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The Constitution, National Security Council and the War on Terror in Kenya

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The Concept of War on Terror

According to Schmitt and Shanker (2005) "War on Terror" (WOT), also known as the Global War on Terrorism (GWOT) refers to the international military campaign that started after the 11 September 2001 terrorist attacks on the United States. Consequently, the United States led a coalition of NATO and non-NATO nations in the campaign against al-Qaeda and other militant extremist organizations. Therefore, the term 'war on terror' adopted a global military, political and legal strategy against state and non-state actors designated as 'terrorist' or supporting terrorist activities. Political theorist, Richard Jackson, argues that WOT is a set of actual practices, wars, covert operations, agencies, and institutions that are directed against terrorism. Bruce Hoffman, a historian at Georgetown University, defines WOT as an endless war, with no clear war boundaries and directed against multiple enemies, not just one adversary.

Comparative Legislative Provisions on the War on Terror

The United Kingdom's anti-terrorism strategy may be traced back to the Prevention of Violence Act of 1939 which was in response to the Irish Republican Army (IRA) violence. In 1973, this Act was repealed and replaced by the Prevention of Terrorism Act. After the September 11 terrorist attack in the USA, the United Kingdom passed the Anti-Terrorism, Crime and Security Act of 2001 (ATCSA) and defined a terrorist as a person or member of a terrorist group, who commissions, prepares, and instigates acts of international terrorism. In 2005, the United Kingdom

also enacted the Prevention of Terrorist Act that gave the government powers to control and impose measures on a person, persons or groups that pose the risk of terrorism to members of the public. The Act allowed for two types of control orders namely derogating and non-derogating approved by the British parliament. The derogating order required the approval of a judge while non-derogating orders required the approval of the Secretary of State. Following the bombing of London's underground transit system in 2006, the United Kingdom passed the Prevention of Terrorism Act which increased the pre-charge detention of suspects from 14 to 28 days. The Act also criminalized acts of inducement, praise, celebration or encouragement of terrorism, to supplement the common law offence of incitement. The UK's anti-terror powers gave the government increasing powers to deal with terror activities. In similar terms, Israel has passed several antiterrorism legislations under the Prevention of Terror Ordinance (PTO) since 1948. The PTO gave the Israeli government powers against those deemed to be terrorists. In PTO standards, a terrorist is an individual, group of individuals or organization(s) that resort to threats, acts of violence that cause or may cause injury or death. The PTO was amended in 1980, 1986 and 1993 as terrorist activities changed in tactic and in an attempt by the Israeli government to comply with internationally accepted democratic standards and human rights.

Over the years, the Israeli government created new laws to combat terrorism: Defense Emergency Regulations of 1945, the Incarceration of Unlawful Combatants Law of 2002; Criminal Procedure Law of 2006 and the Anti- Terrorism Act of 2010. The AntiTerrorism Act of 2010 states that a terrorist is an individual, group of individuals or organizations who promote and/or execute acts of terror. This covers or encompasses auxiliary organizations that implicitly partake in acts of terror by financing or advancing terrorist agenda. The 2011 Counter-Terrorism Act gave the Israeli government more powers in form of administrative detentions and control orders. The security personnel were given the powers to arrest and detain individuals indefinitely without charge, based on secret withheld evidence. The Prison Ordinance of 2011 empowered the courts to suspend access to attorney for a terrorist suspect for up to 12 months in cases where there is suspicion that a meeting between attorney and suspect might be used to coordinate a terrorist attack. The 2012 Budget Principles Law mandates the State of Israel to withhold state funding to an organization that practices incitement to terrorism, or supports armed struggle or terrorism against Israel. Similarly, the law empowers the State to deny or withhold salary and pension funds to suspected members of terrorist groups. The Israeli state also undertook non-legislative measures on regional and international security cooperation. In February 2012, Israel signed a two-year agreement with the Organization of American States' Inter-American Committee against Terrorism

(CICTE) to cooperate on counter-radicalization, counter-terrorist financing, and aviation security.

In the USA since September 2011, several counter-terrorism Acts have been passed. The Patriot Act of 2001 seeks to enhance national security. Section 203 of that Act allows sharing of information between law-enforcement and intelligence agencies which may be obtained from wire-tapping and/or tracking of conversations. Section 206 removes the due process restrictions and allows the law enforcers to conduct investigations on suspected terrorist groups or individuals. Section 311 allows greater scrutiny of charitable organizations that may engage in money laundering or provide material support to terrorist activities. The Department of Homeland Security was also established to consolidate domestic security agencies in coordinating anti-terrorism as well as national responses to major natural disasters and accidents.

US Cyber law on counter-terrorism and electronic surveillance recognizes that the war on terror may be fought on land, in water, on air and on communication networks. It is for this reason that the US passed the Foreign Intelligence and Surveillance Act in 2008 which gave intelligence experts the legal latitude to monitor terrorist targets overseas and their communication networks and traffic. The Australian Anti-Terrorism Act 2005 allows the police to detain suspects for up to two weeks without charge and to electronically track suspects for up to a year. The Act includes a "shoot-to-kill" clause.

Counterterrorism Laws and Democratic Principles and National Interest

One of the fundamental issues that arise from the counter-terrorism laws is whether they are consistent with the fundamental democratic principles. The critics of counterterrorism laws especially civil society organizations argue that these laws tend to perpetuate and normalize anti- democratic principles.

Administrative and Control Orders

The Israeli administrative and control orders, in the thinking of many human rights advocates, violate basic and international human rights laws. Among the injurious measures included in the counter-terrorism law are administrative detention and control orders; widespread use of secret evidence and vague definitions of 'terrorist organizations', 'member of a terrorist group', and 'act of terror'. For instance, the power by the authorities to arrest people indefinitely and impose significant restrictions on their freedom of movement without charge, incarcerating an individual for extended periods of time on the basis of classified material and without due process, gravely threaten some of the most fundamental principles of

democracy. Such acts are considered illegal on the basis of Israel's basic law and on international law because they constitute a severe violation of a person's freedom and dignity. The danger attributed to administrative detention based on previous activities or motives where the state is not required to prove the accusations beyond reasonable doubt in a court of law may be an easy way out for the authorities to imprison individuals when they have no admissible evidence to prove their guilt. The international human rights law allows for preventive detention only when a government has officially proclaimed a temporary state of emergency that threatens the life of the nation.

The administrative detention procedure in Israel allows for broad reliance on secret evidence and accusations concealed both from the suspect and his lawyer. The Act preserves the widespread, routine and improper use of secret evidence materials in a wide range of sensitive proceedings, such as administrative detention, proceedings for designating a group a terrorist organization and forfeiture of property. The problems inherent in the use of secret evidence are that an individual who does not know what he is accused of, or what the accusations are based on, cannot defend him or herself against false or mistaken charges. Many of the countries including the UK, USA and Canada apply these methods.

Who is a Terrorist?

Definitions of terms such as "terrorist act", "terrorist organization" or "member of a terrorist group", may grant state authorities discretion in determining who is a terrorist. The definition of "a member of a terrorist group" as not only someone who takes active part in a terrorist organization but also anyone who "declares his consent to join a terrorist organization, and the imposing of the burden of proof of innocence on the suspect or accused to show that they are not a member of a terrorist organization is a gross violation of human rights.

Case Laws that do not Meet Constitutional Standards

The following examples of case laws demonstrate that the legislation passed did not necessarily meet constitutional standards. In Farrakhan v. Reagan, a United States District Court considered the constitutionality of an executive order made by President Ronald Regan imposing wide-ranging and comprehensive economic sanctions against Libya which virtually halted all economic intercourse with Libya. Plaintiff Muhammad Mosque challenged the order by making a free exercise claim. Muhammad Mosque, Inc. received a $5 million loan from the Islamic Call Society, an agency of the Libyan government. After the executive order was implemented, the plaintiff was unable to repay this loan. He argued that his only dealings with the Society had been religious in nature. Furthermore, one of the plaintiff's religious

beliefs included the repayment of all loans in a timely manner and preclusion of the payment of interest. The Court held that "the Free Exercise Clause does not mandate a religious organization to transmit money to foreign governments during a national emergency. The Court did not find Muhammad Mosque's interest in the free exercise of his religious principles as outweighing the legitimate and compelling security interests of the United States. Similarly, in Holder v. Humanitarian Law Project, the plaintiffs challenged the provision of the Patriot Act, which criminalized those providing material support or resources to certain foreign organizations that engaged in terrorist activity. The support is defined to include among other things, speech, in the form of expert advice, training, service, and personnel.

The plaintiffs sought to advocate for human rights with the Kurdistan Workers' Party, a Kurdish organization in Turkey that the US government had designated a terrorist organization. They did not intend to further the organization's illegal ends but sought to dissuade it from violence, and to urge it to pursue lawful ends through peaceful means. However, the Court did not agree, and ruled that speech, even if nonviolent in nature, could 'unintentionally assist a third party in criminal wrongdoing'.

Although the Court in Holder acknowledges that although some provisions of the Patriot Act may be challenged for being unconstitutional, the government should be allowed increasing powers to safeguard national interest. It is clear that many countries may find counterterrorism laws not to be in line with national constitutions but the legislations are deemed essential for national functional purposes.

National security is at the height of any nation's concern and therefore legislation should be created to promote this interest as expansively as possible. First, national security will always be considered a compelling governmental interest. The courts are inclined to accept legislation in which government's compelling interests are achieved.

It is also clear that in several situations, anti-terror enactments have intruded into individuals' free exercise of rights. The UK Anti-Terrorism and Crime Security Act of 2001 allowed Government the prerogative to decide if an individual was a terrorist without having to justify how it made its determination, and the Prevention of Terrorism Act 2005 gave increasing powers to the police to arrest and detain suspects for specified periods of time. All these legislations were deemed to have violated the European Convention on Human Rights that includes free speech, free exercise of religion, freedom of thought and conscience, and freedom of expression. These legislations were challenged in court in 2006 in R v Commissioner of the Metropolis Police (UKHL12). In this case, Mr Gillan, a foreign student, and Ms

Quiton, a foreign journalist attending a protest march, sued the Commissioner of Police for unlawful detention and for contravening the European Convention of Human Rights. The Court reasoned that public safety was more important than individual liberty. The Court further argued that even if individual liberties were violated, the circumstances compelled the government to undertake such searches and the case was dismissed.

The Kenya Constitution, Domestic Laws and the War against Terror

The Kenya constitution of 2010 lacks a direct provision on terrorism but it embodies the principles contained in the various international human rights conventions. Article 5 of the general rules of international law shall form part of the law of Kenya and Article 6 holds that any treaty or convention ratified by Kenya shall form part of the laws of Kenya under this constitution. This provides for ratification of treaties which provide provisions for terrorism and after the ratification, such treaties form part of the law. The Constitution of Kenya, under Article 238, defines 'national security' as:

> *"the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity and other internal interests."*

In promoting national security, it is then expected that any national organ tasked with upholding national security shall abide by certain principles. These are referred to as the 'principles of national security' envisaged under Article 238(2) which reads that:

a) National security is subject to the authority of the Constitution and parliament;
b) National security shall be pursued in compliance with the law and with utmost respect for the rule of law, democracy, human rights and fundamental freedoms; and
c) In performing their functions and exercising their powers, national security organs shall respect the diverse cultures of the communities within Kenya;

The rule of law dictates that parliament has the authority to legislate and in so doing, due regard has to be given to the principles of national security as well as the need to protect fundamental human rights and freedoms envisaged under Chapter Four of the Constitution. Nonetheless, the tension between the protection of fundamental human rights and national security has always been a recurring theme not only in Kenya but all over the world.

Similar problems have been seen in Pakistan, France as well as the United Kingdom. Whilst governments are expected to abide by the Bill of Rights accorded to its citizens, it has been argued that fighting terrorism is an area which inevitably requires derogation of certain rights and freedoms. A matter clearly supported under Article 24 of the Constitution. This argument, however, has drawn widespread criticism from human rights organizations. Particular focus has been on the extent to which the security authorities treat members of the public in maintaining national security. The Kenya Constitution in itself does not expressly provide for laws on national security and terrorism. Procedural and substantive law on the same is usually to be found within domestic legislation. Acts of terrorism are usually criminal in nature and in effect draw criminal liability. Therefore, in handling threats to national security, one draws reference from the principle legislation which is the Constitution followed by a host of Acts of parliament that cater for criminal offences. This is inclusive but not limited to: the Penal Code (Cap 65); the Criminal Procedure Code (Cap 75, sections 52, 64 and 65); Protection of Aircraft Act section 3; Official Secrets Act (Cap 487 section 4); Firearms Act (Cap 114); Evidence Act (Cap 80); Prevention of Terrorism Act (No 30 of 2012); the National Intelligence Service Act (No 28 of 2012) and the Prisons Act (Cap 90).

Moreover, Article 2 (5) of the Constitution gives recognition to the general rules of international law in the laws of Kenya provided that the State ratifies any such Conventions. Article 2(5) reads: *"The general rules of international law shall form part of the law of Kenya."* Article 2(6) further adds that, *"Any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution."* The need to protect the fundamental human rights and freedoms was born out of the Universal Declaration of Human Rights (UDHR, 1948). Usually, declarations do not require signatures or ratification by governments and usually have no binding effect. The UDHR, however, is a special case. It is regarded as having binding legal authority because it has been incorporated so often in the constitutions of states as well as in hundreds of United Nations resolutions and conventions. This reaffirmation of the principles and authority of the Declaration has caused legal scholars to consider the UDHR to be part of international customary law

Combating Terrorism in Kenya: Attacks on Human Rights

Over the years, Terrorism has established itself in Kenya as a real threat. Among some of the most daring and outrageous attacks witnessed within this period include the one on the Westgate Mall in Nairobi in September 2013 which left 67 civilians dead. This was followed by the killings of 28 civilians on a bus travelling to Nairobi a year later. A month on, several Kenyans were beheaded near the Somalia border. In the Garrisa University College incident, 147 students were murdered in cold

blood in 2015. The terrorist group Al-shabaab has consistently taken responsibility for these attacks. In spite of all this, the response to terror attacks by the government of Kenya has always been wanting.

Kenya's efforts in curbing terrorism have been marred with a series of human rights violations towards civilians by the Kenyan security forces. In implementing the Prevention of Terrorism Act 2012, the government has been accused of infringing on the fundamental rights and freedoms of the members of the public. Various police units have been implicated in the torture, disappearance, and unlawful killings of alleged terrorism suspects and individuals of Somali origin, and Somali refugees in Nairobi and other parts of the country. In the World Report of 2015, a series of articles was written by Human Rights Watch documenting acts of extra-judicial killings, arbitrary detentions and torture of suspected terrorists by the Anti-Terrorism Police Unit (ATPU).

Lack of Accountability and Terrorism

Despite the gains introduced by the promulgation of the Constitution of Kenya 2010, accountability mechanisms remain weak and have not been adequately supported by the executive arm of government. Public complaints of police abuses have not been adequately dealt with. The response to major incidents such as the September 2013 attack on Nairobi's upscale Westgate mall (which left 67 people dead), was poorly coordinated. A UNEP report on environmental crimes released in 2014 indicated that KDF was indirectly funding Al-Shabaab by facilitating the illegal trade in charcoal and sugar in Somalia.

The Security Laws (Amendments) Bill 2014

In the hope of dealing with the terror problem, the government crafted the Security Laws (Amendment) Bill 2014. The Bill was hurriedly published and tabled in the National Assembly by exploiting provisions of the Standing Orders that allow for a reduction of time in terms of the number of days a Bill is required to be passed and assented to. The time within which the Bill was published did not allow enough time for scrutiny.

The Constitution of Kenya, under Article 118, provides that Parliament should facilitate public participation and involvement in the legislative business of Parliament. Part of the Article reads: *Parliament shall conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and facilitate public participation and involvement in the legislative and other business of Parliament and its committees*. Only after complaints from the public, opposition parties and civil society did the National Assembly extend calls for views from the public on the Bill.

The Act sought to make amendments to 22 Acts in Kenya such as the Public Order Act, Penal Code, Criminal Procedure Code, Registration of Persons Act, Evidence Act, Prisons Act, Firearms Act, Radiation Protection Act, Traffic Act, Labour Institutions Act, National Transport and Safety Act, Refugees Act, National Intelligence Service Act, Prevention of Terrorism Act, Kenya Citizenship and Immigration Act, National Police Service Act and Aviation Act. However, these amendments were challenged at the High Court where orders were sought to have the Security Law declared unconstitutional. The Court later suspended eight provisions of this Law and requested the Chief Justice to constitute a full Bench to rule on its constitutionality. The first provision of the law to be suspended was Section 12 that limits the freedom of speech and freedom of media by limiting the publication or distribution of material likely to cause public alarm, incitement to violence or disturb public peace. The law does not define such material and hence gives broad discretion to the security services in deciding when and where to apply the law. Section 16, which allowed the Prosecution to withhold evidence from the Defence up until close to the hearing date, was also suspended. This arbitrarily limited the right to a fair trial which is a non-derogable right under the Constitution. One of the most controversial provisions is Section 48 that sought to limit the number of refugees and asylum seekers in Kenya. It states that the number of refugees and asylum seekers permitted to stay in Kenya shall not exceed one hundred and fifty thousand persons. This is in a country hosting more than half a million refugees and asylum seekers. The United Nations Convention relating to the Status of Refugees and the Organization of African Unity [OAU] Convention Governing the Specific Aspects of Refugee Problems in Africa, which Kenya has ratified, are all against the principle of taking back refugees to areas where they may suffer harm. While there are no specific provisions on the Constitution, Section 48 of the Security Law would have gone against Article 2 of the Constitution that domesticates international treaties ratified by Kenya.

Suspended also was Section 56 that sought to give the National Intelligence Service powers to undertake covert operations and Section 64 that outlawed publication of material that supports terrorism, training for purposes of terrorism, foreign terrorist fighters and travelling to a country for purposes of terrorism. Again, this gives wide discretion to the security agencies in determining who they perceive as a terror suspect, and under their own determination, proceeding to limit fundamental freedoms such as that of movement. However, Article 24 of the Constitution does allow for the limitation of rights and freedoms through legislation. The limitations however should be through the least restrictive means and respect the letter and spirit of the Constitution.

The Kenya Constitution, National Security Council and Fight against Terror

The Kenya Constitution 2010 established the National Security Council. The Council exercises supervisory control over national security organs and performs any other functions prescribed by national legislation. It is stipulated that the President shall preside at meetings of the Council and that the Council shall integrate the domestic, foreign and military policies relating to national security in order to enable the national security organs to cooperate and function effectively. The Council is required to report annually to Parliament on the state of security of Kenya. The Council may, with the approval of Parliament, deploy national forces outside Kenya for regional or international peace support or other supportive operations; and approve the deployment of foreign forces in Kenya. The national security organs are the Kenya Defence Forces; the National Intelligence Service; and the National Police Service whose collective aim is to promote and guarantee national security in a non-partisan manner or without furthering the interests of a particular political party or political interests prejudicial to the constitution.

The Kenya Police Service: Legal and Capacity Challenges in Fighting Terrorism

The concept of state security in Africa is problematic given the historical diversity of states and multiple networks of power structure and relations. Many African states may be described as weak states, quasi-states, fragile states, pseudo states and shadow states. The Kenyan state, like many in Africa and elsewhere in the developing regions, can scarcely guarantee security for its citizenry. The underlying challenges of the Kenya Police Service in fighting terrorism lie in the growing and evident incapacity of the state to provide the necessary infrastructure for policing, such as operational equipment, facilities, intelligence information sharing and coordination.

Examples include the Garissa Massacre in April 2014 and West gate Mall terrorist incidents. The freezing of police recruitment between 2008 and 2010 awaiting the institutionalization of the Police Service Commission in line with the recommendations of the Ransley Report (The National Taskforce on Police Reforms) had serious implications for security. The Kenya Police Strategic Plan of 2008 - 2012 envisaged to have expanded enrolment to possibly meet the UN recommended police -population ratio of 1:450 by 2012 which is still far from a reality as it stands at about 1:900 far below the projected target of 1: 650 in 2007. The poor terms of service including poor salaries, poor housing, poor or lack of insurance schemes, and prolonged hours of working make the police force susceptible to abetting crimes and receiving bribes. There is also the challenge of an ICT-noncompliant police institution. The annual budgetary allocation of the

Kenyan police is hardly enough to ensure that they discharge their duties effectively. An analysis of the financial allocation in 2004 was Ksh. 8.7 billion; in 2009 it was Ksh. 3.6 billion; and in 2013/2014 it was Ksh. 64.4 billion. Over the years, the inadequate budgetary allocations have been further evidenced in the observed infrastructural deficits notably in transport. Policing transnational crimes such as terrorism, money laundering, and cyber-terrorism pose serious challenges to the police. These are mainly in the form of personnel capacity and operational infrastructure gaps. The legal framework of these growing crimes is also impaired by deficiencies in formulation and enforcement of regulatory laws. For instance, on 30th April 2003, the government introduced the suppression of terrorism bill (through Supplement No. 38 of the Kenya Gazette). The anti-terrorism bill was abandoned midway as lobbyists opposed to it perceived that if enacted, it could stereotype and victimize the Muslim population. Critics of the bill argued that it was a reproduction of the US Patriots Act.

The secrecy concerning the training and equipping of the special units of the police for counter-terrorism operations have in the past increased the chances of repression and unaccountability by a police largely perceived to be incompetent, corrupt, repressive and alienating the public that it serves. There is lack of comprehensive legislation to curb cyber-terrorism, identity impersonation, and money laundering. The Kenya Communications Amendment Act of 2008 in which cyber-crimes are defined is not sufficiently comprehensive as there are a number of new crimes that are not covered by the Act. For instance, researchers have found out that over the past two years there has been an increase in fraud involving mobile phone money transfer services that is not adequately addressed in the 2008 legislation. According to the International Narcotics Control Strategy report entitled Money Laundering and Financial Crimes 2011, Kenya serves as a major hub for money laundering. The laundering of funds is attributed to Somali piracy, corruption, misuse of casinos, and narcotics proceeds. Further, Kenya's financial system is said to be laundering over US$100 million each year. The report argues that the unregulated networks of the Hawala money remittances mostly used by Somali refugees in the country are largely untracked by the government.

Policing Illegal Immigrants Police officers find it challenging to track down illegal immigrants, defined as "aliens" under Kenyan law. The majority of illegal immigrants are from the neighbouring failed state of Somalia. The major challenge the law enforcers face is difficulty of differentiating between Kenyan Somali and Somali-Somali refugees" both of whom are the same ethnic Somalis. The Somalis have often been described as a "transnational state" and have in the past posed a threat to national sovereignties in the greater Horn of Africa through their irredentist agitations and campaigns. The first reason is that the Kenyan government lacks the

capacity to police the country's vast north-eastern borders, coupled with the fact that the security forces themselves are unable to adapt to the harsh ecology of the semi-desert environment – a condition to which the traditionally nomadic Somalis are naturally adapted and which criminal elements amongst them easily exploit for cross-border crimes. The second factor is that many of the refugees have Kenyan Somali relatives, which in part contributes to their invisibility once they cross into the Kenyan side of the border. Continuing violent conflict and instances of drought in war-torn Somalia merely exacerbate the outflow of people from that country. Lack of proper policing and laxity of the immigration department facilitates and allows illegal immigrants access into the country without adhering to the due process of the law hence compromising security and national sovereignty. In addition, the criminal justice system is faced with significant challenges. One of these has to do with aspects of the 2010 constitution and specifically Article 49 subsection f (i) on the Bill of Rights. This clause enumerates and guarantees the rights of an arrested person. Under the constitution, a police officer is required to take a suspect to court within 24 hours of arrest. However, police officers argue that 24 hours is insufficient to prepare and produce evidence for court prosecution. The implication of this is that at times, suspects hurriedly brought to court can be set free for lack of evidence. This has resulted in some terrorist suspects released from police custody for lack of evidence being involved in other terrorist activities.

There is also the challenge of intelligence coordination. According to Afua Hirsch of The Observer on 28 September 2013, the National Intelligence Service (NIS) was strongly criticized for poor coordination and sharing of intelligence information. Unconfirmed information in The Star newspaper reported that two unnamed NIS officers had passed warnings about an attack to the police. National Intelligence Service and the Fight against Terrorism The Kenya National Intelligence Service, which is both the domestic and foreign intelligence agency for Kenya, grew from the Special Branch or Directorate of Security Intelligence in 1926 to the National Security Intelligence Service in 1998. The mission of NIS is to detect and identify any potential threat to Kenya, advise the President and Government of any security threat to Kenya and take steps to protect the security interests of Kenya whether political, military or economic and gather intelligence and counter-intelligence.

The NIS is answerable to Parliament's oversight authority in so far as its operations and policies are concerned. Though terrorism stands out as a potent threat to national security due to its amorphous nature, destructive capabilities, potential to create internal armed conflicts and its use of asymmetric warfare to create panic and manipulate the government, the use of counter-terrorism measures to neutralize terrorist organizations, networks and cells by NIS is commendable. The existence

of an effective national defense force and intelligence agencies and their mutual cooperation and coordination has enabled the nation avert grave danger. Enactment of anti-terror legislation does create a conducive environment for preemption, neutralization and response to terror attacks. The strategic deployment of police and paramilitary officers augmented by civil cooperation, contributes to minimization of crime and terrorism. The utilization of intelligence services by both NIS and the military to detect, identify, locate and neutralize or avert threats has gone a long way in protecting the strategic interests of the nation. The intelligence services have also been able to unmask espionage activities through effective counter-espionage. The NIS has also fulfilled its task of protecting highly classified information although there have been instances of criminal elements revealing classified information to unauthorized parties. However, public opinion on the effectiveness of the NIS has been divided especially in the last two years due to increased cases of terrorism carried out within the country with the security organs seemingly unable to stop the attacks. Before the legal amendments, security agents were only required to provide the Police and Defence Forces with intelligence reports and could not compel them to act on the same, leading the NIS to point fingers of culpability especially at the Police Service, by accusing it of failing to act on its reports following the many acts of terror that occurred in different parts of the country especially between 2012 and 2014. Indeed, the practice of finger-pointing between the NIS, the Police, and other agencies was also addressed in the passing of the December 2014 Security Laws Amendment Bill and the establishment of a new body known as the National Counter-Terrorism Centre via amendments to the Prevention of Terrorism Act.

Despite spirited public protestations, these proposals carried the day when on the 19th of December 2014 amendments were made to the Prevention of Terrorism Act 2012 giving the Cabinet Secretary for Internal Security and the National Assembly the authority to permit the NIS and its sister security organs a freer hand to intercept personal communication in the course of their counter-terrorism work. On the same date, officers were given authority to make arrests following amendments to Section 6 of the National Intelligence Service Act of 2012. According to Major General Charles Mwanzia (retired) who headed military intelligence for a decade, corruption and poor management of intelligence information contribute to increased terrorist attacks. The Security organs worked as rivals rather than partners, thus making coordination difficult as witnessed in the Westgate and Garissa attacks in 2013 and 2015 respectively. However, even if intelligence were better coordinated, corruption would still hinder surveillance and tracking of cells. For the equivalent of a few hundred dollars slipped to an officer, a suspect can buy a passport, pass a checkpoint without searches or purchase arms, experts observe.

According to Transparency International, Kenya's police force is among the most corrupt institutions in East Africa, with officers accounting for almost half of all bribes transacted in the country in 2014. Al Shabaab and other criminals can both buy passage, visas and other useful items from the police and other governmental services thus effectively making the border with Somalia highly porous with terrorists able to avoid the police.

Kenya Defence Forces (KDF)

The Kenya Defense Forces utilize particularly the strategy of foreign internal defense (FID) to combat or neutralize actual terrorist activities. FID is necessary because terrorist groups such Al Qaeda or Al Shabaab are transnational in nature and can easily co-exist with local insurgency groups to destabilize the political and economic infrastructure of sovereign states.

The principles and practice of FID, sovereignty and national interest help us to understand the basis of the Kenya Defense Forces' incursion into Somalia to protect the sovereignty and national interest of the Kenyan state. The armed attacks committed by armed bands, groups, irregulars or mercenaries were of high threshold under Article 51 of the UN Charter and therefore the use of force was constitutionally justified.

Recommendations and Way Forward

Terrorism is currently a crime without borders. The threats to Kenya from domestic and international terrorism are becoming more severe. Terror threats directed towards Kenya are more diverse than ever and becoming ever more dispersed. The threats from Al Shabaab and its sympathizers are simply ones that cannot and should not be ignored. There is a need for the country to tighten its grip on the war on terror by giving due regard to certain recommendations with the aim of acting upon them. Since the Constitution of Kenya 2010 lacks a direct provision on terrorism, it may be necessary to revisit it on matters of terrorism. Secondly, it will be necessary for Kenya to ratify international conventions that have provisions on the fight against terrorism. It is therefore recommended that a stable buffer zone in terms of government structures and strong military presence will prevent the infiltration of the Al Shabaab into Kenya. The creation of the buffer zone will be of strategic importance as Kenya opens the northern transport corridor and mineral exploration. This may take up to ten years to stabilize the state of Jubaland or the buffer zone both of which are of importance to Kenya's national security.

Given the fragility of the state of Somalia, the bulk of security efforts should be allocated toward destroying terrorist sources in that country. Strengthening Homeland security isthe other option through institutional capacity building,

intelligence information sharing and acting on the information. Abetting corruption especially on matters of national security should be regarded as sedition. An effective counter-terrorism strategy which brings together domestic and international co-operation and encompasses material and timely response will be crucial. Lastly, it is important that security forces undertake risk assessment in security decision-making Afua Hirsch, in The Observer, September 28, 2013.

References

Ajulu, R. (2002). "Politicized Ethnicity, Competitive Politics and Conflict in Kenya: A Historical Perspective." African Studies 61 (2): 251-68.

Alston, P (2009). "Statement by Professor Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions," delivered at the United Nations Human Rights Council (Geneva, June 3, 2009), **http://www**. un.org/webcast/unhrc/11th/statements/Alston_STMT.pdf (accessed February 10, 2011).

Baker, B. (2006). "Beyond the State Police in Urban Uganda and Sierra Leone.'' Afrika Spectrum 41 (1): 55-76.

BBC, 'Garissa attack: How it has changed Kenya' (BBC News Africa 2015) <http://www.bbc.com/news/worldafrica-32430122> accessed 23 April 2015

Blunkeet, 2001. Bradbury, M. and Kleinman, M. (2010). Winning Hearts and Minds? Examining the Relationship between Aid and Security in Kenya. Boston: Feinstein International Center, Tufts University.

Budget Guide 2013/14 - Institute of Economic Affairswww. ieakenya.or.ke/publications/doc.../277-budgetguide-2013-14

Buhler (2010). Business Daily Capital FM Kenya, http://www.capitalfm.co.ke/news/ kenyanews/kenyan-police-officers-get-pay-rise-9009. html (accessed March 31, 2011).

Charles M. Mwalimu, 'Refugees and State Security: Kenya's obligation under International Humanitarian Law and the Impact of the Law on State Security'[2012]<http://www.academia.edu/3471520/Refugees_and_State_ Security_Kenyas_obligation_under_International Humanitarian Law and the Impact of the Law on State Security> accessed 21 April 2015.

Commonwealth Human Rights Initiative (CHRI) and Kenya Human Rights Commission (KHRC). The Police, The People, The Politics: Police Accountability in Kenya.

Nairobi: CHRI and KHRC, 2006. Constitution of Kenya 2010 a 118 Constitution of Kenya 2010 a 2 (6)

Constitution of Kenya 2010 a 238(2) Country Reports 2012: Middle East and North Africa

Overview in **http://www.state.gov/j/ct/rls/crt/2011/195544**.htm; 2011 International Narcotics Control Strategy Report

(INCSR), Volume 2, Money Laundering and Financial Crimes: **http://www.state.gov/j/inl/rls/nrcrpt/index.htm**.

Daily Nation (2014). "Gichangi set to Get New Powers Over Spy Agency". Business Daily. Retrieved June 2014.

Daily Nation September 4, 2014 and Daily Nation, February 10, 2015

Daily Nation, "Kibaki Says Refugee Problem a Concern," Daily Nation, 9/8/2011; **http://allafrica.com/**stories/201108100349.html (accessed August 10, 2011).

Daily Nation, "Probe fails to link Kenyan MPs to Drugs".

Daily Nation, 30/01/2011.

Daily Nation, "Team Proposes New Syllabus as Hiring of Police Set to Resume.'' 19/02/2011.

Daily Nation, "Team proposes new syllabus as hiring of police set to resume,'' Daily Nation, 19/02/11.; Kenya Police Service, "Strategic Plan 2008-2012" Eevidenhttp://www.progressiveradionetwork.com/theprogressive-news-hour/.ce.

Farrakhan v. Reagan, a United States District Court

FISA Amendments Act of 2008, Sec105.

Francis, D. (2005). 'Introduction' in D. Francis (ed) (2005). Civil Militia: Africa's Intractable Security Menace? Aldershot: Ashgate, pp. 1- 29.

Galtung, J. (1990). "Violence and Peace", in P. Smoker et al (eds.), A Reader in Social Studies. New York: Pergamon Press, pp. 9-14.

Galtung,1990 Gimode, E. (2001). "An Anatomy of Violent Crime and Insecurity in Kenya: The Case of Nairobi in the Last Quarter of the Twentieth Century." Paper presented at a Conference on The Urban Experience in Eastern Africa. Nairobi: British Institute in Eastern Africa.

Gimode, E. (2007). "The Role of the Police in Kenya's Democratization Process'' in Godwin, R. Murunga and Shadrack, W. Nasong'o (eds.), Kenya: The Struggle for Democracy. London: Zed Books, pp. 227-60.

Giraldo, J. and Trinkunas, H. (2007). "Transnational Crime'' in Collins, A. (ed.), Contemporary Security Studies.

New York: Oxford University Press, pp. 346-67.

Government of Kenya (2008). Commission of Inquiry into Post-Election Violence Report. Nairobi: Government Printer.

Government of Kenya (2010). Ministry of Finance. Medium Term Budget Strategy Paper. Nairobi: Ministry of

Finance.http:siteresources.worldbank.org/INTDEBTDEPT/Resources/468980-1295462530893/KenyaMTD502.pdf (accessed March 11, 2011).

Hills, A. (2006). "Trojan Horses? USAID, Counterterrorism and Africa's Police." Third World Quarterly 27(4): 629-43. Holder v. Humanitarian Law Project

Human Rights Watch (2008). Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance. New York: Human Rights Watch, 2008.

Human Rights Watch (HRW) (2002). Playing with Fire: Weapons Proliferation, Political Violence and Human Rights in Kenya. New York: Human Rights Watch. Interview Analysis - Kenya's intelligence work hurt by corruption, rivalries, Nairobi by Edmund Blair, Sept 2013.

J. Meservey, 'False Security in Kenya' [2015] 1, 1

Kamau, C. (2006). "Kenya and the War on Terrorism". Review of African Political Economy 33 (107): 133-41.

Katumanga, M. "A City under Siege: Banditry and Modes of Accumulations in Nairobi, 1991-2004.'' Review of African Political Economy 32, no. 106 (2005): 505-20.

Katumanga, M. and Cliffe, L. (2005). Nairobi – A City Besieged: The Impact of Armed Violence on Poverty and Development. Bradford: Centre for International Cooperation and Security Department of Peace Studies.

Kenya Constitution 2010, article 5 and 6.

Kenya National Commission on Human Rights (KNHCR) (2008). The Cry of Blood: Report on Extrajudicial Killings and Disappearances. Nairobi: KNHCR.

Kenya Police Service (20030. Kenya Police Service Strategic Plan 2003-2007 Draft 2. Nairobi: Kenya Police Service.

Kenya Police Service (2008). Strategic Plan 2008-2012. Nairobi: Kenya Police Service.

Kenya: Halt Crackdown on Somalis' (Human Rights Watch, 2014) <http://www.hrw.org/news/2014/04/11/kenya-haltcrackdown-somalis> accessed 23 April 2015.

Kenya: Somalis scapegoated in counter-terror crackdown (Amnesty International 2014) < http://www.amnesty.org/en/news/kenya-somalis-scapegoated-counter-terrorcrackdown-2014-05-26 > accessed 12 July 2014 (emphasis added).

Kimani, M. (2012). "Security for the Highest Bidder: Shoddy Policing for the Many, Costly Private Protection for the Few.'' Accessed on May 20, 2012 at http://www.un.org/en/africarenewal/vol23no3/233-security.html Liberty or Safety: Implications of the USA Patriot Act and the U.K.'s Anti-Terror

Laws on Freedom of Expression and Free Exercise of Religion. Supra note 6 at 881.

Lucy Kiama and Rufus Karanja, 'Asylum Space in Kenya: Evolution of Refugee Protection over 20 years' [2013] FMR < http://www.fmreview.org/25th-anniversary/kiamakaranja > accessed 12 July 2014.

Mamdani, M. (1996). Citizen and Subject: Contemporary Africa and the legacy of Late Colonialism. London: James Currey.

Mbembe, A. (2001). On the Postcolony. California: University of California Press.

Mkutu, K. (2006). "Small Arms and Light Weapons among the Pastoral Groups on the Kenya- Uganda Border Area.'' African Affairs 106(422): 47-70.

Mkutu, K. and Kizito, S. (2007). "Private Security Companies and Dilemmas for Security.'' Journal of Contemporary African Studies 25 (3): 391-416.

Mueller, S. D. (2008). "The Political Economy of Kenya's Crisis.'' Journal of Eastern African Studies 2 (2): 185-210.

Murunga, R. G. (2005). "Conflict in Somalia and Crime in Kenya: Understanding the Trans-Territoriality of Crime."

African and Asian Studies 4 (1-2):137-61.

Mwalimu (n1 above); '2014 UNHCR country operations profile - Kenya' (UNHCR, the UN Refugee Agency, 2014) **http://www.unhcr.org/pages/49e483a16.html#.%28** accessed 8 April 2015.

Mwenda, A. (2005). A Review of the Kenya Police Force Budget and its Effect on Crime Management. New Delhi: Matrix.

National Council for Law Reporting (2010). Constitution of Kenya 2010, The Attorney General and National Security Intelligence Service. Website retrieved August 2012.

National Council for Law Reporting (2012). National Intelligence Service Act 2012, The Attorney General, National Assembly. Website retrieved September 2014.

National Council for Law Reporting (2012). Prevention of Terrorism Act 2012. The Attorney General. Website retrieved September 2014.

Ndung'u, N. (2008). "Kenya: The December 2007 Election Crisis." Mediterranean Quarterly 1:111-121.

Omeje, K. (2008). "The War on Terror and the Crisis of Postcoloniality in Africa". African Journal of International Affairs 11(2): 89-114.

Osumah, O. and Aghedo, I. (2010). "The Open Sore of a Nation: Corruption Complex and Internal Security in Nigeria." African Security 3: 127-47.

Prevention of Terrorism Act- in **http://www.legisaltion.gov**.uk.2005/2/section1/enacted Quoted in The

Observer, September 28, 2013 R v Commissioner of the Metropolis Police, UKHL12

Schmitt and Shanker, 2005. Section 6 of the National Intelligence Service Act of 2012.

Shaughessy (2006); Prevention of Terrorism Act 2006 in http//.www.legislation.gov.uk.ukpga/2006/11/section/1/enacted?view=interweave.

Shinkman, 2013

Shinkman, 2015

Siegel, L. (2010). Criminology: The Core. Belmont: Wadsworth.

Soma, 2005;Patriot Act,2001 section 203,206,311.

Spuy, E. and Rontsch, R. (2008). Police and Crime in Africa: A Brief Appraisal of Structures, Policies and Practices. Cape Town: Centre of Criminology.

Stevrou, A. (2002). Crime in Nairobi: Results of a Citywide Victim Survey. Nairobi: UN Habitat, Safer Cities Series 4.

Sunday Standard (2009). "Kenya's Most Guarded VIPsUsing Taxpayer's Money and Foreign Aid to Pay the Bill, Sunday Standard, 6/6/2009;http://africanpress.wordpress.com/2009/06/07/Kenya's-most%20guarded-vips-usingtax-payers-money-and%20foreign-aid-to-pay-the-bill/. Accessed March 29, 2011).

Supplement No. 38 of Kenya Gazette. The 2011 International Narcotics Control Strategy

Report (INCSR), Volume 2, Money Laundering and Financial Crimes: http://www.state.gov/j/inl/rls/nrcrpt/index.htm

The Association for Civil Rights in Israel (ACRI) http://cmiskp.echr.coe.int//tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=24704&sessionId=26399324&skin=hudoc

The Australian Anti-Terrorism Act, 2005

The Kenya Communications Amendment Act of 2008.

The Kenya Constitution 2010 Chapter 14, part 1

The Kenya Constitution, 2010 Chapter 14 article 240

The Security (Amendment) Bill s 12.

The Universal Declaration of Human Rights

Torpey, J. (1998). "Coming and Going: On the State Monopolization of the Legitimate Means of Movement". Sociological Theory 16(3): 239-59.

Transparency International Kenya (2009). "The East African Bribery Index. http://www.tikenya.org/documents/EABIReport09.pdf (accessed October 20, 2010).

United Nations Development Program (UNDP). The Human Development Report. Accessed on May 15, 2012 at http:hdr.undp.org/en/reportd/global/hdr1994/chapters

US Department of Defense reference no.2004-04-30; accessed on 26.8.2014.

US Department of State (2011). "International Narcotics Control Strategy Report Volume II: Money Laundering and Financial Crimes." Bureau for International Narcotics and Law Enforcement Affairs, March 2011, http://photos. state.gov/libraries/mauritius/320773/PDF_documents/incsr_2011.pdf (accessed April 7, 2011).

US Department of State, "International Narcotics Control Strategy Report Volume II: Money Laundering and Financial Crimes," (Bureau for International Narcotics and Law Enforcement Affairs, Marh2011.

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