

UNIVERSITY OF NAIROBI

INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES

THESIS

**“THE IMPACT OF INTERNATIONAL TERRORISM ON COUNTER-
TERRORISM LEGISLATION
(THE KENYA SUPPRESSION OF TERRORISM BILL 2003)”**

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DECLARATION

I, the undersigned, declare that this dissertation is my original work and has not been presented to this or any other university for any academic credit.

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This dissertation has been submitted for examination with my approval as the appointed supervisor.

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24 NOV 2010

This work has been submitted to the Institute of Diplomacy and International Studies, University of Nairobi, as a requirement for the partial fulfilment towards the attainment of a Masters Degree in International Studies.

DEDICATION

To Angela

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ABSTRACT

This work assesses the impact of international terrorism on counter-terrorism legislation with specific focus on the Kenya Suppression of Terrorism Bill (2003). It analyses its contents and questions the effectiveness of the legislation's provisions in tackling terrorism. It also studies the forces behind the publication of the bill, both local and foreign and probes the role those factors played in shaping the anti-terrorism bill.

Relying on secondary data, we define the meaning of terrorism, a loosely-bound term, in line with its common usage in international anti-terrorism conventions, which are themselves varied but largely share key elements on what comprises the crime of terrorism. We then elaborate the difference between "modern terrorism" and "old terrorism." The basic difference being the increasing sophistication in the modus operandi between the former and the later also distinguished by a loose time line.

Whether Kenya's anti-terrorism response as contained in the legislation, notably after the September 11 US attacks, addresses to its security imperatives and whether such strategies were imposed or developed domestically are the pivots of this study's objectives. Our analysis is based upon the Game Theory which has two tasks; to present a social conflict as a game and to resolve it.

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CHAPTER I

INTRODUCTION

Terrorism in the late 20th century has brought forth novel challenges to victim states not just by the severity of their strikes, but also the sheer pervasiveness of the terrorists' networks, operations and far-reaching ramifications of the attacks inflicted on perceived enemies and their allies.

This has prompted states to seek counter-strategies ranging from military offensives, tighter immigration rules, and propaganda to law or a combination of the aforesaid. While all these strategies have their limitations and strengths, it is the legal means that poses much intrigue to this study as it raises concerns over its efficacy considering that it seeks to legislate on a pervasive, ideology-based offence, often with devastating effects, without trampling on basic freedoms.

Legislation is at the heart of policy that buttresses other counter-terrorism strategies be they military, propaganda or any other. A country's counterterrorism measures repose on its security policy the nature of which has a bearing on how effective it will be in addressing the challenge of terrorism violence.

Twice struck by terrorist attacks in 1998 and in 2002, Kenya formulated the Suppression of Terrorism Bill (2003), but which was never presented to parliament, partly due to howls of protests by activist groups over rights concerns that would defeat the very purpose the policy was meant to address.

The reasons for the withdrawal of the bill from parliament raise questions about the country's conception of the threat of terrorism and the strategies to combat the violence. Previously bereft of a legal provision to deal with an aggression of the magnitude and nature inflicted by terrorism, the shortcomings of the 2003 anti-terrorism legislation – later discussed in this study – spurs the need to investigate the impact terrorism has on the legislation aimed at deterring the vice.

In Kenya, the principle of a counterterrorism measure was not per se in contest. Accusations about the foundations of the draft law were faulted as being insensitive to the rights of the victims – Third World poor nation suffering collateral damage for its ties with the terrorists' sworn enemy – the United States. Furthermore, the bill was seen as targeting Kenya's Muslim citizens, whose religion they share with the Al-Qaeda terrorists.

The intricate network of terrorist organisation, their ability to strike targets with unpredictability that eludes many government security forces as well as the crusader determination of their attackers – suicide bombers -- complicates security response strategy. Such complication is evident in the US response in Iraq and Afghanistan, where the war on terror has dragged longer than ever imagined, with the level of success, if any, far below the expectation.

To fashion legal response to terrorism, whose perpetrators have no regard to law and mainly driven by conviction of the deity are hard to deal with. One, because their religious conviction, indeed zeal, knows no legal or other boundaries after years of brainwashing and polarisation that eventually becomes too toxic to remedy. And for a country like Kenya, whose legal structures, even without considering terrorism, still call for reform, raises questions on what impact international terrorism has on policy making, such as whether the severity of terrorism impairs or hones counterterrorism strategy, and at what cost.

PROBLEM STATEMENT

The study seeks to analyse the impact terrorism has on policy-making. It will investigate the context in which the Suppression of Terrorism Bill 2003 was formulated to determine how those circumstances and other factors at the time played on shaping the draft law.

Policy decision-making depends not only on the context at the time of the said strategy, both locally and internationally, the nature of the issues being addressed, the political leaders, other states and non-state actors are key to analysing policy decisions.

For this study, what impact terrorism has on policy-making will be useful to determining whether such a phenomenon, with its uniqueness and attendant challenges, impacts on the substance of the resultant policy.

OBJECTIVES

The study will seek to achieve the following aims:

- Asses the impact of international terrorism on counter-terrorism legislation.
- Determine the forces influencing the formulation of the Kenya Suppression of Terrorism Bill (2003).
- Determine the effect of those forces on Kenya's counter-terrorism legislation.

JUSTIFICATION

The twin terrorist attacks that Kenya suffered in 1998 and 2002 calls for a robust strategy to counter further ambushes. The responses to such threat can be through enhancing the laws to deal with the terrorism suspects and to bolstering the security forces through training and better equipment and even strengthening the country's diplomacy to ascertain public support and international backing of measures that satisfy both local and foreign publics, ensuring an effective counterterrorism strategy. A successful attainment reposes on a well-thought-out policy that encompasses the relevant facets.

Hence a legal bulwark against terrorism needs to understand the complexity of the new national security threat posed by terrorism.

Nestled in a strife-torn neighbourhood, Kenya has for long been regarded as an isle of peace, and promoting and maintaining such image was and still is arguably a key factor and ultimate goal for its statesmen.

Peace and security is not only a source of national pride, but an allure for states from beyond the region in terms of trade, security, and other strategic relations. Thus Kenya would be keen to preserve and promote such an image. More importantly was the security objectives the 2003 Suppression of Terrorism Bill was to address, given war-wracked neighbours like Somalia where some of the perpetrators of attacks on Kenya hailed from.

Thus far the Bill has yet to be reintroduced in parliament and Kenya may not be sheltered from a repeat attack. It is critical that the paucity leading to its failure to be debated be

analysed, improved and re-tabled to provide a robust policy that can comprehensively deal with the threat of terrorism.

Illustratively, in 2006, the High Court in Nairobi acquitted a suspect facing murder charges arising from the 2003 bombing of the Israeli-owned Mombasa hotel and was freed two years later when the court overturned a weapons charge after prosecution failed to link him with arms possession charge he was later accused of. The suspects could not be charged with terrorism offence because the law did not provide for it. Prosecutors failed to prove the murder charges they was charged with, which brings to question of the robustness of police investigation. This can be attributed to lack of proper training and necessary tools to conduct an impeccable probe.

LITERATURE REVIEW

The concept terror, its derivatives terrorist and terrorism, import a loosely-bounded meaning that may at times escape or hinder vivid description and explanation despite impeccably serving political and normative ends.

Shades of definitions terrorism vary from the legal to the academic and social, but a broad brush as Tilly's paints terrorism as an asymmetrical deployment of threats and violence against enemies using means that fall outside the forms of political struggle routinely operating within some current regime.¹

He points that terror as a strategy range from (1) intermittent actions by members of groups that are engaged in wider political struggle to (2) one segment in the modus operandi of durably organised specialists in coercion, including government-employed and government-backed specialists in coercion to (3) the dominant rationale for distinct, committed groups and network of activists.

Thus such a broad net traps an array of meaning attached to terrorism that calls for contextualisation and for the purpose of this study, the third variation, which has arguably gained currency in light of the changing trend from state-sponsored insurgency in the 19th

¹ Tilly Charles, *Terror, Terrorism, Terrorists*, Sociological Theory Vol. 22, No. 1, Theories of Terrorism: A Symposium, March 2004. pp 5-6.

century to networks of disparate rebels motivated mainly by zeal for the deity in the late 20th century.

The motivations, objectives and means to achieve them must be brought into context in tandem with the changing trends of the violent groups. For our purposes we will focus on the latest trend of terrorism, which will be described in later.

Consensus seems to be emerging in the definition of terrorism. Enders and Sandler argue that terrorism involves a focus upon underlying political, social, or religious motives, as its violence is separable from crime, personal vengeance, or the act of someone mentally deranged.²

For them, terrorism is the premeditated use or threat of use of extra-normal violence or brutality by sub-national groups to obtain a political, religious, or ideological objective through intimidation of a huge audience, usually not directly involved with the policy making that the terrorist seek to influence.³

The US state Department has near-similar definition that terrorism is a “politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents, usually intended to influence an audience.”⁴ While Chomsky defines terrorism as “the use of coercive means aimed at populations in an effort to achieve political, religious or other aims.”⁵ Similarly Stern’s definition runs thus: “an act or threat of violence against non-combatants, with the objective of intimidating or otherwise influencing and audience or audiences.”⁶

Nonetheless the conceptions leave open the question of motivation and ideology, argue Bergesen and Yi,⁷ pointing that the issues are important in truncating the different historical periods such as the ideology of anarchy and social revolutionaries at the end of 19th century

² Enders Walter and Sandler Todd, *Is Transnational Terrorism More Threatening?* Journal of Conflict Resolution. 2000.

³ Ibid.

⁴ See Ruby C.L., *The Definition of Terrorism*, Analyses of Social Issues and Public Policy 2 (1) pp 9-14, cited by Bergesen A.J and Yi Han in *New Directions for Terrorism Research*, International Journal of Comparative Sociology 2005 p134.

⁵ Chomsky N, cited in Bergesen and Yi in *ibid*.

⁶ Stern J, cited in Bergesen and Yi in *op cit*.

⁷ *Op cit*.

and fundamental Islamic beliefs, or generally religious, in the early 21st century. The definitions also omit whether the violence is perpetrated by the state or sub-national groups, although in his broad definition, Tilly captured the aspect.

Still the concept of terrorism remains deeply contested and its use polemical and rhetoric. Crenshaw points that terrorism can be a pejorative label meant to condemn an opponent's cause as illegitimate rather than describe behaviour. Moreover, even if the term is used as an analytical tool, it is still difficult to arrive at a satisfactory definition that distinguishes terrorism from other forms of violent phenomena.⁸ Whether one terms a particular group of activities terrorist depends on one's political standpoint.⁹

The breadth of the definition that is acceptable also remains contentious as well as the extent to which one should take into account the motives and intentions of the perpetrators as is the question as to whether one should distinguish purely criminal from politically inspired attacks.¹⁰

Furthermore, even within the terms of definition, the practice of "terrorism" encompasses a wide range variety of phenomena, ranging from kidnappings... to indiscriminate mass-casualty bombings of high-profile symbolic targets argues Crenshaw.

This widens the scope as to what meaning should be attached to terrorism not only for analytical reasons, but more importantly what import any given definition has on counterterrorism policy and action. The range also poses the challenge regarding what should be considered as not constituting terrorism, and which in turn has a bearing on the limitations and remit of measures that are or can be undertaken.

The first internationally adopted comprehensive definition of terrorism is to be found in the Convention for the Prevention of Terrorism of 1937 (Geneva Convention of 1937) although the convention never came to force.

⁸ See Crenshaw Martha, *The Psychology of Terrorism: An Agenda for the 21st Century*, Political Psychology Vol. 21, No. 2, 2000.

⁹ Shaw N. Malcolm, *International Law*, New York: Cambridge 1997, pp 803-4.

¹⁰ Ibid.

The convention offers the broadest cast of definition of terrorism, albeit with certain shortcomings as shall be discussed later. It describes acts of terrorism in its Article 1 paragraph 2 as “criminal acts directed against a state or intended to create a state of terror in the minds of particular persons or the general public.”¹¹

Further provisions detail such acts as “any wilful act causing death or grievous body harm or loss of liberty” to public officials in general under Article 2 paragraph 1a, 1b, 1c, “any wilful act calculated to endanger the lives of members of the public” in Article 2 paragraph 3, “wilful destruction of or damage to public property” under Article 2 paragraph 2, and “manufacture, obtaining, possession, supplying or arms, ammunition, explosives or harmful substances with a view to the commission in any country whatsoever” of one of the offences mentioned in Article 2 paragraph 5.¹²

The convention also covers attempts, conspiracy, incitement, if successful, to all offences, direct public incitement to certain acts even if unsuccessful, wilful participation and assistance knowingly given.¹³

Zdzislaw points that the breadth of the definition of terrorism has been argued to have stoked failure by states to ratify the convention. But he also argues that the convention has been the most developed and all-inclusive universal definition.

Outstanding contentions are thus not much about the definition of terrorism acts, but the question of still-not-agreed-on exceptions and exclusions from the scope of the convention, he posits.

Historically, the word *terror* entered the West’s political vocabulary as a name from French revolutionaries’ actions against the domestic enemies in 1793 and 1794.¹⁴ It referred to government repression, most directly in the form of executions. Around 17,000 legal executions occurred under the Reign of Terror, and some 23,000 more occurred illegally. Historians continue to think of the French Revolution continue to think of the original Reign

¹¹ See United Nations 1972, and as cited by Galicki Zdzislaw in *International Law and Terrorism*, American Behavioral Scientist, 2005, pp 746-7.

¹² Ibid Zdzislaw.

¹³ Op cit Zdzislaw.

¹⁴ Ibid Tilly.

of Terror as state-organised or state-backed visitation of violence in France's dissident citizenry during the two central years of radical revolutionary power.

Since the French Revolution, the word terror has expanded in scope, retaining the use of state apparatus against the citizens as well as, and increasingly so, clandestine groups waging attacks on governments or other perceived enemies for varied reasons ranging from political, ideological to religious.

The modern meaning of the term terrorism is hence associated with the Reign of Terror of the 18th century French Revolution.

Over the time, terrorism strategy and trends have evolved markedly from organisational form to network form.¹⁵ The newer terrorist organisations have moved away from the older model of professionally trained terrorist operating within hierarchical organisations with a central command chain toward a looser organisation with a less clear structure. Groups such as Al Qaeda have members from various nationalities and organisational sites outside the leadership's country of origin.

Tilly postulates that the "new" terrorists tend to be more shadowy and more difficult to identify and seem to less often to claim responsibility for specific attacks. The bombing of the US embassies Kenyan and Tanzania and the events of the September 11, 2001 although purportedly organised by Al Qaeda supremo Osama bin Laden were not immediately claimed by that group.

Whereas the "old" terrorist sought short-term political power through revolution, national liberation, or secession, the "new" terrorists seeks to transform the world, argues Crenshaw.

Motivated by religious imperatives, they are thought to lack an earthly constituency and thus feel accountable only to a deity or to some transcendental or mystical idea. Because they do not want popular support, they are unlikely to claim public credit for their actions, se argues.

¹⁵ See Bergesen and Yin

Also the demands made by the “new” perpetrators do not seem apparent as before and what they seem to stand for is hazy. The group Black September demanded the release of comrades when they attacked Israeli athletes at the 1972 Munich Olympics, the IRA wanted the British out of Northern Ireland, the PLO wants the Israelis out of the West Bank and the Basque independence is a clear desire of the ETA.

In contrast, there were no demands surrounding the 1998 US embassy attacks in east Africa and the September 11 events, point Bergesen and Yi.

They also point to an ideological shift from more political to more religious motives, at least in the explicit ideology of the group. What has been called the new religious terrorism, or holy terrorism, reflects the increasing prevalence of religion in the ideology of terrorist organisations, the most notable being Islamic fundamentalism, or political Islam, but also Christian fundamentalism.

There also appears to be more global dispersion of targets unlike for instance in the 1960s and the 1970s when targets were largely centred in Europe and the Middle East. By the 1990s it had moved to Africa South America and US mainland proper.

Also, the violence seems to be more indiscriminate and claim more collateral damage than in earlier attacks. Thus the “new” terrorists seek high to cause high number of casualties and are willing to commit suicide or use weapons of mass destruction in order to do so, says Crenshaw. Whereas businessmen or politicians were often specifically targeted in the 60s and the 70s, it seems that more civilians have become targets in the early 21st century.

The growing dispersion and indiscriminateness of terrorist violence also express a disregard for national boundaries which is a hallmark of globalisation.

Crenshaw chronicles the emergence of the “new” terrorism, tracing its antecedent to anti-Western terrorism organisations originating in the Middle East and linked to radical or fundamentalist Islam dating back to the 1980s terrorism attributed to Shi’ite Hezbollah faction in Lebanon.

In the 1990s, terrorism using the rhetoric and discourse of Islam sprang from Hamas and Islamic Jihad in Israel, the Islamic Group in Egypt, the Armed Islamic Group in Algeria and most recently the Osama bin Laden network. Alarm over the emergence of radical Islam, which is a small minority of the Muslim world, was heightened by a combination of factors: the resort to suicide bombings in Lebanon and Israel, a general willingness to inflict mass civilian casualties, and anti-American and anti-Western targeting patterns.

Since the events of the September 11, 2001, hereafter 9/11, a string of high-profile incidents including, but not limited to, the Madrid train explosions, the London underground train attacks and the car bomb at Glasgow airport, have positioned international terrorism as a critical social problem and fundamentally re-shaped or prompted hammering out of novel security strategies, both collaborative and individual.

Accordingly, point Mythen and Walklate, political discussions in the West have focused on a cluster of interlinked issues, including the increased magnitude of threat, novel mode of attack, robustness of emergency management and the efficacy of counterterrorism measures.¹⁶

The effect of 9/11 brought about a policy shift in the US defence strategy from deterrence to pre-emption, generally referred to as the “Bush Doctrine” as outlined in the 2002 National Security Strategy.

The United States has long maintained the option of pre-emptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively.¹⁷

Such stance informed America’s invasion of Iraq in 2003 to topple the regime accused of sponsoring terrorists and possessing the so-called Weapons of Mass Destruction (WMD). It is noteworthy that the strategy has instead sucked in the US in the vortex of Iraq’s unending violence subsequent to the invasion, with the risk of pulling out without a strong government

¹⁶ See Mythen Gabe and Walklate Sandra, *Terrorism Risk and International Security: The Perils of Asking “What If?”* Security Dialogue 2008.

¹⁷ See the National Security Strategy of the United States, 2002.

in place posing further threats of clandestine terrorist attacks against the US and its allies in the war against terrorism.

Furthermore, pre-emptive attack strategy also found favour with other US state allies that joined in the coalition battles against governments and states that were accused of harbouring radical elements.

As the international reach of terrorist networks demonstrates, argue Mythen and Walklate, national security is in the borderless age of risks, no longer national security and avoiding terrorist attack is impossible, even for the affluent. The unpredictable nature of terrorist attacks makes it impossible for security agencies and governments to guarantee public security.

Such is the reality upon which counterterrorism military strategy reposes. Because of the magnitude and unpredictability, exceptional security measures are necessary. But this does not mean doing away with other measures such as diplomacy, international cooperation, economic sanctions and other covert action.

But as the recent miscommunication of Iraq's weapons of mass destruction 'capability' in the UK and the US demonstrates, a propensity to believe the worst-case scenario among political elites can lead to raw, slap-dash militarism bringing ruinous consequence.¹⁸ Such action limn a hypothetical conception of risk as demonstrated by the US defence policy shift from deterrence to pre-emptive strike in light of the evolution of the novel terrorism trends that have markedly changed since the late 1990s.

In their desire to combat terrorism in modern political contexts, democracies face the conflicting goals and courses of action: (1) providing security from terrorist acts, that is limiting the freedom of individual terrorists, terrorist groups and support networks to operate unimpeded in relatively unregulated environment, versus (2) maximising individual freedoms, democracy and human rights, posits Perl.¹⁹

¹⁸ See www.iraqbodycount.org Between 8,315 and 9,028 people died in 2008, a significant drop from the tens of thousands in the previous years after the Bush administration boosted troop numbers in Iraq.

¹⁹ Perl, F Raphael, *Terrorism and National Security: Issues and Trends*, Congressional Research Services, The Library of Congress, March 2006.

In democracies such as the US, the constitutional limits within which policy must operate may be viewed by some observers to conflict directly with the desire to secure the lives of citizens against terrorist activity. Others strongly hold that no compromise of constitutional rights is acceptable, he adds.

As Mythen and Walklate posit, amid the legitimate concern expressed about terrorist risk, there is a need to ensure that legislative responses are commensurate with the level of threat. Frank Furedi, cited by the pair, argues that dominant institutions such as government, police and the media, whether intentionally or otherwise, have been complicit in creating a climate of fear around terrorism.

The fact that more and more areas of life are seen as targets of terrorists – buildings, power stations, the economy and so on – has little to do with the increased capabilities of the terrorists, rather, it reflects the growth of competitive claims-making around fear and terror, Furedi points out.

Institutional fixation with the catastrophic possibilities of future terrorist attacks is just one dimension of ‘politics of fear’ in which worst-case scenarios drive the introduction of tighter law and order measures. Such overzealous counterterrorism measures – which themselves a product of the politics of fear – loop back into and reinforce a more expansive culture of fear, he says.

As in many previous attacks, it is difficult to know when such strikes occur and thus a state’s security apparatus have not finite knowledge of what would happen. There is a limit to knowledge about terrorist plots, especially with the contemporary terrorist as has been pointed before, the “new” terrorists operate not in hierarchical organisations, but more of ubiquitous, loosely connected ranks but whose members are strongly linked by ideology, such as Al Qaeda network.

In such indeterminate circumstances, political decisions about security regulation take place under conditions of pervasive uncertainty and incomplete knowledge, posit Mythen and Walklate.

They argue that the climate of not knowing enough – and moreover, knowing about not knowing enough – has a visible impact on the authority of security institutions. So far as regulating terrorism is concerned, there has been a palpable shift toward futurity in practices or risk analysis and the language of governance. A precautionary approach that suggests that security professionals must act in advance of possessing conclusive evidence has become prevalent in policing and military operations.

The very impossibility of estimating the terrorist risk can provide a mandate for the hasty implementation of legislation that threatens civil liberties.

The new calculus does not assess the future by focusing on the past – what was – nor indeed the present – what is. Instead, security assessments are directed by the question: What if. This transformation dictates that the basis of evidence changes under the risk of terrorism. Once one assumes a projective ‘what if’ position, presumption of the innocence metamorphoses into presumption of guilt.

Article 12 (1a, 1b) of the Kenya Suppression of Terrorism Bill 2003 provides that “a person, who in public place wears an item of clothing, or wears, carries or displays an article, in such a way or in such circumstances as to arouse reasonable suspicion that he is a supporter of a declared terrorist organisation shall be guilty of an offence and shall be liable to conviction to imprisonment for a term not exceeding six months or to a fine, or both.”²⁰

Section 2 of the Article states that “a member of police force may arrest a person without a warrant if he has reasonable grounds to suspect that the person is guilty of an offence under this section.”

In the first instance, no terrorist wears uniform and profiling suspects on the grounds of clothing points not only to the paucity of the law, but to the sweeping powers of the police. The section does declare the conviction that draws the said term.

Section 2 similarly opens up to the risk of abuse by failing to qualify what constitutes ‘reasonable grounds’ for suspicion.

²⁰ The Kenya Suppression of Terrorism Bill, 2003.

If citizens are detained because they might be planning terrorist attacks in the future, what charges can reasonably be brought? Even in the event of a hypothetical charge being levelled, what legal defence can the accused have?

Evans argues that many, least of all governments, know as much as they should know about terrorism, which he describes as a very complex phenomenon, involving quite different levels of organisation and group identity.²¹

The reality of any threat, or risk, is a function not just of capacity, but intention, and here again we simply don't know enough to make confident judgements. What we do know about contemporary terrorism is that it has been a constantly mutating phenomenon, with a continuing capacity to surprise and shock us - in terms of who has been targeted, when and how and on what scale. Terrorists simply don't always do what others expect them to do.²²

The conception of the draft law draws much from US's shifted policy stance on Africa in the aftermath of the 9/11. These attacks spurred a realignment of the American geopolitical code. Given the contemporary Islamist terrorism is worldwide in reach, all parts of the globe have been reassessed in light of a geopolitical narrative. What follows is a focused look at American foreign policy elites' reassessment of Africa in the context of this light.²³

At the basis of that policy shift is the concern of failing or failed African states that are thought to provide sanctuary for terrorists. As Susan Rice, former Assistant Secretary of State for African Affairs, testified, "terrorist organisations take advantage of Africa's porous borders, weak law enforcement and security services and nascent judicial institutions to move men, weapons and money around the globe."²⁴

Kraxberger points that beyond the articulation of a transnational terrorism-stateness nexus, American foreign policy elites have been calling for intrusive intervention in Africa by the United States.

²¹ See "Responding to Terrorism: A Global Stocktake", Gareth Evans, President, International Crisis Group, during Calouste Gulbenkian Conference on *Terrorism and International Relations*, Lisbon, 25 October 2005.

²² Ibid.

²³ Kraxberger M. Berman, *The United States and Africa: Shifting Geopolitics in an "Age of Terror,"* Africa Today, 2005.

²⁴ Rice Susan E., testimony before the subcommittee on Africa and International Relations Committee, United States House of Representatives, 15 November, 2001.

In the aftermath of the 1998 bombings of US embassies in Kenya and Tanzania and the attack on an Israeli-owned hotel in Mombasa as well as the firing of missiles at an Israeli plane taking off from the coastal town's airport in 2002, the US responded to these attacks with conviction.

In addition to proposing significant increases in development assistance and a major initiative in HIV/AIDS, the Bush administration designated the greater Horn of Africa as a frontline region in its war on terrorism and worked to dismantle Al Qaeda infrastructure there.²⁵

In 2002, to combat terrorism in the Horn, the United States created the Combined Joint Task Force-Horn of Africa (CJFTA-HOA), which involves 1,800 US soldiers and is backed by the US Central Command. Based in Djibouti, CJFTA-HOA's mission is to deter, pre-empt and disable terrorist threats emanating principally from Somalia, Kenya and Yemen.²⁶

In addition, the Bush administration announced a 100-million-dollar counterterrorism package to be spent in the Horn of Africa, with much of the cash, 10 million dollars, going to Kenya for formation of an ant-terrorism police unit and 14 million dollars to support Muslim education.

Legislative action also formed part of the US new overtures to Africa in the post-9/11 era. Key provisions in this sphere dealt with financial crimes and provisions on the detention, interrogation and prosecution of terrorist suspects. Some of the countries that acted under American pressure include Kenya, Malawi, South Africa, Tanzania and Uganda.²⁷ Not surprisingly, some African citizens – especially Muslims – protested the new laws backed by the United States.

In Kenya, protests by Muslim faithful and pressure groups forced the government not to table the Suppression of Terrorism Bill which they said trampled on human rights and unfairly targeted Muslims. Amnesty International's charged that the draft law risked suspending certain safeguards that protect the rights of those prosecuted or detained as provide by the

²⁵ Lyman N. Princeton and Morrison Stephen, *The Terrorist Threat in Africa*, Foreign Affairs Vol. 83 No. 1 January-February 2004.

²⁶ Ibid.

²⁷ op cit Kraxberger.

draft law and therefore violate fundamental rights protected under the Kenyan constitution as well as international human rights standards, some of whose conventions Kenya is party to.²⁸

Of particular concern was the watchdog's worry that the Bill could encourage the creation of a two-tier justice system, providing the legal framework of arbitrary arrests, illegal detention, searches and a flawed judicial process. The creation of a distinct system of arrests, detention and prosecution relating to "terrorism" may violate the right of all people to be equal before the courts.²⁹

Many African countries have adopted legislative anti-terrorism measures that, in varying degrees, erode human rights and civil liberties, argues Makinda.³⁰ The common feature of these legislative mechanisms is that they threaten human rights, and they do so more seriously in countries that do not have human rights legislators or other human rights protective mechanisms, he adds.

An analysis of the African landscape reveals that many have poorly trained security and intelligence agencies, porous borders and enormous governance problems. Some of those with long coastlines on the Indian and Atlantic oceans do not even have boats to patrol their coastline. Even if structural weaknesses were addressed, terrorism would remain unless the social, economic and political causes were eliminated Mukinda points.

Lyman and Morrison suggest that rather than the US concentrating solely on shutting down existing Al Qaeda cells, it must also deal with the continent's fundamental problems – economic distress, ethnic and religious fissures, fragile governance, weak democracy and rampant human rights abuses – that create an environment in which terrorists thrive.

Overall, acceptability of a policy, argues Farnham,³¹ is a constant theme and integral part of the decision process. It is both a prior concern that must be addressed before the other attributes of alternative can be seriously considered and unavoidable constraint fundamentally shaping decision-making at all stages.

²⁸ See Amnesty International's concerns as expressed in *Memorandum to the Kenya Government on the Suppression of Terrorism Bill 2003, September 2004*.

²⁹ Amnesty International, citing Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

³⁰ Makinda S Samuel, *Terrorism, Counterterrorism and Norms in Africa*, African Security Review Vol. 15 No. 3

³¹ Farnham Barbara, *The Impact of Political Context on Foreign Policy Decision-Making*, Political Psychology, Vol. 25, No. 3 (June 2004).

In political context, effective action with respect to substantive goals normally requires “sufficient consensus” in support of the proposed policies, and depends on acceptability. To be effective, internationally as well as domestically, a policy must be acceptable to some minimum number of relevant groups and individuals, she argues.

Morgenthau buttresses the position, pointing that a democratic country must secure the approval of its people for its foreign policies and the domestic ones designed to mobilise the elements of power to in support of them.

THEORITICAL FRAMEWORK

A state’s counter-terrorism strategy can either be pre-emptive or defensive, a bifurcate measure that some scholars also refer to as proactive or reactive, respectively. Proactive policy implies aggressively going after the terrorists and eliminating their resources, infrastructure and personnel, while reactive strike concerns defensive measures either to divert the attack or limit its consequences.³²

Broadly, policy formulation falls under state decision-making realm. Traditionally, state policy making has been studied under two towering perspectives; that of realism and liberalism as well as other offshoot theories that attempt explain why states take the actions they do. Realism is essentially state-centric, explaining state policy in an anarchic world in which power is central to a country’s survival. Decisions are thus based on power relations between countries. Liberalism on the other hand departs from state-centrism and asserts other spheres of cooperation such as international non-governmental bodies, regional blocs and other non-state institutions that foster relations. Thus a country’s policies can be viewed through such nodes. However, the perspectives stress the primacy of the state as a unit of analysis in international politics, with one propounding and the other denying.

But as Mowle posits, there should be a shift in the level of analysis from the state, which is neither intent nor independent action, to individuals within the state who direct purposive

³² Sandler Todd and Arce G. Daniel, *Terrorism and Game Theory*, Simulation Gaming, 2003, p. 7.

action. A state's behaviour is not reflexive; rather it flows from the way its foreign policy decision-makers understand what is happening.³³

A break from the monolithic view of states as unitary actors brings to the fore the role of individuals in formal and in informal positions of power and authority who influence or chart the course of action for the state. In addition, the breakaway also studies the decisions themselves as well as the circumstance under which and for which the policies are made and action taken. Various scholars have dissected decision-making into various components of study.

Some have focused on the decision-makers and their personalities, others have emphasised bureaucratic relationships, and still others have expanded upon the importance of the situation itself. Some have looked into the memory of the decision-makers, whereas others have investigated the generality or specificity of the decision. In the decision process itself, some have concerned themselves with the question of rationality. Others have studied the motivations or goals of the decision-makers.³⁴

For this study, we shall critically analyse the policy itself, that is the Suppression of Terrorism Bill (2003) and the circumstances resulting in its formulation, without prying much into the psychology of the decision makers. The two variables are key in assessing the objectives set out in this endeavour.

To achieve those goals, the framework for the analysis of this study will be the Game Theory, which is the theory of formal decision-making, where several players must make choices that potentially affect the interests of the other players. It is the theory of individual rational decision behaviour in social decision conflict. Individual rationality presupposes unlimited analytic and computation abilities so that the costs of information processing and cognitive efforts can be neglected.³⁵ Thus a Game Theory by its very definition is not a behavioural theory predicting real game playing behaviour.

³³ Mowle S. Thomas, *Worldviews in Foreign Policy: Realism, Liberalism and External Conflict*, Political Psychology Vol. 24 No. 3 2003 pp 561-92.

³⁴ Price J. Thomas, *Behaviour Modes: Toward a Theory of Decision-Making*, The Journal of Politics, Vol. 37, No. 2 1975, pp. 417-435.

³⁵ Guth Warner, *Game Theory's Basic Question: Who Is a Player? Examples, Concepts and Their Behavioural Relevance*, Journal of Theoretical Politics 1991, p. 403-4

Game Theory has essentially two tasks; to represent a social conflict as a game and to resolve it. In this study we shall represent terrorism in the Game Theory's Chicken Game subset. The Chicken Game derives from "dare" games said to be played by Californian teenagers in which two motorists rush down a narrow road towards each other. Each driver has the option to swerve and avoid a head-on collision or to continue on the collision course. The first one to swerve is the chicken.

The greatest perceived pay-off derives from driving straight when the other driver swerves, because the driver who holds the course appears strong to his peers. The next-best pay-off is when both drivers swerve, which is better than swerving alone and being branded chicken. The worst outcome is for both drivers to hold their course and crash in a collision.³⁶ The simulation is analogous to the confrontation between governments and terrorists, each of whom is bent on inflicting as much damage to the opponent. It is represented as follows:

		Player B	
		Straight	Swerve
Player A	Straight	1,1	4,2
	Swerve	2,4	3,3

Each driver has two strategies; keep driving straight or swerve to avoid a collision. The pay-offs reflect the following preferences: The greatest perceived pay-off derives from driving straight when the other driver swerves because the driver who holds the course appears stronger to his peers and is better than swerving alone and being branded "chicken." This game has no dominant strategy: the pay-offs associated with swerving are not both greater

³⁶ Enders Walter and Sandler Todd, *The Political Economy of Terrorism*, Cambridge University Press, 2006, p. 95.

that the corresponding pay-offs associated with driving straight since 2 is greater than one (symbol) but 3 is less than (symbol) 4. Similarly the driving straight strategy does not dominate swerving, insofar as 4 is greater than 3 but 1 is less than 2.³⁷ Chicken game has no dominant strategy.

Sandler enumerates the relevance of the Game Theory in examining terrorism as thus:

- It captures the strategic interactions between terrorists and targeted government, where actions are interdependent and thus, cannot be analysed as though one side is passive.
- Strategic interactions among rational actors who are trying to act according to how they think their counterparts will act and react characterise the interface among terrorists (e.g., between hardliners and moderates) or among alternative targets.
- In terrorist situations, each side issues threats and promises to gain strategic advantage.
- Terrorists and government abide by the underlying rationality assumption of the game theory, where a player maximises a goal subject to constraints
- Uncertainty and learning in a strategic environment are relevant to all aspects of terrorism, in which the terrorists or government or both are not completely informed.

HYPOTHESES

The study will proceed on the following assumptions:

- The Kenya Suppression of Terrorism Bill reflects Kenyan decision-makers' understanding of the effects of international terrorism.
- The anti-terrorism bill represents an external perception of international terrorism weighed upon Kenyan decision-makers.
- The draft anti-terrorism Bill is neither a reflection of Kenyan decision-makers' perception of the magnitude of terrorist attacks nor a result of external influence.

³⁷ Op cit.

METHODOLOGY

This is a qualitative study which will rely on literature and scholarly materials on the study of terrorism. It will also analyse the contents of the Suppression of Terrorism Bill, comparing it with the revised drafts and analyse critiques and input from scholars, analysts and other academics.

As previously outline, the Chicken Game Theory will provide touchstone for analysing the perception of Kenyan policy makers in regard to threats and acts of terrorism as manifested in the Suppression of Terrorism Bill 2006

Conclusions will be drawn from the provisions of the bill, critiques and subsequent draft revisions that have been undertaken in the face, or as a result of strong opposition from pressure groups. This will provide conditions of testing the hypotheses.

SCOPE AND LIMITATION

As already mentioned, the work will be tied to the Suppression of Terrorism Bill in terms of content and within a five-year timeline from 1998 when Kenya was first attacked and the time the Bill was drawn, by which time it had also suffered a second attack.

It will also be within the four-month institutional timeline needed for the completion of such work. Also because terrorism in the late 20th century comes at time where international intercourse is more intense than before and borders have become virtual in a sense, there is a widespread confluence of subjects from economics, politics, cultural to religion that intertwine. This can be debilitating, this work will strive to contain to the most immediate and relevant issues, although need may arise for further research, the sheer volume of issues that terrorism touch on, such as human rights, security as well as terrorists who have become new actors in the international scene, calls for downsizing of scope.

CHAPTER OUTLINE

Chapter One

This introduces the research area, giving a contextual setting of the work. This is further tightened specified in the statement of the problem, justification, theoretical framework, literature review, hypothesis and methodology of study.

Chapter Two

Here we will discuss the antecedents of the Bill, the terrorist attacks in Kenya and the US that may have necessitated a legal framework.

Chapter Three

This will be a content analysis of the Bill to illustrate clauses that raised contention and to provide a basis for examining its prospects and motivations.

Chapter Four

Critically analyse the data collected.

Chapter Five

We will conclude the study and provide recommendation and issues that need further exploration.

CHAPTER II

KENYA AND INTERNATIONAL TERRORISM

Kenya suffered its first major terrorist attack occurred in December 1980, when terrorists allied to the Popular Front for the Liberation of Palestine (PFLP) bombed part of the Norfolk Hotel in Nairobi then owned by a Jewish family. At least 16 people were killed in the blast carried out in retaliation to Kenya's decision to allow Israeli soldiers to refuel in Nairobi after the 1976 Israeli commando raid on Uganda's Entebbe airport to rescue Israeli and Jewish hostages.

In late June 1976, PFLP and the German Baarder-Meinhof militants hijacked an Air France jumbo jet, with 250 people on board, including 85 Israeli nationals, in Athens and flown it to Entebbe. On July 4, 1976, Israeli commandos aboard three Hercules C-130 transport planes flew at low altitude and landed at the airport in a rescue bid code-named "Operation Thunderbolt."

When they arrived, 103 hostages were still being held after non-Israeli passengers had been released. During the 90-minute raid, which freed the hostages, 20 Ugandan soldiers and seven hijackers were killed alongside several Ugandans.

In the aftermath, Nairobi allowed the Israelis to use the Jomo Kenyatta International Airport and refuel their planes. Four years later, on New Years Eve in December 1980, a bomb ripped part of the Norfolk, causing deaths and wounding scores. Kenyan sources revealed that the mastermind of the attack was a 34-year-old Qaddura Mohammed Abdel al-Hamid, a Moroccan citizen and a member of the PFLP, who fled to Saudi Arabia shortly after the bombing.³⁸

Nearly two decades later, the country was struck by so far the most devastating of terrorist attacks in the region. Near simultaneous powerful bombs went off outside the United States

³⁸ See New York Times, "Official Kenyan Sources Assert Radical Mohammed Akilla was Responsible..." on <http://global.factiva.com>

Embassies in downtown Nairobi and in Dar es Salaam on August 7, 1998. A bomb-laden truck exploded and brought down a building near the US embassy in Nairobi, killing 213 and injuring some 5,000 others, almost all of them Africans, marking the bloodiest ever attacks of their kind in sub-Saharan Africa. In the Tanzanian capital, 11 people were killed and 70 others wounded.

Soon the attacks were traced to Osama bin Laden's Al-Qaeda terrorist network, thrusting the region, and particularly Kenya, into the ring of global war on terrorism. Evidence availed in the New York trial of four Al-Qaeda men linked to the twin bombings revealed a terror network that had flourished in Kenya, taking advantage of lax immigration and security laws³⁹ although the popular thinking in Kenya at the time was that the country, an isle of peace amidst a troubled east and Horn of Africa region, was a victim of external aggression rather than a terrorists' incubator.

Kenya's government response for the most part only employed its diplomatic arsenal; meeting with then US secretary of state Madeleine Albright, and cooperating with the US investigative agencies. However, no efforts were made by Nairobi to initiate a broader national counterterrorism strategy that would inform its own home-grown anti-terrorism strategies.⁴⁰

In November 2002, an explosive-packed four-wheel drive vehicle was driven into an Israeli-owned hotel in the Kenyan coastal town of Mombasa, blowing up and killing 18 people, including 12 Kenyans, three Israelis and the bombers.

Moments after the hotel blast, an Israeli airliner carrying departing holidaymakers narrowly missed being hit by a shoulder-fired surface-to-air missile.

Seven suspects were charged over the attacks, however, in June 2005, the Kenyan high court acquitted four of them, all Muslim men, for lack of evidence. But one was immediately re-arrested. Eighteen days later, three others were also freed, with the presiding judge ruling that the prosecution had failed to prove its case.⁴¹

³⁹ United States Institute of Peace, *Terrorism in the Horn of Africa*, January 2004.

⁴⁰ Muhula Raymond, *Kenya and the Global War on Terrorism*, in *Africa and the War on Terrorism*, Ashgate 2007, pp 43-57.

⁴¹ Agence France-Presse, "Kenyan terror suspects acquitted in Al-Qaeda-linked Mombasa hotel bombings" June 9, 2005, and "Last batch of Kenyan terror suspects acquitted in Mombasa hotel bombing" June 27, 2005.

Al-Qaeda claimed responsibility for both attacks and prosecutors presented telephone records showing numerous phone calls between them and Fazul Abdullah Mohammed, a Comoran national blamed for the 1998 US embassy bombings in Kenya and Tanzania. But the evidence was not allowed after errors were detected.

WHY KENYA IS A TARGET

The three attacks on Kenyan soil raise questions about how and why they occurred. A cursory look reveals revenge by insurgents against foreign targets, pointing to the vulnerability and exposure Kenya attracts for its external relations, notably with the Western powers. Secondly, the possibility of carrying out the attacks inside the country brings forth issues about the ability, or lack thereof, of the security system to detect, prevent and even deal with the threats and actual attacks.

Le Sage argues that the threat of terrorism is not always the first security concern that comes to mind when discussing Africa.⁴² Poverty, disease, civil wars, lack of social services and other calamities that cause human suffering are by far greater threats to lives and livelihoods in the world's poorest continent than threats of terrorism. Realising that Africa is often the venue for attacks against Western interests rather than African interests, some African leaders have stated that terrorism is primarily a Western problem rather than their own.⁴³ This seems to be the popular explanation for Kenya as evidenced in the country's slow response in the aftermath of the 1998 bombings. The government's response grew from a denial based on the perception of Kenya as a victim rather than a source of international terrorism. This denial was also tied to the inability to acknowledge the wider context that led to the growth of terrorism: the erosion of governance structures, notably weak enforcement and gate-keeping.⁴⁴

⁴² Le Sage Andre (eds), *Terrorism, Threats and Vulnerabilities in Africa*, in African Counterterrorism and Cooperation: Assessing Regional and Sub-regional Initiatives, Potomac: 2007.

⁴³ *ibid*

⁴⁴ *Op cit*, United States Institute of Peace.

Kenya's general administrative ineptitude, statelessness and porous borders allow terrorism to flourish, notes Otenyo.⁴⁵ These two variables, at least from an analytical point of view, are essential in explaining why the country has fallen victim of terrorist attacks. They however do not explain generally why terrorism occurs. The latter needs complementary ethnographic and cultural explanations which are not within the remit of this study at this stage. Terrorism springs from a welter of reasons which cannot be reduced to just a few variables.

Nonetheless we need to draw a distinction between the root causes of terrorism and permissive factors. The two are however closely linked, but for the purposes of this study, we shall look at elements spurring vulnerabilities and the strategies employed to tackle the threat, while the causes of terrorism will be considered, they might escape the immediate needs for Kenya to secure itself from such attacks.

Broadly, Kenya's vulnerabilities range from its geographical disposition – both as a source and victim of terrorism – to institutional and political, on the domestic as well as international front.

GEOGRAPHICAL DISPOSITION

Located in east Africa, Kenya shares a border with Tanzania, Uganda, Ethiopia, Somalia and Sudan. It is also in the Horn of Africa region, which in addition to the aforementioned states comprises Djibouti and Eritrea. The Horn of Africa region has come to be regarded as a high risk for terrorism⁴⁶ and has been an important area of operation for Al-Qaeda and the jihadi movement since the early 1990s.⁴⁷ Of all of Kenya's neighbours, Tanzania is the only peaceful country.

Somalia, which has Africa's longest coastline, has been embroiled in a civil war since the 1991 ouster of president Mohamed Siad Barre, plunging the country into cycles of near-daily clashes that have defied numerous attempts to restore stability in the war-racked nation. This has over the years seen a huge influx of refugees into Kenya as well as infiltration of

⁴⁵ See Otenyo Eric, *New Terrorism, Toward an Explanation of cases in Kenya*, African Security Review Vol. 13 No. 3, 2004.

⁴⁶ Ibid, United States Institute of Peace.

⁴⁷ See *Al-Qaida's (Mis) Adventures in the Horn of Africa, Harmony Project*, Combating Terrorism Centre at West Point.

arms and illegal immigrants. Kenya is also home to ethnic Somalis and Muslims on the coastal Mombasa region, making it difficult to distinguish Kenyan Somalis from Somalis proper once they get their way into the country thanks to lax immigration laws, corruption and porous borders. The immigrants also blend in easily with Kenya's Muslim population, posing similar challenges of easy distinction.

The presence of extremist elements and movements in the lawless Somalia contributes to Kenya's state security threats. Somalia has provided safe haven for Al-Qaeda-linked terrorists and other radical groups. The latest of which is the Shabaab militia, an extremist Islamist militia which was the armed wing to the Islamic Court Union (ICU). The ICU ruled Somalia in the second half of 2006 after toppling a US-backed coalition of warlords, seizing swathes of territory in southern and central Somalia. However, their rule was short-lived and was crushed by Ethiopia's invasion in late 2006. Remnant fighters regrouped and joined the Shabaab militia, which has since early 2007 battled the weak, but internationally-backed government of President Sharif Sheikh Ahmed, himself a former ICU top official. The Shabaab have regained control of the regions under the ICU. In March 2009 the group warned Kenya, which has repeatedly expressed concern that the rise of a hardline Islamist administration in the southern port city of Kismayo and surrounding areas risked having negative repercussions on security within its borders, to stop interfering in its affairs of the southern border regions.⁴⁸

To the north is Sudan, whose southern region was the theatre of Africa's longest-running civil war that only ended with the 2005 signing of a peace agreement between the southerners and the Khartoum government. Similar infiltration of arms, fighters and refugees has caused security threats to Kenya. Sudan has also provided a safe haven for Al-Qaeda.

In 1991, Al-Qaeda relocated to Sudan where it was headquartered up to approximately 1996, when Osama Bin Laden and other members returned to Afghanistan. During the years it was centred in Sudan, the network continued to maintain offices in various parts of the world and

⁴⁸ Agence France-Presse, "Somali Islamist hardliners warn Kenya" March 8, 2009.

established businesses which were operated to provide income and cover Al-Qaeda operatives.⁴⁹

Kenya also shares a border with the Ethiopia to the northwest. Ethiopia's southern regions have been jolted by rebellions claiming autonomy from the central government. Both the Ogaden National Liberation Force and the Oromo Liberation Front have engaged in years of insurgency. Oromo fighters have repeatedly carried out cross-border raids in Kenya mainly due to battles over cattle, watering points and pasture. This has stirred insecurity in the region and seen a rise in tribes arming themselves.

More than two decades of insurgency by Uganda's Lord's Resistance Army is also a cause of security concern for Kenya, Uganda's eastern neighbour. Fears of cross-border infiltration cannot be ruled out although the group has lately been weakened by a regional offensive launched in late 2008.

Kenya cannot escape the spill-over of the conflicts in some of its neighbours' territories and the insecurity caused can devastate regions bordering the unrest-wracked countries and even the country as a whole.

GEOPOLITICAL DISPOSITION

Kenya has by far suffered the most devastating of terrorist attacks in the region. The targets in all the three major attacks aforementioned were of foreign interests rather than purely Kenyan interests. This raises questions about the country's foreign relations.

Since independence Kenya has maintained close ties with the Western world, mainly with former colonial sovereign Britain and the United States. The country has fundamentally remained pro-Western since its 1963 independence with successive leaders maintaining close ties with Washington and London.

⁴⁹ See *Al-Qaeda International*, A Congressional Testimony of J.T Caruso, Acting Assistant Director, Counter-Terrorism Division, FBI, before the subcommittee on International Operations and Terrorism, Committee of Foreign Relations, United States Senate on December 18, 2001.

In the tenure of its first two presidents – Jomo Kenyatta and Daniel Moi – the country was steadfastly pro-capitalist unlike some of its neighbours which dallied with Afro-socialism or Marxist inspired systems of governance.

Throughout the most intense period of Cold War competition, Kenya remained solidly allied to the United States and Britain at the UN and in other international fora. In response, the United States rewarded Kenya by making it one of the largest African recipients of foreign assistance and by sending it hundreds of US Peace Corps volunteers.⁵⁰

With Britain, Kenya has a protocol allowing three British infantry battalions and one engineering unit spend six to eight weeks a year in northern Kenya, conducting training and live-fire exercise...⁵¹ Britain also maintains a permanent military training assistance group at their Nairobi embassy and a small office in Nairobi's main international airport.

Kenya is also the only country in East Africa with formal agreement – since April 1980 – with Washington for use of its local military facilities. This agreement permits US troops the use of the port of Mombasa as well as airfields at Embakasi and Nanyuki. Kenya also provides its airspace military manoeuvres by the United States.⁵²

Politically, Washington and Nairobi have maintained close cooperation in Kenya's domestic matters and regional affairs. The US embassy in Nairobi has taken on regional importance... it has had a major role in monitoring developments in the Sudan, notably the North-South peace process. The embassy has also had primary responsibility for coordinating policy on Somalia and following the episodic peace negotiations among Somalia's various political factions.⁵³

The 1998 attacks on US embassies in Nairobi and Dar es Salaam can thus be understood in the light of Bin Laden's February 1998 fatwa that Muslims should kill Americans – including civilians – anywhere in the world where they can be found.⁵⁴

⁵⁰ Carson Johnnie, "Kenya: The Struggle Against Terrorism," in Robert Rotberg (ed), *Battling Terrorism in the Horn of Africa*, Brookings Institutions Press, 2005.

⁵¹ *ibid*

⁵² *ibid*, Muhula.

⁵³ *Ibid*, Carson.

⁵⁴ *Ibid*, Caruso's congressional testimony.

KENYA'S DISAFFECTED MUSLIMS

Kenyan Muslims account for about 10 percent of the entire population, estimated at about 40 million and majority of them are found in the coastal Mombasa region and the parched North-Eastern Province. Over the years, the regions have been politically and economically marginalised, especially the north-eastern province, home to Kenyans of Somali descent.

Anti-Western sentiments in the Arab world, with whom Kenya's coastal Muslims have ancestral ties, have resonated with the local population, with clerics issuing condemnatory sermons, protests by Muslims in solidarity with the wider Muslim political causes in the Middle East, or Muslim rights groups condemning perceived infractions by the government or its pro-Western leanings.

Otenyo argues that the need for Kenya to defend its image as a Western-style democracy placed it at odds with several Islamic fundamental organisations. Several Muslim rights groups reacted angrily at the country's Suppression of Terrorism Bill, which they saw as unfairly targeting Muslims and gave police unbridled powers to arrest and detain people suspected of terrorism without warrants.

Many politicians from the coast have repeatedly slammed the government in Nairobi of shunning the region in appointments to top public jobs yet the region contributes immensely to the country's economic growth owing to its numerous tourist hotels and the port which serves most countries in East Africa.

Frustrated by the virtually non-existent political clout, Muslim leaders formed the Islamic Party of Kenya in 1992, but which was swiftly outlawed by Moi fearing it could generate sectarian political strife.

Where Kenya governmental organisations have failed, Muslim charitable organisations, mostly from Saudi Arabia and the Gulf States, have stepped up their activities and increased their funding.⁵⁵ Despite the apparent government neglect of the Muslim community, their frustration has not swirled into extremist tendencies. Only a handful of individuals have since

⁵⁵ Ibid, Carson

the two bombings to rock Kenya been found to have links with Al-Qaeda through family or Islamic schools and no one has been successfully prosecuted on terrorism charges.

Although extremist Islam has not found foothold among Kenya's Muslims, heavy-handed government attacks on Muslim communities, the lack of economic opportunity and growing frustration may in the future prove to be more fertile material for exploitation by terrorists.⁵⁶

CORRUPTION, INSTITUTIONAL AND LEGAL WEAKNESSES

The planning and execution of the 1998 and 2002 terrorist attacks in Nairobi and Mombasa exposed security, judicial and institutional weakness.

Al-Qaeda terrorist began establishing cells in East Africa in the early 1990s and which were eventually responsible for the two bombings. Central to the 1998 US embassy bombing in Nairobi was Abdallah Mohammed Fazul, Comoran national who trained with Al-Qaeda in Afghanistan.

Working with Islamic charities in Nairobi, Fazul coordinated the running of Al-Qaeda cells in Africa, ferrying money for their operations. He returned briefly to the Comoros in 1996 when Al-Qaeda closed shop in Sudan and Osama moved back to Afghanistan. On his return to Nairobi later that year, CIA agents had raided the offices of some of the charities but the raid did not yield much to curtail their operations.

As the Al-Qaeda hunt down intensified both in Kenya and elsewhere, the Nairobi cell went ahead with the execution of the bombing plot.⁵⁷ Fazul made frequent trips between Nairobi and Khartoum and on May 1, 1998, with the help of a friend he rented a villa in Nairobi's Runda Estate and which became the bomb factory. He recruited three bomb makers and fraudulently worked their travel papers to enable them enter Kenya.⁵⁸ The bomb-making material, which included two tonnes of explosives and bomb casings, was brought between November 1997 and June 1998 hidden under consignment of relief food by a charity ironically known as Help Africa People and taken to the Runda villa.

⁵⁶ Rosenau William, *Al Qaida Recruitment Trends in Kenya and Tanzania*, Studies in Conflict and Terrorism, 2005.

⁵⁷ Op cit, Al-Qaida (Mis) Adventured in the Horn of Africa.

⁵⁸ Daily Nation, August 2, 2008.

Fazul bought a pick-up truck, which he modified and had ferried in a cargo truck to Nairobi on August 2, 1998. The following day, three accomplices – Mohammed Sadiq Odeh, a Palestinian living in Jordan, Khalid Salim, a Yemeni and Abdallah Nacha from Lebanon – were booked in a downtown Nairobi hotel. The three had entered Kenya fraudulently as volunteers of the Help Africa People relief group.

On August 4, 1998, Fazul accompanied them for a rehearsal in the streets of Nairobi, riding a taxi to the entrance of the US embassy building in the city centre and took pictures of the building. Two days later, in an apparent move to throw everyone off scent, cartons of relief food were ferried to the hotel where the three were staying. It would later be discovered that the cartons contained rice and powdered milk with forwarding address to a refugee camp in Turkana district.⁵⁹

Early Morning of August 7, 1998, the pick-up truck was driven from the relief group's offices in Nairobi's South C estate to the hotel in the city where it was loaded with some cartons of rice and milk and driven to Runda where it was loaded with the bomb that ripped the embassy building a few hours later.

Later that day, Fazul arranged for his family and father-in-law to fly to the Comoros and that evening he arranged for the keys of the villa to be handed over to the owner, having already hired local people to clean it out. He stayed in Nairobi for another week and on August 14 flew to the Comoros and later to Dubai.

Kenya proved to be a far more conducive setting to base Al-Qaeda operations. The cells worked freely in the country, with few expressed concerns about being monitored or detained by Kenyan police or security forces. The operatives chartered small planes with ease, flying in and out of Somalia with no hint of authorities checking their activities as was with their transactions to hire and purchase boats on the coast for travel into coastal Somalia.⁶⁰

Rampant graft in Kenya makes it easy for terrorists to obtain travel documents and bribe authorities to look the other way, much to the detriment of the country's security. Indeed, the

⁵⁹ *ibid*

⁶⁰ See Harmony, *Al-Qaida (Mis) Adventures in the Horn of Africa*.

Kenya police have topped the list of the most bribery prone institution since 2002, when Transparency International Kenya introduced a bribery index.⁶¹

Testimony in the 1998 embassy bombing trial revealed that Odeh used fake travel documents obtained at a government immigration office to leave Kenya the night before the attack. Omar Said Omar, one of those allegedly involved in the 2002 Mombasa attacks also claimed he used a fake Ethiopian passport to get back to Kenya in December 2001 after completing his Al-Qaeda weapons training in Mogadishu.⁶²

After escaping Kenya, Fazul's next assignment was to assume a leading role in Al-Qaeda East Africa. He based himself in Lamu island where he operated a madrasa, married a local girl and recruited several operatives some of whom worked as fishermen, others as preachers and missionaries.⁶³ This was in preparation for the November 2002 bombing of an Israeli-owned hotel and airliner in Mombasa.

Preparations for the attacks began a year earlier when several members of the team gathered in Mogadishu and began training in rented apartments in small arms and explosives. By April 2002, the targets were identified and by August the group smuggled a number of missiles and shoulder launchers into Kenya by sea from Somalia. The weapons had been earlier bought in Yemen.

Before the attacks, the group divided into four sub-groups, with one staying in Mogadishu, a second carrying out the suicide bombing of the Paradise hotel, a third in Lamu preparing a boat escape to Somalia and a fourth, under Fazul's command, carrying out the failed missile attack on the airliner.⁶⁴

⁶¹ See Transparency International, East Africa Bribery Index 2009, p. 18. The police force retained the top position of the most bribery-prone institution in the country for the sixth year. Similarly, it ranked the worst in only two of the six indicators, down from four in 2005, and five in 2004. See Transparency International-Kenya, Kenya Bribery Index 2007, p.10.

⁶² Op cit, Harmony, p. 53

⁶³ *ibid.*

⁶⁴ Op cit Rosenau, p. 3.

These events show profound weakness in Kenya's security forces. The police lack real investigative capabilities, preferring instead to rely on torture, intimidation and imprisonment to extract information.⁶⁵

On two different occasions, police arrested Fazul, but let him get away. In July 2002, five months before the Mombasa attacks, Fazul was actually arrested and taken to custody in Mombasa for attempting to make purchase using a stolen credit card. Despite the fact that his picture was in wide circulation... he reportedly managed to escape one day later. In August 2003, police tracked down and arrested two Al-Qaeda suspects wanted in connection with the hotel bombing. While being transported to the police station, one detonated a concealed hand grenade and in the ensuing confusion the second suspect, generally thought to be Fazul escaped.⁶⁶

It is widely thought that during the first arrest, Fazul managed to bribe low-level officers into setting him free and that in the second arrest, improper police procedures and sheer incompetence – failing to thoroughly frisk the suspects – led to his escape.

Kenya's judiciary does not escape blame either. The attorney general's office which is responsible for bringing suspects to trial has not acted with great speed or purpose.⁶⁷ Nor have senior state prosecutors demonstrated any great skill in prosecuting Kenyans arrested for allegedly aiding and abetting Al-Qaeda operatives or for taking part in criminal conspiracies that produced the Nairobi and Mombasa attacks.

In June 2005, after more than two years of judicial proceedings, the presiding judge dismissed murder charges against four suspects over the Mombasa bombing for lack of evidence. In the ruling the judge said "since... the suicide bombers... perished during the attack, there is no evidence whatsoever to connect the accused to the murder of the deceased persons."⁶⁸ The judge then ordered for their immediate release.

⁶⁵ *ibid*

⁶⁶ See Carson, p. 184.

⁶⁷ *ibid*

⁶⁸ See Agence France-Presse, *Israel deplores acquittal of suspects in Al Qaeda-linked Mombasa hotel bombing*, June 10, 2005.

Defence lawyers had called for their freedom, arguing that state prosecutors had failed to prove their case and none of the 89 prosecution witnesses had linked the suspects to the 2002 bombing. They charged that their clients were being prosecuted due to pressure from Britain, France and the US to punish someone for the attack.

One of the suspects was however immediately re-arrested and charged with illegal arms possession. His case was overturned in 2008 with the judge citing lack of sufficient evidence.

Three other suspects also being tried for the Mombasa attacks were acquitted on June 27, 2005 after the judge ruled that the prosecution failed to prove its case.

The failure by Kenya's security forces to detect, deter and successfully prosecute terrorism suspects wrought a serious indictment on the country's ability to protect itself from international terrorism. Most evident is the lack of an anti-terrorism law to try suspects, forcing courts to issue murder charges instead as it is arguably the severest under the existing laws and most relevant to such offences. Yet even with this provision, the police, who are charged to investigate and provide string evidence to back up charges have severally failed to mount credible proof for a successful conviction even on other non-terrorism related cases.

In addition, because authorities had for a long time viewed terrorism as targeting Western interests locally, the response had been that suspects be tried in those countries whose facilities were targeted as was the case of the transfer of two 1998 bombing suspects to US authorities fearing that prosecuting them locally would incur further Al-Qaeda attacks.

Even in the absence of counter-terrorism laws, the country's lax immigration procedures and runaway graft pose hurdles to securing the country from external aggression, especially from the unconventional attacks by terrorists.

COUNTER-TERRORISM EFFORTS

After the 1998 US embassy blast, Kenya cooperated closely with Washington on counterterrorism efforts, establishing the National Security Intelligence Service (NSIS) which

received support from the US Anti-Terrorism Assistance Programme through the training of more than 500 Kenyan police.⁶⁹

The US government also funded the East African Counterterrorism Initiative (EACTI) launched in 2003 to the tune of 100 million dollars, with Kenya receiving around 35 million dollars. In the same year Kenya set up the Anti Terrorism Police Unit (ATPU), the Joint Task Terrorism Force (JTTF) and the National Counterterrorism Centre as well as the National Security Advisory Committee in 2004. However, the government disbanded the JTTF in 2005 to the dismay of US policy makers.⁷⁰

The country also upgraded airport security, improved its immigration and screening procedures, especially for citizens from high-risk countries and dedicated more resources to scrutinising Kenyans who might pose terrorist threat.⁷¹ The US and Kenya have also conducted joint military drills, including a naval exercise near Lamu in 2003. The Djibouti-based Combined Joint Task Force-Horn of Africa has also collaborated with Kenyan security to help secure its porous northern borders. In addition, Nairobi is also party to 12 United Nations conventions on terrorism established in 2001.

Such efforts have yielded some results. Shared information between the two countries helped thwart a planned attack on the US embassy in 2003. Also in the same year, the Kenya government published the Suppression of Terrorism Bill. But the legislation faced strong opposition from lawmakers and Muslim pressure groups and other human rights organisations. The MPs argued that the bill was a US-inspired instrument imposed on the government as a condition for further support, while the rights groups derided it as oppressive to Muslims and a claw-back to basic freedoms achieved through years of struggle against the oppressive regime of former president Moi.

In addition, the bill was seen as arbitrary and therefore prone to abuse by agents of the state even when there was no real threat of terrorism. Its broad definition of terrorism, terrorist and the perceived US imposition were some of the sources of the virulent criticism.

⁶⁹ Whitaker Beth Elize, *Reluctant Partners: The United States and Kenya in the War on Terror*, Paper prepared for presentation at the International Studies Association annual meeting, February 28-March 3, 2007, Chicago, Illinois.

⁷⁰ See Whitaker.

⁷¹ *Ibid*, Carson, p. 189.

The bill defined terrorism as:

(a) the action used or threatened: (i) involves serious violence against a person, (ii) involves serious damage to property (iii) endangering the life of any person other than the person committing the action (iv) creates serious risk to the health or safety of the public or a section of the public (v) is designed seriously to interfere with or seriously disrupt an electronic system, (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public; and (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.⁷²

The definition of terrorism, terrorist organisations, terrorist property in the bill are so wide that being drunk and disorderly or in possession of a pen knife can fit the definition.⁷³ Many anti-terrorism legislations define terrorism broadly, emphasise anti-state activities and give the government in question the authority to label whole organisations as terrorist groups.⁷⁴ When such laws are passed without basic freedoms safeguards, they can give authoritarian governments more tools to clamp down on opponents, and may conversely counter the ultimate goal of preventing terrorism. The laws, mostly in Third World countries, generally limit civil liberties and expand law enforcement powers in the name of protecting national security.⁷⁵

The 2003 Suppression of Terrorism Bill has undergone two revisions, in 2006 and in 2009. Although neither of the revisions were published and brought before parliament, they have largely redefined terrorism and polished the much-criticised clause. In the 2006 version, renamed Anti-Terrorism Act, terrorism is defined as:

⁷² Government of Kenya, *Suppression of Terrorism Bill, 2003* Kenya Gazette Supplement No. 38 (Bills No. 15), Nairobi: Government Press, April 2003.

⁷³ See Kitonga Nzamba, *The Fight Against Terrorism in East Africa*, paper presented at the East Africa Law Society Conference on "Globalisation and Terrorism: The New Threats to Regional Integration," October 10, 2003.

⁷⁴ See *Third World Quarterly*, Vol. 26 (1), 2005.

⁷⁵ Whitaker Beth Elise, *Exporting the Patriotic Act? Democracy and the 'war on terror' in the Third World*, *Third World Quarterly*, Vol. 28, No. 5, 2007 p. 1029.

(a) An act of omission in or outside Kenya which constitutes an offence within the scope of counterterrorism convention; (b) An act or threat in or outside Kenya which, *inter alia*, involves serious damage to property; endangers a person's life....⁷⁶

The 2009 edition also renamed the bill; The Prevention of Terrorism Bill, 2009, and in its definitions of various terms are set out in the preliminary section which reads as a caveat to any further references. Terrorist act is extensively but precisely defined. The definition reinstates much of what was in the original draft but expounds on some of the broad and vague provisions.

In addition to defining a "terrorist act" as (a) involving the death or serious bodily harm to a person; (b) involves serious damage to property... it also includes the use of fire arms or explosives as well as chemical or biological weapons.⁷⁷ It also defines a "terrorist" as (a) an entity that has one of its activities and purposes, the committing of, or the facilitation of the commission of a terrorist act...⁷⁸

The revisions are thus seen to be addressing the shortcomings of the first bill, whose contents will be extensively analysed in the next chapter. Comparisons with the 2009 draft will be analysed in subsequent chapters.

⁷⁶ Government of Kenya, *The Anti Terrorism Bill, 2006 (Draft)*.

⁷⁷ Government of Kenya, *The Prevention of Terrorism Bill, 2009 (Draft)*, pp. 5-6.

⁷⁸ *Ibid*

CHAPTER III

THE KENYA SUPPRESSION OF TERRORISM BILL (2003)

The Suppression of Terrorism Bill was published on April 30, 2003, but was withdrawn from parliament due to concerns over some of its provisions. The concerns, as have been previously mentioned, ranged from its potential to undermine basic freedoms, conferring overwhelming powers on the police, equivocal and imprecise definition of terrorism as well as strict penalties for offences under the bill.

The bill comprises 44 sections and four schedules and is divided into nine parts. Part I is a preliminary section on the bill's title, interpretation and the meaning of terrorism. Part II deals with terrorism offences, Part III declared terrorist organisation, Part IV terrorism property, Part V terrorism investigations, Part VI exclusion orders, Part VII mutual assistance and extradition, Part VIII amendments and Part IX miscellaneous provisions.

This chapter will analyse the polemic sections with the aim of understanding the concerns by various Kenyan rights groups, lawmakers and other concerned parties. This is critical in informing the analysis of the policy-makers' perception of the threat and the act of terrorism and how it is manifested in measures to deal with them.

DEFINITION OF TERRORISM

The definition of terrorism and acts of terrorism in the bill has been criticised as ambiguous, vague and too wide.⁷⁹ For instance, an acid attack that endangers the life of the victim, as

⁷⁹ Section 3 (1) In this Act, "terrorism" means the use or threat of action where –

- (a) the action used or threatened --
 - (i) involves serious violence against a person;
 - (ii) involves serious damage to property;
 - (iii) endangers the life of any person other than the person committing the action;
 - (iv) creates a serious risk to the health or safety of the public or a section of the public; or
 - (v) is designed seriously to interfere with or seriously to disrupt an electronic system;
- (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public; and
- (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause:
Provided that the use or threat of action which involves the use of –
 - (i) firearms or explosives
 - (ii) chemical, biological, radiological or nuclear weapons; or

provided for in section 3 (1) (iii), can constitute a terrorist attack, or a carjacker who commits violent robbery using a firearm, or even an angry neighbour who destroys one's property in a fit of rage. Imprecise definition of terrorism or terrorist activity can lead to an abuse of the clause with any loosely-fitting crime being able to be categorised as terrorism. The lack of a clear definition gives further cause for concern because the decision to institute prosecution for such offences could be seen as politically motivated.⁸⁰ In addition, the vagueness violates the principle of legality for crimes⁸¹ and the Constitution of Kenya according to which section 77 (8) says that "no person shall be convicted of a criminal offence unless that offence is defined, and penalty therefore is prescribed, in a written law."

Unlike the Kenyan penal code, the bill does not define terms that constitute an act of terrorism, leaving references such as "serious violence" against a person, "serious damage" damage to property to open interpretation. Chapter II of the penal code that deals with interpretation, for example, defines "grievous harm" as any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, while "harm" means any bodily hurt, disease or disorder whether permanent or temporary.⁸²

However, the definition of terrorism has remained problematic, and as long as there is no clear understanding of what constitutes an act of terrorism, then assigning blame and punishing the offence will remain elusive. The 1937 League of Nations convention⁸³ was the first attempt at defining what terrorism is. Article 2 (2) describes terrorism as "wilful destruction of, or damage to, public property or property devoted to a public purpose belonging to or subject to the authority of another High Contracting Party." Subsequent

(iii) weapons of mass destruction in any form,
shall be deemed to constitute terrorism whether or not paragraph (b) is satisfied.

(2) In this section –

- (a) "action" includes action committee outside Kenya
- (b) a reference to any person or property is a reference to any person, or property, wherever situated;
- (c) a reference to the public includes a reference to the public of a country other than Kenya
- (d) "the government" means the government of Kenya or of a country other than Kenya.

⁸⁰ See Amnesty International, *Memorandum to the Kenyan Government on the Suppression of Terrorism Bill 2003*, p.4, September 2004.

⁸¹ *Ibid* and Article 15 of the ICCPR.

⁸² Government of Kenya, *The Penal Code, Chapter 63*, section 4, p.15.

⁸³ See the 1937 Geneva Convention on the Prevention and Punishment of Terrorism.

articles outline other offences that fall in the remit of a terrorist act. However, the convention never entered into force due failure to receive enough ratifications.

Generally though, terrorism seems to involve influencing an audience, which is often not that of the victims themselves.⁸⁴ Thus terrorism is the premeditated use or threat of extraordinary violence by sub-national groups to obtain political, religious, or ideological objective through intimidation of a huge audience, usually not directly involved with the policy making that the terrorists seek to influence.⁸⁵

The challenge lies in transforming the general concept of terrorism into legislation that safeguards both state security and individual freedoms and rights.

POSSESSION OF AN ARTICLE FOR TERRORIST PURPOSES

Section 6 (1)⁸⁶ of the bill is perhaps the most speculative of the provisions, providing no ground for any substantive action against the purported offender. It is circumstantial and lays the burden of proof with the alleged offender while failing to compel the prosecution to provide incontrovertible evidence and intent against the offender, making it susceptible to abuse by arresting officers. This clause contravenes section 77 (2) (a) of the constitution of Kenya, which provides that “every person who is charged with a criminal offence shall be presumed innocent until he is proved guilty or has pleaded guilty.”

Sub-clause 3⁸⁷ of section 6 is also a violation of the Penal Code under section 9, where “a person is not criminally responsible for an act or omission which occurs independently of the

⁸⁴ Bergesen Albert and Han Yi, *New Directions for Terrorism Research*, International Journal of Comparative Sociology, 2005, p.134.

⁸⁵ Enders Walter and Sandler Todd, *Patterns of Transnational Terrorism, 1970-1999: Alternative Time-Series Estimates*, International Studies Quarterly.

⁸⁶ Section 6 (1) A person who possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding ten years or to a fine.

(2) It is a defence for a person charged with an offence under this section to satisfy the court that his possession of the article was not for the purpose connected with the commission, preparation or instigation of an act of terrorism.

⁸⁷ Sub-section (3) If, in proceedings for an offence under this section, it is provided that an article –

(a) was on any premises at the same time as the accused, or

(b) was on the premises of which the accused was the occupier or which he habitually used otherwise than a member of the public,

exercise of his will, or for an event which occurs by accident. The sub-section also calls for collective punishment and also violates section 77 (2) (a).

DECLARED TERRORIST ORGANISATIONS

Under section 9 of the bill, the security minister can declare an organisation a terrorist group, or revoke the declaration based on the minister's "belief."⁸⁸ However, sub-section 5 states that the minister's move can only be undertaken if the said organisation commits, is involved in, promotes, or otherwise concerned with terrorism. If the later is the case, then it renders the minister's action under this sub-section redundant.

The provision can also be used arbitrarily, more so when the basis of declaring an organisation a terrorist group is the minister's belief and because the purposes for which an organisation is classified as a terrorist outfit are often contested by the said group. Moreover, terrorist are branded as such, they seldom announce themselves as terrorists. Is a terrorist group such because it has been labelled or is it because of its activities? Obviously the basis of determining that should be objective, and even if an organisation were to be declared a terrorist movement, it should be done rationally, backed with proof to preclude abuse of the provision.

The bill does not provide for a chance to challenge the minister's decision, which is without checks and balances.

Clause 10 of the bill makes it an offence to be a member of a declared terrorist organisation. The flaw in the preceding section renders untenable this section because the criteria for deciding whether a group is a terrorist organisation are already contestable. Declaring an individual as a member of a terrorist group, whose classification as such is doubtful, wrecks the basis for which one should be declared an adherent. Furthermore, a group can be declared a terrorist movement with the sole intention of targeting an individual.

the court may assume that the accused possessed the article, unless he satisfies the court that he did not know of its presence on the premises or that he had no control over it.

⁸⁸ Sub-section (3) The Minister may by notice published in the Gazette –

(a) declare that a specific organisation is concerned with terrorism

(b) revoke any notice previously published under this section.

(4) The Minister May exercise his power under sub-section (3) in respect of an organisation only if he believes that it is concerned with terrorism.

UNIFORMS

Section 12⁸⁹ of the bill is the most arbitrary, highly susceptible to abuse and incredibly disingenuous. Crime thrives on disguise and even street pick-pocket is keen to keep cover. It is unimaginative that a terrorist who intends to inflict extensive damage would be as unwise as to expose himself. Moreover, what clothing or article would be used to identify a terrorist or whether one's intention to commit a terrorist act would be determined on the basis of dressing.

For a police officer to arrest a suspect without a warrant on account of one's dressing, or possession of an "article" claimed to be intended to be used to commit a terrorist act is a violation of the constitutional provision guaranteeing innocence until proven otherwise, or confesses to the offence. The powers given the police under this section are far-reaching and are without checks and an affront to basic freedoms. There is no clear definition of what constitutes suspicious dressing, and even if there were, it cannot be justifiable in a democratic society.

PROPERTY TRACKING AND SEIZURE

The proposed bill's section 19, 20 and 21 permit the attorney general to compel the divulging of information by an individual or a bank when one is suspected of involvement in terrorism, or is about to commit an act of terrorism. Failure to comply with the order, the high court will authorise the attorney general or other officer to enter a premises and seize documents. The attorney general may also apply for an ex-parte order to attach property or money seized from a suspected terrorist or organisation.

The flaw in this provision stems first from the use of civil jurisdiction of the high court or magistrate's court to issue ex-parte orders in a criminal case. It is also a violation of the protection from deprivation of property under section 75 of the constitution of Kenya, which

⁸⁹ Section 12 (1) A person, who in a public place –

- (a) wears an item of clothing; or
- (b) wears, carries or displays an article

in such a way or in such circumstances as to arouse reasonable suspicion that he is a member of declared terrorist organisation shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding six months or to a fine or both.

- (2) A member of the police force may arrest a person without a warrant if he has reasonable grounds to suspect that the person is guilty of an offence under this section.

states that “no property of any description shall be compulsorily taken possession of, and not interest in or sight over property of any description shall be compulsorily acquired...” However, the constitution provides for exemption of this action if it is in the defence of public safety, order, morality, health or town planning or development. In such circumstances, subsection (c) calls for the “prompt payment of full compensation.”

Section 19, 20 and 21 make no clear and express provision for the return of any property when the suspect is found innocent, leaving it to the discretion of the contents of an ex-parte order by the attorney general as in section 20 (3) (b) which provides for “the granting authority to make money or other property available to such persons and on such conditions as may be specified in the order.” Or the high court may “release” – unspecified to whom – when initial conditions for such action are not met or “where proceedings are brought in connection with the detained cash.”⁹⁰

Such ambiguous provisions can be abused to deprive persons of money or property for the unjust enrichment of others.

TERRORIST INVESTIGATIONS

Compounding the imprecise definition of terrorism in the clause 3, section 24 of the bill widens the scope of culpability to alleged terrorism crimes committed before the enactment of the Suppression of Terrorism Bill of 2003.⁹¹

This retroactive application of the law is in sharp contravention of Kenya’s constitution. Section 77 (4) provides that “no person shall be held to be guilty of a criminal offence on account of an act or omission that did not, at the time it took place, constitute such an offence.”

Section 26 gives police extensive powers under emergency cases to enter and search premises, seize property and detain a person, who is freed only at the completion of the search.

⁹⁰ See section 21 (8) (a) and (b) of the Suppression of Terrorism Bill.

⁹¹ Section 24 (2) ...The definition of a “terrorist” ... extends to a person who has, before the enactment of this Act, has been concerned in the commission, preparation or instigation of acts of terrorism within the meaning of this Act.

Section 30⁹² allows police to hold a person incommunicado for 36 hours, which is a blatant abrogation of the constitutional provision that a suspect must be brought to court within 24 hours of his or her arrest and to have a prompt access to a lawyer, unless it's a capital offence. This section can increase the risk of torture and mistreatment of detainees. Kenyan security forces have been repeatedly accused of torturing detainees and summary executions of suspected crimes and such provision is a threat to the safety of detainees⁹³ and heightens risk of coerced confessions.

According to a 1995 UN Report of the Special Rapporteur on Torture, "torture is most frequent during incommunicado detention. Incommunicado detention should be made illegal and persons held incommunicado should be released without delay. Legal provisions should ensure that detainees be given access to legal counsel within 24 hours of detention."⁹⁴

While the bill gives reasons as to "why" of this provision... it gives no indication as to what will happen to the detainee and provides no safeguards from any potential abuse during this period of incommunicado detention.⁹⁵

Section 37 under which extradition can be carried out is speculative. It assumes that there will be an international convention to which the country will become a member and will provide basis for extradition.

⁹² Section 30 (1) Where any person is arrested under reasonable suspicion of having committed any offence under the provisions of Parts I, II, III and IV of this Act, a police officer of or above the rank of inspector may, subject to this section, direct that the person arrested be detained in a police custody for a period not exceeding thirty-six hours from his arrest, without having access to any person other than a police officer of or above the rank of an inspector or a government medical officer and, in any such case, that person shall be detained accordingly.

⁹³ See Alston Philip, UN Special Rapporteur account on *Extrajudicial, Summary or Arbitrary Executions in Kenya*, May 26, 2009, pp 6-7 explains that killings by the police are widespread. Some killings are opportunistic, reckless or personal. Many others are carefully planned. It is impossible to estimate reliably how many killings occur, because the police do not keep a centralized database.

There are six primary factors which account for the frequency with which police can kill at will in Kenya: (i) official sanctioned targeted killings of suspected criminals; (ii) a dysfunctional criminal justice system incentivises police to counter crime by killing suspected criminals, rather than arresting them; (iii) internal and external police accountability mechanisms are virtually non-existent; there is little check on, and virtually no independent investigations of, alleged police abuses; (iv) use of force laws are contradictory and overly permissive; (v) witnesses to abuse are often intimidated, and fear reporting or testifying; and (vi) the police force lacks sufficient training, discipline and professionalism

⁹⁴ Report of the Special Rapporteur on torture, UN Doc. E/CN.4/1995/434, paragraph 926 (d).

⁹⁵ Ibid, Amnesty International memorandum.

POWERS OF POLICE AND OFFICERS

Section 40 is tantamount to licensing impunity on the part of security officers by guaranteeing immunity to prosecution irrespective of the apparent potential of abuse of their powers under this clause.⁹⁶ It is unclear, ambivalent and imprecise what “reasonable” force means. As previously mentioned, Kenyan security forces are known for excessive use of force and mistreatment of alleged suspects. This sections opens wide the avenue for unbridled and wanton use of force backed up by immunity from prosecution.

It is curious though why “reasonable” force would be shielded from prosecution arising from the death of a suspect. It is clear that the drafters must have imagined that such use of “reasonable” force can be fatal as to provide caveats. The purpose for which the use of force is necessary is not explained, and so its inclusion in this section or in the bill is not justified. Nonetheless its flimsy veil for torture is evident from loopholes it strives to plug.

Not only does the section abrogate basic rights life, it is also a violation of the constitution insofar as sub-section 4 is concerned. The detention of property for a s “long as necessary in all circumstances” is in contravention of the constitutional provision outlawing the deprivation of property without the due process. To detain property indefinitely in all circumstances is a sure way of disenfranchising the accused persons. It also gives immunity to police, customs officer or “other officers” from prosecution arising from destruction of property. In short, this is a carte blanche for the police or other officers to err while enjoying immunity from any legal proceedings.

⁹⁶ Section 40 (2) A member of the police force, customs officer or other person may if necessary use reasonable force for the purpose of exercising a power conferred to him by virtue of this Act.

(3) A member of the police force, customs officer or other officer who uses such force as may be necessary for any purpose, in accordance with this Act, shall not be liable in any criminal or civil proceedings for having, by the use of force, caused injury or death to any person or damage to or loss of any property.

(4) Where anything is seized by a member of the police force, customs officer or other officer under a power conferred by virtue of this Act, it may (unless the contrary intention appears) be retained for as long as necessary in all the circumstances.

THE PREVENTION OF TERRORISM BILL, 2009 (DRAFT)

Much improvement has been made in the draft 2009 Prevention of Terrorism Bill, expunging and redressing clauses that had sparked outcry and criticism for being drastic, unclear and inconsistent with the constitution, the penal code as well as some international treaties.

Although the revised draft retained most of the constitutive elements defining the act of terrorism as in the 2003 bill, it expanded its scope to encompass the ideological and political motivations.⁹⁷ This part of the definition is consistent with sections in international conventions on terrorism or related offences and in response to United Nations Security Council Resolution 1456 of 2003 which urged that “states must ensure that any measures taken to combat terrorism must comply with all their obligations under international law, in particular international human rights, refugee and humanitarian law.”⁹⁸

Kenya has acceded to all 13 conventions set out in Resolution 1373:⁹⁹

- Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963;
- Convention for the Suppression of Unlawful Seizure of Aircraft 1970;
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971;
- International Convention against the Taking of Hostages, 1979;
- Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (supplementary to the Convention for Suppression of Unlawful Acts against the Safety of Civil Aviation) 1988;
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988;
- Convention on the Physical Protection of Nuclear Material 1980;
- Protocol for the Suppression of Unlawful Acts against the Safety of Fixed

⁹⁷ See Clause 2 (i) to (iii) which says the act of terrorism may reasonably be regarded as being intended to (i) intimidate the public or a section of the public (ii) seriously destabilise or destroy the religious, political, constitutional, economic or social institutions of a country, or an international organisation; or (iii) compel a government or an international organisation to do or refrain from doing any act.

⁹⁸ UN Doc. S/RES/1456/ (2003)

⁹⁹ UN Doc. S/RES/1373 (2001) adopted on September 28, 2001.

Platforms located on the Continental Shelf 1988;

- Convention on the Marking of Plastic Explosives for the purpose of Detection 1991;
- International Convention for the Suppression of Terrorist Bombings 1997;
- International Convention for the Suppression of the Financing of Terrorism 1999;
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Individual Diplomatic Agents 1993;
- Convention for the Suppression of Acts of Nuclear Terrorism 2005.

Nonetheless, there is no agreed universal definition of terrorism. But the 13 international conventions – albeit sectarian – collectively form a general consensus on what amounts to a terrorist act.

For instance, the International Convention for the Suppression of the Financing of Terrorism¹⁰⁰ defines terrorism offence under article 2 (1) (b) as “...(an) act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act.”

A closely-related definition is also under the 2004 UN Security Council Resolution on threats to international peace and security caused by terrorist acts, and which describes the offence as “... criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act...”¹⁰¹

¹⁰⁰ Adopted by the UN General Assembly Resolution 54/109 of December 1999

¹⁰¹ See UN Security Council Resolution 1566, adopted on October 8, 2004, UN Doc S/RES/1566 (2004).

In describing terrorism, the International Commission of Jurists plumped for the primacy of the “act itself, not the actor.”¹⁰²

The Prevention of Terrorism Bill is a seven-part document containing a preliminary chapter, a chapter on specified entities allowing the attorney general to declare an individual or a group a terrorist organisation for the purposes of legal proceedings. The third chapter deals with terrorism offences, what constitute such an offence, conspiracy and abetting terrorism such as through harbouring suspects, providing weapons, recruitment and dealing in property used for terrorism. The chapter also sets out penalties for the various offences, essentially prison terms ranging from between five and ten years.

The fourth part outlines investigation procedures that include powers of arrest, rights to be released, searching for information, seizing and forfeiture of property. Part five deals with trial of terrorist offence and gives lower courts the jurisdiction to try suspects. The sixth chapter deals extradition and assistance to foreign states and the last chapter miscellaneous matters.

What is clear at the onset is that the Prevention of Terrorism Bill (2009) has fewer but consolidated chapters. While the 2003 bill had nine, the current one has two less. Much criticised clauses have all together been struck off. The article imputing criminal culpability on the basis of dressing has been expunged, thereby eliminating risks of arbitrary arrest. It has also done a way with a provision placing the burden of proof of innocence on the accused instead on prosecutors or investigators. The draft 2009 bill also outlines articles in a more logical sequence and expounds on what constitutes an offence of terrorism and trial.

The bill defines who or what organisation is a terrorist group and how such an appellation is arrived at. It also provides an extensive range of acts that amount to a terrorism offence, which broadly comprises conspiracy, abetting and membership of a terrorist group. In total there are 21 offences unlike the previous bill that listed five under the part of terrorist offence. In essence the revised draft logically clusters related articles.

¹⁰² International Commission of Jurists, *Assessing Damage. Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, Geneva, 2009. p.7

Section 3 (2) of the 2009 draft bill, the attorney general can make the declaration under the recommendation of a minister and after reviewing the evidence supporting the need to make such a declaration. In addition, the entity or the person declared as such has a means of redress through the high court to review the decision, thus;

A specified entity may apply to the attorney general requesting the attorney general to recommend to the minister the revocation of an order... in respect of that entity.

Under the chapter of investigation, which is the same article 25 in both bills, the 2009 draft law gives the police powers to arrest without a warrant of arrest a person caught in flagrante delicto or suspected to have committed a terrorist act. However, it calls for habeas corpus within 24 hours in accordance with the constitution, barring a force majeure or remoteness of the place of arrest. This rectifies the flaw in section 30 of the 2003 bill under which a suspect would be held incommunicado for at least 36 hours.

A person arrested under section 25 (herein after referred to as suspect) shall be released within 24 hours of the arrest unless (a) the suspect is produced before a court and the court has ordered that the suspect be remanded in custody; or (b) it is not reasonably practical, having regard to the distance from the place where the suspect is held to the nearest court, the non availability of a judge or magistrate, or *force majeure* to produce the suspect before court not later than twenty-four hours after the arrest of the suspect.

Missing in the first anti-terrorism bill was which court and what category of suspects, whether citizens or foreigners, would be tried for terrorism. Article 31 of the 2009 draft empowers subordinate courts to handle such cases when the offence is committed in Kenya, by a Kenyan, a resident or is aimed at the government or its properties and the suspect is in Kenya after the commission of the offence. The chapter on the conduct of trials also stipulates provision of evidence and confiscation of property used in the commission of a terrorist offence under a court order.

On extradition and mutual assistance in criminal investigation, the new draft however maintains the clause according to which an extradition may be carried out on the strength of an assumed counter-terrorism convention which Kenya and another country are party to in the absence of an extradition treaty between Kenya and a foreign state.

A critical improvement in the latest draft is the exclusion of article 40 of the previous draft which shielded police and other officers from criminal proceedings for causing injury or death to a suspect through the use of force. Instead it protects any one who gives information relating to terrorism under article 40, which also compels financial institutions to report to the Central Bank any suspicious transaction.

Terrorism offences have been reworked to include the commission of an offence knowingly, thus plugging gaps that could have led to arbitrary arrests, collective punishment or laying the burden of proof with the alleged offender. The 2003 draft severally proposed that “it is the defence of that person charged with an offence... to satisfy the court...” that they are not guilty of the said offence.

In general, the draft bill is a vast improvement of the 2003 piece of legislation. It clarifies, revises and aligns its provisions with the penal code and the constitution. For instance, the high court can only give an order to seize property when an application to do so is “supported by an affidavit, that there are reasonable grounds to believe that there is in a building, place or vessel, any property in respect of which an order of forfeiture may be made...”¹⁰³

¹⁰³ See section 41 of the Prevention of Terrorism Bill, 2009 (Draft).

CHAPTER IV

CRITIQUE OF KENYA'S COUNTER-TERRORISM STRATEGY

Despite suffering East Africa's worst terrorist attack in 1998, Kenya did not enact any counter-terrorism legislation until after a second attack in 2002 in Mombasa that targeted an Israeli-owned hotel and an Israeli airline. The Kenya Suppression of Terrorism Bill was published in April 2003, five months after the country was struck by a second terrorist attack, also claimed by Al Qaeda.

Because the attacks were specifically directed at Western interests, reasoning among most local leaders and observers was that terrorism was primarily a Western problem although Kenyans bore the worst brunt. Nairobi's reaction stemmed from the perception that the country was a victim rather than a breeding ground for international terrorism.

However, the two attacks left the country vulnerable, and domestic and international pressure began piling on the government to take action. The US and Britain issued travel warnings to their citizens citing terrorism and security threats in Kenya. These warnings translated to economic pressure, notably on the country's tourism, a top foreign exchange earner. Washington continuously renewed its travel advisory in the aftermath of the 2002 bombings while London suspended British Airways flights to Kenya over similar fears. Calls from the Kenyan public, commitments to international conventions, the equivalent of economic sanctions by the US and Britain which led to a lack of funds to implement its programmes, all pressured the Kenya government to propose the anti-terrorism legislation.¹⁰⁴

Thus in April 2003, the government published the Suppression of Terrorism Bill. But as has been discussed on previous chapters, the bill was withdrawn from parliament due outrage and pressure from civil society groups and Muslim organisations principally because of its draconian clauses that were criticised as offensive to civil liberties, gave police arbitrary and unbridled powers and largely inconsistent with the country's constitution.

¹⁰⁴ Kamau Wanjiru Carolyne, *Kenya and the War on Terrorism*, Review of the African Political Economy, Vol. 33, No. 107, Taylor and Francis 2006.

Critics of the bill labelled it a product of foreign interests, notably the United States and Britain, and was thus not in response to the country's terrorism problems. These suspicions were born out of provisions of the bill that granted inexplicable power over Kenyan officials to foreign governments and the actions of the US and British government as they restricted their citizens' travels to Kenya.¹⁰⁵ Section 34 of the bill states that:

Where a foreign state makes a request for assistance in the investigation or prosecution of an offence related to terrorism, or for tracking, attachment or the forfeiture of terrorist property located in Kenya, the Attorney General shall (a) execute the request; or (b) inform the foreign state making the request of any reason for not executing forthwith or for delaying the execution of the request.

Hence the attorney general is not only under the obligation to explain to a foreign state why Kenya cannot offer assistance as called for in the above clause, but to do so expeditiously without delay. Parallels have also been drawn between the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 broad definition of terrorism and that in the Kenya Suppression of Terrorism Bill (2003). In addition to providing a wide definition of terrorism, the pieces of legislation emphasise anti-state activities and give the government in question the authority to label whole organisations as terrorist groups. They expand law enforcement powers by permitting enhanced surveillance and reducing procedural requirements such as obtaining court approval.¹⁰⁶

Wanjiru argues that critics of the Kenyan anti-terrorism bill who said it was a product of foreign influence were vindicated when as soon as the government published the legislation, the first British Airways flight after more than a month landed at the Jomo Kenyatta International Airport with more than 200 tourists. The BA flights to Nairobi had been diverted to either Uganda or Tanzania which had already published anti-terrorism legislation.

Western influence in many African countries cannot be ruled out as a tool for directing policy. This has been done through threat of sanctions and suspension of aid to exert pressure to achieve certain objectives. In Kenya, the US and Britain were influential in the re-introduction

¹⁰⁵ Ibid, p. 137.

¹⁰⁶ Whitaker Beth Elise, *Exporting the Patriot Act? Democracy and the 'war on terror' in the Third World*, Third World Quarterly, Vol. 28 No. 5 pp 11017-1032.

of multi-party politics in the early 1990s. The suspension of aid by the US and other key donors weighed heavily on Moi's government to liberalise politics. The coming to power of the Kenyan opposition in 2002 at the end of Moi's 24-year autocratic rule was with the US and Britain's backing. It is in this context that the publication of the anti-terrorism bill is understood.

Nonetheless, foreign pressure is not always in direct proportion with policy outcomes in Third World countries. In Zimbabwe for instance, Mugabe's government has come under travel and economic sanctions since the controversial white-owned land seizures launched in the late 1990s, but little changed over the years despite the country plunging into economic disarray and political crisis. It is only in recent years, since the contested 2008 elections, that the ruling regime has bowed to some international pressure and conceded political space in addition to being beleaguered by an economy in freefall and increasing poverty.

Although the US pressure on the adoption of anti-terrorism legislation is largely through rhetoric rather than actual incentives, people in many developing countries clearly believe that such laws are required by the USA as part of its global 'war on terror,' argues Whitaker. This partly explains why Kenya has so far failed to rig through an anti-terrorism bill in the face of heightened pressure and criticism. Foreign backing does not always necessary yield the intended results.

The US, however, deployed huge resources in the Horn of Africa to set up anti-terrorism strategies, including security forces training, boosting intelligence and surveillance capacity and airport security in the aftermath of 9/11. Kenya received much of the 100 million dollars of the Horn of Africa counter-terrorism package to set up an anti-terrorism police unit and support of Muslim education.

Legislation also formed part of Washington's new overtures in the post-9/11 era which saw a number of African countries draft and enact counter-terrorism laws. The Kenya Suppression of Terrorism Bill cannot therefore escape being analysed within this context.

Its provisions, as have been analysed in the previous chapter reveal serious flaws and inconsistencies not only with the country's constitution, but with simple reasoning as well as other international conventions guaranteeing human rights which Kenya is party to. Amnesty

International criticised it as forming a parallel system of justice providing sweeping powers to security forces and stringent penalties for suspects of terrorism.

The outcome of the attempt to legislate against terrorism in Kenya highlighted a lack of understanding about the factors enabling perpetrators to carry out attacks in the country. The Suppression of Terrorism Bill (2003) was a drastic measure to counter what is understood as disproportionate attacks that need equal measure of forceful retaliation. It was a reactionary strategy targeting only the manifestations of deeper socio-economic, political and institutional shortcomings without the breadth to tackle the structural weaknesses that give rise to terrorism. A *locus classicus* is section 40 of the anti-terrorism bill which confers upon the police and other officers the powers to use force “as may be necessary for any purpose” against a suspect, and such an officer “shall not be liable in any criminal or civil proceeding for having, by use of such force, caused injury or death to any person or damage to or loss of property.” This provision, which was expunged in the 2009 Prevention of Terrorism draft law, starkly bares the conception of terrorism by the drafters and policy makers. It is a brutal offence that can only be dealt with in equal measure of force.

The retaliatory response to terrorism has limited effectiveness. It fails to address the conditions that allow terrorist to strike. Broadly, such factors can be internal and external. Internal factors are those domestic conditions creating conducive environment for domestic terrorism to thrive, but also makes a country vulnerable to attacks. They may be economic deprivation, political oppression, government repression or ethnic persecution.¹⁰⁷ While external factors stem from a country’s foreign policies and external relations such as has been discussed previously regarding Kenya’s relations with the West. Alliances with the US and Britain and other key Western nations can explain terrorists’ motivation in striking foreign interests in a poor Third World country which has no direct enmity with the attackers. Moreover, it vindicates the notion of easy-target developing nations whose diplomatic ties with the West provide grounds to hurt foreign interest at lower premium. Another external driver is the development of telecommunication that has made it easier for terrorist networks to conspire and carry out attacks against their enemies without incurring much logistical hurdles.

¹⁰⁷ Botha Anneli, *Africa’s Vulnerability to Terrorism and its Ability to Combat It*, in *Understanding Terrorism in Africa: In Search for an African Voice* (eds), Institute for Security Studies 2006.

In a nutshell thus far, the Suppression of Terrorism Bill 2003 was an event-driven, externally influenced measure that seized the factors of the moment without taking into consideration the wider aspects of terrorism. It was a response to the symptoms of a variety of dysfunctions enabling the occurrence of terrorist attacks.

TERRORISM PREVENTION ANALYSIS

Terrorism is the premeditated use or threat of use of violence against individuals or sub-national groups to obtain political, religious, or ideological objectives through intimidation of a large audience usually beyond that of the immediate victims.¹⁰⁸ Terrorism scenario places states and attackers on a confrontational path, with either side striving to inflict maximum damage on its rival, while mostly states are inclined to annihilate the terrorists, terrorists on the other hand are more ideologically driven and often want to communicate a political or religious stance through violence.

A theoretical analogy of this conflict is illustrated by the Chicken Game, in which two drivers speed down a narrow lane towards each other. Each driver has the option to swerve and avoid a head-on collision, or continue on the collision course. The first one to swerve is the chicken. Both drivers can decide to swerve, in which case they shall have cooperated (CC), or head on for a smash-up – defect from cooperating (DD) while one driver can cooperate and the other defects (CD) or (DC). These strategies lead to four possibilities which are assumed to be ranked from best (4) to worst (1) and can be outlined as follows;

1. Both drivers cooperate (CC) the next-best outcome for them is (3,3)
2. One driver cooperates and the other does not (CD or DC) the best outcome for the driver who does not cooperate and the next-worst outcome for the driver who cooperates is thus (2,4) and (4,2)
3. Both drivers do not cooperate (DD) gives the worst outcome for both players (1,1).

The payoffs for either side can be ranked as $CC > CD > DC > DD$, but in a terrorism scenario, outcome one – the next-best outcome (CC) – is not an option because neither side would achieve its objectives which are in conflict with the other's. This is partly the reason why

¹⁰⁸ See Daniel G et al, *Counterterrorism: A Game-Theoretic Analysis*, Journal of Conflict Resolution, Sage Publications, 2005

states prefer pre-emptive strategies over defensive ones because the adversary would spare no effort to strike when the opportunity presents itself. The Kenya Suppression of Terrorism Bill (2003) is an outcome of this strategy, more so that the country had suffered previous devastating attacks rules out the possibility of a compromise. The iteration of the attacks is a pre-emptive move that spurs an opposite and similar reaction from the state. Hence the state's response assumes a worst case scenario and arms itself proportionately to its adversary. It is to be noted that Chicken Game is a zero sum game in which one player's win is another's loss and one must assume that the worst possible sequence will take place as their interests are diametrically opposed. An opponent establishes a worst-case scenario which serves as his benchmark for the next game. Although the anti-terrorism bill does not provide for attacking terrorist bases whenever they may be in retaliation due to Kenya's military limitations, the drastic measures in the legislation reveal the nature of response the country intended to deploy to restrict possibilities of being attacked once more.

The Game Theory is an appropriate tool as it analyses individual rational decision behaviour in social decision conflicts and represents a social conflict and as a game and how to resolve it.

Recalling Sandler's reasoning, the game theory captures the strategic interactions between terrorist and targeted governments and such interactions are among rational actors who are trying to act according to how they think their counterparts will act and react. In terrorist situations, each sides issues threats and promises to gain a strategic advantage and terrorists and governments abide by the underlying rationality assumption of the game theory where a player maximises a goal subject to constrains. Most importantly, uncertainty and learning in a strategic environment are relevant to all aspects of terrorism in which the terrorists or the government or both are not completely informed.

The order ranking in the Chicken Game manifests imperfect information about the intention of the opponent and hence the propensity not to cooperate to not be seen as the chicken while anticipation that the rival swerves and hands you the strategic score. But the opponent is also mulling the same strategy, making the interaction a risky anticipation venture. The state-terrorist relation then turns the global society into a risky avenue prowled by antagonistic forces trying to outdo the other to gain strategic advantage. With globalisation and technological advancements, terrorism has become a universal problem where there are no

bystanders anymore and the attacks in Kenya testify to this. While the unpredictability of the attacks accentuates the global security risk, an overzealous, absolute and emphatic response makes it all the more precarious.

The climate of uncertainty spurs speculative counterterrorism measures such as manifested in the Suppression of Terrorism Bill and as Mythen and Walklate argue, the very impossibility of estimating the terrorist risk can provide a mandate for the hasty implementation of legislation that threatens civil liberties. They posit that the new security calculus does not assess the future by focusing on the past – ‘what was?’ – nor indeed the present – ‘what is?’. Instead, security assessments are directed by the question ‘what if?’ For instance, clause 12 (2) of the Kenya anti-terrorism bill provides that a member of the police force may arrest a person without a warrant if he has reasonable grounds to suspect that the person is guilty of an offence under this section. It does not explain what ‘reasonable’ grounds are, how long the person will be detained. It is arbitrary and prone to abuse. Similarly section 37 of the bill is presumptive. It assumes that there will be an international counter-terrorism convention to which Kenya will become a party and then makes the convention a basis for extradition.

If citizens are detained because they *might* be planning terrorist attacks in the future, what charges can reasonably be brought? Even in the event of a hypothetical charge being levelled, what legal defence can the accused have? Pose Mythen and Walklate, adding: The fearfulness of risk society is leading Western societies to respond to dangers in ways that undermine the basic values of liberal societies, values honed to guard against the dangers of repression and inhumanity as well as express the commitment to democratic governance. The rebuttal strategy is founded in the Chicken Game theory whose main plank is the zero sum game. As such the security of one player is contingent on the annihilation of the opponent, but in the global security nexus, the strategy is deleterious and fails to distinguish democratic liberal societies from extremist attackers. The US ‘war on terror’ that saw it invade Iraq and Afghanistan are exemplary in being counterproductive. Under the 2002 US National Security Strategy, the greater the threat, the greater the risk of inaction and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack, to forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively.¹⁰⁹

¹⁰⁹ See the National Security Strategy of the United States, 2002.

However, Mythen and Walklate caution that true security cannot and should not depend on inflicting insecurity on others and there is need to ensure that legislative responses are commensurate with the level of threat. But as discussed in the literature review section, Evans notes that terrorism is a complex phenomenon involving different levels of organisation and group identity. The reality of any threat or risk is a function of not just capacity, but the intention, but even then there isn't sufficient understanding to make confident judgement. Contemporary terrorism is constantly mutating, rendering knowledge of when, how and on what scale difficult, he argues.

Such complexity buttresses pre-emptive military strategy, which despite its shortcomings, cannot be disregarded as completely ineffective. There is merit to pursuing terrorists with the aim of weakening their capabilities, but the measure should be tempered with the level of threat and a balance between liberty and security sought. It is important to note that no single strategy however is effective. It is not a case of either one or the other, but a mixed strategy addressing the structural causes and active measures to weaken terrorist potential that offer a longer-term approach to resolving terrorist violence.

Livingston, cited by Muhula¹¹⁰, identifies three categories of counterterrorism measures: military, regulatory (legal) and appeasement. Military approach mix pre-emption with deterrence and retribution, while the judicial responses create penalties for terrorist activities. Kenya's response has been legislative, policy and diplomatic, Muhula notes. Despite the absence of an anti-terrorism legislation, Kenya has in recent years arrested and tried suspected terrorist, although the prosecutions were not successful, as well as thwart attempted attacks in collaboration with US intelligence.

A survey conducted by Volker Krause and Eric Otenyo between December 2002 and February 2003¹¹¹ showed that routine checks was considered the most effective means to prevent terrorism, with 71.7 percent of respondents preferring it to assassination of terrorists, air strikes, intelligence collaboration with the CIA and Mosad, recognising Palestinian

¹¹⁰ See Muhula p. 52.

¹¹¹ Krause Volker and Otenyo E. Eric, *Terrorism and the Kenyan Public*, Studies in Conflict and Terrorism, Routledge, 2005.

statehood and registration of the Islamic Party of Kenya. The researchers attributed the outcome as a reflection of “status quo orientation.”

Kenyans may prefer measures they are relatively familiar with to measures they see as less ordinary and potentially harmful to any individual civil rights they may have acquired or may acquire in a democratising political system.¹¹²

Although the survey was carried out before the publishing of the Kenya Suppression of Terrorism Bill (2003), the tendency to uphold the achieved civil rights is a valid argument bolstering the rejection of the bill, notably because of its potential to erode civil liberties. Overzealous measures such as the bill proposes thus fail to capture what is perceived as the most effective means to curb terrorist threats and despite the effects of terrorism on Kenya’s national security, Kenyans perceive their individual security endangered less by terrorists than by AIDS, local criminals and car accidents, the survey found.

The finding that local criminals and car accidents appear more dangerous than terrorists may suggest that issues of domestic stability, law and order, as well as public safety are of such important daily concern to Kenyan individuals that they overshadow perceived needs to increase protection against terrorism.¹¹³

KENYA’S SECURITY VULNERABILITIES

As discussed in the previous chapter, a number of vulnerabilities make terrorism attacks possible in Kenya. Legislation against terrorist threats and attacks should not only deal with the outcome of such weaknesses but provide a framework to seal loopholes making the country a victim of attacks. The Suppression of Terrorism Bill (2003) was a mechanism aimed mainly to prosecute potential perpetrators and attackers – only if the latter are caught. Legislation is an outline of penalties against a crime, presupposing the existence of miscreants upon whose activities it owes existence and purpose. It is the outcome of a social ill which it seeks to punish and prevent. It does not aim to resolve their *raison d’être*. Such is why there is need to expand the remit of anti-terrorism legislation to enable it severely limit the possibility the occurrence of the crime, because no law can exterminate terrorism, or any other crime.

¹¹² Ibid, Volker and Otenyo.

¹¹³ Op cit, Volker and Otenyo.

As such, the parameters of a crime targeted by any legislation, in our case terrorism, it is vital to investigate and understand why terrorist can carry out violence within the borders, but without necessarily delving into the socio-cultural underpinnings of terrorism. It is also important to weigh the effectiveness of an anti-terrorism legislation and whether it addresses the underlying structural causes or just tackles the symptoms of systematic failures.

In chapter two, we identified geopolitical, geographical, government marginalisation and institutional and legal loopholes as some of the conditions for terrorists to thrive and carry out attacks. In sum, two levels of analysis emerge; intra-state and extra-state and approaches to deal with the threat of terrorism must take into considerations the prevailing circumstances and tackle the root causes as focusing on arresting and prosecuting suspects address only the manifestation of a deeper problem.

Kenya's geopolitical stance has been characterised by its close dalliance with Western states, mainly former colonial power Britain and the United States. After independence from Britain in 1963, the country remained staunchly pro-West throughout the Cold War period. The two Western states maintain military presence in Kenya and their embassies play a key political role in the Horn of Africa which is considered a particularly risky region due to terrorist activities.

So should Kenya renounce its diplomatic ties with the West given that the attacks on its soil seem to stem from Osama bin Laden's 1998 fatwa that Muslims should kill Americans, including civilians, anywhere in the world? Surely not, instead there should be close collaboration to confront a common enemy facing these historic allies. However, it is important that the Britain and especially the US understand and harmonise approaches of combating terrorism in order to achieve a meaningful objective for all. As has been noted, terrorism is not a top threat to most Kenyans, crime and personal insecurity are perceived as more present and menacing than terrorism. This does not mean that threat of terrorism is not real, but that the threats of terrorism could be shrouded by other forms of crime. For instance, high crime rate is an indicator of lax security and inadequate policing. It can also point to economic deprivation thus people resort to crime for survival, or rising population and diminishing resources, which in turn reveal inadequate government action to cope with changes in the society. Preoccupation with the life's humdrum challenges can cloud people's broader appreciation of what such life hurdles can spur. Indeed, a general sense of deprivation can be exploited by terrorists to recruit idle youths to become foot soldiers, while security

lapses are sure means of committing crime, including terrorism acts, and even getting away with it.

Volker and Otenyo argue that it is quite likely that Kenya's commitment to the war on terrorism is motivated less by Kenyans' perception of terrorist threats in a quid pro quo or trade-off between public goods. Specifically, Kenya's policy may be to support the United States against terrorists in exchange for US support for against AIDS and for political stability, democracy, pluralism and economic development. Such policy may help reduce friction and tension in US-Kenyan relations.¹¹⁴

To have an effective counterterrorism approach to work for Kenya and possibly in the region, it is critical to assess domestic conditions and understand how structures of government, political participation and the society in general work before coming up with a counterterrorism policy. Hard security approaches currently identified with Washington's policy can only exacerbate insecurity and put Africa's weak democracies at risk.¹¹⁵ Some critics of the Kenya Suppression of Terrorism Bill (2003) denounced it as a US-imposed strategy and that Nairobi was acting on orders without having understood the import of the proposed legislation. Indeed, given the parallels between the legislation in developing countries and Patriot Act, there is ample reason to suspect active American participation of these laws.¹¹⁶

A mutually benefiting strategy between Kenya and its Western partners ought to exploit the US and British comparative security and intelligence advancements and blend it with domestic realities and exigencies to fashion a formidable strategy against terrorism. This calls for a review of the partners' objectives and means through their diplomatic channels. A review of the US and British military presence should be undertaken in the face of changing security realities given the present day terrorist threats. Whether such military installations are mutually beneficial or whether they are a security burden to the host country is an issue that should be reviewed.

Kenya's geographical disposition in a region riven with violence, especially Somalia, which has lacked a central authority for nearly two decades and with which it shares a long and porous border, is a source of security concern. The 1998 and 2002 bombing in Kenya have

¹¹⁴ See Volker and Otenyo.

¹¹⁵ Kagwanja Peter, *Counter-terrorism in the Horn of Africa: New Security Frontiers, Old Strategies*, African Security Review, Vol. 15. No. 3.

¹¹⁶ See Whitaker p. 1021.

Somalia links in terms of infiltration of weapons and would be attackers. Preparations for the November 2002 Mombasa attacks began a year earlier in Somalia before the mastermind, Abdallah Mohammed Fazul, moved into Kenya's coastal town of Lamu, where he set up base and trained those who later carried out the attack which claimed 15 lives.

Porous borders and the ability to cross through illegally without much hassle is not only a function of inadequate security, it also points to weak and compromised immigration oversight. The plotting of the 1998 US embassy Nairobi blast revealed systematic lapses in immigration and intelligence. Fazul was able to obtain fake passports for himself and his accomplices and use them to travel in and out of the country, where Al Qaeda cell worked freely, with few raised eyebrows. They chartered small planes with ease, flying in and out of Somalia with no hint of authorities monitoring their activities as was their transactions to hire and purchase on the coast for travel into coastal Somalia.

Makinda points that there is hardly any African country that has the capability to police its coastline, while many of the countries rely on poorly trained and corrupt intelligence personnel.¹¹⁷ Kenya police for instance have topped the list of the country's most corrupt institution since 2002 according to an annual survey by the Transparency International Kenya chapter. Rampant graft makes it easy to obtain travel papers and cross various points of entry without much questioning at the detriment of a country's security as well as escape arrest by bribing the police. Fazul himself was arrested on two occasions but managed to escape. In one instance he is said to have paid off his way to freedom, the second was due to improper police procedures in which they failed to properly frisk a suspect, who later detonated a grenade and helping Fazul to flee in the confusion.

While suspects can be prosecuted for terrorism offences, hurdles in jurisprudence and lack of specific anti-terrorism laws such as in Kenya make successful conviction difficult. Suspects arrested in connection with the Mombasa attacks were all freed due to lack of sufficient evidence. In addition to a litany of procedural restriction during trials such as period of detention of terrorist suspects – deemed too short to secure enough proof – Okello also blames

¹¹⁷ Makinda M. Samuel, *History and root causes of terrorism in Africa*, in *Understanding Terrorism in Africa: In Search for an African Voice* (eds), Institute for Security Studies 2006.

lack of trained manpower, modern equipment (forensic laboratory, etc) and financial resources are major hurdles in the prosecution of terrorism and related cases.¹¹⁸

Strengthening the country's institutions to deal with terrorism, from prevention to successful prosecution of suspects is critical to undermining terrorists' potential to prepare and launch attacks. A wholesome strategy that combines intelligence gathering, border security and judicial aptitude deploys an array of arsenal against the threat of terrorism and ensures preventive and punitive legal measures to put a stranglehold on the crime.

CONCLUSION

The title Suppression of Terrorism implies that terrorism can be smothered by the clauses set out by the legislation, yet legislation is nothing but a punitive tool used against plotters and executors of a crime and not a strategy to pursue terrorist and annihilate them as the title may suggest. It is also just one facet of measures at tackling terrorist violence, indeed it is a regulatory measure applied *a posteriori*. The implication of the title is vindicated by the bill's draconian clauses and so is the perception of terrorism by the bill's drafters and policy makers. The much-improved 2009 draft bill entitled Prevention of Terrorism is a more realistic appellation whose contents also reflect a revised view.

Since the terrorist attacks, Kenya, with the US support, has upped its vigilance at points of entry, upgrading airport surveillance systems and intelligence gathering through its Counterterrorism Centre, Anti-terrorism Police Unit and the National Security and Intelligence Service. It has also deployed army battalions to supervise its long and porous border with Somalia. These steps can be credited with preventing further attacks. They have arguably been effective in the absence of a specific anti-terrorism legislation. The need for multiple approaches to fight terrorism is thus vindicated by the steps so far taken by the Kenya government. Nonetheless, there has been an outcry over rights violations by the Anti-Terrorism Police Unit accused of arresting innocent people, being complicit in renditions and gaffes. A diplomatic spat arose in April 2009 between Kenya and Dubai after Kenyan anti-terrorism police arrested four members of the Gulf state's ruling family in Mombasa on

¹¹⁸ Okello Edwin, *The arrest and prosecution of terrorist suspects*, in *Understanding Terrorism in Africa: In Search for an African Voice* (eds), Institute for Security Studies 2006.

suspicion of being terrorists. Dubai responded by restricting visa issuance only to Kenyans with university degrees.¹¹⁹

As previously discussed, there is a link between economic depression, ethnic or religious marginalisation, wanting security strategies and weak institutional and governance structures and international terrorism. Caution should be taken though to not infer a cause-effect relation between one condition or all the conditions and terrorism. Africa is the world's poorest continent and if a deductive conclusion were to be made, it thus necessarily is the theatre of international terrorism, which is not the case. Similarly porous border and weak immigration does not necessarily translate to terrorism. Drug and arms trafficking can thrive under such condition. International terrorism springs from a confluence of factors that cannot be reduced to one or two variables. However, the aforementioned conditions broaden the understating of international terrorism catalysts with the aim of devising a comprehensive mechanism that deals both with the contributing factors and manifestations of terrorism. By treating terrorism merely as a symptom – the primary focus is on arresting and prosecuting the perpetrators – without addressing the underlying cause, it will remain a threat to human security.¹²⁰ A medical analogy reinforces this approach. Symptoms are manifestations which help to identify an ailment and guide a physician to the causes of the disease, which if properly tackled health is restored. Conversely, treating the disease and not the symptoms can lead to degeneration and further complication, and so a multiple therapy aiming to clear both the disease and its symptom is the most complete remedy, and so are approaches to terrorist violence.

Several scholars concur thus. Lyman and Morrison¹²¹ point that the US counter-terrorism approach in Africa should be more holistic. Rather than concentrate solely on shutting down existing Al Qaeda cells, it must also deal with the continent's fundamental problems – economic distress, ethnic and religious fissures, fragile governance, weak democracy and rampant human rights abuses – that create an environment in which terrorists thrive. Governments must re-commit themselves to counter-terrorism by strengthening counter-terrorism laws, police and intelligence, tightening border controls, coastline surveillance and anti-money laundering measures to detect, deter and diffuse terrorist threats, but strike a healthy balance between these measures and the values of democracy and human rights,

¹¹⁹ See Daily Nation, *No degree, no travel to Dubai*, April 19, 2010, see also BBC *Dubai fury as Kenya expels rulers*, on <http://news.bbc.co.uk> downloaded on April 30, 2010.

¹²⁰ Ibid. Botha.

¹²¹ Ibid. Lyman N. Princeton and Morrison J. Stephen.

argues Kagwanja.¹²² He also calls for bolstering of regional capabilities through cooperation with world powers such as the US to guard against the tendency of foreign nations' perspectives of war clouding local security realities.

For Makinda, the best counter-terrorism approach for African states should be based on political and economic empowerment, social justice, development, creative institutional designs and capacity building.¹²³ The Suppression of Terrorism Bill (2003) and its revised versions if finally voted through parliament should form the basis of a broader national counter-terrorism strategy comprising the so far discussed spheres to ensure an effective multi-pronged anti-terrorism bulwark. The shortcomings of the 2003 bill, the critics levelled against it and the revised versions are important ingredients towards this endeavour. As Farnham posits, the political decision-maker's most important task is to find an alternative around which a consensus can be built. The withdrawal from parliament of the first anti-terrorism bill is a testimony to lack of political consensus, which must be addressed in future plans to introduce a new version.

Even if an acceptable counter-terrorism bill were to be presented to parliament and passed, the importance of incorporating other strategies, as the absence of such a bill has shown since Kenya embarked on an anti-terrorism drive, it would not succeed in preventing an attack. Indeed some lawyers have argued that amendments to the constitution and the penal code suffice to prosecute the crime of terrorism. In other words, the security and intelligence measures undertaken have proven to be effective thus far, but a lack of prosecutorial tool will surely undermine a successful conviction of suspects under the current circumstance and the sustainability of the security measures alone will crumble if they yield suspects who cannot be tried for terrorism, let alone punished.

Carson¹²⁴ points out that Kenya must realise that an effective counter-terrorism strategy relies on coordination between the police, military and the intelligence services as well as a comprehensive social, economic and political response. He however notes that as a result to poor pay and low professional standards, many policemen and immigration officials remain susceptible to corruption by criminals as well as terrorist elements. The socio-economic and

¹²² Ibid. Kagwanja.

¹²³ Ibid. Makinda.

¹²⁴ Ibid. Carson.

political causes that generate support and sympathy for terrorist causes must be addressed by Kenya's political class and senior officials, he argues.

CHAPTER V

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

The objective of this study is to find out the impact of international terrorism on counter-terrorism legislation, to determine the forces influencing the formulation of the Kenya Suppression of Terrorism Bill (2003) and how those forces shaped the legislation to combat terrorism.

As discussed in chapter two and four, Kenya's various domestic and external factors such as socio-economic and political conditions as well as its relations with foreign states renders it susceptible to terrorist attacks. A counter-terrorism strategy, as we have highlighted, should address the vulnerabilities to ward off attacks. The Kenya Suppression of Terrorism Bill (2003) which was published five months after the country was stricken for the second time by terrorists was an attempt to punish those suspected of attempting to commit terrorism, those colluding with terrorists and those who actually commit terrorism crime. However, many of the drastic penalties set out were inconsistent with the constitution, the penal code and some international human rights conventions Kenya is party to, while the broad definition of terrorism extended the meaning to include almost any crime. Its disregard to civil liberty, collective punishment and violation of the presumption of innocence until proven otherwise were a reflection of an overzealous measure borne out of fury rather than a rational consideration of the threat. It was true to its appellation: "suppression of terrorism."

Scholars have drawn parallels with the US PATRIOT Act in its wide and imprecise definition of terrorism, while the US incorporation of Africa, especially the Horn of Africa region, in its "war on terror" following the devastation of 9/11 attacks was a clear sign of Washington's determined involvement in counter-terrorism in the region. Kenya, where the worst attacks against a US embassy occurred in 1998, received the bulk of a multi-million dollar initiative in the Horn of Africa. East African governments have been largely receptive to engagement with the United States, note Lyman and Morrison, but they point out that strong US support for anti-terrorist measures by the Kenyan parliament has also provokes anger, particularly from civil libertarians and Muslims. Kenya cooperated closely with the US after the 1998 embassy blast, establishing the National Security Intelligence Service supported by

Washington, which also funded the East African Counter-terrorism Initiative. Nairobi also set up the Anti-Terrorism Police Unit and the National Counter-terrorism Centre.

The US was thus an influential force behind Kenya's anti-terrorism efforts. Little wonder that the Kenya Suppression of Terrorism Bill was discredited as a US-imposed legislation. It is hence valid to infer that the bill bore foreign traces and not an entirely home-grown solution to Kenya's terrorism threats given the overall United States' involvement in the region and particularly in Kenya. The elevation of national security over individual freedoms as is the hallmark of many a modern day anti-terrorism measures is reflected in Kenya's counter-terrorism legislation and is one of the strong reasons behind its rejection.

With a heavy-handed US approach to terrorism in Kenya it is clear that its perception of terrorism and how to deal with it was prescribed to its partners in Africa without consideration to local security realities, notably the perception of the level of terrorism threats and other factors making African states susceptible to terrorist violence. A key pointer is that thus far terrorism has mainly targeted foreign interests in African states, although as previously discusses, it does neither preclude the African countries from providing terrorists' breeding ground nor by consequence exclude the states, considering their own unique disposition, from attracting terrorist strikes.

International terrorism is a relatively new phenomenon in Africa which is mainly beset by challenges of disease, hunger, natural calamities and civil wars. Understanding international terrorism and how to deal with it, given its low ranking among security concerns, remains a cumbersome task for many African governments, more so that the targets of such attacks have thus far invariably been Western interests. Afflicted African countries find themselves thrust in an international arena of violence whereas they are use to dealing with local insurgencies, political opposition and electoral challenges, are simply baffled by their presence and relevance at such a battle field characterised by obscure belligerent entities fighting a foreign nation on their soil. Formulating a counter-strategy against a nebulous conflict is at the onset nothing but gamble and gaffes. Identifying the offenders, defining the offence, how to punish it, whether the punishment is commensurate and effective is mind-stretching for countries still struggling to overcome economic, political and social difficulties all in the midst of domestic and foreign pressures. The legal challenges are compounded by the general lack of law observance and enforcement even without the threat of or actual terrorist act.

Enacting an anti-terrorism legislation has faced competing and conflicting domestic and foreign interests in Kenya. On the one hand there is the US and Kenya, and on the other is Kenya and its Muslim community. For the US the objective is to undermine Al Qaeda and its local tentacles which entail convincing Kenyan authorities and ordinary people about the importance of its anti-terrorism activities. For Kenya, the aims are more problematic. It seeks to maximise its trade-off in its cooperation with the US at the same time it wants to minimise three attendant costs: (a) the loss of political support from its citizens in an increasingly competitive electoral climate, (b) their higher profile as a legitimate target which accompanies close association with the US and (c) the concern that too much “buy-in” to terrorism concern will hurt vital tourism industry.¹²⁵

Kenya on its part is wary of upsetting the Muslim community owing to electoral and political reasons as well as the fear that antagonising this demographic through anti-terrorism measures will make them more sympathetic to terrorists’ agenda. Thus Kenya’s commitment to the counter-terrorism agenda remains equivocal.¹²⁶ A dilemma arises between receiving the incentives stemming from close cooperation with the US in fighting international terrorism and the domestic fallout it portends for the government with its citizens. This is worsened by the disparate priorities on terrorism between Kenya and the United States. While Western powers make high significance of terrorist threats, for Kenya, it remains a low. This further lends credence to criticism that the Kenya Suppression of Terrorism Bill had foreign roots and the reluctance to revise and enact a fresh legislation partly confirms the low priority set for terrorism. International terrorism places many developing nations at odds with their own citizens and their international partners first in terms of the perception of the threat of terrorism and the divergent objectives to counter it, as such anti-terrorism measures have either been largely rigged through parliament in less democratic states, rejected or subjected to rigorous criticism and review before enactment in more open and liberal countries. However, initial counter-terrorism legislations or those passed without much debate remain much more like the Kenya Suppression of Terrorism Bill (2003).

We hypothesised that the anti-terrorism bill reflected the Kenyan decision-makers’ understanding of the effects of international terrorism, represented an external perception of

¹²⁵ Harmony, *Al Qaeda (mis) Adventures in the Horn of Africa*.

¹²⁶ Ibid.

international terrorism or was neither a reflection of Kenyan decision-makers' perception of the magnitude of terrorist attacks nor a result of external influence.

Because of the perceived low significance of terrorism threat by Kenya and the efforts brought about by the US in the wake of the 1998 embassy bombing, the anti-terrorism legislation is very much a US-made measure, even if not overtly. In addition, America is Al Qaeda's top foe and attacks are carried out in retaliation for US meddling in the Middle East and other alleged violations. While striking Western targets in African cities have largely been seen as symbolic, the presence of such installations in developing countries provides just enough reason for terrorist strikes, drawing them into the line of fire and becoming part of US's grand anti-terrorism strategy. An independent home-grown Kenya anti-terrorism bill would not have been necessary without the attacks on the US and Israeli interests here, neither would the attacks been worthwhile without such targets and so isolating these linkages demolishes criticism of external manifestations in the Kenyan Suppression of Terrorism Bill (2003).

The pervasiveness of "new terrorism" ushered by an unconventional means of warfare piled pressure on the US, Britain and other world powers to devise means of detecting, deterring and defeating the indiscriminate terrorist attacks. Bolstering national security and public safety brought with it the elevation of state security over individual liberty with characteristic draconian legislations aiming to deal a severe jolt to terrorism and its apologists. The apocalyptic fear sown into the public psyche, whipped up the media through governments' connivance generated widespread sense of insecurity aimed at justifying the absolute and drastic measures to counter terrorism. It neatly sunk a ridge dividing the bad guys and the good guys, good and evil and set the context for former US president George W. Bush to snugly clutch his mantra: "Either you are with us or against us." The resultant climate gave rise to a new security calculus focusing not on the past or present, but an uncertain future where the concern is "what if?" as illustrated by Mythen and Walklate and the "what if?" questions produce "solutions" that are extremely problematic at the level of both law enforcement and criminal justice. The two scholars note;

What is most striking about the "war on terror" is its emphatic and absolute approach. Instead of seeking to limit and reduce risk, the alleged objective of the "war on terror" is simply to wipe terrorism out. The obliteration of terrorism can only be achieved by the adoption of an

aggressive set of policies that actively seek out terrorist cells and punish states that fail to quash or challenge terrorist activities. Such power-plays are put into motion through aggressive activities that “take the fight to the terrorists,” such as the invasion of Afghanistan and Iraq.

As allied states were roped in into the US global war on terrorism so were its approaches handed down to them. It would be disingenuous to consider Washington’s active involvement in the Horn and East Africa for instance only in military terms. Efforts to establish counter-terrorism legal measures must surely bear its hallmarks and so the Kenya Suppression of Terrorism Bill (2003) cannot escape being seen in such light. Our theoretical framework and analysis explain the bill’s severe approach to the threat of terrorism.

The Chicken Game theory portrays an adversarial contest in which one player’s win is the other’s loss. For governments and terrorist organisations, it is a no-compromise tussle where the enemy’s threat is placed high and response absolute and decisive. For states that have to formulate counter-terrorism policies, the threat perception has a direct bearing on their decisions and can be determined by rational and emotional variables, and the converse appropriately applying as well. Kahneman and Tversky¹²⁷ in their development prospect theory posit that an analysis of decision making is characterised by the tension between rationality and logic on one hand and individual beliefs, preferences and feelings on the other.

To illustrate the theory, individuals were presented with two sets of risky situations that logically have the same outcome but framed differently. Respondents were asked to choose their preferred outcome in the following situation: A flu outbreak is expected to kill 600 people. Two alternative programmes to fight the epidemic are proposed. If programme A is adopted, 200 people will be saved. If programme B is adopted, there is one-third probability that 600 people will be saved and two-thirds probability that nobody will be saved. Seventy-two percent chose programme A, which under which 200 people will surely live. A large majority prefer to definitely save 200 rather than gamble on saving 600. The same subjects were then presented with two other programmes: If programme C is adopted, 400 people will die. If programme D is adopted, there is one-third probability that nobody will die and two-thirds probability that 600 people will die. Seventy-eight percent chose programme D, which

¹²⁷ Kahneman Daniel and Amos Tversky, *Prospect Theory: An analysis of decision under risk*, *Econometrica* 1979, cited by Gordon Carol and Arian Asher in *Threat and Decision Making*, *Journal of Conflict Resolution*, Vol. 45, No. 2 2001.

has the exact same probabilities for life and death as programme B, which was chosen by 28 percent of the respondents. Exactly the same number of people is predicted to live in programme A and C, but 72 percent chose A., which emphasises a certainty of saving 200 lives and only 22 percent chose C, which emphasises a certainty of 400 deaths. Kahneman and Tversky attribute this aspect of decision-making to the counter-factual, non-logical effect of framing and context which are more like perceptual illusions than computation errors.¹²⁸

Seymour Epstein, cited by Gordon and Arian, theorise that the more threatened one feels, the more one's policy choices tend to be made on emotional rather than rational basis. Irving Janis et al 1953 work on *Effects of fear-arousing communication*, also cited by the pair, concluded that (a) the lowest level of threatening communication was most effective in attitudes and behaviour change regarding good dental hygiene; and (b) the high threat condition promoted a "state of emotional tension" producing "cognitive impairment," aggression and rejection of communication. Gordon and Arian conclude that rational/cognitive behaviour occurred under low threat conditions and emotional behaviour occurred under high threat.

Likewise the perception of terrorism threats as high therefore produce a policy document reflecting an emotional response often characterised by extremism and zeal as terrorism is viewed as a great risk capable of bringing untold calamity to a country. The "Bush Doctrine" of the "war on terror" is a *locus classicus*, and a reflection of that thinking found its way in the Kenya Suppression of Terrorism Bill (2003) – a ruthless legislative reaction. When we feel threatened, most of us tend to just react. We do not sit down and think about it and rationally decide what to do – we just do something, argue Gordon and Arian. This reaction is physiologically reinforced by our "fight or flight" reaction. But when we do not feel threatened, while our emotions play a role, there is more of a balance between them and our rational selves, which is reflected in our policy choices.

Recalling Krause and Otenyo's work on Kenya's public perception of terrorism threat, the low ranking of the threat would presuppose a rational counter-terrorism strategy, on the contrary, the anti-terrorism bill is nothing but. This reinforces the argument that the bill was not an outcome of Kenyan decision makers' endeavour and thus nullifies our first hypothesis

¹²⁸ Ibid, Gordon and Arian, p. 207.

and validates the assumption that the Kenya Suppression of Terrorism Bill represented an external perception of the effects of international terrorism.

The terrorism attacks in Kenya and the efforts to combat the crime, notably through legislation, evince a pair of contradicting objectives and understanding of terrorism between Kenya and the US. We single out the US because of its comparatively prominent anti-terrorism drive in Kenya and the Horn of Africa region. The divergent perception of the threat of terrorism between Kenya and the US antagonises the partners. While Washington and other Western powers put primacy on the menace of terrorism above other security concerns in the wake of the September 11, 2001 attacks, its partners like Kenya view the threat as low and not urgent, partly due to terrorists' Western targets in developing countries which engenders the thinking that terrorism is mainly concerned with foreign powers despite collateral damage suffered by the third countries. Secondly, the failure to take into consideration factors rendering developing countries susceptible to terrorist attacks for a comprehensive counter-terrorism framework or the propensity towards military anti-terrorism measures cause tension in countries like Kenya, where the government runs the risk of upsetting the population by pursuing options set out by its international partners. These two emerging issues, which are mutually reinforcing, undermine the prospects of devising an effective domestic tool to fight terrorism.

The divergent views of terrorism inside and outside the (African) continent are a related tension, notes Kraxberger. Many African governments welcome renewed attention from the United States, but they have concerns that the "war on terrorism" is too narrowly conceived and ignores the anxieties of many Africans about other types of terror and insecurity. It is unclear how much American policymakers care about the depredations of warlordism and other types of terrorism that exclusively afflict Africans.¹²⁹ Kenya's legal shortcomings to effectively try and convict terrorism suspects is a compelling reason to come up with an anti-terrorism law, and while that is not in dispute, the type prescribed by the Suppression of Terrorism Bill (2003) is. Lessons should be drawn from the weaknesses of the proposed law as well as other anti-terrorism measures that have been established thus far to prevent further attacks in Kenya so as to fashion a wholesome counter-terrorism strategy. This can be through

¹²⁹ See Kraxberger, *The United States and Africa: Shifting Geopolitics in an "Age of Terror"* p. 63.

amendments to the penal code or improving the much-maligned anti-terrorism bill as well as harmonising the legislative with the security and intelligence measures.

A comprehensive anti-terrorism strategy should also draw lessons from other causes of insecurity such economic deprivation and marginalisation, poor policing at borders and in other spheres. Kenya's bilateral relation with world powers which may be viewed as attracting terrorist attacks should be reviewed through closer cooperation and understanding to forge a unified counter-terrorism strategy in sync with the objectives of the involved partners.

In addition, counter-terrorism legislation must guarantee and respect human rights and freedoms while preventing acts of terrorism and punishing perpetrators of terrorism violence or abetting its occurrence. It implies measures to address the conditions conducive to the spread of terrorism, including the lack of rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion and socio-economic marginalisation.¹³⁰ The objective is to establish a balance between terrorism prevention by stifling its catalysers while protecting human rights because just as terrorism devastates humanity by negating the right to life, liberty and physical integrity, so too can measures adopted to counter terrorism. Rushed anti-terrorism laws have the effect of impairing civil liberties and fundamental human rights and in turn become potential causes of revolt and in the extreme, a source of terrorism violence. States' management of terrorism thus becomes a cusp between preventing and promoting the crime.

A lingering question in the realm of anti-terrorism in Kenya emerges after the last devastating attack in Mombasa. Over the years the country has set up security strategies such as the National Security Intelligence Service, the anti-terrorism police outfit and the Counter-Terrorism Centre which can be credited with detecting and deterring possible attacks in the absence of a working counter-terrorism legislation, although certain activities of the Anti-terrorism Police Unit amount to the extra-legal application of the Suppression of Terrorism Bill (2003), as such enhancing security operations and revamping surveillance can to a large extent forestall terrorism threats without necessarily resorting to a drastic legislative means. However, without a coherent policy to combat terrorism may make such an endeavour chaotic

¹³⁰ Office of the United Nations High Commissioner for Human Rights, *Terrorism and counter-terrorism Fact Sheet No. 32*.

and uncoordinated. While solely relying on legislation to tackle the threat confines the effectiveness to post-act. There is therefore a need to develop a national security policy that deals not only with domestic insecurity, but with terrorism as well, and whose bases must emerge from the recognition of the vulnerabilities Kenya suffers and which make the occurrence of terrorism possible. An integral policy encompassing the legislative and the security operation spheres which at the same time is malleable to the realities of a dynamic world where security challenges, especially terrorism, are mercurial. Insecurity in the modern world, more so within the international community circle, has expanded to include food, health, economic insecurities et cetera, and which can be triggers of dissent when a group perceives marginalisation by a central authority or if the government marginalises a group for political purposes. Consequently a test of the worth of national security policy, which hitherto Kenya lacks, manifests its *raison d'être* by identifying the causes of insecurity and offering an appropriate solution. The Suppression of Terrorism Bill was at best a knee-jerk response to a threat Kenya suddenly found itself faced with. Its stringent clauses were starkly at odds with the much-touted political and legal reforms of Kenya's first government borne of political opposition.

This study hence proposes not only a rework of the Suppression of Terrorism Bill, but a formulation of a comprehensive national security strategy not limited to external threat, rather one which also appreciates the country's internal imperatives for the existence of such a grand strategy. This does not necessarily need a separate piece of anti-terrorism legislation, but as has been previously discussed and as some scholars have proposed, an amendment of the penal code and other relevant laws to include the crime of terrorism, while at the same time proposing ways of suppressing terrorism catalysts.

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