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War on terror or war on human rights? Implications of the "war on terror" for human rights in Kenya.

By

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A Masters Research Report submitted to the faculty of humanities, in partial fulfilment of the requirements of the Master of Arts degree (Human Rights and democratisation)

UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG

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DECLARATION

I declare that this research report is my own work and that no part has been previously submitted to any University or institution of higher learning as a requirement for the award of any academic qualification.

Signed…….Date……

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Dedication

I would like to dedicate this research report to my late father Wahome Mutahi *(Whispers*) who would have loved it; and my mother Ricarda Wahome (*Thatcher)* who has showed me the strength of a woman.

Chapter One

Introduction

It is interesting how a specific date and month has come to define the world. In the dawn of the millennium, few people would have thought international politics would suddenly change. It was even harder to envisage that America would be a direct target of terror groups' right inside their country in such a huge magnitude, in this age after the end of cold war when it was the only super power.

The events of September 11, 2001 will forever remain entrenched in history and even more so the political events that followed after, since they have redefined the world and its political ideology. Different states have responded to the attacks differently, springing surprises, twists and turns that have shaped the agenda of the human rights discourse. The response to the attack on the Pentagon and World Trade Centre has posed a dilemma to scholars in international human rights law, some of them whom have questioned if this is the end of human rights era.[1] This is because of how the human rights discourse has been put at cross purpose with the anti-terror efforts that have been employed.

After Al-qaeda operatives crashed three airlines into the Pentagon and World Trade Centre, while a fourth one crashed in a field in Shanksville, this was seen as a direct act of aggression on America and President George Bush vowed revenge. On October 8th 2001, Bush launched a campaign to track Osama Bin Laden and followers of his Al-qaeda group, who were responsible for the attacks. The "war on terror" began the same day with the bombing of Afghanistan that aimed at toppling the Afghanistan government, which supported Al-qaeda. While doing this, Bush placed terrorism above any other global agenda. It is important to note that the toppling of the Afghanistan regime was through the UN Security Council**.** When a new government was set up after the regime was toppled, the "war on terror" entered new frontier.

In his *S*tate of the Union address in January 2002, President Bush declared that Iran, Iraq and North Korea were "rogue states" and alleged that the three countries were developing weapons of mass destruction. Bush feared that terrorists would use these

[1] Michael Ignatieff, Is the Human Rights Era Ending?' in *New York Times*, 5 February 2002

chemical and biological weapons to attack other countries, more so American interests and hence measures had to be taken before this happened.

He next turned to Iraq which was suspected of having chemical and biological weapons and links with Al-qaeda. He vowed to topple the Iraq regime of Saddam Hussein on these pretexts.[2] These actions led to a lot of international debate, with many countries urging America not to use force to push its agenda. Specifically, most countries were of the view that inspectors from the United Nations Monitoring, Verification and Inspection Commission (UNIMOVIC) should be allowed to inspect Iraq to authenticate the claims.[3] In addition, many countries felt that for such a war to happen, the UN Security Council had to pass a resolution allowing the attack of Iraq. Nevertheless, America and its allies went ahead with their plans of toppling Saddam. On April 9, 2003 the regime of Saddam Hussein was toppled and he was captured on December 14, 2003. However, Osama has not yet been caught.

At the same time, the United Nations (U.N.) has passed various resolutions condemning terrorism and urging countries to enact anti-terror measures that do not infringe on the people's human rights. Despite this, the anti-terrorism measures adopted by many countries have fallen short of the U.N. human rights requirements and have proved to be a challenge to international human rights law and refugee law. This has led to various scholars arguing that the U.N. charter should be reviewed to adequately cater for the "war on terror" and the enforcement of human rights while engaging in these efforts. In any case, it is clear that legal safeguards that were once viewed as unchangeable are now being challenged. As David Rieff avers, "…the threat that internal war and terrorism poses to the edifice of international law would have become apparent sooner or later. If anything, September 11 only hastened and focused the process."[4]

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[2] As the war on terror progressed, the reasons for attacking Iraq kept on changing from the issue of chemical and biological weapons to liberating Iraq people from Saddam. This was especially so when it was clear that Saddam did not possess any chemical and biological weapons or links with Al-qaeda.

[3] The United Nations Monitoring, verifications and Inspection Commission (UNIMOVIC) was created through the adoption of Security Council Resolution 1284 of 17 December 1999. It was to replace United Nations Special Commission (UNSCOM) and continue with the latter's mandate to disarm Iraq of its weapons and missiles with a range of more than 150 km. At the same time, it was to continuously monitor and verify Iraq's compliance with its obligations not to reacquire the weapons and missiles.

[4] Rieff, David 'What is really at stake in the US campaign against terrorism,' article posted on www.crimesofwarproject.org

This research report aims to study the implications of the "war on terror" for the protection of human rights in Kenya. In doing so, it is noted that even though Kenya has been a victim of terrorist activities, it was only after America began the "war on terror" in October 2001 that it started putting up structures to address terrorism. Thus, the main thrust of this research is to investigate the human rights dilemma that Kenya faces in these efforts including interrogating the reasons for the tensions that resulted from the draft *Suppression of Terrorism bill 2003* that was drawn up by the government in its effort to fight terrorism. In order to do this, several research questions inform the study.

a) How has the "war on terror" shaped the understanding and practices of human rights in Kenya?
b) How has the "war on terror" shaped Kenya's approach to terrorism?
c) How did the draft *Suppression of Terrorism bill 2003* emerge*?*
d) Was the draft bill a result of social struggles and history of the country as regards terrorism?
e) What are the human rights concerns that have emerged from the draft bill?
f) What are the tensions that have cropped up between protecting human rights and ensuring national security in Kenya? This will include a study of local campaigns by the Civil Society and Muslim community against the draft anti-terror bill.
g) Why have the tensions come up between the citizens and the government? To do this, the study will look into the human rights history of Kenya and relationship between the government and its citizens.
h) What has been the impact of anti-terrorism measures on certain ethnic and religious groups?
i) How have suspected terrorists in Kenya been treated while under custody?

Human rights as applied in this research report refers to a set of internationally agreed upon principles which have been set down in the various declarations of United Nations human rights instruments, African Charter and other legal documents like Constitutions. Over the years, these principles have continuously been refined and extended to ensure that more people especially the minorities are catered for and have since been evoked when oppression occurs.

1.1 Human rights as a point of departure.

The U.N. has since its inception, enacted a body of human rights doctrine that is embodied in international law. It is these laws that have shaped the existence of human rights. However, the rights notion has been a point of contestation over what exactly are the rights to be protected? Who protects them? When are human rights to be derogated from? When do the rights trump over culture? Are human rights absolute and universally applicable? While answers to these questions will differ between various scholars, they are useful to understand the importance and growth of human rights. A point of departure in understanding the concept of human rights is to examine the various theories around human rights.

Karl Marx argued that law is an instrument used by the bourgeoisie to oppress the proletariat.[5] As such, the law was determined by the material conditions of the people and since the ruling class is the one which owned property, it served to cater for them. Marx thus viewed human rights as an edifice of the bourgeoisie who determined such virtues as liberty and freedom. Hence the only rights guaranteed are those that have been granted by the state and their exercise depends upon the citizens' fulfilment of their obligations to the state. This meant that guaranteeing and protecting human rights was the duty of the state and other countries could not interfere with this arrangement. This is what enabled countries that adopted Communism to oppress their citizens and deny them human rights as it was treated as a domestic affair. However, this has changed over the years as human rights has become a matter of international concern, with international law giving the U.N. and international community right to intervene when there is gross human rights violations in a country.

John Locke however was of the view that human rights are natural and the fact that one is a human being, entitled one to these rights, which he called natural rights.[6] To this end, people were supposed to form a government that would enter into a social contract with them so that it could protect these rights from those who would want to trample on them. However, the people still retained their natural rights of life, liberty and property. In case the government did not honour the social contract, it ceased to

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[5] Cotterrel, Roger. *The Sociology of law: An introduction,* 2nd edition, Butterworths 1992 pg 109

[6] Shestack, Jerome, 'The philosophic foundations of human rights,' in *Human Rights Quarterly,* Number 20 1998, pg 207

be valid in office. However, this theory has been criticised for its silence on what constituted the norms that are to be considered as part of the law of nature and therefore inalienable.[7] Despite this, it should not be lost to the fact that Locke's theory of natural rights was instrumental in the French declaration of rights and the U.S. declaration of independence as well as many states that fought against colonialism and totalitarianism. Of more importance is that it formed the principal building blocks of the U.N. charter.

However, positivist theorists deny the conception of natural rights and argue that the source of human rights is found only in law that spells out the sanctions that emanate when it is not adhered to. In other words, positivists see law as the guarantor of human rights and it must be obeyed no matter how immoral it might be or even if it disregards the freedom of the individual. The apartheid regime in South Africa thus could have justified their actions since that is what the law of the land stipulated and the theorists' blind justification of the law has been its criticism. This is because "unjust laws not only lack a capacity to demand fidelity, but also do not deserve the name of law because they lack internal morality."[8] Nevertheless, it should be noted that positivists have contributed to the growth of legal rights and international human rights law that provide a ground for rights protection.[9] However, they do not cater for the notion that society develops laws that are to be exercised by the people and human rights are considered as rights by virtue of one being a human being and are part and parcel of the integrity and dignity of the individual. Therefore law serves as an implementing organ but it is not the absolute source and cannot take the rights at will any time.

From a sociological perspective, human rights go beyond the notion of natural rights and legal rights. It extends to the view that rights are a construction of the society and emanates from the social struggles among the people. In this regard, law is an avenue for social struggle that is a part of peoples' lives.[10] Since it emanates from a society's history and struggles, this means that law is going to be interpreted in various ways. However, if the law does not reflect the society's needs, it will not be applicable and

[7] ibid pg 207
[8] ibid pg 209
[9] ibid
[10] Cotterrel, Roger *opcit* pg 1-2

this is the dilemma that Kenya has been grappling with its anti-terror legislation. Furthermore, law expresses and regulates power relations.[11] Thus, it is a field where power is exercised and the structures like Constitutional courts ensure that all in the arena are protected, especially the minority and the best way to guarantee this is to invoke the rights language. This is so because human rights are also a product of contestation, meaning that they exercise a particular form of power. Therefore one can say that constitutionalism and bill of rights provide law and courts with a big role of shaping power relations because they have been shaped into an arena of struggle. In the Kenyan context, they have been used to challenge arbitrary detentions and discriminative arrests of terrorism suspects.

This research report extends Stephen Luke's arguments on the notion of power[12] and emphasises the ability of people to resist oppression and inequality. In this regard, it is argued that the rights language provides the best avenue for contestation of power since they can challenge or limit power relations. It therefore agrees with Foucault's arguments that power is not individually possessed but exercised through small proportions and can be analysed from the bottom-up.[13]

If human rights are a point of contestation, their application is different from region to region. After the United Nations Declaration of Human Rights (UNDHR) was adopted in 1945, African nations were not present since they were being treated as extensions of the colonies. Hence the U.N. doctrine was seen as universal and absolute. However, after independence, African and other non-western countries started challenging the universality of the UNDHR. Their main problem was that the rights of minority and indigenous people had not been taken into account when it was being formulated, for example the right of self-determination.[14] Hence, Africans and other third world countries felt that the UNDHR reflected Western ideology, which only advocated individual rights and has no provision for group rights.[15] Thus, they

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[11] ibid pg 74
[12] Luke, Stephen, *Power: A radical view,* Macmillan, 1974, pgs 52 – 56 in Torfing, Jacob, *New theories of discourse: Laclau, Mouffe and Zizek,* Blackwell publishers, 1999 pg 160
[13] McGowen, Randall, 'Power and humanity or Foucault among the historians,' in Roy Porter and Colin Jones (eds), *Reassessing Foucault: Power, medicine and the body,* Routledge, 1994 pg 96
[14] Shestack, Jerome, 'The philosophic foundations of human rights,' *Human Rights Quarterly,* Number 20 1998, p 205
[15] Cranston, Maurice, *What are human rights*?, New York: Taphinger, 1973 pg 70

started calling for rights to be implemented according to the cultural settings of the people. This is because the local traditions and settings dictate the growth of political structures, law and economics, which differ from place to place.

The importance of cultural relativism is what Maurice notes, that a cultural context determines the amount of attention given to human rights.[16] This varies from one region to another since, there is nothing like universal morality since the world has many cultures. Makau Mutua takes the discussion further when he warns that as currently constituted, the human rights movement will ultimately fail because it is perceived as an alien-ideology in non-western countries since it does not deeply resonate in their cultural fabrics. However, if it is to succeed, it must be moored in the cultures of all people.[17] He argues that this is so because the human rights discourse is driven by what he calls the 'savage-victim-saviour' metaphor, in which human rights is a grand narrative of an epochal contest that pits savages against victims and saviours. As such, democracy and western liberalism are internationalised to redeem savage non-Western cultures from themselves, and to alleviate the suffering of victims, who are generally non-western and non-European.[18]

However, there are still those people who believe in the universalism of human rights, and sometimes argue that cultural relativism is an ideological tool to serve the interests of powerful emergent groups.[19] Despite this, there is an emerging consensus that the U.N. charter and other international instruments provide standards of achieving rights in a society. They are always invoked when the people are struggling for their rights, enacting laws and other political institutions.

In the same regard, some scholars have argued that the "war against terror" is a strategy by Western countries to propagate Western liberalism because Western countries are the ones who are spreading it and do not enquire the input of third world countries. Makau portends that the war targets non-Western peoples and their cultures, especially Muslims. Hence, the West uses the "war on terror" to construct

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16 ibid
17 Mutua, Makau *Human Rights: A political and cultural critique,* Philadelphia: University of Pennsylvania Press, 2001 pg 14
18 ibid pg 10
19 Jhabala, farokh, 'On human rights and the social-economic context,' *Netherlands International Law review XXX1, 1984 pg 164*

and strengthen its cultural and political domination of the international legal order, including human rights.[20] In post September 11, the savage has turned to be Muslim people who have been branded as terrorists, who hate the West for being free, liberal, and peace-loving.[21] Consequently, the world has been divided between the West and many in the Islamic and Arab World. As such, the Muslim countries have to adopt the Western liberal democracy or be left out of the global political culture and free market economy.[22] Therefore, terrorism and the "war against terror" emerge as a challenge to human rights, which advocate liberty, freedom and dignity.

1.2 Rethinking terrorism

Terrorism has been termed a political action that uses violence and fear against civilians and civilian infrastructure in order to revenge, influence behaviour or punish them.[23] Acts of terrorism are a global threat to the rule of law, democracy and particularly to certain fundamental rights, including the right to life, to personal safety, and to freedom. They therefore pose a serious threat to national and international stability and security, making it impossible for a state to effectively protect its citizens or property in and outside the country. This is because terrorists do not respect national borders and regard a state, community, diplomat, business or property merely as a target.

A major dilemma arises in defining terrorism and to date no standard definition has been outlined. This is because the term terrorism is very emotional and value loaded hence it differs from region to region. Consequently, it becomes hard to conclusively discuss the history of terrorism since what may be said to be terrorism by one group of people is not terrorism to the other group. At the same time, it should be borne in mind that over the years, terrorism has been manifested differently. Hence, its definition becomes more difficult.

Nevertheless, scholars generally agree that the word 'terrorism' emerged during the French revolution in 1793-1794. Originally an instrument of the state, terror was

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[20] Mutua, Makau, 'Terrorism and Human Rights – Power, Culture and Subordination.' A paper presented at an International Meeting on Global Trends in Human Rights before after and September 11.
[21] Ibid
[22] ibid
[23] Booth Ken, Tim Dunne (eds), *Worlds in collision: Terror and the future of global order,* Palgrave Macmillan, 2002 Pg 8

designed to consolidate the power of the newly-installed revolutionary government, protecting it from elements considered 'subversive.' During this time, it was considered a positive term and French revolutionary leader Maximilien Robespierre saw it as vital if the new French Republic was to survive its infancy. He proclaimed terror as "nothing other than justice, prompt, severe, and inflexible...a virtue that was a consequence of the general principle of democracy."[24] It was not long before terrorism started being discussed and viewed in negative ways with political philosopher Edmund Burke popularising the term in the English language while demonizing its French revolutionary practitioners.[25]

As Bruce Hoffman notes, one of the negative acts of terrorism were propagated by Carlo Pisacane's who came up with the theory of 'propaganda of the deed', which essentially meant that terrorism can be used to deliver a message to an audience other than the target, draw attention to and support a cause.[26] Modern day terrorists have extensively used this theory where they target civilians so that the government could recognise their grievances, for example Al-qaeda or Chechen rebels who abducted school children in Basra.

In the 20th century, some liberation movements in the third world engaged in terrorist tactics to acquire independence. Such was the case in Kenya, Algeria among other countries. These nationalist groups who were commonly known as freedom fighters engaged in warfare that was aimed at enabling other countries recognise their plight under colonialism and successfully realise their goals of indepedence. As Hoffman notes, such groups "…were the first to recognize the publicity value inherent in terrorism and to choreograph their violence for an audience far beyond the immediate geographical loci of their respective struggles."[27] However, it should be noted that the liberation groups engaged in guerrilla warfare but they employed terrorist tactics. Their aim nevertheless was not to harm civilians who at most times helped them to collect intelligence and provide food and medicine. Their violence hence was directed at the colonisers and African collaborators.

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[24] Modern history source book, *Maximilien Robespierre: Justification of the use of terror,* in http://www.fordham.edu/halsall/mod/robespierre-terror.html
[25] Center for defence information, 'Brief History of terrorism,' in http://www.cdi.org/program/document.cfm?
[26] Hoffman, Bruce, *Inside Terrorism,* New York: Columbia University Press, 1988 pg 17.
[27] Ibid pg 65

Throughout history, the agenda of terrorist groups has evolved from being liberation movements to other groups either fighting for secession or they are motivated by ethnic and ideological agendas. For example the Palestinian Liberation Organization (PLO), Basque ETA, and Irish Republican Army among others have engaged in terror campaigns for different political reasons. Their methods involve not only killing civilians and destroying their infrastructure, but they also use them to publicize their goals and accomplishments internationally. At the same time, they use recognised international forums like the U.N. for example the PLO uses the body to push for their agenda.

This research report notes that there are various aspects of terrorism: state-sponsored terrorism, religious terrorism, trans-national terrorism, national terrorism.

National terrorism takes the form of liberation movements most of which were employed during the struggle against colonial domination in Africa for example Kenya's *Mau Mau.* Though they use guerrilla tactics, liberation movements engaged in terror tactics like bombings and kidnappings. So far, they have been the most successful groups in waging terrorism since they were able to get international attention for their plight and also induce colonial powers to withdraw from their countries. Liberation movements also managed to get the U.N. backing in their struggle when the U.N. gave consent to the principle of self-determination, which is outlined in the U.N. charter and endorsed in Resolution 1514 (xv) of 1960.[28] Thus, the actions of liberation movements are seen as legitimate and "when legitimacy rests on such fragile grounds, the atrocities of the "weak" seem natural, inevitable responses to oppression, and the reactions of the strong…appear morally indefensible."[29] Consequently, this makes it more difficult to define terrorism because many groups accused of terrorism insist that they are freedom fighters. Furthermore, some of those labelled terrorists like Nelson Mandela later became Presidents and respected international figures.

[28] Declaration on the granting of independence to colonial countries and peoples.
[29] Rapoport, David, C. 'Terror and the messiah: an ancient experience and some modern parallels,' in *The Morality of Terrrorism: Religious and Secular justifications,* David C. Rapoport and Yonah Alexander (eds), Pergamon Press, 1982 pg 17

Other nationalist terrorist groups have been involved in terrorism but their aim is to secede from their respective countries for example the Basque Fatherland and Liberty seeks to create a Basque homeland separate from Spain, and the Kurdistan Workers' Party, which seeks to create a Kurdish state independent from Turkey. At the same time, other nationalist groups resist foreign occupation and domination for example, the Palestine Liberation Organization (PLO) fights against Israel occupation of its land.

In the case of state terrorism, the state is the one that carries out terrorist attacks on its people. State terrorism can take forms of oppression and repression, where the government denies its citizens their rights and there is no space for political activity. State terrorism can also be instances when the state uses deliberate acts or threats of violence to create fear and compliant behaviour in the victims.[30] Many governments have used state terror as an effective tool to shape the media, interest groups, and political parties and with this they influence the citizens to accept their policies. In Kenya, the former government of President Daniel Moi used state terrorism to influence elections when sponsored militia terrorised opposition candidates and their supporters. These militias unleashed violence in various parts of the country and the government explained that the violence was between different ethnic groups hence termed it as "tribal clashes" so as to hide the fact that it had sponsored them.[31] What consists of state terrorism depends on who wields the power and as Michael Stohl argues, "…by convention…great power use and the threat of the use of force is normally described as coercive diplomacy and not as a form of terrorism…though it commonly involves the threat and often the use of violence for what would be described as terrorist purposes were it not great powers who were pursuing the very same tactic."[32] Thus, though the Kenyan civil society viewed the violence as state terrorism, the government using its apparatus like the media portrayed the violence as "tribal clashes," and it was able to influence the citizens who did not see the state's hand in it.

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[30] John Richard Tackrah *Encyclopaedia Of Terrorism And Political Violence,* Routledge & Kegan Paul, 1987, p. 237

[31] For more information, see Human Rights Watch, *Playing with fire: Weapons proliferation and human rights in Kenya, HRW, 2002;* Republic of Kenya, *Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and other parts of Kenya,* Government of Kenya, 1993

[32] Michael Stohl, 'States, Terrorism and State Terrorism,' in Robert O. Slater and Michael Stohl, *Current Perspectives on International Terrorism,* London: Macmillan publishers, 1988

Religious terrorism is an old phenomenon and has taken various forms over the years. Religious terrorists seek to use violence to further what they see as divinely commanded purposes, often targeting broad categories of foes in an attempt to bring about sweeping changes according to the groups religious orientation. Religious terrorists come from many major faiths, as well as from small cults for example Aum Shinrikyo. Scholars explain that when faced with poverty, social injustice, political oppression among other problems, human beings seek solace in religion and divine intervention. The religious leaders thus look for solutions to the problems and this can be through educating and mobilising the people to agitate for their rights or engage in political violence to oust the authoritarian regime.[33] Another way that the leaders address the problems is through prophesying the end of the world, such that the problems will end. For example, the March 1995 sarin nerve gas attack in Tokyo's subway system by Aum Shinriyko was motivated by the group's leader to help provoke a world-wide apocalypse.

If religious terrorists do not resort to violence, they engage with the ruling elite since it is the one that controls institutions like schools, which can be used to propagate their message. They can also vie for office and slowly influence the government from within its ranks. Involvement and participation in politics marks a turning point for the group to embrace political ideals and thus use religion only as an ethnic identity. This mix of religion and secularism is what Mark Jurgensmeyer, calls ethnic religious nationalism[34] and notes, "One of the greatest differences between the goals of religious nationalists is the degree to which religion is an aspect of ethnic identity…and the degree to which it is part of an ideological critique that contains an alternative vision of political order."[35] Thus, in the case of Northern Ireland, the conflict is divided along religious lines with Republicans (who seek to abolish the Northern Irish state and unify the north and south of Ireland) being Catholic, and loyalists (who seeks to maintain Northern Ireland as part of the United Kingdom) Protestant. Though both sides use religion to propagate their agenda, the conflict is

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[33] Pottenger, John, R. 'Liberation theology: its methodological foundation for violence,' in *The Morality of Terrrorism: Religious and Secular justifications,* David C. Rapoport and Yonah Alexander (eds), Pergamon Press, 1982 pg 100

[34] Juergensmeyer, Mark, 'The worldwide rise of religious nationalism,' in *Journal of International Affairs,* 50 Number 1, 1996 pg 2

[35] Ibid pg 4

largely a political one. In this case then, religion signifies their membership in terms of geographical status rather than their motivations and though religion is important it is not the main motivation. It should however not be lost that there are other groups for whom the religious imperative is foremost, and thus can correctly be considered religious terrorists.

It is noted that there is a blur between religion and politics and this is expressed in two different forms. In the first case, religion can be politicised, meaning there can be attempts to apply political solutions in the form of political violence through terrorism to religious problems. The second way is when there are attempts to apply religious solutions to political problems and this also can be through terrorism. Such attempts involve efforts to justify the violence, and attract and motivate terrorists, through religious rhetoric.[36] One of the groups that has applied the second way is Al-qaeda which though having a political agenda of creating an Islamic state, it uses religion to motivate its adherents and engage in terrorism. It is through this way that Al-qaeda has been able to carry out trans-national terrorism.

According to Kruger, transnational terrorism is when terrorist acts are carried out by individuals and organisations on their own initiative with or without the support of sympathetic states which they are citizens or not.[37] Thus, it is propagated by citizens of one country on another country, making it trans-national. It is a higher projection of International terrorism and Al-qaeda has arguably popularised it in its operations.

The September 11 attacks were a clear case of trans-national terrorism and they propelled U.S. to tackle the problem of terrorism as a priority. Previously, the group was attacking American interests in other countries and this was the first time that the attacks were carried out in America. The "war on terror,' was a consequence of the attacks, and by engaging in it, America had two main purposes. One, it was revenging the attacks and subsequent deaths of Americans and secondly, it was driven by the fear that future terrorist strikes might be even more deadly and even employ weapons of mass destruction. The threat of terrorists possessing and using weapons of mass

[36] Center for defense information, 'Explaining religious terrorism part 2: Politics, religion and the suspension of the ethical,' in http://www.cdi.org/friendlyversion/printversion.cfm?documentID=2384#_ednref11
[37] Kruger, T. J. 'Responding to terror – International Law under attack?' A paper presented at Pretoria University during on a discussion on 'Terrorism and counter terrorism in Africa.' See http://www.up.ac.za/academic/cips/

destruction is the primary issue that made President George Bush and his coalition of the willing engage in the "war on terror." Hence, the war intended to dismantle the terror network and cripple terrorist operations.

1.3 Addressing human rights and terrorism in Kenya

Kenya has been hit thrice by acts of terrorism - in 1980 when a bomb destroyed the ballroom of the Jewish-owned Norfolk hotel in Nairobi; August 7 1998 when the U.S Embassy was bombed; and November 28, 2002 when terrorists attacked the Israel owned Kikambala Paradise hotel in the Coast Province. In all the cases, most of the casualties were Kenyans. Thus, it is correct to say that Kenya has borne the brunt of terrorism. Even though various reasons have given to explain the attacks, it is noted that terrorist cells exist especially in the coastal part of Kenya. This is mainly seen as being an impact of Kenya neighbouring those States that habour terrorists.

This study notes that Kenya is in a very strategic place as regards the "war on terror." In the Great Horn of Africa, Kenya is the regional power broker, and has an influence over countries that U.S regards as harbouring terrorists. It is has successfully mediated the Sudan and Somali peace processes, countries which have been housing terrorists. The problem of state failure has been of outmost importance in the age of terrorism as failed states have conditions that give rise to both 'in-house' terror and international movements.[38] As is noted, "The absence of local authority not only allows use of African territories by external actors, but permits the activities of paramilitaries in terrorising local populations." Thus, while discussing terrorism in Kenya, it is vital to note the impact of Sudan and Somalia as weak and failed states respectively and how easy it is for terrorist cells to grow in those countries. The research notes that this has had an impact on terrorism efforts in Kenya and hence it is vital that Kenya tries to find lasting peace in the two countries.

Since independence, Kenya has been ruled by autocratic leaders who have twisted the Constitution to favour the ruling elite and people from their ethnic groupings. Until 1991, Kenya was a single party regime and there was no clear separation of powers between the three arms of government. In the same year, the constitution was

[38] Herbst, Jeffrey and Greg Mills, 'Africa and the War on Terror,' *South African Journal of International Affairs,* Volume 10, Issue 2, 2003 pg 31

amended to allow the country to return to a multi-party system of governance. After that, there have been several Constitutional amendments aimed at removing oppressive laws that had been enacted over the years for example sedition and detention laws. However, these reforms were not adequate to cater for the human rights void that was present in governance and the civil society urged for a complete constitution review. This started in 2001 when the Constitution of Kenya Review Commission was established mandated to come up with a new constitution.[39]

It should be noted that in the 2002 general elections, Kenya African National Union (KANU) that had ruled since 1963 was ousted from power and an opposition coalition, National Rainbow Coalition (NARC) took power. The elections were hailed by the international community as free and fair and they represented an opportunity for the country to consolidate its human rights gains and build democratic structures. This hope of democracy was further expounded by members of NARC who campaigned and voted for under the banner of human rights, good governance and fighting corruption. It should also be emphasised that the leadership of the coalition was made up of human rights lawyers and activists who had for long fought for human rights and democracy in Kenya and thus, it was widely believed they would ensure the country was ruled in a just manner. However, as the research findings show, human rights in Kenya are being sacrificed in the country's fight against terrorism.

This study also notes that Kenya is influenced by world politics and by drafting the *Suppression of Terrorism bill 2003,* Kenya was adhering to the U.N.'s call for nations to enact measures including legislation that address terrorism. The government however has shelved the draft bill after it drew outrage from the civil society and Muslim community who alleged that it was discriminatory against Muslims and curtails the political and civil rights of Kenyans. Due to this outrage, the Law Society of Kenya and Kenya National Commission on human rights have each drafted different bills in the context of the human rights issues raised by the Muslims and civil society. This is my point of investigation, which is guided by the premise that to

[39] The draft constitution is being debated due to various contentious issues especially to do with Presidential powers.

cope with terrorism, the nature of response by society and by the authorities is of paramount importance and issues of human rights top the agenda.

Available literature on terrorism in Kenya has mostly focused on the effects of International Relations after September 11 and little attention has been paid to the impact on human rights in Kenya. My study seeks to fill this vacuum. I intend to make one of the first contributions to study the impact of the "war on terror" on human rights especially on emerging democracies like Kenya. Hence, I hope to make my own contribution in the academic debate of how to resolve the dilemma that has emerged in fighting terrorism and protecting human rights, especially in Kenya. It is my hope that this study will contribute and shed some light in finding a way in which the Kenyan government can put in place measures to curb terrorism and at the same time respect human rights. In a wider scope, my study will make an addition to the limited but growing body of literature on terrorism and human rights.

The fieldwork conducted presents new data and information of the dilemma that Kenya faces in ensuring national security and protecting human rights. It is my hope that ideas generated by this research will prove valuable in providing sufficient knowledge and forum for scholarly debate that can help the Kenyan government as well as other governments and affiliated institutions to curb terrorism as well as promote, protect and advance the enjoyment of human rights.

1.4 Chapter outline

This research report makes its arguments over several chapters. The following chapter outlines the methodology used to obtain data and analyse it. It discusses the importance of using qualitative research and also the problems that manifest themselves in the doing the research.

Chapter 3 provides a background for the main argument presented in this research report. It discusses the arguments that have been forwarded to explain the September 11 terror attacks and the human rights concerns that have arisen due to the "war on terror." In addition, it theoretically engages in interrogating the various U.N. resolutions and other documents that have been enacted to address terrorism.

Chapters 4 and 5 give the contextual background that informs this research. In chapter 4, the Kenyan context as regards terrorism is addressed when various factors that led to the 1998 and 2002 bombings are explored. It then proceeds and lays out how the bombings occurred and the national as well as international response to them. Chapter 5 elaborates how the September 11 attacks occurred and how America and Kenyan governments responded to them. It then outlines the onset of the "war on terror," that has greatly informed this research report.

Chapters 6 and 7 are an analysis of the field research findings. They focus on how the "war on terror" as discussed in chapter 5 has had an impact on human rights in Kenya. To do this well, Chapter 6 gives a background to the human rights gains that Kenya has made over the years. In doing this, it notes that after the 2002 transition in Kenya, it was widely believed that it was an opportunity for the country to consolidate its human rights gains. This is contrasted with the various methods that the government has employed to address terrorism and how they have impacted on the human rights situation in Kenya. To continue the debate, chapter 7 analyses the draft *Suppression of Terrorism bill 2003* that is supposed to legislate against terrorism and analyses the human rights concerns arising from it.

Chapter 8 concludes the arguments presented by noting that the human rights gains made in Kenya throughout the years are in the danger of being eroded by the anti-terrorism campaign since it is disregarding them. The research report then makes a case for the observance of human rights in Kenya while the government is tackling terror since the language of rights is the only "universally available moral vernacular that guarantees the oppressed a right to exist"[40]

[40] Ignatieff, Michael 'Are human rights defensible?' *Foreign Affairs* Nov/Dec 2001 Vol 80 Number 6 pg 116

Chapter two
\Methodology

2.1 Conceptual context: locating "war on terror" in the Kenyan setting.

Qualitative rather than quantitative methodology was extensively used in the collection of data and analyzing it for the purposes of this study. While discussing the place of qualitative research in social science, Lawrence Neuman noted that the context is critical for understanding the social world.[41] This means that the importance of meaning of a social action depends on the context in which it appears. In other words, parts of social life are placed into a larger whole picture that forms the context. Thus, when the action is removed from the context, the social meaning and significance attached to it are distorted. The field work employed in this research report stems from that point of the context being critical and thus interrogates Kenya's anti-terrorism efforts in the larger picture of the "war on terror", while focusing on the distinct nature of the Kenyan context.

Qualitative research involves the use of data where the researcher records real events, what the people say, observes their behaviour and studies written documents and visual images. He then proceeds and places this findings in the larger context that they occurred. This is what has been referred to as ethnomethodology.[42] In essence it means that the researcher studies the everyday reasoning of the people, empathizes with their plight and gets to know why they act in a certain way. It is only by doing this that he can be able to deduce correct conclusions in the study. As it is noted, "the researchers mind is open to absorb everything inherent. It allows one to get untapped, rich resources of data and also provides for multiple interpretations of reality and alternative interpretations of data."[43] The researcher hence is able to get these data by studying the written documents, interviewing people, observing them, among other things. In this study, the researcher in discussing Kenya's draft anti-terror bill and anti-terrorism measures did so with the understanding that they are influenced by the U.N. resolutions and its charter that call upon States to legislate against terrorism but

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41 Neuman, Lawrence, *Qualitative and quantitative approaches,* Allyn and bacon, 2nd edition 1992 pg 331
42 Blaikie, Norman, *Approaches to social enquiry,* Polity Press, 1993 pg 208
43 Maxwell, Joseph, ' Designing a qualitative study,' *Handbook of applied social research methods,* Leonard Bickman and Debra J. Rog, (eds), sage publishers, 1998 pg 474.

to ensure human rights take precedence in these efforts. At the same time, Kenya's draft bill and anti-terror measures are placed in the wider context of the "war on terror", which necessitated the actions. In interrogating these efforts, this study locates them in Kenya's context of its experience with terrorism as well as its struggle for democracy.

In analysing data, qualitative research takes assumptions about social life and thus research that employs this method gives a reader a feel of particular people and events in concrete settings. This is because the data gathered focuses on subjective meanings, metaphors and symbols as well as description of specific cases.[44] In other words, it is an attempt of capturing aspects of the social world, which can be difficult to be expressed as numbers. This is done by finding out the views of the people being studied, how they define and understand their situation and what it means to them. Through understanding these personal reasons one can be able to understand the reasons for the social actions taken by the people. After understanding the reasons for their actions, this is placed in the specific context. In this research, the study of Kenya's road to democracy was important in evaluating the people's opposition to the draft anti-terror bill. This is because the draft bill is being viewed by Kenyans in the context of the struggle for human rights and democracy that they feel is under threat from it.

As earlier noted this study argues that human rights can be used to challenge power relations and thus resists oppression and inequality. Neuman still discusses the role of qualitative research in power relations arguing that research findings may raise questions regarding power and inequality.[45] This is because when the people being studied are oppressed, they tell the researcher their plight and the researchers then can translate these stories into action oriented reports.[46] When the reports are put into the public domain, the issues can be debated and causes the government to act and in this way, the research findings have challenged power. At the same time, it can be argued that the findings may sustain power relations in that they may favour the status quo arguing that changing or altering it will not be viable.

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[44] Neuman, Lawrence *opcit,* pg 329
[45] ibid pg 330
[46] Hammersley, Martyn, *The politics of social research,* Sage publications, 1995 pg 107

This study was motivated by the challenge that the Kenyan government faces in its quest of protecting human rights while ensuring national security. It noted how globally the "war on terror" has been defined and shaped by America and many countries have been pressurised to conform to the U.S. way of dealing with terrorism. However, this poses a problem since terrorism is unique to different countries hence anti-terror techniques are context specific. In this regard, Kenya is no exception as it will be later seen in the study from the tensions and controversies that have arisen due to the publication of the draft *Suppression of Terrorism bill 2003* and other anti terror measures that the government has adopted. This study thus was motivated by the researcher's premise that to protect national interests in the "war against terror," protection of human rights is paramount. This approach arises from the fact that researchers using ethnomethodology research construct the social world through their interpretation of data and this influenced by their social settings and values. In this regard, it is noted that the data gathered and analysed in this research report provides an argument on how Kenyans thorough invoking the rights language have been able to challenge power relations and force the government to redraft the anti terror draft bill.

One of the hallmarks of qualitative research is that it uses a case study approach where information on one or several cases are studied and then interrogated. The use of a case study enables the researcher to deeply know the society under study since he is involved with it in the people's lives and actions and thus is able to locate their daily lives in a larger context. Hence, using the case study design, both primary and secondary sources of data were extensively utilized to gather data. According to David de Vaus, the task of the case study researcher is fundamentally theoretical. Collecting and analyzing information must be guided by theory.[47] In this instance the debate that there is tension between protecting human rights while ensuring national security in the "war on terror" is the basis of the research. Using Kenya as a case study, this argument is tested by the field research findings and also compared to other theories so as to give it meaning. Case studies can involve the collection of a vast amount and this information must be carefully processed and distilled before it is

[47] Vaus, De, *Research design in social research,* Sage publications, 2001

presented. This applies to the case study being undertaken. Different data collection methods were used and because of this, there generated several different results. However, these differences were used as valuable sources of information about social life that needs to be differently analysed.

This research report takes the transcendental approach of qualitative research, meaning that its research questions emanated from the people being studied and thus treats them as creative and independent human beings, who can make sound judgments.[48] It thus holds that people create and define the social world through their interactions hence their social actions "have a bearing on the everyday social process of constructing meaning"[49] because meaning is socially constructed. Thus, the research observes that Kenyans in their opposition to the government's anti -terrorism measures is shaped by their world and thus they can be able to deduce what the measures mean to them for example various articles in the draft bill are seen as a return of provision for human rights abuses that were rife in the 1980's. This means Kenyan's experience of the oppression in the 1980's shaped their understanding of the draft bill. However, this does not mean that it is only the immediate surroundings and history that influence the people, but also other world affairs have a bearing on how Kenyans interpret and act on various issues.

One of the key elements of qualitative research is that it does not assume a single view of reality, and this means that the researcher does not follow a set path of collecting data. Thus, he is allowed to go forward or backward, in circles gathering data and gaining new insights. In the end, there emerges a sequence or correlation of information and data from which sound conclusions can be made. This means that the researcher interacts different research components of the study in a way that they harmoniously affect each other and the advantage of this is that it allows the researcher space to modify research questions in response to the data gathered or changes in the area under study.[50] In this report, the data collected was not done in a rigidly structured process but was dictated by what was happening in the field. In this regard, the amount of data collected to a large extent depended on its availability as

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48 Neuman, Lawrence, *opcit* pg 229
49 ibid pg 346
50 Maxwell, Joseph, *opcit,* pg 70

well as accessibility. This ranged from the documentary evidence to interviews conducted.

Although case studies are useful in generating qualitative information that enables researchers to understand a process in greater detail it is difficult to generalise the findings. This is particularly the case when only one case study is undertaken. In this case, the study specifically looked at anti-terror efforts in Kenya and its human rights situation. Thus, the findings are very context specific and cannot be used to refer to another country other than Kenya at the time that the research was done. However, the findings of this case study can be used in comparative studies with other countries in the world

2.2 Data collection

a) Documentary research

The Kenya Human Rights Network, (KHURINET) which is the umbrella that human rights NGO's rally under, has been carrying out a campaign against the draft anti-terrorism bill. The researcher obtained press releases, published and unpublished papers, memo's and letters presented to the government. This data helped to show the concerns raised by K-HURINET as regards the draft bill and treatment of suspects. The documents also served to highlight the tensions that have cropped up with the publishing of the draft bill.

People against Torture (PAT), a non-governmental organisation in Kenya has been documenting the treatment of terrorism suspects since 2003. The researcher was able to access written statements from suspects detailing their treatment while in custody. The statements used are for Mr. Feisel, Abdul Rogo, Omar Said,Salmin Mohamed Hamis, and Mohamed Sadi Odeh.

Policy documents like draft *Suppression of terrorism bill 2003*, U.S. *National security strategy*, 2002 which is the blueprint of America's "war on terror" also formed part of the documentary data as they provide the official communication as regards the war on terrorism. These official documents have been analysed and treated as social

products[51] emanating from a particular social setting and not relied on uncritically as sources of information.

Other documentary materials used in this study include newspapers cuttings, magazine articles published that show the concerns of people as regards terrorism in Kenya and the measures taken by the government. The newspaper cuttings and magazine articles also give a clear picture of how the "war on terror" is being carried out internationally. In addition, the researcher has used written statements from the suspects that were submitted to the human rights NGO's detailing their treatment when arrested and interrogated by police.

b) Interviews[52]

Primary data was obtained from the field through semi-structured conversations and carrying out interviews with people suspected of being terrorists' but were released after the State dropped their cases. The use of unstructured interviews was an approach that enabled the researcher to cover sensitive matters and get detailed responses from the interviewee. This was through the ability of the researcher to have space for asking extra relevant questions not planned for but arose as the interview progressed.

The people interviewed detailed their experiences when they were arrested and provided further insight into how security agents in Kenya are treating terrorism suspects and whether the suspects' rights were abused or the due process of arrest and interrogation was followed. A total of four suspects were interviewed but only Akhmed Mohamed Surur agreed to be identified by name.

The interviews began with questions about identity. The questions then asked informants about their religion, their language and the crime for which they were arrested and charged as well as their treatment when they were in police custody. The personal details like religion and ethnic identity helped to trace a pattern of the various groups targeted for arrest in suspicion of being terrorists. In addition, the

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[51] Hammersley, M and Atkinson, P, *Ethnography: principles in action*. 1995, London, Routledge pg 168
[52] All the interviews were done in Nairobi by the researcher in July 2004.

questions were structured in a way to obtain data that reflect their social mobility, and education to get the holistic idea of their treatment while in custody.

Problems however arose when interviewing the suspects. Some of them told exaggerated stories or had some details missing out. This anomaly was corrected by going thorough the contentious statements again, checking where there are contradictions and clarifying issues with the informants. At the same time, some could not remember or feared saying what exactly happened due to fear of retribution from the security forces. Nevertheless, these gaps were filled by the researcher being able to pick out the consistencies in the various testimonies thus highlighting them as clear examples of human rights violations. In other words, the testimonies were evaluated on their basis of fitting to the larger picture of the study. At the same time, the researcher guaranteed confidentiality in situations where the people did not want to be identified by name.

Officials from the human rights NGOs and lawyers representing suspected terrorists also formed part of the interviewees and apart from trying to correspond what the suspected terrorists said they provided an insight into the legal mechanisms of dealing with terrorism in Kenya. The questions asked were both open ended and closed and addressed the dilemma of balancing between respecting human rights while at the same time preventing terrorism in Kenya. Those interviewed included Beatrice Kamau who was coordinating the campaign against the draft *Suppression of terrorism bill 2003,* Miriam Kahiga (Co-ordinator of Amnesty International, Kenya Chapter), and Al Haj Ahmed Isaack Hassan (an advocate of the High Court of Kenya).

Government agencies formed a substantial part of the interviews as they make policy regarding terrorism. Drafts people from the Attorney General's office were interviewed so as to get information on the origins of the anti-terror bill, how it was drafted, and the concerns they had when they came up with it.[53] The questions were open ended and sought to find out whether the draft bill was a result of social struggles and Kenya's experience with terrorism or it was a result of other

[53] They requested that their names be withheld for legal reasons.

international forces. In addition, they sought to try and find out the government position regarding the draft *Suppression of terrorism Bill 2003*.

At the same time, the researcher interviewed Andrew Kabetu, the head of the anti-terrorism unit, which is the police organ that principally deals with terrorism. This sought to corroborate what the suspects said regarding their treatment while in custody and at the same time get to know the difficulties that the unit has while carrying out its duties.

Interviewing the above people is what Neuman calls "elite interviews,"[54] and some problems arose. On of them is that most were unavailabe due to tight work schedules so they kept on rescheduling interview times and dates time and again. On other times, it was hard to get access to them due to bureaucracy and many gate keepers in their respective organizations.

Nevertheless, the information obtained from the government organs, NGO's, lawyers representing suspected terrorists provided a layout on how the "war on terror" has impacted on the protection, promotion and preservation of human rights in Kenya. In addition, the researcher benefited from attending a colloquium of Eastern and Southern African countries on measures to combat and eliminate terrorism that took place in Nairobi, Kenya on 4th-6th July 2004. The colloquium was organised by L'etwal International, a foundation for Law and Policy for contemporary problems. All the information obtained during the research aimed at answering the key question, that is, how has the "war on terror" shaped human rights in Kenya?

[54] Neuman, Lawrence, *opcit* pg 337

Chapter three

In the trail of terrorism

Terrorism is an old phenomenon but its manifestations and tactics have changed over the years. The word terrorism originated during the French revolution which began in 1789 and the Jacobin reign of terror in France (1792-1794).[55] Today, terrorism is often used as a political weapon to bring attention to a group's goals or to gain those goals. The statement, "one man's terrorist is another man's freedom fighter," summarises the obstacles of coping and defining terrorism. The matter of definition and conceptualization is usually a purely theoretical issue but due to the different manifestations of terrorism over time, it has been difficult to find a standard definition of the term 'terrorism.' Any effort to formulate to do so has been fraught with historical, political, religious and ideological biases.

This chapter reviews the problem of defining terrorism and interrogates the U.N. resolutions and provisions of the African Charter that have tried to address this problem. It at the same time looks at the reasons that have led to the growth of terrorism and terrorist activities and trace the growth of Al-qaeda, which arguably is the most visible and active terrorist group today. To do this, the chapter locates Al-qaeda as an Islamic fundamentalist terrorist group whose influence has been felt worldwide. However, it is noted that there are several forms of Islamic fundamentalists. There is the institutionalised ruling Iranian hierarchy, the pre-emptive Saudi fundamentalists and finally the Al-qaeda network[56].

The place of human rights in the "war on terror" has also informed this chapter when it addresses the importance of human rights in combating terrorism. To effectively do this, it is noted that there is a tension between protecting human rights and ensuring national security. This is because terrorism is a violation of human rights and hence some governments may be tempted to limit the rights, which enable terrorists to operate for example freedom of association. However, the chapter also observes that the best guarantor of national security is protection and respect of human rights.

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[55] Cindy C. Combs, *Terrorism in the Twenty –First Century* (New Jersey: Prentice-Hall Inc, 1997) and Andrew Sinclair *An Anatomy of Terror: A History of Terrorism* (London: Macmillan, 2003) P 71-72

[56] Lewis, Bernard, *The Crisis of Islam: Holy War and Unholy terror,* Weidenfeld and Nicolson, 2003. pg 107

3.1 A question of definition

During the colonial rule, some colonial powers used the term to describe liberation movements that were against colonialism. In Kenya, the Mau Mau was described by Britain as a terrorist organisation and its leader Dedan Kimathi was hanged by the British. As late as the 1990s, the U.S. listed the African National Congress (ANC) as a terrorist organisation. Nelson Mandela, its leader and later a Nobel Peace laureate, was once on the U.S. State Department's list of international terrorists. At the same time, former U.S. President Ronald Reagan, thought that the late Jonas Savimbi and Unita were freedom fighters, despite the terror they inflicted on Angolans over the years. Hence, the old adage that one person's terrorist is another person's freedom fighter.

When the Bush administration began the "war on terror", definition of a terrorist has become loose with Bush calling countries that opposed the war as being part of the terrorist groups. This, according to Makau Mutua has made non-western people, cultures and those who stand up against western subordination be regarded as terrorists.[57] This is mainly on certain Islamic traditions and political projects. Recently, African countries that have put up anti-terrorism measures have come to regard dissenting groups as terrorist organisations and have severely repressed them. As I will show later, Kenya's draft *Suppression of terrorism bill 2003* has given the government provision to label dissenting groups as terrorists.

All this shows that definition of a terrorist is ideologically and politically subjective and very partisan to whoever is defining it. Since the task of coming with an objective definition is elusive, scholars have to do with what Lacquer calls a "minimum theory"[58] which involves outlining the characteristics of terrorism and terrorist activities according to the terrorist event. The lack of a standard definition has been blamed for the slow pace of tackling terrorism and thus it is imperative that the search

[57] Mutua, Makau, 'Terrorism and Human Rights – Power, Culture and Subordination.' A paper presented at an International Meeting on Global Trends in Human Rights before after and September 11.
[58] Lacquer, walter. *The Age of Terrorism,* Little Brown and Company, Boston, 1987 pg 2.

for a definition continues. This will avoid the simplification of the term to a point where a terrorist is one who commits violence 'that we do not approve.'[59]

The U.N has been caught up in this quagmire and despite concerted efforts, it has not been able to formulate a standard definition but it has defined what constitutes a terrorist activity.

The General Assembly resolution 2625 (XXV) of 24 October 1970 on the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, addresses terrorism when it urges states to' refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.'[60] It further asks states not to 'organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another state, or interfere in civil strife in another state.'[61]

A clear milestone in formulating anti-terrorism conventions came in 1972 after the kidnapping and killing of 11 Israeli athletes during the Olympic Games at Munich. Then U.N. Secretary-General Kurt Waldheim requested that the General Assembly include in the agenda of its 25th session an additional item of an important and urgent character, entitled 'Measures to prevent terrorism and other forms of violence which endanger or take innocent human lives or jeopardize fundamental freedoms'.[62] As a result of the convention, the General Assembly adopted resolution 3034 (XXVII) of 18 December 1972, providing for the setting up of an ad hoc committee, consisting of 35 members, to study issues relating to international terrorism and to report to it.[63] The work of the committee enlisted debate about terrorism and this led to the General Assembly adopting four international conventions that address crimes associated with terrorism. These were the convention on the safety of United Nations and Associated

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[59] Schmid, A.P and Jongman A.J. *Political terrorism: A new guide to actors, authors, concepts, data bases, theories and literature*, North Holland Publishers Company, Amsterdam, 1988, pg 2.
[60] http://www.un.org/documents/ga/res/25/ares25.htm
[61] ibid
[62] Special rapporteurs report on 'Terrorism and Human Rights' posted on http://www.unhchr.ch/Huridocda/Huridoca
[63] ibid

Personnel, Convention for the suppression of Terrorist bombings, Convention against taking of hostages, Convention on the prevention and punishment of crimes against internationally protected persons including diplomatic agents.

The *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons* (1973) outlawed attacks on senior government officials and diplomats terming them as terrorist activities. These were acts that constituted intentional murder, kidnapping, or other attacks upon the person or liberty of an internationally protected person, a violent attack upon the official premises, the private accommodations, or the means of transport of such person. In addition, threats, attempts or being accomplice to commit such attacks were also defined as being terrorist activities. The defining characteristics of terrorism were taken further when it was passed that any person "who seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third party," so as to gain release of a hostage was committing terrorist activity.[64] In 1980, the unlawful possession, use, transfer, of nuclear material, theft of nuclear material, and threats to use nuclear material to cause death or serious injury to any person or substantial property damage was made a criminal activity. This was after realising the potential of terrorists coming into possession of nuclear materials that they could use.[65]

In 1988, hijacking an airplane or a ship by force, threat, or intimidation or performing an act of violence against a person on board a ship or airplane was categorised as a terrorist activity.[66] In addition, placing a destructive device or substance aboard a ship or airplane and any other acts going against their safety was defined as an act of terrorism. In 1985, the U.N. condemned international terrorism as criminal as well as all acts, methods and practices of terrorism no matter where they are committed and whoever committed. After September 11 attacks, the U.N. Security Council unanimously adopted a resolution on the terrorist attacks in the United States of America.[67] The resolution condemned the terrorist attacks and called on States to

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64 International Convention against the Taking of Hostages ("Hostages Convention", 1979
65 Convention on the Physical Protection of Nuclear Material (Nuclear Materials Convetion",) 1980
66 Protocol for the Suppression of Unlawful Acts of violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Extends and supplements the Montreal Convention on Air Safety), 1988; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, (1988 – applies to terrorist activities on Ships).
67 UN Security Council resolution S/RES/1368 (2001)

work together to bring justice to the perpetrators of the terrorist activities. At the same time, the Security Council committed itself to take any necessary steps to combat all forms of terrorism in accordance with the charter.

In Africa, the Organisation of African Unity (OAU)[68] on 14th July 1999 adopted the *Convention on the prevention and combating of terrorism* and the convention came into force in December 2002. The OAU convention in its definition of terrorism greatly borrows from the U.N. resolutions and conventions. However, in Article 3, the convention says that 'acts that are in accordance with the principles pf international law for the peoples liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.'[69] Africa's experience with colonialism and foreign domination was a huge factor in shaping Article 3 since when the UN charter was being formulated, African countries were considered part of the colonial metropolis and there was no provision in the charter for self-determination and struggle from colonial rule.

Africa has played a crucial and active role in the global fight to combat terrorism. In addition to adopting the anti-terrorism convention, the AU has taken steps to establish the Centre for Study and Research on Terrorism, which is supposed to come up with ways that Africans can use their resources to fight terrorism in the continent. This is in the understanding that terrorism manifests itself in its unique way in different places and thus the mechanisms for fighting terrorism differ regionally.

The characteristics of terrorists as outlined in the various U.N. conventions and the OAU convention are the ones employed in this study in defining terrorism and terrorist activities. At the same time, the research notes as Walter Eugene (1969), Michael Stohl (1983) and Graham Benton (1982) explain that a terrorist activity is characterized by loss of innocent lives, evokes emotional reaction from the victims and there are profound political and social effects from the terrorist activity. Terrorism forms what Cindy Combs calls 'a synthesis of war and theatre, a

[68] The OAU later changed to Africa Union (AU)
[69] www.africa-union.org

dramatisation of the most proscribed kind of violence that is played before an audience in the hope of creating a mood of fear for a political purpose.'[70]

On the same note, there are different kinds of terrorism i.e. state sponsored terrorism, religious terrorism, domestic terrorism, nationalist terrorism and transnational terrorism. I will dwell on transnational terrorism, which is terrorism based on the principle of non-state-subsidised acts of terror perpetrated by individuals and organisations on their own initiative with or without the support of sympathetic states which they are citizens or not.[71] Thus, it is propagated by citizens of one country on another country, making it trans-national. Kruger argues that trans-national terrorism is a recent phenomenon and is a higher projection of international terrorism, a view also taken by Walter Enders and Todd Sandler (2001).

Terrorism thus is an old phenomenon and though its definition is loaded with emotions, the U.N. and A.U. have provided guidelines to combat it. However, it emerges that terrorists are motivated by political and social factors that are discussed in the next section.

3.2 Reasons for terrorism

The reasons behind terrorism are diverse and mostly depend with the group involved but there are general reasons why terrorist groups commit the acts. It should be noted however, that the ultimate aim of terrorists is to pass a message that the group exists, it must be heard and the government may ignore it at its own peril.[72]

For maximum success, terrorists target civilian population so that the government at hand is compelled upon by their citizens to adhere to the terrorists demands or deal with them.[73] Together with this is the terrorist's ability of shocking, instilling fear and surprising the government with their activities and usually when a terrorist activity takes place a group claims responsibility and sometimes it is a new group unknown by the government. Fear is especially employed by terrorists for their own interests. It is politically constructed and deployed at different levels to reinforce divisions between

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[70] Cindy C. Combs, *opcit* pg 72
[71] Kruger, T. J, *opcit*
[72] Stohl, Michael (Eds), *The Politics of Terrorism,* Marcel Dekker Incorporated, 1983 pg 3
[73] ibid

nations and communities as well as control and manipulate social and political discourses.[74] Through their actions, Al-qaeda has created fear and mistrust between Muslims and Western liberal democratic countries and statements given by Osama have further reinforced the fear e.g. in an audiotape released in October 2002, Osama said, "…the young men of Islam are preparing for you something that will fill your hearts with terror and will target the nodes of your economy until either you cease your injustice and aggression or the quicker of us dies." Fear has also forced countries to change their styles of governance[75] by limiting some human rights thus changing the lifestyle of people e.g. in the airports one has to be thoroughly checked and sometimes it takes a lot of time. Travellers thus have to check into the airport many hours before boarding to give time for the checks, something that was not being done before the September 11 attacks. At the same time, fear can bring individuals and communities together to employ different strategies in response to it.[76] This can be seen in the many initiatives that countries and individuals have created in response to the fear posed by terrorism worldwide. Thus, one can say that fear can be employed in a positive manner to bring people together and fight injustices as well as a negative manner in which the people's fears are manipulated for political reasons.

Furthermore, terrorists' activities aim at winning concessions from the government through coercive bargaining characterised by threats, bombing, and kidnappings among other tactics.[77] Terrorists' have justified their actions by saying they have exhausted all other means available for their grievances to be heard. However, this reasoning depends not only on the goals of the movement but also the success of different tactics.[78] It should be noted that these reasons and tactics used by terrorists have also over the years also been used by other groups like guerrilla movements and this has made it hard for a distinction to be made between the terrorists and freedom fighters.

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[74] Pain, Rachel and Peter Shirlow, 'The geographies and politics of fear,' in *Capital and Class,* No 80 London, pg 15
[75] ibid pg 19
[76] ibid pg 23
[77] ibid pg 3
[78] Mickolus, Edward 'International Terrorism' in Michael Stohl (Eds) *The Politics of Terrorism* Marcel Deker Inc, 1983 pg 399

Due to the contestation of who is a freedom fighter or a terrorist, many freedom fighters have been branded terrorists but the two are different. In the 20th century, guerrilla movements have featured in the struggle against colonialism or against an oppressive government. International law recognizes the rights of citizens to oppose an existing government militarily to protect human rights, overthrow a dictatorship, or establish self-rule.[79] Sometimes citizens can only achieve self-rule and enact democracy by waging guerrilla warfare against the government e.g. Museveni used guerrilla warfare to get to power and instil democracy in Uganda. Though guerrilla movements use terrorist tactics, their aims are different but they all seek to induce an effect on international and domestic opinion that will be favourable to them. Nevertheless, there is still a blurred distinction between the two groups as their actions sometimes overlap for example Chechen guerrilla leader Shamil Basayev took responsibility for organising the September 1, 2004 Russian school siege in which at least 320 hostages were killed, many of them children. This action seems to dispute the fact that guerrillas do not target civilians since they depend on them for moral support or sometime gathering intelligence, food and weapons supplies among other things.

While terrorists aim at maximising the damage, guerrillas engage legitimate military targets while limiting collateral damage to the minimum, including civilian casualties. At the same time, guerrillas do not kidnap people for cash ransoms though they can kidnap certain personalities for strategic reasons that will serve their ultimate aim. At the same time, while terrorists recognise terrorism as the final tool to achieve their goals, guerrillas regard terrorist activities as a tool to be discarded or taken up at will, as circumstances demand.[80] That is why it is easier to negotiate with guerrilla groups than terrorist groups. South Africa's African National Congress (ANC) abandoned its military campaign and went for negotiations with the apartheid government, a gesture that paved way for elections and inception of democratic rule.

It should be noted that it is hard to identify terrorists since they do not have uniform or place of operation. However, guerrilla forces mostly have an identifiable badge or uniform and their areas of operation are clear. Terrorist groups grow from a small

[79] Wilkinson, Paul *Terrorism versus democracy: The Liberal State response,* Frank Cass Publishers, 2002 pg 11
[80] ibid pg 15

group of insurgents who mobilise, organise and recruit members whom they share the same plight. For the group to survive, it has to have the ability of getting popular support from the population, capable leaders who can inspire and sustain the members and lastly sufficient weapons and money for the activities.[81]

3.3 Terrorism and Human Rights

Terrorists engage in violence and cause fear to civilians and destroy civilian infrastructure in order to revenge, influence behaviour or punish them.[82] Terrorist activities are thus an international threat to the rule of law, democracy and human rights. They therefore pose a serious threat to national and international stability and security, making it impossible for a state to effectively protect its citizens or property in and outside the country because terrorists respect no national borders and regards a state, community, diplomat, business or property as potential targets aimed at furthering their agenda.

After a terrorist activity has taken place, what matters thereafter is how a government reacts in order to prevent further terrorist activity. Governments are tempted to curtail most of the human rights and basic freedoms arguing that it is these freedoms that enabled the terrorists to operate or they are doing so for the sake on national interest. Balancing measures to address terrorism and human rights is the challenge of governments, especially in post-September 11. Governments have moved to hastily enact emergency legislation after the attacks and this has most of the time overridden both established process and rational action, having a negative effect on the vulnerable and disenchanted sections of society.[83]

The dilemma of balancing between curbing terrorism and ensuing national security without infringing on human rights is a challenge facing many governments. This dilemma arises from the fact that human rights are a construction of the society and they emanate from the social struggles among the people. In this regard, they address different power relations and interests in society. Since targeting civilians for violent attack is a human rights violation,

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[81] ibid pg 23
[82] Booth Ken, Tim Dunne (eds), *opcit* Pg 8
[83] Thomas A. Phillip 'Emergency and Anti-terrorist powers' in *Fordham International Law Journal* Vol 26, 2003 pg 193

those who believe in human rights have a direct interest in the success of anti-terrorism efforts. However, most governments have tended to ignore human rights in fighting terrorism. As Kenneth Roth avers, "tendency to ignore human rights in fighting terrorism is not only disturbing on its own terms; it is dangerously counter-productive. The smouldering resentment it breeds risks generating terrorist recruits, puts off potential anti-terrorism allies, and weakens efforts to curb terrorist atrocities."[84] It is definite that there is tension between human rights and counter-terrorism measures since human rights seeks to ensure individual freedom while counter-terrorism measures give power to the security agencies over the citizens.[85] In order to guarantee national security, protection of human rights and continued vigilance is paramount as it will serve to drain the energy of terrorists.[86]

Human rights are a weapon of the weak against the strong and they can challenge and sustain power relations since they are socially constructed. This is because the rights language is what Ignatieff calls the only "universally available moral vernacular that guarantees the oppressed a right to exist."[87] At the same time, it gives the minimum standards that a government must hold to in constraining the lives of individuals. Neil Stammers argues that over the years, human rights have challenged power right from the civil rights movement, 20th century agitation for labour rights and Africa's quest for self determination.[88] Thus, for any struggle to succeed, it must evoke the rights language since rights are linked to power through agenda setting, fighting for power and shaping beliefs and opinion of people. It is because of their virtue of emanating from a struggle that rights have the capacity to be elements of emancipation and can advance political aspiration and action. It is vital that anti-terrorism efforts and legislations should reflect these struggles. In countries like Kenya which have suffered terrorism attacks, the anti-terror tactics should reflect the people's pain and struggle over terrorism and this can be through agitating for laws reflecting their experiences as well as their political aspirations.

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84 Roth Kenneth, 'Human rights, the bush administration, and the fight against terrorism: The need for a positive vision' in www.hrw.org.
85 ibid
86 Cillers, J. and Sturman K (eds), Africa and terrorism. Institute for Security Studies, 2002 pg 9
87 Ignatieff, Michael 'Are Human Rights defensible?' in *foreign Affairs,* Nov/Dec 2001 Vol. 80 pg 116
88 Stammers, Neil. 'Human Rights and Power' in *Political Studies XLI,* 1993 pgs 70-82

Over the years, it has emerged that governments cannot be left alone to guarantee human rights since they have emerged also as rights violators. That is why there is a need for constitutionalism and democratic culture to be embedded in a country. Constitutionalism limits state power and institutions like courts that are not caught in the political struggles ensure that human rights are respected and protect the minority from majority rule. Human rights thus are what Mahmood Mamdani calls a 'legal umbrella' under which minorities seek protection.[89] In post-September 11, the challenge of Constitutional institutions to guarantee the rights of minority groups cannot be gainsaid. This is so because most anti-terror laws and tactics have geared towards certain minority groups and ethnic groups.

Terrorist activities are clearly human rights violations as they undermine democratic values and process, rule of law, democratic institutions as well as scaring investors thus disrupting businesses and infringing on the peoples economic rights. When acts of terrorism occurs, people's way of life momentarily stops as they have to deal with the casualties and trauma associated with the act and sometimes it may take a long time before normal life continues.

The Vienna Declaration and Programme of Action (1993) affirms that "acts, methods and practices of terrorism in all its forms and manifestations as well as linkage in some countries to drug trafficking are activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of states and destabilizing legitimately constituted Governments."[90] The declaration thus called upon states to engage in measures curbing terrorism in accordance with the charter and respect of human rights.

After the September 11 attacks, the U.N. termed terrorism as a crime against humanity.[91] This was a departure of previous arguments that due to lack of standard definition of terrorism, it would be hard to categorise terrorism as a crime against

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89 Mamdani, Mahmood 'Constitutionalism in Africa,' in *Journal of Modern African Studies,* 28 (3), 1990 pg 373

90 http://www.unhchr.ch/huridocda/huridoca.nsf

91 According to the International Criminal court (Rome statute), the term crime against humanity means acts committed as a part of widespread or systematic attack directed against any civilian population with the knowledge;- rape persecution against any identifiable group or collectively on political, ethnic religious or other grounds, that are universally recognised as impermissible under international law, and other inhuman acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health.

humanity.[92] That is why national courts and domestic legislations were left to deal with terrorism. While characterizing the September 11 attacks as a crime against humanity, the then United Nations High Commissioner for human rights Mary Robinson was of the view that this labelling "puts a clear responsibility on all governments to seek out the perpetrators and hand them over to justice, that could be through the domestic courts or there could be some kind of tribunal."[93] At the same time, the UN passed resolution 1373 (2001) that called upon states to submit their first report to the Counter-Terrorism Committee (CTC), within 90 days and thereafter according to a timetable proposed by the committee on steps state parties have taken to implement the resolution.[94] These measures include enacting anti-terrorism laws, tackling money laundering, establishing counter-terrorism bodies in their respective countries and ratify anti-terrorism conventions. All these efforts however, have to conform to the UN charter and International human rights law. It should be noted that the CTC is not a sanctions committee and does not have a list of terrorist organisations or individuals but merely guides states in preventing terrorism as well as respecting human rights while doing so.

The events that followed after the resolution was passed with countries trying to conform to the demands of the UN resolution have made some people argue that the events of and after September 11 marked the end era of human rights.[95] At the same time, the "war on terror" has emerged as the greatest threat to human rights in the world as it has been accompanied by large scale violations of human rights.[96] Many governments in post September 11 have been faced with the dilemma of fighting terrorism and ensuring human rights and they have enacted legislation that has curtailed civil and political liberties. According to a study done by the *Human Rights Watch*, it has become a common feature for countries to use anti-terror laws to fight political dissidents through branding them terrorists.[97] By doing this, governments have arrested terror suspects, held them indiscriminately at the same torturing them. Foreigners are quickly deported back to their home countries after being detained for

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92 Cassese, Antonio, 'Terrorism is also disrupting some legal categories of international law,' in *European journal of international law.* http://www.ejil.org/forum_WTC/ny-cassese
93 'September 11attacks were crimes against humanity" says Robinson in United States Institute for Peace.
94 www.un.org
95 Ignatieff, Michael 'Is the Human Rights era ending?' in *New York Times,* 5 February 2002
96 Mutua, Makau, opcit
97 www.hrw.org

a long time.[98] As Makau notes, the war against terrorism allows states and powerful interests to re-define the legitimacy of any struggle, and cast it, if they wish, in an unfavourable light, and therefore justify the most extreme measures against it.[99]

Roger Cotterrel argues that law is an avenue for social struggle that is a part of people lives.[100] Since it emanates from a society's history and struggles, this means that it is going to be interpreted in various ways according to the society it is being applied. However, if the law does not reflect the society's needs, it suffices that it will not be applicable and as it is discussed later, this is the dilemma that Kenya has been grappling with its anti-terror legislation.

Furthermore, law expresses and regulates power relations.[101] Thus, it is a field where power is exercised and the structures like Constitutional courts ensure that all in the arena are protected, especially the minority and the best way to guarantee this is to invoke the rights language. Human rights provide the best protection for minorities because rights are also a product of contestation, meaning that they exercise a particular form of power. Thus, one can say that constitutionalism and bill of rights provide law and courts with a big role of shaping power relations because they have been shaped into an arena of struggle. In the Kenyan context, they have been used to challenge arbitrary detentions and discriminative arrests of terrorism suspects.

The UN argues that in times of an emergency that threatens the life of a nation - and the existence of such an emergency is officially proclaimed - States can, under Article 4 of the *International Covenant on Civil and Political Rights*, take measures derogating from their obligations under the covenant "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".[102] However, Article 4 does not allow derogation of certain fundamental rights including freedom from being subjected to torture, inhuman or degrading treatment or

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98 ibid
99 Mutua, Makau, opcit
100 Cotterrel, Roger. o*pcit* pg 1-2
101 ibid pg 74
102 UN International Covenant on Civil and Political Rights adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1996.

punishment. The recognition in the charter of the United Nations of the inherent dignity and of the equal and inalienable rights of all member States is the foundation of freedom and justice. In accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear can only be achieved if conditions are created where everyone enjoys civil and political rights and this should be the guiding principals in the fight against terrorism.

The African Charter on Human and People's rights like the UN charter also spells out the fundamental human rights. However, it defers with the UN charter in that it does not give provision for derogation of rights in emergency cases. Nevertheless, rights in the African charter are limited through 'claw-back-clauses'.[103] In case of any derogation and limitation of rights, this is supposed to be in direct proportional with the situation at hand.

As Makau argues, the "war on terror" has had a detrimental effect on human rights. Tactics employed in the terrorism war crushes dissent and virtually eliminates any opportunities for a robust dialogue on the scope of human rights, their cultural relevance, and the strategies for their enforcement.[104] This is because America and its allies are defining which rights to exclude and narrow. At the same time, it allows the United States to define the opponents of its version of human rights as enemies or supporters and sympathisers of global terrorism.[105] So, those who are against curtailing civil liberties in the pretext of fighting terror are seen as against America, and thus supporting terrorists. In addition, this does not give room for cultural relativism of human rights in the respective countries since they will have aligned themselves in the dichotomy and not find anti-terror solutions that are relevant to the country.

The challenge of upholding human rights in the "war on terror" is as uphill task that is fraught with tensions and emotions. However, it is from these contestations that individual countries can be able to enact sound legislations that reflect their social and

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[103] Lagwanth S and F. Soltau, 'Terrorism and Human Rights in Africa' in *Africa and Terrorism, Joining the Gobal campaign,* Institute for Security Studies, Monograph N0 74, July 2002, Chapter 2.
[104] Mutua, Makau, opcit
[105] ibid

political struggles as well as protect minorities and the vulnerable groups. Nevertheless, countries have found themselves unable to balance the challenges of national security and respecting human rights.

3.4 In the trail of Al-qaeda

Every ideology, whether economic, political, or religious, is based on certain features that characterise it, which form the fundamental principles of the organisation. For example, the fundamentals of modern capitalism are a free market economy and private ownership of property; democracy's fundamental principles are a government of the people, for the people and by the people among other things. Hence, fundamentalism arises when members who adhere to their fundamental principles propagate them while allowing little space for other people to express their views. However, the term fundamentalism is almost exclusively used in the context of religion and in the 21st Century, there has been a rise in religious fundamentalists. Through their actions, fundamentalists aim to reform the society in accordance with their religious tenets, change the laws of morality, social norms and political configurations.[106] In essence, they aim to wholly change the society according to their religious whims.

Fundamentalism has been termed a popular religion,[107] where fundamentalists offer alternatives to modern life, usually by desiring to achieve a religious, social and political agenda that is not being propagated by policy makers and which they feel is against their beliefs. In order to create this alternative society, fundamentalisms agenda has been termed as narrow, aiming for maximum effect and minimum compromise.[108]

Religious fundamentalism has three main features. The first is that fundamentalists try to control women bodies since women reflect the morality of society. For example, the growth of women rights movement has led to the fore issues that empower women to choose decisions over their bodies e.g. women now have the right to choose

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[106] Hayness, Jeff. 'Religion, secularization and politics: a post modern conspectus,' in *Third World Quarterly Vo.l 18, No. 4 1997* pg 719

[107] ibid pg 717

[108] Marty, Martin and R. Scott Appleby (eds), *Accounting for fundamentalisms: The dynamic character of movements,* Vol 4, University of Chicago Press, 1994 pg 2

whether to have an abortion or not. However, this has not been taken kindly by some fundamentalist groups like the Christian Coalition in the U.S. that is totally against women's right to choose whether to have a baby or not. The same can be said about Muslim women wearing veil all the time and their faces are not supposed to be seen by other people.[109] Thus, by confining women to 'traditional' spheres of life where they are subordinated is one of the hallmarks of fundamentalism. Secondly, fundamentalists most of the time reject political pluralism and want the government to rule using the Bible.[110] Thus, any decision made has to have religious undertones and appointments made are said to be divine. Consequently, there is little chance for opposition to grow as it will be interpreted as going against God's will. Thirdly, fundamentalists create links with governments since they realise that it holds over institutions which they believe are integral to their campaign to change society e.g. schools, parliament, courts.

Hayness notes that the rise of fundamentalism is a response to insecurities posed by the post-modernist era. Many people, especially in the third world, view post-modernism as being synonymous with poverty and high rate of unemployment hence, they are receptive to fundamentalists arguments, 'who have a mobilising ideology.'[111] Within the Christian fundamentalists, they seek to reverse what they see as excessive liberalisation and relaxation of social and moral mores. They are normally associated with conservative political forces.[112] At the same time, Islamic fundamentalist groups seek to overthrow the political and social order through violence and establish Islamic states.[113] Terrorism therefore reflects a pattern of violent action that seeks to disrupt the effects of modernisation process and return to the religious set-up. However, it should be noted that not all fundamentalists are terrorists since some of the fundamentalists groups aim at changing the society through legal means and engaging with the government.

For the purposes of this study, we are going to deal with Islamic fundamentalism. At the same time, the study notes that is not right to equate mainstream Islamic religion

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[109] Sayyid, S. *A fundamental fear: eurocentrism and emergence of Islamism,* Zed books, 2nd edition, 2003 pg 8
[110] ibid
[111] Hayness, Jeff, opcit pg 719
[112] ibid
[113] ibid

with terrorism committed by extremist groups acting in the name of Islamic beliefs since this will further perpetuate prejudice and marginalisation of the whole Islamic community.

The 1980's saw emergence of extreme Islamic movements who were commonly inspired by the success of Iranian Islamic revolution of 1979 led by Ayatollah Khomeni. Khomeni was able to establish the Iranian Islamic state and has been accused by Western countries of supporting Islamic fundamentalists who have a similar goal. Thus over the years, Islamic fundamentalism has become the biggest threat to Western liberal democracy as it directly, ideologically and morally challenges it. However, Western governments had a reserved and cautious attitude towards Islamic fundamentalism and none wanted to be caught up in its struggle against western liberal democracy.[114] Various countries kept a distance hoping the heat will subside, while taking minimal measures to keep the situation at bay. This was to change on September 11 2001 when Al-qaeda attacked the twin towers. In reality, it attacked the epitome of western liberal democracy, signified by the Pentagon (Military) and World Trade Centre (trade).[115]

Al-qaeda is led and financed by Osama bin Laden, who was born to a Syrian mother and Yemeni father. Al-qaeda was formed in 1988 to fight alongside the Mujahidin, in their war against the Soviets and its motive then was to provide a base for the recruitment of Arabs. Osama was able to organise and recruit a lot of Arabs to join the war. The Mujahidin and consequently Osama received significant financial and military support from various nations and individuals. The United States supported the Mujahidin primarily through the CIA by giving them weapons and money. This was not controversial since it was during the cold war and compared to the Soviet threat, "the relatively new threat of Islamic fundamentalism" was inconsequential, and "fighting communism was still first and foremost in the minds of U.S. policymakers".[116] Consequently, "The U.S. ignored the threat of Islamism and used it

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[114] O'Ballance, Edgar, *Islamic fundamentalist terrorism, 1979-95: The Iranian connection,* New York University Press, 1997 pg 214

[115] Bamber, David, 'Bin Laden: Yes I did it,' *Daily Telegraph,* November 11, 2001 in http://www.portal.telegraph.co.uk/news/main.jhtml?xml=/news/2001/11/11/wbin11.xml i.e

[116] Tanner, Stephen. *Afghanistan: A military history from Alexander the Great to the fall of the Taliban*, De Capo Press, 2002 pg 477

as a bulwark against communism and revolution" in Afghanistan.[117] In the end, it is estimated 35,000 Islamic fundamentalists from 40 Muslim countries came to Afghanistan and joined the jihad, contributing to the long-term development of "a radical Islamic foreign legion."[118]

After the defeat of the Soviets, Osama went to Sudan where with his experience, money and weaponry he had got, developed a possibility of waging *jihad* on America and Western interests all over the world. His mission was to establish Islamic law in societies, have religious authorities and ideologies play a larger role in governmental decision making processes, oppose the secularization of society as well as promote s*haria* law in every sector of society, "with little concern for the religious freedom of non-Muslims.[119]" It was in Sudan that Osama established Al-qaeda and he opened businesses in Khartoum to finance Al-qaeda and at the same time recruited many followers. By the time he left Khartoum for Afghanistan in 1996, Osama had established an Al-qaeda network not only in Sudan but also in neighbouring countries.[120]

Though Osama is the de-facto leader, the Al-qaeda network has four committees: military, religious-legal, finance and media.[121] These committees co-ordinate the people involved in setting up the targets and they do this through four stages. The first stage involves surveillance or intelligence gathering, then from the information got, the leadership can undertake the next step, which is deciding whether to conduct the mission or not.[122] Third stage is where the group will gather materials needed for the attacks and the last stage is where the team that will actually carry out the attack arrives. The network is complex and its terrorist cells are autonomous though they have personal links.[123]

At the same time, Osama has managed to convert domestic terror groups to be wholly on its side and wage the *Jihad*. This is what happened to the Jemaah Islamiya group in

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117 ibid
118 ibid pg 489
119 Esposito, John. *Unholy war: Terror in the name of Islam,* Oxford University Press, 2002. pg 61
120 Abuza, Zachary *Militant Islam in South East Asia: crucible of terror,* Lynne Rienner publications, 2003 pg 6
121 ibid
122 'Duo recounts frenzied activity before the blast,' *Daily Nation* March 3, 2001
123 Abuza, Zachary, opcit pg 9

South East Asia and it is now seen as part of the Al-qaeda network.[124] In addition, Osama has co-opted some of the groups and he shares with them intelligence, money among other things. The Federal Bureau of Investigation (FBI) has accused Al-qaeda of supporting terrorist groups like HAMAS and Hezbollah in the Middle East or the Al-lttihad in Somalia. The linkages and sharing of intelligence is vital for the network and its success. At the same time, the terrorist network as a whole has little hierarchy and decision making is decentralised allowing local initiative and autonomy[125] hence the attacks will get the authorities by surprise as only a few people know about the mission. Another hallmark of the Al-qaeda is that information is disseminated promptly and broadly as desired within the network and to relevant audiences.[126] This is through the media and it was especially employed during the September 11 attacks. Thus, through the media, Al-qaeda is able to gain publicity and instil fear to the public. Another key factor of Al-qaeda is that its operations are properly planned and executed and they strike only when they have a high degree of success.[127] The Nairobi and Tanzania bombings were being planned as early as 1993 but were only executed in 1998.

Al -qaeda has changed the way terrorist organisations operate. The use of suicide members against political targets has set a new precedent for terrorist operations in modern warfare.[128] Terrorist attacks committed by suicide bombers are incredibly difficult to defend against and are always successful since they have an element of surprise. In addition, from the events of September 11, Al-qaeda showed how it is ready to use western technology for terrorist purposes.

Since the onset of the war on terror, the Al-qaeda has diversified to other areas since its operating base in Afghanistan was destroyed with the toppling of the Taliban regime. However, it is clear that the network is still alive with active and sleeper cells operating in various countries as seen with the bombings of Madrid in March 2004 and Kikambala in November 2002. At the same time, the war on terror has enabled

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[124] ibid pg 51
[125] Arquilla, John, David Ronfeldt and Michele Zanini, 'Networks, Netwar and information age terrorism,' in Ian O. Lesser, *Countering the new terrorism,* Rand corporation, 1999 pg 49.
[126] Ibid pg 51
[127] Abuza, Zachary, opcit pg 6
[128] ibid pg 34

Al-qaeda to become an ideology and not just an organisation.[129] Many radical Islamic groups have emerged that have aligned themselves with Al-qaeda's *jihad* even though they are not directly linked with the network.

3.5 Clash of civilisations or clash of fundamentalists?

Since the attacks of September 11 and the start of the "war on terror," there has grown a body of literature and scholars who argue that the events marked the expected clash of civilisations. It is this group of scholars who subscribe to the notion of the clash of civilization as propagated by Samuel Huntington. Huntington argues that with the end of the cold war, culture and cultural identities, which at the broadest level are civilization identities, are shaping the patterns of cohesion, disintegration, and conflict.[130] He notes that after the cold war, conflict between groups in different civilizations will be more frequent, more sustained and more violent than conflicts between groups in the same civilization. These conflicts are most likely and most dangerous source of escalation that could lead to global wars and the paramount axis of world politics will be the relations between "the West and the Rest".[131] In addition, he notes that the elites in some torn non-Western countries will try to make their countries part of the West, but in most cases face major obstacles to accomplishing this; a central focus of conflict for the immediate future thus will be between the West and several Islamic- Confucian states.[132] Thus, the attack on the twin towers according to those who subscribe to the notion of 'clash of civilizations' was the culmination of the conflict between Western identity and Islam. This has been further expounded by the Bush doctrine of dividing the world into two when he said either countries join America in the terrorism war or they be branded as supporting terrorists. By this, he literally divided the West, this being those who formed the coalition of the willing as well as their supporters and the rest of the world who were opposed to the war.

However, the notion of 'clash of civilisations' has come under stiff resistance from other scholars who argue that America is trying to forcefully spread western liberal democracy and this is what led to the September 11 attacks. Western liberal

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[129] ibid
[130] Huntington, Samuel, 'The clash of civilizations?' in *Foreign Affairs,* 1993 V72, No3, pg 23
[131] ibid
[132] ibid

democracy is what Tariq Ali calls the "new religion" and he faults America for trying to force it on different countries thus propagating what he terms as 'American Imperialism.'[133] He argues that even if most Muslim countries are authoritarian and are supposed to democratise their countries, they should do so in their own ways and not be forced to adhere to America's western liberal democracy. Hence, this will mean 'opening up the world of Islam to new ideas which are seen to be more advanced than what is currently on offer from the west.[134] Tariq's view of 'American imperialism' is shared by Zarina Patel, who argues that 'U.S. fundamentalism in all forms – military, strategic and economic – is the greatest source of terrorism on earth.[135]

Another group of scholars like John Gray are of the view that the September 11 attacks were a manifestation of the failure of Western liberal democracy and not actually a clash of civilisations. John Gray argues that the attacks did not only destroy the world trade centre and pentagon and killed thousands of people, but it destroyed the West's ruling myth. [136] He sees the war on terror as a pretext of America to create hegemony of Western liberal democracy, denoting a complex of political, cultural, and economic arrangements which are rooted in liberal theory and philosophy.[137] This civilisation requires some form of political democracy and a free-market system. Gray warns that Al-qaeda is a manifestation of the rejection of individualism that comes with liberal democracy. That governments have started surveillance over their populations as a strategy to counter terrorism has led to loss of individualism and civil liberties that liberalism professes to protect, thus the Al-qaeda is in a way winning the war.[138]

Makau Mutua takes the debate further when he warns that the "war on terrorism" "targets non-Western peoples, cultures…and is mainly focused on certain Islamic traditions and political projects."[139] This, according to him is particularly the case when some Arab and Muslim political actors and movements deem American policies

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[133] Ali, Tariq, *The clash of fundamentalisms: Crusades, Jihads and Modernity,* Verso. pg 307
[134] Ibid 339
[135] Patel, Zarina, 'There's a war far more important,' *Daily Nation,* September 26, 2001
[136] Gray, John. *Al qaeda and what it means to be modern.* New Press Publishers, 2003 pg 1
[137] ibid
[138] ibid pg 2
[139] Mutua, Makau, opcit

in the Middle East and the Muslim world detrimental. He warns that the "war on terror" has exposed a deep cultural divide between the West and many in the Islamic and Arab World since the West has emphatically put it that "the summit of human civilisation can only exist within the perimeters of liberal theory and philosophy."[140] Hence, "It seems a foregone conclusion: Muslim societies, like all other non-Western societies, must modernise, democratise, liberalise, and adopt open, free market systems. The message is loud and clear. Islamic societies must Westernise or perish."[141]

It is a contestation on whether the events of September 11 and thereafter were a 'clash of civilisation' or 'clash of fundamentalists.' What however is clear is that the "war on terror" has completely changed the global political landscape. Kenya as part of the global system has been influenced by the "war on terror" and it has been a victim of terrorist attacks.

[140] ibid
[141] ibid

Chapter four

Darkness at noon: the bombing of the U.S. Embassy and Kikambala hotel

4.1 Introduction

Kenya has been hit thrice by acts of terrorism. In 1980, a bomb wrecked the ballroom of the Jewish-owned Norfolk hotel in Nairobi, killing 15 and wounding more than 80 people. In August 1998, the U.S Embassy was bombed killing 247 people and many more were injured. In November 28, 2002 the Israel owned Kikambala paradise hotel at the Coast province was bombed and at least 15 people died. Though the targets were Western interests, Kenyans bore the brunt of the bombings and questions were raised on why the country was a target for terrorist activities.

It has been argued that Kenya has become vulnerable to terrorist activities due to its "wait and see" foreign policy.[142] Willy Mutunga notes that Kenya has no official foreign policy and it waits for the President to give directions on matters touching on foreign policy instead of the Ministry of foreign affairs formulating them.[143] This leads to government officials making statements or carrying out actions that have led to Kenya being viewed as an ally of Western countries. For example, in 1976 members of the Baader-Meinhof group and the Popular Front for the Liberation of Palestine (PFLP) hijacked an Air-France Airliner and its 258 passengers forcing it to land in Uganda. Israeli army used Kenya as their operating base in rescuing the passengers. During the rescue mission, 20 Ugandan soldiers and all seven hijackers were killed alongside three hostages. Four years later, the Israeli owned Norfolk hotel in Nairobi was bombed in an action that was seen as a punishment to the country's role in the Entebbe crisis.[144]

Since 1970, the U.S. has maintained military access agreements with the Kenyan government that permit the U.S. military to use Kenyan sea and air bases. During the Gulf War, the port of Mombasa was extensively used by the U.S. marines as well as

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142 Mutunga Willy, 'Kenya's "foreign" foreign policy,' in Patrick Mutahi, Mugambi Kiai, Willy Mutunga, Margot Albert (Eds) *Human Rights as Politics.* Kenya Human Rights Commission, 2003 196

143 ibid

144 Kahura, David, 'Kenya a vulnerable target,' *East African Standard,* November 29, 2002

during the U.S. intervention to Somalia in 1992 and the Rwanda humanitarian assistance after the genocide. In case of any military activity in the Horn of Africa by the U.S., this base will be a centre field.

In addition, Kenya is in a strategic position in East and the horn of Africa. Being the regional power broker, it has immense influence over countries that U.S regards as habouring terrorists mainly Sudan and Somalia. In geo-political terms, Kenya emerges as a relatively stable country and has recently successfully mediated the Sudan and Somalia peace processes. Both Sudan and Somalia have been severally accused of being hubs for terrorists[145] and this has had an impact on Kenya.

This chapter discusses the reasons why Kenya has been a target for terrorist activities. To do this, it interrogates the impact of failed and weak states surrounding Kenya which have harboured suspected terrorists who are alleged to have build terror networks in Kenya. The chapter also establishes the treatment of Muslim population in the country by the government and why it could be easy for terrorist networks to recruit members from the Coastal region. Lastly the U.S. embassy and Kikambala hotel bombings are analysed with a view of establishing how Kenyans reacted to them as well as the local and international response.

4.2 Impact of failed and weak states

a) Sudan

Since it became independent as a unitary state on 1st January 1956, Sudan has been involved in an internal conflict that has made the process of nation building impossible. It is a conflict that has claimed more than two millions lives and to some extent has destabilized the Horn region.[146] The Khartoum Islamic government controls the Northern region while the South is in the hands of the Sudanese People's Liberation Movement (SPLM) and its military wing, the Sudanese People's Liberation Army (SPLA), successor of Anya Nya II movement. This chronic conflict

[145] Dagne, Ted. '*Africa and the War on Terrorism*', Washington: CRC Report for Congress, January 2002. p.6
[146] The exceptional peaceful period in sudan was between 1972 – 1983 during President Jaafar Numeri's period when both parties signed the Addis Ababa agreement on sharing power and greater autonomy of the South. Abrogation of this agreement in 1983 witnessed resurgence of civil war and claim for right to self-determination by the Southern rebel movement, Anya Nya II.

between the Muslim North and Christian South has led Sudan to be classified as a weak state and has given ground for growth of terrorist cells in the country.

In 1993, the U.S. placed Sudan on the list of states that sponsor terrorism with Osama bin Laden having used Sudan as his operating base until 1996 when he went to Afghanistan. Osama played the role of both an investor while at the same time recruited and trained Al-qaeda members[147]. Osama had been invited in 1991 to Khartoum by the country's ruling Islamic fundamentalist party, the National Congress Party (NCP)[148] under its spiritual leader Dr. Hassan al-Turabi. While in Sudan, Osama and his agents rented farms and homes that were used to accommodate them and also as training grounds for Al Qaeda members.[149] The U.S. government later bombed Khartoum after the East Africa embassy bombings in 1998 due to this interaction with Osama.

In June 1995, members of an Egyptian Islamic group attempted to assassinate President Hosni Mubarak of Egypt while he was in Addis Ababa, Ethiopia. The assassination squad was reportedly to have been given safe haven in Sudan where they prepared for the assassination and some of the members were also identified as Sudanese. In addition, the weapons were flown into Ethiopia by Sudan Airways. However, the assassination was unsuccessful, and five of the assassins were captured while one fled back to Sudan. The government of Sudan did not deny nor confirm the presence of the suspected group and the U.N. Security Council passed three resolutions demanding the extradition of the suspects.[150]

The U.S. State Department report of 1999 accused Sudan of continuing to serve as a central hub for terrorist groups and radical Islamist groups including Al-qaeda, Lebanese Hizballah, Egyptian Islamic group, HAMAS and the Abu Nidal organisation.[151] It also accused Sudan of supporting other terrorist groups in Algeria, Uganda, Tunisia, Ethiopia and Eritrea.[152]

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147 Rohan Gunaratna, *Inside Al Qaeda : global network of terror*, Berkley Books, 2003 p. 43
148 It was formally known as National Islamic Front.
149 Rohan Gunaratna, opcit p.41
150 Dagne Ted *opcit*
151 http://www.state.gov/www/global/terrorism/1999report/patterns.pdf
152 State Department, *Patterns of Global Terrorism* , (April 30th, 2003) http://www.state.gov

b) Somalia

In Somalia, since the ouster of the government of Siad Barre in 1991, the country has been without a central government and has been declared a failed state.[153] Warlords and political factions control various territories and factional fights are a daily occurrence. In 1991, the Somali National Movement declared the north-west region independent and renamed it Somaliland. In the northeast, in Puntland, another group is in charge while in the south a number of political warlords claim legitimacy but no single group controls it. In 2000, a transitional government was formed but it has not been recognised by the international community. In essence, Somalia is a country divided along clan lines, and armed factions.

At the same time, there is spread of Islamic fundamentalism in the country. In mid 1990's, Islamic courts that functioned as the government began to emerge in parts of the country and governed using the *sharia* law.[154] Al-Ittihad Al Islamiya is viewed as the most active of all the Islamic groups to integrate into the courts, with its principal objective being to establish Somalia as an Islamic state.[155] However, the U.S. in September 2001 placed the group in its list of terrorist groups and said it had links with Al-qaeda.

In early December 2001, the U.S. government raised concerns over the instability of Somalia and feared that Al-qaeda operatives would flee into the country from Afghanistan.[156] The Assistant Secretary of State for Africa Walter Kansteiner, stated the U.S. has three objectives as regards Somalia.[157] First, the U.S. will work with neighbouring countries to make Somalia "inhospitable" to terrorist groups and secondly, it will ensure that any activities in Somalia would not affect its neighbouring countries. Thirdly, the U.S. will work towards a lasting peace and economic development in Somalia. This clearly shows the seriousness that U.S. takes as regards Somalia and its relation with terrorist activities.

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153 Rotberg, I Robert, 'Failed states in a world of terror' in *Foreign Affairs Vol 81 July-August 2002* Council on Foreign Relations pg 127
154 Dagne, Ted, opcit, pg 10
155 ibid
156 ibid pg 16
157 ibid pg 16

4.3 Failed and weak states in the war against terrorism

Even though the phenomenon of weak and failed states is not new, it has become more relevant and worrying with the growth of trans-national terrorism. Robert Rotberg argues that failed states are incapable of projecting power and asserting authority within their own borders, leaving their territories governmentally empty.[158] This leaves the country open to any transactions and flow of all manner of illegal goods through the porous borders, endangering peace not only in the region but also internationally. This is so because international security depends on national governments to be stable and authoritative at home as well as deliver what Rotberg terms as "political goods."[159]

This is the situation that Sudan and Somalia find themselves. Due to the lack of stable government and porous borders, illegal arms flow through the borders into Kenya and other neighbouring countries, also threatening their stability. The state capacity is weak and key interests groups like warlords emerge and are less loyal to the State. Consequently, the people are aligned to the different warlords since the social contract binding the people and government in non-existent. In the case of Sudan and Somalia, it has not helped with the existence of Islamic fundamentalist groups in the country, a situation that gives rise to terrorist groups.

For a country to offer a terrorist group protection and operation base, it means there are favourable conditions for cells to grow and training of terrorists to take place. The government must be willing to protect the terrorists and give them opportunity to recruit and train members. At the same time, the terrorist group will need space to establish physical infrastructures, develop financial support, and be able to command and control operations. The government must be willing to facilitate these activities either because they are compatible with its own foreign policies or because the terrorists are paying the government for protection.[160] The Sudanese government supported Osama's ideals of bombing Western interests and some Somali warlords are sympathetic to Al-qaeda.

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[158] Rotberg, I Robert, opcit, pg 127

[159] ibid

[160] Dr. Nicholas Berry Reyko Huangin, *Eliminating Terrorist Sanctuaries: the case of Iraq, Iran, Somalia and Sudan*. Dec. 10, 2001 in http://www.cdi.org/terrorism/rogues.cfm

Another condition for terrorist cells to operate is that the country harbouring terrorists must be free of foreign agents who are capable of detecting and challenging the terrorist organization and its protectors. The government can do this by cutting off relations with other countries, muzzling the press and if the country is a weak or failed state the conditions for terrorist cells to grow are very apt.[161] In addition, the host government must be willing to suffer some measure of isolation, economic and political sanctions from other governments wanting to destroy the terrorist network.[162] Both Sudan and Somalia fulfil these conditions as they have poor human rights records and have been isolated by the International community through sanctions.

Thus, Kenya has suffered the consequences of being surrounded by Sudan and Somalia. Illegal arms are rife in North Kenya, which borders the two countries and Kenyans living along the border are constantly attacked by militias from Sudan and Somalia. Over time, the illegal arms have found their way into other parts of the country resulting to an increase in urban crime. Kenya has a large number of Somali populations and is already housing many other refugees from both Somalia and Sudan. The country has poor refugee screening mechanisms and terrorists have utilised this loophole. It is suspected Al-Ittihad has been able to infiltrate some of the refugee camps in North Kenya bordering Somalia and established cells there and some of the terrorists have consequently made their way into Mombasa.[163]

Due to the concern of security in the region and threat of terrorist cells growing in the country, Kenya has continuously been involved in brokering peace in the two countries under the auspices of the Inter-governmental Authority on Development (IGAD). IGAD was founded in Djibouti in 1986 by six African countries: Djibouti, Ethiopia, Kenya, Somalia, Sudan, and Uganda while Eritrea joined the organization in 1993 after achieving independence in the same year. IGAD has three priority areas: food security and environmental protection; political and humanitarian affairs, including conflict prevention, mitigation, and resolution; and regional economic cooperation.

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161 ibid

162 Ibid.

163 International Institute for strategic studies, *Strategic Survey 2002/3: An evaluation and forecast of World Affairs,* Oxford University Press, 2003 pg 331

IGAD's search for peace in Sudan dates back to 1993 when the Sudanese government and the Sudan People's Liberation Movement/Army (SPLM/A) agreed that IGAD should assume the task of mediating the peace process. Thereafter, IGAD established a Peace Committee under the chairmanship of former Kenyan President, Daniel Arap Moi which also had representatives from Eritrea, Ethiopia, and Uganda. In 1994, the warring parties accepted the Declaration of Principles (DOP) as the basis for negotiations. The DOP covers a broad range of areas, including state and religion, self-determination, and interim arrangements. It in essence gave the unity of Sudan a chance but also allowed the people of south Sudan to opt for autonomy should it become necessary. However, the Government of Sudan refused to accept the right of South Sudan to pursue self-determination and the peace talks failed. The stalemate continued until 2001 when former President Moi appointed Retired General Lazarus Sumbeiywo to spearhead the initial IGAD initiative. This led to the signing of the Machakos Protocol on July 20, 2002 which defined the relationship between State and religion and provided for self-determination exercisable through a referendum.

After the signing of this protocol, other protocols and agreements followed, which effectively ended the 21-year war in Southern Sudan through a promise of more inclusive government. These included the adoption of the agreement on security arrangements during the interim period which was signed on September 25th September 2003; the agreement on wealth sharing during the pre-interim and interim period signed on 7th January, 2004. Protocols between the Government of Sudan and SPLM/A touching on power sharing, resolution of conflict in Southern Kordofan/Nuba Mountains and Blue Nile States and on the resolution of conflict in the Abyei Area were all signed on 26th May, 2004. In January 2005, the Government of Sudan and the SPLM/A signed a memorandum of a New Sudan in Nairobi, where John Garang was installed as the first vice-president of New Sudan and the President of South Sudan.

As early as 1999, the U.S. government had an interest in the Sudan peace talks when then President Bill Clinton appointed former congressman Harry Johnston as Sudan's special envoy. The envoy made several trips to Sudan to rally support for the IGAD initiated peace process and by early 2000, serious talks between the government of

Sudan and the Clinton administration had began to take place.[164] America's interest in finding peace in Sudan continued with the new regime of George Bush who in October 2001 appointed Senator John Danforth as special envoy to Sudan. It should be noted that the U.S. continued imposing sanctions in the government of Sudan but it however embraced more dialogue with the warring parties.[165] During the signing of the final protocols, the U.S. was represented by Secretary of State Colin Powel who travelled to Kenya to witness the signing ceremony. However, the comprehensive peace settlement has been threatened by the conflict in the Darfur region where an estimated one million people have been made homeless by fighting between mainly African rebels and Arab militia. If peace is finally realised in Sudan, it will ensure Kenya's safety from terrorism as the country will have a stable government that will be able to police its borders and ensure there is no flow of illegal arms. By ensuring stability and a central government as well as democratic institutions, it ensures that it will be hard for terrorists to operate from there.

Somalia's torturous peace journey began in 1991 and has been riddled with many hurdles. In mid-1991, the Djibouti government hosted two conferences aimed at establishing a government of national unity for Somalia and preventing the country from sliding into civil war. However, the talks concluded with the declaration of a new national government and this only aggravated a political split within the United Somali Congress (USC), a faction based on the Hawiye clan, which had seized control of much of south central Somalia, including the capital.[166] The two sides of the USC were the Somali National Alliance (SNA) led by General Aidid, and the Somali Salvation Alliance (SSA) headed by the businessman Ali Mahdi Mohamed who then started fighting for control of the capital, Mogadishu. In 1993, the UN tried to mediate and congregated Somalia's major faction leaders in Addis Ababa with the aim of establishing transitional institutions but this led to more violence with the militia of General Aidid fighting with international forces. This violence led to death of 18 U.S. forces and the rest of them were withdrawn from Somalia in 1994, followed by the UN peace keeping force in 1995.

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[164] Dagne, John 'The Sudan Peace Process' Report for Congress, June 4, 2003 found at www.crsweb.org
[165] ibid
[166] International Crisis Group, 'Biting the Somali bullet,' *ICG Africa Report No 79* Nairobi/Brussels, ICG pg 2

The 1996 Ethiopia conference and another one held in Cairo in 1997 only generated transitional national charters but failed to enact institutions to implementing them hence did not offer any realistic peace prospects.[167] In August 2000, a conference convened by Djibouti at the resort village of Arta gave rise to a Transitional National Government (TNG) headed by Abdiqasim Salad Hassan, a former minister. The TNG failed to establish its authority beyond parts of the capital, and in 2001 a coalition of Somali leaders called Somali Restoration and Reconciliation Council (SRRC) and backed by Ethiopia was established as an opposition to the TNG.[168] Thus, violence continued and peace talks collapsed until October 2002 when Kenya hosted the peace talks in Eldoret town. These talks were landmark since they brought together 22 key Somalia leaders and consequently on 27th October 2002, some of them signed a cessation of hostilities agreement. The leaders then on 15th September 2003 approved a draft transitional charter and on 29th January 2004 endorsed a revised transitional charter, known as the Safari Park Declaration after the Nairobi hotel which it was agreed. Through the declaration, Somalia leaders agreed to end hostilities, a transitional charter, and formation of transitional national institutions for five years. It is on this basis that a transitional federal parliament was elected in August 2004. The following month, the 275-member parliament elected a speaker and on October 10 2004 Somali held their Presidential elections in Nairobi where Abdullahi Yusuf Ahmed was elected as Somalia's President. The President was sworn in and chose a Prime Minister as well as a cabinet.

Though this has been achieved, the country is still far from realising lasting peace with the warlords in Somaliland and Puntland have refused to recognise the new government. The Republic of Somaliland claims the territory of the former British Somaliland Protectorate, which merged with Italian Somalia in 1960 to form the Somali Republic, and it declared itself independence from the larger Somalia in May 1991.The Puntland on the other hand is an autonomous administration that sees itself as a future federal Somali republic. At the same time, there are other many warlords who are posing a security risk to the country and hindering the enactment of peace in the country. Thus, it should be emphasised that it is only through the enactment of

[167] ibid
[168] ibid

lasting peace in Somalia that the threat of terrorism can be minimised if not eradicated. Currently, that is not the case.

4.4 The treatment of Kenyan Muslim population

The Muslim population in Kenya comprise 7-15% of the total population[169] and they are concentrated in the Coast and North Eastern Provinces. The Somali and Swahili are the main ethnic groupings in these regions and they are deeply Muslim. A third indigenous Muslim people are the Digo but they are not a huge population like the Somali and Swahili. Muslim communities are also found throughout the interior of Kenya, in all the major towns and in a number of rural villages, but nowhere in the interior are they the dominant population.

The Kenya government has had a good relationship with Muslims and although Kenya is a secular state, it has acceded to Muslim demands in the fields of education, law, dress code and freedom of worship in schools. However, Muslims still perceive that many of their social and educational needs are disregarded, that their cultural and religious values continue to be threatened, if not disrespected, and that they have been neglected and marginalized politically and economically in the modern Kenya state.[170] Indeed, the Coast and North Eastern Provinces are less well integrated into the modern economy, and are the least developed provinces in the country.

In order to have a voice in government, several Muslims in 1993 formed the Islamic Party of Kenya (IPK). The party was led by Sheikh Balala and its aim was to propagate the ideals and principles of Muslims as well as run for electoral office. The government refused to register it on the grounds that the constitution does not allow religious groups to form political parties.[171] The party leaders and their supporters engaged in demonstrations calling for the party to be registered but the government was categorical that IPK would not get a licence and to-date it has not been registered. Muslims have never forgotten the violence that was meted out on them by police during the demonstrations and many times, memories of IPK are revived when politically contested issues arise and they argue that if they had a party of their own

[169] From the latest census, Kenya's population is estimated to be 30,339,770.
[170] Sperling, David. 'Islam and the religious dimension of conflict in Kenya,' Unpublished paper.
[171] The Kenyan constitution spells out the country as a secular state.

they could benefit like other tribes.[172] Though the party died naturally, its activities for the three years it existed created more radicalisation of Muslims in Kenya.

In 1999, a number of MP's from the Coast Province touted for the creation of an Islamic state or *majimboism,*[173] where Sharia laws would prevail. This recommendation was perceived as growing radicalisation of Islam in the region and Non-Muslims complained that there are "deliberate attempts to Islamise" Mombasa and Coast Province, and that the clamour for *majimbo* is part of that scheme.[174] Among the leaders calling for *majimbo* was Shariff Nassir who sees it as inevitable and has declared that all the people of Coast Province support *majimbo*, while warning non-coastal people to "keep away" from the politics of the region.[175] The government refused to consent to these demands but since they had been openly expressed and got support from Muslims in the province, it could form a ground for radicalisation of Muslims in the region to agitate for their own state. Furthermore, this is a fertile ground for Islamic fundamentalist groups to recruit and operate.

Technology has made the world a global village and this has enabled Kenyan Muslims to know and identify with what is happening to other Muslims especially in the Middle East. The mosques have been centres of dispatching information about injustices done to their brothers in Afghanistan and Palestine, and argue against the Bush administration's stance on Iraq, easily quoting UN resolutions, past US statements, and oil statistics.[176] By identifying with the fate of their fellow Muslims, Kenyan Muslims are attracted to join terrorist groups and support their struggle e.g. in Iraq and Afghanistan.

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[172] A case in point is during the Constitution review where Muslims wanted Kadhi courts to be provided for in the new constitution. There followed a long campaign against this by Christian population and the idea was shelved. However, Muslims viewed this as further marginalization by the larger Christian population.

[173] Majimboism is a Kenyan style of federal government but it borders on ethnic divisions. It was widely touted as an alternative government in the 1990's and some politicians used the agenda to cause ethnic conflict that led to deaths of thousands of people and over 600,000 displaced. See Kuria, Gibson Kamau, *Majimboism, Ethnic Cleansing and Constitutionalism in Kenya,* Kenya Human Rights Commission, 1994

[174] "A sure formula for strife: Alleged suggestions for the creation of a Muslim jimbo at the Coast raises tension along religious lines,' *The Weekly Review,* 12 February 1999

[175] ibid

[176] Harman, Danna, 'Why radicals find fertile ground in moderate Kenya,' in *Christian Science Monitor,* December 6, 2002 at www.csmonitor.com

At the same time, Kenya has allowed the establishment of U.S. and British military bases and training grounds in the predominantly Muslim Lamu district in the Coast and Northern parts of the country. This has angered Muslims who see this action as a direct attack on them as they view the U.S. and British as enemies. The British soldiers have been accused of raping women in areas they are situated and the Kenyan government has not done any investigations on these accusations nor demanded an explanation from the British government. This has angered the Muslim population, who see the government as not being concerned about their plight and wanting to please their Western allies.

After the terrorists attacks, Kenya's economy greatly suffered and more so the tourism sector in the Coast province. This was further worsened by the travel advisories that most countries issued warning that it was unsafe to travel to Kenya. The travel advisory warnings in the long run are having a negative effect since they not only slow down the recovery of the Kenyan economy and hence increase poverty levels, but they have also inflamed the anti-American sentiments. This is because since tourism is hurting mostly people at the Kenyan coast, which harbours a huge Muslim population, rising unemployment in this region is likely to be interpreted as an economic sanction by Americans. Most hotels at the coast have suffered massive loss of bookings and excess capacity resulting in massive lay offs.

The Kenya Tourism Board (KTB) in a study noted that before the US travel warning, tourist arrivals in 2003 were showing growth of 22 per cent against 2002. After the travel ban tourist arrivals fell by 42 per cent against the 2002 level of 23,196 in the period between May and December of each year. The overall effect of the US travel ban is that less that half the tourists that had been budgeted for visited Kenya in 2002.[177] Another study conducted by Ministry of Foreign Affairs in Kenya details the impact of the travel advisories on Kenyan tourism. The study estimates that the direct impact of the travel ban imposed by the UK government alone cost the economy UK£108 million. This is equivalent to 1.6 per cent of Kenya's national wealth. Apart from tourism sector, the horticultural industry lost UK£3.5 million as a result of being unable to export fresh produce due to flight cancellations and the expense associated with premium freight costs. The ban has also caused Kenya Wildlife Services (KWS)

[177] Wachira Nick, 'The horrifying result of US ban in Kenya,' *East African Standard,* March 16, 2004

to lose an estimated at nearly UK£7 million, which represents around 10 per cent of KWS's annual revenue.[178]

Thus, Kenya has suffered the effects of being surrounded by Somalia and Sudan, which have harboured terrorists. This has had an effect on Kenya in that terrorists could easily enter into Kenya and establish cells there. In addition, the high unemployment rate and misrule by the government as well as neglect of Muslim populated areas has all contributed to a crisis of identity and a search for authenticity among the Muslim population. Together with these is the ineffective security system that is not only inadequate in terms of personnel, underpaid and demoralised but is rife with corruption. These formed an environment for a breeding ground for terrorist cells to grow in the country and carry out terrorist activities.

4.5 Al-qaeda comes to town

On August 7, 1998 at 10.30am, the U.S. embassy in Kenya was bombed by terrorists leading to the death of 247 people including 12 Americans while over many others were injured.[179] The blast, which occurred at Ufundi Co-operative House between the American Embassy and Co-operative House, was heard miles around the city and blew glass windows and doors of buildings in a radius of several kilometres. Ufundi Co-operative House was completely flattened while Co-operative House, the American embassy and the adjoining buildings were severely damaged. Nearby vehicles were also extensively damaged and also some buildings had their roofs blown off or windows shattered.

Immediately, after the blast, rescue workers were mobilized from South Africa, Israel, France, Germany, Britain and the United States and frantically started searching for survivors. The area around the embassy was blocked off as a crime scene as FBI agents, Kenya Police, anti-terrorism specialists and explosive experts searched for forensic evidence. In addition, the U.S. sent a warning to all it embassies in the region and around the world to be on high alert. The U.S. increased its physical security at their embassies, missions and military facilities. At the same time, the then U.S.

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[178] ibid

[179] A similar blast went off almost simultaneously near the American embassy in Dar es Salaam, Tanzania leading to the death of 12 Tanzanians while 86 people were injured. No American was killed.

President Bill Clinton promised “to use all the means possible to bring those responsible to justice, no matter what or how long it takes.”[180] The Kenya police force erected roadblocks along major highways and checked all vehicles leaving the city, as it was alleged that four people suspected to be of Arab origin were spotted inside a yellow van parked in the vicinity of Cooperative House and the American embassy moments before the blast.[181]

A few hours after the bombing took place, a group calling itself the "Islamic Army for the Liberation of Holy Places" claimed credit for the attacks.[182] Though it was contentious about the existence of the group, two suspected Al-qaeda operatives arrested after the bombing mention the group in a home video made shortly before the bombing. In the video, the two men "celebrate their anticipated 'martyrdom' in a bombing operation against U.S. interests."[183] At the same time, Osama did not claim responsibility for the attacks, though he supported the action.[184] However, in its findings, the FBI was of a different view and put the blame of the attacks on Osama.

A week after the embassy bombings, police alleged they had arrested five people in connection with the bombing, with one of them having been arrested after the blast and the others were tracked down and arrested during the week.[185] The investigations were carried out in conjunction with the FBI who in a declassified executive summary of status and findings of their report concluded that sometime in 1993 to early 1994, individuals associated with al-Qaeda, began to locate to Kenya, specifically in Nairobi and Mombasa.[186] One of the first to relocate Wadih El-Hage, a Lebanese Christian by birth, who later became a naturalized American citizen and converted to Islam. Others included Fazul Abdullah Mohammed aka Harun Fazhl and Muhammed Sadiq Odeh aka Mohammed Sadiq Howaida. According to the FBI report, other people involved in the attack were Abdullah Ahmed Abdullah aka Saleh, Fahad Mohammed Ally aka

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180 ‘Clinton statement on U.S. embassy bombings in Africa’ in http://usinfo.state.gov/is/Archive_Index/Clinton_Statement_on_US_Embassy_Bombings_in_Africa.html

181 ‘Carnage! Scores dead as bomb blast rocks city,’ *Daily Nation,* August 7, 1998

182 ‘U.S. takes four embassy bombing suspects to trial’ in http://edition.cnn.com/LAW/trials.and.cases/case.files/0012/embassy.bombing/overview.html

183 ibid

184 ibid

185 Omari, Emman, ‘Five held over Embassy blast,’ *Daily Nation*, August 14, 1998

186 While the full report is still confidential, the executive summary has been declassified and the information used in this section emanates from that executive summary. The executive summary is available at www.pbs.org/wgbh/pages/frontline/shows/binladen/bombings/summary.html

Ally, Abdul Rahman, Mohammed Rashed Daoud Al-Owhali, and Jihad Mohammed Ali aka Azzam. Each person had a distinctive role in planning and excuting the bombing attacks. While Saleh is described in the report as the "mastermind" of the attacks, Odeh is an "explosives consultant" and trained architect. Ally was the owner of a pick-up truck subsequently believed to be used by Harun to lead the bomb delivery truck to the rear of the US Embassy in Nairobi. Rahman is described to be a bomb technician. The report notes that the suspected people were at one time or another associated with Kenya based non-governmental organizations (NGO's), ostensibly created for the purposes of humanitarian relief and aid work. At the same time, they were said to have set up other businesses in Kenya.

The FBI report records that initial planning of the attacks against the US embassy in Nairobi seems to have begun in spring 1998, when key Al-qaeda operatives settled in the country. In May 1998, Harun rented a house at Runda estate, an upscale residential neighborhood outside the center of Nairobi. The home was isolated by high walls that surrounded the property, making it nearly impossible for any person to observe activity in and around the house. Moreover, the gate driveway was large enough to accommodate trucks, as was the garage. The FBI believed that the bomb used to destroy the US Embassy at Nairobi may have been constructed and actually stored at this location.

Two vehicles were used to carry out the mission. The FBI report notes that in the first vehicle was Harun, while the second vehicle was a truck, containing the passenger Al-Owhali and Azzam as the driver. Al-Owhali was armed with a pistol and a number of homemade stun grenades and he was to "scare away" people in the vicinity of the embassy compound in order to allegedly reduce the number of potential Kenyan casualties. The FBI was of the view that Al-Owhali was also to manually detonate the bomb in the event that the detonation device malfunctioned. The report however notes that upon exiting the bomb delivery vehicle at the U.S. Embassy, Al-Owhali forgot his pistol in the truck and was left only with the stun grenades. Instead of returning to the bomb vehicle, Al-Owhali brandished a stun grenade before throwing it in the direction of a security guard and then fled the scene. At about the same time, Azzam who was the driver manually detonated the bomb and he is believed to have died at the spot. Al-Owhali was subsequently arrested and rendered to the United States on

August 27, 1998. Odeh was arrested by Kenyan police on August 14th, 1998 and rendered to the United States on August 28th, 1998.

The international community condemned the Embassy bombings, with U.N. Secretary General Kofi Annan terming the acts as "heartless terrorism."[187] On August 11 1998, the U.N. Security Council condemned the attacks as criminal acts and two days later, it passed and adopted resolution 1189 (1998) that called on upon "all states and international institutions to cooperate with and provide support and assistance to the ongoing investigations in Kenya, Tanzania and the United States to apprehend the perpetrators of these cowardly criminal acts and to bring them swiftly to justice."[188] The resolution also asked state parties to adopt, "in accordance with international law and as a matter of priority, effective and practical measures for security cooperation, for the prevention of such acts of terrorism, and for the prosecution and punishment of their perpetrators."[189]

In retaliation, the U.S. on August 20, 1998 bombed selected targets in Afghanistan and Sudan accusing them countries of harbouring and supporting Al-qaeda. In Afghanistan there were six targets and one of them was Aswa Kali al Batr base, South of Kabul, which according to the US had trained terrorists in 'hundreds if not thousands'. Clinton described the Afghan facility as "one of the most active terrorist bases in the world" and home to groups linked to Osama, while other targets were support complexes and training camps.[190] The target in Sudan was the El Shifa pharmaceutical plant in Khartoum, which the US claimed was producing chemicals used for VX nerve gas, a chemical and biological weapon.[191] The VX nerve gas kills by coming in contact with the skin or by being inhaled. A single drop will result in vomiting, involuntary defecation, convulsions, and a complete paralysis of the central nervous system that ends in death. From contact to death the time elapsed is about ten minutes.[192]

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[187] "Kofi Annan reacts to the U.S. Embassy bombings in Africa,' in www.un.org
[188] www.un.org
[189] ibid
[190] 'U.S. takes four embassy bombing suspects to trial' opcit
[191] Ibid; International Institute for strategic studies, *opcit* p.62
[192] http://www.thewednesdayreport.com/articles/research/weapons_of_mass_destruction-VX.htm

Though the US government stated that these targets were linked to Osama, there were doubts about his connection with the pharmaceutical plant in Sudan. The Sudanese government said the building was a privately owned pharmaceutical company that produced vital goods vital for the country.[193] However, this did not deter America from freezing the assets of the pharmaceuticals owner Salah Idris, accusing him of sponsoring Osama. Idris then sued the U.S. treasury and in a twist, his assets were unfrozen 18 months later and he was effectively cleared of any terrorism charges.[194] In addition, the U.S. government put up a reward of US$5 million for information leading to the arrest of eight suspects, including Osama.[195] Others with a price on their heads are Muhammad Atef,[196] Mustafa Mohammed Fadhil, Khalfan Khamis Mohamed, Ahmed Khalfan Ghailani,[197] Fahid Mohammed Ally, Sheikh Ahmed Salim Swedan and Haroun Fazi who were all suspects of the embassy attacks.

Kenyans were at first angry with the violence committed but also were of the view that they were being used as an arena between Americans and Islamic fundamentalists. Demonstrations were held in Nairobi city condemning the bombings, but the people also called upon the American government to take responsibility due to its foreign policy, which they said was breeding animosity and hatred among the Muslims hence the terrorist activities. Al-qaeda had struck Kenya when the country was experiencing political turmoil. The country had just come from its second multi-party elections that were mired by rigging, large scale political violence and international observers regarded them as not being free and fair. The opposition parties had lodged petitions in the high court challenging the election of President Daniel Moi but the bombings brought together politicians including President Moi and opposition parties together as they demonstrated against terrorism. The political anger that was prevalent then was turned against the terrorists.

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193 Ibid

194 Fiona Symon, 'Factory bombing: A matter of evidence,' http://news.bbc.co.uk/1/hi/world/africa/336375.stm. May 5, 1999.

195 'U.S. steps up the hunt for bombers,' *Daily Nation,* July 18 1999. The amount has been increased to US $25 million for any information leading to the arrest of Osama. The rest of the suspects still remain US $5 Million. For more information, see 'Most Wanted Terrorists,' in www.fbi.gov/mostwant/terrorist.htm

196 Atef was killed on October 2001 in the U.S. led 'war on terror' in Afghanistan.

197 Ghailani was arrested in Pakistan in late July 2004 and is now in U.S. custody.

The choice of carrying out the embassy attacks on August 7 has relevance. On that date in 1990, U.S. troops went into Saudi Arabia in response to the Iraqi invasion of Kuwait. This was an offensive to Osama and other fundamentalist followers of the Sunni school of Islam practiced in Saudi Arabia who viewed it as disgracing the holy Islamic cities of Mecca and Medina.[198] It is a fact that Osama refers to repeatedly when he says of the need to drive the "American enemy out of the holy land."[199] In addition, it is suspected that the bombings were in retaliation against the 1993 U.S. involvement in Somalia. On October 3, 1993, in an operation dubbed "Operation Restore Hope," about 100 U.S. soldiers and elite delta fighters were mobilized to round up fighting Somali warlords in an effort to help restore peace in the country. Instead of achieving its intended mission, American troops were set upon by an angry mob of armed Somalis, leading to the death of 18 U.S. marines and four of their bodies were dragged through the streets of Mogadishu. Three of the suspected Al-qaeda men indicted as taking part in the embassy bombings are accused of having trained some of the Somalis who led this assault.[200]

The bombings were not carried out without prior warning. On June 12, 1998, the U.S. state department warned that Osama was threatening "some type of terrorist action in the next several weeks."[201] The U.S. heightened security at several U.S. embassies but apparently, the Kenyan embassy was not considered a "high risk."[202] On August 4, 1998, three days before the attack, the Egyptian Islamic Jihad that is suspected to have ties with Al-qaeda, issued a statement threatening to retaliate against America for its involvement in rounding up three of its members helping Muslim forces fighting in Albania.[203] The warnings however were not seriously considered by American authorities hence the terrorists had an easy time to plan and execute the attack. More lives were to be lost four years later in another bomb attack at the Coast province.

4.6 The Kikambala bombing

On the morning of November 28, 2002, an explosive laden car drove into and detonated a bomb inside the Israeli owned Kikambala Paradise hotel in Mombasa

198 'U.S. takes four embassy bombing suspects to trial' opcit
199 ibid
200 ibid
201 ibid
202 ibid
203 ibid

killing 15 people and injuring 80 others. Among the dead were 12 Kenyans, three Israelis and three terrorists.[204] At the same time of the hotel bombing, another group of terrorists were firing two missiles at an Israeli plane carrying 260 Israel bound tourists as it took off from Mombasa's Moi international airport. The missiles, which were fired at Jomvu near the offices of the Zakhem Construction Company, and only 100 metres from a police booth narrowly missed their target.

Hours later, a group calling itself the 'Army of Palestine' claimed responsibility, saying it carried out the attacks to 'make the world hear once again the voice of Palestinian refugees, and to cast light on Zionist terrorists in the West Bank and Gaza'.[205] The attacks were also intended to mark the 55th anniversary of the UN resolution to partition Palestine, which occurred on November 29 1947 leading to the creation of the Israeli state.[206] The relation between the group and Al-qaeda has been discounted because there has been little proof of direct links between Palestinian groups and Al-qaeda.[207] This is because Palestinian groups have a nationalistic agenda and if they get antagonised with Osama's religious fundamentalism, they might lose their local focus and concentrate in Al-qaeda's global agenda.[208] At the same time, a group calling itself the 'Al-qaeda political office' posted on the internet a message claiming responsibility for the Kikambala bombing saying it was a Ramadhan present to the Palestinian people.[209] The group also boasted that 'at the same place where the Jewish crusader coalition was hit four years ago, here the fighters come back once again to strike heavily against that evil coalition. But this time it was against Jews.'[210] This was apparently in reference to the 1998 embassy bombings and America believes the statement from the Al-qaeda political office to be authentic.

To give more credence to the suspicion that Al-qaeda carried out the attacks, the pattern and mode of operations pointed to the group. The serial number of the missile launcher used in Mombasa was from the same batch used in 2002 in a failed Al-qaeda

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204 Officially, the terrorists were not counted among the dead though they perished in the blast.
205 'Army of Palestine Claims Responsibility' *The East African Standard* November 29, 2002. p.4
206 ibid
207 'CDI terrorism report: Al qaeda attempts to widen war,' December 6, 2002 in www.cdi.org/friendlyversion/printversion
208 ibid
209 'Alqaeda claims Kenya attacks on the Internet,' December 3, 2002 in http://www.abc.net.au/news/2002/12/item20021203104914_1.htm
210 ibid

attack on a U.S. warplane in Saudi Arabia.[211] Also, the organisation is known to carry out simultaneous attacks similar to the embassy bombings and the attack showed that Al-qaeda cells are still active in Mombasa. In addition, intelligence sources believe Somali militia Al ltihaad that is affiliated to Al-qaeda played a part in organising the Kikambala attacks.[212]

The Kikambala bombing opened a new frontier in international terrorism. It was the first time that Al-qaeda openly targeted Israelis and their interests even though Osama has always viewed Israel as an enemy, which he compares to the Crusaders who were eventually pushed out of the holy land by the Muslim warrior Saladin.[213] The attacks thus appear to be an answer to what has been termed as the "anger" in the Arab world that Israel had not been touched until the Kikambala bombing.[214] If this clearly marked the entry of Israel into the Al-qaeda targets and their first operation occurred in Kenya, it shows two distinctive features of country. One is that there are still active Al-qaeda cells in Kenya thus it partly acts as a terrorist hub and secondly, it is still an easy target for terrorists' activities.

The Israeli Mossad, the FBI and Kenya Police worked together to find the perpetrators of the attacks. Security was beefed up in all embassies, airports and international hotels while the Kenya police mounted roadblocks on major highways to inspect vehicles. The police were specifically looking for one of the two Pajero four wheel vehicles used to carry out the bombing. The first Pajero was a green one and driven by the terrorists who actually denoted the bomb and it was reduced to a shell at the hotel, while the other one was a white Pajero seen near the airport when the missiles were fired and they used it as a getaway vehicle.[215]

Reacting to the attacks, the then President Daniel Moi accused the international community of not helping Kenya in the fight against terrorism. Nevertheless, he said the country would continue with its fight against terrorism but warned that the country

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211 'CDI terrorism report: Al qaeda attempts to widen war,' opcit
212 ibid
213 ibid; for further information about the Crusaders see Lewis Benard, *Crisis of Islam: Holy War and Unholy Terror,* Weidenfeld & Nicolson, 2003
214 'Pro-US states are likely to suffer more attacks,' *People Daily* December 4, 2002
215 'Police arrest 19 in terrorist attack probe,' *Daily Nation* November 30, 2002

had done what it could "within her resources to combat terrorism."[216] The Council of Imams and Preachers in Kenya was of the view that the country was attacked for a second time because of its active campaign against terrorism. The council however called for extra measures to be put to end the attacks.[217] In addition, the Supreme Council of Kenya Muslims (SUPKEM)[218] condemned the bombing saying the perpetrators "were enemies of Islam and Muslims of Kenya."[219] Generally, Kenyans were angry that the country was once again an arena for terrorists' activity and were more concerned about the effect this would have on the economy since tourism is the biggest foreign exchange earner in Kenya. Before the bombing, the tourism industry was on an upward trend and the general feeling of the stakeholders had been to see a completely revamped industry after the 1997 politically instigated Likoni clashes.[220] The bombing attack consequently triggered panic and losses in the Kenyan tourist circuit with many tourists cancelling their bookings.[221]

A week after the bombing, police announced they had arrested 13 suspects. Two of them were being detained over the missile attacks, while another is said to be the owner of the car used in the suicide bombing at the hotel and claims to have sold the vehicle to two men of Arab origin. In the group of the other 10 people were at least 2 Somalis and six holders of Pakistani passports said to have been issued in Mogadishu even though Pakistan does not have a diplomatic mission in Somalia.[222] It also emerged that two of the three suicide bombers were fugitives linked to Al-qaeda who were also involved in the 1998 embassy bombings. They were named as Abdullah Ahmed Abdullah, who allegedly supervised Al-qaeda's operations in East Africa, and Faed Ali Sayam, a Kenyan.[223] Eventually, four men were charged with murdering 15 people during the bombing of Paradise Hotel. They are Aboud Rogo Mohammed,

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216 'President consoles victims,' *East African Standard* November 29, 2002
217 ibid
218 SUPKEM is the umbrella organization of the Muslim community.
219 www.islamonline.net/english/news/2002-11/29/article40.
220 In 1997, there broke political violence in Likoni, Coast province that pitted the local population against people who had settled in the area and were viewed as foreigners. The violence occurred before the second multi-party elections in 1997 and led to deaths of hundreds of people and destruction of property as well as the near death of the tourism industry. Since then, the industry has been struggling to regain its status. See Alamin Mazrui, *Kayas of Deprivation, Kayas of Blood: Violence, Ethnicity and the State in Coastal Kenya,* Kenya Human Rights Commission, 1997
221 'Hoteliers panic over bookings,' *East African Standard* Nov. 29, 2004
222 'CDI terrorism report: Al qaeda attempts to widen war,' opcit
223 'How Western security failure led to bombing,' *East African,* December 2, 2002

Mohammed Kubwa, Omar Said Omar and Swaleh Nabhan Mohammed and their case is still proceeding at the Nairobi high court.

Similar to the 1998 embassy bombings, the terrorists had given prior warning about the eminent attack. Leader of the London based Al Muhajiroun group that is affiliated to Al-qaeda said that a week before the bombing, Islamic fundamentalist groups had warned of an attack on Kenya through Internet chat rooms and e-mails and they mentioned Israelis.[224] Though the groups did not identify themselves, they said they were Islamic fighters who support Al-qaeda.[225] In addition, two weeks before the bombing, Germany and Australia had issued travel warnings to their citizens warning that they had intercepted information of terrorist threats to Mombasa. The information however was not specific on the timing, location or method of the possible attacks.[226] The Israeli and American governments though they had also the same information, they did not consider it as a potential threat to warrant issuing travel advisories.[227] In addition, the Kenyan intelligence was alerted about the intended attacks but they did not put up anti-terrorism measures to prevent the attacks.[228]

Kenya thus has for various reasons twice suffered the brunt of transnational terrorism leading to loss of many lives, injuries and destruction of property. Though Kenyans sympathised with the loss of innocent lives, they saw the problem as belonging to America and repeatedly passed that message in demonstrations against terrorism in the country. The government also accused the international community of leaving the country on its own to track down the terrorists with its meagre resources that could not achieve much. Thus, when terrorists hit America, it was time for it to take a role in Kenya's efforts to combat terrorism.

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224 'Army of Palestine claims responsibility,' *East African Standard,* November 29, 2002
225 ibid
226 'Police arrest 19 in terrorist attack probe,' *opcit*
227 'CDI terrorism report: Al qaeda attempts to widen war,' opcit
228 'How Western security failure led to bombing,' *opcit,*

Chapter five

September 11 attacks and the "war on terror."

The date September 11 has become synonymous with terrorism and Al-qaeda. This is because after the terrorist attacks in America, issues of terrorism moved to top the agenda of the world politics and it has remained so with the onset of the "war on terror." This "war" has had an impact on the promotion of fundamental human rights and implementation of legal standards worldwide and Kenya specifically.

This chapter analyses the attacks of September 11, 2001 and the events that followed the attacks. It starts by tracing how the attacks occurred and how the Bush administration reacted. Next, it interrogates the onset of the "war on terror" and the various guiding principles that inform the "war." It also analyses the efforts of the U.N. Security Council in regarding to the attacks and the various resolutions passed in response to September 11 that governments have used to develop anti-terror measures. Thereafter, the chapter analyses Kenya's reaction to September 11 attacks and the "war on terror."

5.1 Al-qaeda hits America

On September 11 2001 Al-qaeda operatives hijacked and flew aeroplanes into the Pentagon and World Trade Centre in Washington and New York cities. At 8.45 A.M., a hijacked passenger jet, American Airlines flight 11 out of Boston, Massachusetts, crashed into the north tower of the World Trade Center, tearing a gaping hole in the building and setting it on fire. 15 minutes later, a second hijacked airliner, United Airlines flight 175 from Boston, crashed into the south tower of the World Trade Center and exploded with the twin towers collapsing within 90 minutes. At 9.37 a.m. another flight slammed into the western side of the pentagon and 30 minutes later, a fourth airliner crashed in a field in Southern Pennsylvania and it is suspected it was headed to White house or United States Capitol. In the end, over 45,000 people died in the attacks and hundreds more were injured.

Suddenly, the whole world came to a near standstill as it was clear that America was under terrorist attack. A few minutes after the attack, America's President George

Bush addressed Americans to reassure them that the government was working to assist local authorities to save lives and to help the victims of these attacks.[229] He also promised that his government was going to hunt down and punish those responsible for the attacks saying all appropriate security precautions had been taken to protect the American people. At the same time, all American embassies around the world were placed on high alert status.[230] Within hours, the FBI launched what has become the biggest manhunt and investigation in U.S. history, with more than 4,000 FBI agents involved, with 3,000 support staff and more than 400 laboratory personnel.

On September 12, the U.N. Security Council met and unanimously adopted U.N. Security Council Resolution 1368 (2001) that condemned the terrorist attacks in the United States of America. Two weeks later, the Security Council passed Resolution 1378 (2001), which apart from condemning the terrorist attacks called on states to work together to bring justice to the perpetrators of the terrorist activities.[231] At the same time, the Security Council committed itself to take any necessary steps to combat all forms of terrorism in accordance with the charter.[232] The resolution also established a Committee Terrorism Committee (CTC) to monitor the resolution's implementation and called on all states to report on actions they had taken to that end no later than 90 days from the passing of the resolution.[233] The Security Council voiced its concern about the close connection between international terrorism and transnational organized crime, illicit drugs, money laundering and illegal movement of nuclear, chemical, biological and other deadly materials. Hence, it urged countries to enhance the coordination of national, sub-regional, regional and international efforts to strengthen a global response to that threat to international security.[234] The U.S. permanent representative to the Security Council at the time John Negroponte called the UN "a unique partner in troubled times" and the Resolution "the single

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[229] 'Remarks by President upon arrival at Barksdale Air force base,' in http://www.whitehouse.gov/news/releases/2001/09/20010911-1.html
[230] ibid
[231] http://www.un.org/News/Press/docs/2001/sc7158.doc.htm
[232] ibid
[233] By December 2002, the committee had received 175 reports from the 191 member states. By April 2003, only three states had not yet filed their reports.
[234] ibid

most powerful response in the war on terrorism."[235] This was because it globalised the war on terrorism by involving other U.N. member states.[236]

Confusion reigned as to who was responsible for the attacks even though the U.S. government suspected it was the work of Osama and Al-qaeda. Initially, the Palestinian group Democratic Front for the Liberation of Palestine took responsibility, but this was denied by a senior officer of the group soon after. Next in line to claim responsibility were Taliban of Afghanistan but the Taliban government denounced the attacks and claimed that it was not connected to Osama. Although Osama did not at first claimed responsibility, he praised the attacks but two months later, he admitted responsibility for the attacks saying the people who died were "not civilians" but were working for the American system.[237]

It also emerged that U.S. intelligence officials had several warnings that terrorists might attack inside the U.S. using airplanes. According to a report of a joint inquiry of the House and Senate intelligence committees, as early as 1994 the U.S. government had information that international terrorists were going to use airplanes to carry out terrorist attacks.[238] The report revealed that in 1998, U.S. officials received reports that Al-qaeda was trying to establish an operative cell in the United States and that Osama was attempting to recruit a group of five to seven young men from the United States to travel to the Middle East for training in conjunction with his plans to strike U.S. domestic targets. In the same year, U.S. intelligence officials received information that a group of unidentified Arabs planned to fly an explosives-laden airplane into the World Trade Centre but the Federal Aviation Administration (FAA) found the plot highly unlikely given the state of the terrorists originating country's aviation program.[239] The FAA also believed a flight originating outside the United States would be detected before it reached its target inside the country and consequently, the FBI took no action. Just a month before September 11, the CIA

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[235] Oudraat, Chantal de Jonge, 'Combating terrorism,' in *Washington quarterly,* Autumn 2003 Centre for Strategic and International Studies, pg 167
[236] ibid
[237] Bamber, David, 'Bin Laden: Yes I did it,' *Daily Telegraph,* November 11, 2001 in http://www.portal.telegraph.co.uk/news/main.jhtml?xml=/news/2001/11/11/wbin11.xml i.e
[238] 'Report cites warnings before 9/11,' September 19, 2002 in www.cnn.com/2002/allpolitics/09/18/intelligencehearings
[239] ibid

alerted the FAA warning of a possible hijacking "or an act of sabotage against a commercial airliner by Pakistanis based in South America.[240] Though the information was not clear on when or what Al-qaeda is going to strike, it shows that Osama started plotting the attacks as early as 1998.

5.2 Onset of the "war on terror"

On October 8th 2001, Bush launched a campaign to track Osama and followers of his Al-qaeda group, who were responsible for the attacks in what he called the "war on terror." In the speech, Bush declared Al-qaeda a criminal group, thus making it and its activities illegitimate. This is an important gesture since it justified any action the government was going to take against the illegitimate group and those who support it.[241] On the same day, America started bombing Afghanistan with an aim of toppling the ruling Taliban government, which supported Al-qaeda.[242] The Taliban government was finally ousted and in late 2001, major leaders from the Afghan opposition groups and diaspora met in Bonn, Germany, and agreed on a plan for the formulation of a new government. Hamid Karzai was eventually installed as the President on 22 December 2001.

In his *S*tate of the Union address in January 2002, President Bush declared that Iran, Iraq and North Korea were "rogue states" and alleged that the three countries were developing weapons of mass destruction. Bush feared that terrorists would use these chemical and biological weapons to attack other countries, more so American interests and hence measures had to be taken before the weapons got into the hands of terrorists.

After the Taliban government was toppled, Bush and his coalition of willing next vowed to oust government of Saddam Hussein which was suspected of having chemical and biological weapons and also being linked to Al-qaeda. Most countries however opposed this move urging them to first give the United Nations Monitoring, Verification and Inspection Commission (UNIMOVIC) time to inspect if Iraq still possessed the chemical and biological weapons. In addition, the coalition was asked

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[240] ibid

[241] Dekker Marcel (Eds) Introduction: *The Politics of Terrorism* Marcel Dekker Inc, 19830 pg 11

[242] Before it was ousted, the Taliban government was only recognized as a legitimate government by Pakistan, United Arab Emirates and Saudi Arabia.

to draft and present a resolution to the UN Security Council allowing it to carry out a military operation against Iraq. However, a resolution allowing America to attack Iraq was not passed after France threatened to veto it but America and the coalition of the willing went ahead with their plans of toppling Saddam.[243]

In situations that a government abuses in a large scale human rights of its citizens or in cases where there is clear threat of international peace, international law allows the U.N., a regional actor or a strong state to intervene in that country. Westphalia's principle of unconditional sovereignty has over the years changed after governments misused it to suppress political opposition and hence commit gross human rights violations. The international community thus has made sovereignty conditional on a myriad of qualifications, key among them respect of human rights and the U.N. charter has balanced both the idea of sovereignty and intervention.

Article 2(4) of the charter notes, "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.[244] Thus, it makes it clear that it prohibits the threat of force or aggression of any country against another. Nevertheless, there are two exceptions in this regard. First, the use of force can only be allowed when it has been authorised by the U.N. through the Security Council and secondly, when the use of force is in self-defense[245] for example when the U.S. bombed the pharmaceutical company in Sudan after the 1998 bombings, justified it as acts of self-defence. Article 39 empowers the Security Council to "determine if there is a threat to peace, breach of peace, or act of aggression." If it determines so, then it can authorise the use of force against the offending state under article 42. This was the basis for the toppling of the Taliban regime in Afghanistan after September 11 and hence the war had a basis under International law. Intially, the U.S. and its coalition of the willing started bombing Iraq without the consent and support of the U.N. saying Saddam was a threat to world peace since it was suspected he was possessing chemical and

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[243] On April 9, 2003 the regime of Saddam Hussein was toppled and he was later captured on December 14, 2003. Osama is still on the run.

[244] *Charter of the United Nations* 1945; see http://www.unhchr.ch/html/menu3/b/ch-chp1.htm

[245] Article 51 of the United Nations Charter, see http://www.unhchr.ch/html/menu3/b/ch-chp7.htm

biological weapons.[246] When the weapons could not be found, U.S. and its coalition said that Saddam was abusing Iraqis human rights and stiffling political oppostion hence they had a legitimate concern to install a democratic governmnet. This was done so that they could justify their actions of invading Iraq.

Richard Falk argues that intervention depends on geopolitics and a country will intervene when it stands to gain more than it loses after the change of regime.[247] This he warns is a dangerous indulgence likely to intensify conflict among states without really helping victims of human rights abuses.[248] The underside is that when the country falls outside the strategic interests, it is not likely to mount strong pressure for humanitarian intervention e.g. the U.S. and U.N. were very reluctant to intervene during the mid 1990's humanitarian disasters in Rwanda, Burundi and Congo since they were of little strategic importance.[249]

Events surrounding the "war on terror" have put in cross purpose the human rights discourse and this has had an implication for the advancement of human rights. In its quest to have partners in the war, America has allied with countries that have for long been accused by international human rights groups, U.N and even America in its State Department report for gross abuse of human rights e.g. Pakistan, Sudan and Saudi Arabia. These countries have thus continued to abuse rights but their activities are no longer under scrutiny as microscope of human rights has changed with the advent of "war on terror."[250] For example, Pakistan authorities in 2002 handed over more than 400 people to America without adequate human rights safeguards, in breach of domestic legislation regarding extradition and without determining the danger of torture or ill treatment from the Pakistanis.[251] In addition, America has showed little inclination to confront such governments as Russia, China, and Israel that used the

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[246] U.S. has managed to get support from the U.N. through taking draft resolutions to the Security Council urging it to take a decisive role in the reconstruction of Iraq. Consequently, the U.N. has become involved in Iraq after the toppling of Saddam.

[247] Falk, Richard, *Human Rights horizons: The pursuit of justice in a globalizing world,* Routledge, pg 44

[248] ibid

[249] ibid

[250] Roth, Kenneth, 'Human Rights, the Bush administration, and the fight against terrorism: The need for a positive approach," in www.hrw.org

[251] Amnesty International 'Counter-terrorism and human rights,' in *2003 Annual Report,* AI, http://web.amensty.org/report2003/focus2002

fight against terrorism to intensify repression aimed at separatist, dissident, or nationalist movements that were themselves often abusive.[252]

Secondly, despite America's declared policy of supporting human rights, Roth notes that the Bush administration in fighting terrorism refused to be bound by human rights standards.[253] This was seen when it rejected to apply the 1949 Geneva Conventions Relative to the Treatment of Prisoners of War for prisoners from the war in Afghanistan and at the same time it is trying the suspected terrorists in military commissions where they do not have access to independent lawyers and their trials are being held in secrecy.[254] According to the third Geneva Convention article 5, captured combatants are to be treated as prisoners of war until a "competent tribunal" determines otherwise. Hence, under the convention, the detainees who were former Taliban soldiers would almost qualify as POWs, while many of the detainees who were members of Al-qaeda probably would not. But the administration refused to bring any of the detainees before a tribunal and unilaterally asserted that none qualified as POWs.[255] However, the United States Supreme court later ruled that terrorist suspects held at Guantanamo bay must have access to the country's courts hence the suspects would get a chance to argue their cases.[256]

America treated the suspects as "enemy combatants," a concept applied to detainees regardless of the circumstances in which they were captured or taken into custody arguing that it was "at war" with Al-qaeda.[257] Thus, it meant that America could detain the "enemy combatants" until the "war" ended, which could be indefinite and without the rights afforded to prisoners of war or criminal suspects. As Roth notes, America fights the "war on terror" as if human rights were not a constraint and this willingness to compromise human rights to fight terrorism is not only counter-productive, but it also sets a dangerous precedent.[258] This is so because of the leadership role that the U.S. government has so often played in promoting human

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[252] Roth, Kenneth, *opcit*
[253] ibid
[254] ibid
[255] ibid
[256] 'A step towards freedom,' *Mail and Guardian* July 9-15 2004
[257] Amnesty International *opcit*
[258] Roth, Kenneth, *opcit*

rights other countries will be tempted to compromise rights in quest for national security, yet both of them are mutually reinforcing.[259]

President Bush and his coalition of the willing in his effort to combat terrorism have been guided by the 2002 National Security Strategy (NSS). One of the measures that the NSS advocates for is the doctrine of pre-emption, which has been a key feature of the "war on terror." As U.S. Secretary of State Collin Powell explains, the concept of pre-emption is explicit for obvious reasons. One reason was to reassure the American people that once the American government recognised a clear and present threat it uses its power to first strike it using military power or any other means at their disposal.[260] In the context of transnational terrorism, it means that America will not allow future attacks to happen again before they took action and this was the reason why they led the war to oust Iraq's Saddam Hussein since he not only celebrated September 11 attacks, but America suspected he supported Al-qaeda and had weapons of mass destruction. A second reason for including the notion of pre-emption in the NSS was to convey a message to terrorists and those who protect them, both state actors and non-state actors, to stop their activities. This, America hopes will create anxiety in terrorist groups thus increases the likelihood they will cease activity or make mistakes and be caught.[261] In the course of "war on terror," President Bush has repeatedly warned that countries harbouring terrorists to stop doing so and take measures that will stop terrorist activities. Hitherto, countries like Sudan that America termed as a rogue state and at one time gave Osama refuge have become American allies in the "war on terror".[262]

The NSS authorizes America to create a working partnership with other countries, which involves economic and political empowerment to make weak governments stronger so that they are not used as hubs for terrorism.[263] In addition this partnership involves the U.S. giving countries money to upgrade their intelligence facilities so that they can be able to detect terrorist cells in their respective countries before they

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[259] ibid

[260] Powell, Colin, 'A strategy of Partnerships,' in *Foreign Affairs,* Council on Foreign Relations, January/February 2004 Pg 24

[261] ibid

[262] Karl, Vick 'Sudan, newly helpful, remains wary of U.S.' *Washington Post* December 10, 2001 in www.washingtonpost.com

[263] Powell, Colin, *opcit*

attack. To accomplish this mission, emphasis is placed on international action by working with the willing, enabling the weak, persuading the reluctant, and compelling the willing.[264] As Powell notes, "the logic of this dual approach rests on the fact that terrorism threatens the world order itself -- and thus creates a common interest among all powers that value peace, prosperity, and the rule of law."[265]

Though calling upon other states to support it in the "war on terror," Kenya is going to be driven by several things so that it could undertake this initiative. It is going to evaluate the threat posed to it by terrorists, Kenya's relations with the U.S., any incentives U.S. offers for the co-operation, the domestic opinion and the enhanced counterterrorist measures on its domestic interests.[266] However, these may change with time and circumstances for example if Kenya is attacked again, it may be easier for parliament to pass the draft anti-terrorism bill.

However, Kenya has continued to be a key partner and lends high-level support in the global "war on terrorism." There has been ongoing law-enforcement cooperation and sharing of information between the United States and Kenya concerning suspected terrorists. Kenya also participates in the US Terrorist Interdiction Program and is a party to 11 of the 12 international counterterrorism conventions and protocols.[267] In the wake of September 11, America greatly increased its military support for Kenya since the country was identified as a strategic ally in the war against terrorism. Although it received no Foreign Military Financing (FMF)[268] from 1991 to 2001, in fiscal year 2002, $15 million was allocated to the Kenya. In fiscal year 2003, Kenya was granted $1.5 million in FMF and $600,000 in International Military Education and Training (IMET).[269] In the fiscal year 2004, Kenya was to receive $6.5 million in FMF, $600,000 in IMET and $8 million through the Emergency Support Fund (ESF).[270] In addition, Kenya is also to receive a portion of the $15 million designated

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264 'U.S. measures for combating terror,' *East African Standard,* July 14, 2003
265 Powell, Colin, *opcit* Pg 28
266 Pillar, A. Paul, 'counterterrorism after Al-qaeda,' *Washington Quarterly,* Centre for Strategic and International Studies. Summer 2004 pg 106
267 Ted Dagne '*Africa and the War on Terrorism'*, Washington: CRC Report for Congress, January 2002. p.8
268 The FMF provides countries with grants and loans to purchase U.S. produced arms, defense services and military training.
269 IMET is provided to foreign militaries to make them professional, effective and reflective of U.S. values. The use of IMET for fighting terrorism is a new focus.
270 Garcia, Victoria. 'Kenya: Responding to terrorism,' in www.cdi.org/kenya/friendlyversion

for a new regional counterterrorism program known as the African Contingency Operations Training and Assistance Program (ACOTA). This program, a modified version of the African Crisis Response Initiative (ACRI) that limited training to non-lethal peacekeeping, will now provide offensive training and equipment for peacekeeping operations.[271] This increased military funding complements the military training offered to Kenya soldiers by the U.S.

5.3 Kenya's reaction to September 11 and "war on terror"

Having being hit twice by Al-qaeda, Kenyans naturally were sympathetic to America but at the same time, there were voices that argued that it was time the U.S. directly suffered the brunt of terrorism. This was aptly captured by Consolata Wanjiru Mugo who felt that "it was time Americans got a taste of what Kenya went through and feel what it was like to be attacked by terrorists."[272] Kenya's President Daniel Moi condemned the September 11 attacks calling them "heinous and evil" but hours later the Ministry of Foreign Affairs released a statement calling for the creation of an independent Palestinian State.[273] This clearly meant that it saw the attacks as a political problem emanating from U.S. foreign policy in the Middle East as the statement called for an evaluation of America's role in the Middle East. At the same time, a task force was set up to assist Kenyans in getting information about their relatives in New York and Washington. Security was also heightened in major highways, international hotels and Embassies in Nairobi.[274] It is noteworthy that the Kenya government supported the U.S. led war in Afghanistan but it was at categorical that it could only support the Iraq war if it was sanctioned by the U.N. Security Council.[275]

In an opinion column, John Kamau was of the view that the September 11 attacks was due to America's foreign policy, which he says must pull its act together and "stop living in the ivory tower of politics, where it listens only to itself …time has come for

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[271] ibid
[272] Interview with Consolota Wanjiru. She was injured during the 1998 Embassy bombing.
[273] 'Kenya backs a free Palestine,' *Daily Nation* September 12, 2001
[274] ibid
[275] 'Kenyans read intimidation,' July 10, 2003 in http://www.news24.com/News24/South_Africa/Bush_in_Africa/0,6119,2-7-1505_1385447,00.html

it to sit down with its traditional archrivals and settle for peace."[276] It was the same message that the editorial of the *Daily Nation* was passing across when it said "almost all terrorist movements can be traced to real or perceived social injustices on the Palestinians."[277] The editorial continued to blame the Bush government for the bombings, whom it said, was made of "swashbuckling right-wingers" and asked it to reconsider its role in the Middle East. While sympathizing with Americans, Christian religious leaders asked the U.S. to restrain itself in seeking out the terrorists.[278] At the same time, politician Shariff Nassir, who had been calling for Mombasa to be ruled using *sharia* law, called on the American government to enter into dialogue with the rest of the world to curb acts of terrorism, saying terrorism should not be associated with any race or religion.[279]

Two days after America and its allies started the bombing Afghanistan, Kenyans including Muslims in Nairobi and Mombasa demonstrated against these actions. Demonstrations organised by Muslims occurred after their Friday prayers and the demonstrators were carrying pictures of Osama whom they termed a hero.[280] Demonstrators marched to President Daniel Moi's office and handed in a demand that the government condemns US and British "acts of terrorism and aggression against the innocent people of Afghanistan".[281] The demonstrations continued for several weeks into the Afghanistan war.

America's bombing of Iraq was met with the same protests as the Afghanistan case and the Kenya government was categorical that it would support America if the war was sanctioned through the U.N. Security Council and argued that "full scale war could have been avoided through dialogue." Kenyans once again protested through street demonstrations with the Muslim community being the most vocal as they were supporting their Muslim brothers who said the protest was "to support the fight to end all forms of injustices against the Iraqi people and to press for an end to the US

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[276] *Daily Nation,* September 18, 2001
[277] 'This terrorism demands counter offensive," *Daily Nation,* September 12, 2001
[278] 'Kenyans in plea for U.S. restraint,' *Daily Nation,* September 15, 2001
[279] ibid
[280] 'Anti war protest in Nairobi,' October 12, 2001 in www.news.bbc.co.uk/1/hi/world/africa
[281] ibid

occupation of Iraq."[282] Muslims were also of the view that since America had failed to prove to the world that Iraq has weapons of mass destruction, it must therefore be held accountable for the destruction and compensate all Iraqi families killed or injured as a result of the war.[283]

It has been noted that Kenya agitated for America and its coalition to engage in any military intervention through the U.N. The Kenyan government also viewed America's foreign policy in the Middle East as the cause of the September 11 terrorist attacks and it urged the U.S. to reconsider its foreign policy if terrorism was to be realistically tackled. That is why the government did not support America's military intervention in Iraq and Afghanistan despite Kenyans sympathizing with the victims of September 11 attacks. Nevertheless, as the "war on terror" progressed, the Kenya government started putting together measures aimed at combating terrorism in order to fulfil UN Security Council Resolution 1373 (2001). These efforts will be analysed in the next chapter.

[282] 'Worldwide protests against U.S. occupation of Iraq' in http:..islamonline.net/English/news/2003-04/12/article11.shtml
[283] ibid

Chapter six
The missing debate on the "war on terror."

6.1. Introduction

Striking the appropriate balance between combating terrorism and protecting human rights is the challenge facing governments in the world. While some governments have hurriedly enacted laws and other measures to curb terrorism, some of these actions have challenged the doctrine of human rights and caused some people to question if this is the end of human rights era.[284] Human rights organisations recognise the legitimate security concerns of States and their duty to protect citizens from terrorist acts. Nevertheless, the concern is whether this is being done while respecting human rights. In this regard, the U.N. in various resolutions and in the Charter has provided guidelines.

The U.N. General Assembly on December 18, 2002 adopted resolution 57/219 which specifically focuses on the need to protect human rights and fundamental freedoms while countering terrorism.[285] The resolution affirmed that states must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law. It stressed that non-derogable rights must be fully observed at all times, and that where states derogated from their other obligations, they must meet the strict requirements of international law. The resolution also asked the U.N. High Commissioner for human rights to monitor the protection of rights in the fight against terrorism and to make recommendations to governments and U.N. bodies. In addition, the U.N. secretary-general is to submit reports to both the U.N. Commission on human rights and the General Assembly on the implementation of the resolution.[286] A resolution with similar approach was adopted on April 25, 2003 by the Commission on human rights at its 59th session.[287]

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[284] Ignatieff, Michael 'Is the Human Rights era ending?' in *New York Times,* 5 February 2002
[285] 'In the name of counter-terrorism: Human rights abuses worldwide' in http://www.hrw.org/un/chr59/counter-terrorism-bck3.htm
[286] ibid
[287] E/CN.4/RES/2003/68

Kenya has been engaged in various ways of fighting terrorism. However, these efforts were initiated after the September 11 attacks, yet the country had first been attacked three years before then. The government has established the anti-terrorism police unit, increased vigilance across the borders and is corroborating with other international law enforcement agencies in combating terrorism. This has led to police swoops in the country in an effort to track down suspected terrorists. This chapter interrogates these efforts by the government in an effort to see how they have had an impact on the human rights situation in Kenya.

In this regard, it is noted that Kenya's bill of rights is enshrined in Chapter V of the Constitution and it aims to protect citizens' fundamental rights and freedoms. This is done by affirming both substantive and procedural rights, together with political and civil liberties. In addition, the Constitution is clear that its primary objectives are to establish constitutional structures which provide for individual freedoms and guarantees, while also giving the government power to implement fundamental reforms and social reconstruction. The rights as outlined in the bill of rights however are subject to limitations that ensure equal enjoyment of rights.

International human rights law has sought to strike a fair balance between legitimate national security concerns and the protection of fundamental human rights and freedoms. This balance is reflected in the International Covenant on Civil and Political Rights (ICCPR), which Kenya ratified and acceded to on May 1, 1972, and also the African Charter on Human and Peoples' Rights which she is a party. The ICCPR in article 4 recognizes that some rights can be derogated from in time of public emergency but at the same time, it outlines other rights that cannot be suspended under any circumstances. These are the right to life; freedom of thought, conscience and religion; freedom from torture and cruel, inhuman or degrading treatment or punishment, being held in servitude; in countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force when the crime was committed and the penalty can only be carried out pursuant to a final judgment rendered by a competent court. However, the African Charter does not allow derogation of rights as does the ICCPR. What it notes is that rights as outlined in the Charter shall be

exercised with due regard to the rights of other, collective security, morality and common interest.

Article 4 of the ICCPR notes that derogation from rights is only permitted in special circumstances and any measure taken must be of exceptional character, strictly limited in time and to the extent required by the emergency. Furthermore, the emergency situation and derogation is subject to regular review, consistent with other obligations under international law and must not discriminate any people in whichever way. In addition, the state is obliged to inform the U.N. Secretary-General of the provisions from which a state has derogated and the reasons for such derogation. The U.N. and African charters require that when such actions are taken they should be proportional to the emergency that a country faces.

This chapter discusses Kenya's measures of tackling terrorism against this background of derogation of rights outlined in the ICCPR and its bill of rights. To effectively do this, the chapter first gives a historical outline of the struggle for democracy and human rights in Kenya from Independence until present. Then it analyses the government's efforts of combating terrorism viz a viz the gains made in establishing a human rights culture in Kenya.

6.2 Short history of Kenya's road to democracy

Kenya gained independence on December 12, 1963 with Jomo Kenyatta as the first President and Oginga Odinga as the vice-president. Being a newly independent country, Kenyatta propagated the philosophy of nationalism, with agenda of fighting hunger, ignorance, and disease. It should be noted that the country's constitution was a multiparty one and apart from Kenya African National Union (KANU) which was the ruling party, the other parties were Kenya African Democratic Union (KADU) and the African People's Party (APP). In 1964, KADU, in which Daniel Arap Moi was the chairman, dissolved itself and crossed the floor to KANU and APP followed suit hence there was no opposition party in parliament. Moi was then appointed vice-president in 1967, a position he held until 1978 when he became President. He retired in 2002 and Mwai Kibaki became the third President of Kenya.

Okoth Ogendo argues that from their experience under colonialism, newly independent African governments had realised it was easy to control national institutions and convert national economy into personal interests. The independence constitutions were not geared to prevent this from happening and hence the new ruling elite had the power and will of 'legitimately' subverting the constitution.[288] In this regard, they politicised the Constitution and declared it a liability and subsequently converted it into a political instrument. One of the ways of doing this was extending the authority of the President to all offices in the Public Service including Constitutional ones like the Attorney General and Judges. A second manner was to subject the process of recruitment at all levels to strict party sponsorship and this in a way hastened the way towards a one party state. Thirdly, states used their power to derogate extensively from the bill of rights. This was done through weakening parliamentary role of being a watchdog over the executive to more of a 'rubber stamp.'[289] As a result, a rush to amend the constitution whenever a political crisis emerged became increasingly attractive and limitless. As seen later, all these facets are relevant to an analysis of Kenya's road to democracy.

During Kenyatta's reign, various constitutional amendments were made which had a negative impact on Constitutionalism, human rights and democracy in Kenya. A constitutional change in 1966 brought a preventive detention law, which allowed the government to detain persons or restrict their movements if the Minister of Home Affairs "is satisfied that it is necessary for the preservation of public security." Charges against such persons needed not to be revealed, nor are such persons guaranteed the right to communicate with lawyers or family members. There is no guaranteed recourse to the courts, and the length of detention is not limited by law.[290] Between 1966 and 1969, thirteen people were detained under this act, all of whom were associated with the Kenya Peoples Party (KPU), the opposition party led by the former vice president, Oginga Odinga.[291] Odinga had fallen out with Kenyatta and he formed the party but it was banned by the government hence the detention. This was

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[288] Ogendo, Okoth, 'Constitutions without constitutionalism: Reflections on an African paradox' in Issac Shijvi (Eds), *State and Constitutionalism: An African debate on democracy,* Southern Africa Political Economy Series, 1991 pg 11

[289] Ibid pg 12

[290] Bakari Mohamed, 'Kenyan Elections 2002: The end of Machiavellian politics?' Turkish Journal of International Relations, http://www.alternativesjournal.net/volume1/number4/bakari.htm

[291] ibid

despite the fact the Constitution guaranteed existence of other political parties except KANU. To curtail activities of KPU, the government pushed through parliament a constitutional amendment that made the post of vice president rotational in the eight provinces. Furthermore, another constitutional amendment was enacted that forced party defectors to seek fresh mandate from the electorate.[292] This created an uneven field for the opposition since the government owned the electoral machinery and could easily manipulate it.

In 1965 the constitution was amended to abolish the federal system of governance, ostensibly to unite all Kenyans. This effectively made Kenya a centrally governed country, and it was a matter of time before the leaders amassed central powers. In 1966, the Civil Service was put under the Ministry of the Office of the President, thus cutting of any political ambitions of civil servants. This was largely to curtail their involvement in opposition politics as they will be loyal to the government of the day, which is their employer. In 1975, a Constitutional amendment was passed, which gave powers to the President to pardon a politician for electoral malpractice. This amendment was passed to favour Paul Ngei, a politician who had been imprisoned with Kenyatta during the *Mau Mau* war for independence but had being barred from contesting elections for committing electoral offences. Consequently, Kenyatta pardoned him and he was allowed to run for 1975 elections.

During Kenyatta's reign, politicians who were deemed a threat to the Presidency were assassinated. First was Pio Gama Pinto, an Indian who was involved in the struggle for independence who was killed on February 24, 1965. In 1969, politician Tom Mboya was assassinated in the streets of Nairobi and in 1975, Josiah Kariuki was killed and his body found in a forest in the outskirts of Nairobi.

By the time he died in August 1978, Kenyatta's political realm was dominated by small elite from his Kikuyu tribe and specifically from Kiambu, his home district. This group undermined his nationalist and populist background, alienating other ethnic groups, as well as many non-conforming Kikuyus.[293] It ensured that the Kikuyu

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[292] ibid

[293] Adar G. Korwa and Issac Munyae, 'Human rights abuse in kenya under Daniel Arap Moi, 1978-2001,' *Africa Studies quarterly online journal,* in http://web.africa.ufl.edu/asq/v5/v5i1a1.htm

from the Kiambu district dominated the governmental bureaucracy in the civil service, the banking system, the parastatals and other corporations that the government had a stake[294] Daniel Arap Moi took over from Kenyatta, having served as vice-president from 1967.

After taking over the Presidency, Moi in December 1978 released all twenty-six political detainees most of whom had been languishing in jails for years. At the same time as Angelique notes, he also reassured Kenyans that the government would not condone drunkenness, tribalism, corruption, and smuggling, problems that already were deeply entrenched in Kenya.[295] Public officials accused of engaging in corruption resigned, a gesture that indicated dawn of a new era of adherence to accountability, democracy and human rights.[296]

However, this policy of good governance changed within a short time when Moi started consolidating his power and stifling dissidents. He popularised his philosophy of "love, peace and unity", that "later turned out to be a strategy geared toward the achievement of specific objectives, namely, the control of the state, the consolidation of power, the legitimization of his leadership, and the broadening of his political base and popular support."[297] In short, the philosophy had little respect of human rights and this marked the foundation for a dictatorship and innumerable human rights violations by his administration.

In 1982, Jaramogi Oginga Odinga and George Moseti Anyona sought to register a socialist opposition party. The government refused to register it and soon after this attempt, Constitution of Kenya Amendment Act, Number 7 of 1982, was brought to parliament that made Kenya a *de jure* one party state, effectively killing any active oppositional political activity or mobilisation. After making Kenya a one party state, Moi ultimately usurped other powers of the Judiciary and put other measures to ensure he retained total influence and power in the legislature. He did this by rewarding patronage and loyalty with cabinet posts, government jobs or contracts among other things. In addition, members of his Tugen tribe got a lot of jobs in the

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294 Bakari Mohamed, *opcit*
295 Haugerud, Angelique, *The culture of politics in modern Kenya,* Cambridge University Press, 1995 pg 82
296 Adar G. Korwa and Issac Munyae, *opcit*
297 ibid

government without merit. These actions did not go down well with some Kenyans and on August 1 1982 there was an attempted military coup by some junior Kenya Air Force officers in protest over the centralisation of power. Government forces crashed the coup but it only gave Moi a chance to consolidate his power in the executive, leading to over-bureaucratization of life and increasing marginalization of civil society.[298]

In his tenure, Moi managed to change the constitution to suit his own political needs; for example a few days after releasing all political detainees a bill was passed in parliament granting him all emergency powers. This was the first time for such a thing to happen in Kenya's post-independence history. Apart from this, detention laws which had been suspended in 1978 were reinstated through Act 14 of 1988, which allowed police to detain perceived and real opposition members for fourteen days without access to a lawyer. Other colonial era laws, like the Chief's Authority Act, the Public Order Act, the Preservation of Public Security Act, the Public Order Act, and the Penal Codes, that gave the President the right to suspend individual rights were retained in the constitution giving him unfettered powers. Furthermore, the Provincial Administration became operatives of ruling party KANU and they were used to review and clear party meetings throughout the country and to isolate dissenters. Since they got their powers from the President, it meant they now had the power to prevent an elected member of parliament from addressing his or her own constituents.[299] In addition, patronage and loyalty to the President became mandatory for one's political survival as well as promotion.

In 1986 parliament enacted Act No. 14 followed in 1988 by Act No.4, that imposed limitations on the independence of the judiciary and this had an effect on the protection of human rights in Kenya. These constitutional amendments provided for the removal of security of tenure of the Attorney General, the Controller and Auditor General, the judges of the High Court and the Court of Appeal. Thus, the President became the sole person to hire people to serve in the Judiciary and this consequently meant they owed him total loyalty. That parliament did not oppose these amendments,

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[298] Ogot. B. A. 'The politics of populism,' *Decolonisation and Independence in Kenya 1940-1993*, B.A. Ogot and W.R. Ochieng' (Eds), James Currey Publishers, 1995 pg 201

[299] ibid

it showed the influence that Moi had over the body. The result was that there were no checks and balances on the Presidency and as Korwa Adar et al notes, between 1964 to 1990, twenty-four constitutional amendments were enacted by parliament all intended to strengthen the presidency at the expense of civil rights.[300]

Any form of political agitation was not tolerated. Three years after assuming power, Moi had banned all ethnic based associations including workers unions like the Civil Servants Union and the Nairobi University Academic Staff Union (UASU). Over the years, many of the other organisations became affiliated to KANU for example Maendeleo Ya Wanawake Organization (MYWO), a national non-governmental organization for women officially changed its name to Kanu Maendeleo ya Wanawake organisation. Furthermore, the Central Organization of Trade Unions (COTU) which is the umbrella body for most of the trade unions in Kenya became an extension of the ruling party.

The next victim of democracy was free and fair elections. In 1986, the secret ballot voting system was replaced by the queue system where the electorate lined up behind their candidates. This system encouraged electoral rigging and intimidation of candidates as well as supporters. Many of the times, candidates who were loyal to Moi but received short queues were declared winners and there was little if any chance of appeal. This is because election disputes were often refereed to the President personally as the final judge since KANU was the only political party and Moi was the chairperson. Ultimately, there were no free and fair elections in Kenya until 1990 when the system was abolished.

The repression reached its peak in the 1980's after Moi had totally consolidated his power and detentions, torture, arbitrary arrests and police brutality became the order of the day. This was not so much unexpected since Moi perceived human rights "as alien and euro centric conceptions inconsistent with African values and culture…the pro-democracy and human rights as unpatriotic, disloyal, and ungrateful individuals influenced by what he called foreign masters.[301] The government started cracking

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[300] Adar G. Korwa and Issac Munyae, *opcit*

[301] Adar,G. Korwa, 'Human rights and academic freedom in Kenya's public universities: The case of the Universities Academic staff union,' *Human Rights Quarterly 21 (1) February 1999 pg 187* quoted in Adar G.

down on perceived and real dissidents, whom he accused of belonging to an illegal underground movement called *Mwakenya*.[302]

In his book *Kenya: A Prison Notebook*, Maina Kinyatti claims *Mwakenya* was formed in the 1970s.[303] He writes that originally it was referred to as the 'December Twelfth Movement', before it changed to *Mwakenya.* It also published and distributed *Mpatanishi* (bringing together/hold together) and *Pambana* (struggle) pamphlets that called for an end to the ruling of President Daniel Moi and KANU and restoration of multi-party democracy. These gave the government a justification to crackdown and prosecute its members since it was treasonous to make such statements. Suspects were rounded up, tortured and accused of various clandestine activities ranging from being members of *Mwakenya* to publishing and possessing the "illegal" *Mpatanishi* and *Pambana*. In most cases the suspects were taken to courts after working hours, charged and jailed, all in a day, and without an opportunity to seek legal representation. Jail terms ranged from 15 months to more than 12 years.

The crackdown was ruthless and it reached its peak in 1986 when a KANU Governing Council meeting under the Chairmanship of former President Moi condemned all those behind the "subversive" movement.[304] The meeting instructed branches countrywide to be vigilant in detecting the "dissidents" and accused the movement of aiming at "retarding development in the country" and gave the government "fullest " support in dealing with the menace. In the crackdown, university students, lecturers, journalists, hawkers among people from other professionals were arrested and tortured before being taken to court.[305] It should be noted that Moi used the same tactic when he denounced the February Eighteenth Movement (FEM) which he accused of planning attacks on Kenya to be launched from Uganda in the early 1990s.

Korwa and Issac Munyae, 'Human rights abuse in kenya under Daniel Arap Moi, 1978-2001,' *Africa Studies quarterly online journal,* in http://web.africa.ufl.edu/asq/v5/v5i1a1.htm

[302] Mwakenya is an acronym for *Muungano wa Wazalendo wa Kuikomboa Kenya*, which loosely translates to 'The progressive movement to liberate Kenya.'

[303] Kinyatti, Maina London, *Kenya: A Prison Notebook,* Vita books, 1996, 196

[304] Mburu Stephen, 'Govt reaction was harsh,' *Sunday Nation* March 12, 2000

[305] For a comprehensive account of *Mwakenya*, see *We lived to Tell: The Nyayo House Story* Citizens for Justice and Friedrich Ebert Stiftung 2003.

The repression did not end with political parties and politicians, but even clergymen who were critical of the authoritarian regime were not spared. Anglican Bishop Alexander Muge was killed in a mysterious car accident in 1990 when he dared a cabinet minister to curtail his movements in the country. When coming from a service at the cabinet minister's hometown, he had an accident and he died. Other clergy people like Timothy Njoya were routinely arrested for speaking out against the government.

Though the repression was supposed to silence the growing opposition, it had the opposite effect. In 1989, calls for the country to return to a multiparty State intensified. They were led by the Clergy whom the government had been unable to repress together with politicians, lawyers and activists who nevertheless were arrested, tortured, harassed and imprisoned. In 1990, for the first time, the international community took notice. However, it should be noted this was after the cold war and the communist regimes in Eastern Europe had collapsed. All along, U.S. and Western Europe had supported corrupt regimes all over Africa in their attempt to keep communism from the door. Kenya was an ally of the West in East Africa during the cold war since Tanzania had turned socialist under Julius Nyerere while Uganda under Obote adopted the People Charter which was a socialist one. Somalia was also led by socialist policies of Siad Barre as well as Ethiopia under Mengistu Haile Mariam. Thus, it was not hard for U.S. and other Western countries to overlook Kenya's violation of human rights since they wanted to keep the country free from communists.

Apart from the international community, other institutions like the World Bank also started urging for countries to embrace credible legal framework that ensured governments' accountability to the citizens and respect of human rights. In this regard, donors in 1990 froze aid to Kenya demanding the government be accountable for the human rights violations. The US Congress passed the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1991 that required the government to "charge and try or release all prisoners, including any persons detained for political reasons; cease any physical abuse or mistreatment of prisoners; restore the independence of the judiciary; and restore freedoms of expression." before it could

disburse $15 million in economic and military aid to the country.[306] The Scandinavian countries that were among the biggest donors to the country stepped up the pressure for good governance and this gave morale to the local human rights activists who engaged in civil disobedience.

In the end, Moi and KANU had to give in to the pressure. On December 1990, Section 2 (A) was repelled allowing the formation of other political parties, but Moi warned that this would lead to chaos. It should be noted that the 1990 Constitutional amendments was a process that was initiated by the Executive and the ruling elite. As Clive Napier argues, such a process is initiated from the centre due to pressures from below for change. Consequently, the President appoints a Commission to look into the grievances put forward and the body's recommendations are either accepted or rejected. In addition, constitutional conferences or referendum are not generally employed to legitimise the Constitutional amendments. In Kenya's case, Moi had appointed a KANU review committee to look into how KANU should be reformed. Many of the people who made submissions to the committee chaired by then Vice-President George Saitoti, did not want to be confined to suggesting ways to improve KANU and instead spoke out on how Kenya should be governed. Most of the fundamental demands from the citizens including the resignation of the government, introduction of a multiparty political system and a limited presidential tenure, were not noted adhered to by the state. Instead, the government conceded to ending the queuing system for general elections, stopping the expulsion of party members as a disciplinary measure and restoration of security tenure to sections of the judiciary and civil service. Although these concessions won praise from both the U.S. and Britain, Kenyans were not contented. Thereafter, KANU held a National delegates conference where Moi announced that Section 2 (a) should be scrapped despite opposition from other KANU members.

At the same time, these new constitutional dispensations that Kenya experienced at the time had an international outlook and were driven by three elements. One of them is that there arose a globalisation of political traditions that did away with authoritarian and one-party systems instead adopting multi-party mode of

[306] Adar G. Korwa and Issac Munyae *opcit*

government.[307] In this regard, democratic institutions like Constitutional courts, truth and reconciliation commissions and tribunals investigating gross human rights abuses were set up. Secondly, there developed an imperative for international human rights that was propagated by the international human rights movement; leading thirdly to particular national struggles that led to the creation and implementation of a new constitutional order based on human rights and rule of law.[308]

The first multi-party elections after the reintroduction of pluralism were set to be held on December 27 1992 and were characterised by politically instigated violence in Rift valley Province. This was viewed as a response to Moi's warning that Kenya would plunge into chaos if it reverted to multi-party politics. The same violence erupted before and after 1997 elections and spread to Nairobi and Coast Provinces. Various human rights groups that investigated the violence concluded that it was instigated by KANU to intimidate and disenfranchise opposition supporters. The reports implicated many KANU politicians for funding and starting the clashes but no one was arrested and charged for the violence.[309] The Kenya Human Rights Commission estimates that over 4,000 people were killed during the clashes and over 600,000 people displaced. It is noteworthy that even after the onset of multi-partism, detention, arbitrary arrests and torture continued since the laws authorising the actions were still in operation. The laws were especially used to intimidate and harass the opposition members of parliament and their supporters. KANU continued manipulating the Electoral Commission of Kenya and thus easily won the elections.

Another step towards realising democracy was realised before the 1997 general elections when the opposition and the church started calling for a review of the constitution. This was because it was clear that despite Kenya being a multiparty, KANU still used the same authoritarian laws to stifle political activity. In addition, the country was going to the second multiparty elections with an uneven playing field that was tilted in KANU's favour. Once again, civil disobedience was used to agitate for reforms and it was led by the now vibrant civil society and church. The donors and

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[307] Klug Heinz, *Constitution democracy: Law, Globalism and South Africa's Political Reconstruction,* Cambridge University Press, 2000, pg 2

[308] ibid

[309] For more information, see Human Rights Watch, *Playing with fire: Weapons proliferation and human rights in Kenya, HRW, 2002;* Republic of Kenya, *Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and other parts of Kenya,* Government of Kenya, 1993

international community also increased pressure on the government. In November 1997, a month before elections, the Preservation of Public Security Act, sections of the Penal Code dealing with sedition and treason, the Public Order Act, the Chiefs Authority Act, the Administration Police Act and the Societies Act were repealed in what was known as the IPPG reforms.[310] These reforms enabled greater freedom of assembly and association but this was largely on paper as police still used different reasons to disperse opposition meetings. One of the laws retained was that the police are authorized to stop and prevent the holding of a meeting if no notice has been given or if another meeting in the same venue presents clear or imminent dangers of the breach of peace or the public order. Since it was left to the police to determine the danger, when they want to disperse a meeting called by the opposition, they cite this provision of the law.

The period between 1998 and 2000 saw the government return to business as usual but the civil society and the opposition renewed their concerted efforts to put together a comprehensive constitutional review body that would not be controlled by the political centre. These efforts bore fruit with the enactment of the Constitution of Kenya amendment Act (2001) that created the Constitution of Kenya Review Commission (CKRC) which was mandated to come up with a new Kenyan constitution.

In 2002, Kenya held its first free and fair multi-party elections where the National Rainbow Coalition (NARC) won with a majority vote.[311] The political transition of 2002 represented an important opportunity for Kenya to improve human rights in the country since the new government was elected on a platform of good governance and accountability. While Moi and KANU demonstrated unwillingness to uphold the sanctity of human rights, the new government was wiling to adhere to respect the rule of law and human rights. For example, a few months after assuming office, President Mwai Kibaki appointed a committee to look into modalities of establishing a truth, justice and reconciliation commission to address the historical injustices in the country. At the same time, the government operationalised the Kenya National

[310] IPPG stands for Inter parties' parliamentary group, which is the body that negotiated the reforms. It was made of politicians from different political parties.
[311] NARC is a coalition of political parties that were mainly from the opposition. KANU lost power after ruling since 1963.

Commission on Human Rights, which guides the government in enacting sound policy on human rights.

In addition, Kenya has signed and ratified all the major international human rights treaties but it has not fulfilled its reporting obligations to international bodies. At the same time it has not yet domesticated all international covenants.[312] However, it is hoped that when the new constitution is enacted, it will secure the protection of all human rights.[313]

Thus, with the new government, it was a chance to consolidate the human rights gains and at the same time realise more of them. However, the measures that the government has enacted in tackling terrorism have had an implication in the protection of human rights and tend to roll back the gains already made.

6.3 Fighting terror or human rights?

a) Establishment of the anti-terrorism police unit

One of the things that the Kenyan government has done is to establish the anti-terrorism unit. The unit started operating in February 2004 and is a branch of the police force. Members of the unit are selected from serving police officers and only 'those who display exemplary acumen in investigations and anti-terrorism are considered.'[314] In addition, candidates have to do a month long special course on anti-terrorism. Those who do well are picked and taken for further training locally, at the CID Training School, and internationally in countries like Israel, Egypt, United States and also at an American base in Botswana.[315]

The anti-terrorism unit has been behind raids in areas suspected to have terrorist cells. The unit's head, Andrew Kabetu says that the continuing arrests and prosecution of suspects attests to their success of the squad in the "war against terror"[316] but suspects

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312 'Kenya's Unfinished democracy,' Human Rights Watch in http://www.hrw.org/reports/2002/kenya2/Kenya1202.htm

313 Currently, contentious issues in the new draft constitution are being debated especially the provisions to do with the Presidential powers.

314 Kinuthia Njoroge, 'Arm that responds to terror threats,' *East African Standard* February 26, 2004

315 ibid

316 ibid

who have been accuse the police of torturing them to extract information. At the same time, KHURINET has accused the unit of detaining and carrying out investigations in disregard of the law and respect of human rights.

b) Treatment of "terrorist" suspects

KHURINET observes that since the government started its campaign against terrorism, cases of torture, harassment, detention, intimidation and arbitrary arrest have increased. Though there are no statistics to prove this statement, the body argues that there has been an increase in reported cases of detention and torture from suspected terrorists. This is through reporting by the media or through fact-finding by their respective human rights organisations.

In a press statement dated 21 October 2003, KHURINET specifically notes that the security apparatus by design or not has been engaged in arresting people at the Coast or in the North-Eastern part of the country, where many people are Muslims. KHURINET notes that suspects are hooded after arrest, put into a fast moving vehicle, then to an aeroplane and flown to distant places for interrogation. In addition, they accuse police of intimidating the suspects, holding them incommunicado, torturing them and denying them access to their relatives and lawyers. These accusations have been given credence by the testimonies of suspects.

Abud Rogo Mohammed is one of the people charged with the 2002 Kikambala bombing.[317] He was arrested on April 2, 2003 and taken to Mombasa central police station but was then shifted to Port police station where he was booked but the occurrence book was written, 'not to be seen.' When the family enquired his whereabouts from Mombasa police station, the police said he had gone home to bring his passport and his identity card. He was booked at Port police station but at around 11.30p.m, he was put into a police vehicle which had armed police officers and camera. They then cocked their guns and told him that he has to tell them where a certain Abud Karim was. They then gave him a board written 'terrorist' and told him to hold it in front of his chest. He was then taken to Hadi police station in Karen

[317] He gave his statement to People Against Torture (PAT), an NGO that researches, monitors and does advocacy work on issues to do with torture.

where he was constantly threatened with death if he did not say the whereabouts of Abud Karim and for three days he was not given food.

After a few days, the officers came with three other plainclothes police who were introduced as FBI officers but in his statement, he says they had a Jewish accent. He refused to answer their questions and five days later, he was arraigned before Nairobi high court and charged with harbouring an unlawful person in Kenya. In court, it was the first time he was seeing his lawyer and family members since he was arrested and was released on a Kshs300,000 bond. However, he was immediately rearrested together with two other people - Mzee Kubwa and his son Councillor Mohamed - and later charged with murder, which according to Kenya's law is not bailable. Their case is still continuing but they are the only people who have been arrested and arraigned on court in terrorism related charges. It should be noted that murder charges were preferred since Kenya does not have a terrorism law.

The same scenario befell Akhmed Mohamed Surur who was arrested when going home from a mosque.[318] After being arrested, Surur was pushed into a police car and a black hood was put on his head and it was only removed when they arrived at a residential place and his fingerprints were taken. The days that followed were full of beatings and interrogation by people who he claims had an American accent. His interrogators accused him of being a member of al-qaeda. When he refused the charges he was subjected to more beatings and torture including being subjected to electric shocks. He refused to sign some papers they were giving him and this led to more electric shocks.[319] After three days, he was released and no charges were laid on him.

The above cases provide a scenario of what suspects are undergoing under the hands of police officers. Torture, intimidation and threats characterise the interrogation methods. Though Kabetu avers that the suspects get access to their families and lawyers[320] this has not been the case according to the suspects. They have to spend many days and most see their families when they are released from custody either by

[318] Interview with Surur in Nairobi, July 2004

[319] It should be noted that the Evidence Act was changed in Kenya such that any statement made by the suspect to the police cannot be used as evidence in the case. This was done to eradicate torture.

[320] Interview with Andrew Kabetu, Nairobi July 2004

the lawyers filing for *habeas corpus* in the court or being cleared after being tortured. As Beatrice avers, "most of the suspects are taken to courts when their lawyers intervene by obtaining a court order that calls upon the Police Commissioner to release the suspect or produce them in Court."[321] On keeping them long in custody more than the law allows, Kabetu is of the opinion that sometimes it takes time to interrogate suspects. However, this only serves to give police time and space to continually torture them. Furthermore, Kavetu noted that in cases where they have realised that they have arrested the wrong suspects, they have apologised to them. This however does not seem to be the case since no suspect interviewed talked about apologies from the police. In the case of Surur, the American embassy released a statement denying that the FBI were involved in torturing him saying they had no authority to carry out arrests in Kenya.[322]

While the aim of torture is to extract confessions, it should be noted that it flourishes is situations of impunity and secrecy. Thus, it is hard for suspects to prove that they were tortured or get to know who tortured them. The torture and illegal detention have brought forth memories of the one-party state when people were routinely tortured to confess to crimes that they did not commit. Many innocent people were jailed in this manner. At the same time, police are acting with impunity following the start of the fight against terrorism. All these have a negative implication of human rights in Kenya as the gains made since over the years are being rolled back. The detentions and torture are in contrary to the U.N. resolution that calls on States to uphold human rights while combating terrorism. In addition, the police are supposed to be accountable to the law and should be prosecuted when they torture and illegally detain people.

This culture of impunity, illegal arrests and detention is worrying the Muslim population that is living with fear of being arrested, confined and tortured. At the same time, the selective application of anti-terrorism measures has led to growth of Islam-phobia.

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[321] Interview with Beatrice Kamau, July 2004

[322] 'Terrorism fight: Unravel mystery of alien agents,' *People Daily,* December 5, 2003

c) Growth of Islam-phobia

It is noted that the operations of police swoops and arrests have only targeted Muslim populated areas. While it can be argued that Al-qaeda operatives will operate well in areas where there is a huge Muslim population, this only seeks to discriminate against the Muslim population. However, it also shows the influence of America's "war on terror" since as Makau notes, the "war" is mainly focused on certain Islamic traditions.[323] These actions have led to growth of xenophobia especially to people with Arabic features or attire. For example, a tourist to Nairobi from Dubai had gone to book a room at Panafric hotel, which is owned by an Israeli and is situated behind the Israeli embassy. The attendants refused to book him and called police on suspicion of being a terrorist since he was wearing a Muslim robe and had Arabic features. He was arrested and held in secret for seven days and when the police could not find any evidence linking him to terrorism, he was deported back to his country.[324]

In addition, some of the questions asked by the interrogators point that Islamic members are being targeted. Most of the suspects say they are asked by interrogators why they wear Muslim robes, the Islamic caps and why they grow long beards. Others are asked why they chose to help *Madrassas (*Muslim schools) and where they get their funding from.[325] These actions discriminate against the Muslim population and are against the U.N. charter that calls for States to carry out anti-terrorism measures without discriminating against minorities.

That the Muslims feel being discriminated upon has led to them being suspicious of any assistance, especially from Western countries. In February 2004, Muslims refused an offer by the American government to fund Islamic religious schools (Madrassas) in Kenya.[326] Muslim leaders expressed fears that the initiative could be a ploy by the US intelligence to manipulate the curriculum in the schools as part of its international anti-terrorist campaign.[327] It later emerged that the Ministry of Education had issued a directive requiring all *madrassas* in Kenya to be counted and to disclose their source

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[323] Mutua, Makau, *opcit*

[324] Interview with Commissioner Al Haj Ahmed I. Hassan, a practising lawyer and a Commissioner of the Constitution of Kenya Review Commission.

[325] Mango, Caroline, 'Muslims insist terror bill is aimed at them,' *East African Standard* July 14, 2003

[326] Mayoyo, Patrick, 'Kenya Muslims say No to US school funds,' *East African,* February 23, 2004

[327] ibid; the funding is part of U.S. initiative of trying to win the Muslim support in the "war on terrorism" and it has also been carried out in Pakistan, Afghanistan and Saudi Arabia.

of funding. Muslims were suspicious of this directive since it was not applied to other institutions that were allied to religious organisations like the Catholic Church or Anglican. Furthermore, they suspected that the interest was based on suspicions that terrorist organisations had infiltrated religious schools on the Coast. Their argument was that the *madrassas* were being funded by NGOs that the Kenya government had banned for being suspected of terrorism links and called for them to be unbanned. As the next section discusses, the banning of NGOs has implications for advancement of human rights in Kenya.

d) Banning of NGO's

The Civil Society has played a big role in the quest for democracy and human rights in Kenya. As discussed earlier, it was through its mobilisation efforts and agitation for rights that the government started respecting human rights of Kenyans. NGO's in Kenya are registered by the NGO coordination board, which was formed by the NGO co-ordination Act, 1990. Apart from getting their legitimacy from the people they serve, NGO's are protected by the right of association enshrined in the Constitution. During the one-party era, most of the NGO's that the government deemed as a threat were deregistered e.g. CLARION, was deregistered and accused of disseminating material of a political character.[328] In the wake of Kenya's anti-terrorism efforts, Muslim NGO's have been deregistered for suspicion of being linked to terrorist groups.

In a letter to the diplomatic corps, the Supreme Council of Kenya and Council of Imam and Preachers raised concerns that Muslim NGO's have been closed down yet they were providing humanitarian Aid in the Northern Province. The closures they say are done through various ways for example intimidation, threats of closure or asking them to expose their sources of funding.

On September 1998, a month after the terrorist bombing of the U.S. Embassy in Nairobi, the NGO co-ordination board deregistered five Muslim NGO's for allegedly supporting terrorism. The board did neither detail the charges or give the NGO's a

[328] CLARION had published a book on corruption in Kenya accusing the government of abetting the vice.

chance to defend themselves.[329] Many Muslims severely criticized the closures and sought redress from the high court, which stayed the board's decision. However, three NGO's appealed against the ruling and in December 1998 they were reinstated.

Another banned organisation is *Al-Haramain*, which according to Kenyan Muslim leaders was supporting orphans and destitute children at Dadaab, Ifo Dagahle and Hagardeera camps.[330] However, the US Treasury Department says the *Al Haramain* Islamic Foundation's branches in Tanzania, Indonesia, Pakistan and Kenya are used to provide financial, material and logistical support to Osama as well as other suspected terrorist organisations.[331] The Kenya government also banned *Al-Muntada Al-Islami*, which had been funding several *madrassas* and health facilities in the country. Its Sudanese director, Sheikh Muawiya Hussein, was deported in January after the government questioned his status. The World Assembly of Muslim Youth has been having offices in Nairobi since the 1970's was also banned. Others are *AI-Ibrahim* foundation and the *Wakalatul-Rahmah* offices in Nairobi. The *AI-Najah* Islamic Centre in Garissa town with its headquarters in Qatar is also on the verge of closure since it has not been able to remit the centre's sponsorship funds due to US pressure to investigate its possible terrorism links.

While financing terrorism is an issue that requires concerted efforts to arrest, the banning of NGO's only seeks a short term solution and it is discrimination when it targets only those ran by a particular religious group. The concern is that the Kenya government may be tempted to ban NGO's that it deems are a threat to the system for example in 1998, the government issued a circular indicated that NGOs sponsoring civic education are a threat to the security of the state and their activities must be curtailed. The fear is that the same could happen particularly in the light of the anti-terror laws, where the government could say some NGO's are linked to terrorists yet they were just calling on the government to be accountable to the people. In order to preserve the freedom of association and the place of civil society in democracy, the government should enact money laundering laws that will effectively expose where

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329 U.S. State department, *Annual Report on international Religious Freedom for 1999,* http://www.cesnur.org/testi/irf/irf_kenya99.html.

330 Mayoyo, Patrick *opcit*

331 ibid; The Tanzanian branch of the NGO was shut down after its director Abu HUbheyifa and an official. Ally Saleh Al-Asaad were deported for lying on their citizenship applications.

the terrorist finances are going instead of banning the NGO's. This ensures that the rule of law takes place and the NGO's are subjected to a hearing before a court of law.

6.4 Postscript

As earlier noted, Kenya's transition on December 2002 presented one of the best opportunities for Kenya to improve human rights in the country since the new government was elected on a platform of good governance and accountability. Despite NARC's willingness to uphold the sanctity of human rights, its actions as discussed above have served to take the country steps backward in its quest for full realisation of democracy in Kenya and growth of human rights.

Several reasons can explain this. To start with, while enacting the anti-terror measures, Kenya was following the provisions of UN Security Resolution 1375 (2001) that called upon member states to take any necessary steps to combat all forms of terrorism. This resolution should be seen in accordance with the U.N. General Assembly resolution 57/219 which specifically focuses on the need to protect human rights and fundamental freedoms while countering terrorism. Thus, Kenya is obliged to observe human rights while countering terrorism but this has not been the case. This can be due to the fact that the country is being influenced by the international political culture, which is shaping the "war on terror." Some countries have been abrogating from their human rights responsibilities while fighting terrorism and Kenya can be said to be emulating them. This is because there are no sanctions of retributions that they are suffering by doing this.

At the same time, the International "war on terror" seems to be focused on the Muslim communities. Most of the international arrests of terrorism suspects have been Muslims and the fact that all of those who committed the attacks of September 11 are Muslims attests to the notion that Muslims are the ones engaged in international terrorism. In this respect Kenya has not engaged in enacting countrywide measures that arrest terrorism, but it has concentrated its efforts in Muslim dominated areas. Police swoops and arrests have been carried out in Muslim areas and the NGO's banned have been the ones ran by Muslims. This clearly shows the international influence of the "war on terror" on Kenya as it has served to target Muslims and Kenya likewise does so.

It is thus clear that Kenya's effort to address terrorism threaten the very foundation of democracy in Kenya, namely the preservation of human rights and the rule of law. In addition, counter-terrorism measures targeting specific ethnic or religious groups are contrary to human rights and would carry the additional risk of an upsurge of discrimination. The same scenario emerges with an analysis of Kenya's draft anti-terror bill, the *Suppression of Terrorism bill 2003.*

Chapter seven

The draft *Suppression of Terrorism bill 2003*

The September 11 attacks and the "war on terror" have had an impact on the promotion and implementation of international legal standards including international humanitarian law and the fundamental instruments of human rights and refugee law. When a state has been attacked by terrorists, it has a right to prevent further attacks and its primary duty is to safeguard national interests. This is especially so when the terrorists are beyond the reach of its national jurisdiction and one of the ways to do this is to enact anti-terror legislation.

International law allows the suspension of certain rights in times of emergencies. Article 4 of the International Covenant on Civil and Political Rights (ICCPR) provides that a State in situations threatening the life of a nation, may issue formal declaration suspending certain human rights guarantees. However, scholars have argued that most governments in times of emergencies like terrorist attacks have hurriedly moved to enact anti-terror legislations, which override both established process and rational action thus having a negative effect on the vulnerable and disenchanting sections of society.[332] In addition, Derep notes that some governments abuse this prerogative through continuous invocations of "special powers" to pass "national security" legislations providing for administrative detention with limited, if any, judicial review thus making them part of criminal law.[333]

This chapter analyses Kenya's draft *Suppression of terrorism bill 2003* as legislation arising from emergency conditions that have been created by terrorist activities of September 11. To do this, the chapter traces the place of law in society and the various mechanisms of creating a viable law. Furthermore, it interrogates various notions of power that are manifested in society and how the law regulates and formalises them. It then proceeds to interrogate the contentious provisions in the draft bill and analyses how they impact on the human rights situation in Kenya.

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[332] Thomas A. Phillip 'Emergency and Anti-terrorist powers' in *Fordham International Law Journal* Vol 26, 2003 pg 193

[333] Jinks, Derep, 'The anatomy of an institutionalized emergency: preventive detention and personal liberty in India,' *Michigan Journal of International Law,* Winter 2001 pg 359

7.1 Law as an arena for struggle

Law is an arena for contestation as well as a social phenomenon and a part of life that permeates all realms of social behaviour.[334] Since the early times, law has been used in society to regulate behaviour and ensure good co-existence of members in a society. Therefore, law grows out of societal mores and shades into them but it acquires a higher pedestal than mores since it is backed by the state.[335] However, law most of the times tries to limit these mores and bring it into direct conflict with the people's interests and as it will be discussed later, Kenya's anti-terror draft bill is in direct conflict with the rights of people by trying to limit operations of their lives. Thus, in assessing the role of law in society it should be noted that it is a product of social and cultural contestation that is subject to various kinds of interpretation and manipulation.

Early Marxist theories stressed that law is a device for repression and "its importance is as an agency of direct class power, controlled by or acting on behalf of the dominant class."[336] Thus, they viewed law as a tool of coercion and ideological domination where it is used to protect the private property of capitalists. The thrust of the Marxist arguments is that law is made by the ruling class whose ideas dominate them and the courts and judges are elites. As such, they will tend to perpetuate the ideas of the ruling class over the rest of the people and continue dominating them. In order to cover up the domination, the courts offer small victories to the dominated people so that they can feel they are a part of the system. However, this notion has been challenged since law provides the avenue for protecting private property by criminalising attacks on them, thus defending the interests of the existing order. Furthermore, a capitalist system cannot be maintained through repression and coercion alone.[337] At the same time, law provides a legitimate ground of which workers can mobilise and associate through trade unions and other labour organisations where they can agitate for their rights. If there was no law, these

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[334] Cotterrel, Roger *opcit* pg 1-2
[335] ibid pg 19
[336] ibid pg 109
[337] Van Huysteen, *The Constitutional Court, Human Rights and Democracy in South Africa: A sociological analysis*, University of Witwatersrand, PHD Thesis, 2003 pg 51

grounds of legitimacy would be lacking. Hence, law is a battle ground where different class struggles take place and legitimise the actions of the oppressed when they rally against the ruling class demanding their rights. In essence, the law affects all the facets of the workers lives and does not just serve as a source of domination.

Since law is a point of contestation, it is clear that sound legal doctrine emerges from the social action, disputes and political conflict involving the people. Therefore, the law written at any one time "is no more than a static representation of a process which is always continuing…and it acquires meaning and significance only in relation to the social conditions in which it is developed, interpreted and applied."[338] In addition, the government before formulating a new law should carry out a preliminary survey of the social setting and communicate to people why there is a need for new legislation.[339] This will make the entire process be legitimate and ensure there are no handles in implementation.

At the same time it should be borne in mind that law is both an expression of power relations and an important mechanism for formulating and regulating such relations.[340] When people need to exercise their power, they depend upon the law and legal structures to organise and provide the avenue. These structures are borne out of political and social struggles and thus can be used to challenge and sustain power relations for example the Constitutional courts. Due to the law's ability to exercise its own power by regulating relations and legitimising the actions of various actors, it has two distinct features: it serves as a source of domination and also it provides possibilities where the domination can be challenged. As such, the concern therefore should not be that law is shaped and serves the elite but also is an instrument for organisation and extension of power relations.[341] This is due to the fact that law protects the powerless by directing the power over them into relatively predictable forms.[342] Nevertheless, the question of how power is possessed and consequently exercised has been a point of contestation.

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[338] Cotterrel, Roger, *opcit*, pg 42
[339] ibid pg 63
[340] ibid pg 74
[341] ibid pg 113
[342] ibid 114

7.2 Law and contestation of power

According to Thomas Hobbes, power is static and is derived from an authority that reserves the right to exercise it.[343] Writing after the England civil war, Hobbes argued that the Monarch had the power to restore order in the country. In this regard, he was of the view that the State is always right, as long as it is capable of maintaining civil peace. Furthermore, Hobbes saw law as being dependent on power. Thus, a law without a credible and powerful authority behind ,it is just simply not a law in any meaningful sense. In essence, he propagated the notion of legal positivism, which means that justice is whatever the law says it is.[344]

Marx Weber, holds the view that power is when one person has the capacity to carry out his own will against the wishes of the other for example *person A* has power over *person B*. this notion of power has been called the distributive approach to power since it assumes the gaining of *person's A* power leads to the decrease of *person's B* power. In contrast, Talcott Parsons conceives power as a property of social systems. He views power in terms of casual effect on social agency but notes that the origin of the effect is not another social agency, but rather a social subsystem. According to Parson's view of power, it "is a specific mechanism operating to bring about the changes in the action of other units, individual or collective, in the process of social interaction."[345] In order for the system to work, it is assumed that social systems are open, and engaged in continual interchange of inputs and outputs with their environments. Moreover, the different internal subcomponents are also continually involved in processes of interchange.[346] Thus, power is divided and allocated along the subsystems, and it is a collective feature. This means that *person A* and *B* may co-operate and enhance their power over *person C*. The distributive and collective forms of power though are important dimensions of phenomena of power they are not the only ones.

Stephen Luke holds that social actors shape the actions and wants of other people and these actors act according to structurally determined limits. However, it should be

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[343] Hobbes Thomas, *Leviathan,* Penguin, 1986 pg 218
[344] 'Thomas Hobbes: 1588 – 1679' in http://cepa.newschool.edu/het/profiles/hobbes.htm
[345] Torfing, Jacob, *New theories of discourse: Laclau, Mouffe and Zizek,* Blackwell publishers, 1999 pg 160
[346] Talcott Parsons, *The System of Modern Societies.* Prentice-Hall, 1971, pp. 4-8 in http://www2.pfeiffer.edu/~lridener/courses/PARSONS2.HTML

borne that the actors have relative autonomy in the sense that they could have always acted differently.[347] This means that even though the structure will determine how a person wields power, he has the option of changing this and thus Luke privileged the agency over the structure. Luke also argues that contestation of power takes place not only in overt and covert conflicts, but also in latent conflicts, which he calls the third force of power.[348]

In the overt conflict, it involves making decisions over issues where different individuals or groups express different policy preferences and as such, there is direct conflict among the people. For example, when the government proposes a law, it may be contentious and the people may protest against it. However, the government may take it to Parliament and coerce members of parliament to pass it and this way, power lies with the government. The covert or non-decision making conflict of power involves using power to prevent certain decisions or discussions from being made. Using the same example of a government, it may not draft a particular bill arguing that it wants the citizens to publicly debate whether there is need to legislate over the issue or not. Hence, it makes the public feel that they are being involved with the running of the country yet the government is using its power not to draw up the bill, which might threaten its own interests. The conflict thus is hidden by those in power and hence to understand it, interests and issues have to be identified that either gain or are systematically excluded from the political agendas.

The latent conflict of power occurs when potential issues are kept out of politics, whether through the operation of social forces and institutional practices or through individual decisions. This conflict mostly occurs in disempowered communities where the people have been oppressed for a long time such that they do not have any sense of making demands or resisting. Thus, these people are empowered and start resisting oppression and start demanding the government to rightfully cater for their needs. Through empowerment, the people thus are able to invoke the rights language that will enable the authorities to note their demands and act upon them. It is noted that the overt and covert conflicts are a direct consequence of grievances, but in the case of latent conflict there are no articulated grievances and the people are just

[347] Luke, Stephen, *opcit* pg 160
[348] ibid pg 24

empowered, they become aware of their true interests and hence the notion of third force. This idea of power falls within Foucault's arguments that power is not individually possessed but exercised through small proportions and can be analysed from bottom-up.[349] Thus, power strategies are guided by a series of aims and objectives, which cannot be mastered by an individual subject.[350] That is why during emergencies, the state can use its power to suspend certain rights but at the same time, the citizens can challenge this through mobilisation and agitation for their rights. This kind of power shows that power is not vested in one place and is exercised by micro-structures, leading to small instances of resistances of subordination.

The next section interrogates Kenya's draft S*uppression of terrorism bill 2003* employing Foucault's notion of power and as well noting that law is a point of contestation. It observes that even though law can be used to acquire human rights, it can also be used to deprive the same rights and hence it is an arena of struggle over power. However, through contestation and agitation for human rights at the local levels, society can achieve the desired change that is not being guaranteed by the law. This is so because human beings are not just victims of an ever-expanding power, but can also exercise power in their own way and the concept of agitation for human rights is a measure of doing so. This entails embracing the idea of law as an arena of struggle over power and the agitation of rights is a reason in this regard.

7.3 Exegesis of the bill

Kenya's Attorney General Amos Wako on April 30, 2003 published in the *Kenya Gazette* the *draft Suppression of terrorism bill, 2003.* The bill is set to introduce an Act of parliament to provide measures for the detection and prevention of terrorist activities; to amend the extradition (Commonwealth Countries) Act and the extradition (Contiguous and Foreign Countries) Act; and for related purposes.[351] The draft bill was in line with fulfilling the requirements of U.N. Security Council Resolution 1373 (2001) that called upon member states to take any necessary steps to

[349]McGowen, Randall, 'Power and humanity or Foucault among the historians,' in Roy Porter and Colin Jones (eds), *Reassessing Foucault: Power, medicine and the body,* Routledge, 1994 pg 96
[350] Torfig, Jacob, *opcit*, pg 163
[351] The Suppression of Terrorism Bill, 2003,' *Kenya Gazette Supplement No. 38 (bills No. 15) No. 38 (bills No. 15)*

combat all forms of terrorism in accordance with the charter.[352] However, it should be noted that the government drafted the bill without consulting relevant organisations like human rights groups. The Law Society of Kenya (LSK)[353] and Kenya Human Rights Network (KHURINET)[354] immediately after the draft bill was published faulted the government that it did not consult them or any other concerned parties while drafting the bill yet this was the expected practice.

a) Problem of definition

In trying to define terrorism, the draft *Suppression of terrorism bill 2003*, provides a general and narrow definition of 'terrorism' and what constitutes 'acts of terrorism.' Section 3(1) of the bill states that,

> *"terrorism" means the use or threat of action where …action used or threatened involves serious violence against a person; involves serious damage to property; endangers the life of any person other than the one committing the action; creates a serious risk to the health or safety of the public or a section of the public.*

The draft bill does not define what constitutes an "act" of terrorism or a threat of terrorism, leaving it to law enforcement agencies and the State to decide what an "act" or "threat" of terrorism entails. At the same time, Section 3(1) (a) of the draft bill takes ordinary criminal acts of assault, damage to property (malicious or otherwise), public health, and criminal trespass and classifies them as "terrorism" hence a person who has maliciously damaged property can be imprisoned for life when charged under this law.

Sections 3 (1) (b) and (c) of the draft bill further defines terrorism as,

> *"the use or threat designed to influence the government or to intimidate the public or a section of the public; the use or threat is made for the purpose of advancing a political, religious or ideological cause."*

The draft bill however does not define what is the politically, or religiously correct ideology. This leaves the State and police to interpret what consists of political and

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[352] In East Africa, Kenya is the only country that has not yet enacted an anti-terror legislation.
[353] LSK registers and licenses all practicing lawyers in Kenya
[354] This is the umbrella body of the Human Rights organizations in Kenya

religious activities that will amount to terrorism. If a person is convicted of terrorism, one is liable for life imprisonment.

c) State sovereignty

The draft *Suppression of Terrorism Bill 2003* section 3(2) (d) defines a "government" as *"the government of Kenya or of a country other than Kenya"*. This means that if the draft bill is enacted it would apply even to other countries and not only Kenya. Furthermore, Section 3(2)(c) of the draft bill says, *"a reference to the public includes a reference to the public of a country other than Kenya."* Hence under this draft, the threat to be addressed does not have to be against Kenyans only, but also of another foreign country.

In line with section 3 (2), section 34(1) of the draft bill states that,

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

This means that the Kenya government is required to extradite any person requested by another country for terrorism charges as soon as the request is made. However, the process of extradition is not spelt out. Furthermore, the Attorney General does not bear responsibility for anything that person undergoes in the foreign country. Besides this, the draft bill allows foreign security agents to operate in the country and arrest Kenyans without the government being involved.

c) Right to secure protection of the law

Section 9 of the draft *Suppression of terrorism bill 2003* gives the Minister in charge of National Security unfettered power to declare any organization that he deems, a terrorist organization. There is no criterion listed that he can employ to arrive at a declaration that an organization is a terrorist organization but only needs to publish the declaration in the *Kenya Gazette.* If a particular organization is declared to be a terrorist organisation, it effectively means that it is an offence to take part in any affairs of the said organization. Hence, according to section 10 (1) of the draft bill, a

person who belongs or professes to belong to a terrorist organisation is at once guilty of an offence by the fact that the Minister has proscribed the organisation. In addition, it becomes an offence to support the banned group in any manner or address members of the group and if one is holding a private meeting with one of the members, he has to prove to the court that the meeting was not for terrorism purposes.

Furthermore, the draft bill in section 6(3) (a) and (b) state that,

> "*if, in proceedings for an offence under this section it is proved that an article was on any premises at the same time as the accused, or was on premises of which the accused was the occupier or which he habitually used otherwise than as a member of the public, the court may assume that the accused possessed the article, unless he satisfies the court that he did not know of its presence on the premises or that he had no control over it."*

Thus, a person who is caught with goods suspected to be used for terrorism purposes has to prove to the court that he was not aware that they were for terrorism purposes or had no control over them.

d) Freedom of speech, assembly and association

The whole of section 3 of the draft bill which defines terrorism puts into cross purpose the freedom of speech, assembly and association. As I will show later, the section puts into threat the existence of lobby groups and social movements since the Minister of National Security can declare them terrorist organisations and hence they cease to operate.

Under section 12(1), the draft *Suppression of terrorism bill 2003* limits what a person can wear. The section states,

> "a *person who, in a public place wears an item of clothing; or wears, carries or displays an article, in such a way or in such circumstances as to arouse reasonable suspicion that he is a members or supporter of a declared terrorist organization."*

The draft bill does not elaborate what is "reasonable suspicion" or spell out the attire of terrorist organisations. It is left to the discretion of police to judge what consists of terrorist clothing or any other clothing that arouses suspicion.

e) Right to protection of property

Sections 13 up to 23 of The draft *Suppression of terrorism bill, 2003* give security officers permission to seize your property any time when they have "reasonable grounds to suspect" that the property is for terrorist activities. In particular, section 21(3) and (4) of the draft bill, says that an authorised officer only needs to suspect a person of being a terrorist and without any criminal proceedings pending against a suspect, proceed to seize the property and cash. Furthermore, section 26(1) of the draft bill gives police officers authority to search suspect's premises without a court warrant. The sections says,

> *"where in the case of urgency, communication with a judge to obtain a warrant would cause delay that may be prejudicial to the maintenance of public safety or public order, a police officer of or above the rank of Inspector may, notwithstanding any other Act, with the assistance of such other members of the police force as may be necessary, (a) enter and search any premises or place, if he has reason to suspect that, within those premises or that place and offence under this Act is being committed …(b) search any person or vehicle found on any premises or place which he is empowered to enter and search under paragraph (a); stop, board and search any vessel, aircraft or vehicle if he has reason to suspect that there is in it evidence of the commission or likelihood of commission of an offence under this Act;….(e) arrest and detain any person whom he reasonably suspects of having committed or of being about to commit an offence under this Act."*

Even though section 21(4) introduces the need for a court order to make the seizure legal, the property has already been seized and then the officer goes to seek the High Court's *ex parte* order to detain the money. This means that it is only the authorized officer who goes to court in the first instance, and he can plead his case before the Judge concerning the suspicion of the seized cash being "terrorist property", without the accused or his lawyer being there to be heard.

e) Protection from torture, inhuman treatment and extrajudicial killings

Section 26 (1, e) and (2) of the draft *Suppression of terrorism bill 2003* allows detention and possible torture of suspects since when under detention a person is at the mercy of the police. It says that police can *"arrest and detain any person whom he reasonably suspects of having committed or of being about to commit an offence…may be detained by a member of the police force until the completion of investigations."* Alongside this, section 30 provides that a suspect can be held incommunicado without contact or access to a lawyer, doctor, spouse, relative or friend for 36 hours.

Furthermore, section 40 (2) and (3) of the draft bill allows the police to use "reasonable" force for the purpose of enforce the bill when in becomes law. However, the police officer will not be held liable in case of death or injury of suspects; damage or loss of property.

f) Right to privacy

Under section 27 of the draft bill, the Second Schedule is given effect that a police officer can require a financial institution to provide him with information about a particular customer for the purposes of investigation. The institution is obliged to give the information in any manner that the officer desires and it is an offence for the financial institution not to give the information. Consequently, the police officer is authorised under section 40(2) to use reasonable force to get the information. At the same time, the draft bill in section 33 - 35 authorizes the Attorney General and Police Commissioner to divulge to foreign state information relating to the tracking, attachment or forfeiture of terrorist property located in Kenya as long as they make a request on this regard. With the information obtained from the financial institutions, a police officer can then proceed to declare such an account holder's cash held by the bank terrorist property, whereupon he can seize it, and the bank would have absolutely no choice but to give the police officer the money.

7.4 Human rights concerns arising from the draft *Suppression of Terrorism Bill 2003*

One of the concerns arising from the draft bill is that it gives the police unfettered and unchecked powers over citizens. Since the definition of terrorism is not clearly defined, the police have just to prove that there exists a "threat" of the described situations. The nature of envisaged "threat" is also not outlined in the draft bill and this gives the police and other people leeway to do anything to prove that there is a "threat" or a particular action is an "act" of terrorism. The implication of this for human rights in Kenya is that the broad definition of terrorism can include legitimate forms of political protest. If passed in its current form, the draft bill can be used to prosecute people holding demonstrations against government policies, striking workers, and people opposing land grabbing or engaging in a civil disobedience campaign. The concern is that the government can use its power to victimise people or organisations that are against its policies. It should be borne in mind that Kenya achieved independence and multi-party democracy through acts of civil disobedience and mass action that the draft bill will render as "acts of terrorism" hence proscribe organisations propagating such ideologies.

Hence, it is vital that a precise and relevant definition of what consists of terrorism or acts of terror is made to protect Kenyans from the police or other authorities who may use the draft bill to stifle political agitation. In other words, the draft bill gives law enforcement agencies a wide choice of possible criteria and circumstances to pick and choose which one might best suit the event to inescapably classify any kind of mildly unlawful act as "terrorist acts."

Furthermore, the draft *Suppression of terrorism bill 2003* does not define what is the politically, or religiously correct ideology, leaving the state and police to interpret what consists of political and religious ideologies that will amount to terrorism. This clause would also impede churches from preaching about politics since it would be termed as propagating terrorism. Section 78(1) of the Constitution of Kenya clearly allows a person enjoyment of his freedom of conscience, freedom of thought and of religion, freedom to change his religion or belief, to manifest and propagate his religion or belief in worship, teaching, practice, and observance. The draft *Suppression of terrorism bill 2003* therefore goes against the Kenyan constitution by

muzzling the freedom of religion since it tries to dictate what religion a person should belong to and what should be preached.

The fear of police misusing their powers stems from Kenya's experience during the colonial era and one party state when the law enforcement agencies were extensively used to harass people agitating for pluralism. As Atsang'o Chesoni notes, "the colonial purpose of the Kenya police and other security apparatus was to protect the British and their interests. The post-colonial Kenyan regimes have never addressed this philosophical genesis…and the purpose of the police was and remains…to contain the "natives" particularly troublesome democratic elements and protect the *Mzungu's* (whites) property."[355] Thus, the same thing might happen, especially in the case where the Minister in Charge of National Security has the absolute powers to declare an organisation as a terrorist organisation. Under Kenyan law, the Police are answerable to the Minister in Charge of National Security hence they will do what he commands them to do.

Kenya has the option of passing legislation that narrowly defines terrorism and thereby limits acts of terrorism to those offences already described in existing U.N. conventions or it can strengthen existing laws to target activities like drug trafficking and proliferation of small arms.[356] If, however, the government insists on going for a broader definition, then it should ensure that there are exclusion clauses to limit the impact of the definition. This would include protests, demonstrations, strikes and advocacy, provided they are not intended to endanger persons, cause harm or damage to property or pose a risk to public health and safety.[357]

Another human rights concern that emanates from the draft bill is that Kenya's sovereignty is going to be undermined if the draft bill is enacted the way it is. The draft bill provides for foreign security agents to work in the country, sometimes without the assistance of Kenya police. This is an avenue that can be used to harass people and instil fear in them especially the minorities and vulnerable in society. The draft bill also calls upon the government to extradite a terrorist suspect to any country

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[355] Chesoni, Atsang'o, 'International terrorism and problems of emergency responses, Security Issues and economic consequences,' Unpublished paper presented at the Eastern and Southern African Colloquim on measures to combat and eliminate terrorism on July 4-6, 2004

[356] Kagari Michelle, 'Home-grown anti-terror bill best option,' *Daily Nation,* April 3, 2004

[357] ibid

that requests this to be done and if the Attorney General does not do this in the required time, he should explain the delay. The implication of this for human rights is that the government can extradite a Kenyan wanted in another country for terrorism charges without it being held responsible for anything that he/she undergoes in the foreign country. International human rights law provides that a government should not extradite a suspect if it believes the suspect is going to undergo torture or ill treatment in the country he is going to be taken. This appears not to be considered in the draft bill as the Attorney General is required to extradite the suspect as soon as he gets the request. At the same time, the due process of extradition which the Attorney General will have to follow is not outlined in the draft bill.

In addition, section 3(2) provides that the draft bill if it becomes law can operate in and outside Kenya. However, this is not enforceable since Kenya's courts have no extra-territorial jurisdiction, unless the Constitution is amended to widen their jurisdiction. The draft bill thus violates section 1 of the Kenyan Constitution, which states that Kenya is a sovereign republic meaning the Kenyan laws can only apply to Kenyans and not any other nationals, expect in cases where foreigners have committed crimes within the country. The implication for human rights if the draft bill is passed with this section is that the country will have given away its sovereignty to other countries.

The draft *Suppression of terrorism bill 2003* undermines the right to secure protection of the law in that the police are given powers of arresting a suspect or conducting a search without having a warrant. In addition, they can seize property and cash and keep it until the time a suspect proves that he is not a terrorist. Section 9 of the Penal code, Cap 63 of the Kenyan Constitution, guarantees that any person charged with a criminal offence, shall be presumed to be innocent until he is proved or has pleaded guilty. Furthermore, section 75 of the Kenya Constitution guarantees property rights and clearly stipulates the procedure to be followed if at all such property is to be compulsorily acquired by the State, and the police must have a warrant. The draft bill thus goes against the present Constitution in that it takes the presumption of innocence away and places the accused the onus of proving innocence in a court of law, meaning one is pronounced guilty before being heard. In the same manner, it goes against the provisions of section 75 on how the seizure of property is to be done.

The implication of this for human rights is that innocent people will be taken to court on terrorism charges and when they cannot prove their innocence, they are hauled to jail for not more than ten years or a fine or both.

Furthermore, the draft bill does not provide an avenue for the suspect to appeal against the detention of property or an unfair court ruling. Even though section 21(4) introduces the need for a court order to make the seizure legal, the property has already been seized and then the officer goes to seek the High Court's *ex parte* order to detain the money. This means that it is only the authorized officer who goes to court in the first instance, and he can plead his case before the Judge concerning the suspicion of the seized cash being "terrorist property", without the accused or his lawyer being there to be heard. In this regard, there is no fair treatment of the accused as he is not given any hearing and the Judge has to rely on one side of the evidence to give the order. It is a miscarriage of justice and deprivation of the right to a fair trial. With this clause, the purpose of courts will be to sanction what the executive has ruled to be right or wrong and not serve to check its exercise of power. When police are given these unchecked powers to seize property at will and detain it, the worry is that it is a provision that can be used to harass and intimidate people. In addition, the police may put evidence on the suspect's property as they are known to do when they do not find proof when conducting searches. Furthermore, the draft bill does not address the issue of compensation to those suspects who have been innocently prosecuted. Therefore, sufficient Constitutional safeguards are required to protect the suspect.

The seizure of property may be seen in line with the provision of accessing a suspect's bank account. The draft bill provides unlimited access by police to a suspect's bank account and financial deals. As earlier noted, if the bill becomes law, when the police ask details from the bank about a particular client, the bank is supposed to give the information immediately or the police would use reasonable force to get the information. The implication of this is that despite being an infringement of the right to privacy under section 70(c) of the Kenyan constitution, police again would be given unlimited powers to get information from financial institutions. Kenya does not yet have an anti-laundering law and Section 19 of the draft anti-terror bill seems to cater for this. It is noted that the UN General Assembly

resolution 51/210 of 1996, paragraph 3(f), called upon all states to take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorist activities and together with terrorist organisations, whether such financing is direct or indirect through organisations which have or claim to have charitable, social or cultural goals. However, the problem arises where it is not clear that the money is being used for terrorist activities yet the police have already frozen it.

The implication for human rights is that apart from convicting the suspect before trial, the suspect has no chance of appeal and the police can keep the cash frozen until the time they are sure it is not been used for terrorist activities. The draft bill does not provide a framework of how long the police can detain the cash, leaving it up to them to decide the timeframe. This is a provision that is bound to be abused by harassing people whom the government wants to curtail their political activities. It would also create a climate of fear and it will be hard for NGO's to exist as they will be always expected to account where they get their funding from and where it is channelled. Some may close down as the government scrutiny may make the donors who may not be comfortable in funding them, especially those who wish to remain anonymous. At the same time, the provision may be used to harass NGO's led by Muslims and they can be accused of getting finances from terrorists.

The draft *Suppression of terrorism bill 2003* if enacted the way it currently stands, will take away the vibrancy of social movements, lobby groups and other institutions that agitate for democracy and accountability of the government. This is so because when they become very active, the government may be tempted to curb their activities by labelling them terrorist groups hence ban them. This concern is due to the fact that the declaration of the terrorist status of an organization is unilateral and vested absolutely in the Minister in charge of national security. Hence, the potential for abuse of these declarative powers is diverse especially for political purposes**.** At the same time, the act of the Minister declaring an organization a terrorist one is in disregard of the due process of justice that entitles suspects innocence before being judged and also entitles one to a full hearing before a competent impartial court of law. Since according to section 11 (1) it will be a crime to associate with a group that has been declared a terrorist organisation, this puts into risk lawyers and activists who may want to challenge the ban since they cannot openly lobby for the unbanning of

the “terrorist” organisation without being accused of being terrorist themselves. The draft bill thus contravenes section 80 of the Kenya Constitution, which guarantees an individual’s right of association, free assembly and association, as well as freedom to form or belong to trade unions or other associations. It should be noted that Kenya’s independence and multi-party democratic space was realized through agitation through trade unions, lobby groups, churches and other associations.

The draft bill makes it an offence for someone to wear an article of clothing which gives rise to reasonable suspicion that the article can be used for terrorism purposes. The onus is placed on police to determine what constitutes an item that can be used for terrorism purposes, and this provision can be abused to implicate Muslims and their loose attire (*Kanzu or* women’s *Hijab*). It only requires a police officer to say that the Muslim attire arouses reasonable suspicion that the wearer belongs to a terrorist organisation. Applied this way, it leads to discriminations against Muslims. Furthermore, this section if enacted will make it illegal for a person to wear or display an item of clothing that will be deemed politically incorrect, for example T-shirts and caps with political inscriptions. Therefore, this would be an abrogation of the right to free speech. The implication is that this will effectively stifle political opposition and agitation for the fear of being branded terrorists, eroding freedom of thought and conscience.

Though the 1997 Constitutional reforms outlawed police detention, the draft bill provides for police to detain suspects indefinitely giving leeway for possible torture. The draft bill while allowing police to detain suspects also provides that in case a suspect dies in the course of investigation for terrorist purposes, police will not be liable for prosecution. At the same time, under the draft bill a suspect is neither allowed access to a personal doctor nor a lawyer. This directly contravenes International law and Kenyan laws that provide a suspects right to a private doctor and counsel. It should be noted that the history of Kenya’s government doctors is that most of the times they have been compromised by the state and do not implicate police officers who have tortured suspects. Thus, they are accomplices to torture and most of the times they cannot be relied upon to give an independent report on the treatment of suspects while in custody. This was the case during the 1980’s at the

height of political repression. [358] By allowing detention and possible torture, the government does not show the connection between the powers given to police, the emergency inherent or the results they are going to achieve. It is what Derep warns when he notes that in case of emergencies, states may be tempted to suspend the due process and fair trials and create situations that lead to contribute to violations of non-derogable rights.[359]

The draft *Suppression of terrorism bill 2003* sanctions impunity when it absolves the police of any liability of suspect's death who is being investigated for terrorism. The implication of this for human rights is that police can shoot and kill people or torture them to death and not be charged for murder. This will lead to legitimisation of extra-judicial executions and it can be an easy way of settling scores where the police will shoot people and brand them terrorists. For example, opposition leaders and other people who are perceived dissidents could be killed after being branded terrorists and the police will not be answerable. This is counter to the provision of section 71 (1) of the Kenyan Constitution that says no person shall be deprived of his life intentionally. In line with this, the draft bill does not address the issue of compensation to those suspects who have been innocently prosecuted. Thus, the government should put mechanisms to ensure compensation for terrorist victims and this as Cotterrell notes is an incentive for the people to use the legislation[360] since they are benefiting from getting damage awards or compensation.

After the draft bill was published, there were protests from KHURINET, LSK and religious groups as well as other Kenyans who viewed it as a backward step back of the gains made in enacting a human rights culture in the country. KHURINET immediately launched a campaign pressuring the government to withdraw the draft while the LSK warned the government that the bill was against the Kenya Bill of Rights and would be successfully challenged in the Constitutional Court. At the same time, the LSK and KHURINET faulted the government that it did not consult the

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[358] During the 1980's, suspects who were tortured were examined by government doctors who issued reports that most of the injuries were self-inflicted thus absolving the police from blame. However, many of the suspects when released sought medication abroad and some were permanently paralysed, a situation that could have been avoided if the torture wounds were attended to properly when they were still fresh. See also Kenya Human Rights Commission, *Mission to Repress,* KHRC, 1998

[359] Jinks, Derep, *opcit* pg 363

[360] Cotterrell, Roger, *opcit* pg 63

body or any other concerned parties while drafting the bill hence that is why it fell short of expectations.

In its campaign, KHURINET constantly issued press statements and paid up advertisements in the media highlighting the faults of the bill. It at the same time petitioned MPs, organised protest rallies and demonstrations urging the government to reconsider the draft bill. Though condemning terrorism as a violation of human rights and pledged support for any positive government efforts to curb terrorism, KHURINET feared that the proposed law will draw back the gains made in the struggle to achieve democratic rights as it threatens the rights of all Kenyans.[361] In an opinion column, Makau Mutua termed the proposed draft bill as "a draconian piece of legislation that, if enacted, would create a republic of fear, violate a broad range of basic human rights and effectively repeal the Bill of Rights in the constitution."[362] Human rights lawyer Ng'ang'a Thiong'o summarised the bill as "an assault on Kenya's sovereignty and dignity as it takes away all that Kenyans have so dearly fought for in the last 30 years in terms of human rights and fundamental individual freedoms."[363]

KHURINET was of the view that the draft bill did not serve Kenyans interest and suspected that it was being pushed for enactment by foreign countries. As Beatrice Kamau who was heading the campaign says, "while the US Patriot Act is crafted in such a manner that targets foreigners and preserves the fundamental rights of American citizens, our own legislation seeks to reinvent the suppression of the fundamental rights and throws the bill of rights out of the window."[364] Makau takes the debate further when he says the draft bill was not drafted by Kenyans or based on Kenya's needs but it originated in Britain.[365] He adds that both Britain and the U.S. are intimidating and coercing Kenya into enacting unnecessary law into their hands.[366] The drafts people at the Attorney General's office who were interviewed expressed

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361 The Kenya Human Rights Network statement to the press on "The suppression of terrorism bill 2003" issued on November 16, 2003.
362 Mutua, Makau, 'Kenyans must reject anti-terrorism bill,' *Daily Nation,* July 2, 2003
363 Interview with Ng'ang'a Thiong'o in Nairobi. He is a human rights lawyer and chairperson of Release Political Prisoners lobby group.
364 Interview with Beatrice Kamau, Nairobi.
365 Mutua, Makau, 'Kenyans must reject anti-terrorism bill,' *Daily Nation,* July 2, 2003
366 ibid

the same sentiments saying they were dictated as to the contents of the bill. Though they did the actual drafting, the extent to which they went into proposing measures to curtail human rights in the fight against terrorism, "even left the foreign embassies amazed"[367]

In the meantime, the LSK set up a committee to draw up an alternative anti-terror bill that was going to cater for the human rights concerns that it felt were not present in the bill. In addition, the Kenyan National Human Rights Commission (KNHRC) which is the government human rights implementing organ offered to draw an alternative bill that will arrest the human rights concerns.

By engaging in the campaign, KHURINET and other organisations were able to shape power relations in Kenya by mobilising and agitating people to fight for their rights guided by the aim of protecting rights that were under threat from the provisions of the draft *Suppression of terrorism bill 2003.* This kind of power shows that power is exercised by micro-structures, leading to small instances of resistances of subordination. In essence, it means that the group did not rely only on legal strategies to ensure protection of rights, but it also engaged in mobilisation and considered litigation as one of the strategies for acquiring rights. This entailed employing counter-hegemonic strategies, where legal rights for example freedom of assembly and association were used to agitate and mobilise for rights that were threatened by the draft anti-terror bill. This is possible because of the law's ability to disguise domination by its invocation of neutrality, autonomy and formal equality before the law. [368]

Gramsci argues that hegemony is exercised in political, cultural, and economic domains through consent and coercion and it changes as class interests and material conditions change.[369] Hence to engage in counter-hegemony, one has to reclaim and re-appropriate the myth that has being propagated to create the hegemony. This is because the myth helps to organise a collective will and has the capacity to produce

[367] The drafts people requested to remain anonymous.
[368] Van Huyssteen, Elsa *The Constitutional Court, Human Rights and Democracy in South Africa: A sociological analysis*, University of Witwatersrand, PHD Thesis, 2003 p 76
[369] Hunt Alan, *Explorations in law and society, New York: Routledge, 1993 p 232*

action, which in turn affirms the "truth" in the myth.[370] In this case, the "myth of rights" that human rights can only be realised by laws is reoriented and used to mobilise people, where legal rights were used in mobilisation e.g. right to freedom of assembly makes it easy for the organisations to meet with their members and articulate their concerns. Though the government did not agree that the draft bill had human rights flaws, KHURINET was able to articulate them through peaceful demonstrations, a right provided by the constitution as freedom of assembly and speech. In this way, the organisation mobilised and voiced their concerns within the law but employed other counter-hegemonic strategies. At the same time, through successful mobilisation and agitation for rights, KHURINET was able to alter power relations in that the government withdrew the draft bill and ordered that it be redrafted taking into account the human rights issues raised. It is yet to be brought to parliament.

7.5 Whither a new bill

Despite opposition to the draft bill, there is emerging consensus that the country needs to enact a sound anti-terror law that will curb terrorism activities. By promising to issue alternative draft bills that reflect the human rights concerns is a sign in this regard but the Muslim community have constantly voiced opposition to any bill whatsoever, saying it will serve to discriminate them.[371] KHURINET though not opposing a new bill was of the opinion that anti-terror law should not instil fear in the citizens but should cover the existing loopholes in the Penal Code so that terrorists' offences are well defined[372]. In an opinion column, Michelle Kagiri, was of a similar opinion, arguing that the large number of acquittals in Kenya's courts "is not for lack of any laws but for lack of proper utilization – lack of proper investigation and prosecution, and lack of adequate number of courts to try the offences. Unless this root problem is redressed, adopting draconian laws will only lead to their grave misuse"[373]

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[370] ibid p 233
[371] Interview with Commissioner Al Haj Ahmed I. Hassan. He sits in the Constitution of Kenya Review Commission and was part of the LSK draft committee that drew the alternative bill
[372] Interview with Beatrice Kamau, Nairobi.
[373] Kagari Michelle, *opcit*

In its campaign, KHURINET has been engaged with the Muslim community who perceive that the bill is aimed at them. The Secretary of the Council of Imams and Preachers of Kenya Sheikh Mohammed Dor voiced Muslims concerns when he said that since the "war on terror" began, it has targeted only the Muslims and this had created bad blood between them and non-Muslims.[374] The same views were expressed by the Parliamentary Committee on the Administration of Justice and Legal Affairs Committee which opposed the bill fearing that it would "tear apart the very fabric of the nation and could offer fertile ground for inter-religious animosity and suspicion". Consequently, the committee, which deals with legal affairs at Parliament called for what they called "political solutions since terrorism is a political crime."[375] The government however has continually insisted that the bill is not aimed at Muslims but protecting the general population against terrorism. However, this is not reflected in the government's actions aimed at curbing terrorist growth in the country e.g. police swoops and arrests of suspected terrorists since they have targeted Coast and Northern parts of Kenya as well as Eastleigh area in central Nairobi, which are populated by Muslims.

Scheingold argues that employing counter hegemonic strategies can lead to a realisation of politics of rights, which is form of political activity made possible by the presence of rights.[376] This essentially involves using the already acquired rights to mobilise for political reasons and takes three forms. The first involves political activation, which is educating and informing the people about their rights which are under threat; secondly it involves tying the mobilisation to a particular legitimate group and thirdly it entails getting support from politicians hence make the rights political issues. By making the rights claimed a political issue, it ensures that many people get to know about it hence derive many sympathisers who will support them. In its campaign, KHURINET were able to successfully mobilise and agitate for rights within the framework provided by law. In addition, they were able to lobby politicians to reject the draft bill and this led to the campaign getting support from the Administration of Justice and Legal Affairs Committee. This ensured that the rights they claimed became political issues and having got support from this committee, it

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374 Mango, Caroline, 'Muslims insist terror bill is aimed at them,' *East African Standard,* July 14, 2003
375 'Kenya's terror bill rejected,' July 15, 2003, http://news.bbc.co.uk/2/hi/africa/3069211.stm
376 Scheingold, Stuart, *The politics of rights: lawyers, public policy and political change.* New York Haven and London: Yale University Press, 1974 pg 83

was a sign that the draft bill even if taken to parliament will not be able to get required support for it to be passed as law.

The U.N. charter urges countries to exercise proportionality while enacting emergency powers but this seems to have faded in the draft *Suppression of terrorism bill 2003.* This is because the threat of terrorism posed to Kenya does not account for the powers given to the security agencies. Proportionality may include a strict focus on the legitimate aim of the measures, which is the prevention of further terrorist attacks and these measures are supposed to be reviewed periodically when the perceived security threat has lowered. If this does not happen, there may be a clash with fundamental human rights norms since the emergency powers become permanent, leading to derogation of rights even when it is not necessary. Furthermore, as Zoller discusses, the enactment of anti-terror laws that restrict human rights will lead to a higher level of national security is highly problematic. This is because security is not defined on a normative level but on a factual basis, meaning that security measures are enacted in connection with specific threats and activities.[377] This is difficult when operating with groups like Al-qaeda that are highly unpredictable. This means that the factual character of security can't be balanced against the normative character of the basic rights and it has resulted to national security prevailing over other basic rights.

As earlier indicated, laws that are realised through agitation and reflect the society's needs are more relevant to a particular society and applicable since they record the interests that have been successfully pressed upon for recognition and protection as well as those that have been rejected. The draft *Suppression of terrorism bill 2003* thus cannot be said to relate to Kenya since it does not reflect the country's struggle with terrorism. It is bound to legislate what has been termed as "crimes without victims," which are offences where the law aims at enforcing particular moral principles in private life irrespective of whether offenders acts can be shown to cause harm to others or even to the offender.[378] At the same time, it does not seek to give solutions to Kenya's terror problem that apart from being a hub and victim of

[377] Zoller, Vennela, 'liberty dies by inches: German counter terrorism measures and human rights, part 1 of 2' *German law journal No. 5,* May 2004 in http://www.germanlawjournal.com/article.php?id=424#_ednref8 accessed on November 2, 2004
[378] Cotterrell, Roger, *opcit* pg 54

terrorism, the country has a weak security and intelligence apparatus that is ineffectual and ill prepared to track down and apprehend terrorists before they attack.

Furthermore, the hallmark of an effective legislation is that it must be expressed in terms of its compatibility and continuity with established cultural and legal principles.[379] However, the draft *Suppression of terrorism bill 2003* falls short of this as it not only goes against the Bill of Rights enshrined in Kenya's Constitution, but it also "does not take into account the general Kenyan statutory regime of Criminal Procedure and it's at variance with the Penal Code system."[380] Another lawyer, Harrison Kinyanjui takes the debate further and says the draft bill "purports to override Constitutional protections of personal liberties and fundamental rights, negating the very right to life and freedom that is the bedrock of the Constitution. It even eliminates the line between domestic and foreign acts of terrorism, which is not only a violation of international law, but an implicit overthrowal (sic) of the doctrine of sovereignty of states."[381]

Despite these concerns, Kenya surprisingly in a report to the U.N.'s Counter-Terrorism Committee dated March 4, 2004, reported that all measures that she had undertaken to combat terrorism were in compliance with international law and that the draft *Suppression of terrorism bill 2003* had only elicited various comments from stakeholders which could be cured by building consensus. Furthermore, the report stated that these measures were in consistent with the Constitution and that there were no constitutional challenges that have been voiced against the measure enacted.[382]

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379 ibid pg 59

380 Kahura, Dauti, 'Anti terrorism bill is out of sync with the Kenya legal system,' *East African Standard,* July 14, 2003

381 Kinyanjui, Harrison, 'The Suppression of Terrorism 2003 bill violates Constitution and should neither be debated nor passed' Unpublished paper.

382 Hassan I. Al Haj Ahmed. 'National legislations and international terrorism: A comparative analysis,' Unpublished paper presented at the Eastern and Southern African Colloquim on Measures to combat and eliminate terrorism, July 4-6, 2004.

Chapter eight

Conclusion: A human rights agenda for thought and action in Kenya.

Acts of terrorism are a global threat to the rule of law, democracy and fundamental human rights. In addition, terrorism poses a serious threat to national and international stability and security and makes it virtually impossible for a state to effectively protect its citizens. However, the security threat posed by terrorism should not obscure the importance of human rights. Many countries including Kenya are increasingly giving powers to the security forces, in the process implying that terrorism is being directly addressed. This however is far from the reality since these efforts are eroding human rights, which provide a long term agenda for protecting the citizens, while the effectiveness of such strategies is still unclear.

The Kenyan constitution guarantees respect and protection of human rights by the government. However, as this study has shown, the anti-terror measures being undertaken by police for example police swoops and tracking down terrorist funding are going against this provision since they have resulted to unfair and arbitrary arrests especially of Muslims. Thus, the Kenya government should adopt an anti-terrorism policy that does not ignore human rights including any legislative or procedural mechanisms. This is because when anti terror laws are enacted that trump on the human rights of Kenyans, this will undermine the public support needed to defeat terrorism. Furthermore, any measures that the government adopts must be in accordance with international law as prescribed in the U.N. charter; should be proportionate to the emergency at hand, and be reviewed periodically to ensure that application of the emergency measures is necessary.

At the same time, Kenya's anti-terrorism measures should seek to build strong international norms and institutions on human rights, which will be used to guarantee national security. One way that the government can do this is by not discriminating against Muslims. Rather, they should be seen as allies in anti-terrorism and the Kenyan government should seek their input in this regard. Furthermore, suspects should be regarded as criminals for the purposes of arrest and prosecution and entitled

to the rights afforded to them at time of arrest. This will mean not torturing, detaining or threatening them while under interrogation.

This research report argued that upholding fundamental human rights in Kenya's anti-terror measures can contribute to challenging power relations within the state and between the government and the citizens. This can be achieved by decentralisation of power within the state and the separation of powers, which provides a ground for power relations to be challenged in the courts. In this case, absolute power is not given to security forces and when they go beyond their mandate while dealing with terrorism, their actions can be challenged in a court of law. This in essence means that the state will not be able to wage arbitrary powers, which they can invoke when faced with political situations that threaten the status quo for example mass action calling for better governance. This will ensure that the marginalised and minority people can be able to express their opinions and the citizens can be able to question some political decisions made or laws enacted.

Seeds of social discord and insecurity are sprouting between non-Muslims and Muslims in Kenya. As it has been discussed in this report, this is due to the discriminatory policies that the government has employed in the "war on terror," which largely seems to target Muslims and people with Arabic features. This policy has been accelerated by the global political rhetoric about "good and evil" or "you are with us or against us". Thus, it is not lost that Muslims view the draft *Suppression of terrorism bill 2003* as targeting them hence increasing the polarisation. In fact, it is easier for a non Muslim Kenyan citizen, posing the same security risk as an Islamic fundamentalist to freely conduct business in Kenya, but a Muslim of person with Arabic features can be locked up with no charge or subjected to torture. It is worse for foreigners who are deported back to their home countries just by the mere suspicion of being terrorists. This kind of stigmatizing in society is a source of danger, encouraging a climate in which xenophobia and racism flourishes.

This study in its analysis noted that the challenge of upholding human rights in the "war on terror" is an uphill task that is fraught with tensions and emotions. However, it has argued that it is from these contestations that individual countries can be able to enact sound legislations that reflect their social and political struggles as well as

protect minorities and the vulnerable groups. Thus for it to be relevant, Kenya's draft *Suppression of terrorism bill 2003* should reflect the country's democratisation process as well as its struggle for human rights and safeguarding national security. It has been noted in the study that Kenya's draft anti-terror bill fails to observe the established rule of law and human rights. It seeks to curtail the freedoms and rights that Kenyans secured when the country returned to multi-partism in 1991 at the behest of fighting terrorism. The draft anti-terror bill creates a general climate of fear and suspicion in which the State and law enforcement agencies are vested with coercive, intrusive, and intimidating powers and no area of private activity is spared. Unless the contentious human rights concerns are addressed, the draft *Suppression of terrorism bill 2003* will serve to marginalise minorities and vulnerable people who will be at the mercy of the police and in the end will not serve the ultimate purpose of tackling terrorism.

Kenya is faced with the challenge of coming up with anti-terror legislation which strikes a balance between the need for national security and the protection of human rights. As it currently stands, the proposed bill poses a bigger threat to civil and political liberties thereby carrying some elements of the history of human rights abuse under the one-party regime. Kenya's history of gross violation of human rights perpetrated by the state through manipulating the Constitution and enacting draconian laws is still fresh in Kenyans' memories. Hence, the government must engage in finding out why the country is both a victim and hub of terrorist activities. The Kenyan government should address the problem of discriminating against Muslims in the country that has led to the growth of fundamentalism. It should engage with them to find out their social and economic pressures, frustrated political aspirations, and why they are a ground for recruitment by terrorist groups. This will enable it to find local solutions to the terrorism.

At the same time, the government should consider enacting an anti-terror law that reflects Kenya's history and aspirations as regards terrorism. This is important because such laws note the citizens' interests that have been successfully pressed upon for recognition and protection as well as those that have been rejected. In addition, the Kenyan government must stand firm against any pressure to pass the draft *Suppression of terrorism bill 2003* in its current form.

Kenya's human rights movement has a task to engage in a battle of ideas and challenge directly the claim that national security trumps human rights and make the human rights agenda as the best guarantor of national security.[383] It should not rely only on legal strategies in social change, a notion that Sheingold termed as "myth of rights," but it should be vibrant and use litigation as one of the avenues to protect human rights in the "war on terror." In pursuit of this, it means employing other alternative strategies for protecting rights in the context of the "war on terror", where rights have largely being sacrificed for national security. As earlier noted, by engaging in the campaign against the draft *Suppression of terrorism bill 2003* the human rights movement has shown that it is not relying only on courts to guarantee human rights and it should take these efforts a notch higher. It is by doing this that the human rights movement will move from "denunciation alone to engagement, working with local activists, and with the parts of the government that will listen, moving these societies back from the precipice.'[384]

[383] Ignatieff, Michael 'Are Human Rights defensible?' in *foreign Affairs,* Nov/Dec 2001 Vol. 80 pg 118
[384] ibid

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