

**THE UNLAWFUL IMPACT OF COUNTER-TERRORISM OPERATIONS  
ON FREEDOM FROM TORTURE**

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**Declaration**

I, CHRISTINE ADHIAMBO AGISO, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: .....

This Research Proposal has been submitted for examination with my approval as University Supervisor.

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## **Abstract**

Terrorism has greatly affected Kenya for over a decade, with recent attacks occurring as a result of the deployment of the Kenyan military to neighbouring country Somalia. Terrorism is a matter that affects national security and the well being of society. The government has been prompted to take drastic measures to counter terror attacks. The measures employed by the government to counter terrorism have had a profound impact on human rights. There has been a violation of human rights more specifically, freedom from torture. Freedom from torture is an absolute right and derogation from this right is not justified under any circumstance. This research provides a case study that highlights the various ethnic and religious groups that have been targeted during counter-terrorism operations and whose freedom from torture has been violated. The study seek to provide ways in which security agents responsible for the violations are held accountable and ways in which further violation could be prevented.

## **List of abbreviations**

ATPU- Anti-terror police unit

ICCPR-International Convention on Civil and Political Rights

KDF-Kenya Defence Forces

KNCHR-Kenya National Commission on Human Rights

NIS- National Intelligence Service

UDHR-Universal Declaration of Human Rights

UN- United Nations

## **List of cases**

Prosecutor v Anto Furundzija, ICTY judgement of 10 December 1998

William Wahome and others v Hon. Attorney General petition no.201 of 2013



## **List of legal instruments**

African Charter on Human and Peoples' Rights

Constitution of Kenya (2010)

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

International Convention on Civil and Political Rights

Kenya Defense Force Act

Prevention of Terrorism Act Kenya (no.30 of 2012)

Universal Declaration of Human Rights

# CHAPTER 1

## INTRODUCTION

Human rights as set out in Constitution of Kenya 2010 under the Bill of Rights are those belonging to an individual and are not granted by the state, these also include fundamental freedoms. These rights are recognized and protected by the state in order to preserve the dignity of the individuals and communities and to promote social justice and the realization of the potential of all human beings. Collective rights are those which belong to members of the society as a whole.

There is an intrinsic conflict between individual rights and collective rights which is ordinarily evident in the event that they are in competition. <sup>1</sup>Human rights are in competition in instances whereby enjoyment of rights and freedoms by a group of people would interfere with an individual's rights and freedoms.<sup>2</sup> The state must allow an individual to act within their rights once it recognizes and defines them(rights).<sup>3</sup> Human rights are inherent in every individual by virtue of their dignity. It could therefore be argued that it would be grossly unjust for the state to limit or derogate from rights and freedom without a justifiable reason. On the other hand however, the state has a duty to safeguard or rather protect the rights of all other members of society. Hence, the state must strike a balance between competing rights; those of the individual and the society as a whole respectively.

An instance of competing human rights would be in the circumstance whereby an individual's right to freedom and security of the person is derogated from in the case of torture during counterterrorism operations to safeguard the society. The right to freedom and security of person

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<sup>1</sup> Dworkin R, *Taking Rights Seriously*, Bloomsbury Publishing, London ,2013, 12.

<sup>2</sup> Dworkin, *Taking Rights Seriously*, 12.

<sup>3</sup> Dworkin, *Taking Rights Seriously*, 12.

is expressed in the Bill of Rights under article 29 of the Constitution of Kenya. It stipulates that every person has the right not to be subjected to torture, both physical and psychological.<sup>4</sup>

Kenya has suffered several terrorist attacks since 1998 whereby many have lost their lives or been injured.<sup>5</sup> There have been rising incidents of violation of human rights during counter terrorism operations.<sup>6</sup> Alleged terrorists have been subjected to torture as a means of intimidation and obtaining information with respect to terror attacks.

Findings by the Kenya National Commission on Human Rights have shown that human rights violations have occurred as regards counter terrorism efforts.<sup>7</sup> These violations include; torture, extrajudicial killings, enforced disappearances, arbitrary arrests and detention. Evidence has shown that security agents are responsible for the human rights violations against alleged terror suspects.<sup>8</sup>

Research conducted by the Human Rights Watch reveals that suspects of terror attacks were detained in isolated blocks and kept away from their families and lawyers. Muslim groups have accused the Kenyan government of condoning the ill- treatment of individuals of the Muslim community in the counter terrorism operations.<sup>9</sup> Human rights violations by the various state security agencies tasked with the prevention of terrorism have led to the violation of the right to freedom from torture.

It is the duty of the state to safeguard citizens and ensure national security not only during terror attacks but also from internal and external threats to its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests.<sup>10</sup> National security is to be guided by certain principles; it is subject to the authority of the constitution and legislature.<sup>11</sup> It shall be pursued in compliance with the law and guided by the rule of law, democracy, human rights and

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<sup>4</sup> Article 29(a), *Constitution of Kenya (2010)*

<sup>5</sup> Momanyi S, 'The impact of al-shabab terrorist attacks in Kenya' Thesis, Faculty of Humanities, Social Science and Education Centre for Peace Studies, December 2015, 2.

<sup>6</sup> Kenya National Human Rights Commission, *Preliminary report of Human Rights Abuses in the Ongoing Crackdown against Terrorism, 2015, 3.*

<sup>7</sup> Kenya National Human Rights Commission, *Preliminary report of Human Rights Abuses in the Ongoing Crackdown against Terrorism, 2015, 3.*

<sup>8</sup> <https://www.hrw.org/news/2014/08/18/kenya-killings-disappearances-anti-terror-police> on 7 February 2017.

<sup>9</sup> Ploch L, 'Counter Terrorism in East Africa: The U. S Response' *Congressional Research Service* (2010), 16.

<sup>10</sup> Article 238, *Constitution of Kenya (2010)*

<sup>11</sup> Article 238(2) (a) *Constitution of Kenya (2010)*

fundamental freedoms.<sup>12</sup> The national security organs are enjoined to respect the diverse culture of the communities of Kenya while carrying out their function.<sup>13</sup>

### **1.1 Statement of the problem**

Ideally a right and a fundamental freedom shall not be limited except by law. This is clearly outlined in the Constitution of Kenya under Article 24, the African Charter on Human and People's Rights article 6 and article 9 of the International Convention on Civil and Political Rights (ICCPR). The Constitution of Kenya further stipulates that the limitation of a right or fundamental freedom should be justifiable, reasonable and based on human dignity and freedom<sup>14</sup>. This however has not been the case; terror suspects are subjected to torture, cruel, inhuman and degrading treatment an infringement of their freedom of security and person. The limitation to this fundamental freedom does not observe equality since only Muslim communities in Nairobi, the coastal, and northern region of Kenya are targeted.<sup>15</sup> The infringement of these fundamental rights and freedoms further violates human dignity.

### **1.2 Justification of Study**

The implications of counter-terrorism operations are profound specifically on the right to freedom from torture. Article 25(a) of the Constitution of Kenya provides that freedom from torture shall not be limited. Article 4 of the ICCPR, stipulates that there shall be no derogation from freedom of torture. The prohibition of torture is outlined in article 29(d) of the Constitution of Kenya under right to freedom and security of person.

### **1.3 Statement of objectives**

There are various aims propounded by this study and these include establishing; - why the state limits rights and,- the grounds advanced for the limitation of the right to freedom from torture. This dissertation will interrogate whether the grounds advanced for limitation of the right to

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<sup>12</sup> Article 238(2) (b) *Constitution of Kenya(2010)*

<sup>13</sup> Article 238(2) (c) *Constitution of Kenya(2010)*

<sup>14</sup> Article 24, *Constitution of Kenya (2010)*

<sup>15</sup> Kenya National Human Rights Commission, *Preliminary report of Human Rights Abuses in the Ongoing Crackdown against Terrorism,2015,3.*

freedom torture would be sufficient to justify limitation and whether it is justifiable to infringe on the right to freedom from torture of alleged terrorists in order to safeguard the community.

#### **1.4 Research questions**

This study is centered towards answering various questions as outlined below;

1. Is it justifiable for the state to limit the right to freedom from torture? 2.
2. What would be the grounds or reasons advanced for the derogation or limitation of rights?
3. In this case, is it justifiable for the state to infringe on the rights of the alleged terrorist in order to safeguard the rights of citizens?
4. Would the reasons propounded be sufficient to justify the infringement of this right by the state?

#### **1.5 Literature Review**

In a study entitled the 'Impact of Counter-Terrorism Operations on Human Rights' in Kenya, David Oramini suggests that everyone should be included in the fight against terrorism, and that the government should take all measures to ensure there are no illegal immigrants entering the country.<sup>16</sup> The study concludes that the state and its security agents are reluctant to observe human rights standards in the fight against terrorism but it fails to show the ineffectiveness of torture in counter-terrorism operations. A Preliminary Report by KNCHR establishes that there have been complaints of human rights violations in countering terrorism, and seeks to investigate and monitor these operations to establish whether they are in line with human rights standards.<sup>17</sup> The report gives a detailed account of human rights violations during counter-terrorism operation. An article by Samwel Mukira on 'Preventive Counter Terrorism Action' analyses challenges, human rights concerns, and inefficient counter- terrorism legislation with respect to

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<sup>16</sup> Oramini D, 'The Impact of Counter-Terrorism Operations on Human Rights in Kenya' Research Project, Centre for Human Rights and Peace Studies University of Nairobi, November 2014, 4.

<sup>17</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 2015, 6-32

counter- terrorism operations.<sup>18</sup> The article fails to provide a detailed account of torture and its implications in counter-terrorism operations.

The study, ‘Countering Terrorism in East Africa’ by Lauren Plotch gives an overview of the involvement of USA in counter-terrorism operations in East Africa.<sup>19</sup> This article does not address the human rights concern that result from counter- terrorism operations. ‘Kenya’s Counterterrorism Policy and the Safeguarding of Human Rights and Fundamental Freedoms’ by Evans Mwangangi seek to address the inadequacy of current legislation in safeguarding the rights of alleged terrorists.

The study by Ochieng’ ‘Counter-terrorism operations and Human Rights in Kenya’ analyses the mechanisms of counter terrorism operations and whether they are in line with human rights. The study also provides that the respect for human rights complements the fight against terrorism.<sup>20</sup> ‘Human Rights and the Genesis of Counter- Terrorism Practice in Kenya’ by Dr. Peter Onyango addresses the inadequate domestic legal framework to combat terrorism and the implications that arise out of this. The research by the Office of the United Nations High Commissioner for Human Rights titled ‘Human Rights Terrorism and Counter-terrorism’ addresses the multiplex relationship between human rights and terrorism. The thesis by Nthamburi deals with the human rights legal systems with respect to terrorism and the methods used by judicial and monitoring bodies when dealing with issues relating to human rights and terrorism.<sup>21</sup>

The Kenya National Commission on Human Rights contends that the government has a responsibility to ensure that its citizens are protected bearing in mind that there have been rising incidences of insecurity.<sup>22</sup> The report however does not show the nexus between counter-terrorism operations and human rights violations. The article ‘Terrorism and Counter terrorism in East Africa’ by Patrick Kimunguyi argues that counter-terrorism operations are faced with challenges such as competing national priorities, Islamic radicalization and lack of state capacity.

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<sup>18</sup>Samuel Mukira:Preventive Counter-terrorism Action’, 15 April 2011  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1898930](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1898930) on 8 August 2017.

<sup>19</sup>Lauren Plotch: Countering Terrorism in East Africa’ *Congressional Research Service*, 3 November 2010  
<https://fas.org/sgp/crs/terror/R41473.pdf> on 8 August 2017.

<sup>20</sup> Ochieng’ J, ‘Counter terrorism and human rights in Kenya’ LLB dissertation, Moi University, April 2014, 14.

<sup>21</sup> Nthamburi N, ‘Fighting Terror in East Africa: Less Liberty for More Security? Analysis Of Counter-terrorism Legislation And Its Impact On Human Rights’ LLM thesis, University of Capetown School for Advanced Legal Studies,2014,59.

<sup>22</sup> Kenya National Commission on Human Rights, *Occasional Report*, 2014, 14-83.

The study 'Counter-terrorism and the Protection of Human Rights by Human Rights Advocates' presents a commentary on the promotion and protection of human rights during the fight against terrorism.

The African law Journal on Counter-Terrorism Legislation and the Protection of Human Rights looks into the measures taken to fight terrorism and its connection to human rights. Samuel Aronson gives an overview on the significance of Kenya's fight against terrorism and its link to global security in his article.<sup>23</sup> The article however fails to address the violations on human rights that have come about due to counter-terror activities.

Extensive research and studies have been conducted with respect to counter-terrorism operations. The studies will be used to show that these operations have had a negative impact on the protection of the right to freedom from torture.

## **1.6 Theoretical Framework**

This study will focus on the concept of human rights and the rule of law. The rule of law means that everyone is subjected to the law. All persons including government officials are bound and required to abide by the law.<sup>24</sup> Ideally for the rule of law to prevail, certain requirements must be met. First, laws must be set out in general terms. Second, the laws must be well known and understood this is through promulgation. Third, there should be established institutions to deal with breaches.<sup>25</sup> Human rights are universal values and legal guarantees that protect individuals against actions and omissions mainly by state officials that interfere with fundamental rights and freedoms.<sup>26</sup> Human rights and fundamental freedoms are the birthright of all individuals and the government has a primary role in ensuring that they are protected.<sup>27</sup>

## **1.7 Hypothesis**

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<sup>23</sup> Aronson S,' Kenya and the Global War on Terror: Neglecting History and Geopolitics in Approaches to Counterterrorism' *African Journal of Criminology and Justice Studies* (2013), 32-33.

<sup>24</sup> Tamanaha B,'The History and Elements of the Rule of Law' *Singapore Journal of Legal Studies* (2012), 233.

<sup>25</sup> Tamanaha B, 'The History and Elements of the Rule of Law', 233.

<sup>26</sup> Office of the United Nations High Commissioner for Human Rights, *Fact sheet no.32*, 2007, 3.

<sup>27</sup> Kameri-Mbote P, "Fallacies of equality and inequality" Inaugural lecture, Nairobi, 24 January 2013

Counter-terrorism measures have the potential of violating the right to freedom from torture.

### **1.8 Assumptions**

The researcher in this study assumed that: There have been violations of human rights; specifically freedom from torture during counter terrorism operations.

### **1.9 Research Design and Methodology**

The research design used in this study will be comparative case studies. This study will focus on acquiring data through secondary sources; these are library research and internet searches to obtain written works such as journals, articles and reports.

### **1.10 Limitations**

Since there are a number of rights and fundamental freedoms, this research will be centered only on the right to freedom from torture. Due to time constraints, the researcher will focus on case study research design.

### **1.11 Chapter Breakdown**

Chapter one will be the introduction. The researcher will deal with the theoretical framework in chapter two, the legislative framework in chapter three. The comparative case studies will be covered in chapter four. Lastly, chapter five will be the conclusion and recommendation.

### **1.12 Timeline/duration**

This study will be carried out over a period of nine months. The researcher will focus on one chapter every month.



## CHAPTER 2

### THEORETICAL FRAMEWORK

Human rights and the rule of law will form the basis of the theoretical framework. There are no human rights if the rule of law is not respected and the converse is also true.<sup>28</sup> The rule of law is the instrument through which human rights are actualized.<sup>29</sup> The rule of law has a fundamental role in forming the foundation of social, economic and cultural rights in constitutions and other pieces of legislation.<sup>30</sup> The rule of law provides a means of redress when protected human rights are violated.<sup>31</sup> Human rights and the rule of law have an intrinsic relationship evident through the adoption of the Universal Declaration of Human Rights which stated that, “*if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law*”.<sup>32</sup>

#### 2. 1 Human rights

Human rights are universal values and legal guarantees that protect individuals against actions and omissions mainly by state officials that interfere with fundamental rights and freedoms.<sup>33</sup> Human rights and fundamental freedoms are the birthright of all individuals and the government has a primary role in ensuring that they are protected.<sup>34</sup> Terrorism interferes with the enjoyment of human rights therefore prompting the government to take measures that counter terrorism.<sup>35</sup> International human rights law imposes an obligation on states to respect and protect human rights and; - respect for human rights involves a prohibition on interference of their enjoyment.<sup>36</sup> Counter-terrorism measures and protection of human rights are interdependent and must be pursued simultaneously.<sup>37</sup> Certain rights may be limited under international law in special

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<sup>28</sup> <https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/> on 9 January 2018.

<sup>29</sup> <https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/> on 9 January 2018.

<sup>30</sup> <https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/> on 9 January 2018.

<sup>31</sup> <https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/> on 9 January 2018.

<sup>32</sup> <https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/> on 9 January 2018.

<sup>33</sup> Office of the United Nations High Commissioner for Human Rights, *Fact sheet no.32*, 2007, 3.

<sup>34</sup> Kameri-Mbote P, “Fallacies of equality and inequality” Inaugural lecture, Nairobi, 24 January 2013

<sup>35</sup> Office of the United Nations High Commissioner for Human Rights, *Fact sheet no.32*, 2007, 3.

<sup>36</sup> Office of the United Nations High Commissioner for Human Rights, *Fact sheet no.32*, 2007, 3.

<sup>37</sup> Office of the United Nations High Commissioner for Human Rights, *Fact sheet no.32*, 2007, 3.

circumstances.<sup>38</sup> These limitations must be necessary, proportional, and serve a legitimate purpose.<sup>39</sup> Limitation must be prescribed by law on grounds of public safety, national security, health, morals, safeguarding rights and freedoms of other individuals. Limitation must be necessary in pursuance of a crucial aim and measures implemented must be proportional to the objective or aim sought after.<sup>40</sup> The necessity of a limitation of a fundamental right and freedom must show a nexus between the measure taken and the objective anticipated.<sup>41</sup> The principle of proportionality has its foundation in the principle of necessity.<sup>42</sup> A state must act within its constitutional and respective legal provisions when declaring a state of emergency that would warrant derogation of specific rights.<sup>43</sup> Derogation from the right to freedom from torture is not justifiable under any circumstance. This is because the prohibition of torture is a peremptory norm or rather a norm of *jus cogens*.<sup>44</sup> Countering terrorism can be regarded as a crucial objective thus justifying the limitation of certain rights.<sup>45</sup> Limitations on specific rights may only be considered justifiable if they observe certain requirements; these are necessity, legitimate aim, and proportionality. Limitation and derogation clauses both provide a legal channel for states to escape from their human rights obligations.<sup>46</sup> Derogations are only appropriate for extraordinary situations that could threaten the survival and security of a nation, therefore are intended to be temporary in nature.<sup>47</sup> Limitation clauses on the other hand have a wider scope of application and are applicable for various reasons as highlighted above. Provisions relating to derogation are dependent on legality and the rule of law.<sup>48</sup>

Political, social, civil, economic and social human rights are inherent in every person by virtue of their dignity.<sup>49</sup> The present-day concept of human rights is grounded in the encounters of 'legal

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<sup>38</sup> Office of the United Nations High Commissioner for Human Rights, *Fact sheet no.32*, 2007, 3.

<sup>39</sup> Office of the United Nations High Commissioner for Human Rights, *Fact sheet no.32*, 2007, 3.

<sup>40</sup> Office of the United Nations High Commissioner for Human Rights, *Fact sheet no.32*, 2007, 3.

<sup>41</sup> Office of the United Nations High Commissioner for Human Rights, *Fact sheet no.32*, 2007, 3.

<sup>42</sup> Alton P and Goodman R, *International human rights*, Oxford University Press, Oxford, 2012, 394.

<sup>43</sup> Alton and Goodman, *International human rights*, 394.

<sup>44</sup> Alton and Goodman, *International human rights*, 394.

<sup>45</sup> Alton and Goodman, *International human rights*, 394.

<sup>46</sup> Alton and Goodman, *International human rights*, 394.

<sup>47</sup> Alton and Goodman, *International human rights*, 394.

<sup>48</sup> Alton and Goodman, *International human rights*, 394.

<sup>49</sup> Marta Santos: A Human Rights Conceptual Framework for UNICEF' UNICEF, May 1999 <http://direitoshumanos.gddc.pt/pdf/essay-9.pdf> on 18 January 2018.

*lawlessness*, when crimes were committed with the authorization of law.<sup>50</sup> A solution to these encounters was the development of the international law of human rights.<sup>51</sup> Human rights are universal; they belong to each and every individual.<sup>52</sup> Human rights are inalienable, one can neither be deprived of them (rights) nor relinquish these rights by themselves.<sup>53</sup> Equality is another defining characteristic of rights; this has been expressed in the Universal Declaration of Human Rights whereby all individuals are described to have equal rights and dignity.<sup>54</sup> Equality as a characteristic of human rights posits equality before the law and equal protection of the law.<sup>55</sup> Human rights can be described as a series of interrelated relations of those who have a duty to act or refrain from acting and the rights holder.<sup>56</sup> Respect for individual human dignity triumphs over the good of a group of persons and the state.<sup>57</sup> Terrorism has a direct impact on the enjoyment of human rights.<sup>58</sup> The state is therefore obligated to protect its citizens against violation of their rights as a consequence of terrorism.<sup>59</sup> Counter-terrorism operations have a potential of interfering with the enjoyment of human rights.<sup>60</sup> The state must therefore strike a balance between effective counter-terrorism measures and protecting the rights of suspected

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<sup>50</sup>Marta Santos: A Human Rights Conceptual Framework for UNICEF' *UNICEF, May 1999* <http://direitoshumanos.gddc.pt/pdf/essay-9.pdf> on 18 January 2018.

<sup>51</sup>Marta Santos: A Human Rights Conceptual Framework for UNICEF' *UNICEF, May 1999* <http://direitoshumanos.gddc.pt/pdf/essay-9.pdf> on 18 January 2018.

<sup>52</sup>Marek Piechowia:, The concept of human rights and their extra-legal justification' [https://www.academia.edu/4031501/What\\_are\\_Human\\_Rights\\_The\\_Concept\\_of\\_Human\\_Rights\\_and\\_Their\\_Extra-Legal\\_Justification](https://www.academia.edu/4031501/What_are_Human_Rights_The_Concept_of_Human_Rights_and_Their_Extra-Legal_Justification) on 18 January 2018.

<sup>53</sup>Marek Piechowia:, The concept of human rights and their extra-legal justification' [https://www.academia.edu/4031501/What\\_are\\_Human\\_Rights\\_The\\_Concept\\_of\\_Human\\_Rights\\_and\\_Their\\_Extra-Legal\\_Justification](https://www.academia.edu/4031501/What_are_Human_Rights_The_Concept_of_Human_Rights_and_Their_Extra-Legal_Justification) on 18 January 2018.

<sup>54</sup>Marek Piechowia:, The concept of human rights and their extra-legal justification' [https://www.academia.edu/4031501/What\\_are\\_Human\\_Rights\\_The\\_Concept\\_of\\_Human\\_Rights\\_and\\_Their\\_Extra-Legal\\_Justification](https://www.academia.edu/4031501/What_are_Human_Rights_The_Concept_of_Human_Rights_and_Their_Extra-Legal_Justification) on 18 January 2018.

<sup>55</sup>Marek Piechowia:, The concept of human rights and their extra-legal justification' [https://www.academia.edu/4031501/What\\_are\\_Human\\_Rights\\_The\\_Concept\\_of\\_Human\\_Rights\\_and\\_Their\\_Extra-Legal\\_Justification](https://www.academia.edu/4031501/What_are_Human_Rights_The_Concept_of_Human_Rights_and_Their_Extra-Legal_Justification) on 18 January 2018.

<sup>56</sup>Marek Piechowia:, The concept of human rights and their extra-legal justification' [https://www.academia.edu/4031501/What\\_are\\_Human\\_Rights\\_The\\_Concept\\_of\\_Human\\_Rights\\_and\\_Their\\_Extra-Legal\\_Justification](https://www.academia.edu/4031501/What_are_Human_Rights_The_Concept_of_Human_Rights_and_Their_Extra-Legal_Justification) on 18 January 2018.

<sup>57</sup>Marek Piechowia:, The concept of human rights and their extra-legal justification' [https://www.academia.edu/4031501/What\\_are\\_Human\\_Rights\\_The\\_Concept\\_of\\_Human\\_Rights\\_and\\_Their\\_Extra-Legal\\_Justification](https://www.academia.edu/4031501/What_are_Human_Rights_The_Concept_of_Human_Rights_and_Their_Extra-Legal_Justification) on 18 January 2018.

<sup>58</sup> SekyereP, Assare B, 'An examination of Ethiopia's anti-terrorism proclamation on fundamental human rights' *European Scientific Journal* (2016), 354.

<sup>59</sup> SekyereP, Assare B, 'An examination of Ethiopia's anti-terrorism proclamation on fundamental human rights', 354.

<sup>60</sup> SekyereP, Assare B, 'An examination of Ethiopia's anti-terrorism proclamation on fundamental human rights', 354.

terrorists.<sup>61</sup> A state whose foundation is grounded on a respect for human rights is identified as a democratic state governed by the rule of law.<sup>62</sup>

## 2.2 Rule of law

The principle rule of law indicates that no one is above the law.<sup>63</sup> It seeks to prevent arbitrary exercise of power by government officials on its citizens.<sup>64</sup> For the rule of law to prevail, certain requirements must be met. These are that the system of rules must be promulgated and well known. They must also be applied equally on every individual. The laws must be stated in general terms and easy to follow. The laws should not be contradictory.<sup>65</sup> Mechanisms must be established to deal with breaches of the rules.<sup>66</sup> Where rule of law is adhered to, justice is attainable and the converse is also likely to occur.<sup>67</sup> One could argue that if the following requirements are lacking, rule of law is nonexistent.<sup>68</sup>

There were a few ways to restrict the powers of the monarch and government officials by law in the pre-modern era<sup>69</sup>. The first was by monarch accepting to be bound by the law.<sup>70</sup> This usually would be by taking oath to be bound by positive, divine and customary law while assuming office.<sup>71</sup> One of the major duties of the monarch was to abide by the law this did not exclude the king. Secondly, it was widely assumed that the laws within which the monarch and government officers operated applied to everyone to nobody's exclusion.<sup>72</sup> When the law was breached there were consequences. The repercussions were of a political nature as opposed to legal. For instance

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<sup>61</sup> SekyereP, Assare B, 'An examination of Ethiopia's anti-terrorism proclamation on fundamental human rights', 354.

<sup>62</sup> Marek Piechowia, 'The concept of human rights and their extra-legal justification' [https://www.academia.edu/4031501/What\\_are\\_Human\\_Rights\\_The\\_Concept\\_of\\_Human\\_Rights\\_and\\_Their\\_Extra-Legal\\_Justification](https://www.academia.edu/4031501/What_are_Human_Rights_The_Concept_of_Human_Rights_and_Their_Extra-Legal_Justification) on 18 January 2018.

<sup>63</sup> <http://www.lexisnexis.co.uk/en-uk/about-us/rule-of-law.page> on 25 October 2017.

<sup>64</sup> Ndung'u Wainaina : 'Enforcing Constitution Promotes Rule of Law, National Development' *Standard Digital*, 3 June 2012 <https://www.standardmedia.co.ke/article/2000059185/enforcing-constitution-promotes-rule-of-law-national-development> on 25 October 2017.

<sup>65</sup> Kameri-Mbote P, Aketch M, *Justice sector and the rule of law*, Open Society Initiative for Eastern Africa, Nairobi, 2011, 3-5.

<sup>66</sup> Tamanaha B, 'The History and Elements of the Rule of Law', 233.

<sup>67</sup> Kameri-Mbote P, Aketch M, *Justice sector and the rule of law*, 3-5.

<sup>68</sup> Tamanaha B, 'The History and Elements of the Rule of Law', 233.

<sup>69</sup> Tamanaha B, 'The History and Elements of the Rule of Law', 233.

<sup>70</sup> Tamanaha B, 'The History and Elements of the Rule of Law', 233.

<sup>71</sup> Tamanaha B, 'The History and Elements of the Rule of Law', 233.

<sup>72</sup> Tamanaha B, 'The History and Elements of the Rule of Law', 233.

threat of excommunication by the church, threat of revolt this was particularly present in Germany.<sup>73</sup>

Today, the sovereign can be held accountable by employing legal mechanisms. This would involve the establishment of institutions within the government that perform law-related functions such as an independent prosecuting chamber.<sup>74</sup> A clear illustration of this could be found in the United States of America whereby officers within the Department of Justice investigated President Nixon to establish whether he had violated the law in connection with the Watergate affair.<sup>75</sup> An independent judiciary is also vital in ensuring that government officers are held accountable or are held to the law.<sup>76</sup>

Contrast is usually derived between the rule of law and rule of man.<sup>77</sup> The rule of man is subject to bias, prejudice, ignorance, subjectivity and other human weaknesses. This idea has been criticized. It is argued that human participation is necessary with respect to law making and interpretation. Hence the same human weaknesses may be difficult to avoid. A proposed solution to this problem would be to identify members of the judiciary as the legal specialists.<sup>78</sup> Ideally the judge is free from bias, ignorance and other human weakness that may affect law making and application.<sup>79</sup>

Laws must inform the actions of government and its officials.<sup>80</sup> The strength of the rule of law in society highly depends on people's respect for it. Individuals in society must believe that the law serve their interests and respects and protects their values.<sup>81</sup> Law must gain the trust of those who it is aimed at.

Against the backdrop of the anti-terrorism operations, it is evident that there is little respect for the rule of law which has resulted in the violation of human rights. Terror suspects are subjected to torture during these operations. The Kenya National Commission on Human Rights (KNCHR)

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<sup>73</sup> Tamanaha B, 'The History and Elements of the Rule of Law', 233.

<sup>74</sup> Tamanaha B, 'The History and Elements of the Rule of Law', 233.

<sup>75</sup> Tamanaha B, 'The History and Elements of the Rule of Law', 233.

<sup>76</sup> Tamanaha B, 'The History and Elements of the Rule of Law', 233.

<sup>77</sup> Tamanaha B, 'The History and Elements of the Rule of Law', 233.

<sup>78</sup> Tamanaha B, 'The History and Elements of the Rule of Law', 233.

<sup>79</sup> Tamanaha B, 'The History and Elements of the Rule of Law', 233.

<sup>80</sup> Tamanaha B, 'The History and Elements of the Rule of Law', 233.

<sup>81</sup> Tamanaha B, 'The History and Elements of the Rule of Law', 233.

has documented extrajudicial torture of suspected terrorists.<sup>82</sup> A report by KNCHR reveals that some victims had been handcuffed, faces covered and beaten for more than eight hours.<sup>83</sup> The report further shows that the perpetrators of these violations were Counter-terrorism Police Unit (ATPU), Kenya Defence Force (KDF), Rapid Deployment Unit of Administration Police, National Intelligence Service (NIS) and chiefs.<sup>84</sup> Specific groups have been targeted during these operations; these are the Somali and those who profess Islamic faith.<sup>85</sup> This counts as discrimination and is a violation of the right of the victims.

A member of the Anti-Terrorism Police Unit admits to extra judicial killings. He says “The justice system in Kenya is not favorable to the work of the police, so we opt to eliminate them. We identify you, we gun you down in front of your family, and we begin with the leaders.”<sup>86</sup> Similarly, in a documentary aired by the tv station Al Jazeera, four police officers admit to carrying out killings in Mombasa targeting Muslim clerics and activists in connection to the counter terrorism operations.<sup>87</sup> Torture is a technique commonly used by the police to acquire evidence with respect to anti- terrorism operations.<sup>88</sup> The police use excessive force and subject terror suspects to acts amounting to torture.<sup>89</sup>

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<sup>82</sup> ‘Peace Loise : KNCHR report: 25 killed, 21 missing in anti-terror operation’ *Standard Digital*, 15 September 2015 <https://www.standardmedia.co.ke/article/2000176419/knchr-report-25-killed-81-missing-in-anti-terror-operation> on 24 September 2017.

<sup>83</sup> ‘Peace Loise : KNCHR report: 25 killed, 21 missing in anti-terror operation’ *Standard Digital*, 15 September 2015 <https://www.standardmedia.co.ke/article/2000176419/knchr-report-25-killed-81-missing-in-anti-terror-operation> on 24 September 2017.

<sup>84</sup> ‘Peace Loise : KNCHR report: 25 killed, 21 missing in anti-terror operation’ *Standard Digital*, 15 September 2015 <https://www.standardmedia.co.ke/article/2000176419/knchr-report-25-killed-81-missing-in-anti-terror-operation> on 24 September 2017.

<sup>85</sup> ‘Peace Loise : KNCHR report: 25 killed, 21 missing in anti-terror operation’ *Standard Digital*, 15 September 2015 <https://www.standardmedia.co.ke/article/2000176419/knchr-report-25-killed-81-missing-in-anti-terror-operation> on 24 September 2017.

<sup>86</sup> Mwenda A, ‘Human rights abuses of muslim minority in Mombasa, Kenya’ *International Journal of Islamic Thoughts*, 41.

<sup>87</sup> Mwenda A, ‘Human rights abuses of muslim minority in Mombasa, Kenya’, 41

<sup>88</sup> Mwenda A, ‘Human rights abuses of muslim minority in Mombasa, Kenya’, 41

<sup>89</sup> Mwenda A, ‘Human rights abuses of muslim minority in Mombasa, Kenya’, 41

## CHAPTER 3

### LEGISLATIVE FRAMEWORK ON FREEDOM FROM TORTURE

Human rights are guaranteed under both domestic and international legislation. The right against freedom from torture is absolute and non-derogable. An absolute right is that which a state cannot infringe even for legitimate reasons such as safeguarding national security.<sup>90</sup> Non-derogable rights are those that cannot be infringed even during exceptional situations such as war.<sup>91</sup>

#### 3.3 Domestic legislation

Article 25(a) of the Constitution states that freedom from torture shall not be limited. Article 29 of the Constitution of Kenya states that every person has a right to freedom and security of person which includes the right not to be subjected to torture in any form, whether physical or psychological. The Prevention of Torture Act of Kenya was enacted in April 2017 pursuant to article 25(a) and 29 (d) of the Constitution of Kenya and the principles of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The Act defines torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person.<sup>92</sup> Article 4(a) of The Prevention of Torture Act further states that torture is prohibited for purposes of obtaining a confession or information from a person, for punishment for a crime committed or suspected to have been or planned to be committed, and for the purpose of intimidating a person to do or refrain from doing an action. Torture is an offence that imposes criminal liability of up to twenty five years imprisonment on conviction or life imprisonment in the event of death from the act (torture).<sup>93</sup> Torture shall not be justifiable even under special circumstance such as; a state of war or threat of war, internal political instability, and public

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<sup>90</sup> Turner I, 'Freedom from Torture in the War on Terror: Is it Absolute' *Journal of Military Ethics* (2011), 419-437.

<sup>91</sup> Turner I, 'Freedom from Torture in the War on Terror: Is it Absolute', 419-437.

<sup>92</sup> Section 4, *Prevention of Torture Act*, ( Act no. 12 of 2017)

<sup>93</sup>Section 5, *Prevention of Torture Act*, ( Act no. 12 of 2017)

emergency.<sup>94</sup> The KDF Act states that any military officer who violates the right of any individual by virtue of their position shall be punished.<sup>95</sup>

The case of *William Wahome and others v Hon. Attorney General petition no.201 of 2013* further asserts the prohibition of torture. The petitioner was arrested at his home in Kabachia Estate in Nakuru and taken to Nyayo house torture chambers. William was presented in front of a group of ten people who interrogated him and asked him to give details about the Kenya Patriotic Front, a political movement. He was ordered to strip naked and subjected to slaps, kicks and blows. Rubber whips and broken chair pieces were also used on him. All these took place for more than a week. Pressurized water was also sprayed on him for several hours every day. The petitioner was locked in cold dark cell without food, a sleeping mat and drinking water for eight days. It was determined by the court that the aforementioned acts amounted to torture and was used as a method of interrogation. The court relied on the *Bhagwan Singh and Another v State of Punjab* case to assert its position in relation to the prohibition of torture. The court remarked that: “It is the duty of the police to interrogate or arrest individuals suspected to have committed a crime, this however, should be done in accordance with the law. Torturing persons and using third degree methods are of medieval nature and contrary to the law.”

### **3.2 International instruments**

Freedom from torture has been enshrined in various international instruments as discussed below. Article five of the Universal Declaration of Human Rights (UDHR) prohibits torture. The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) entered into force in the year 1987, it asserts that torture shall not be justified under any circumstance. The definition of torture under the convention corresponds to that of the Prevention of Torture Act of Kenya. Article seven of the International Convention on Civil and Political Rights prohibits torture. The ICCPR states that there shall be no derogation from the freedom from torture in time of public emergency which threatens the life of the nation.<sup>96</sup> The African Charter on Human and Peoples’ Rights is a regional convention. The convention

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<sup>94</sup> Section 6, *Prevention of Torture Act*, ( Act no. 12 of 2017)

<sup>95</sup> Section 126 (1), *Kenya Defence Forces Act* (no. 25 of 2012)

<sup>96</sup> Article 4(2), *International Convention on Civil and Political Rights*, 19 December 1966, 14668.



prohibits all forms of exploitation which includes torture.<sup>97</sup> All ratified international instruments shall form part of Kenya's law and hence are binding.<sup>98</sup>

### 3.3 Torture in International law

Freedom from torture is a civil right; it could also be argued that it is a norm of *jus cogens* in public international law.<sup>99</sup> No limitation upon this right would be justifiable even in the declaration of a state of emergency.<sup>100</sup> Peremptory norm or norms of *jus cogens* are binding on states irrespective of consent.<sup>101</sup> Human rights allows the limitation of certain rights in exceptional cases, however freedom from torture is an exemption.<sup>102</sup> This right is of importance because it provides basic assurance to the physical integrity of human beings which is often vulnerable in times of national emergencies.<sup>103</sup>

The case of Anto Furundzija further asserts the status of freedom from torture as a norm of *jus cogens*.<sup>104</sup> The accused was a soldier charged with torture among other crimes.<sup>105</sup> It was alleged that the accused inflicted severe mental and physical pain on a non-combatant during an interrogation with the aim of obtaining information and to intimidate, therefore committing torture.<sup>106</sup> Although the accused did not participate in the physical commission of the crime, he encouraged his fellow soldiers in the commission of torture.<sup>107</sup> The accused was present as fellow soldiers beat and raped non-combatants.<sup>108</sup> It was affirmed that the violations took place in the context of an armed conflict between the Republic of Bosnia and Herzegovina<sup>109</sup>. The tribunal held that the prohibition of torture by a peremptory norm of international law affected both the inter-state and individual levels.<sup>110</sup> The purpose at the inter-state level is to invalidate

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<sup>97</sup> Article 5, *African Charter on Human and Peoples' rights*, 27 June 1981.

<sup>98</sup> Article 2(6) *Constitution of Kenya*(2010)

<sup>99</sup> Rahman A and Jahid M, *An introduction to international human rights law*, IDC publishers, Leiden, 2010, 60.

<sup>100</sup> Rahman and Jahid, *An introduction to international human rights law*, 60.

<sup>101</sup> Rahman and Jahid, *An introduction to international human rights law*, 60.

<sup>102</sup> Rahman and Jahid, *An introduction to international human rights law*, 60.

<sup>103</sup> Rahman and Jahid, *An introduction to international human rights law*, 60.

<sup>104</sup> *Prosecutor v Anto Furundzija*, ICTY judgement of 10 December 1998, para 51.

<sup>105</sup> *Prosecutor v Anto Furundzija*, 51.

<sup>106</sup> *Prosecutor v Anto Furundzija*, 51.

<sup>107</sup> *Prosecutor v Anto Furundzija*, 51.

<sup>108</sup> *Prosecutor v Anto Furundzija*, 51.

<sup>109</sup> *Prosecutor v Anto Furundzija*, 51.

<sup>110</sup> Wet E, 'The prohibition of torture as an international norm of *jus cogens* and its implications for national and customary law' *European Journal of International Law* (2004), 97-121.

any legislative, administrative or judicial act permitting torture.<sup>111</sup> At the individual level in the context of criminal responsibility, states have an obligation to investigate, prosecute, and punish or extradite those accused of torture, as a consequence of the status of freedom from torture as *jus cogens*.<sup>112</sup>

Notwithstanding the extensive legal framework with respect to prohibition of torture both in domestic legislation and ratified international instruments, the right has been persistently violated especially during counter-terrorism operations.

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<sup>111</sup> Wet E, 'The prohibition of torture as an international norm of jus cogens and its implications for national and customary law', 97-121.

<sup>112</sup> Wet E, 'The prohibition of torture as an international norm of jus cogens and its implications for national and customary law', 97-121.

## CHAPTER 4

### COMPARATIVE CASE STUDIES

Specific areas are targeted during counter- terrorism operations. These include the Northern region, the Coastal region and Nairobi particularly Eastleigh area.<sup>113</sup> Terror suspects are subjected to torture in a bid to get them to confess to acts of terrorism. Kenya's counter terrorism strategy is comparable to that of the United States of America whereby torture is employed during operations. Ethiopia's has been successful in the battle against terrorism due to its comprehensive counter-terrorism framework.

#### 4.1 Kenya

In Mombasa, several persons' rights have been violated, more specifically freedom from torture. Swale Shebe Auni recalls acts of torture on him by the Kenya Defence Force.<sup>114</sup> He was arrested after the Mpeketoni attack and was brutally beaten.<sup>115</sup> Swale was subjected to attacks by ants in the forest where the KDF officers took him and they further subjected him to degrading treatment.<sup>116</sup> Ali Mugo from Witu was also a victim of torture.<sup>117</sup> He states that he was beaten by the butt of a gun and kicked while on his way to the police station.<sup>118</sup> Ali with several other victims who had been arrested with him were forced to sleep on the floor on top of each other.<sup>119</sup> KDF officers would step on them, kick their private parts and hit their heads.<sup>120</sup> The suspects did

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<sup>113</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 2015, 6-32

<sup>114</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 2015, 6-32..

<sup>115</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 2015, 6-32.

<sup>116</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 2015, 6-32.

<sup>117</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 2015, 6-32..

<sup>118</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 2015, 6-32.

<sup>119</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 2015, 6-32.

<sup>120</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 2015, 6-32.,

not receive water while in remand.<sup>121</sup> Mohamed Jara Bae recalls a similar situation to that of Ali Mugo.<sup>122</sup>

Mohammed Ware Galgalo claims to have been blindfolded by KDF officers who took him away in a helicopter.<sup>123</sup> He was arrested due to his alleged part in the Mpeketoni terror incident.<sup>124</sup> Ware was flown to an unknown destination where he was handcuffed, blindfolded and subjected to acts of torture for more than two days.<sup>125</sup> He also recalled water being poured on his face to create an illusion of drowning while his hands were tied.<sup>126</sup> Mohammed was strangled and simultaneously forced to drink water.<sup>127</sup> Hot metal bars were used to burn him and his face cut with a razor blade and his private parts squeezed with pliers.<sup>128</sup>

In Nairobi Eastleigh area Liban Abdulle who was a refugee at Kakuma camp was arrested by the Anti-terror Police Unit.<sup>129</sup> It was alleged that he was involved in the Westgate terror attack and he was harbouring terrorists.<sup>130</sup> He was repeatedly beaten and strangled. Similarly in Eastleigh, Abdul-Aziz Yussuf's dead body was recovered in Maragua river together with two other people.<sup>131</sup> The bodies had torture wounds; they had been strangled and hand and legs tied

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<sup>121</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 2015, 6-32.

<sup>122</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 2015, 6-32.

<sup>123</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 2015, 6-32.

<sup>124</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 2015, 6-32.

<sup>125</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 2015, 6-32.

<sup>126</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 2015, 6-32..

<sup>127</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 2015, 6-32.

<sup>128</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 2015, 6-32.

<sup>129</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 2015, 6-32..

<sup>130</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 2015, 6-32..

<sup>131</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 2015, 6-32.

together with nylon ropes.<sup>132</sup> In addition to this, severe knife wounds on the head and eyes were present.<sup>133</sup>

Counter-terrorism operations have been concentrated in Mandera, Wajir and Garissa county situated in the Northern part of Kenya. Several incidents of human rights violations have been reported. Affey Abdullahi a resident of Wajir county was arrested by KDF soldiers and taken to Wajir police station.<sup>134</sup> He was later transferred to an unidentified location where he was subjected to electric shocks, denial of food, mock execution and severe whipping.<sup>135</sup> He was released days later. Maulid Adan of Mandera county was arrested by men in plain cloth who tied his feet and hands and took him to the military camp. He was immersed in ice cold water and subsequently immersed in hot water until he gasped for air. Maulid was also subjected to beatings for two days. It was alleged that he was involved in the Mandera bus attack and the officers demanded to know his accomplices. Hassan Abdulahi was shot by KDF officers who later took him away.

The aforementioned incidents evidently demonstrate that specific groups of people have been the target of law enforcement officials with respect to counter terrorism operations. There have been several victims of torture. All these violations are in contravention of the law, both domestic and international.

## **4.2 Ethiopia**

The Horn of Africa which is composed of Eritrea, Ethiopia, Djibouti, Sudan, South Sudan and Somalia is characterized by weak states which are further affected by internal conflicts and political instability.<sup>136</sup> Ethiopia is among some of the East African countries battling with terrorism. Among the countries on the horn of Africa, Ethiopia seems to have a more effective

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<sup>132</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 2015, 6-32.

<sup>133</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 2015, 6-32.

<sup>134</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 2015, 6-32.

<sup>135</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 2015, 6-32.

<sup>136</sup> SekyereP, Assare B, 'An examination of Ethiopia's anti-terrorism proclamation on fundamental human rights', 354.

security force.<sup>137</sup> Counter-terrorism strategies employed by Kenya and Ethiopia are controlled by the United States.<sup>138</sup> Ethiopia has been able to successfully combat terrorism owing to its autocratic regime.<sup>139</sup> Ethiopia has utilized various strategies in order to deal with terrorism and this is within their constitutional, policy and administrative framework.<sup>140</sup> Under their constitutional framework, the Federal government has been tasked with national security and border control.<sup>141</sup> A third of the provisions in the Ethiopian Constitution highlight fundamental rights and freedoms.<sup>142</sup> Adherence to the rule of law and human rights are essential elements in the fight against terrorism.<sup>143</sup> It is imperative to create a proper balance between security measures and protection of human rights and freedoms.<sup>144</sup> The country does not affiliate terrorism with any religion, nationality or ethnic group.<sup>145</sup> Any measures used to combat a threat of terror are proportionate to the terror anticipated, and may sometimes require for limitation of fundamental rights and freedoms, albeit in line with the Constitution.<sup>146</sup>

Ethiopia's administrative framework is a major contributor to its fight against terrorism. The country is considered to be a Federal state with nine regions based on ethno-linguistic patterns.<sup>147</sup> Each region has the power as provided in the constitution to establish its own form of administration that furthers a democratic order based on the rule of law.<sup>148</sup> The decentralization of economic, political and social structures as result of federalism makes Ethiopia less vulnerable

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<sup>137</sup> SekyereP, Assare B, 'An examination of Ethiopia's anti-terrorism proclamation on fundamental human rights', 354.

<sup>138</sup> Simon Nyambura: Counterterrorism Strategies: A Comparative Analysis of Ethiopia and Kenya' <http://satsa.syr.edu/wp-content/uploads/2011/04/SimonNyambura.pdf> on 28 January 2018.

<sup>139</sup> 'Simon Nyambura: Counterterrorism Strategies: A Comparative Analysis of Ethiopia and Kenya' <http://satsa.syr.edu/wp-content/uploads/2011/04/SimonNyambura.pdf> on 28 January 2018.

<sup>140</sup> Bogale G, 'Ethiopia's comprehensive approach to counter-terrorism in the horn of Africa: challenges and opportunities' thesis, School of Graduate Studies of Addis Ababa University, June 2016, 70.

<sup>141</sup> Bogale G, 'Ethiopia's comprehensive approach to counter-terrorism in the horn of Africa: challenges and opportunities' thesis, School of Graduate Studies of Addis Ababa University, June 2016, 70.

<sup>142</sup> Bogale G, 'Ethiopia's comprehensive approach to counter-terrorism in the horn of Africa: challenges and opportunities' thesis, School of Graduate Studies of Addis Ababa University, June 2016, 70.

<sup>143</sup> Bogale G, 'Ethiopia's comprehensive approach to counter-terrorism in the horn of Africa: challenges and opportunities' thesis, School of Graduate Studies of Addis Ababa University, June 2016, 70.

<sup>144</sup> Bogale G, 'Ethiopia's comprehensive approach to counter-terrorism in the horn of Africa: challenges and opportunities' thesis, School of Graduate Studies of Addis Ababa University, June 2016, 70.

<sup>145</sup> Bogale G, 'Ethiopia's comprehensive approach to counter-terrorism in the horn of Africa: challenges and opportunities' thesis, School of Graduate Studies of Addis Ababa University, June 2016, 70.

<sup>146</sup> Bogale G, 'Ethiopia's comprehensive approach to counter-terrorism in the horn of Africa: challenges and opportunities' thesis, School of Graduate Studies of Addis Ababa University, June 2016, 70.

<sup>147</sup> Bogale G, 'Ethiopia's comprehensive approach to counter-terrorism in the horn of Africa: challenges and opportunities' thesis, School of Graduate Studies of Addis Ababa University, June 2016, 70.

<sup>148</sup> Bogale G, 'Ethiopia's comprehensive approach to counter-terrorism in the horn of Africa: challenges and opportunities' thesis, School of Graduate Studies of Addis Ababa University, June 2016, 70.

to acts of terror.<sup>149</sup> This is because, the right to self-determination through federalism limits domestic terrorism since decentralization provides an environment for dealing with socio-economic and political problems. Secondly, both the federal government and regional states share responsibility with respect to counter-terrorism activities.<sup>150</sup> Regional states are taking on a more decisive role in the fight against terrorism this is because they are better placed in knowledge of the activities of the community.<sup>151</sup>

The policy and strategic framework of Ethiopia has greatly contributed to its counter-terrorism success.<sup>152</sup> The country's counter-terrorism activities ensue from The Foreign Affairs and National Security Policy and Strategy (FANSPS) document.<sup>153</sup> The document highlights poverty, lack of good governance and democracy as some of the factors that may increase Ethiopia's vulnerability to terror attacks.<sup>154</sup> The government asserts that the best way to deal with terrorism is to address factors that may increase its (Ethiopia's) vulnerability.<sup>155</sup> In addition to having a comprehensive legislative framework for dealing with terrorism, Ethiopia has also taken measures to deal with socio-economic problems.<sup>156</sup> The country has had a successful battle against terrorism; however it faces challenges with regards to protection of human rights during counter- terrorism operations. Freedom of expression, freedom of association and freedom from arbitrary detention have been violated.<sup>157</sup> International human rights permit the limitation of these rights and derogation in exceptional cases.

### 4.3 United States of America

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<sup>149</sup> Bogale G, 'Ethiopia's comprehensive approach to counter-terrorism in the horn of Africa: challenges and opportunities' thesis, School of Graduate Studies of Addis Ababa University, June 2016, 70.

<sup>150</sup> Bogale G, 'Ethiopia's comprehensive approach to counter-terrorism in the horn of Africa: challenges and opportunities' thesis, School of Graduate Studies of Addis Ababa University, June 2016, 70.

<sup>151</sup> Bogale G, 'Ethiopia's comprehensive approach to counter-terrorism in the horn of Africa: challenges and opportunities' thesis, School of Graduate Studies of Addis Ababa University, June 2016, 70.

<sup>152</sup> Bogale G, 'Ethiopia's comprehensive approach to counter-terrorism in the horn of Africa: challenges and opportunities' thesis, School of Graduate Studies of Addis Ababa University, June 2016, 70.

<sup>153</sup> Bogale G, 'Ethiopia's comprehensive approach to counter-terrorism in the horn of Africa: challenges and opportunities' thesis, School of Graduate Studies of Addis Ababa University, June 2016, 70.

<sup>154</sup> Bogale G, 'Ethiopia's comprehensive approach to counter-terrorism in the horn of Africa: challenges and opportunities' thesis, School of Graduate Studies of Addis Ababa University, June 2016, 70.

<sup>155</sup> Bogale G, 'Ethiopia's comprehensive approach to counter-terrorism in the horn of Africa: challenges and opportunities' thesis, School of Graduate Studies of Addis Ababa University, June 2016, 70.

<sup>156</sup> Bogale G, 'Ethiopia's comprehensive approach to counter-terrorism in the horn of Africa: challenges and opportunities' thesis, School of Graduate Studies of Addis Ababa University, June 2016, 70.

<sup>157</sup> Hassen H, 'The impact of Ethiopian anti-terrorism law on human rights defenders' Research Project, International Institute of Social Studies, December 2016, 24.

Torture is one of the commonly used tactics in the fight against terrorism globally. The United States openly used this technique on terrorists to gather intelligence or rather information.<sup>158</sup> The tactics used were referred to as “enhanced interrogation”, “extreme interrogation”, and “alternative set of procedures” under the operation dubbed ‘War on Terror’ that took place as a result of the attack on the World Trade Centre in September 2001 that left three thousand people dead.<sup>159</sup> These techniques were carried out by the Central Intelligence Agency (CIA) under the CIA program in Guantanamo Bay.<sup>160</sup> Detainees in Abu Ghraib prison in Iraq were also subjected to torture by military personnel in order to obtain information.<sup>161</sup> Detainees were subjected to highhanded methods of interrogation during detention characteristic of torture for months.<sup>162</sup> Methods used are; - suffocation by water poured over a cloth placed over the nose and mouth, prolonged stress standing position while naked with arms chained and extended above the head continuously up to three days, beatings by use of a collar held around the detainees neck and used to forcefully bang the body and head against the wall, beating and kicking, prolonged nudity, and sleep deprivation.<sup>163</sup> The detainees were exposed to cold temperatures via cold cells by cold water poured over the body, prolonged shackling of hands and feet, threats of ill-treatment detainee and family, and deprivation of solid food for up to one month.<sup>164</sup>

Despite the use of torture techniques on terrorists and suspects of terrorism in the USA, terrorism persisted. Several other terror attacks took place from the year 2002 to 2017.<sup>165</sup> There has been no evidence showing that the use of torture would be effective in obtaining information or a confession.<sup>166</sup> Torture techniques as employed by CIA officials were counter-productive; they

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<sup>158</sup> ‘Mark Danner: The Red Cross Torture Report: What it Means’ *The New York Review of Books*, 30 April 2009 <http://www.nybooks.com/articles/2009/04/30/the-red-cross-torture-report-what-it-means/> on 21 January 2018.

<sup>159</sup> ‘Mark Danner: The Red Cross Torture Report: What it Means’ *The New York Review of Books*, 30 April 2009 <http://www.nybooks.com/articles/2009/04/30/the-red-cross-torture-report-what-it-means/> on 21 January 2018.

<sup>160</sup> International Committee of the Red Cross, *ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody*, 2007, 9-20.

<sup>161</sup> Bell J, ‘Behind this Mortal Bone: The (In)effectiveness of Torture’ *Indiana Law Journal* (2008), 346.

<sup>162</sup> International Committee of the Red Cross, *ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody*, 2007, 9-20.

<sup>163</sup> International Committee of the Red Cross, *ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody*, 2007, 9-20.

<sup>164</sup> International Committee of the Red Cross, *ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody*, 2007, 9-20.

<sup>165</sup> ‘Ben Jacobs: America since 9/11: timeline of attacks linked to the war on terror’ *The Guardian*, December 11 2017 <https://www.theguardian.com/us-news/2017/nov/01/america-since-911-terrorist-attacks-linked-to-the-war-on-terror> on 21 January 2018.

<sup>166</sup> Bell J, ‘Behind this Mortal Bone: The (In)effectiveness of Torture’, 346.



resulted in faulty intelligence as a consequence of fabricated information on important security concerns.<sup>167</sup> Detainees provided accurate information prior to, or without being subjected to torture.<sup>168</sup>

Measures and strategies used by the Kenyan and USA government to fight terrorism are extra legal and have not been efficient to root out the problem. It has been shown that torture is used as a method of acquiring evidence during the interrogation process and, to intimidate terror suspects. This is contrasted to Ethiopia's successful strategy that utilizes a comprehensive framework and strategy that is in line with the provisions of its constitution and other legal instruments. Ethiopia has been successful in combating terrorism in the absence of torture.

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<sup>167</sup> Senate Select Committee on Intelligence, *Committee study of the CIA's Detention and Interrogation Program*, 2014, 2.

<sup>168</sup> Senate Select Committee on Intelligence, *Committee study of the CIA's Detention and Interrogation Program*, 2014, 2.

## CHAPTER 5

### CONCLUSION

Kenya is battling with the ongoing challenge of terrorism arising from a combination of local, regional and international attacks such as Al Shabab, Al Qaeda, Boko Haram and ISIL.<sup>169</sup> Terror attacks on Kenya have significantly escalated after the deployment of the Kenyan military to Somalia in October 2011 in the fight against Al Shabab.<sup>170</sup> A number of people have since lost their lives, been injured, and property destroyed in acts of terror targeting specific regions in Nairobi, the coastal, and northern region of the country.<sup>171</sup> Some of the memorable attacks include the attack on Westgate mall in September 2013 that left 67 people dead, others injured, and the mall destroyed; the Lamu attack in June 2014; the attack in Mpeketoni which left 68 dead; the bus attack in Mandera killing 28; yet another attack in Mandera leaving 36 quarry workers dead and the more recent Garissa University College attack in April 2015 where 148 students were killed.<sup>172</sup>

The frequency and magnitude of the acts of terror has been profound and brought about adverse effects.<sup>173</sup> Social services such as healthcare and education have faced the greatest impact as a result of the attacks especially in the Northern region of the Kenya due to flight of healthcare professionals and teachers leading to closure of health institutions and schools.<sup>174</sup> The implication is that the Kenyan government has employed extralegal security measures to counter

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<sup>169</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 2015, 3.

<sup>170</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 3.

<sup>171</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 3.

<sup>172</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 3.

<sup>173</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 3.

<sup>174</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 3.

the terror attacks and as a result led to violation of human rights of terror suspects and civilians.<sup>175</sup> Torture has been employed as a technique to obtain information, intimidate, and punish individuals for suspected acts relating to terrorism. This technique of countering terrorism violates the dignity of the victims and is not justifiable. A study conducted by University of North Carolina proved that popular counter-terrorism practices such as torture are in fact, acts of terror.<sup>176</sup>

Torture has been employed during counter-terrorism operations as an interrogation technique, suspected terrorists have been subjected to acts of torture with the aim of obtaining information, intimidate and punish for crimes committed or suspected to have been committed. Torture is prohibited under domestic legislation and international legislation. It is a norm of *jus cogens*, meaning that the prohibition is binding on all states irrespective of consent.<sup>177</sup> The constitution of Kenya however, provides that the right to freedom from torture may not be limited. The International Convention on Civil and Political Rights further provides that the right to freedom from torture may not be derogated from. Derogation from rights and fundamental freedoms is justified under exceptional circumstances pursuant to national security.<sup>178</sup> However, the right to freedom from torture among other rights and fundamental freedoms are an exemption.<sup>179</sup>

The rule of law posits that individuals should abide by the law and those who do not abide by the law should be held accountable. Despite the prohibition of torture under both international and domestic legislation, it has been shown that terror suspects are tortured during counter-terrorism operations.<sup>180</sup> Reports have also shown that law enforcement officials only target specific groups of people during these operations; these are members of the Muslim community.<sup>181</sup> It is justifiable for states to limit and even derogate from certain rights.<sup>182</sup> A state can limit rights and

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<sup>175</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 3.

<sup>176</sup> Lydia Canaan: Fighting Terrorism without Violating Human Rights ‘ *Huffington post*, 2016 [https://www.huffingtonpost.com/lydia-canaan/fighting-terrorism-withou\\_b\\_9513034.html](https://www.huffingtonpost.com/lydia-canaan/fighting-terrorism-withou_b_9513034.html) on 21 January 2018.

<sup>177</sup> Rahman and Jahid, *An introduction to international human rights law*, 60.

<sup>178</sup> Alton and Goodman, *International human rights*, 394.

<sup>179</sup> Article 4(2), *International Convention on Civil and Political Rights*, 19 December 1966, 14668.

<sup>180</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 2015, 6-32.

<sup>181</sup> Kenya National Commission on Human Rights, *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism*, 2015, 6-32.

<sup>182</sup> Alton and Goodman, *International human rights*, 394.

fundamental freedoms in pursuance of a legitimate aim such as public safety and morals.<sup>183</sup> Derogation from certain rights and fundamental freedoms is also permitted in exceptional circumstances such as war.<sup>184</sup> The right to freedom from torture however, is exempted from limitation or derogation as provided in the constitution of Kenya and the International Convention on Civil and Political Rights, respectively. The limitation of this right during counter-terrorism operations is not justified. Law enforcement agents who violate this right should therefore be held accountable.

## 5.1 Recommendations

In light of the ongoing counter-terrorism operations, recommendations are provided in order to remedy the violations that continue to happen. In order to ensure impartiality, a commission of inquiry should be established to investigate into matters regarding torture.<sup>185</sup> The commission shall be made up of investigators who have expertise and have been trained in documenting torture and worked with victims of trauma.<sup>186</sup> Several other factors should be taken into consideration with regard to creation of a commission of inquiry. Investigators should have support of adequate personnel and be allowed access to objective legal aid to ensure that the investigation will generate admissible evidence for criminal proceedings.<sup>187</sup> The investigators should have access to state resources and support.<sup>188</sup>

There should be an establishment of codes of conduct for security agents that stipulate acceptable practices that are appropriate and correspond to human rights.<sup>189</sup> Security agents should only use force when necessary and the use of force should be proportional to impending danger or attack.<sup>190</sup> The code should emphasize the absolute prohibition of torture and that no justification

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<sup>183</sup> Alton and Goodman, *International human rights*,394.

<sup>184</sup> Alton and Goodman, *International human rights*,394.

<sup>185</sup> *Istanbul Protocol*, Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 2004, professional training series no. 8/Rev.1.

<sup>186</sup> Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Istanbul Protocol*.

<sup>187</sup> Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Istanbul Protocol*.

<sup>188</sup> Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Istanbul Protocol*.

<sup>189</sup> ACHPR, *Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa*, April 2008.

<sup>190</sup> UNGA, *Code of conduct for law enforcement officials*, UN A/Res/34/169(17 December 1979)

may be used to subject a detainee or suspect to torture.<sup>191</sup> The code should provide a reporting mechanism. Any security agent that has reason to believe that a violation of freedom from torture has or is about to occur should inform superior officials and any other relevant body.<sup>192</sup>

Education should also be incorporated in counter-terrorism operations. It should be employed as a preventative measure. This can be done through inclusion in the education curriculum, where students can learn about terrorism, the causes, threats presented by it (terrorism), and the impact it has.<sup>193</sup>

Only specialized law enforcement officials should be involved in counter-terrorism operations. These operations should fall within the mandate of the Anti-terrorism Police Unit who should be adequately trained with regards to compliance with international human rights standards.

The State should protect alleged victims, witnesses and their families from intimidation that may arise pursuant to investigations.<sup>194</sup> Awareness training education and public education should be conducted with respect to the prohibition against torture.

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<sup>191</sup> UNGA, *Body of principles for the protection of all persons under any form of detention or imprisonment*, UN A/RES/43/173 (76th plenary meeting) 9 December 1988.

<sup>192</sup> UNGA, *Body of principles for the protection of all persons under any form of detention or imprisonment*.

<sup>193</sup> Bogale G, 'Ethiopia's comprehensive approach to counter-terrorism in the horn of Africa: challenges and opportunities' thesis, School of Graduate Studies of Addis Ababa University, June 2016, 70.

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