Terrorism in Asymmetrical Conflict; Ideological and Structural Aspects. SIPRI Research Report No. 23, Oxford University Press 2008

Freedom to Write Global Report, Oct. 28, 1977

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

Onyango Oloo, “Lessons from Mpeketoni”, The Star, November 22, 2014, <http://www.the-star.co.ke/article/lessons-mpeketoni#sthash.pIcXabcX.dpbs>

Human Rights Watch, Report Titled Deaths and Disappearances – Abuses in Counterterrorism Operations in Nairobi and in Northeastern Kenya Human Rights Watch 2016

Human Rights Watch, Kenya: Killings, Disappearances by Anti-Terror Police, available at <https://www.hrw.org/news/2014/08/18/kenya-killings-disappearances-anti-terror-police>

Human Rights Watch, Insult to Injury The 2014 Lamu and Tana River Attacks and Kenya’s Abusive Response 2015 Human Rights Watch available at <http://www.hrw.org>

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

IPOA report following the Mpeketoni attack, redacted version, sections 5.0.1 and section 5.0.2,” September 2014

IPOA, Monitoring Report on Operation Sanitization Eastleigh Publically Known as “Usalama Watch” dated 14th July 2014

J. Stephen Morrison, *Kenya’s Dangerous, Vague Alchemy—Refugees and Terror, May 17, 2016, Center for Strategic and International Studies, 2016*

Jane Perlez, ‘Kenya Leader Ousts Aide tied of Killing’, in the New York Times, 21 October 1991.

KAACR, The Cradle, ICJ, Kenya Section, COVAW, OMTC, “State Violence in Kenya”, An Alternative Report to the United Nations Human Rights Committee 83rd Session Nairobi and Geneva, February 28th, 2005 available at <https://reliefweb.int/sites/reliefweb.int/files/resources/F99E41A580CBD14DC1256FE300372D90-omct-ken-28feb.pdf>

Kenya: Report of the Northern Frontier District Commission, London, Her Majesty’s Government 1962

Lucy Hannan, Seditious by Edition, in Africa Report (New York), 36, 3, May-June 1991, p. 49

Mumbi Ngugi, “A Matter of Moral Courage: A Chat with Chief Justice Schofield” (2004) 68 The Lawyer

Report of KNCHR investigations on Operation Usalama Watch July 2014 available at <https://www.knchr.org/Portals/0/CivilAndPoliticalReports/Report%20of%20KNCHR%20investigations%20on%20Operation%20Usalama%20Watch.pdf?ver=2018-06-06-194906-830>

Republic of Kenya, report of the Sub Committee on Ethics and Governance of the Judiciary 2005, 164

- Swamy, Gurushri; DEC; Swamy, Gurushri*DEC. 1994. *Structural adjustment in the 1980s: Kenya (English)*. Policy, Research working paper; no. WPS 1238. Washington, DC: World Bank. <http://documents.worldbank.org/curated/en/771151468774952469/Structural-adjustment-in-the-1980s-Kenya>
- Sandra Obi, Abigael Kenelwa Ayiro, and Kennedy Ochieng' Aketch, Jaramogi Oginga Odinga and the Rise of Opposition Politics in Kisumu; From Kenya African National Union [KANU] to the Forum for the Restoration of Democracy-Kenya [FORD-K], 2014 available at <https://macleki.org/stories/jaramogi-oginga-odinga-and-the-rise-of-opposition-politics-in-kisumu/>
- Standard reporter, Blast from the Past: Intrigues that led to the first coup attempt in Kenya, reported on Feb 12 2017 available at www.standardmedia.co.ke
- The Final Report TJRC (2013) available at <https://www.jfjustice.net/downloads/1460970274.pdf>
- Tabea Scharrer. 2019. 'Ethnic Neighborhoods' and/or Cosmopolitanism? The Art of Living Together. Refugees and Forced Migrants in Africa and the EU, pages 129-150.
- The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses available at www.thegctf.org
- T. P Ghai, "Judicial Protection Against the Executive", National Reports, New York, 1969
- UN General Assembly, United Nations Global Counter-Terrorism Strategy, A/RES/60/288, 20 September 2006, Pillar IV (hereinafter "Strategy"). See Tom Parker, "Rule of Law and Human Rights," in *Toward a Rule of Law Culture* (Washington, D.C.: United States Institute of Peace, 2015), pp. 30–32, https://www.usip.org/sites/default/files/Toward-a-Rule-of-Law-Culture_Practical-Guide_0.pdf
- United Nation Economic and Social Council, Civil and Political Rights, Including the Question of Torture and Detention Report of the Working Group on Arbitrary Detention Chairperson-Rapporteur: Leïla Zerrougui Distr. GENERAL E/CN.4/2006/7 12 December 2005.
- United States Department of State, The Anti-Terrorism Assistance Program: Report to Congress for Fiscal Year 2003, at www.state.gov/documents/organization/35833.pdf.
- US Army Field Manual, 2006.
- Zoe Flood, Kenyan Police Arrest Iranians Suspected of Terror Plot, The Telegraph 6:44PM BST 22 Jun 2012 available at <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/kenya/9350172/Kenyan-police-arrest-Iranians-suspected-of-terror-plot.html>

Laws

Constitution of Kenya 2010

Constitution of Kenya (Amendment) Act No. 18 of 1966:

Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783

Kenya's Independence Constitution

Prevention of Terrorism Act No. 30 of 2012

Public Security (Control of Movement) Regulations Act

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

Security Laws (Amendment) Bill, 2014

Online Newspaper Sources

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

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

BBC News May 6, 2013 available at <https://www.bbc.com/news/world-africa-22425366>

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

Bishop Julius Wanyoike, Anglican Church of Kenya, quoted in [Wachira Kigotho](#), Churches Accuse Muslim Scholars of 'Inaction' Over Attack 24 April 2015 available at <https://www.universityworldnews.com/post.php?story=20150423163242805>

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

Business Daily available at www.businessdailyafrica.com

Cyprian Ombati, Standard Digital of May 7th 2014 available at www.standardmedia.co.ke

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

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

David Goldman, Kenya Judiciary Blamed for Terror by Government, dated May 5, 2014 available at www.intelligencebriefs.com

H.E Ambassador Youcef Yousfi, the then Permanent Representative of Algeria to the United Nations address at the Africa-America Institute An AAI symposium – February 17, 2006 available at <https://www.aaionline.org/wp-content/uploads/2013/03/FullReportTerrorismSymposium2006.pdf> accessed on September 1, 2017

http://info.mzalendo.com/media_root/file_archive/REPORT_OF_THE_COMMITTEE_ON_WESTGATE_ATTACK_-_4.pdf

<https://www.nation.co.ke/news/Key-dates-in-Kenya-history/1056-2108572-uhnef0/index.html>

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

https://www.the-star.co.ke/news/2016/12/02/two-iranians-charged-after-taking-videos-of-israeli-embassy_c1466119

Edmund Blair, Duncan Miriri, President says Kenyan politics not Islamists behind attacks, Reuters World News

June 17, 2014 / 9:29 AM / 5 years ago available at <https://www.reuters.com/article/us-kenya-attacks/president-says-kenyan-politics-not-islamists-behind-attacks-idUSKBN0ES0HE20140617>

Frontline available at <http://www.pbs.org/wgbh/pages/frontline/shows/binladen/bombings/bombings.html>

Jennifer Williams, From torture to drone strikes: the disturbing legal legacy Obama is leaving for Trump available at <https://www.vox.com/policy-and-politics/2016/11/14/13577464/obama-farewell-speech-torture-drones-nsa-surveillance-trump>

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

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

Jamaicaobserver Tuesday May 6, 2014 available at www.jamaicaobserver.com

John Kamau, How Kenya is Caught up in Delicate Iran and Israel Drama, <https://www.nation.co.ke/news/How-Kenya-is-caught-up-in-fragile-Iran--Israel-drama/1056-4729286-10fjji8/index.html>

Kamau Mutunga, Moment of Bravado that Changed Kenya, in the article an estimated 600 to 1,800 lives were lost to quell the coup available at <https://www.nation.co.ke/lifestyle/dn2/How-1982-coup-changed-Kenya/957860-1467488-13vl42az/index.html>

Kenya Beefs Up Security Following Mpeketoni Attack”, Mail and Guardian, June 16, 2014, Johannesburg <http://mg.co.za/article/2014-06-16-kenya-beefs-up-security-following-mpeketoni-attack>.

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

Goodman David, “Lamu Terror Attacks Blamed on Mombasa Republican Council Militants”, The Intelligence, July 8, 2014, <http://www.intelligencebriefs.com/lamu-terror-attacks-blamed-on-mombasa-republican-council-militants>.

Fred Oluoch, Julius Barigaba, Mike Mande and Adam Ihucha, “Exchange of Crime Suspects Within Region ‘Normal,’ Say Police Chiefs,” AllAfrica.com, October 11, 2010; allafrica.com/stories/201010111204.html.

Reported by [Noel Omukubi](#) in the Jamhuri Magazine available at <http://jamhurimagazine.com/index.php/kenya/4676-operation-usalama-watch.html>

Otsieno Namwaya and Najma Abdi, Wounds of Garissa Attack, Four Years On; Kenya Should Review Counter-Terror Tactics to Address Abuse, Human Rights Watch available at

Willis Oketch, Man on terror charges jailed for 110 years available at

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