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**GPR 699: RESEARCH PAPER**

**A CRITICAL ANALYSIS OF THE USE OF EXTRAJUDICIAL MEASURES ON  
COUNTER-TERRORISM IN KENYA**

**BY**

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**OCTOBER 2016**

## DECLARATION

This Thesis is my Original Work and has not been presented for a Degree or Award in any Other University.

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**APPROVAL**

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## **DEDICATION**

To my parents: Mr. Benson Musau Kisilu and Mrs. Evangeline Ngina Musau. My siblings: Joyce, Maureen, Diana and Samuel; for their constant love, inspiration, guidance, encouragement and support.

I will live to cherish and treasure you all forever.

I also dedicate this research to the families who have lost their loved through terrorist attacks. May the Almighty God grant them peace and comfort.

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## LIST OF LEGAL INSTRUMENTS

### National Legal Instruments

1. Republic of Kenya, Constitution of Kenya, 2010.
2. Laws of Kenya, Prevention of Terrorism Act, Chapter 30 of 2012.
3. Laws of Kenya, Criminal Procedure Code, Chapter 75 of 2015.
4. Laws of Kenya, Penal Code, Chapter 63 of 2014.
5. Laws of Kenya, Proceeds of Crime and Anti-Money Laundering Act, Chapter 59B of 2009.
6. Laws of Kenya, Prevention of Organized Crime Act, Chapter 59 of 2012.
7. Laws of Kenya, The Security Laws (Amendment) Act, No. 19 of 2014.
8. Laws of Kenya, Kenya National Commission on Human Rights Act, No. 14 of 2011.

### Regional Legal Instruments

1. Organization of African Unity (OAU), *OAU Convention on the Prevention and Combating of Terrorism*, 14 June 1999. (***Adopted 14 June 1999 in Algiers and entered into force on 6 December 2002.***)
2. African Unity Convention Governing Specific Aspects of Refugee Problems in Africa. (***Adopted on 10 September 1969 by the Assembly of Heads of State and Government. CAB/LEG/24.3. It entered into force on 20 June 1974.***)

## International Legal Instruments

1. European Convention on Human Rights, Act Number 20 of 2003.
2. UN General Assembly, *Measures to Eliminate International Terrorism - Report of the Secretary-General*, 6 September 1996, A/51/336.
3. UN General Assembly, *The United Nations Global Counter-Terrorism Strategy : resolution / adopted by the General Assembly*, 20 September 2006, A/RES/60/288.
4. UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).
5. UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V).
6. The United Nations General Assembly. “International Covenant on Civil and Political Rights.” *Treaty Series* 999 (1966).
7. Torture Victim Protection Act of 1991.

## **LIST OF CITED CASES**

1. Salim Awadh Salim and 10 Others v. Commissioner of Police and 3 others
2. Omar Awadh Omar and others v. Attorney General
3. Rasul v Bush (03-334) 321 F.3d 1134

## LIST OF ACRONYMS

AG	Attorney General
AP	Administration Police
Art.	Article
ATPU	Anti-Terrorism Police Unit
AU	African Union
AMISOM	African Union Mission to Somalia
Cap.	Chapter
CoK	Constitution of Kenya
CCTV	Closed Circuit Television
CTC	Counter-Terrorism Committee
DG	Director General of State Security Service
GA	General Assembly
ICCPR	International Convention of Civil and Political Rights
ICJ	International Court of Justice
IDF	Israel Defense Forces
IDP	Internally Displaced Persons
IED	Improvised Explosive Device
IG	Inspector General
IPOA	Independent Policing Oversight Authority
ISIS	Islamic State of Iraq and Syria
LOAC	Law of Armed Conflict
KDF	Kenya defence Forces
KNDR	Kenya National Dialogue and Reconciliation
MUHURI	Muslims for Human Rights
NCBD	Nairobi Central Business District
NCLR	National Council for Law Reporting
NGO	Non-Governmental Organisations
OAU	Organization of African Unity
ODIHR	Office of Democratic Institute on Human Rights

OHCHR	Office of the High Commissioner for Human Rights
OTC	Over The Counter
PEV	Post Election Violence
Res.	Resolution
Sec.	Section
SC	Security Council
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
USDD	United States Department of Defense
USDS	United States Department of State
UNSC	United Nations Security Council
USA	United States of America

## **CHAPTER ONE: INTRODUCTION**

### **1.1 Background Information**

This study strives to explore and analyse the use of extrajudicial measures in countering terrorism in Kenya. The study looks at what counter-terrorism entails and in specific does an in-depth research on the use of extrajudicial measures in the fight against terrorism. The researcher addresses the judicial measures, reasons as to their inadequacy and the need to look at other effective measures. The researcher discusses extrajudicial measures, as most of the measures suggested do not fall within the bracket of judicial measures. The researcher reviews the legality, justiciability and analyses the extrajudicial measures. Finally, the researcher implores the strengths and weakness of extrajudicial measures in countering terrorism in Kenya. Considerations are therefore made in reference to human rights of the citizens by looking at State security and the rights of terror suspects.

This chapter therefore discusses various terms and concepts, background to the problem, statement of the problem, theoretical framework, literature review, objectives of the research, hypotheses, research questions, research methodology and chapter breakdown.

When discussing the above, it is important to highlight the use of the following terms;

#### **1.1.1 What is Terrorism?**

At the national level, Section 2(1) of the Prevention of Terrorism Act<sup>1</sup> provides for the definition of a terrorist act. This has been defined as;

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<sup>1</sup>No. 30 of 2012, Laws of Kenya.

‘The use of violence against a certain class of people, by creating serious risks to their safety or health. It results to loss of property since firearms and explosives are used. In most cases, the main aim of a terrorist is to cause fear or intimidate a class of people and cause distractions in governments and institutions by prejudicing national security or public safety’.

It is clear that from the above definition that the Laws of Kenya only provides for the definition of a terrorism act but no meaning of terrorism.

The regional law, OAU Convention on Prevention and Combating of Terrorism,<sup>2</sup> defines terrorist action to mean:

‘any act which is a violation of the criminal laws of a State party and which may endanger the life, physical integrity or freedom of, or cause serious injuries or death to, any person, any member or persons or group of persons or may cause damage to public or private property, natural resources, environmental or cultural heritage. This act is calculated or intended to intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof. For one to do or abstain from doing any act or to adopt or abandon a particular, standpoint or to act according to certain principles; or disrupt public service, the delivery of any essential service to the public or to create a public emergency, or create general insurrection in a State. Any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat,

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<sup>2</sup> The Convention on the Prevention and Combating of Terrorism (The Algiers Convention) was adopted in July 1999 in Algeria at the 35<sup>th</sup> Ordinary Session of the A.U Assembly of Heads of States and Government. It entered into force on 6 December 2002.



conspiracy, organizing, or procurement of any person with the intent to commit any act referred above'.<sup>3</sup>

The OAU Convention also falls short and fails to get a definition of terrorism as it only defines a terrorist action. The definition provided above however elaborates the definition provided for by Prevention of Terrorism Act Kenya.

The Black's Law Dictionary however gives a definition of terrorism. It is defined as 'the use or threat of violence to intimidate or cause panic, especially as a means of affecting political conduct'.<sup>4</sup> This emphasis on the attainment of political goal though not exhaustive, find more support as Cline and Alexander also define terrorism 'as the deliberate employment of violence or the use of violence by sovereign States as well as some national groups, assisted by sovereign States in order to attain strategic and political objectives through the violation of law'.<sup>5</sup> This definition by Cline and Alexander does not hold true in all circumstances. It wrongly presupposes that all acts of terrorism are carried out either by State actors or by other groups at the behest of sovereign States. It is certain that the Al-Shabaab group<sup>6</sup> does not enjoy the support of Kenya as a sovereign State.

At the international level, the American definition of terrorism is; 'premeditated, politically motivated violence perpetrated against noncombatant targets by sub national groups or clandestine agents'. A terrorist group on the other hand is defined as 'any group, or which has significant

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<sup>3</sup> Article 1(3) the OAU Convention on Prevention and Combating of Terrorism.

<sup>4</sup> Black's Law Dictionary, eighth Edition, (Ed) Bryan A. Garner, Thomson West (Minnesota) 2004.

<sup>5</sup> Oviasogie F.O, "State Failure, Terrorism and Global Security: An Appraisal of the Boko Haram Insurgency" P. 21.

<sup>6</sup> This is the terrorist group that accepts responsibility of all the terrorist attacks in Kenya.

subgroups which practice international terrorism (international terrorism being terrorism involving citizens or the territory of more than one country)?<sup>7</sup>

The United States Department of Defense (USDD) define terrorism as the ‘calculated use of unlawful violence or threat of unlawful violence to inculcate fear, intended to coerce or to intimidate government or society in the pursuit of goals that are generally political, religious or ideological’. The United States Department of State (USDS) took it a notch higher when it defined terrorism as ‘premeditated politically motivated violence perpetrated against non- combatant targets by sub- national groups or clandestine agent, usually intended to influence an audience’.

The United Nations (UN) admitted the difficulty of arriving at a comprehensive definition of terrorism by the international community. In 1994, the GAs’ Declaration on Measures to Eliminate International Terrorism, set out in its Res. 49/60, defines terrorism to include;

‘criminal act intended or calculated to provoke a State of terror in the general public, group of persons or particular persons for political purposes and that such acts are in any circumstances unjustifiable whatever the consideration of a political, philosophical, ideological racial, ethnic, religious or other nature that may be invoked to justify them’.<sup>8</sup>

The most controversial definition is the UN’s definition; ‘terrorism is attempting to bring about political and/or social change by deliberately attacking civilians’. This definition has made it difficult especially in trying to differentiate resistance movements that oppose forms of occupation and a terrorist organization. They both often use violence to obtain a political change. For example,

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<sup>7</sup>22 U.S. Code § 2656f - Annual Country Reports on Terrorism’ (*LII / Legal Information Institute*)  
<<https://www.law.cornell.edu/uscode/text/22/2656f>> accessed 21 June 2016.

<sup>8</sup>‘A/RES/49/60. Measures to Eliminate International Terrorism’  
<<http://www.un.org/documents/ga/res/49/a49r060.htm>> accessed 26 September 2016.

during the colonial period in Kenya, the Mau Mau fighters attacked Europeans on their farms and stole their goods. If the same situation were to be replayed in the 21<sup>st</sup> century, then many scholars would consider the Mau Mau as a terrorist organization, when relying on the UN definition.

From a combined reading of the various definitions, the researcher is able to distill some common denominators of the term terrorism. This has lead the researcher to define terrorism as the use or deployment of violence in a criminal manner on a population, mostly the civilian and police are targeted, calculated at instilling fear or to provoke a State of terror with the intention of achieving goals that could be ideological or even more.

For any State to be able to counter-terrorism there is a need to understand the driving force. By identifying these drivers, it makes it easier to understand the root causes of terrorism. Bruce Hoffman in *Inside Terrorism*<sup>9</sup> explains that one driving force is ethno-nationalism. This is the desire of a population to break away from a government and create a State of their own and this is seen as a cause that leads to formation of terrorist groups. In the 20<sup>th</sup> century it was seen often times with regions or States attempting to gain independence from their colonial era masters.

Another driving force is discrimination or alienation. Many times different individuals feel unwanted and useless in the societies they stay and live in. This is because they feel they have not achieved most of their goals and hence isolate themselves. Terrorist recruiters therefore target them and make them feel important and hence get in the process of getting radicalized. Since they have no other options, they find themselves inclined to take up that offer which is always lucrative.

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<sup>9</sup>Bruce Hoffman, *Inside Terrorism* (Columbia University Press; Revised & enlarged edition (June 6, 2006)) <[https://www.amazon.com/gp/product/0231126999/ref=as\\_li\\_ss\\_tl?ie=UTF8&tag=hanofrea-20&linkCode=as2&camp=217145&creative=399369&creativeASIN=0231126999](https://www.amazon.com/gp/product/0231126999/ref=as_li_ss_tl?ie=UTF8&tag=hanofrea-20&linkCode=as2&camp=217145&creative=399369&creativeASIN=0231126999)>. (emphasis added)

Marc Sageman, in *Understanding Terror Networks*, explains how this works. The discriminated or alienated individual find the new ‘society’ much more bearable than his or her own community.<sup>10</sup>

Another driving force is religion. This has however been defined as profiling by categorizing a particular type of individuals based on their religious beliefs. For instance, the *Jihad* believe that they have a religious duty imposed on Muslims to spread Islam by waging war; what they call the “holy war”.<sup>11</sup> Any unbeliever of their faith is known as a *Kafir*, or one who rejects the Islam faith. The religious doctrine poses more danger as their encouragements of attacks is viewed to be more violent in nature than other type of terrorism.<sup>12</sup> However, the researcher is of the view that religion misconception has also been a driving force of terrorism activities.

The fight for a socio-economic status is a major drive to terrorism. Terrorists’ are driven by a sense of deprivation and lack of upward mobility within society. Terrorism has created awareness about opportunities available elsewhere. In most circumstances, the youth who are seen to be frustrated, humiliated and unemployed prefer getting radicalized with the hope of “achieving it in life” for the purpose of making ends meet. As long as they have a feeling of belonging and have their needs meet to satiety. Many people are willing to join terrorists and enhance their goals and agendas,

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<sup>10</sup>Marc Sageman, *Understanding Terror Networks* (University of Pennsylvania Press; first Edition (April 16, 2004) <[https://www.amazon.com/gp/product/0812238087/ref=as\\_li\\_ss\\_tl?ie=UTF8&tag=hanofrea-20&linkCode=as2&camp=217145&creative=399369&creativeASIN=0812238087](https://www.amazon.com/gp/product/0812238087/ref=as_li_ss_tl?ie=UTF8&tag=hanofrea-20&linkCode=as2&camp=217145&creative=399369&creativeASIN=0812238087)>.

<sup>11</sup>‘Jihad | Islam | Britannica.com’ <<https://www.britannica.com/topic/jihad>> accessed 5 August 2016.

<sup>12</sup>‘Causes of Terrorism | Hand of Reason’ <<http://handofreason.com/2011/featured/causes-of-terrorism>> accessed 5 August 2016.

even if they bring about gross violations to human rights or create social injustice to someone else.<sup>13</sup>

### **1.1.2 What is Counter-Terrorism?**

From the understanding of terrorism as defined above, the most common definition of counter-terrorism is the practices, tactics, techniques, and strategies that governments, militaries, police departments, and corporations adopt in response to terrorist threats and/or acts, both real and imputed. They all have an objective in the war on terror. The mission is to neutralize terrorist cells and operatives as they help dismantle terrorist networks. The main two aspects of counter-terrorism are to make citizens safer from terrorist threats and on neutralization of terrorists through arrests, prosecutions, assassinations, raids on terrorist facilities and military action etc.<sup>14</sup>

The UN Global Counter-Terrorism Strategy in the form of a resolution<sup>15</sup> and an annexed Plan of Action is composed of four pillars. They include addressing the conditions conducive to the spread of terrorism and measures to prevent and combat terrorism. Measures to build States' capacity to prevent and combat terrorism and to strengthen the role of the UN's system in that regard and measures to ensure respect for human rights for all and the rule of law as the fundamental basis for the fight against terrorism.

The important pillar that applies in this study is pillar two: on measures to prevent and combat terrorism. Member States have resolved to undertake measures to prevent and combat terrorism.

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<sup>13</sup>Ömer Taşpınar, 'Fighting Radicalism, Not "Terrorism": Root Causes of an International Actor Redefined' (2009) 29 SAIS Review of International Affairs 75.

<sup>14</sup>'What Is Counter-Terrorism?' (*About.com News & Issues*) <[http://usforeignpolicy.about.com/od/defense/a/what-is-Counter-Terrorism .htm](http://usforeignpolicy.about.com/od/defense/a/what-is-Counter-Terrorism.htm)> accessed 13 September 2016.

<sup>15</sup> A/RES/60/288.

The main way is by denying terrorists access to means to carry out attacks, their targets and the desired impact of those attacks.<sup>16</sup>

### **1.1.3 What are Human Rights?**

The origin of "human rights" lies in the nature of human beings.<sup>17</sup> Human rights belong to every member of the human family. This is regardless of sex, political opinion, race, socio-economic group, nationality, sexual orientation, or any other status. They are rights that are inherent to all human beings. Human rights are all universal, interrelated, interdependent, and indivisible.<sup>18</sup> They are universal because they apply to all people simply based on being human. They are inalienable since a person seeking them does not take the rights away to exercise their rights whether one likes them or not. They are only limited in certain tightly defined circumstances and some rights, such as the prohibition on torture and slavery are never limited.<sup>19</sup> They are indivisible since one does

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<sup>16</sup> States have done this by agreeing on not to facilitate, organize or tolerate any terrorist activities. Having obligations under international law, States are to cooperate and bring the perpetrators to justice, e.g. by extraditing when asked to for purposes of prosecuting the terrorists, or by providing necessary information when required to do so. To ensure justice to victims but at the same time make sure that the measures they are applying to curb terrorism are in accordance with the human rights law, international humanitarian law and refugee law. States are to take all appropriate measures and ensure that the asylum seekers do not carry out terrorist activities. Recently in Kenya, there has been the decision to close the largest refugee camp in Dadaab, because it has mainly brought about insecurity that has been threatening Kenya for a while now. States are to cooperate with the UN and focus on confidentiality and help the UN in fulfilling its goals in attainment of peace and security. For States to improve on issuance and production of travel documents, so that, they are not employed in commissioning of a terrorist act. States also have the mandate of inviting the UN to improve co-ordination in planning a response to a terrorist attack. This is being done using nuclear, chemical, biological or radiological weapons or materials, in particular by reviewing and improving the effectiveness of the existing inter-agency co-ordination mechanisms for assistance delivery, relief operations and victim support, so that all States receive adequate assistance.

<sup>17</sup> This is attributed to by world's major religions and moral philosophy.

<sup>18</sup> 'What Are Human Rights' <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>> accessed 29 November 2015. Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups. All human rights are indivisible, whether they are civil and political rights, such as the right to life, equality before the law and freedom of expression. Economic, social and cultural rights, such as the rights to work, social security and education, or collective rights, such as the rights to development and self-determination, are indivisible, interrelated and interdependent. The improvement of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affects the others.

<sup>19</sup> Article 25, Constitution of Kenya, categorizes them as inalienable rights.

not choose or handpick which rights they want to honor or dishonor. Many rights depend on each other to be meaningful, for example, the right to fair trial would be meaningless without the prohibition on discrimination, and the right to free speech must go hand in hand with the right to assemble peacefully.

Human rights also do entail both rights and obligations. States assume obligations and duties under international law to respect, protect, promote, observe, and fulfill human rights.<sup>20</sup> Human rights are owed by the State to the people. This means that public bodies must respect ones human rights and the government must ensure there are laws in place so that other people respect another's human rights too.<sup>21</sup> For instance, after the Second World War, there was need for response to the atrocities committed before and during the war. The newly formed UN then adopted the Universal Declaration of Human Rights (UDHR). The international community had sought to define the rights and freedoms necessary to secure the dignity and worth of each individual. Art. 2 of the UDHR<sup>22</sup> defines that everyone is entitled to all the rights and freedoms in that Declaration, without any distinctions whatsoever.

Human rights are guaranteed and expressed in law. They are in the form of general principles, treaties, customary international law and international law. International human rights law lays

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<sup>20</sup> The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfill means that States must take positive action to facilitate the enjoyment of basic human rights. At the individual level, while we are entitled our human rights, we should also respect the human rights of others.

<sup>21</sup>For example, the right to life requires not only that the actions of those working on behalf of the State do not lead to one's death, but that laws are also passed and put in place to protect everyone from the actions of the other that might want to do harm.

<sup>22</sup>'The Universal Declaration of Human Rights | United Nations' <<http://www.un.org/en/universal-declaration-human-rights/>> accessed 29 November 2015.

down obligations of governments to refrain from certain acts or to act in certain other ways, in order to promote and protect fundamental freedoms and human rights of groups or individuals.<sup>23</sup>

Kenya has adopted and enshrined in the Constitution of Kenya (CoK), 2010, Chapter 4, the Bill of Rights. It entails the limited and unlimited rights (those that are not derogable). Those that are derogable are at times justified in certain circumstances such as, during public emergency, which threatens the life of the State.<sup>24</sup> Apart from that, Kenya has ratified a couple of international conventions and treaties on international humanitarian law and on international human rights law. They include charters and protocols.<sup>25</sup> Art. 2(5) (6) of the CoK, provides that treaties or conventions ratified by Kenya shall form part of the Laws of Kenya.<sup>26</sup> Therefore, Kenya has accepted to protect human rights and uphold the same by virtue of adopting and enshrining different laws. It should always aim to act in ways that promotes the fundamental freedoms and rights and it is obligated to refrain from acts that limit the enjoyment of those rights.<sup>27</sup>

#### **1.1.4 What are judicial measures?**

The Prevention of Terrorism Act in Kenya criminalizes terrorist acts. It is two-pronged; where one who commits an offence when carrying out a terrorist act is liable, on conviction, to imprisonment

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<sup>23</sup>‘Global Issues at the United Nations’ <<http://www.un.org/en/globalissues/humanrights/>> accessed 29 November 2015.

<sup>24</sup> Art. 4 of the ICCPR sets out the formal and substantive requirements that a State party must fulfill in order to derogate legitimately from certain obligations under this covenant.

<sup>25</sup> Kenya has ratified over 315 conventions and 12 treaties over the years. It has also a signatory to 13 charters and 78 protocols.

<sup>26</sup>‘NCLR Home Page | Treaties Database’ <<http://kenyalaw.org/treaties/>> accessed 10 March 2016.

<sup>27</sup> The rights are categorized as civil, political, social, cultural and economic. This was initially seen as Three generation of rights as was initially proposed in 1979 by the Czech jurist Karel Vasak at the International Institute of Human Rights. The first-generation human rights, which are often called "blue" rights, deal essentially with liberty and participation in political life. They are fundamentally civil and political in nature: as they serve to protect the individual from excesses of the State. Second-generation human rights are related to equality. They are fundamentally economic, social, and cultural in nature. They guarantee equal conditions and treatment. Third-generation human rights go beyond the mere civil and social, as expressed in many progressive documents of International Law.



for a term that is less than thirty (30) years. While a person who is found liable on conviction for carrying out a terrorist act, which results in death of another person, the punishment is to be sentenced to imprisonment for life.<sup>28</sup> From the above definition, it is clear that terrorist act is a crime that is punishable in Kenya.

The criminal justice system mandates the court to prosecute a terrorist suspect and sentence the accused when he/she is found guilty. The court looks at the evidence provided by both the prosecution and the defense. However how serious a case is, for instance, on grounds that there have been large masses of civilian losses, the court rules in favour of the prosecution's case if the threshold is met. Since the prosecutor has the burden of proving on the guilt of a suspect, the standard set, is beyond reasonable doubt.<sup>29</sup> In instances where it is ruled that the accused has a case to answer, and is put on defense, the court later rules on an acquittal or conviction of the accused when found innocent or guilty respectively.<sup>30</sup>

In Kenya, due to a backlog of cases, a case may take years to be fully heard and determined. Although in most times a terrorist case is heard in urgency, it is not concluded in a day. This also brings about a number of challenges. One challenge is that the accomplices of a terror suspect may try to compromise the hearing. For instance, in the case of Lukeman Khatib, the magistrate gave

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<sup>28</sup>Sec. 4 of the Prevention of Terrorism Act, Cap. 30, Laws of Kenya.

<sup>29</sup> Sec. 210 of the Criminal Procedure Code, Cap 75, Laws of Kenya, provides for an acquittal of a suspect when the prosecutor has failed to prove its case against the suspect and therefore the court finds it not necessary to put the accused on its defence. Although in most circumstances, this may frustrate by the witnesses. This happens when witnesses are corrupted or are threatened and hence fears for their lives and decides to withdraw their testimonies, yet they had a strong case for the prosecutor to rely on. The witnesses might also be tired especially when the matter has taken long or whenever they attend court, there is lack of audience since the court is not sitting at that particular time. Another instance is if the investigations team has failed to provide evidence of any sorts. This gives the prosecution no documents to rely on when proving the guilt of a suspect. The police are also to blame when they fail to provide the correct charges to a suspect.

<sup>30</sup> Sec. 215 of the CPC.

an order of transferring the case of the accused to Shanzu Law Courts instead of Mombasa Law Courts since the accused was held at Shanzu Prison, and during the transportation of the said criminal, the accomplices have been trying to sabotage the situation. The intelligence report proved that Lukeman and his associates, who were not in custody, were potential threats to security officers escorting him as well as other court users.<sup>31</sup>

Another challenge that the criminal justice system has faced is that there are no special terrorism courts, unlike the Environmental and Land Courts<sup>32</sup> or Employment and Labour Relations Courts<sup>33</sup> as created in the 2010 CoK. The same magistrates and judges sitting through different cases of different gravities are the ones mandated to hear and determine terrorist cases. This increases the length of proceedings. However, the researcher is also of the opinion that having specific personnel on a terrorism court, if created, one might not be up to the task due to the security concerns attached with such cases. Therefore, most of the magistrates and judges are at a security risk and are a target of attacks to make them refrain from sitting in such cases.

Once one is tried and found guilty, they are sentenced and a punishment is imposed. Punishment

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<sup>31</sup> 'Kenya : Court Orders Transfer of Terror Suspect Lukeman Khatib over Security Concerns - The Standard' <<http://www.standardmedia.co.ke/article/2000184749/court-orders-transfer-of-terror-suspect-lukeman-khatib-over-security-concerns>> accessed 27 February 2016.

<sup>32</sup> Art. 162 (2) (b) CoK.

<sup>33</sup> Art. 162 (2) (a) CoK.

may include retribution or revenge<sup>34</sup>, deterrence/public education<sup>35</sup>, incapacitation<sup>36</sup>, rehabilitation<sup>37</sup> and retribution.<sup>38</sup> The same principles are applied in terrorism cases. As seen from the discussion above, terrorism acts are punished under Sec. 4 of the PTA.<sup>39</sup> The most serious punishment that the Laws of Kenya prescribe is the Capital Sentence or Death Penalty. However, this is confined to crimes such as Murder, Robbery with Violence, Treason among others as outlined in the Penal Code.<sup>40</sup> For instance, if the researcher is of the view that terrorism should have a capital punishment, the question that rises is its effect on a terrorist. Most terrorists in Kenya

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<sup>34</sup> Any criminal act injures the individual and the society. Due to the reaction by the society, the State is called to punish this particular criminal as a desire for revenge but also to satisfy the need of the society. On retribution, it prevents the occurrence of a future crime by excluding the criminal from the desire of avengement by the society. Whenever victims or a society discovers that a criminal is adequately punished for a crime, they achieve a certain satisfaction that our criminal procedure is working effectively, which enhances faith in the law enforcement process and our government.

<sup>35</sup> Deterrence prevents future crime by ‘frightening’ either the criminal or the members of the society. They are two types of deterrence: specific and general deterrence. Specific deterrence applies to an individual defendant. When the government punishes an individual defendant, he or she is theoretically less likely to commit another crime because of fear of a similar or worse punishment. General deterrence applies to the public at large. When the public learns of an individual defendant’s punishment, the public is theoretically less likely to commit a crime because of fear of the punishment the defendant experienced. When the public learns, for example, that an individual defendant was severely punished by a life imprisonment sentence or the death penalty, this knowledge inspires deep fear of criminal prosecution. E.g. the death penalty is a form of punishment, for instance, in cases of treason in accordance with Sec. 40 (3) of the Penal Code, Laws of Kenya.

<sup>36</sup> This prevents future crime. It happens when the criminal is delinked from the society. They are through incarceration, house arrest, or death penalty execution. Jail or prison terms generally lengthen with the seriousness of the crime. The longer sentences serve the ends of revenge and deterrence, and serve another purpose. The longer a person is in custody, the less opportunity that person has to commit new crimes. This is particularly true of repeat offenders. When an offender has not been deterred by prior penalties, protection of potential victims from that offender becomes an important consideration. At some point, it is in society’s interest to protect oneself by a certainty that a dangerous person is unable to harm others and incapacitation through custody serves that interest.

<sup>37</sup> Rehabilitation aims at correcting the values of the criminals since when one is punished, they have time to reflect on their conduct and behaviors. They are bound to reshape their behaviors by evaluating their past conduct. For instance, drug addict criminals will undergo counseling to rehabilitate themselves. Programs for rehabilitation should be offered when one is serving their jail term and even when freed into the society. The court combines rehabilitation with incarceration or with probation or parole. Rehabilitation therefore prevents future crime by altering a defendant’s behavior that lowers reoffending.

<sup>38</sup> Restitution prevents future crime by punishing the defendant by making them offer compensation to the victim or victims. This compensation is mostly financial as to pay the victim for any harm caused and it resembles a civil litigation damages award. The compensation may be for physical injuries caused, for loss of property or money, and rarely, emotional distress. In addition, a fine covers some of the costs of the criminal prosecution and punishment.

<sup>39</sup> Where one commits a terrorist act is found liable on conviction he/she is to be imprisoned for a term that is less than thirty years. While a person who is found liable on conviction for carrying out a terrorist act that results in death of another person, that person is to be sentenced to imprisonment for life.

<sup>40</sup> Chapter 63, Laws of Kenya.

are suicide bombers, although they are those who plan, organize and either finance or direct others to carry out the attacks, without actual participation of the crime. For example, suicide bombers are initially ready to die. They have nothing to lose after all. Therefore, having terrorism or terrorist acts punished by the death penalty, and having our laws prescribe that punishment brings about retribution; it actually assists the terrorists in furthering their cause. This therefore brings about the failure and ineffectiveness of the judicial systems.

In the opinion of the researcher, it does not deter terrorists from striking neither does it bring about rehabilitation. The researcher appreciates that the justice system has been ineffective. Once the courts determine and interpret the statutes and find an accused guilty, it boils down to bringing justice to the victims since they attest to the fact that the law has prevailed and the terrorists have been punished. The terrorist is kept away from the society, but that individual or group of individuals do not alter the organization and planning of a future crime since the larger group is left out to assist in the planning and commissioning of another attack. The researcher then is forced to look at other measures that are possible to deal away with large numbers of the Al-Shabaab group, or assist the State in getting ways as to enable it to fully deal with the menace of terrorism and war against terrorism to the terrorists as a whole.

### **1.1.5 What are extrajudicial measures?**

Having looked at judicial measures thoroughly, the researcher is of the view that judicial measures are inadequate, or are not effective *per se*. This therefore calls for other measures that are to be incorporated to deal with terrorism. Most of the measures to be discussed are viewed as controversial. One of the primary difficulties of implementing effective counter-terrorism

measures is the warning of civil liberties and individual privacy that such measures often entail both citizens and those detained by States attempting to combat terror.

The researcher is of the view that extrajudicial measures are measures that go beyond the scope of the judicial arm of the government and the criminal justice system. This is discussed in detail in chapter 2 of this study. The researcher outlines the possible extrajudicial measures that help in the fight against terrorism. A critique is given on the same since different scholars support some of the measures while others reject them. The measures to be discussed include targeted killings, closing of refugee camps, deportation, physical and psychological torture of the suspected terrorists, seizure of property/freezing of the properties or assets, detention and arrests and lastly, surveillance.

## **1.2 History of Terrorist Attacks in Kenya**

Kenya has experienced a number of terrorist attacks.<sup>41</sup> In February 1975 two explosions occurred in NCBD at Starlight nightclub and at a travel bureau near Hilton Hotel in Nairobi.<sup>42</sup> In March 1975 a blast occurred in OTC bus terminus killing thirty people.<sup>43</sup> On December 1980 Norfolk Hotel was bombed killing twenty people and injuring more than one hundred people.<sup>44</sup> On August 1998 Al-Qaeda carried an attack on the USA Embassy in Kenya, killing two hundred and twelve and injuring an estimate of four thousand people.<sup>45</sup> In November 2002, there was an attack at

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<sup>41</sup> The National Counter-terrorism Center <http://Counter-Terrorism.go.ke/attacks.html>

<sup>42</sup> Charles Hornsby, *Kenya: A History since Independence* (IBTauris 2013).

<sup>43</sup> 'The Three Curious Bombings That Rocked Nairobi in 1975' <<http://owaahh.com/the-three-curious-bombings-that-rocked-nairobi-in-1975/>> accessed 29 November 2015.

<sup>44</sup> Aislinn Laing, 'Nairobi Assault: Kenyan Terrorist Attacks since 1980' (21 September 2013)

<<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/kenya/10325230/Nairobi-assault-Kenyan-terrorist-attacks-since-1980.html>> accessed 29 November 2015.

<sup>45</sup> The Trail of Evidence - The U.S. Embassy Bombings Trial - A Summary - Hunting for Bin Laden' (*FRONTLINE*) <<http://www.pbs.org/wgbh/pages/frontline/shows/binladen/bombings/bombings.html>> accessed 29 November 2015.

Kikambala Paradise Beach hotel by Al-Qaeda inspired operatives, killing fifteen people and injuring eighty others. On 16<sup>th</sup> June 2010 six worshippers were killed and thirty injured in a grenade attack at Uhuru Park. Three police officers were killed in separate grenade attacks in Nairobi on 4<sup>th</sup> December 2010. One person killed, twenty-six others injured after a grenade explosion at Kampala Coach Bus terminus in River Road on 20<sup>th</sup> December 2010.

A grenade attack hit OTC bus terminal in downtown Nairobi, killing one person, and injured eighteen people on 24<sup>th</sup> October 2011. Nine people were killed and more than forty-eight injured when four hand grenades were hurled at Machakos bus station in Nairobi on 10<sup>th</sup> March 2012. At least two people were killed and twenty-four wounded in a grenade attack targeting a church gathering in Mtwapa on 31<sup>st</sup> March 2012. Four people were injured in a grenade attack in a hotel next to Mombasa city stadium on the same day as the Mtwapa church attack. An explosive device was hurled through shops in Assanands house, central Nairobi, wounding thirty-eight people on 28<sup>th</sup> May 2012.

On 2<sup>nd</sup> February 2013, a KDF soldier was killed in a blast in Wajir after a terrorist who appeared to know him hurled a grenade at the man and his girlfriend. The soldier was among other soldiers on a break, from the coordinated Linda Nchi operation<sup>46</sup>, in southern Somalia. Two other police officers were wounded in the said explosion and the girlfriend had injuries to her legs. Twelve people including six police officers were killed in an ambush in Mombasa and Kilifi counties hours before voting began on 4<sup>th</sup> March 2013. Al-Shabaab associated gunmen targeted and shot customers at Nairobi's Westgate Shopping Mall. Over sixty-seven people were reportedly killed

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<sup>46</sup> 'Operation Linda Nchi | Critical Threats' <<http://www.criticalthreats.org/somalia/operation-linda-nchi>> accessed 27 February 2016.

in the attack of 21<sup>st</sup> September 2013. At 12.30pm Al-Shabaab militia men sprayed bullets to an AP vehicle where five AP officers, three civilians died and one unidentified body recovered suspected to be of an Al-Shabaab militia on 10<sup>th</sup> December 2013. An explosive device detonated in a minibus carrying passengers from Eastleigh next to Pangani Girls School. Six people died from the incident on 14<sup>th</sup> December 2013.

At 2000hrs, a saloon car exploded at the gate of Pangani police station killing two civilians who were on board and two police officers who had arrested them on 23<sup>rd</sup> April 2014. Two buses were detonated at Thika road and three people lost their lives while eighty-seven people were injured on 4<sup>th</sup> May 2014. A grenade was hurled at a *matatu* and when the crowd gathered, there was a secondary explosion (IED) where twelve people died and about one hundred and twenty people were injured on 16<sup>th</sup> May 2014. There were Mpeketoni Attacks in Lamu, South of Kenya, which occurred on 15<sup>th</sup> to 17<sup>th</sup> June 2014. Gunmen stormed Garissa University College in Garissa, killing one hundred and forty-eight people, and injured more than seventy-nine people on 2<sup>nd</sup> April 2015.

From the above background, it proves that indeed terrorism activities are carried out in Kenya. All these have been linked to the Al-Shabaab and the group has on several occasions accepted liability in most of these attacks.<sup>47</sup> The attacks have targeted both civilian population and the police enforcement units. As per the definition of terrorism given above by the researcher,<sup>48</sup> the main aim is to instill fear on citizens.

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<sup>47</sup>National Counterterrorism Center | Groups’.

<sup>48</sup> as the use or deployment of violence in a criminal manner on civil and civilian target calculated at instilling fear or to provoke a State of terror with the intention of an achieving goals that could be ideological or even more.

After the detailed outline of the previous terrorist attacks in Kenya, one gets a clear image on the need of how to counter-terrorism. As mentioned earlier, this study seeks to analyse extrajudicial measures that should be applied in countering terrorism in Kenya. A comparative analysis is employed by the researcher to show how some of the measures have worked in other jurisdictions.

### **1.3 Statement of the Problem**

Terrorism encroaches on the right to life and many more rights<sup>49</sup> in an unlawful manner. This is because every individual, either a Kenyan or not, needs to enjoy their rights without infringement whatsoever. For this matter, a Kenyan citizen enjoys the right to life and is taken away in a manner prescribed by law.<sup>50</sup> This right is not derogated by the mere fact that some individuals choose to be terrorists or carry out terrorist activities. On the other hand, terrorists have a right: that one ought to be presumed innocent until proven guilty. This is in line with all the other rights of an accused or arrested person as outlined in the bill of rights.<sup>51</sup> As discussed previously in this study,

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<sup>49</sup>Art. 20 (1) CoK on the Bill of Rights applies to all law and binds all State organs and all persons. Terrorists therefore either as an individual or a group are obliged or bound by this provision. Sub art. (2) Provides that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

<sup>50</sup> Art. 26 of the CoK prescribes the situation when one are be deprived of their right to life but with an exception to an extent authorized by this Constitution or other written law. Some instances as provided for in Art. 26 (4) is Abortion. However, there is a proviso to this particular clause. It is only allowed if in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law. Another instance where the right to life is denied or deprived is where a death penalty is effected to a criminal convict. Capital punishment is recognized in the Penal Code in various sections, Sec. 204 provides that any person convicted of murder shall be sentenced to death. Sec. 297 (2) provides for death penalty when one is convicted of robbery with violence. Sec. 40 (3) also provides for death sentence in a crime for treason. Sec 60 on Administration of unlawful oaths to commit capital offences is also punishable by death. Self defence has also been debated to be an exemption where one will deprive another person's right to life. However, the burden of proving self defence or acts done were equivalent to that of the attacker or even less and was not excess.

<sup>51</sup> Art. 50 (2) (a) CoK Terrorists are human beings. Most human right defenders have stated that despite them being terrorist they are owed the right to life like any other human being and that this should not be violated in any circumstances. Their rights are mostly violated when one is still a suspect and has not undergone the due process of the law to determine whether they are indeed guilty or not. Others have argued that by the mere fact that have ascribed to terrorism, they have given up their human rights as they have also disregarded the rights of other human beings.



the penalty for terrorism in Kenya is either thirty (30) years sentence or a life imprisonment; depending on the offence, one is found guilty of committing.

The researcher also explained that even if capital punishment is imposed, after going through a lengthy trial, the perpetrators of terrorism are not concerned because they are ready to die for their ideologies, beliefs and actions. Due to the existing phenomenal approaches, fundamentalism and fanatical expressions exhibited by terrorism perpetrators, it makes countering terrorism a difficult situation to deal with. States are then forced to take extra measures in protecting its citizens, and in the end, this means that terrorists have to account for their actions.

Studies show that the criminal justice system is inadequate.<sup>52</sup> The research therefore focuses on the force of extrajudicial measures in countering terrorism in Kenya. This however has been done with an in-depth analysis as to their effect on human rights. It is required under international law that counter-terrorism measures should not violate human rights.<sup>53</sup> Kenya is a signatory to the UNCHR. The UNCHR acknowledges that any measures adopted and/or taken in countering terrorism by States have always posed serious challenges to human rights and the rule of law.<sup>54</sup> Kenya has made concrete effort in making sufficient steps in counter-terrorism measures in order to make the nation secure. More so, since the advent of terrorism acts of 9/11 in the USA, most

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<sup>52</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions by Philip Alston; Human Rights Council, 14<sup>th</sup> session, Agenda item 3.

<sup>53</sup> 'UN Global Counter-Terrorism Strategy | Counter-Terrorism Implementation Task Force' <<https://www.un.org/counterterrorism/ctitf/en/un-global-counter-terrorism-strategy>> accessed 27 September 2016.

<sup>54</sup> 'Salma Yusuf, Protecting Human Rights While Countering Terrorism' <<http://www.e-ir.info/2012/02/14/protecting-human-rights-while-countering-terrorism/>> accessed 28 September 2016.

nations, Kenya included, are forced to have legislations that could oversee the eradication of terrorism within their borders.<sup>55</sup>

## **1.4 Theoretical Framework**

The study is concerned with viewing events as they occurred in the past and discussing the real issues that have arisen in the fight to counter-terrorism and in reference to norms of international law. The theories discussed below are in line with tackling the second and fourth research objectives of this study. They answer the research questions of the legal basis of for the extrajudicial measures and their significance when applied to counter terrorism.

### **1.4.1 Utilitarianism Theory**

The researcher centers this study on the utilitarianism theory approach in an effort to counter-terrorism. This is mainly in regards to human rights and sanctity of life. The purpose for adopting utilitarianism and human rights to the exclusion of natural law underlies in that the study is formulated under international law in consideration to fight terrorism activities globally.

The basic precept of utilitarianism is measured in happiness and pain of an individual. No one persons' happiness or hurting is more imperative than another person's enjoyment or ache, with regard to his or her situation in life. According to Bentham, for a regime to do its' work correctly it must first guarantee the greatest amount of happiness to all. Then second, where pleasure is sacrificed for some to make others happy, a government must seek to make the greatest happiness to the greatest number of individuals.<sup>56</sup> However, in doing the above, the rights and the voices of the marginalized and minority must be protected, as well as heard. If rights of the minority or

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<sup>55</sup> Kenya has the following legislations: 2012 Prevention of Terrorism Act, 2011 Proceeds of Crime and Anti-Money Laundering Act, 2010 Prevention of Organized Crime Act and Security Laws (Amendment) Act 2014, which together provide a strong legal framework under which to prosecute acts of terrorism.

<sup>56</sup> Gerald J. Postema, *Interests, Universal and Particular: Bentham's Utilitarian Theory of Value*. *Utilitas*, (2006) 18, 109-133. Doi:10.1017/S0953820806001889.

marginalized are trampled upon or tossed on the behest of majority, there is a possibility of the minority organizing themselves with a vengeance attitude. This is to annihilate the majority because of their feelings of being mistreated by the government because of the same.

The basic notion of Bentham's ethical and political viewpoint was public utility. He linked it directly with the concept of the universal interest, which comprises a distinctive partnership of the interests of all members of the community. The ultimate end of government and aim of all of morality is 'the advancement of the universal interest'.<sup>57</sup> Even in the fight against terrorism, the government must put into consideration the interest of its citizen more than the rights of the few who are out to cause fear and pain to a nation.

More so, the extremists or terrorists must come to an understanding that every action has consequences and attracts punishment or reward. In essence, the interest of the public that incorporate their security and safety, prevails over the interest of few who have purposed not to adhere to the norms and laws of the society or State. However, in accomplishing the above, the suspects must be given fair trials through judicial process.<sup>58</sup> As the researcher had previously outlined, there is a notion that terrorists regardless of their terrorist acts are always ready to die. This is because of the hope and belief they have in the disguise of a particular ideology or faith that they are affiliated to. Thus making it very difficult to give terrorists a fair trial as they are ready to die and that is their joy and outmost satisfaction.

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<sup>57</sup>Micheal Quinn, Bentham on Mensuration: Calculation and Moral Reasoning. *Utilitas* (2014) 26 (1):61-104.

<sup>58</sup> The fair hearing provisions have been outlined in Art. 50 of the CoK.

John Rawls analyzes this theory, when he brings about the Theory of Justice as Fairness. He states that for justice to be seen to be done, everyone should be afforded the same rights under the law.<sup>59</sup> He is dissatisfied with the utilitarian argument that the society should focus the greatest good for the greater number. This he views as the idea of the tyranny of majorities over minorities. He expounds the above by adding that individuals intuit a moral aspect by deciding on what is right or wrong. He therefore identifies the structure of the society as the subject of justice in all cases. He adds that justice should be identified as a virtue of all institutions, organizations and all divisions of society. The main principles of justice that Rawls explains are that; one, each person should have equal rights to the most extensive liberties consistent with other people enjoying the same liberties; and two, that inequalities should be arranged so that they would be to everyone's advantage and arranged so that no one person would be blocked from occupying any position.<sup>60</sup>

From the understanding of the above, the researcher is of the view that both the above mentioned theories advocate for happiness to the greater majority and also the fact that states have a responsibility to protect their citizens. If terrorist acts violate the rights of others and hamper their full enjoyment, the state is automatically called upon to take action. This specific action in this study is seen to go beyond the ambit of the law. The study argues that it is better to preserve the majority over minority rights because in this case, the rights of the minority, being the terrorists, threaten the safety of vast majority. Looking critically at utilitarianism and social contract theory, the state has a right to tamper upon and violate the rights of terror suspects, with an aim as to maintain its peace and security, since it is a sovereign state.

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<sup>59</sup> Rawls, John, and Erin Kelly. *Justice as Fairness: A Restatement*. Cambridge, MA: Harvard UP, 2001. Print.

<sup>60</sup> 'A Theory of Justice Summary - eNotes.com' (*eNotes*) <<http://www.enotes.com/topics/theory-justice>> accessed 29 November 2016.

### 1.4.2 Social Contract Theory (SCT)

The proponents of SCT view that in every set of rules, morality is a major factor, which is accepted by rational people on condition that others accept them too. The major proponents, Thomas Hobbes and John Locke, argued that living in a society requires rules and laws. This then invoke compromises in the society to the extent that the individuals in living in a particular social structure gain protection from their government from those who may seek to harm them but in return, they have to give up certain freedoms.<sup>61</sup> In this sense, the researcher agrees with this particular proposition; the state is tasked with protecting the citizens; hence it should put that at the forefront. When waging a war against terrorism, the state is responsible for protecting its citizens and the citizens expect that of them. This should be a driving force into the attainment of peace and security of any given country.

Hobbes also propounds that the SCT serves double duty: one, as a political theory that justifies the existence of a government and two, as a moral theory that specifies our moral obligations. As a political theory, Hobbes's social contract theory maintains that governments are the creations of people, and not the creations of God. The complete justification for a government's existence is its role as preserver of the peace. A critique is posed that, even though we are the ones who create governments, we are never allowed to overthrow them once they are established, even if we are not happy with the job that they are doing. The reason for this is that, to guarantee that governments will be effective in their peacekeeping mission; we must give them absolute and irrevocable authority over us. For

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<sup>61</sup> Great Philosophers: Thomas Hobbes: social contract,  
[http://oregonstate.edu/instruct/ph1201/modules/Philosophers/Hobbes/hobbes\\_social\\_contract.html](http://oregonstate.edu/instruct/ph1201/modules/Philosophers/Hobbes/hobbes_social_contract.html)

Hobbes, if governments have anything less than this, then they will be unable to enforce the laws. From the understanding of this theory, man by very nature has a desire for security and order. In order to secure self-protection and self-preservation, and to avoid misery and pain, man entered into a contract with the government. In order to achieve this, they voluntarily surrendered all their rights and freedoms to some authority by this contract who must command obedience. The mightiest authority is to protect and preserve their lives and property. Hobbes placed moral obligations on the sovereign who shall be bound by natural law.<sup>62</sup>

Hume has critiqued SCT by arguing that political allegiance is not grounded in any social contract, but instead on our general observation that society cannot be maintained without a governmental system. He concedes that in savage times there may have been an unwritten contract among tribe members for the sake of peace and order. There is nothing to transmit that original contract onwards from generation to generation, and our experience of actual political events shows that governmental authority is founded on conquest, not elections, or consent. Political allegiance, he concludes, is ultimately based on a primary instinct of selfishness, and only through reflection will we see how we benefit from an orderly society.<sup>63</sup> From the above exposition, the researcher still holds the SCT as an important one when discussing ways to counter-terrorism. A government, having been entrusted by its citizens, should put the needs of its citizens at the forefront in attainment of security and peace.

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<sup>62</sup> Social Contract Political Philosophy on Britannica.com

<sup>63</sup> Hume, David Internet Encyclopedia of Philosophy

## 1.5 Literature Review

This sub-section reviews the available scholarly material on the topic of extrajudicial measures on counter-terrorism. It discusses the contributions of other scholars and commentators on the position of counter-terrorism, and further exposes their literature with the aim of filling the gap of knowledge therein. Counter-terrorism has greatly influenced human rights and this has accorded a lot of attention worldwide. With demoralizing results for the satisfaction of the right to life, freedom and the integrity of victims, terrorist activities have authentic and direct effect to the rights of the people. On top of these losses of individual life, civil societies are weakened, calm, security destabilized, and social-economic growth threatened.<sup>64</sup> All this hinders the fulfillment and enjoyment of human rights.

According to the Eminent Jurists Panel,<sup>65</sup> many States have let terrorism sow terror in them. They have hence adopted other responses in tackling the menace of terrorism, by including other measures that do not fall within the scope of their laws. These measures however undermine cherished human values and rights and the national and international framework. They have also viewed that the threat from terrorism as a long-term one and therefore instead of the hasty responses, solid-terms are needed. The panel also concluded that counter-terrorist policies are only successful with the active support of an informed public. The study has however failed to borrow from this particular Panel because they failed to bring out the permanent or solid-terms that

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<sup>64</sup>Oramini\_The Impact of Counter-Terrorism Operations on Human Rights in Kenya.pdf  
<[http://erepository.uonbi.ac.ke:8080/xmlui/bitstream/handle/11295/77896/Oramini\\_The%20Impact%20Of%20Counter-Terrorism%20Operations%20On%20Human%20Rights%20In%20Kenya.pdf?sequence=3&isAllowed=y](http://erepository.uonbi.ac.ke:8080/xmlui/bitstream/handle/11295/77896/Oramini_The%20Impact%20Of%20Counter-Terrorism%20Operations%20On%20Human%20Rights%20In%20Kenya.pdf?sequence=3&isAllowed=y)>  
accessed 3 July 2016.

<sup>65</sup> <http://icj.wpenetdna-cdn.com/wp-content/uploads/2012/04/Report-on-Terrorism-Counter-terrorism-and-Human-Rights-Eminent-Jurists-Panel-on-Terrorism-series-2009.pdf>.

different States should borrow. This study will however be able to espouse the measures that are to have a long-term effect to counter-terrorism.

Secondly, Surya Deva, suggests that the approach of separating citizens from the terrorists leads to alienating communities whose support is essential for successful counter-terrorism action. The advice is to strengthen civil society. An urgent need arises, of political leadership at a national and international level. This to the author stipulates that one ought to develop a comprehensive strategy. The strategy is committed to counter-terrorism that *inter alia*, repudiates torture and other grievous human rights violations, restore and maintain respect for the already well-established principles of international humanitarian law and international human rights, and insist on the effective integration of human rights law into counter-terrorism initiatives.<sup>66</sup> However this does not hold true in this study. As stated above, the author suggested that separating terrorists and citizens will not bring out effective counter-terrorism. This particular research focuses solely on the war against terrorism and not their relationship between terrorists and citizens or with third parties.

Nesi<sup>67</sup> argues that terrorism is to be effectively achieved by tackling the root causes such as inequality, underdevelopment and poverty. He further argues that these are the factors that lead to anger, alienation, frustration, and despair especially to the youths who are exploited by terrorists because they rightly or wrongly believe that they are of no value to the society. This work by Nesi however falls short of discussing the measures that should be taken up once a State has realized

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<sup>66</sup> Surya Deva, 'Access to Justice: Human Rights Abuses Involving Corporations-the People's Republic of China' [2010] International Commission of Jurists (ICJ) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2028788](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2028788)> accessed 30 November 2015.

<sup>67</sup>'AI Kanu, the African Union' in G Nesi (Ed) International Cooperation in Counter-Terrorism: The UN and Regional Organizations in the Fight against Terrorism (2006) 175'.



the possible roots of terrorism. The above work also fails to discuss the impacts of counter-terrorism on human rights in Africa and the world. It furthers the argument that war on terror undermines the very values it seeks to protect if it is waged without respect to the rule of law and human rights.<sup>68</sup> In respect to this, the study will be answering the question as to whether extrajudicial measures are significant when they are applied to counter-terrorism in Kenya.

P Hoffman in *Human rights and Terrorism*, is one scholar who has discussed the need for striking a balance between human rights and counter-terrorism measures.<sup>69</sup> He makes a step in examining any legal ambiguities surrounding the measures and reaches to a finding that it has created an opportunity for governments to evade responsibility and legal accountability for violation of human rights that comes because such efforts are unmonitored.<sup>70</sup> However the study posits that a State is sovereign, and it should not be held accountable when it is focusing on fighting groups or individuals who seem to bring havoc or cause distress in the country.

In the reflection of the above, extrajudicial measures are justified as self-defense yet the overuse of brutality and force is to be looked into.

## **1.6 Objectives of the Research**

The study is set to find out whether it was possible to effectively combat terrorism by applying extrajudicial measures in Kenya while ensuring the protection of and respect for human rights of both suspects and citizens.

The specific objectives of the study were to:

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<sup>68</sup>Counter-terrorism and Human Rights in Kenya | Jumah Daniel; - Academia.edu' <[https://www.academia.edu/11750578/counter\\_terrorism\\_and\\_human\\_rights\\_in\\_kenya](https://www.academia.edu/11750578/counter_terrorism_and_human_rights_in_kenya)> accessed 19 December 2015.

<sup>69</sup>P Hoffman, 'Human Rights and Terrorism' (2004) *Human Rights Quarterly* Vol. 26 No 4, 932-934'.

<sup>70</sup>'International Council on Human Rights Policy, *Human Rights after September 11* (2002) 19'.

1. Describe the effect of terrorism on the enjoyment of all fundamental freedoms and human rights;
2. To determine the significance of the application of extrajudicial measures and the legal consideration of human rights of both citizens and suspects in countering terrorism;
3. To analyze violations of human rights of the suspects in the context of extrajudicial measures in countering terrorism; and
4. Establish whether there are legal foundations of extrajudicial measures in countering terrorism in Kenya.

### **1.7 Hypotheses**

The study proceeds on the assumption that extrajudicial measures are applicable in countering terrorism and are necessary to be used in consideration to the damage done by terrorists in regards to deaths of innocents and its effect on the security and economy of a nation. More so, the study is done on the presumption that since terrorists are ready to die while fighting the perceived infidels, even if legislations are put into place to give them a death penalty when convicted, terrorist attacks do not end. This means that there is a need for extrajudicial measures that assist States in curbing the present and future terrorist attacks.

### **1.8 Research Questions**

1. What are the effects of terrorism on the enjoyment of fundamental freedom and human rights?
2. What is the significance of the application of extrajudicial measures and the legal consideration of human rights of both citizens and suspects in countering terrorism?

3. Is there violation of human rights of the suspect in the context of extrajudicial measures in countering terrorism?
4. What are the legal basis for the application of extrajudicial measures in countering terrorism in the contemporary society and globally?

## **1.9 Research Methodology**

The study was designed as an exploratory review of the existing literature on the subject. The highly preferred method for this study, taking into consideration the availability of secondary sources, was desktop analytical research<sup>71</sup>; this include articles, books, journals conventions, treaties, internet, and case studies. The books, internet and periodicals were the main tools of conducting this research. Secondary analysis is when you analyse data which was collected by another researcher. It allows the researcher to explore areas of interest without having to go through the process of collecting data themselves in the field. They ease the accessibility to the research material, very time efficient and cost friendly. This therefore renders the desktop analytical method the most preferred for this work.

Desk research comprises probing of obtainable resources, such as articles and reports mainly obtained from libraries at the University of Nairobi, internet, and statistical publications.

## **1.10 Chapter Breakdown**

In **Chapter One**, the study introduces the topic of discussion and outlines the subject matter of the thesis. The study outlines the background of extrajudicial measures in countering terrorism in Kenya. The study probes the right of the suspect as well as that of the citizens. The study states

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<sup>71</sup>PMR Research, Desk Research. <http://www.research-pmr.com/desk-research>. Accessed on 29 November 2015.

the problem statement and analyses the problem and its significance. More so, the study outlines details of approach of the study by integrating desktop analysis. There is also a section on literature review: this chapter reviews the literature that is available on the subject matter of the study. The literature review is done with an aim of establishing what other scholars have written on the topic of the study. The literature review reveals gaps that the study seeks to fill. The literature review undertakes along thematic areas that flow from the objectives of the study.

In **Chapter Two**, the study looks at extrajudicial measures to counter-terrorism. The measures to be discussed include targeted killings, closing of refugee camps, deportation, , physical and psychological torture of the suspected terrorists, seizure of property/freezing of the properties or assets, detention and arrests and lastly, surveillance. The analysis has a critique of the forms of the measures listed, with both their advantages and disadvantages. The study examines the rights of suspected terrorists' vis-a-vis the rights of the citizens by looking at the theory of utilitarianism. The analysis was carried out along the objectives of the study.

In **Chapter Three**, the study examines and evaluates cases in which other States and democracies have applied different extrajudicial measures listed in Chapter Two. A comparative study was done on different countries of the world that face terrorism and which have found ways to completely deal with the challenge and those who are still struggling to curb the menace. This chapter therefore investigates best practices from other jurisdictions, which Kenya is to borrow from with a view of strengthening its counter-terrorism tactics.

In **Chapter Four**, the study makes summaries and conclusions that are in connection to the findings in this paper. There are recommendations based on findings as well as suggesting the related areas for further research to be done.

## **CHAPTER TWO: EXTRAJUDICIAL MEASURES IN COUNTER-TERRORISM**

### **2.1 Introduction**

In this chapter, the researcher critically reviews extrajudicial measures to counter-terrorism. The researcher also analyses the forms of extrajudicial measures, the advantages and the disadvantages of such measures. In doing the above, the researcher critically analyses the rights of the suspected terrorists in addition to understanding the agendas of their actions. The researcher collates what has been said or written previously by distinguished scholars and authorities in the field related to the study.

### **2.2 Forms of Extrajudicial Measures in Countering Terrorism**

Terrorism has become a serious global issue that needs specific approaches in addressing it. According to Yigal Mersel, terrorism is no longer secluded to the terrorist prone areas, but an issue that affects all democracies. It has no boundaries in the contemporary society.<sup>72</sup> Terrorism has become a challenge that poses security risks and has been deemed very difficult to eradicate in the 21<sup>st</sup> century.<sup>73</sup> The sole responsibility of tackling and dealing with terrorism lies mainly with the three arms of the government. The legislative arm come up with laws and legislations, the judiciary should be at the forefront of interpreting the provisions of the law and lastly the executive wing should implement the interpreted legislations.<sup>74</sup>

Nations are therefore required to look for modalities within the legal framework in taking appropriate steps in order to deal with the menace of terrorism. The researcher will briefly look

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<sup>72</sup> Yigal Mersel, *Judicial Review in Countering Terrorism Measures: The Israel Model for the Role of Judiciary during the Terror Era*. (International Law and Politics, 2006), 67-120.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

into types of extrajudicial measures in addressing the menace of terrorism in the contemporary society.

They are as follows:

### **2.2.1 Targeted Killing and Enforced Disappearances**

Targeted killing is the execution of a person by a governmental authority without necessarily seeking judicial or legislative guidelines. Humanitarians view them to be unethical, since the targeted killings do not follow the due process of the legal jurisdiction in which they occur. The words ‘targeted killings or executions’ are used interchangeably with ‘extrajudicial killings’ in different jurisdictions.

Targeted killing is a measure that is viewed to infringe the rights to life and freedom to expression of victims. There are contradicting views presented by scholars as well as human rights activists pertaining to this particular measure. There are those who however support targeted killing as a means of countering terrorism activities and those who do not support the same. The States that use this approach argue that they apply in “security self-defense” against non-state actors.<sup>75</sup> The extreme end few human rights’ activists have said that at certain instances, targeted killings are justified morally as well as legally.<sup>76</sup>

The disadvantage of this measure is that the rights of most citizens are violated since anyone might be a target of targeted killings. Furthermore, the researcher only supports targeted killings in order

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<sup>75</sup> Gross, ‘Thwarting Terrorist Acts by Attacking the Perpetrators of their Commanders as an Act of Self-Defence: Human Rights Versus the State’s Duty to protect its Citizens’, 15 Temp Int’l & Comp LJ (2001) 195; Rivkin, Jr., Casey, and Bantram, ‘A Legal Analysis of the Attacks on Civilians and Infliction of “Collateral Damage” in the Middle East Conflict’, The Federalist Society for Law and Public Policy Studies, available at <http://www.fed-soc.org/Laws%20of%20war/collateral%20damage%20white%20paper%20cvr%20pg.pdf> (accessed 18 May 2016).

<sup>76</sup> Ibid.

to save lives and in self-defense of the sovereignty of a nation. The researcher also asserts that there should be a certain framework that guides the police enforcement unit on how to carry out the killings. The IPOA for instance, in Kenya, would have to know how to deal with the police excessive use of force.

The following elements therefore need to be present for a clear definition of the term above: use of deliberate and intentional lethal force, a degree of premeditation and against an individual or individuals.<sup>77</sup> Therefore, these killings are not unintentional or accidental since the goal of the operation when incepted is ‘shooting to kill’.<sup>78</sup>

For instance, in Kenya, The Human Rights Watch, MUHURI Kenya and Open Society Foundations, have backed up their reports with strong evidence to show that the Anti Terrorism Police Unit, has carried out a series of extrajudicial killings and enforced disappearances. The Open Society Foundations stated that all these began around April 2012.<sup>79</sup> It has been asserted that the ATPU officers have made an assumption that whenever a suspect is arraigned to court, they lose the suspect and therefore they resort to killing the individual. There is an assumption that the ATPU cannot rely on the Kenyan courts to prosecute terrorist crimes, this is because of the difficulty of gathering evidence and getting informants to appear in court. This definitely leads to an acquittal as the prosecution fails to meet the threshold in any criminal case.

According to the above-mentioned report by the Open Society Foundations, the ATPU officers have blamed the disappearances on the suspects themselves, since they flee the consequences they

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<sup>77</sup> Nils Melzer, Targeted Killing in International Law (2008) at p. 4-5.

<sup>78</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions by Philip Alston; Human Rights Council, 14<sup>th</sup> session, Agenda item 3 p.5.

<sup>79</sup> We are Tired of Taking You to the Court-2014.indd - human-rights-abuses-by-kenya-atpu-20140220.pdf

are to face when they take part in a terrorist act and also state that they die because of the in-fighting of the Al-Shabaab or personal disputes.<sup>80</sup> The ATPU have acknowledged a couple of killings. These include the killing of Kassim Omollo in June 17, 2013, after the ATPU claimed that he had failed to surrender himself to the officials. Salim Mohammed Nero (also known as Suleiman Shauri) was also shot on the same day. The officials explained that he was resisting arrest and he was caught up in a shot out that erupted then. The Justice Initiative and Muslims for Human Rights stated that they were unaware of any official investigation into these deaths. Others to be killed in October 2012 were Omar Faraj and Titus Nabiswa. Faraj was killed when he was said to have been escaping arrest yet the deceased were not attacking back, hence claiming excess use of force. The police stated that they were using Nabiswa to get information as to terror cells in the area and were using him as an informant to give the ATPU further leads.<sup>81</sup>

There has also been unacknowledged disappearances and killings by the ATPU. This has been seen in the deaths of Badru Mramba, an acquaintance of Sheikh Aboud Rogo, on November 14, 2012. Others include Bekhit Kassim, Sylvester Owino Opiyo (also known as Musa Osodo), Jacob Musyoka<sup>82</sup>, Jeremiah Onyango Okumu (also known as Duda Black), Stephen Mwanzia Osaka (also known as Duda Brown), Omar Shwaib, Salim Abubakar, Sheikh Ibrahim Omar Rogo, also known as Ibrahim Ismael and lastly Sheikh Aboud Rogo<sup>83</sup>.

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<sup>80</sup> Muslim Human Rights Forum, "MHRF statement on killing of Sheikh Aboud Rogo," August 27, 2012; Jonathan Horowitz, "Rumblings Along the Coast," *Foreign Policy*, September 11, 2012, at [www.foreignpolicy.com/articles/2012/09/11/rumblings\\_along\\_the\\_coast](http://www.foreignpolicy.com/articles/2012/09/11/rumblings_along_the_coast)

<sup>81</sup>Ibid

<sup>82</sup> Tom Odula, "Lawyers suspect Kenyan police in terror abduction," *Associated Press*, May 26, 2012, at <http://bigstory.ap.org/content/lawyers-suspect-kenyan-police-terror-abduction>, accessed September 12, 2013

<sup>83</sup> Rogo's house was on U.S. and UN terrorist sanction lists and facing criminal charges for terrorism-related activities at the time of his murder. He had also been charged and acquitted of crimes relating to a 2002 Kikambala hotel bombing in Kenya. These circumstances, along with his escape from an attempted abduction in Nairobi in July 2011, carried out by individuals that Rogo and a friend, Abubakar Shariff Ahmed, identified as police, raised strong suspicion that the Kenyan government had a hand in his murder, something authorities deny.



## 2.2.2 Closing of Refugee Camps

Kenya as a signatory to international refugee law and in that effect it has pledged to respect refugees. However, on May 6, 2016, Kenya made a decision that it no longer hosts refugees and that means that both the Kakuma and Dadaab camps are closed. The reasons behind that particular decision were two-pronged; because of the economic challenges and the security threats.

The United Nations refugee agency (UNHCR) was of the view that refugees or those seeking asylum should not return to war-torn areas. This is because they face real risk of serious harm and persecution. They suggested that instead of closing down the refugee camps, they should tackle those who carry out terrorist activities. This has also been another reason why the camps are closed down.<sup>84</sup> The Kenyan government and especially the security forces claim that the camps have been serving as breeding grounds for training, radicalization and recruitment into the Al-Shabaab group.<sup>85</sup> However, human rights defenders have stated that the actions of a few refugees should not influence the lives of all refugees.

The AU has given various options. They noted that they should take a step and help Kenya achieve a more realistic and balanced solution that takes into account the refugees needs and their security concerns fully. The AU States that it is important for a State to uphold their obligations under the international and African instruments.<sup>86</sup> It makes suggestions that since governments have an obligation to take care of its citizens, the Somali government for instance should reconstruct itself

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<sup>84</sup>Human Rights Watch |350 Fifth Avenue, 34th Floor | New York and NY 10118-3299 USA | t 1.212.290.4700, 'Kenya: Ending Refugee Hosting, Closing Camps' (*Human Rights Watch*, 6 May 2016) <<https://www.hrw.org/news/2016/05/06/kenya-ending-refugee-hosting-closing-camps>> accessed 5 June 2016.

<sup>85</sup> Two assailants from al-Shabaab's 2013 attack on Nairobi's Westgate Mall lived in Kakuma.

<sup>86</sup>This includes the 1951 United Nations Convention relating to the status of refugees and the 1967 UN Protocol relating to the status of refugees, as well as the 1969 Organization of African Unity Convention.

and be ready to take back its citizens and provide for their needs. It also suggests that the AU Mission in Somalia (AMISOM) and the Somali Security Forces work hand in hand in their efforts to stabilize Somalia. This is seen to encourage Somali refugees to voluntarily return to their country.<sup>87</sup>

This measure was recently effected by the government of Kenya and therefore underway towards its implementation. The result of closing refugee camps that are viewed as breeding grounds and terrorists hideouts has a possibility of reducing terrorist actions. The study then views this as a way to uphold peace and security of Kenya. The process has currently been suspended.<sup>88</sup>

### **2.2.3 Deportation and Rendition**

Deportation of terrorists happens after closing down refugee camps or after a security crackdown. Rendition is the process of transferring a suspect or fugitive from one state or jurisdiction to another. However, unlike extradition, rendition takes place without any legal process. In the previous years, immigrants and illegal un-registered individuals were deported back to their countries. Although not all illegal immigrants are terrorists, some come as drug traffickers, but they are all criminals since they have evaded registration as they come into Kenya. Any undocumented individual in Kenya has posed a security threat since they are unrecognized or unidentified. Although deporting people to conflict zones is a disregard of their human rights as discussed earlier on, they come to Kenya, forge documents and begin their criminal operations.

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<sup>87</sup>Tchioffo Kodjo, '590th PSC Meeting Decision on the Situation of Refugees in the Dadaab Refugee Camps in Kenya-African Union - Peace and Security Department' (*African Union, Peace and Security Department*) <<http://www.peaceau.org/en/article/590th-psc-meeting-decision-on-the-situation-of-refugees-in-the-dadaab-refugee-camps-in-kenya>> accessed 5 June 2016.

<sup>88</sup> This was the position as of November 2016.

Since the rights of citizens are paramount to those of a minority group, it is right for any government to take up measures to protect their citizens from third party interferences that cause violations.

Therefore, in accordance with the researcher, deportation of a family perceived to be terrorists may seem derogatory, since the law does not apply arbitrarily to punish those who never took part in committing the offence. However, when one looks at the greater harm to be done to the State, the researcher justifies deportation of undocumented individuals. This also covers those documented but have acquired registration and identification through fraud or corruption.

In 2007, Kenya rendered to Somalia at least 85 people, who were then rendered to Ethiopia.<sup>89</sup> Applicants who sought damages from a Kenya High Court claimed that Kenyan authorities arbitrarily detained them without bringing them before a court within 24 hours of their detention and denied them a hearing or access to extradition and/or deportation procedures, all of which are required by Kenyan domestic law. In those legal proceedings the head of the ATPU, said he was involved in the operation and that it was conducted on national security grounds, but he did not admit to committing abuse.

In the case of *Salim Awadh Salim and 10 Others v. Commissioner of Police and 3 others*<sup>90</sup>, the court held that reasons of national security cannot be a basis for violating the constitutional rights of any person. However, the ATPU argue that they have a constitutional right to protect its citizens

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<sup>89</sup> Human Rights Watch, “Ethiopia/Kenya: Account for Missing Rendition Victims: Secret Detainees Interrogated by US Officials Are Still in Custody,” Press Release, October 1, 2008, at [www.hrw.org/news/2008/10/01/ethiopiakenya-account-missing-rendition-victims](http://www.hrw.org/news/2008/10/01/ethiopiakenya-account-missing-rendition-victims), accessed November 28, 2016

<sup>90</sup> High Court at Nairobi (Constitutional and Judicial Review Division), *Petition No. 822 of 2008*, July 31, 2013, para. 75

and can deport terror suspects and illegal immigrants when they have been rendered, so that they face the due process of the law in those countries. The sovereign nature of states enables different countries to be at the forefront to advocate for peace and justice within its borders.

#### **2.2.4 Physical and Psychological Torture of the Suspected Terrorists**

Torturing occurs in detention facilities where investigators use threats or physical and psychological torture on suspected terrorists.<sup>91</sup> The act of torture is against humanity as it infringes on an individuals' human rights and fundamental liberal principles of freedom, dignity, and justice. In the ongoing global "war on terror", a vast array of counter-terrorism precautions have been enacted. No individual measure, no matter how draconian or violent, provides a sole remedy to the ubiquitous and continued threat of terrorism.<sup>92</sup> This approach is condemned and restricted by the CoK<sup>93</sup>.

According to Human Rights Watch Press Release in 2003, 'Rejecting torture does not mean forgoing effective interrogations of terrorist suspects. Patient, skillful, professional interrogations obtain critical information without relying on cruelty or inhuman or degrading treatment. Indeed, most seasoned interrogators recognize that torture is not only immoral and illegal, but ineffective and unnecessary as well. Given that people being tortured say anything to stop the pain, the information yielded from torture is at times often, false or of dubious reliability'.<sup>94</sup>

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<sup>91</sup> H. Williams, 'The torture convention, rendition and Kant's critique of 'pseudo-politics'. (*Review of International Studies*, 36, 2010), 195-214.

<sup>92</sup> J. Lutz and B. Lutz, '*Global Terrorism*' 3rd Edition Routledge, (London, 2013), 274.

<sup>93</sup> The CoK under Art.25 (a) provides for the non-derogable rights. 'Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited: freedom from torture and cruel, inhuman or degrading treatment or punishment'.

<sup>94</sup> Human Right Watch, *The Legal Prohibition against Torture*. (Human Right Watch, March 11, 2003)

<<https://www.hrw.org/news/2003/03/11/legal-prohibition-against-torture>>. accessed on 18/08/2016.

However, the researcher suggests that other appropriate means should be employed rather than torturing an individual to get facts or information that aims at countering terrorism. This does not necessarily mean that when one is tortured they reveal the information required or that it amounts to counter-terrorism. However, a question arises as to whether torture is permitted in some circumstances. This arose during the debate of the ticking time bomb scenario. This was discussed to show the outcome of torture. The questions that arose were if torture is to be allowed, and in which circumstances.

Various scholars and writers have argued in support and against torture. The scenario is where a terror suspect is arrested and is aware of an underway planned attack, which they refer to as “ticking time bomb” scenario. The argument is that are the law enforcers allowed to torture the said suspect to reveal information of the whereabouts of the bomb or should they avoid torture and figure out means of defusing the bomb using their intelligence? The questions that follow is if the intelligence have sufficient time to get ahead of the terrorists’ plans and save the targets or they have to take a shorter way in finding out of the eminent plans and attacks. In the opinion of the researcher, torture should be used on terrorists to get more information about underway plans. The problem that arises is are there professional torturers, who are able to derive the right and important information that would be sufficient to counter-terrorism.

The report by justice initiative<sup>95</sup> documents detailed and credible allegations that the ATPU physically abused Swaleh Abdullah Said, a man captured in Mombasa on suspicion of terrorist-related activities, including the Westgate Shopping Mall attack. In the case of Omar Awadh Omar and others v. Attorney General,<sup>96</sup> eight accused men claimed that any criminal trial against them

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<sup>95</sup> <sup>95</sup> We are Tired of Taking You to the Court-2014.indd - human-rights-abuses-by-kenya-atpu-20140220.pdf

<sup>96</sup> Constitutional Court of Uganda, Constitutional Petition No. 55 of 2011, November 15, 2011

would be unconstitutional because two of them were coerced through “trickery, force and torture” to give confessions. Relying on the discussion given above, the study inclines more to allowing the law enforcement officers using due pressure on suspects, with an aim to extract information that will help in their investigations and that will assist in combating terrorism fully.

### **2.2.5 Seizure of property /Freezing of the Properties or Assets**

Sec. 37 of the Prevention of Terrorism Act provides for legal measures in dealing with terrorism. The law provides that the Inspector General has the power to seize property that is used for the commission of terrorist acts. There is a requirement of a High Court order that is needed to seize the said property. Obtaining the court order, and waiting for an *Ex parte* hearing in most cases takes a while because of the court backlog of cases in the judiciary. This challenge hinders in making such a measure effective. The fact that the High Court also gives the accused persons or suspects a fair hearing, time to explain their case, tends to drag the cases and this enables the terrorists to explore other options to avoid having their property frozen and operations finally seized by the government. Sec. 40 provides for ordering for forfeiture of property on conviction. The law also provides for an appeal in cases where one is aggrieved by the forfeiture. There are circumstances where an innocent person is caught up in such scenarios and the law provides for a fair hearing and appeals, but the terrorists on the other hand might use this as an excuse and a channel to escape legal process and justice.

Section 43<sup>97</sup> requires that whenever there are reasonable grounds to believe that a property is used for a commission of a terrorist attack, the police have been given permission to search the premises. However, before the search warrant is given, one has to make an application to the High Court. From the above discussion although freezing of assets and seizing of property is provided for in Kenya by the legislature in the laws, it has not been effective at all.

Part IV of Prevention of Organised Crimes Act<sup>98</sup> gives provisions on Tracing, Confiscation, Seizure, and Forfeiture of Property. On property tracing, the law requires the AG to make an application to court whenever he/she has grounds to suspect that an individual is a member of an organised criminal group, to make investigations to compel the person to deliver identification documents and produce property belonging to him/her. Whenever a person refuses to honor the request of the AG, the AG has the power to enter his/her premises and search it. The orders granted are to prohibit any further dealings of the suspect with any other individual and even financial institutions since the AG also publishes it in the Kenya Gazette. On Seizure and detention<sup>99</sup> of organized criminal group cash', whenever an authorized officer<sup>100</sup> is informed and believes of any cash incoming to the country is the property of terrorists, they intercept and seize the property.

For instance, on 7 April 2015, the IG froze the accounts of two leading human rights organisations, *Muslims for Human Rights* (MUHURI) and *Haki Africa*. They were amongst 85 individuals and institutions, known as 'specified entities,' which were equated to 'terrorist groups' and froze their bank accounts. The researcher is of the argument that the IG had already done prior investigations

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<sup>97</sup> Prevention of Terrorism Act, Laws of Kenya.

<sup>98</sup> Cap 59, Laws of Kenya.

<sup>99</sup> Sec.17, Prevention of Organised Crimes Act.

<sup>100</sup> The Commissioner of Customs and Excise holding office under the Customs and Excise Act (Cap. 472); the Commissioner of Police holding office under the Police Act (Cap. 84) (now repealed); the Attorney-General; or any other person upon whom written law vests functions of maintenance of law and order.

to warrant such a step and the fact that the PTA, grants little right of appeal, places the burden of proof on the accused, and makes membership of a terror group punishable by up to 30 years' imprisonment.<sup>101</sup>

However, due process should be granted to both parties but the fact that terrorism is a crisis in Kenya, the rights of the citizens should prevail above the rights of terror suspects. As long as there are no human rights violators, such as terrorism, there are no accusations of police forces overusing their powers. At every election, the presidential aspirants give many promises to Kenyans; that when one is elected, peace and security is at the forefront of their leadership.

Therefore, the president having been giving powers by the citizens ought to fight terrorism completely so as everyone enjoys their rights and even work to improving the economy of the country other than live in fear of their safety. This effort may be the best approach; however, a challenge is raised on the criteria used to identify an individual or a group involved in terror activities and thus failure by the government to prove has a negative ramification in the fight against terrorism.

#### **2.2.6 Detention and Arrests**

This most likely happens before any other measure is applied, for instance deportation or rendition. Suspects are arrested and detained to enable investigations to take place. However this type of detention is not only for twenty four (24) hours as provided for in the Constitution of Kenya. It is often called pre-charge detention as one is usually not arraigned in court yet at that particular time

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<sup>101</sup>The National Coalition of Human Rights Defenders | Defending HRDS' <<http://nchr.dk.org/>> accessed 7 May 2016.



to answer charges and investigations are still ongoing. At this particular time, the investigation team looks for evidence that strengthens the case of the prosecution if they are to charge them.

During this period, the suspects, being an important link to the thread of terrorist acts and plans, affects the other conspirators since one of their contact persons is in the custody of the police officers. The reason for detention in most cases is to drill information out of suspects on their plans and previous attacks. This helps in countering terrorism because it is believed that the suspect most likely reveals crucial information to the police officers. It is designed to capture the terrorists and monitor their actions and movements in the urge of extracting information.

### **2.2.7 Surveillance**

During investigation and detection of crimes, law enforcement agencies and government entities use surveillance to gather information about a crime. Surveillance is conducting close observations of a group or an individual.<sup>102</sup> The investigators spot their targets and collect data from the suspects using different techniques. The obvious method is following suspects and having to document their routines. The other method is using of new dragnet metadata collection and tools to fight encryption or some even more powerful capability. There is use of closed circuit television (CCTV) cameras that record and transmit to local police agencies and are used to watch certain areas and people using closed circuit television. These cameras tape actions and events of a certain area and the police can sieve as to which individual frequents a particular area. This is known as the use of pre-constructive surveillance techniques and technology. In contrast, there is the use of reconstructive surveillance. The investigators in this case use evidence left behind at a crime scene

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<sup>102</sup> 'What Is Surveillance? - Definition, Systems & Techniques' (*Study.com*)  
<<http://study.com/academy/lesson/what-is-surveillance-definition-systems-techniques.html>> accessed 30 June 2016.

to reconstruct events that have taken place. The use of fingerprint powder gives DNA details of an individual.<sup>103</sup>

The current situation in Kenya is that in May 2014 it contracted Safaricom Limited<sup>104</sup> to build the Integrated Public Safety Communication and Surveillance System (IPSCSS) to help security forces fight crime.<sup>105</sup> The IPSCSS was to result in the installation of 1,800 CCTV cameras with face and motor vehicle number plate recognition capabilities in strategic locations in Kenya's two big cities of Mombasa and Nairobi; they were to set up a command and control centre where CCTV footage will be relayed in real time; a video conferencing system; connecting a number of police stations with high-speed internet; the development of a 4G LTE<sup>106</sup> network for the police with 80 base stations; supplying the police with radio communication devices with SIM cards and photo and video capability; and linking police vehicles to the command and control centre.

Article 31 of the CoK enshrines Kenyans' right to privacy of home, person and property and communications. The right to privacy in Kenya may be limited by statute under certain circumstances, but currently, the communications of persons under investigation can only be covertly intercepted through application of a warrant. The Securities Laws (Amendment) Act 2014, removes the requirement to obtain a warrant prior to intercepting a digital communication. Section 65 of the Act would remove the requirement for the intelligence service to obtain a warrant to authorize interception and, by extension, any independent judicial review of the interceptions

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<sup>103</sup> Ibid.

<sup>104</sup> The leading mobile telecommunication network operator in Kenya. [www.safaricom.co.ke](http://www.safaricom.co.ke)

<sup>105</sup> PSCU. (2014, May 14). Integrated communication, surveillance system to boost security.

<sup>106</sup> Online discussion on Security Situation in Kenya. [www.kictanet.or.ke/?p=20030](http://www.kictanet.or.ke/?p=20030)

process. It would be entirely up to the intelligence services to determine how surveillance is carried out and on whose communications.

The Act also extends the category of people who can have their Constitutional privacy rights violated to anyone "who is subject to investigation by the Service" without detailing any safeguards that would make selection more rigorous being at the discretion of the Service agent. Section 66 of the Act introduces a whole new covert operations section that gives any member of the Service broad powers to enter any physical place and extract, modify, search, remove, record and perform other actions on any material found, requiring only the authorization of the Director General of the Service. Sec. 80 also would give new powers of interception to other agencies including KDF that are not prescribed by law, but rather by the CS who establishes procedures at his discretion.

The study views the goal of the project, among other things, enable security agents to communicate better and boost their capacity to fight terrorism.<sup>107</sup> The government has also put in place a National Cyber Security Strategy<sup>108</sup> to counter the ever-evolving cyber threats.

The new surveillance technology is called the StingRay. It is also marketed as IMSI Catcher, Cell-site Simulator, Triggerfish, or Digital Analyzer. It is a sophisticated, portable spy device, able to track cell phone signals inside vehicles, homes and insulated buildings. StingRay trackers act as fake cell towers, allowing police investigators to pinpoint location of a targeted wireless mobile by sucking up phone data such as text messages, emails and cell-site information.<sup>109</sup> The other

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<sup>107</sup> Daily Nation. (2014, May 13). Why State House made a call to Safaricom chief over insecurity. Daily Nation. [www.nation.co.ke/news/Why-State-House-made-a-call-to-Safaricom-chief-over-insecurity/-/1056/2313756/-/ybd3dt/-/index.html](http://www.nation.co.ke/news/Why-State-House-made-a-call-to-Safaricom-chief-over-insecurity/-/1056/2313756/-/ybd3dt/-/index.html)

<sup>108</sup> [www.icta.go.ke/wp-content/uploads/2014/03/GOK-national-cybersecurity-strategy.pdf](http://www.icta.go.ke/wp-content/uploads/2014/03/GOK-national-cybersecurity-strategy.pdf)

disadvantage is that it also extracts data off potentially thousands of other cell phone users in the area, hence infringing on their right to privacy.

### **2.3 Conclusion**

This chapter has set out an analysis of other measures that are not provided for in the criminal justice system. The measures that have been discussed in detailed include: targeted killings, closing of refugee camps, deportation and rendition, physical and psychological torture, seizure and freezing of assets, detention and arrest and finally surveillance. All these measures have been analysed in this study, their effect on human rights and their legality, and a case scenario of Kenya has been given to explain each measure. The researcher has set out the strengths and inadequacies of the law.

## CHAPTER THREE: A COMPARATIVE ANALYSIS

### 3.1 Introduction

In this chapter, the researcher looks at various cases of countering terrorism with the use of different extrajudicial measures that are discussed in chapter two. In studying various cases, the researcher assesses the legal implications of extrajudicial measures in countering terrorism. The researcher briefly reviews counter-terrorism measures of France, Israel, Russia, Great Britain, Nigeria, the United States of America and China.

#### 3.1.1 France

Over the recent years France has been a terrorist target. According to figures published in 2015, France, has produced more *jihadists* than any other European nation.<sup>110</sup> The French have introduced major counter-terrorism Acts.<sup>111</sup>

Under their current law, specialized prosecutors and judges who work with French intelligence agencies deal with terrorism cases.<sup>112</sup> This is important because prosecutors involved in terrorism cases are trained and knowledgeable in evidence and the details involved in prosecuting terrorism cases. Unlike in Kenya, there are no special courts and the personnel required to prosecute and determine terrorism cases have other myriad of cases ranging from drug trafficking to sexual offenses among others. No specific attention is given to terrorism hence not much productivity is seen from the judges and prosecution. The fact that there are no specialized courts makes it even

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<sup>110</sup> 'Foreign Fighter Total in Syria/Iraq Now Exceeds 20,000; Surpasses Afghanistan Conflict in the 1980s / ICSR' (ICSR, 26 January 2015) <<http://icsr.info/2015/01/foreign-fighter-total-syriairaq-now-exceeds-20000-surpasses-afghanistan-conflict-1980s/>> accessed 30 August 2016.

<sup>111</sup> The four major counter-terror laws are the ones of 1986 (Law no. 86-1020 of 9 September), of 1996 (Law no. 96-647 of 22 July), of 2001 (Law no. 2001-1062 of 15 November), and of 2006 (Law no. 2006-64 of 23 January).

<sup>112</sup> 'France - Counter-Terrorism - Legislationline' <<http://www.legislationline.org/topics/country/30/topic/5>> accessed 28 March 2016.

worse to deal with terrorists' cases at much detail and a shorter time because of the backlog at the judiciary.

The 1996 law punished those criminals who were associated in carrying out terrorist activities and were punished for ten (10) years imprisonment. However, the 2006 law has increased the punishment for up to twenty (20) years. When this is compared to the laws of Kenya, Cap. 30 of 2012 in Sec. 4 provides for an imprisonment term not exceeding thirty (30) years or imprisonment for life on circumstances when one is found guilty of committing a terrorist act that results in the death of another person. On detention of terrorists, the French law provides for a maximum length at police custody being four to six days and there are certain conditions given. Under Kenyan laws,<sup>113</sup> suspects are to be brought before a court of law within 24 hours after they have been arrested. However, in the case of Muchiri and Musa,<sup>114</sup> ATPU officers were granted more time to detain terror suspects by the court. In the researcher's opinion, detention is valid for a reasonable time in order to collect as much information as possible for a State to protect its citizens from any terror attack.

In 2014, France introduced a new aspect in counter-terrorism legislation. It now focused in individuals rather than groups. This has not yet seen light of day in the Kenyan context. The PTA in the interpretation section only defines what a terrorist group is. It focuses more in an entity rather than individuals.

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<sup>113</sup> Art. 49, CoK

<sup>114</sup> Abdulaziz Muchiri and Ali Kipkoech Musa were arrested by ATPU officers at Musa's home in Kariobangi south on April 20<sup>th</sup> 2013. During the hearing on 22<sup>nd</sup> April 2013, ATPU officers sought for orders to extend detention by 14 days and the same was granted by the court.

### 3.1.2 Israel

Ever since its birth in 1948, the nation of Israel has always experienced hostility from Arab nations. The threat of terror attacks is from rejectionist associations such as the Popular Front for the Liberation of Palestine, *Hamas*, Palestinian Islamic *Jihad*, and *Hizbollah*. Since these groups do not defeat the Israel Defense Forces (IDF) on the battlefield, they target Israeli citizens in an attempt to subvert the national will.<sup>115</sup> In other words, in realization that they do not defeat the IDF they have devised means by which they execute their activities through targeting masses and thus causing damages to the nation of Israel. They employ suicidal bombs where they execute their agenda by killing multitudes of Israeli citizens.

In 2000, the Israeli Human Rights Organization reported that 'Israel has conducted 85 targeted killings of Palestinian militia leaders and security personnel suspected of involvement in attacks on Israelis. Several of these targeted killings, often carried out with helicopter-borne missiles, have claimed the lives of bystanders, often including children'.<sup>116</sup> In the opinion of the researcher, Israel has opted to use the approach in order to defend its territories as well the occupied places where her citizens are settled. More so, the terrorists are extreme due to perceived religion conviction in which kill innocent nationals in the belief that they are fighting for their God.

In contrast to their enthusiastic censures of all categories of Palestinian violence, successive USA administrations have given mixed signals to Israel about targeted killings, which European governments and human rights groups clearly deem to be targeted killings. Official and State

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<sup>115</sup> Jonathan B. Tucker, *Strategies for Countering Terrorism: Lessons from the Israeli Experience*. <<https://coincident.wordpress.com/2008/06/04/strategies-for-countering-terrorism-lessons-from-the-israeli-experience/>> accessed on May 17, 2016.

<sup>116</sup> Chris Toensing, and Ian Urbina, "*Israel, the US and "Targeted Killings"*" <http://merip.org/mero/mero021703>> accessed on May 17, 2016.

Department opposition to the practice has frequently been undermined, and even contradicted, by milder rebukes from other parts of the government.<sup>117</sup> In essence, the USA has been standing with Israel when it comes to Palestinian revolts. The reason being, that Palestinian militant groups are among listed by USA on terror group list and thus they not supporting the terrorists. Secondly, the Palestinians have refused to recognize Israel existence and for the same cause, USA continues to stand with Israel on its war against Palestinians' extremists.

Blum and Heymann ascertained that, "More than any other counterterrorism tactic, targeted killing operations display the tension between addressing terrorism as a crime and addressing it as war. The right of a government to use deadly force against citizens is constrained by both domestic criminal law and international human rights norms that seek to protect the individuals' right to life and liberty. In law enforcement, individuals are punished for their individual guilt".<sup>118</sup> However, at certain extremes if a government is provoked by extremists who not only want to combat but to strike without notice, hence government defends the innocent in any other ways. Some of the terrorists are ready to die while executing their target and thus it is appropriate for governments to prevent such eventualities before they happen rather than waiting for them to cause havoc.

For the same reason, Israel through its intelligence does spy on the suspected terror groups and tries to exterminate them before they cause much damage to the nation. In the opinion of the researcher, it is the duty of the nation to defend the rights of her citizens from any aggression. However, political elites in eliminating their political rivals in the name of countering terrorism should not abuse the privilege. More so, such privileges should not be abused in targeting innocent

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<sup>117</sup> Ibid.

<sup>118</sup> Gabriella Blum and Philip Heymann, "*Law and Policy of Targeted Killing*". Harvard National Security Journal 1: June 27, 2010.



people. It is important for the governments to do thorough investigations to prove that a person involved is a terror suspect, without which, the targeted killings need apply.<sup>119</sup> Despite the approach, it has made terrorist groups to harden and device new methods in dealing with Israel. More so, the approach has also caused the Israel citizens to live in fear of attack. Furthermore, human rights defenders internationally have pointed their fingers against Israel on using extra force in exterminating the activities of the perceived terrorists' networks.

Israelis recommended travel warning as a measure for counter-terrorism to avoid threats.<sup>120</sup> Another measure that Israel is applying is the policy of punitive house demolitions of terrorists and detention. Their laws allow for detaining a terror suspect for up to fourteen (14) days without judicial review and the same are renewed every six (6) months by a judge. The detainees are barred from legal representation or communication for twenty-one (21) days. The Israeli security services have however been restricted from using torture but it allows for “moderate physical pressure” especially in cases where there is an urgent need to obtain information that could lead to the prevention of an attack.<sup>121</sup>

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<sup>119</sup> ‘Countering the Changing Threat of International Terrorism’ <<http://fas.org/irp/threat/commission.html>> accessed 28 June 2016.

<sup>120</sup> תוציפנחולאש <<http://www.nsc.gov.il/en/Pages/FAQ.aspx>> accessed 7 May 2016.

<sup>121</sup> Bureau of Public Affairs Department Of State. The Office of Website Management, ‘Israel and The Occupied Territories - The Occupied Territories’ (Department Of State The Office of Website Management, Bureau of Public Affairs 2014) Report <<http://www.State.gov/j/drl/rls/hrrpt/2013/nea/220358.htm>> accessed 28 June 2016.

### 3.1.3 Russia

Ever since June 1995, Russia has a tragic record of terrorist attacks.<sup>122</sup> Russia has passed a series of amendments to existing counterterrorism legislation.<sup>123</sup> The current legislation has made it a crime for failure of warning the authorities of “reliable” information about planned terrorist attacks. The law has also provided for expressing approval of terrorism on the internet as a crime that is punishable with up to seven (7) years in prison. The legislation obliges communication providers to store records of all communications for six (6) months and all metadata for three (3) years, as well as help intelligence agencies decode encrypted messaging services. However, this poses as a challenge to telecommunication firms as storing such a huge amount of information would require expensive and new infrastructure since users possess encryption keys. Encouraging people to take part in “mass disturbances” is also a crime and is punishable by five (5) to ten (10) years in prison.

The current laws are critiqued and have been termed as attacks on freedom of expression, freedom of conscience and the right to privacy that gives law enforcement unreasonably broad powers. There is an increased sentence for terror-related offenses, imposition of fines and enabling the State to seize assets of suspected terrorists and their close relatives. However, this has been seen as a collective punishment because the Russian authorities have justified this approach as an attempt to break the ethnic clan system.

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<sup>122</sup> In June 1995 until currently in October 2015, a bomb was planted on board a Russian passenger plane from Egypt killing 224 passengers and crewmembers.

<sup>123</sup> Human Rights Watch |350 Fifth Avenue, 34th Floor | New York and NY 10118-3299 USA | t 1.212.290.4700, ‘Russia: “Big Brother” Law Harms Security, Rights’ (*Human Rights Watch*, 12 July 2016) <<https://www.hrw.org/news/2016/07/12/russia-big-brother-law-harms-security-rights>> accessed 28 September 2016.

On detention, a terror suspect has a pre-charge detention for up to thirty (30) days. Russia has also incorporated torture, attacks on the suspects and their families and punitive home demolition. Kenya has no laws on demolition or involving the family of terrorists unless they have taken part in commission of the terrorists' act. However, the researcher views the family as a very important link and value to any human being and the mere fact that a suspect is aware of the danger they have placed their families into, it triggers one to retrace their actions and even in commission of a crime.

### **3.1.4 Great Britain**

The 2010 to 2015 Government Policy on counter-terrorism has a four point based strategy that is concerned with pursuing (with an aim to stop terrorist attacks), preventing (to stop people becoming terrorists or supporting terrorism), protecting (with an aim to strengthen their protection against a terrorist attack) and lastly prepare (to mitigate the impact of a terrorist attack.)

Chapters 1 and 2 of Part 1 of the Act<sup>124</sup> have placed temporary restrictions on travel. This has been done by seizing of passports and travel documents from persons suspected of involvement in terrorism and also give terrorism restriction orders not to re-enter Britain if one is a terror suspect. Part 3 of the Act provides for retention of relevant internet data. Part 5 deals with Risk of being drawn into terrorism. This particular chapter addresses the issues of radicalization. Freedom of expression has also been discussed upon in Section 31 of the said act since the UK believes that that can be a public area where extremists decide to 'hunt' for recruits.

Apart from the above measures, they have put in place the use of science and technology. This has helped them protect themselves against cyber terrorism, understand the root causes of

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<sup>124</sup> Counter-Terrorism and Security Act 2015

radicalization, identify, detect and improvised explosives and counter novel and lastly to understand and counter chemical, biological, radiological, nuclear and explosive threats (CBRNE). Britain introduced the Counter-Terrorism and Security law when British Muslims began joining terror groups like the Al-Qaeda and ISIS. There have been laws since 9/11 but there was a need to give the law enforcers and security personnel more power to defend the country. Among its contentious provisions, the law allows the police to instantly seize the passports and travel documents of those suspected of going abroad for terrorist activities.

The law introduces “temporary exclusion orders”, which banned citizens involved in terrorism from re-entering Britain for a period of up to two (2) years, unless on conditions that they are willing to be strictly monitored and incase one returns covertly, the person would incur a five (5) year prison sentence. Britain also monitors movements of terror suspects on their travel and communication gadgets. Different scholars have argued that this is invasion of privacy but every State has a right to protect its citizens and that should be done at all costs. So far, Kenya is still lagging behind in intelligence but is still trying to monitor suspects and even benchmark with countries like Israel.

On radicalization, Britain is on the forefront of giving public institutions the mandate and duty to ensure that individuals are not radicalized. One such measure is by ensuring that they ban extremists from speaking in any functions at the institutions. Under the Terrorism Act 2006, authorities detain terror suspects for up to fourteen (14) days without charge and suspects are also denied legal assistance for up to the first forty-eight (48) hours of detention.

### 3.1.5 Nigeria

Nigeria is currently battling an Islamist terror group, Boko Haram, which has sparked worldwide outrage after kidnapping more than 200 schoolgirls in 2014. The country's first anti-terror act was approved in 2011.<sup>125</sup> Law enforcement officers are given greater powers to detain and prosecute suspects to the Federal High Court of Nigeria. Under this law, officials access communication channels e.g. mail, emails and phone calls. The police and security forces seal off property without a warrant. Detention is ordered by judges for up to thirty (30) days in the interests of national security. It gives broad powers to government without any judicial oversight. A Security Intelligence Officer may enter and search any place, person, or vehicle without a warrant, if one has "reason to suspect" that an offense is being committed and there is adequate evidence.

The Officer may also search, detain, and arrest anyone if there is "reasonable suspicion" that the person has committed or is about to commit an offense. The Director General of State Security Service (DG) may use communication service providers as he/she deems fit. The DG also has the authority to seize funds if he/she has reasonable grounds to suspect that they were obtained through acts of terrorism, they belong to a terrorist organization, or they were intended for use to further terrorist activities. A Senior Security Officer has the authority to order the detention of a terrorism suspect for 48 hours without access to anyone, including his/her attorney. The law gives law enforcement officers immunity from civil or criminal liability for the use of force "as may be

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<sup>125</sup> Terrorism Prevention Act 2011

necessary for any purpose” that results in injury or death of any person, damage or loss of any property.<sup>126</sup>

One is sentenced for a maximum duration of thirty (30) years and the law allows for the death penalty in some instances. In May 2013, President Goodluck Jonathan, declared a State of emergency in Northeast Nigeria. This was to send in more troops and increase powers of law enforcement officers. The government has however been criticized of using brutal tactics and perpetrating rights abuses, including detention of suspects and killing them.

### **3.1.6 The United States**

During the post 9/11 war on Terror, suspects were detained as “enemy combatants” and were subjected to military law. They were detained without charge but had access to legal representation. In January 2002, President Bush opened the Guantanamo Bay detention camp to hold terror suspects and were detained overseas. Statistics show that there has been a majority of 136 remaining inmates who have been held for over ten (10) years without being tried of any offense. The fate of convicted inmates has varied. Some have been returned to their countries of origin while others have served prison sentences. However, in the case of Boston Marathon bombing, suspect Dzhokhar Tsarnaev, he was tried as a civilian, despite pressure on President Obama to treat him as an “enemy combatant.”

The USA has used drone and air strikes to fight terrorists in Yemen, Somalia, Pakistan, Iraq, Syria and Afghanistan. The ethics of drone attacks have been challenged by the Pakistani Government.

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<sup>126</sup> Hanibal Goitom, ‘Nigeria: Senate, House Approve Anti-Terrorism Bill | Global Legal Monitor’ (24 February 2011) <<http://www.loc.gov/law/foreign-news/article/nigeria-senate-house-approve-anti-terrorism-bill/>> accessed 28 September 2016.

The researcher is of the view that it clearly provides for a method of neutralizing terrorists without a military presence. Among other strategies that the USA has employed include intelligence sharing. This has been viewed as a critical element is ensuring data is shared with local police in foreign countries so they can arrest potential terrorists before they execute their plans. The USA intelligence community must be able to fuse intelligence data, diplomatic reports, and open-source information and distribute it to the relevant parties.<sup>127</sup>

The USA have also applied the measure of renditions or secret abductions of suspected terrorists to third party countries for interrogation. Suspects purportedly were brought to secret prisons operated by the CIA and tortured. Renditions have been an effective tool in capturing international criminals for many years. To ensure that renditions have been effective in USA, they have put in place strict standards regarding holding locations, on how to conduct interrogation, how long one can be detained, and the type of evidence and its weight, so as not to violate or disregard The prospects of abuse are reduced by an approval through a classified court or external review proceeding prior to executing the rendition.<sup>128</sup>

Training camps, terrorist bases and safe havens that are terrorist hideouts are being raided severally. Governments are always encouraged to destroy those sites as they are a breeding ground o the terrorists. USA also prepares itself to destroy the above mentioned areas even if they are in foreign government, because that particular government is not willing to destroy them. This in most cases has been seen as an attack in the sovereign nation's territory. It has led to political

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<sup>127</sup> <http://usforeignpolicy.about.com/od/defense/a/what-is-counterterrorism.htm>

<sup>128</sup> Ibid

fallouts and hence the USA intelligence has always been keen and carries out the destruction with certainty and completely eradicates the target.<sup>129</sup>

### **3.1.7 China**

In China, terrorism has mainly been linked to the Muslim Uighur minority. They are from the far western Xinjiang Uyghur Autonomous Region. Uighurs resent and terrorize their country because of discrimination from Beijing's control and immigration of Han Chinese to their region. Most suspects have been arrested and convicted for terror-related charges and a large number executed. There are also reports of heavy casualties at the hands of troops. The Chinese government has also carried out cracked down on Muslims, on women being detained and having their places of worship closed. Under Chinese criminal law, terrorists are be jailed for a term of up to ten (10) years, but are also sentenced to death.

A number of laws have been enacted to delineate the acceptable practices of Islam. These include bans on fasting during Ramadan festival, and restrictions as to wearing the Islamic clothing such as the veils. Another strategy by the Chinese government is repatriation from abroad. They repatriate because they believe that they are on their way to be recruited into *Jihadism* and when they came back, there has been reports of disappearances into the Chinese prison systems.

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<sup>129</sup> Ibid



### **3.2 Conclusion**

The analysis that has been done above compares different countries in the world that are facing terrorism and that have been at the forefront of combating terrorism. The comparison has been done to the Kenyan laws and the measures that Kenya should adopt as explained in chapter 2.

From the analysis done above, most countries wage a war against terrorism by putting in place provisions within their legislations that combat terrorism. The measures mostly use detention, imprisonment, deportation, targeted killings, physical and psychological torture, freezing of assets and surveillance.

## CHAPTER FOUR: FINDINGS, CONCLUSIONS, RECOMMENDATIONS AND FUTURE AREAS OF STUDIES

### 4.1 Introduction

In this chapter, the study sought to make findings, conclusions, recommendations and further areas of study based on the findings. It is hoped that the findings and suggestions adds to the body of knowledge that informs the reforms in the criminal justice system. This should in turn enable the three arms of the government realize the roles their play in countering terrorism and ensure dispensation of justice.

The recommendations come in light of a thorough analysis and the comparative studies done in chapter three above. The mentioned States in one way or another have been waging war against terrorism in their countries. More so, the study has critically analyzed the theory of utilitarianism in which it talks about happiness for the vast majority as being acceptable and pain for the vast majority as unacceptable. The study also looked at social contract theory, where any sovereign state should be seen to recognize and uphold the rights of its citizens as it maintains peace and security.

The purpose of the study was to critically analyse extrajudicial measures in countering terrorism with focus being on Kenya. Throughout the study, the study established that extrajudicial measures were appropriate.<sup>130</sup> In essence, the law<sup>131</sup> was enacted with intentions to address terrorism.

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<sup>130</sup> Worldwide Movement for Human Rights, *China's first counter-terror law and its implications for Tibet*. <<https://www.fidh.org/en/region/asia/tibet/china-s-first-counter-terror-law-and-its-implications-for-tibet>>. Accessed on 05/09/2016.

<sup>131</sup> Prevention of Terrorism Act, Kenya

However as seen from the research, Kenya has not tackled the problem of terrorism fully and hence the need to apply other measures. It is therefore paramount for the government to look at these alternative means of tackling terrorism rather than judicial measures. Extrajudicial measures should only be applied if the nation has sought all the viable means to counter-terrorism and have failed due to inadequacy. Having encompassed theoretical framework, literature review, measures in countering terrorism with clear inclination to the Kenyan case, the study would therefore make conclusions and recommendations in various areas that are pertinent in the fight against terrorism. This is done in consideration of international laws and the entire legal and legislative framework available in tackling the menace of terrorism as the situation demands in the global forum.

Countering terrorism is of significance to all nations, thus the matter has been on the international list of items for several decades.<sup>132</sup> However, in 2006, an historic milestone occurred in which all the UN member States agreed anonymously on an international strategy to counter-terrorism through coordination efforts.<sup>133</sup>

## **4.2 Summary of the Major Findings**

In chapter one, the researcher introduced the study by giving definitions of some of the major terms that were used in the study, a background of terrorist attacks in Kenya over the years, stated the problem, the objectives of the study, as well as canvassing through theoretical framework and literature reviews as pertains to existing works done by various scholars. The researcher applied the theory of utilitarianism and social contract theory, with a view to seek a balance of acts that are in consideration to human rights and those that are recognized universally.

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<sup>132</sup> United Nations' Security Council, *UN Global Counter-Terrorism Strategy*. <<http://www.un.org/en/sc/ctc/action.html>>. Accessed on 30/08/2016.

<sup>133</sup> Ibid.

The researcher was guided by the following hypothesis: Those extrajudicial measures are applicable in countering terrorism and are necessary to be used in consideration to the damage done by terrorists in regards to deaths of innocents, and its effect on the security and economy of a nation. More so, the study was done on the presumption that since terrorists are ready to die while fighting the perceived infidels, even if legislations are put into place to give them a death penalty when convicted, terrorist attacks did not come to an end. This means that there was a need for extrajudicial measures that assist States in curbing the present and future terrorist attacks.

The researcher asserted that human rights are owed by a State to its people and the government must ensure that there are proper laws in place so that every individual's rights are respected and not infringed upon. On counter-terrorism, the researcher asserted that terrorism has a real and direct impact on human rights. It was also noted that terrorism has had devastating consequences on the enjoyment of the right to life and liberty among other rights.

The specific objectives of this study were to: determine the effect of terrorism on the enjoyment of all fundamental freedoms and human rights; determine the significance of the application of extrajudicial measures and the legal consideration of human rights of both citizens and suspects in countering terrorism. To analyze violations of human rights of the suspects in the context of extrajudicial measures in counter-terrorism; and establish whether there are legal foundations of extrajudicial measures in countering terrorism in Kenya.

To realize these objectives, four research questions were formulated. The first research question was to find out the effect of terrorism on the enjoyment of all fundamental freedoms and human rights. The second research question was to enquire into the significance of the application of extrajudicial measures and the legal consideration of human rights of both citizens and suspects in

countering terrorism. The third research question was to analyze violations of human rights of the suspects in the context of extrajudicial measures in counter-terrorism. Lastly, the fourth research question was to establish whether there are legal foundations of extrajudicial measures in countering terrorism in Kenya.

The study analyzed and determined the effect of terrorism on the enjoyment of all fundamental freedoms and human rights. This study has ascertained that terrorism has trampled upon most of the rights and freedoms enshrined in Chapter 4 of the Constitution of Kenya and the other International Human Rights instruments. The study was also able to analyse and set out extrajudicial measures that Kenya should use in countering terrorism that will protect the rights of the citizens and the terror suspects. The study also analyzed violations of human rights of the suspects in the context of extrajudicial measures in counter-terrorism. This objective has been met since the researcher has outlined the human rights violations if the measures stated are to be applied. They are however justified since utilitarianism is seen to be paramount in counter-terrorism. Lastly, the researcher established whether there are legal foundations of extrajudicial measures in countering terrorism in Kenya.

In chapter two, the study reviewed extrajudicial measures in countering terrorism in which the study highlighted the various extrajudicial measures that included: targeted killings, closing of refugee camps, deportation, physical and psychological torture of the suspected terrorists, detention and arrests and lastly, surveillance. The study ascertained that combating terrorism should be done within the legal framework, but when it fails, other measures should be applied as long as they do not constitute human rights violations on the majority. This is done by applying measures that include prevention of individuals or groups from engaging in terrorist activities and

help in detecting activities that are organized with an intention to cause destruction. The study however noted that there are circumstances in which extrajudicial measures were to be applied and this was when the lives of the majority were seen to be paramount than those of a majority that chose to be terrorists. This brought about the justification of extrajudicial measures in counter-terrorism.

In chapter three, the study did comparative studies on different countries of the world that face terrorism and have found ways to completely deal with the challenge and those who are still struggling to curb the menace. This was done in relationship to the various extrajudicial measures used in the counter-terrorism as outlined in chapter two of the study.

### **4.3 Recommendations**

The dialogue progressed around suggestions that touched on all characteristics of the areas in extrajudicial measures. It scrutinized the study and was in line with the research objectives as indicated in the beginning of this thesis. Subsequently, the study was to come up with recommendations for possible improvements on counter-terrorism in Kenya. The government had to do everything possible to enhance security of its people as well as ensuring that human rights were enjoyed by all. This is regardless of either one is a suspect or law-abiding citizen as based on the findings.

The study therefore recommends that in countering terrorism, it is critical for the government to close all avenues that has potentials to favor terrorism. This calls for legal and legislative framework that empowers the intelligence and security apparatus through the government in order to prevent terrorism before its occurrence. The legislative framework had the ability to state the penalty for the persons involved in terrorist activities and thus punish the enforcement officers

who fail to battle terrorism. It was based on the available legal approaches as stipulated in International Human Rights Law. As it was done with consideration of human rights, it must be clearly demarcated in countering terrorism as the rule of the law observes. Without which, the infringement of rights of all is the order of the day. The war against terrorism is collective and corporate in which the citizens as well as all stakeholders. This mostly included security officers and intelligence personnel.

In accordance to a report released by the Open Justice Initiative as discussed above displays that Kenya has been at the forefront in tackling the terrorism menace. The ATPU has been accused of being brutal and accused of applying high-handedness force in carrying out extrajudicial measures.<sup>134</sup> It was critical for the police officers in law and order enforcement are to observe the rule of the law as well as working as stipulated in the constitution to protect the rights of the entire citizens and the rights of the suspects. The study has also shown that the rights of the citizens of Kenya are paramount; this should be the driving force of police officers. However there should be restrictions to the above statements. Police excess should be avoided as the IPOA should hold every officer accountable for their actions and even prosecute those who are using these measures as chances to increase their brutality to even innocent people. The best way forward is if reasonable force or pressure is applied to a suspect, especially one who is unharmed or disarmed in a certain operation. During self-defense however, the police officers should always strive to maintain peace and secure the majority of those caught up in any attack.

“An investigation into the Mandera quarry worker massacre revealed that the attackers not only roamed freely in the area but were also assisted by the police and immigration officers to cross the

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<sup>134</sup>KNCHR, *Are We Under Siege? The State of Security in Kenya: An Occasional Report (2010-2014)*. Nairobi: KNCHR, 2014), 5.

Kenya-Somalia border. The border has long been a conduit for smugglers of sugar, charcoal and other goods as well as human and drug traffickers<sup>135</sup>. In essence, the police and immigration officers were not involved in helping the perpetrators of terrorism activities without a bribe and thus the researcher would recommend the following that should be looked into by the government because they have the legal ramifications in the fight against terrorism by:

- a) The government needed to review the remuneration of the law enforcement and immigration of officers and thus pay them better in order not to look into bribe offers by the culprits;
- b) An enactment of laws prohibiting police and immigration officer from being involved in acts meant to interfere with war against terrorism activities either by receiving bribe or helping the culprit attaining the Kenyan Citizenship. This may be through forgery with a minimum penalty of 10 years in prison or a fine of 1 million or both in order to deter them from being involved in such activities.

To the Judiciary, there should be creation of specialized courts and have judicial officers personnel trained to handle terror cases. This will reduce backlog of cases and undue pressure that is usually experienced by magistrates or judges in presiding over different cases of different magnitudes and still having to research and come up with decisions that are legally binding. There should be legislation that is put into place by the national government that will shift the burden of proof from the prosecution to the terror suspects so that they are tasked with explaining why one has been caught being in possession of certain terrorists weapons and explosives.

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<sup>135</sup> Mark Kapchanga, *How corruption makes terror easy in Kenya*. <<http://newafriaremagazine.com/how-corruption-makes-terror-easy-in-kenya/>>. Accessed on 3/08/2016.



#### **4.4 Further Areas of Studies**

The study was sheltered up to a selected area on extrajudicial measures applied as means in which to counter-terrorism. It would be of great advantage if the study were unlimited to cover other areas in relation to:

1. Extrajudicial measures and their implications in addressing the insecurity issues in Kenya.
2. Extrajudicial measures and its legal implications in tackling corruption menace in the public sector and within the police force in Kenya.
3. Radicalization of youth in the Coastal and Northern-Eastern regions of Kenya and its implications on National security.
4. Co-relationship between unemployment of youth population and escalation of terrorism and its ramifications on economic development of a nation.

## REFERENCES

### 5.1 Books and Chapters

1. Alison Brysk and Gershon Shafir, *National Insecurity and human Rights*. (Berkeley: Global, Area, and International Archive, University of California Press, 2007)
2. Bruce Hoffman, *Inside Terrorism* (Columbia University Press; Revised & enlarged edition (June 6, 2006))
3. Charles Hornsby, *Kenya: A History since Independence* (IBTauris 2013).
4. Christopher Greenwood, Historical Development and Legal Basis, In the Handbook of Humanitarian Law in Armed Conflicts 1, 12 (Dieter Fleck, 2d ed. 2008).
5. Elena Pokalova, "Terrorism: The Dilemma of Response," in *International Criminal Justice: Critical Perspectives and New Challenges*, ed. G. Andreopoulos, (Springer Science+Business Media, LLC, 2011)
6. F Viljoen, *International Human Rights Law in Africa* (2007) 298
7. Garry D. Solis *The law of armed conflict: international humanitarian law in war*. (New York: Cambridge University Press, 2010) 538
8. J. Lutz and B. Lutz, '*Global Terrorism*' 3rd Edition Routledge, (London, 2013), 274.
9. Marc Sageman, *Understanding Terror Networks* (University of Pennsylvania Press; first Edition (April 16, 2004)

## 5.2 Journal Articles

1. Andrew Heard, 'The Challenges of Utilitarianism and Relativism. Human Rights: Chimeras in Sheep's Clothing?' 2007.
2. C Goredema and A Botha, Africa Commitments to Combating Organised Crime and Terrorism: A Review of Eight NEPAD Countries (2004) 5.
3. Chris Toensing, and Ian Urbina, "Israel, the US and "Targeted Killings"
4. Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 European Journal of International Law 655
5. Gabriella Blum and Philip Heymann: Law and Policy of Targeted Killing. Harvard National Security Journal (Volume 1 June 27, 2010) 1-26
6. Gerald J. Postema, Interests, Universal and Particular: Bentham's Utilitarian Theory of Value. *Utilitas*, (2006)
7. Gross, 'Thwarting Terrorist Acts by Attacking the Perpetrators of their Commanders as an Act of Self-Defence: Human Rights Versus the State's Duty to protect its Citizens'
8. H. Williams, 'The torture convention, rendition and Kant's critique of 'pseudo- politics'. (*Review of International Studies*, 36, 2010), 195-214
9. Ian Brownlie, "Interrogation in Depth: The Compton and Parker Reports," *Modern Law Review*, no. 35 (1972), 501
10. Micheal Quinn, Bentham on Mensuration: Calculation and Moral Reasoning. *Utilitas* (2014) 26 (1):61-104.
11. Nils Melzer, Targeted Killing in International Law (2008) at p. 4-5
12. Oviasogie F.O, "State Failure, Terrorism and Global Security: An Appraisal of the Boko Haram Insurgency" P. 21.
13. Ömer Taşpınar, 'Fighting Radicalism, Not "Terrorism": Root Causes of an International Actor Redefined' (2009) 29 SAIS Review of International Affairs 75.
14. P Hoffman, 'Human Rights and Terrorism' (2004) Human Rights Quarterly Vol. 26 No 4, 932-934
15. Restatement (Third) of The Foreign Relations Law of the United States § 102(2) cmt c (1987)
16. Salma Yusuf, Protecting Human Rights While Countering Terrorism'

17. Shri Akhil Kumar Jain “IN” *Journal of the National Human Rights Commission, India* 8, 2009, 1-235
18. Surya Deva, ‘Access to Justice: Human Rights Abuses Involving Corporations-the People’s Republic of China’ [2010] International Commission of Jurists (ICJ).
19. Theodor Meron, The Humanization of Humanitarian Law, 94 AM. J. INT’L L. 239, 240 (2000)
20. Transnational Terrorism Security and The Rule of Law, “The Ethical Justness of European Counter-Terrorism Measures,” December 19, 2008, 7
21. W Benedek& A Yotopoulos-Maragopoulos (eds) *Anti-Terrorist Measures and Human Rights* (2004) 24
22. Yigal Mersel, *Judicial Review in Countering Terrorism Measures: The Israel Model for the Role of Judiciary during the Terror Era.* (International Law and Politics, 2006), 67-120

### 5.3 Other Publications

1. Banks, W. C. & Raven-Hansen, P. Targeted killing and assassination: The U.S Legal framework. *University of Richmond Law Review* 37, 667
2. Black's Law Dictionary, eighth Edition, (Ed) Bryan A. Garner, Thomson West (Minnesota) 2004.
3. Causes of Terrorism | Hand of Reason' <<http://handofreason.com/2011/featured/causes-of-terrorism>>
4. Global Counter-Terrorism Forum, *Criminal Justice Sector and Rule of Law Working Group: Recommendations for Using and Protecting Intelligence Information in Rule of Law-Based, Criminal Justice Sector-Led Investigations and Prosecutions*
5. International Council on Human Rights Policy, *Human Rights after September 11* (2002) 19
6. Kenya: Ending Refugee Hosting, Closing Camps' (*Human Rights Watch*, 6 May 2016)
7. Michael L. Gross, *Assassination and Targeted Killing: Law Enforcement, Execution or Self-Defence?* "IN *Journal of Applied Philosophy*, 23, (3), 2006, 324-335
8. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions by Philip Alston; Human Rights Council, 14<sup>th</sup> session, Agenda item 3
9. Stephen D Krasner, "Sovereignty," *Foreign Policy* 122, no. 24 (2001): 22
10. T Davis Preface to *Human Rights and the Fight against Terrorism: The Council of Europe Guidelines* (2005) 5
11. Tchioffo Kodjo, '590th PSC Meeting Decision on the Situation of Refugees in the Dadaab Refugee Camps in Kenya-African Union - Peace and Security Department' (*African Union, Peace and Security Department*)
12. Worldwide Movement for Human Rights, *China's first counter-terror law and its implications for Tibet*

#### 5.4 Thesis

- 1) Alex Chung, *Human Rights and Terrorism: A Comparative Security Analysis*. Nov 25 2015, 958 views E-International Relations Students. AI Kanu, the African Union' in G Nesi (Ed) *International Cooperation in Counter-Terrorism: The UN and Regional Organizations in the Fight against Terrorism* (2006) 175.
- 2) Counter-terrorism and Human Rights in Kenya | Jumah Daniel.
- 3) Oramini\_The Impact of Counter-Terrorism Operations on Human Rights in Kenya.

## 5.5 Websites

1. <https://www.britannica.com/topic/jihad>
2. <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>
3. <http://usforeignpolicy.about.com/od/defense/a/what-is-Counter-Terrorism.htm>
4. <http://www.un.org/en/universal-declaration-human-rights/>
5. <http://www.un.org/en/globalissues/humanrights/>
6. <http://kenyalaw.org/treaties/>
7. <http://Counter-Terrorism.go.ke/attacks.html>
8. <http://owaahh.com/the-three-curious-bombings-that-rocked-nairobi-in-1975/>
9. <http://www.pbs.org/wgbh/pages/frontline/shows/binladen/bombings/bombings.html>
10. <http://www.criticalthreats.org/somalia/operation-linda-nchi>
11. <https://www.un.org/counterterrorism/ctitf/en/un-global-counter-terrorism-strategy>
12. <http://nchrk.org/>