

HUMAN RIGHTS AND THE GENESIS OF COUNTER- TERRORISM PRACTICE IN KENYA

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

International terrorism, trans-boundary terrorism and national terrorism still operate under quasi-judicial assumptions without proper legal interpretation as of what is the definition of terrorism and how best to legislate it. As this failure comes from both international systems, regional systems and national legal systems, the question of bringing justice to presumed terror criminals is left to the discretion of the judiciary which often feel obliged to take cognizance of human rights and international standards whenever they have to deal with terrorism and counter terrorism measures adopted by the government. In this case there is a situation of hands-off terrorism or leaving for powerful nations especially the USA of America to carry the cross.

This paper seeks to analyse the major legal challenges facing the counter terrorism measures adopted by the Kenyan government since 2010 and discussing challenges brought about by human rights principles to this effect.

To make the discussion more balancing the paper shall evaluate both the past, the present and the future of terrorism and human rights.

1. HISTORICAL BACKGROUND (MATTER OF FACTS) There is no best way of reading and interpreting acts of terrorism and counter-terrorism measures taken by Kenya without relating it all to the very genesis of terrorism and counter-terrorism practices adopted by States. The need to understand counter-terrorism laws, policies and practices on

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community cohesion, equality and human rights is critical². It would make audible sense to track this discussion from the very genesis of terrorism and counter-terrorism practices before looking at Kenyan case.

1.1. **December 1988, LOCKERBIE TERRORIST ATTACK**

1.2. Boeing, over Scotland skies, a jumbo-jet bombed over the sky over Scotland- the Lockerbie tragedy (a locality on the border of Scotland and England) which shocked the conscience of man was a terrorist attack. It was an event that shocked the world's conscience. PAN AM - Flight 103, 474 Boeing, carrying over 259 passengers was bombed killing everybody on board. This was a tragedy that the world will never forget. The Jumbo Jet was en-route, to New York (USA), from Frankfurt through Heathrow International Airport.

1.3. The culprits were Libyan terrorists, a disaster that brought the suspects to justice and Libya had to pay the price through justice system. Terrorist attack, one of its own kind in human history. The bomb which was in a brown bag in the hold did not belong to anyone on board. The investigative question is who was behind the Lockerbie terror attack? Iran had hired Palestinian terrorist to launch Lockerbie attack. Both Libya and Iran were indicted³. The case was heard in The Netherlands and the 2 Libyan suspects (Fimmah & Abdel Baset el-Megrahi) were the main suspects but the evidence was very weak. Till date it is unclear who were the perpetrators and what was their intention affirming that terrorism criminal investigation is not easy and unpredictable. In 1991, the evidence was still too weak to help in conducting proper judgment. The Aircraft that was coming from Frankfurt via Heathrow got the unknown bag with bomb at Heathrow? Megrahi who was a

² TUFYAL CHOUDHURY AND HELEN FENWICK, "The impact of counter-terrorism measures on Muslim communities", in the International Review of Law, Computers & Technology, Vol. 25, No. 3, November 2011, 151.

³ <http://www.youtube.com/watch?v=4PUTdvT5yDg>

Libyan residing in England was charged but he pleaded unguilty of all the charges against him. He is now dead but his family members are still seeking justice through an appeal.

1.4. **August 1998** NAIROBI & DAR ES SALAM US EMBASSIES

(Nearly a decade after the worst terrorist atrocity in the African continent) Attack on the US Embassy⁴ – (Ufundi building went down) the attack targeted the United States of America and its foreign interests and Kenya was on the forefront. Twin truck bombs exploded in the Ufundi building hosting US embassy. US ambassador Prudence Bushnell was injured by the terrorist attack. Several innocent persons, civilians were killed and several were seriously injured. The attack was linked to local Egyptian Islamic Jihad and both Osama Bin Laden and Ayman al-Zawahiri were blamed for the attack. Fuzuh Abdullah Mohammed and others were mentioned in the FBI list. At the same time US embassy in Dar-Es-Salam was attacking killing many innocent civilians and creating panic all over. Neither Kenya nor Tanzania was under siege but was used as the means to terrorize the United States of America. Reasons for such terrorist attack and possibility to link the suspects with the crime become dwindling and unclear in their making⁵.

The impact of this bombardment of US objectives around the world including Tanzania created need to have counter terrorism measures agreed and adopted by the members of the United Nations. The UN Commission of Human Rights could not come up with the right measures. US had to carry out its operations to bring the suspects to justice considering kill some of them and detaining others.

⁴http://en.wikipedia.org/wiki/1998_United_States_embassy_bombings#Aftermath_and_international_respon
[settp://www.youtube.com/watch?v=8o5esSMAnPc](http://www.youtube.com/watch?v=8o5esSMAnPc)

⁵ "Counter-terrorism in Kenya" by Edward Mogire and Kennedy Mkutu Agade, in Journal of Contemporary African Studies, Vol. 29, No. 4, October 2011, 473-491.

As counter-terrorism reactions and counter-actions, the administration of Bill Clinton allegedly ordered Operation Infinite Reach cruise missile attacks on Sudan and Afghanistan⁶. The United Nations Security Council passed Resolution 1189 condemning the attacks on the embassies and this is the time the Republic of Kenya officially engaged in Counter-Terrorism measures with the Western support.

1.4. **September 11, 2001, MANHATTEN AIR RAID**

(Nearly 3 years after another worst terrorist attack occurred) tragedy took the world with a big shock and it became clear that terrorism was targeting United States of America⁷. Four coordinated terrorist attacks were launched on the American soil by Islamist terrorists.

It was the time President George W. Bush came into power after Bill Clinton and the global war on terror was still unilaterally declared by the USA and its allies. In what was first war on terror it changed to be war on human rights in which the protection of the territory outweighs human life⁸.

Even after the resolution of the United Nations Security Council, The United Nations was still none committal in the unfolding crime of terrorism. US officially launched an attack against Afghanistan with the help of some EU allies to deal with terrorist organization Al-Qaeda under the leadership of Osama Bin Laden and hosted by the government of the Taliban. In what was seen as another human rights tragedy⁹, the international community remained undecided on whether to support the war or condemn it. Before the war against terrorism declared by Bush was determined and concluded on Afghanistan the same administration declared war against Iraq under the regime of Saddam Hussein and this time

⁶http://en.wikipedia.org/wiki/1998_United_States_embassy_bombings#Aftermath_and_international_response research carried out on 18/05/2014.

⁷ http://en.wikipedia.org/wiki/September_11_attacks Research carried out on 18/05/2014.

⁸ CONOR GEARTY, "11 September 2001, Counter-Terrorism and Human Rights Act", p. 2.

⁹ IDEM, "Introduction".

there was a big show-down in the international community and especially from the United Nations¹⁰. United Kingdom, under the administration of Tony Blair supported President Bush to bring down the regime of Saddam Hussein with allegations of Weapon of Mass Destruction, an allegation which was never true. It was based on the level of perception of fear and threat of terrorism in the UK and the USA and their interests¹¹.

With US unilaterally declaring the two wars and creating massive violations of human rights, the world public opinion was divided and America lost its historical diplomatic reputation in what is now evident as the war on human rights.

The hunt for Osama Bin Laden was not completed, Saddam Hussein and his regime were attacked by the United States of America for allegations of Weapons of Mass Destruction (WMD), acclamation which never was and George W. Bush was brandished as a terrorist and violator of human rights by protesters.

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

Terrorist networks were spreading systematically with Al-Qaeda threatening America and its chief allies such as the UK and other members of the European Union. UK was attacked, Spain the same, Russia and other pro-US allies. The network of Al-Qaeda started to spread out with fundamentalist and extremist Muslims emerging in Yemen, and Somalia. New terrorist organizations such as Al-Shabaab in Somalia, Boko Haram in Nigeria and terrorist

¹⁰ CONOR GEARTY, 11 September 2001, Counter-Terrorism and Human Rights Act, "Introduction".

¹¹ Cf. TUFYAL CHOUDHURY AND HELEN FENWICK, "The impact of counter-terrorism measures on Muslim communities", in the International Review of Law, Computers & Technology, Vol. 25, No. 3, November 2011, 151–181.

groups in other individual countries around the world started to emerge with similar agenda, to destroy the infidel, meaning Christians and their governments. Radicalization process of Muslim communities has been witnessed as a perceived threat to individuals and government securities. The war on terror as counter-terrorism measures and impacts on Muslim communities in general have only moved the situation from substantive to severe¹².

Alleged killing of Osama Bin Laden on May 2, 2011, by President Obama's administration spelled out another episode and turn of affairs¹³ in the war against terrorism or counter terrorism measures. The murder of number suspect of terrorism did not make matters any better.

*Good evening. Tonight, I can report to the American people and to the world that the United States has conducted an operation that killed Osama bin Laden, the leader of al-Qaeda, and a terrorist who was responsible for the murder of thousands of innocent men, women, and children.*¹⁴ This is the speech made by President Obama saying that justice has been finally done. Is this another terror or counter terror?

The CIA lead operation has been found in the wrong side of human rights by some human rights activists. In the philosophy of human rights Osama Bin Laden was also a holder of human rights and he was entitled to principles of being born free and equal and with dignity as any other member of human community. He is a bearer of human rights, natural rights and deserves full protection of law to this effect. Taking away his life is the same as extra-judicial killing. In the due process and fair trial principles prosecution was to be done within the law and in respect to human rights before executing the suspect. He was not given time to defend himself in a fair trial process and was not heard. So, his killing by the American forces, US

¹² IDEM.

¹³ http://en.wikipedia.org/wiki/Killing_of_bin_Laden (Searched on 18/5/2014).

¹⁴ http://en.wikipedia.org/wiki/Killing_of_bin_Laden (Searched on 18/5/2014).

Navy Seals was also a violation of human rights law and one of the blunders of the US military option as counter terrorism security measures.

In what has been termed as war against terrorism, it turns to be counter-terrorism measures that tend to profile Islamic and some ethnic groups around the world¹⁵ resulting into religious fundamentalism, extremism and radicalization¹⁶. Even if the definition of terrorism is not yet clear, in the minds of powerful Western nations, terrorism is linked to Islamic militants, making the Islamic religion and Islamic community bear the brunt¹⁷ as the author of the world war of terror. Some Muslims argue that there is islamophobia, and religious hatred¹⁸.

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

Al-Shabaab abducted a French tourist in the coasts of Mombasa. The old and frailly French citizen died later in Somalia after the failure to save her life.

In the counter terrorism operations Kenya has decided to get rid of elements of terrorists from its territorial jurisdiction. Suspects, and illegal immigrants have been arraigned in law courts,

¹⁵ OLIVIER DE SCHUTTERN AND JULIE RINGELHEIM, "Ethnic Profiling: A Rising Challenge for European Human Rights Law", in *The Modern Law Review*, Published by Blackwell Publishing, 9600 Garsington Road, Oxford OX4 2DQ, UK and 350 Main Street, Malden, MA 02148, USA, p. 1.

¹⁶ CONOR GEARTY, Op. Cit.

¹⁷ TUFYAL CHOUDHURY AND HELEN FENWICK, "The impact of counter-terrorism measures on Muslim communities", in the *International Review of Law, Computers & Technology*, Vol. 25, No. 3, November 2011, 151–181.

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¹⁸ Idem.

some sent to the refugee camps and some forcefully sent back to Somalia through evictions and expulsions.

Given this background story it is now in order to ascertain that terrorism is a real international crime but it is also true that most of the counter terror mechanisms adopted by Governments are likewise abhorrent and violating international standards of universal human rights principles. The question that may bother the minds of subtle judges today is what would be the best option to manage counter terrorism without committing human rights offences?

2. TERRORISM & COUNTER TERRORISM

Kenyan Government took it upon its responsibility to act decisively against terrorists within its borders and in Somalia after the offensive attacks from presumed terrorists starting from the time the US embassy was attacked in the Kenyan jurisdiction. Government policy on dealing with national security opted for military option both in Somalia and in Kenya.

As a member of the United Nations and trusted ally of the United States and the Western powers, Kenya had the support to deal decisively with terrorism within its territorial space but needed legal framework to be able to do so without landing into problem with international law¹⁹.

Lacking credible legal framework and strong institutions to deal with terrorism perpetrators and suspects of terrorism would be sent to the United States of America to face justice as had happened with Somali suspects of piracy in the High Sea and Somali waters. The failure to have proper and sufficient legislation and well founded jurisprudence on terrorism, most of the counter-terrorism attacks have taken military option and use of violence to deal with the

¹⁹ See Edward Mogire and Kennedy Mkutu Agade, "Counter-Terrorism in Kenya", p. 1.

presumed suspects of terror, a reality that has been condemned by both mainstream and non-mainstream human rights watch-dogs especially the Amnesty International and Human Rights Watch blaming Kenya for extrajudicial killings and breach of fundamental freedoms of individuals and associations.

Kenya has been on the forefront of various terrorist attacks in almost the last two decades even before 2001. The need to come up with Anti-Terrorism Legislations has been growing calling for more law reform, preparedness mechanism, better trained intelligence gathering bodies, and judicial authority, despite strong opposition especially from Muslim legislators that argue that such law would only target the human rights and fundamental freedoms of their community members other than taming terrorism.

Political and legislative failure to come up with proper statutes and poor case law on the crimes of terrorism puts the judiciary in a rather awkward position to deal with terror suspects in Kenya.

International criminal jurisprudence is at its premature stage in the Kenyan legal system making it somehow cumbersome for the courts to come up with acceptable rulings on terrorism and counter terrorism policies.

International Crimes Act 2008, and Prevention of Terrorism Act, 2012 in Kenya including the Constitution of 2010 are all legal measures to deal with terrorism in a manner that would respect human rights and avoid pejoration of the security.

3. TERROR ATTACKS IN KENYA

In 1975, when Israeli flight stopped to fuel in Nairobi before the Entebbe rescue, several attacks and attempts were felt in Nairobi including Jewish owned Norfolk Hotel. Norfolk Hotel was bombed in 1980, followed by OTC bus bomb attack. In 1998 US Embassy

bombing occurred. On 28th November 2002, an Israeli chartered airliner Boeing was almost hit by missile leaving Mombasa Airport in Kenya and Kikambala hotel in Mombasa where they were receiving Israeli tourists was attacked. The main suspect was Mr. Fazul who sneaked into Kenya and forced out later by the Government. Mr. Fazul was killed in Somalia by American CIA.

In October 2011, a coordinated operation between the Somali military and the Kenyan military began against the Al-Shabaab group of insurgents in southern Somalia. The mission was officially led by the Somali army, with the Kenyan forces providing a support role. Since then, a series of explosions have rocked various areas in Kenya, bombings which are believed to have been retaliatory attacks by Al-Shabaab. In early June 2012, Kenyan forces were formally integrated into AMISOM²⁰.

According to US Embassy in the past 2011/2012, there have been at least 17 attacks involving grenades or explosive devices in Kenya. At least 48 people died in these attacks, and around 200 people were injured. Nine of these attacks occurred in North Eastern Province, including locations in Dadaab, Wajir, and Garissa. Four attacks occurred in Nairobi, and four in Mombasa. Targets included police stations and police vehicles, nightclubs and bars, churches, a religious gathering, a downtown building of small shops, and a bus station. The most recent attack involved two simultaneous assaults on churches in Garissa on 1 July 2012. In this attack, 17 people were killed and about 50 people were injured. Another reality is that those who have been caught in terrorist attempts some are Kenyan converts into Islam or members of Kenyan Mujahidin Members making the attempt to launch an effective counter terror measures much more complicated.

²⁰ http://en.wikipedia.org/wiki/Terrorism_in_Kenya

Westgate Mall Shooting in September 2013 and the dynamics of terrorism in Kenya in 2014

The Westgate shootings that left several innocent civilians dead and some injured and property looted and destroyed in Nairobi is one of the most recent deadly attacks in the face of President Uhuru's young government. The attackers have been defined as terrorists since their intention was not to rob business people but to kill and maim the people.

Kenya has had some other small incidents of terrorist attacks in Churches, Mosques and in Public commuter buses and open air market (Gikomba in Nairobi) targeting Kenyan interests. Several lives have been equally lost in such terrorist attacks and it is the duty of the government to bring law and order under human rights conditions.

It is very clear that terrorism attacks did not only target the USA and the Western allies. It is not only a Kenyan domestic problem but an international issue that requires international approach²¹. It is also very clear that the international law has not had a common stand in the definition of terrorism.

3.1. MILITARY OPTION

The government of Kenya, by sending its KDF and Linda Inchi sections of the military into Somalia²² and allowing them to deal militarily with the terrorism, has been alleged of not respecting critical human rights standards and universal principles. Military option aims to prevent, protect, secure, deter and pursue in counter-terrorism operations.

While noting the rising incidents of terrorist attacks in the State party and the establishment of an Anti-Terrorism Unit in the police service, the Committee is concerned at the lack of a legal framework that clearly sets out the human rights that

²¹ Edward Mogire and Kennedy Mkutu Agade, Op. Cit.

²² Op. Cit., p. 10.

must be respected in the fight against terrorism. The Committee is also concerned at allegations of the State party's involvement in extraordinary renditions and the refoulement of individuals suspected of being involved in terrorist acts to countries where they are likely to be tortured or face serious human rights violations (arts. 2 and 7).

The State party should enact legislation on counter - terrorism and ensure that it (a) define terrorist crimes both in terms of their purpose and their nature with sufficient precision, and (b) not impose undue restrictions on the exercise of rights under the Covenant. The State party should desist from any acts of extraordinary rendition and should ensure that the proposed Refugee bill 2011 complies with the absolute prohibition of refoulement under article 7 of the Covenant which also applies to cases of persons deemed a threat to national security²³.

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

Extrajudicial killings in connection with terrorists have been accused of lacking human rights standards. Torture of the arrested and detained persons has been a violation of human rights rules and lacks the authorized standards.

Shoot to kill bill has been criticised by the human rights activists and declaring war on terrorism are not compatible with human rights rules. This includes the use of drone to eliminate targeted persons which end up killing civilians. It is all the same an extra-judicial killing meant to deter terrorists or others from venturing into the atrocities and crimes of aggression. If the definition of terrorism is to create fear in an authority or in a perceived group of terrorists then extra-judicial killing is tantamount to another terror attack.

²³ United Nations CCPR/C/KEN/CO/3 Report from Special Rapporteur of Human Rights in Kenya, 31st August 2012, (No.14).

For our purpose, following Schmidt (2004), we define terrorism as the deliberate use or threat of violence by individuals, and non-state and state actors against targets that are chosen in order to manipulate a wider audience for political, ideological, religious or criminal goals²⁴.

Contemplated in the above definition and by deploying military approach to counter terrorism, States certainly are as well found on the wrong side of the rule of law and may be held responsible for human rights violations.

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

3.2. HUMANITARIAN OPTION

Fight poverty in Somalia in order to quell acts of Al-Shabaab and their attacks. Offer them basic needs and ensure that they do not use poverty to recruit your jobless and unemployed youth into the militia group. This option is rare and not convincing as one of the best counter terrorism measures, though the safest under human rights perspective. The State must abide by its international obligations and observe the Geneva Conventions and Additional Protocols.

3.3. DIPLOMATIC OPTION

²⁴ Edward Mogire and Kennedy Mkutu Agade, p. 1.

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

This option couples with international cooperation and venturing into diplomatic discussions in a manner to strike a deal. The expected result is to win hearts and minds of those who are engaged in terrorism or those who may become terrorists.

3.4. LEGAL OPTION:

Are terrorists criminals? Suspects of terrorist groups and criminal units must be brought to justice. This is the rule of law as opposed to the rule of people or police. Use of excessive force to deal with terrorists is also a violation to human rights standards. Proportionality and respect of a person should always be observed by the government and the judicial authorities. The rule of law meaning that suspects must be brought to court process and guaranteed respect to their persona is the basis of all this. Allowing the suspects to have their legal defence at their own choice, ensuring that they can contact their lawyer and family members and ensure that the suspect is kept in an environment required for their human dignity.

Legal option as counter terrorism approach is the only way out to deal with terrorism in a manner that would take into account most of the human rights principles and standards.

However, it is difficult to deploy successful since terrorism happens as a surprise and its suspects sometimes die in action or are difficult to trace. It is also not easy for the police and prosecutorial bodies to get hold the perpetrators with strong evidence to support the case against them. It is also evident that the intelligence of the State rarely share its findings with the judicial authority in good time.

Suicide bombing is a reality that becomes difficult to justicize since the perpetrator would be already dead when the attack happens.

Establishing reliable evidence is another challenge since proofs and alibi in such cases become technically difficult. It requires forensic know-how to ascertain facts by the law court. The whole process requires training of the judicial community including the investigators.

LEGISLATIVE ANALYSIS

International Crimes Act, 2008

Constitution of the Republic of Kenya, 2010

Prevention of Terrorism Act, 2012

International Crimes Division (ICD) in the High Court on 13th December 2013- the judiciary proposed the ICD to deal efficiently and effectively with international crimes, terrorism, and elections related violence in Kenya which was approved by the Judicial Service Commission in 2012. Though this is in its early stage the fact is that the judiciary has now a Division in place to deal with terrorism to bring meaningful justice²⁵.

²⁵ <http://www.vrwg.org/ACCESS/ENG-22Ongeso.pdf>; <https://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-Prosecutions-2013.pdf>;

In what seems to be controversial, Kenya is coming up with a legal framework which is likely to make counter terrorism measures easier than what it is. Even if there is no much jurisprudence on terrorism in Kenya and the courts rely heavily on international judicial reviews and other legal instruments, it is real that there is increasing need to cultivate academic and researched analysis of what would be the Kenyan approach respecting human rights standards.

4. HUMAN RIGHTS

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

One of the main duties of any state is to guarantee security to its citizens and foreigners within its jurisdiction. The failure of the government to sufficiently guarantee security is tantamount to failed state.

Human Rights Law embraces the rule of law and human rights standards that should be equally implemented by all states. Does human rights law endorse and promote act of terrorism? The clear answer is no. Does human rights law obligate states not to prevent terrorism? The answer is still no. Does the human rights law out-rule any mechanism that the State may use to guarantee security and offer lawful protection to its population? The answer to this is still no. Does the human rights law authorize an individual to commit terrorism? The answer is still no. Does the human rights disarm judicial organs from prosecuting suspects of terrorism? The answer is no. Does human rights advocate protection of terrorists

from extrajudicial killing? The answer is yes. Does the human rights prevent UNSC from intervening in counter terrorism? The answer is no. Does human rights prevent States from coming up with anti-terror legislations²⁶? No.

What is real is that human rights advocates universal standards that must be applicable to all human beings for the sake of their being part and parcel of the human community. It does not distinguish who is a terrorist and how such a person should be handled. The prominent question that follows is, whether human rights is also a security threat and a menace to sovereignty of States?²⁷

What it promulgates or rules in this case is following the right process of law: the rule of law system and constitutionalism. It advocates the due process and fair trial among other principles to be pursued by the authority and justice system. Human Rights is against detention without trial for example Guantanamo Bay (Cuba) and Abu Ghraib (Iraq). It condemns use of torture, discrimination and taking away of some one's life either judicially or extra-judicially²⁸. Human rights is against deny individuals their fundamental freedoms such as prohibiting groups or individuals their freedom of worship. Human Rights stands against the use of hunger to torture suspects, exclusion to torture suspects, denial of communication with their family members or denying them needed medical care. Human rights is against any act that may deny individuals their natural rights and malign their human dignity or degrade them.

5. JUDICIAL CHALLENGES

²⁶ PREVENTION OF TERRORISM ACT, 2012

²⁷ GORDON, NEVE, "Human Rights as Security Threat: Lawfare and the Campaign Against Human Rights NGOs", in *Law & Society Review*, Jun2014, Vol. 48 Issue 2, p311-344. 34p.

²⁸ Convention Against Torture, non Discrimination measures must be strictly observed by the counter-terrorism measures in place. See Quirine Eijkman, "Preventive Counter-Terrorism and Non-Discrimination Assessment in the European Union", in <http://web.a.ebscohost.com/ehost/pdfviewer/pdfviewer?vid=3&sid=5fd731e3-a978-41d0-88e7-6ad968c4f8cb%40sessionmgr4001&hid=4214>.

How should courts deal with suspects of terrorism? First of all, are there sufficient pieces of legislation in place? Is there proper jurisprudence and precedents that the court can always make reference to? Five problematic issues are going to be analysed:

5.1. Evidence is always problem number one (burden of proof):

5.2. The sentence to give is problem number two:

5.3. Preventive and deterrent measures problem number three:

5.4. Expedition of the case before the court is problem number four:

Issues appertaining to biasness and relating terrorism to religion is problem number five:
(denial of bail to terrorist suspects) –

CONCLUSIVE REMARKS

Human rights is one of the most rapidly developing branches of the international law of the 21st Century and there is no doubt that terrorism and counter terror approaches are subjected to the rule of law and human rights. The reality that law keeps on changing it cannot ignore cardinal universal principles brought about by the International Bill of Human Rights that has been developed by the United Nations till today.

However, it sounds simple, law practitioners and the judicial authorities still find it a stumbling block in ensuring that the best system is in place for peace and justice to reign after World War II. It was just by the fall of the iron curtain that ended the cold war in 1989 after almost six decades that terrorism became a new armed conflict taking the international community with surprise and need to define it. It is also certain that human rights law is developing to an extent that will see some traditional criminal justice systems being overhauled or reformed.

The discussion in this research has revealed that terrorism has been there for quite a while and the counter-terrorism options adopted by various nations still fail to spell out terrorism both in international and national laws. This failure to define terrorism within the international law has made it unnecessarily difficult to bring suspects of terrorism to justice let alone applying the judicial discretion in dealing with its practice.

The creation of UN Human Rights Council to replace the defunct UN Human Rights Commission in 2006 has strategically created another change of paradigm in the human rights justice system. Members of the Council that seats in Geneva do not necessarily exclude States that do not respect Human Rights. It makes the campaign for human rights difficult.

Tendency by some members of religion to link or delink terrorism from religion is another unfolding scenario. Some believers of Islamic faith negate that their religion has nothing to do with terrorism even if the majority of the mentioned suspects are from the Islamic faith. They tend to claim that their religion has been hijacked by criminal fundamentalists that use the religion to commit crime but this has nothing to do with their core faith in Islam. Isolating terrorism from Islam is another twist in the history of terrorism.

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

²⁹ Edward Mogire and Kennedy Mkutu Agade, p.1.

Government has stake in the wrongful killings of such vocal leaders in the Muslim community or has failed to prevent crimes and terror practices.

It appears that every counter-terrorism measure creates call for revenge and strengthens more the jihadist ideology at the same time. It is as though the fight is eminent but no party is willing to take responsibility or cede ground. In this triangle of crimes and counter crimes, the Courts have been left to deal with big problem against weak institutions. The prominent question is how can the judiciary absolve itself from the allegations of discriminations and denying some persons freedom of worship, rights of bail and fair trial without breaching the human rights law? How can the judiciary stand for justice while human rights is violated by the government it is supposed to serve? How can members of the judiciary serve justice, the government and the law at the same time without going against some principles of human rights? How can the judicial system deal with terrorism effectively having the laws and human rights principles at the same level?

All the above given questions call for more debate on how to observe universal human rights principles while keeping in mind the administration of justice, the rule of law and the government policies on security and anti-terror measures and international law state obligations.

I would like first and foremost to thank the Judicial Training Institute, the National Counter Terrorism Centre, National Security Intelligence Service, Anti-Terrorism Police Unit, the Joint Terrorism Task Force, to control, coordinate and command various government agencies. It is a bold step and risk taking operation to bring perpetrators of terrorism to justice trying not to fall in the same legal trap.

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