



**UNIVERSITEIT VAN PRETORIA
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**PREVENTING HUMAN RIGHTS VIOLATIONS BY LAW
ENFORCEMENT AGENCIES DURING COUNTERTERRORISM
OPERATIONS IN KENYA AND UGANDA**

By

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Doctor of Laws in the Faculty of Law at the University of Pretoria**

Supervisor

Prof Magnus Killander

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DECLARATION

I, Emmanuel Okurut, hereby declare that the work contained in this thesis is my own original work and has not previously in its entirety or in part been submitted at any other university for a degree.

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I would like to dedicate this thesis to my parents, Prof Francis N Okurut & Mrs Leah M Okurut and my family for the support and encouragement they have given me throughout this long journey. I am eternally grateful to my parents who have gladly supported me financially and emotionally throughout my academic pursuits. You have always taught me to aspire for excellence and I know I have made you proud with this monumental achievement. To my sisters Esther Tino Ochieng, Apolot Joy Christine Musiime, Julie Adeke, Hope Chodry, Grace Acam and Rachel Kedi, you are such a blessing. It has certainly not been a smooth ride and many times I felt that I could not take it anymore. However, your kind words and advice encouraged me to keep working against all odds.

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ABSTRACT

The problem of terrorism has escalated over the past two decades and has continuously posed a challenge to global peace and security. While the major terrorist organizations like ISIS and al-Qaeda have devastated the Middle East, Europe and the United States, the East African region has not been an exception to the influence of radical Islamist terrorist groups. Kenya and Uganda have particularly been targeted by al-Shabaab, a Somali based Islamist terrorist group that has sworn allegiance to al-Qaeda. These attacks have mainly been in response to the deployment of military troops under the AU's peace-keeping mission in Somalia (AMISOM). In addition to the threat by al-Shabaab, the two countries have also battled internal home-grown terrorist organizations that have threatened the peace and security of their respective homelands.

In response to the threat of terrorism and its impact on the various institutions, the international community adopted the United Nations Global Counter-Terrorism Strategy to fight against terrorism in order to preserve peace and security. These counterterrorism measures also contain safeguards that are designed to ensure that states do not unjustifiably infringe on human rights. The African region under the African Union has also adopted counterterrorism measures under the OAU Terrorism Convention and numerous other instruments which tackle the problem of terrorism in great detail.

Kenya and Uganda have been vulnerable to terrorist attacks and have adopted some interventions including the adoption of counterterrorism legislation and reinforcing law enforcement to be able to respond better to the threat of terrorism. Kenya enacted its Prevention of Terrorism Act in 2012 while Uganda's Anti-Terrorism Act was passed in 2002. There are a number of legitimate counterterrorism measures within these pieces of legislation for example the criminalization of terrorism and terrorist organizations. However, there is a danger that some of these interventions may unlawfully erode fundamental human rights and freedoms. This is particularly true for their counterterrorism police and security agencies which usually conduct their operations in secret with no clear channels of accountability. This poses a challenge for any effective form of review because most of such operations are protected as state secrets.

The thesis examined the extent to which counterterrorism legislation and policy affects the enjoyment of human rights. The analysis showed that there were some significant deficiencies in the counterterrorism legislation of Kenya and Uganda. The most prominent challenges were the lack of supervision and review of exercise of discretion by law enforcement during counterterrorism operations, and weak accountability frameworks. In this regard, the thesis recommends the immediate codification of the Joint Anti-Terrorism Taskforce of Uganda; the amendment of the Uganda Police Act to take into account proportionality in the use of force by law enforcement; the amendment of the Anti-Terrorism Act of Uganda to remove the unfettered discretion of a security officer; and the inclusion of the right to silence and the right to apply for release from unlawful custody in Uganda's Constitution.

A closer look at the practice of counterterrorism agencies also reveals a pattern of gross violation of human rights and disregard for the rule of law. Such unlawful conduct also violates the principles of democracy that require public officials to be accountable for actions taken in their official capacity. In an effective democracy, public officials are appointed by the authority of the public and they serve the collective interests of the society at large. In addition, there are certain law enforcement accountability mechanisms that are established in order to ensure the efficiency, professionalism and discipline of the police forces. While most of these accountability mechanisms are carefully thought out and drafted, they are not always implemented in practice. Nevertheless, they constitute a potential avenue for the prevention of abuse of human rights during counterterrorism operations. In order to improve the overall effectiveness and accountability of the police forces, the thesis recommends freeing the police from undue influence of the executive branch of government; exercising accountability before, during and after counterterrorism assignments; education of law enforcement officials in the protection and promotion of human rights; and improving the living and working conditions of members of law enforcement in order to prevent unprofessionalism.

LIST OF ABBREVIATIONS

Journal abbreviations

| | |
|------------------------------|---|
| AHRLJ: | African Human Rights Law Journal |
| AJIL: | American Journal of International Law |
| Am. U. Int'l L. Rev.: | American University International Law Review |
| ASIL: | The American Society of International Law |
| AUILR: | American University International Law Review |
| BMC Psychiatry: | BioMed Central Psychiatry |
| Buffalo HRLR: | Buffalo Human Rights Law Review |
| Cardozo J. Int'l & Comp. L.: | Cardozo Journal of International and Comparative Law |
| Chi. J. Int'l L.: | Chicago Journal of International Law |
| CICJ: | Current Issues in Criminal Justice |
| Colum. L. Rev. | Columbia Law Review |
| Deakin Law Review: | Deakin Law Review |
| Denv. J. Int'l L. & Pol'y: | Denver Journal of International Law and Policy |
| Direito GV L. Rev.: | Direito Getulio Vargas Law Review |
| EJIL: | European Journal of International Law |
| Eur J Int Law: | European Journal of International Law |
| Eur. J.L. Reform: | European Journal of Law Reform |
| Ga. L. Rev.: | Georgia Law Review |
| J. Legal Educ.: | Journal of Legal Education |
| N.C.J. Int'l L. & Com. Reg.: | North Carolina Journal of International Law and Commercial Regulation |
| NWC: | Naval War College Review |
| Nw. J. Int'l L. & Bus.: | North Western Journal of International Law & Business |
| Or. L. Rev. | Oregon Law Review |

| | |
|----------------------------|---|
| SAIS Rev. Int'l Aff.: | School of Advanced International Studies Review of International Affairs. |
| Tul. J. Int'l & Comp. L.: | Tulane Journal of International and Comparative Law |
| Tul. L. Rev. | Tulane Law Review |
| Vand. J. Transnat'l L.: | Vanderbilt Journal of Transnational Law |
| Yrbk Int'l Humanitarian L: | Yearbook of International Humanitarian Law |

Other abbreviations

| | |
|-----------|--|
| ACHPR: | African Charter on Human and Peoples' Rights |
| ADF: | Allied Democratic Forces |
| AMISOM: | African Union Mission in Somalia |
| ATPU: | Anti-Terrorism Police Unit (Kenya) |
| AU: | African Union |
| AUMF Res: | Authorization for Use of Military Force Resolution |
| BBC: | British Broadcasting Corporation |
| CAR: | Central African Republic |
| CBP: | Community Based Policing |
| CIA: | Central Intelligence Agency |
| CNN: | Cable News Network |
| CSO: | Civil Society Organization |
| DRC: | Democratic Republic of Congo |
| EAC: | East African Community |
| EAPCCO: | East African Police Chiefs Cooperation Organization |
| FATF: | Financial Action Task Force |
| HRC: | Human Rights Council |
| ICCPR: | International Covenant on Civil and Political Rights |
| ICED: | International Convention for the Protection of All Persons from Enforced Disappearance |
| ICESCR: | International Covenant on Economic, Social and Cultural Rights |

| | |
|---------------|--|
| ICJ: | International Court of Justice |
| ICTY: | International Criminal Tribunal for the former Yugoslavia |
| IGAD: | Intergovernmental Authority on Development |
| IS/ISIS/ISIL: | Islamic State of Iraq and the Levant |
| ISO: | Internal Security Organization |
| JATT: | Joint Anti-Terrorism Taskforce (Uganda) |
| JSOC: | Joint Special Operations Command (United States of America) |
| LRA: | Lord's Resistance Army |
| OAU: | Organization of African Unity |
| OHCHR: | The Office of the High Commissioner for Human Rights |
| NGO: | Non-Governmental Organization |
| PCT: | The Public Committee against Torture in Israel |
| PLO: | Palestine Liberation Organization |
| S.J. Res: | Senate Joint Resolution |
| SOCOM: | Special Operations Command |
| SLDF: | Sabaot Land Defense Force |
| TNG: | Transitional National Government |
| UDHR: | Universal Declaration of Human Rights |
| UFIA: | Uganda Financial Intelligence Authority |
| UN: | United Nations |
| UNCTS: | United Nations Counterterrorism Strategy |
| UNESCO: | United Nations Educational, Scientific and Cultural Organization |
| UNSC: | United Nations Security Council |
| UPDF: | Uganda Peoples' Defense Forces |
| US: | United States of America |
| USAID: | United States Agency for International Development |

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CHAPTER ONE

1. Introduction to the thesis

The problem of terrorism in Kenya and Uganda has considerably increased over the last two decades and poses a serious threat to peace and stability.¹ In the recent past, these countries have experienced several terrorist threats and attacks that have been attributed to violent extremism. Such attacks have compromised security and resulted in the loss of many lives and destruction of property and infrastructure.² While terrorism is not a recent phenomenon, global consciousness on terrorism and its devastating effects intensified after the terrorist attacks on the United States of America (US) in September 2001.³ In the aftermath of the attacks, the US government made a commitment to fight terrorism⁴ which was largely supported by several United Nations (UN) Security Council (UNSC) resolutions.⁵ The UNSC resolutions condemned the terrorist attacks on the US and designated terrorism as one of the most serious crimes that destabilizes international peace and security.⁶ The UNSC also noted in the preamble of UNSC Resolution 1377 (2001) that terrorism (including facilitating and financing it) was contrary to the purposes and principles of the UN Charter.⁷ In addition to condemning terrorism, the UNSC welcomed the commitment by member states to fight against terrorism.⁸ On 12 September 2001, the UNSC again condemned the terrorist attacks on the US and recognised the inherent right of a state to defend itself against terrorist attacks individually or collectively.⁹ Acting on the

¹ United States Department of State *Country Reports on Terrorism 2016* (July 2017) available at: <https://www.state.gov/documents/organization/272488.pdf> (accessed 01 November 2017).

² As above 34, 62.

³ U Beck 'The Silence of Words: On terror and war' (2003) 34(3) *Security Dialogue* 255; B Hoffman 'Rethinking terrorism and counterterrorism since 9/11' (2002) 25(5) *Studies in conflict & terrorism* 304.

⁴ RA Wilson (ed) *Human rights in the 'War on Terror'* (2005) 1; R Jervis 'Understanding the Bush doctrine' (2003) 118(3) *Political Science Quarterly* 365.

⁵ UNSC Resolutions 1377 (2001); 1373 (2001); 1368 (2001). *See also*: UNSC Resolution 1269 (1999). The UNSC expressed concern at the growing number of incidents of terrorism globally and condemned terrorism.

⁶ UNSC Resolution 1377 (2001) para 2.

⁷ UNSC Resolution 1377 (2001) para 5.

⁸ UNSC Resolution 1377 (2001), para 9.

⁹ UNSC Resolution 1368 (2001), introductory remarks and para 1; Art 51 of the UN Charter. The right of a state to defend itself individually or collectively against an armed attack is protected by the UN Charter provided it conforms to the principles of necessity and proportionality. *See also*: Grotius (1965) *De Jure Ac Pacis* [On the Law of War and Peace] reprinted in Scott J.B. (1925) *The Classics of International Law* at 173. Grotius who is one of the most famous

strength of this Resolution, the US together with her allies went on to invade Afghanistan in search for Osama bin Laden who was known to be the leader of the infamous terrorist organization, al-Qaeda that had claimed responsibility for the 11 September 2001 terror attacks.¹⁰ The warfare against the Taliban and al-Qaeda in Afghanistan began in 2001 and continued until 2014 when most combat troops were withdrawn. Although this may suggest that the conflict is over, the US military still maintain a presence in Afghanistan to support the Afghan National Army in suppressing Islamic extremism and terrorism resurgence within the region.¹¹ The US war on terror has since then expanded into several countries including Iraq, Syria, Yemen, Libya and Pakistan where bin Laden was eventually located and killed in an operation mounted by US Special Forces.¹²

The Office of the High Commissioner for Human Rights (OHCHR) noted that the human cost of terrorism affects the entire world and has serious consequences on the quality of life of its victims.¹³ It is therefore necessary for states to develop adequate counterterrorism measures to address the problem of terrorism. On the other hand, it has been rightfully argued that counterterrorism measures may have the effect of limiting certain fundamental rights and freedoms.¹⁴ The major concern is that such measures tend to be broadly permissive allowing for

jurists in international law supported the idea that a state had the right to engage in the use of force before armed attack was applied against it. He argued however that given the seriousness of such action, there was a need to ensure that there was a foreseeable danger or imminent attack impending against it. The existence of the new principle of pre-emptive self-defense seems to find support in state practice and the development of the *Caroline Standard*. It states that '*Necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment of deliberation...*' See: RY Jennings 'The Caroline and McLeod Cases' (1938) 32(1) *American Journal of International Law* 82-99.

¹⁰ P Rogers *A war on terror: Afghanistan and after* (2004) 2.

¹¹ P Mcleary (9 March 2017) 'More U.S. Troops Bound for Afghanistan, As Marines, Commandos, Arrive in Syria' *The Cable* available at: <http://foreignpolicy.com/2017/03/09/more-us-troops-afghanistan-marines-syria-commandos-iraq/> (accessed 10 July 2017).

¹² P Baker, H Cooper and M Mazzetti (1 May 2011) 'Bin Laden is dead, Obama says' *The New York Times*. Available at: <http://www.nytimes.com/2011/05/02/world/asia/osama-bin-laden-is-killed.html> (accessed 10 July 2017) at para 1.

¹³ OHCHR *Human rights, terrorism and counter-terrorism* (2008) Fact Sheet No. 32. Available at: <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf> (accessed 13 March 2014) 1.

¹⁴ M Head 'Counter-terrorism laws: A threat to political freedom, civil liberties and constitutional rights' (2002) 26 *Melbourne University Law Review* 667; A Roberts 'Counter-terrorism, armed force and the laws of war' (2002) 44(1) *Survival: Global Politics and Strategy* 8; L Lustgarten 'National security, terrorism and constitutional balance' (2008) 75(1) *The Political Quarterly* 4.

wide interpretations. This has the effect of granting law enforcement wide discretion with limited accountability posing a serious challenge to human rights protection.¹⁵ Therefore, there is a need to strike a balance between countering terrorism on one hand and protecting human rights on the other. This study consequently focuses on the counterterrorism regimes of Kenya and Uganda, and the impact of such measures on the protection of human rights.

1.1 Background

The East African region has experienced a significant number of acts of terrorism which are attributed to various causes for example political instability, poverty and armed conflict.¹⁶ In August 1998, the US embassies in Kenya, Uganda and Tanzania came under attack. While the attempt on the US embassy in Kampala (Uganda) was unsuccessful, the terrorist attacks in Nairobi (Kenya) and Dar es Salaam (Tanzania) left approximately 225 people dead and more than 4000 injured.¹⁷ Al-Qaeda, a terrorist organization then under the leadership of Osama bin Laden, claimed credit for the attack.¹⁸ In 2002, Kenya suffered another wave of terrorist attacks¹⁹

¹⁵ M Mutua 'Terrorism and human rights: power, culture and subordination' (2002) *Buffalo HRLR* 302. See also: K Anderson 'U.S. counterterrorism policy and superpower compliance with international human rights norms' (2006-2007) 30 *Fordham International Law Journal* 455; A Kielsgard and D Mark 'Human rights approach to counterterrorism' (2005-2006) 36 *California Western International Law Journal* 249; A Hudson 'Not a great asset: The UN Security Council's counter-terrorism regime: Violating human rights' (2007) 25 *Berkeley Journal of International Law* 203; J Fitzpatrick 'Speaking law to power: The war against terrorism and human rights' (2003) 14(2) *EJIL* 241; C Gearty '11 September 2001, Counter-terrorism, and the human rights act' (2005) 32(1) *Law and Society* 18; J Mertus & T Sajjad 'Human rights and human insecurity: The contributions of US counterterrorism' (2008) 7(1) *Journal of Human Rights* 2.

¹⁶ J Lind & J Howell 'Counter-terrorism and the politics of aid: Civil society responses in Kenya' (2010) 41(2) *Development and Change* 335; V Krause & EE Otenyo 'Terrorism and the Kenyan republic' (2005) 28(2) *Studies in Conflict & terrorism* 99; EE Otenyo 'New terrorism' (2004) 13(3) *African Security Review* 76; AKK Mukwaya 'The politics of international terrorism in the security complexes in the Greater Horn of Africa: An overview from Uganda under the movementocracy' (2004) 7(1&2) *African Journal of International Affairs* 38; P Kagwanja 'Counter-terrorism in the Horn of Africa: New security frontiers, old strategies' (2010) *African Security Review* 76; DH Shinn 'Terrorism in East Africa and the Horn: An Overview' (2003) 23(2) *The Journal of Conflict Studies* 2.

¹⁷ DH Shinn 'Fighting Terrorism in East Africa and the Horn' (2004) *Foreign Service Journal* 37; P Bergen & S Pandey 'The Madrassa scapegoat' (2006) 29(2) *The Washington Quarterly* 119.

¹⁸ Shinn (n 17 above) 37.

¹⁹ TM Schaefer 'When terrorism hits home: Domestic newspaper coverage of the 1998 and 2002 terror attacks in Kenya' (2006) 29(6) *Studies in Conflict & Terrorism* 581; Shinn (n 17 above) 41; M Malvesti 'Explaining the United States' decision to strike back at terrorists' 13(2) *Terrorism and Political Violence* 93; A Carter, J Duetch & P Zelikow 'Catastrophic Terrorism' 77 *Foreign Affairs* 81; PN Lyman & JS Morrison 'The terrorist threat in Africa' 83(1) *Foreign Affairs* 75.

directed at Paradise Hotel and an Israeli airliner in Mombasa²⁰ by Islamist groups that were linked with al-Qaeda.²¹ Fortunately, the two surface-to-air missiles missed the target and the plane was able to safely proceed and land in Israel.²² Davis rightfully contends that Kenya and Uganda may claim to be secure from external terrorist threats but for attacks from al-Qaeda and its affiliates such as the notorious al-Shabaab terrorist organization which has its origins and base in Somalia.²³ These violent outrages for instance the July 2010 Kampala terrorist attacks,²⁴ the September 2013 Westgate Mall shooting²⁵ in Nairobi, and the 2015 Garissa University College siege²⁶ have been particularly fuelled by the conflict in the Horn of Africa and the battle for the control of Somalia. These attacks were carried out by al-Shabaab in retaliation of the deployment of Kenyan and Ugandan troops in Somalia under the African Union Mission in Somalia

²⁰ J Fighel 'Al-Qaeda – Mombasa attacks 28 November 2002' (2011) *International Institute for Counter-Terrorism*, (Available at: www.ict.org.il accessed 17 July 2014); D Ignatius 'The Mombasa attacks: Al Qaeda's new weapon' (November 2002) *The New York Times* (Available at: www.nytimes.com accessed 17 July 2014); R Seesemann 'East African Muslims after 9/11' (2005) *Bayreuth African Studies Working Papers No.3* 8. The attacks were directed at Paradise Hotel (Mombasa) after sixty Israeli visitors had checked in and an Israeli airliner.

²¹ Kagwanja (n 16 above) 73; Y Schweitzer 'Air Power' (2003) 148(3) *The RUSI Journal* 84; B Hoffman 'Al-Qaeda, Trends in terrorism, and future potentialities: An assessment' 26(6) *Studies in Conflict & Terrorism* 435

²² J Fighel 'Al-Qaeda – Mombasa Attacks 28 November 2002' (2011) *International Institute for Counter-Terrorism*, (Available at: www.ict.org.il accessed 17 July 2014); D Ignatius 'The Mombasa Attacks: Al Qaeda's New Weapon' (November 2002) *The New York Times* (Available at: www.nytimes.com accessed 17 July 2014); Seesemann (n 20 above) 8.

²³ J Davis 'Evaluating counterterrorism in Africa' (2010) in J Davis (ed) *Terrorism in Africa: The Evolving Front in the War on Terror*.

²⁴ Open Society Foundations *Counterterrorism and human rights abuses in Kenya and Uganda* (2013) 19. The July 2010 Kampala terrorist attacks were targeted at crowds watching the 2010 FIFA World Cup final match in two different venues in Uganda's capital city, Kampala (a restaurant known as the Ethiopian Village located in the suburb of Kabalagala and the Kyadondo Rugby Club grounds located in Lugogo). The bomb explosion left scores of people dead and several others injured.

²⁵ BBC News Africa 'Nairobi Siege: How the attack happened' (2013). <http://www.bbc.com/news/world-africa-24189116> (accessed 19 March 2014). The Westgate Mall shooting took place at a shopping complex in Nairobi and escalated into a siege between the gunmen and security personnel that lasted four days. Heavily armed and masked individuals invaded the Westgate Mall and killed approximately 72 lives and left over 200 injured. The gunmen allegedly claimed allegiance to al-Shabaab.

²⁶ B Brumfield (6 April 2015) *Garissa university attack: The problems plaguing Kenya's security efforts* CNN International. Available at: <http://edition.cnn.com/2015/04/03/africa/garissa-attacks-kenya-security/> (accessed 24 April 2015). In April 2015, armed gunmen infiltrated and mounted a deadly attack at Garissa University in Kenya where they besieged the institution killing 148 people and injuring 78. The attack was claimed by al-Shabaab who kept more than seven hundred students hostage. The Islamic gunmen reportedly freed Muslim students and killed the remaining who happened to be of different faiths. The Kenyan police and army ended the attack the same day when the gunmen were shot dead. A number of people were detained in relation with the attack. Kenyan authorities identified Mohamed Mohamud as the organizer of the attacks and placed a bounty of twenty million Kenya Shillings for information that would lead to his capture.

(AMISOM).²⁷ The reason for this retaliation is that al-Shabaab, just like its al-Qaeda affiliate, is opposed to foreign intervention from infidels in areas that are traditionally and historically Islamic.²⁸ The waves of al-Shabaab's terrorist attacks in Kenya and Uganda have increased considerably over the past few years and continue to pose a significant threat to the peace and stability of the East African region and the Horn of Africa. Although the most prominent terrorist attacks against Kenya and Uganda have been attributable to external terrorist organizations like al-Shabaab and al-Qaeda, the two countries have also experienced significant terrorist activity that has been carried out by indigenous or home grown terrorist organizations like the Mungiki and SLDF in Kenya and the Lord's Resistance Army in Uganda. These various indigenous terrorist organizations and their influences in Kenya and Uganda are discussed in greater detail under chapter three of this thesis.

With the challenge of terrorism being felt in East Africa and the world at large, the United Nations (UN) has increasingly become instrumental in the coordination of global efforts to combat terrorism while promoting and protecting human rights through its subsidiary bodies and agencies. The World Summit in 2005 strongly condemned terrorism in all its forms regardless of the intended outcome noting that it constitutes a great challenge to international peace and security.²⁹ In addition, the Heads of State and Government urged UN member states to ensure that all their counterterrorism measures and frameworks conform to their obligations under international law (international human rights law, international humanitarian law, and international refugee law).³⁰ States are therefore under an obligation to strike a balance

²⁷ AMISOM is a multinational alliance comprising of African troops under the auspices of the African Union (AU). The main aim of the AMISOM coalition is to counter the influence of al-Shabaab in Somalia and to strengthen the Federal Government. *For more on AMISOM, see:* <http://amisom-au.org/> (accessed 19 March 2014); SJ Hansen *Al-Shabaab in Somalia: The history and ideology of a militant Islamist group, 2005-2012* (2013). Al-Shabaab (Harakat al-Shabaab) is an Islamist organization based in Somalia. The organization has its origins in the Islamic Courts and is linked to al-Qaeda.

²⁸ RG Rogan 'Jihad against infidels and democracy: A frame analysis of Jihadist ideology and jurisprudence for martyrdom and violent Jihad' (2010) 77(3) *Communication Monographs* 393; RL Euben 'Killing (for) politics: Jihad, martyrdom, and political action' (2002) 30(1) *Political Theory* 15-16.

²⁹ World Summit Outcome A/RES/60.1 (2005) adopted by UNGA at para 81. Available at: <http://www.ifrc.org/docs/idrl/I520EN.pdf> (accessed 07 July 2017).

³⁰ World Summit Outcome (n 29 above) at para 85; *see also:* UNSC Resolution S/RES/1456 (2003).

between national security on one hand and ensuring the protection of human rights and freedoms on the other.³¹

In 2006, the UN General Assembly by consensus adopted the United Nations Global Counter-Terrorism Strategy (UNCTS) which promotes national, sub-regional, regional and international efforts to combat terrorism.³² The UNCTS represents a universally acceptable approach towards the fight against terrorism that consolidates a number of measures including strengthening individual state capacity to fight against terrorism and implementing UN counterterrorism initiatives.³³ The UNCTS is periodically reviewed every two years to ensure that it takes into account the evolving nature of terrorism across the globe.³⁴ This is particularly important because terrorists and their organizations are always modifying their methods of operation in order to evade detection and capture by authorities. In order to fulfil the objectives of the UNCTS, the UN member states included a Plan of Action therein. The Plan of Action which forms part and parcel of the UNCTS addresses four pillars for combatting terrorism while protecting human rights and freedoms.³⁵ These include measures that address the factors that promulgate terrorism; methods of effectively preventing and combatting acts of terrorism; mechanisms that empower member states and law enforcement to deal with the threat of terrorism individually as well as collectively; and, securing human rights and the rule of law as the foundation for all counterterrorism frameworks in every democratic state.³⁶ In 2005, the Secretary General of the United Nations established the Counter Terrorism Implementation Task Force (CTITF) under the UNCTS which has the mandate of coordinating counterterrorism frameworks within the UN

³¹ CC Joyner 'The United Nations and Terrorism: Rethinking Legal Tensions between National Security, Human Rights, and Civil Liberties' (2004) 5 *International Studies Perspectives* 241; B Golder & G Williams 'Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of terrorism' (2006) 8(1) *Journal of Comparative Policy Analysis: Research and Practice* 43; MD Kielsgard 'A Human Rights Approach to Counter Terrorism' (2006) 36 *California Western International Law Journal* 249.

³² Adopted by the UNGA on 8 September 2006 by resolution and an annexed Plan of Action (A/RES/60/288) available at: <http://www.ipu.org/splz-e/unga07/counter.pdf> (accessed 23 October 2014).

³³ United Nations *UN Global Counter-Terrorism Strategy*. Available at: <https://www.un.org/counterterrorism/ctitf/en/un-global-counter-terrorism-strategy> (accessed 07 July 2017).

³⁴ As above.

³⁵ Annexed UN Plan of Action (n 32 above).

³⁶ As above.

system.³⁷ The CTITF's objective is to improve the capacity of individual state parties to implement the four pillars of the UCNTS noted above.³⁸ The CTITF mainly carries out its mandate by providing policy support, promoting sensitization and providing expert advice to UN member states on the UNCTS.³⁹

The UN Commission on Human Rights appointed the Special Rapporteur on the Promotion of Human Rights while Countering Terrorism⁴⁰ in 2005 who reports to the Human Rights Council (HRC) and the UN General Assembly.⁴¹ In 2013, the HRC mandated the Special Rapporteur on the Promotion of Human Rights while Countering Terrorism to make recommendations on the protection of human rights and freedoms during counterterrorism; collect information and intelligence regarding human rights violations during counterterrorism; highlight and promote counterterrorism measures that respect human rights and freedoms; cooperate with various agencies and organizations in the promotion of human rights during counterterrorism; promote teamwork between human rights agencies to avoid replication of efforts to promote human rights while countering terrorism; and to be accountable to the HRC and UNGA.⁴² It must be noted that the Special Rapporteur's recommendations are not legally binding. Despite their lack of force of law and sanctions for non-compliance, these recommendations constitute strongly persuasive authority; raise publicity on breaches of human rights in a particular state; and constitute guidelines on the protection of human rights while fighting terrorism.⁴³

In addition to the Special Rapporteur on the Promotion of Human Rights while Countering Terrorism and other UN Special Procedures, there are also treaty monitoring bodies within the UN that are charged with the mandate of overseeing the implementation of human rights treaties. There are currently ten treaty bodies that oversee the implementation of core UN

³⁷ Counter-Terrorism Implementation Task Force, available at: <https://www.un.org/counterterrorism/ctitf/en> (accessed 23 October 2014).

³⁸ As above.

³⁹ See also: <https://www.un.org/counterterrorism/ctitf/en/about-task-force> (accessed 12 July 2017).

⁴⁰ Human Rights Resolution 2005/80, Protection of human rights and fundamental freedoms while countering terrorism.

⁴¹ As above, para 14.

⁴² UN Human Rights Council Resolution 22/8.

⁴³ For more information, see: <http://freeassembly.net/about/mandate/> (accessed 13 December 2016).

treaties on human rights.⁴⁴ Treaty bodies are usually comprised by a panel of experts which utilize four mechanisms of enforcement in the execution of their mandate including state reporting,⁴⁵ individual complaints,⁴⁶ inter-state complaints⁴⁷ and investigatory systems. These UN bodies and agencies collectively play an important role of ensuring that UN member states recognise and respect human rights at all times including times of counterterrorism. It is therefore imperative that state parties recognise the mandate of the treaty bodies and fulfil their treaty obligations in accordance with international law.

While the UN has played an important role in the creation of a commendable global counterterrorism framework, the African region under the leadership of the then Organization of African Unity (OAU) and currently the African Union (AU), has also taken steps in order to combat the spread of terrorism across the African continent. The OAU adopted the OAU Convention on the Prevention and Combating of Terrorism in 1999⁴⁸ and the Protocol to the OAU Convention on the Prevention and Combating of Terrorism in 2004.⁴⁹ The Convention and

⁴⁴ Office of the High Commissioner for Human Rights *Human rights bodies* available at: <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (accessed 08 July 2017). The ten UN Treaty Bodies include: Committee against Torture (CAT); Committee on the Elimination of Racial Discrimination (CERD); Committee on the Rights of Persons with Disabilities (CRPD); Committee on Economic, Social and Cultural Rights (CESCR); Committee on Migrant Workers (CMW); Human Rights Committee (CCPR); Subcommittee on Prevention of Torture (SPT); Committee on Enforced Disappearances (CED); Committee on the Elimination of Discrimination against Women (CEDAW); and Committee on the Rights of the Child (CRC). Of the ten treaty-based bodies, nine actively monitor the implementation of human rights while the tenth, which is the SPT observes the conditions of treatment of detainees within the detention and correctional facilities of individual state parties.

⁴⁵ See: Article 40 of ICCPR; Article 16 of ICESCR; E Kornblum 'A comparison of self-evaluating state reporting systems' (1995) *International Review of the Red Cross*, No. 304, section 2.1; DD Fischer 'Reporting under the Covenant on Civil and Political Rights: The first five years of the Human Rights Committee' (1982) *76(1) American Journal of International Law* 142; D Cassel 'Does international human rights law make a difference' (2001) *2 Chicago Journal of International Law* 121; T Landman 'Measuring human rights: Principle, practice and policy' (2004) *26(4) Human Rights Quarterly* 906.

⁴⁶ Office of the High Commissioner for Human Rights *Human rights treaty bodies - Individual communications* Available at: <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx> (accessed 18 June 2015); Article 41 of ICCPR; Article 3 of the Optional Protocol to International Covenant on Economic Social and Cultural Rights on admissibility of communications.

⁴⁷ D Chirwa *Socio-economic rights in international human rights law* (2007) 108; Office of the High Commissioner for Human Rights (n 46 above) *Inter-State Complaints*.

⁴⁸ Adopted in Algiers, Algeria on 14 July 1999 and entered into force on 6 December 2002. Available at: <http://www.au.int> (accessed 20 March 2014); C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2013) 90.

⁴⁹ Adopted in Addis Ababa on 8 July 2004.

Protocol play a very important role in coordinating African efforts to combat terrorism while promoting and protecting human rights and freedoms, and improve the capacity of individual states to fight terrorism through emphasizing criminalization of terrorism, inter-state cooperation and technical support among other measures.⁵⁰ These two instruments have become increasingly important to the African region as many more parts of the continent have been affected by scourge of terrorism. It must also be noted that Kenya and Uganda have both taken the initiative to ratify the OAU Terrorism Convention on the Prevention and Combating of Terrorism.⁵¹ However, the two states have only gone as far as signing the Protocol to the OAU Convention on Terrorism.⁵²

Acting on the authority under Article 45(1) (b) of the ACHPR,⁵³ the African Commission adopted the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa⁵⁴ which are modelled upon African laws, treaties, best practices, resolutions, and international and regional instruments. The African Commission Guidelines provide African states with direction on the best approach for implementing and protecting human rights and freedoms while effectively fighting against terrorism. The guidelines achieve this objective by highlighting the plight of the victims of acts of terrorism; creating a clear understanding of terrorism and its associated offences; assessing the latest trends of terrorism in order to modify existing counterterrorism strategies as well as adopting new ones; and emphasizing state

⁵⁰ For a more in-depth discussion of the provisions of the OAU Convention on the Prevention and Combating of Terrorism, and the Protocol to the OAU Convention on the Prevention and Combating of Terrorism, see chapter 4 of this thesis.

⁵¹ For the full list of African Countries that have signed the OAU Convention on the Prevention and Combating of Terrorism, please see: <http://www.au.int/en/sites/default/files/Convention%20on%20Terrorism.pdf> (accessed 19 March 2014).

⁵² List of countries that have ratified the Protocol available at: http://www.au.int/en/sites/default/files/PROTOCOL_OAU_CONVENTION_ON_THE_PREVENTION_COMBATING_TERRORISM.pdf (accessed 21 October 2014).

⁵³ Article 45(1) (b) of the ACHPR states that 'The function of the Commission shall be to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations.'

⁵⁴ Adopted by the African Commission on Human and Peoples' Rights during its 56th Ordinary Session in Banjul, Gambia (21 April to 7 May 2015). Available at: http://www.achpr.org/files/special-mechanisms/human-rights-defenders/principles_and_guidelines_on_human_and_peoples_rights_while_counterterrorism_in_africa.pdf (accessed 08 July 2017).

cooperation, intelligence sharing, capacity building and adoption of the guidelines by state parties.⁵⁵ The guidelines discuss several individual human rights and freedoms that may be negatively affected during counterterrorism for example the right to privacy, liberty, association, religion and life; and how such human rights and freedoms may be protected while effectively fighting terrorism. States are therefore under an obligation to formulate measures that will adequately protect these rights in order to prevent violations. The guidelines therefore form a basis upon which counterterrorism legislation of African states should be modelled upon in an effort to ensure that they conform to their obligations under international law.

1.2 Statement of the problem

Kenya and Uganda are party to most United Nations and African Union conventions on the prevention or repression of terrorism. It must be noted that these conventions and treaties also emphasize the recognition and implementation of human rights and freedoms during the fight against terrorism. As such, every counterterrorism strategy must recognize and protect human rights. It must be emphasized that the implementation of these human rights safeguards are dependent upon the effectiveness of state machinery for their recognition and protection.⁵⁶ However, unlike Western states that have a long history of the rule of law and democracy, African democracies in comparison are relatively young and are still in their formative stages.⁵⁷ Concepts like democracy, the rule of law, constitutionalism and separation of powers are still in their developmental stages and are not always properly implemented. In addition to these challenges, Africa's political climate is characterized by weak states whose governments are struggling to assert *de facto* control over their territories for example South Sudan, Democratic Republic of Congo and Somalia.⁵⁸

⁵⁵ As above, foreword.

⁵⁶ See: www.ssc.govt.nz/meaning-machinery-government (accessed 13 July 2017). State machinery is a metaphor that is used to refer to the various systems, functions and structures that are essential for the smooth running of the government. State machinery also encompasses the division of duties within state departments and agencies which all that contributes to the overall effectiveness of a government.

⁵⁷ C Ake 'Rethinking African democracy' (1991) 2(1) *Journal of democracy* 32.

⁵⁸ R Rotberg 'Failed states, collapsed states, weak states: Causes and indicators.' *State failure and state weakness in a time of terror* (2003) 20.

It must be noted that according to the Plan of Action that is annexed to the UNCTS,⁵⁹ respect for the rule of law and democracy is the basis for the protection of human rights and freedoms while countering terrorism.⁶⁰ However, most African states including Kenya and Uganda have a poor record of human rights protection. If the UNCTS is wholly adopted without additional safeguards, it might be subject to abuse. It is therefore important to take African realities on terrorism into account in formulating a workable counterterrorism strategy for the African region. The details of the differences between the AU and UN approaches to counterterrorism are discussed under chapter four of this thesis.⁶¹

A bulk of the UNSC's counterterrorism strategy is centered on strengthening law enforcement to be able to deal with the threat of terrorism rather than dealing with the root causes of terrorism in the first place.⁶² While bolstering law enforcement's capacity to detect, investigate and prevent acts of terrorism is an extremely essential measure for any successful counterterrorism strategy, such laws usually grant law enforcement certain discretions such as the use of force, authority to intercept personal communication, powers to conduct extensive surveillance, and powers to conduct searches on individuals and their property.⁶³ If such extensive powers are not accompanied with any form of effective monitoring mechanisms, those discretions may inevitably have the effect of limiting or eroding certain human rights and freedoms altogether. There is therefore a real danger that without proper accountability mechanisms put in place by law and policy, law enforcement may find themselves violating the rights of citizens they are supposed to serve and protect. In addition, there is another concern that counterterrorism legislation may in itself facilitate human rights violations in an endeavour to prevent the

⁵⁹ Adopted by the UNGA on 8 September 2006 by resolution and an annexed Plan of Action (A/RES/60/288) available at: <http://www.ipu.org/splz-e/unga07/counter.pdf> (accessed 23 October 2014). See the four pillars of combatting terrorism while protecting human rights and freedoms.

⁶⁰ As above, para 21.

⁶¹ Chapter 4 of this thesis, 'International and regional counterterrorism frameworks and their implication on Kenya and Uganda.'

⁶² For some of the strategies taken by the UNSC, see: UNSC Resolution 1269 (1999); UNSC Resolution 1377 (2001); UNSC Resolution 1373 (2001); UNSC Resolution 1368 (2001).

⁶³ M Mutua 'Terrorism and human rights: Power, culture and subordination' (2002) *Buffalo HRLR* 302; K Anderson 'U.S. Counterterrorism Policy and Superpower Compliance with International Human Rights Norms' (2006-2007) 30 *Fordham International Law Journal* 455.

occurrence of terrorism.⁶⁴ The danger of curtailing human rights of ordinary citizens in the interpretation and application of counterterrorism legislation has been a major concern to states and human rights defenders alike over the years. It is no wonder that the Office of the High Commissioner for Human Rights (OHCHR) has on several occasions stressed the need to respect human rights at all times and this obligation extends to the fight against terrorism.⁶⁵ The OHCHR also noted that while terrorism affects human rights and the quality of life of its victims, counterterrorism measures may also have a negative impact on the enjoyment of certain basic human rights and freedoms. In an effort to secure security during counterterrorism, the state may end up eroding the protections of human rights through the enactment and adoption of unreasonable laws and policies. As such, states have an obligation to respect and protect human rights while countering terrorism.⁶⁶

During counterterrorism operations, states find themselves in a difficult position of having to balance between public safety and security on one hand, and human rights considerations on the other.⁶⁷ The major concern with most counter-terrorism legislation is that it tends to be broadly permissive with minimal restrictions and this makes it particularly prone to wide interpretations.⁶⁸ Such wide interpretations have the effect of granting the executive and law enforcement unfettered discretion in the execution of their counterterrorism mandate with

⁶⁴ MC Waxman 'Police and national security: American local law enforcement and counterterrorism after 9/11' (2009) 3 *Journal of National Security, Law and Policy* 378; A Hills 'Trojan Horses? USAID, Counter-Terrorism and Africa's Police' (2006) 27(4) *Third World Quarterly* 630.

⁶⁵ OHCHR (n 13 above) 19.

⁶⁶ R Foot 'Human Rights and Counterterrorism in Global Governance: Reputation and Resistance' (2005) 11(3) *Global Governance: A Review of Multilateralism and International Organizations* 291; Kielsingard (n 15 above); J Fitzpatrick 'Speaking Law to Power: The War against Terrorism and Human Rights' (2003) 14(2) *European Journal of International Law* 242; R Foot 'The United Nations, Counter Terrorism and Human Rights: Institutional Adaptation and Embedded Ideas' (2007) 29(2) *Human Rights Quarterly* 450.

⁶⁷ CC Joyner 'The United Nations and Terrorism: Rethinking Legal Tensions between National Security, Human Rights, and Civil Liberties' (2004) 5 *International Studies Perspectives* 241; B Golder & G Williams 'Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of terrorism' (2006) 8(1) *Journal of Comparative Policy Analysis: Research and Practice* 43; MD Kielsingard 'A Human Rights Approach to Counter Terrorism' (2006) 36 *California Western International Law Journal* 249.

⁶⁸ M Head 'Counter-Terrorism Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights' (2002) 26 *Melbourne University Law Review* 667; A Roberts 'Counter-Terrorism, Armed Force and the Laws of War' (2002) 44(1) *Survival: Global Politics and Strategy* 8; L Lustgarten 'National Security, Terrorism and Constitutional Balance' (2008) 75(1) *the Political Quarterly* 4.

minimal accountability.⁶⁹ Mutua gives the example of the US that has used counterterrorism legislation to limit the application of several human rights and freedoms in its 'war against terror.'⁷⁰ The so-called war against terror was first declared by the Bush administration following 11 September 2001 terror attacks on the US that were carried out by a terrorist organization known as al-Qaeda.⁷¹ Mutua further notes that law enforcement was been granted more discretion to tap personal phone calls, search individuals and property on spot, interrogate individuals of interest, detain and even apply lethal force during counterterrorism operations.⁷² With such immense powers at its disposal, it becomes easy for law enforcement officials to blur the line between respecting human rights and freedoms on one hand, and infringing upon them on the other.

This thesis analyzes the counterterrorism legislation and policies of Kenya and Uganda in an effort to determine whether there are human rights safeguards contained therein, and whether these laws conform to international law. In addition, the conduct of law enforcement during counterterrorism operations is analyzed to determine whether it actively contributes to the violation of human rights and freedoms. The study also traces the obligations placed upon state parties by international, regional and sub-regional counterterrorism frameworks to combat

⁶⁹ See the Authorization for Use of Military Force (AUMF Resolution) S.J. Res. 23 (18th Sept. 2001) Public Law 107-40, 107th Congress. The Authorization for the Use of Military Force empowers the President of the US to authorize the use of force including lethal force against any state or individual or organization that is perceived as posing an imminent terror threat to the United States of America. The AUMF has been used as a basis for the arrest, indefinite incarceration and even torture of certain persons of interest in and out of the US. *See also*: Brennan (2012) A Speech Prepared for Delivery by the Assistant to the President for Homeland Security and Counterterrorism, Woodrow Wilson International Center for Scholars, Washington, DC. It is also under the AUMF Resolution that the Bush Administration authorized the indefinite imprisonment and torture of 'terrorist' suspects at Guantanamo Bay. *See*: J Davis 'Evaluating counterterrorism in Africa' (2010) in J Davis (ed) *Terrorism in Africa: The Evolving Front in the War on Terror* 212.

⁷⁰ M Mutua 'Terrorism and human rights: Power, culture and subordination' (2002) *Buffalo HRLR* 302. *See also*: K Anderson 'U.S. Counterterrorism Policy and Superpower Compliance with International Human Rights Norms' (2006-2007) 30 *Fordham International Law Journal* 455; A Kielsingard and D Mark 'Human Rights Approach to Counter-Terrorism' (2005-2006) 36 *California Western International Law Journal* 249; A Hudson 'Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights' (2007) 25 *Berkeley Journal of International Law* 203; J Fitzpatrick 'Speaking Law to Power: The War against Terrorism and Human Rights' (2003) 14(2) *European Journal of International Law* 241; C Gearty '11 September 2001, Counter-terrorism, and the Human Rights Act' (2005) 32(1) *Journal of Law and Society* 18; CC Joyner (n 67 above) 240; J Mertus & T Sajjad 'Human Rights and Human Insecurity: The Contributions of US Counterterrorism' (2008) 7(1) *Journal of Human Rights* 2.

⁷¹ J Goldsmith *The terror presidency: Law and judgment inside the Bush administration* (2007) 2.

⁷² Mutua (n 15 above) 10.

terrorism while upholding human rights and freedoms, and the rule of law. The study concludes by examining the accountability mechanisms that ensure that law enforcement officials do not violate human rights and freedoms, and are held answerable for their actions in the execution of their mandate.

1.3 Research objectives

The overall objective of this research is to establish whether the counterterrorism legislation and policy frameworks of Kenya and Uganda contribute to the violation of human rights. In addition to this, the study also seeks to ascertain the following specific objective:

- Whether the counterterrorism legislation of Kenya and Uganda complies with the principles of international law.
- Whether law enforcement agencies contribute to the violation of human rights during counterterrorism operations.

1.4 Research questions

What are the factors that contribute to the violation of human rights by law enforcement officials in Kenya and Uganda during counterterrorism?

1.4.1 Sub-questions

- a) To what extent does Kenya's and Uganda's legislation respect international human rights obligations to safeguard and protect human rights during counterterrorism?
- b) To what extent does law enforcement respect human rights rules during counterterrorism? Is it a problem of a weak human rights framework or a deliberate disregard of laws by law enforcement in practice?
- c) How effective are law enforcement accountability mechanisms for the violation of human rights? How can these measures be improved in an effort to protect human rights in Kenya and Uganda?

1.5 Terminology

Terrorism: Gerwehr and Hubbard define acts of terrorism as the unlawful use of force against non-combatants with a political motivation.⁷³ The aim of engaging in terrorist activities is therefore to send a message to a particular audience for example a government or a community with the aim of invoking immediate and radical changes.⁷⁴ Terrorism ultimately thrives on emotions, violence, threat and intimidation which puts members of a particular community in a state of panic.⁷⁵

Ruby argues that terrorism is rooted in three perspectives which are psychological, moral and behavioural.⁷⁶ Terrorism consequently feeds off the fear (reasonably or unreasonably) that an individual or community is a sitting duck that is vulnerable to an attack at any time. Secondly, the moral perspective supposes that an act of violence would be deemed as an act of terrorism if it lacked a moral justification. However, there is no universal threshold of morality as what is moral to one might be immoral to another and vice versa. The third perspective is the behavioural aspect which contends that terrorism should be determined by exclusive examination of the conduct.

Beres criticized previous attempts to define terrorism on five grounds.⁷⁷ Firstly, the proposed definitions drew little distinction between the legal and illegal use of force. Secondly, the definitions do not make reference to the principles of *jus ad bellum* and *jus in bello*. Thirdly, most definitions of terrorism make reference to a 'threat' of force or violence without defining the scope of threat. The fourth criticism is that any definition that does not make reference to terrorist organizations or insurgent groups is not valid. Beres contends that under international law, states are not capable of committing crime although it may be held responsible for wrongful

⁷³ S Gerwehr & K Hubbard 'What is terrorism: Key elements and history' (2006) in B Bongar (ed) *Psychology of terrorism* 87.

⁷⁴ I Primoratz 'What Is terrorism?' (1990) 7(2) *Journal of Applied Philosophy* 129.

⁷⁵ AJ Rapin 'What is terrorism?' (2011) 3(3) *Behavioral Sciences of Terrorism and Political Aggression* 163;

⁷⁶ CL Ruby 'The definition of terrorism' (2002) *Analyses of Social Issues and Public Policy* 9–14.

⁷⁷ See: LR Beres 'The meaning of terrorism-jurisprudential and definitional clarifications' (1995) 28 *Vand. J. Transnat'l L.* 239.

actions of its agents.⁷⁸ The fifth and final criticism is that definitions that make reference to political violence do not adequately delineate the difference between political and criminal violence.

The former UN Special Rapporteur, Martin Scheinin, proposed a definition of terrorism which was adopted by the HRC in 2010.⁷⁹ The definition states that:

Terrorism means an action or attempted action where:

1. The action: (a) Constituted the intentional taking of hostages; or (b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or (c) Involved lethal or serious physical violence against one or more members of the general population or segments of it; and
2. The action is done or attempted with the intention of: (a) Provoking a state of terror in the general public or a segment of it; or (b) Compelling a Government or international organization to do or abstain from doing something; and
3. The action corresponds to: (a) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or (b) All elements of a serious crime defined by national law.

It must also be noted that while the above definition that was adopted by the UN is almost identical to the one adopted by the AU in the OAU Terrorism Convention, the latter interprets terrorism to include acts and threats to damage personal and public property, natural resources, environmental or cultural heritage sites,⁸⁰ and disruptions to public delivery of essential goods and emergency services.⁸¹ The OAU definition also interprets terrorism to include the taking and detention of hostages which is a popular *modus operandi* of terrorist organizations. In this thesis I will use the definition of terrorism adopted under the OAU Convention on the Prevention and Combatting of Terrorism. This is because the said Convention was specifically adopted to prevent

⁷⁸ See: Art 4 Draft Articles on Responsibility of States for internationally wrongful acts. Adopted by the International Law Commission at its fifty-third session (2001).

⁷⁹ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin. A/HRC/16/51. 22 December 2010.

⁸⁰ Art 3(a) of the OAU Terrorism Convention states that ‘...any act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to...’

⁸¹ Art 3(a) (ii) of the OAU Terrorism Convention.

acts of terrorism within the African region and Kenya and Uganda are bound by its provisions by virtue of being member states.

Accountability: Accountability is one of the principles of democracy in which public officials are held accountable by the community for functions carried out in their official capacity. Bovens argues that effective accountability constitutes openness and answerability of public officials to the citizens concerning the execution of their publicly entrusted mandate.⁸² If the law enforcement institution is secretive about its operations and does not give members of the public a reasonable opportunity to scrutinize their actions (subject to sensitivity of information), such conduct defies the spirit of accountability. Schedler *et al* also define accountability as a mechanism for surveillance and oversight of public officials during the execution of public authority.⁸³ Accountability therefore constitutes checks and balances to ensure that public officials do not abuse the power that they are entrusted with. In this thesis therefore, the term accountability refers to the obligation placed upon public officials including law enforcement officers to be answerable for their actions in the execution of their mandate. This includes both internal and external accountability mechanisms.

1.6 Significance of the study

This study assesses counterterrorism legislation and practices in Kenya and Uganda to determine whether they contribute to the violation of human rights and freedoms. The assessment focuses on the interpretation of counterterrorism legislation, the methods and procedures utilized by counterterrorism law enforcement during their operations, and how it may infringe on human rights in Kenya and Uganda. The study also assesses whether there are human rights safeguards built into the constitutions of Kenya and Uganda, their bills of rights, counterterrorism legislation, as well as policies adopted pursuant to counterterrorism measures. The outcome of this thesis

⁸² M Bovens *Public accountability* (2003) Paper for the EGPA annual conference, Oeiras Portugal September 3-6, to be presented in workshop 8 (Ethics and integrity of governance) 2003. Available at: <http://www.law.kuleuven.be/plaatsingsdienst/integriteit/egpa/previous-egpa-conferences/lisbon-2003/bovens.pdf> (accessed 18 January 2015).

⁸³ A Schedler, LJ Diamond & MF Plattner *The self-restraining state: Power and accountability in new democracies* (1999) 13.

adds knowledge on existing terrorism trends in Kenya and Uganda, identifies counterterrorism measures and the loopholes therein, aids policy formulation, inspires law formulation or reform, and advocates for the recognition and protection of human rights during counterterrorism.

1.7 Methodology

This study was entirely a library based research study. Questionnaires could not be administered to collect primary data because there was a significant security risk posed to the researcher. The issue of terrorism and counterterrorism operations is a very sensitive matter to the governments of both Kenya and Uganda. Acquiring approval to carry out any form of interviews with some key respondents like the Minister and the police officers proved to be a difficult task. The researcher also attracted unnecessary scrutiny as to his motives in carrying out the research and attempts to conduct the said interviews had to be abandoned for the sake of security. In addition, this thesis strongly criticizes the governments' poor records of human rights. This was ultimately bound to upset some authorities who might feel offended by the findings, arguments and recommendations. This posed another security risk to the researcher who might have been perceived as a government detractor. Regardless of these limitations, quality of the research was not affected as the researcher went on to use available primary and secondary data for analysis.

The data collection involved an extensive search of the literature on international law, human rights, terrorism and counterterrorism legislation and policy frameworks in East Africa, as well as the international community. The literature that was examined in this study included both primary and secondary sources of information. The primary sources of information included for example court cases, policies, departmental reports, international instruments, first-hand journalist accounts as well as legislation and policies.

The role of examining these primary sources was to generate an understanding of the terrorism phenomenon in Kenya and Uganda, and the responses that have been adopted by the two countries in order to counter these attacks. This enabled would-be readers to gain an appreciation of the magnitude of the problem as well as provide a basis of analysis. Access to the first-hand information (primary sources) was therefore very important. The study also

utilized secondary sources for example textbooks, journal articles, commentaries and criticisms. The role of this examination was to provide a context for the study as well as understand the past and current debates surrounding the research area.

After the data collection stage which comprised of a review of primary and secondary sources, the next important step was analysis of the data in order to make sense of it. The study utilized the following methods of data analysis: logical analytical and comparative analysis. The logical analysis method⁸⁴ was invaluable in understanding and making sense of the existing data and patterns of action/measures taken by the state in an effort to counter the prevalence of terrorism. This also helped to establish the cause of violations of human rights and freedoms by law enforcement during counterterrorism operations and how this may be addressed. The logical analysis of the data was essential for understanding some links in the data for example cause and effect. Logical analysis method was also used in drawing informed conclusions based on the primary data.

The second method of data analysis that was utilized was the comparative method.⁸⁵ This method was also used throughout the study in order to understand and appreciate the disparities in the trends of terrorism between states, the counterterrorism measures adopted, and the identification of good practices that Kenya and Uganda can emulate. This study concentrated on two East African countries which are Kenya and Uganda. These two countries were chosen because they are both located within the same geographical location and have similar legal, economic, social, cultural and political systems. They have also been affected by the terrorist attacks and threats from al-Shabaab as well as indigenous terrorist organizations. The study therefore made significant assessments to compare their positions of law and policy on counterterrorism, experiences and how the respective governments have approached the issue of protecting human rights while countering terrorism. This exercise was important so as to draw positive lessons that could inform Kenya and Uganda's counterterrorism strategies. This exercise also exposed the strengths and weaknesses of the two countries' counterterrorism systems and

⁸⁴ I Chikalov, V Lozin, I Lozina, M Moshkov, HS Nguyen, A Skowron & B Zielosko 'Logical Analysis of Data: Theory, Methodology and Applications' (2013) 41 *Intelligent Systems Reference Library* 147-192.

⁸⁵ D Collier, 'The comparative method' in AD Finifter, ed. (1993) *Political Science: The State of the Discipline II*. 10.

proposed important recommendations regarding the protection of human rights while fighting against terrorism.

The study population that was selected for this study was Kenya and Uganda, two countries located in the East African region. The motivation for this focus was that these two East African countries have had a particularly high prevalence of terrorist activity over the past two decades, more than any other countries in the sub-region.⁸⁶ Kenya and Uganda have also continuously become an important political and economic focal point within the East and Central African region and the Horn of Africa with significant influence on the state of affairs (political, social and economic). In addition, these two countries have had a long history of human rights violation with the largest proportion of incidents being perpetrated by states themselves through their law enforcement agencies.⁸⁷ However, the influence of transnational terrorist organizations as well as indigenous terrorist groups have also contributed significantly to the prevalence of terrorism. It was highly probable that some human rights would be infringed upon during counterterrorism. The study therefore sought establish whether counterterrorism legislation and the practice of law enforcement during such operations contributed to the violation of human rights in Kenya and Uganda.

1.8 Limitation of study

Present-day state practices in response to acts and threats of terrorism are considered to be delicate issues of public safety, order and national security.⁸⁸ As such, this information is often treated with secrecy and states are weary of divulging these materials even long after the threat has been dissipated or appropriate action taken. This is probably due to the fact that some

⁸⁶ C Goredema & A Botha 'African commitments to combating crime and terrorism: A review of eight NEPAD countries' (2004) *African Human Security Initiative*, Paper 3.

⁸⁷ S Dicklitch & D Lwanga 'The politics of being non-political: Human rights organizations and the creation of a positive human rights culture in Uganda' (2003) 25(2) *Human Rights Quarterly* 482; M Mutua 'Savages, Victims, and Saviors: The metaphor of human rights' (2001) 42(1) *Harvard International Law Journal* 201.

⁸⁸ JE Mueller *Overblown: How politicians and the terrorism industry inflate national security threats, and why we believe them* (2006) 12; D Cole and JX Dempsey *Terrorism and the constitution: Sacrificing civil liberties in the name of national security* (2006) 20; GW Bush *The national security strategy of the United States of America* (2002) Executive Office of the President para 2.

unconventional measures may have been utilized in averting the threats of terror which might impute badly on the reputation of the government.⁸⁹ For some of the states that have divulged such information which revealed any irregularities, those governments have been seriously criticized for being unprocedural.⁹⁰ The research was therefore slightly impacted by the fact that some vital information regarding state responses to terrorism was not easily accessible to the researcher. However, the researcher made use of other alternative sources of key information in order to inform the study and overcome this limitation. The quality of the research was therefore not significantly compromised by these limitations.

1.9 Literature review

Blakesley argues that the biggest challenge in counterterrorism may well be an overreaction by the executive branch of government that might take excessive measures in response to an act of terror which unreasonably limit human rights.⁹¹ In the heat of the moment, the executive may use terrorism as a justification to infringe upon constitutionally entrenched checks and balances without giving much thought to the consequence of their actions.⁹² Davis makes reference to the Authorization of the Use of Military Force (AUMF) that empowered the President of the US to authorize attacks against any person or organization that is perceived as a threat to the state.⁹³ The AUMF has been used as a basis for a number of military interventions in for example Pakistan, Yemen, Libya, Iraq and Syria, and even the sanction of the use of torture against terrorist suspects in Guantanamo Bay.⁹⁴ Furthermore, the government of the US has on several occasions refused to grant any institution access to the information regarding counterterrorism operations citing

⁸⁹ R Murphy and AJ Radsan 'Due process and targeted killing of terrorists' (2009) 31(2) *Cardozo Law Review* 412.

⁹⁰ SR David *Fatal choices: Israel's policy of targeted killing* (2002) 2. Israel adopted an open policy of targeted killing of Palestinian suspects in relation to acts of terrorism carried out within the Occupied Palestinian territory. Israel's open policy of targeted killing prompted widespread condemnation because it ultimately led to the violation of human rights.

⁹¹ C Blakesley *Terrorism, drugs, international law and the protection of human liberty: A comparative study of international law, its nature, role and impact in matters of terrorism, drug trafficking, war and extradition* (1992) 25.

⁹² Blakesley (n 91 above) 30; see also: J Davis 'Evaluating counterterrorism in Africa' in J Davis (ed) *Terrorism in Africa: The Evolving Front in the War on Terror* (2010) 212.

⁹³ As above.

⁹⁴ Davis (n 92 above) 213.

that such intelligence is classified under national security.⁹⁵ Mutua further argues that the overemphasis on national security in the interpretation and application of counterterrorism legislation results in the infringement of human rights and liberties.⁹⁶ Moreover, the definitions attached to 'national security' are often too broad as to encompass any scenario that might suit the executive.

Goold and Lazarus also argue that efforts to ensure national security on one hand and the protection of human rights and freedoms on the other, should not be perceived as conflicting obligations in the fight against terrorism.⁹⁷ If counterterrorism measures disregard respect for human rights, the rule of law and basic freedoms, such measures will end up violating the same standards and ideals which they sought to protect in the first place. According to Hoffman, disregarding human rights, basic freedoms and the rule of law compromises on essential checks and balances that would otherwise ensure accountability of public officials including police.⁹⁸

Doswald-Beck argues that during counterterrorism, human rights and freedoms should not be considered as merely theoretical, but they should be applied for the benefit of those communities which they seek to protect.⁹⁹ The implementation of human rights therefore calls for well-organized law enforcement operations and measures, clear legislation and strong protections that prevent unjustifiable infringement on human rights and basic freedoms. In 1994, Charters carried out a study on the counterterrorism laws of the UK, US, Germany, Israel, France and Italy in an effort to establish their effect on the state of democracy and human rights in the respective countries.¹⁰⁰ The findings of the study showed that counterterrorism legislation of the respective countries had significantly contributed to the infringement of human rights and freedoms through its application and interpretation by law enforcement.¹⁰¹ Under those counterterrorism strategies, law enforcement was given more discretion in the course of their

⁹⁵ P Rogers *A war on terror: Afghanistan and after* (2004) 3.

⁹⁶ M Mutua 'Terrorism and human rights: Power, culture and subordination' (2002) *Buffalo HRLR* 302.

⁹⁷ L Lazarus & BJ Goold 'Security and human rights: The search for a language of reconciliation' in BJ Goold & L Lazarus (eds) *Security and human rights* (2007) 1

⁹⁸ P Hoffman 'Human rights and terrorism' (2004) 26(4) *Human Rights Quarterly* 932.

⁹⁹ L Doswald-Beck *Human rights in times of conflict and terrorism* (2011) 35.

¹⁰⁰ DA Charters *The Deadly Sin of Terrorism: Its Effect on Democracy and Civil Liberty in Six Countries* (1994) 221.

¹⁰¹ Charters (n 96 above) 222.

operations to carry out extensive on-spot searches on people and properties, apprehend and detain suspects for periods longer than those specified under penal law, and the power to deport individuals who were considered a threat to peace and security. This indicated an inclination of the governments to prioritize counterterrorism over civil rights and liberties.

Charters further argued that it is possible for a state to effectively enforce counterterrorism measures without unlawfully infringing on human rights and freedoms.¹⁰² Human rights should not be viewed as a hurdle to law enforcement's work during counterterrorism but must be respected at all times. Human rights consequently constitute an important safeguard for the protection of citizens. With the increase of terrorist activity across the world, there has been a need for states to strengthen law enforcement to better handle the evolving challenges of terrorism.¹⁰³ Waxman noted that since the 2001 terrorist attacks on the US, local law enforcement agencies had been empowered to deal with issues of national security. Moreover, specialized tactical units were constituted to deal with the threat of terrorism. These law enforcement agencies are heavily militarized and this raises a number of human rights concerns for instance accountability for the use of firearms.¹⁰⁴ Doswald-Beck also argues that states must take preventive measures to avoid violation of human rights during counterterrorism and should exercise due diligence in respect of actions by its own law enforcement officials, as well as other third parties.¹⁰⁵ Such measures should amongst others include investigations of allegations of human rights violation, prosecution of individuals who are found guilty of breach of human rights, conviction, and punishment of individuals, agents and third parties who wrongfully infringe upon human rights.¹⁰⁶

¹⁰² As above, 223.

¹⁰³ Open Society Foundations (n 24 above) 20.

¹⁰⁴ MC Waxman 'Police and national security: American local law enforcement and counterterrorism after 9/11' (2009) 3 *Journal of National Security, Law and Policy* 378; A Hills 'Trojan Horses? USAID, Counter-Terrorism and Africa's Police' (2006) 27(4) *Third World Quarterly* 630.

¹⁰⁵ Doswald-Beck (n 99 above), 37.

¹⁰⁶ Doswald-Beck (n 99 above), 36-38. JK Neil 'Coming to terms with atrocities: A review of accountability mechanisms for mass violations of human rights' (1996) 59(4) *Law and Contemporary Problems* 128. See also: CS Nino 'The duty to punish past abuses of human rights put into Context: The case of Argentina' (1991) 100(8) *Yale Law Journal* 2619; C Apodaca 'The rule of law and human rights' (2003-2004) 87 *Judicature* 292. Apodaca studied the role of the law and the independence of the judiciary in the protection of human rights in 154 developing

Doswald-Beck further points out that there are certain circumstances under which a state may be legitimately unable to ensure the protection of human rights and freedoms. These may include but are not limited to unforeseeable occurrences for example hostilities during armed conflict, force majeure, lack of *de facto* control over a particular part of its territory and the sudden breakout of violence beyond the control of the state and its available resources. Regardless of these conditions, it is argued that the state will still have a duty to minimize the effects of the human rights violation after the initial uncontrollable situation or surprise factor has calmed down or stopped altogether.

In 2006, the Commonwealth Human Rights Initiative (CHRI) undertook a study on the accountability of law enforcement in Uganda.¹⁰⁷ The CHRI noted that just like the Kenyan police, members of the Ugandan Police Force engaged in regular misconduct and abuse of office for example unlawful detention, torture, favouritism and corruption.¹⁰⁸ CHRI also noted that the police in Uganda often use their authority to illegitimately prevent peaceful and lawful protests, especially protests organized by opposition parties. It was further argued that this conduct is aimed at protecting the interests of the current government at the expense of fairness and justice.¹⁰⁹ It was also noted that members of law enforcement do not only disperse legitimate protests but also deny the public permission to hold rallies completely. CHRI contended that the function of law enforcement in society is to preserve order, uphold the law and protect citizens rather than limit legitimate rights and freedoms.¹¹⁰ It was also argued that the execution of police functions should not contravene the law and human rights. During the colonial era, the police force served the interests of the government rather than protecting members of the public. The

countries. She concluded that the independence of the judiciary is extremely necessary in the protection of human rights; C Goredema 'Initiatives against terrorism in Southern Africa: Implications for human rights' (2003) 12(1) *African Security Review* 99. Goredema also notes that some rights may be derogated from in strict compliance with the law and the principles of proportionality and necessity. *See also*: UN Human Rights Committee General Comment 27 para 12.

¹⁰⁷ Commonwealth Human Rights Initiative *The police, the people, the politics: police accountability in Uganda* (2006) ISBN: 81-88205-29-X. Available at: http://www.humanrightsinitiative.org/publications/police/uganda_country_report_2006.pdf (accessed 10 September 2014).

¹⁰⁸ Commonwealth Human Rights Initiative (n 107 above) 7.

¹⁰⁹ Commonwealth Human Rights Initiative (n 107 above) 11; *see also*: Human Rights Watch *World Report 2003: Uganda* (2003) available at: <http://www.hrw.org/wr2k3/africa13.html> (accessed on 11 September 2014).

¹¹⁰ Commonwealth Human Rights Initiative (n 107 above), 25.

police was unduly controlled by the executive (was used to control but not protect the public); protected the interests of the government; and were alienated from the public. In contrast to the colonial model of policing, the CHRI advocated for democratic policing in which law enforcement abides by the rule of law; is accountable to the community; acts with sufficient reasonable transparency; prioritizes the protection of citizens; upholds human rights and freedoms; and works together with members of the public in the execution of their duties.¹¹¹ Stone and Ward also argue that effective democratic policing requires effective accountability of law enforcement members at the different levels of authority and seniority.¹¹² In other words, each rank of seniority within law enforcement creates an added layer of accountability in which all officials below that rank become answerable to the senior officer.

In his article, Neil addresses criminal prosecution as a deterrent for mass violations of human rights by private individuals and state institutions. He argues that prosecution and punishments of perpetrators is an essential accountability mechanism that can only be achieved with a high degree of judicial independence.¹¹³ He notes that the duty to prosecute perpetrators is incumbent upon the state and must be carried out in the most transparent of ways. Mutua also argues that any democracy that seeks to uphold human rights must firstly respect the rule of law and constitutionalism.¹¹⁴ He further stresses the importance of an independent judiciary in creating checks and balances for the other arms of government. Perry further argues that the judiciary should be free of undue interference from the executive and legislative branches of government in order to safeguard human rights.¹¹⁵ Independence of the judiciary is part and parcel of the concept of separation of powers whose role is to ensure that no organ of government becomes too powerful to a point of abusing its powers.¹¹⁶

¹¹¹ As above; CE Stone & HH Ward 'Democratic policing: A framework for action' (2000) 10(1) *Policing and Society: An International Journal of Research and Policy* 11.

¹¹² Stone & Ward (n 111 above) 12.

¹¹³ JK Neil 'Coming to terms with atrocities: A review of accountability mechanisms for mass violations of human rights' (1996) 59(4) *Law and Contemporary Problems* 128.

¹¹⁴ M Mutua 'Justice under siege: The rule of law and judicial subservience in Kenya' (2001) 23(1) *Human Rights Quarterly* 96.

¹¹⁵ M Perry 'Protecting human rights in a democracy: What role for the courts' (2003) 38 *Wake Forest L. Rev.* 635.

¹¹⁶ Doswald-Beck (n 99 above) 33.

In 2003, Dudziak analyzed the role of the judiciary (courts) in establishing and maintaining the rule of law in selected countries within the African continent.¹¹⁷ It was noted that in several developing countries in Africa, the judiciary is perceived as an agent of the state and political leaders rather than an independent and objective arm of government that is charged with the responsibility of administering justice.¹¹⁸ As such, ordinary citizens seem to lack confidence in the judicial systems that seem to protect the interests of the executive rather than dispensing impartial justice.¹¹⁹ The perception of partiality and unreliability does not resonate with the designated role of an independent judiciary in a democratic society. It is therefore one of the duties of the state to ensure that their judiciaries are independent from all forms of undue influence. This is usually achieved by ensuring effective separation of powers between the three arms of government.¹²⁰

Goredema and Botha conducted a research on the prevalence of terrorist activities in eight NEPAD countries in 2004. Although the study is more than a decade old and was carried out before the wave of al-Shabaab attacks in Kenya and Uganda, the assessment yielded important findings which are still applicable today. The study found that among other states, Kenya and Uganda particularly have a very high risk of terrorist activity.¹²¹ Goredema and Botha argued that in order for these states to effectively combat terrorism, there were a number of commitments and measures that could be implemented. These included ratifying international instruments on terrorism and domesticating them;¹²² establishing and promoting inter-agency collaboration at national level;¹²³ tightening border security;¹²⁴ and suppressing the financing of terrorism.¹²⁵ However, these counterterrorism legislation may in itself embody some infringements on human rights.

¹¹⁷ ML Dudziak 'Who cares about courts? Creating a constituency for judicial independence in Africa' (2003) 101 *Michigan Law Review* 1622.

¹¹⁸ Dudziak (n 117 above) 4.

¹¹⁹ As above, 5.

¹²⁰ DC Flatto 'The historical origins of judicial independence and their modern resonances' *The Economist* (2017).

¹²¹ Goredema & Botha (n 106 above) 28.

¹²² Goredema & Botha (n 106 above) 60; Art 2 of the OAU Terrorism Convention.

¹²³ Art 4(2) (i) of the OAU Terrorism Convention.

¹²⁴ Art 4(2) (a-c) of the OAU Terrorism Convention.

¹²⁵ Art 4 of the OAU Terrorism Convention.

In 2010, the former Special Rapporteur, Martin Scheinin submitted a report in which he proposed ten good practices that will ensure compliance with human rights obligations while countering terrorism.¹²⁶ In his report, the Special Rapporteur noted that counterterrorism legislation must contain the following safeguards: Counterterrorism measures must be consistent with human rights law, refugee law, and humanitarian law; In the execution of any mandate under counterterrorism, no one may act contrary to international human rights and refugee law obligations and counterterrorism measures should principally be carried out by civilian authorities in accordance with principles of normalcy and specificity; It is important that counterterrorism measures should be periodically reviewed by an independent body who shall submit a report on the findings and that counterterrorism legislation must contain provisions on remedies for victims of human rights violations including a speedy trial and an effective remedy; Provisions on reparation and assistance must be catered for directly out of the state budget for victims of human rights violations and counterterrorism legislation must have a clear definition; States should criminalize the act of incitement to terrorism which involves distributing information that advocates for terrorist acts/offences; The listing of individuals and organizations as terrorists must be based on concrete information; Such individuals must be informed of the listing and its consequences and the listed entity may apply to be de-listed; Compensation must also be paid for those individuals who are wrongfully affected and any arrests and/or interrogation of suspects must conform to human rights and the rule of law.¹²⁷

The discussion above reveals that terrorism in itself is not a new phenomenon in the East African region and there have been concerted some efforts that have been adopted in order to contain its prevalence. A number of measures have been adopted at international, regional, sub-regional and state level in order to more effectively fight against terrorism. These measures and legislative frameworks emphasize the need to respect human rights and basic freedoms in the implementation of counterterrorism measures. The literature also highlights the need to strike a fine balance between the attainment of security on one hand and the protection of

¹²⁶ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin. A/HRC/16/51. 22 December 2010. Available at: http://ap.ohchr.org/documents/dpage_e.aspx?m=134 (accessed 22 October 2014).

¹²⁷ As above.

fundamental human rights and freedoms on the other. States therefore need to develop counterterrorism frameworks that recognise and protect of human rights and freedoms.

Regardless of the existence of counterterrorism frameworks that contain human rights safeguards, there are still several documented cases of human rights violations that are carried out by law enforcement. The various reasons for this recurrence of rights violations stills remain unexplored in in the context of Kenya and Uganda. It is therefore necessary to engage in this study to establish why law enforcement and security agencies in these two countries are contributing to the violation of the same rights and freedoms which they are constituted to protect in the first place. I will therefore make an assessment as to why such a disturbing trend continues to persist in Kenya and Uganda. The results of this evaluation will help to understand whether it is a problem of weak legislative frameworks, inadequate policy strategies or the blatant disregard of laws and procedure by law enforcement in the course of their counterterrorism operations. The result of this assessment will highlight the strengths and weakness in the legislation framework of Kenya and Uganda as well as identify the causes of violation of human rights by law enforcement in the fight against terrorism. This study will therefore be a valuable addition to existing literature and influence law formulation and reform.

1.10 Scope of the study

This study was carried out between 2014 and 2017 and involves a review of the counterterrorism frameworks of Kenya and Uganda. Such frameworks include laws and policies on counterterrorism and human rights. These frameworks are analyzed against international law principles on the protection of human rights while countering terrorism.

Chapter two: Theoretical framework

This chapter explores the different theories that contextualize and contribute to the counterterrorism discourse. The chapter will first examine the theory of good law as proposed by Lon Fuller in order to set the interpretative context upon which the counterterrorism laws of Kenya and Uganda will be examined. This section will also examine the concepts of constitutionalism, separation of powers, the rule of law and democracy.

The chapter will then move on to examine the theories of policing which include; broken windows policing; problem oriented policing; community policing theory; and democratic policing. Understanding these theories will enlighten the readers on the various approaches and techniques utilized by specific police institutions, as well as how their priorities are formulated in the fight against crime. These theories will also help to evaluate the overall effectiveness of law enforcement units.

Chapter three: International, regional and sub-regional frameworks on counterterrorism

Chapter three focuses on extent of the problem of terrorism in the East African region and the Horn of Africa and in particular, Kenya and Uganda. The inclusion of the Horn of Africa is because Kenya and Uganda's greatest terrorism threat emanates from one of Somalia's most notorious terrorist organization, al-Shabaab that is waging war against the weak government for control over the territory. This chapter examines the rise of al-Shabaab in Somalia as one of the most infamous terrorist organizations on the African continent. This chapter consequently assesses the extent of al-Shabaab's influence in Somalia and its cross-border incursions against neighbouring states including Kenya and Uganda. This section concludes by examining some of the most prominent legislative and policy counterterrorism interventions adopted by Kenya and Uganda's governments in an effort to curb acts of terror and the growing influence of terrorist groups/organizations.

Chapter four: International and regional counterterrorism frameworks

This chapter examines treaties, resolutions, action plans and frameworks that have been adopted by the various international organizations to which Kenya and Uganda are member states. In addition to these frameworks, this section also examines the bodies and agencies that have been created to oversee the implementation of these international instruments. This chapter focusses on the implication of the UN counterterrorism strategy and how it affects the enjoyment of human rights. In Addition to the UNCTS, this chapter examines the core human rights treaties that protect these rights. The chapter also examines the African Union system of counterterrorism, and its implications on Kenya and Uganda.

Chapter five: Life, non-discrimination, opinion, religion and privacy

Chapter five examines the protection right to life, equality and protection against discrimination, the freedom of opinion and expression, the freedom of thought, conscience and religion, and the right to privacy of the person, home and property in relation to counterterrorism. The chapter examines the international and regional protection of these rights and freedoms as well as their recognition under state law. The chapter then examines when these rights may be lawfully limited under counterterrorism law, and how law enforcement in Kenya and Uganda has contributed to the violation of these rights.

Chapter six: Liberty, personal security and the rights of detainees

This chapter focuses on the right to liberty and personal security. This right which is closely related to the right to fair trial contains a number of rights subsumed under it including: the protection against arbitrary arrest and detention, the right to know the reason of arrest, the right to be brought before a judicial officer within a reasonable time, the right to remain silent during arrest, detention and even trial, and the right to legal counsel/representation. In addition to these protections, the chapter also examines the prohibition of torture, cruel, inhuman and degrading treatment. This chapter also examines the international and regional protections of these rights as well as their recognition under state law. This chapter additionally examines how these human rights and freedoms may be affected by counterterrorism legislation and how law enforcement contributes to their gradual decline during the course of their day-to-day operations.

Chapter seven: Accountability of law enforcement for human rights violations during counterterrorism

Chapter seven examines the mechanisms that are put in place in order to ensure that law enforcement agencies are accountable for their actions in order to minimize abuse of power and human rights violations during counterterrorism operations. The chapter assesses the various law enforcement accountability frameworks that have been formulated under international, regional and sub-regional level, as well as under the state law of Kenya and Uganda. The chapter

also examines internal and external accountability mechanisms that ensure that law enforcement respect human rights.

Chapter eight: Conclusion and recommendations

Chapter eight is the final section of the thesis. It summarizes the study by drawing on the major themes and topics that arose throughout the assessment. In addition to summarizing the thesis, the chapter explores a framework for an effective police force that is accountable to the people and not subservient to the ruling government or the interests of a select few. Lastly, the chapter offers some reforms that if adopted by Kenya and Uganda should ensure a higher degree of accountability of police which will invariably register a decline in the violation of human rights during counterterrorism.

CHAPTER TWO

2. Theoretical framework on counterterrorism

2.1 Introduction

A theoretical framework which is sometimes used interchangeably with a conceptual framework is a broad discussion of concepts pertaining a particular subject that have been developed from literature, debates and other important information over time.¹ A theoretical framework therefore constitutes a basis upon which research questions and assumptions of the study may be drawn from. It therefore sets the context upon which general understanding of the existing debates on a particular discipline have been developed over time. In addition, a theoretical framework may be used to make informed predictions (hypotheses) about certain aspects of the study that have not yet been investigated. It is therefore important because it constitutes a roadmap for the research study and sets out the methods and approaches that are to be taken during an investigation.

This section examines therefore the different theories and concepts that contribute to shaping the framework for the protection of human rights while countering terrorism. A theory may be defined as an idea or concept that explains a phenomenon based on certain proposed variables at a particular time and place.² Theories therefore facilitate understanding of the history, current changes as well as predictions of expected changes within a specific field of knowledge. They also explain the status quo as well as behavioural patterns in an attempt to assess the magnitude of the problem. This chapter will examine the theory of good law, separation of powers, constitutionalism, the rule of law and democracy. The reason for examining these particular doctrines is that they advocate for framework of good governance and accountability. These theories will guide the study in the analysis of the counterterrorism legislation of Kenya and

¹ TO Nelson 'Metamemory: A theoretical framework and new findings' (1990) 26 *Psychology of learning and motivation* 125-173; USC Libraries (12 July 2017) *Organizing your social sciences research paper: Theoretical framework*. Available at: www.libguides.usc.edu/writingguide/theoreticalframework (accessed 14 July 2017).

² See: Merriam-Webster. Available at: <https://www.merriam-webster.com/dictionary/theory> (accessed 05 June 2017).

Uganda to determine whether they are indeed best suited for the objectives they seek to accomplish. In addition, these theories propose a proper framework by which public officials should carry out their mandate in order to benefit the community. The chapter will also examine the different theories of policing including broken windows policing, problem oriented policing, community policing theory, and democratic policing. These theories of policing are relevant to counterterrorism because they aid in understanding the philosophical approaches of different law enforcement agencies to crime within their communities. This is important because the different approaches to crime dictate the methods adopted by law enforcement in crime analysis and prevention. In addition, they propose certain frameworks for improving the overall effectiveness and professionalism of law enforcement during the discharge of their functions.

2.2 The theory of good law

This section examines the theory of good law and how it is relevant to the topic of human rights and counterterrorism in Kenya and Uganda. With the increase of terrorist activity in East Africa, it became necessary for the states in the region to adopt counter-terrorism legislation in order to improve the capacity of law enforcement to detect, investigate, prevent terrorist activities, apprehend the culprits and punish them accordingly.³ Uganda adopted the Anti-Terrorism Act In 2002⁴ while Kenya enacted its Prevention of Terrorism Act in 2012.⁵ These two acts therefore constitute the primary counterterrorism frameworks for these two countries. They criminalize terrorism, prohibit terrorist organizations and stipulate the powers of law enforcement in the prevention of terrorism amongst other measures. Benjamin Franklin noted that ‘they who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.’⁶ This quotation summates the importance of balancing between the national security and protecting fundamental rights and liberties. It is therefore crucial to ensure that any

³ See: Anti-Terrorism Act of Uganda, Act No 14 of 2002; Prevention of Terrorism Act of Kenya, Act no 30 of 2012.

⁴ Act No 14 of 2002.

⁵ Act No 30 of 2012.

⁶ B Franklin ‘Pennsylvania Assembly: Reply to the Governor’ (1755) 6 *The Papers of Benjamin Franklin* 242 (Available at: <http://franklinpapers.org/franklin/framedVolumes.jsp?tocvol=16> accessed 19 July 2014);

ML Wade ‘Fear vs Freedom Post 9/11-A European debate: Introduction’ (2007) 13(12-13) *European Journal on Criminal Policy and Research* 11.

counterterrorism framework must recognize and respect human rights and liberties. This consideration gives rise to the question which has been the area of contention for legal scholars over a long time namely, what is good law/what constitutes good law?

In order to attempt answering the above question, reference must be made to the works of Lon Fuller, one of the leading legal philosophers who enumerated a criterion by which a piece of legislation can be assessed to determine whether it constitutes good law or otherwise. Fuller reasoned that every law must possess an inner morality (a determination of the rightness or wrongness of an act or omission) which it seeks to fulfil.⁷ According to Fuller, there is no theoretical difference between the law and morality which all seek to fulfil similar objectives within the community.⁸ He argued that the law is in itself a moral commitment for the attainment of social order by the introduction of regulations.⁹ In consequence therefore, any piece of legislation that fails to meet the minimal moral standard of fairness cannot be considered as legitimate.

The moral commitment of the two pieces of legislation can be ascertained by examining their purpose or objective which can be found in the long titles of both Acts.¹⁰ The objective of the two Acts is therefore to illegalize, detect, investigate, prevent and punish acts of terror.¹¹ These objectives indeed play an important role in the preservations of social order within the respective states which is a justifiable measure. However, an inquiry as to the legitimacy of a piece of legislation cannot stop at the examination of the long title. It must be scrutinized holistically in

⁷ EW Tucker 'The morality of law, by Lon L. Fuller' (1965) 40(2) *Indiana Law Journal* 270.

⁸ J Raz *Ethics in the public domain: Essays in the morality of law and politics* (1994) 1.

⁹ LL Fuller 'Positivism and fidelity to law: A reply to Professor Hart' (1958) *Harvard Law Review* 630.

¹⁰ See the long title of Uganda's Anti-Terrorism Act of 2002. 'An Act to suppress acts of terrorism, to provide for the punishment of persons who plan, instigate, support, finance or execute acts of terrorism; to prescribe terrorist organisations and to provide for the punishment of persons who are members of, or who profess in public to be members of, or who convene or attend meetings of, or who support or finance or facilitate the activities of terrorist organisations; to provide for investigation of acts of terrorism and obtaining information in respect of such acts including the authorising of the interception of the correspondence of and the surveillance of persons suspected to be planning or to be involved in acts of terrorism; and to provide for other connected matters.' See also: the long title of Kenya's Prevention of Terrorism Act of 2012: 'An Act of Parliament to Provide for the detection and prevention of terrorist activities....'

¹¹ As above.

order to make a conclusive determination as to whether it meets the standard of good law.

In addition to the moral consideration of law, Fuller proposed eight principles which he described as the important qualities that every good law must possess in order to be considered legitimate and these include:¹²

- (1) The generality of laws;
- (2) The demands that laws are published;
- (3) That laws are not retroactive;
- (4) The clarity of laws;
- (5) The consistency of laws;
- (6) The demands that the laws do not impose duties that are impossible to perform;
- (7) That laws are not changed frequently; and
- (8) The demand that governmental action is in accordance with the general laws which are laid down beforehand.

The first principle of generality requires that laws must be drafted in such a way that they can be applied in a general manner. Fuller argues that laws that overly stress individual differences between persons are highly undesirable.¹³ The second principle is that laws must be published and made available to the individuals who are affected by it.¹⁴ It must be noted that laws are enacted to regulate human conduct. Communication of laws to the governed therefore enables them to conduct themselves in accordance with the requirements therein.¹⁵ The third principle requires that laws that are newly enacted should not apply retrospectively.¹⁶ In other words, a new law that criminalizes certain conduct from a new date for example 2016, should not criminalize similar conduct that took place before the specified date. The fourth consideration is that laws must be drafted in clear language and must clearly state who it applies to and/or the conduct it seeks to regulate.¹⁷ Tucker notes that at times it may not be reasonably possible to

¹² HLA Hart 'The morality of law by Lon L. Fuller' (1965) 78(6) *Harvard Law Review* 1285.

¹³ EW Tucker 'The morality of law, by Lon L. Fuller' (1965) 40(2) *Indiana Law Review* 270-279.

¹⁴ Tucker (n 13 above) 274, para 2.

¹⁵ As above.

¹⁶ Tucker (n 13 above) 274, para 3.

¹⁷ Tucker (n 13 above) 274, para 4.

legislate for each and every form of conduct. He concludes that in such instances, the power to legislate for the finer details should only be delegated to enforcement authorities or bodies in instances where it is absolutely required.¹⁸ The principle of clarity of laws¹⁹ was later expanded to include the qualities reliability, enforceability and availability.²⁰ A law that is not enforceable, does not impose any penalties, and lacks the backing of force of law cannot therefore be considered to be good law.

Principle five requires that laws should be consistent over the years.²¹ This means that in adopting new legislation, lawmakers should take precaution to ensure that subsequent laws must not contradict other pieces of legislation that were enacted before it.²² Should the new law contain contradictory clauses, it must either repeal or amend the earlier law.²³ Principle six requires that the law should not impose onerous duties upon individuals that are difficult to execute.²⁴ A regulation that demands an irrational response from the governed therefore violates the morality of law.²⁵ Principle seven that is often referred to as the stability of law requires that laws should not be frequently changed.²⁶ Frequent alteration of the law has a negative impact of haphazard changes in lives of the governed in an endeavour to ensure their conduct falls within the acceptable confines of the law. The eighth and last principle requires that actions taken by the government and its agencies must conform to the norms that have been prescribed in the law.²⁷

Tucker notes that Fuller does not stipulate which of the eight principles are more important than others. There is no hierarchy of the principles that ranks them from the most to the least

¹⁸ As above.

¹⁹ Hart (n 12 above) Principle 4 of Fuller's criteria of morality of law.

²⁰ P Popelier 'Legal certainty and principles of proper law making' (2000) 2 *Eur. J.L. Reform* 321.

²¹ Tucker (n 13 above) 274, para 5.

²² As above.

²³ For a definition of repealing and amendment, see: www.legal-dictionary.thefreedictionary.com/repeal (accessed 15 July 2017).

²⁴ Tucker (n 13 above) 274, para 6.

²⁵ As above.

²⁶ Tucker (n 13 above) 274, para 7.

²⁷ Tucker (n 13 above) 274, para 8.

important.²⁸ The result is that all the principles should be given equal prominence in determination of whether a legislation is good law. The eight principles therefore constitute conditions which lawmakers must take into account during the law-making process.²⁹ When laws are legislated in accordance with the eight principles, they contribute to the overall understanding of the governed thus realizing more compliance.

It must be noted that Fuller's eight principles for the determination of the morality of law have raised some criticism. Hart for example argues that Fuller's eight principles of the law and morality merely represent a means to an end approach which is rather inappropriate for such an assessment.³⁰ In addition, he criticizes Fuller's reference to a 'moral standard of law' arguing that the most heinous of actions may very well possess a certain 'inner morality' of its own which results in total absurdity.³¹ Nicholson also adds that Fuller erroneously contends that there is an obligation to obey all laws simply because they poses some sort of inner morality or justification.³² He rightfully argues that there may be some instances where the law is exceptionally unfair and tyrannical that there is no conceivable moral obligation to observe its requirements.³³ Regardless of the above criticisms, I am of the opinion that Fuller's principles of good law have become a yardstick by which the legitimacy of laws are measured today.

Uganda's Anti-Terrorism Act was enacted by its Parliament without any major challenges or hurdles. However, this was not the same case for Kenya that had to revise its legislation a number of times before it was passed. The first version of the Suppression of Terrorism Bill of Kenya was strongly opposed by Parliament and NGOs in 2003. The reason why the Bill was opposed was that it unjustifiably limited liberty and religious related human rights.³⁴ A revised version of the

²⁸ Tucker (n 13 above) 275.

²⁹ C Murphy 'Lon Fuller and the moral value of the rule of law' (2005) 24 *Law and Philosophy* 241.

³⁰ PP Nicholson 'The internal morality of law: Fuller and his critics' (1974) 84(4) *Ethics* 307.

³¹ As above.

³² Nicholson (n 30 above) 302.

³³ As above.

³⁴ J Mulama 'Kenya's Anti-Terrorism Bill raises concern' (2005) iol news. Available at: http://www.iol.co.za/news/africa/kenya-s-anti-terrorism-bill-raises-concern-1.252804#.U5RBAoGSz_E (accessed 8 June 2014). It was alleged that the Suppression of Terrorism Bill of Kenya targeted Muslim leaders who were unreasonably accused of being advocates of terrorism.

Bill in 2006 faced the same fate because the Muslim community was allegedly unfairly targeted by most provisions.³⁵ However, Kenya eventually passed its Prevention of Terrorism Act in 2012 which did not drastically differ from the initial bills that had been criticized by Parliament and NGOs. These two pieces of legislation (Uganda's Anti-Terrorism Act and Kenya's Prevention of Terrorism Act) form the core counterterrorism strategies for Kenya and Uganda. However, as with the concerns raised in relation to the Kenya's bills on counterterrorism, these laws may embody certain human rights violations.

Counterterrorism legislation is indeed a very important measure in the fight against terrorism in Kenya and Uganda. However, this particular type of legislation imposes certain limitations on the conduct of ordinary citizens and the enjoyment of certain human rights. In addition, these laws usually carry serious penalties for contravention of the provisions therein. It is therefore important that such legislation must be general as to the conduct prohibited; it must be published and made readily available to the public; the sanctions for the crime of terrorism must not be retrospective; counterterrorism laws must be clear and understandable to ordinary citizens; these laws must not conflict with other laws; counterterrorism legislation should not embody impossible requirements; should not be frequently changed; and government action on counterterrorism must be in accordance with the law. This criteria will be referenced in several parts of this thesis especially when examining the legitimacy of Kenya and Uganda's counterterrorism legislation.

2.3 Separation of powers

In order for any counterterrorism strategy to be effective without any form of partiality, it is important for the concept of separation of powers to be recognised and effectively implemented by every government. The reason for separation of powers is to ensure that no branch of government abuses its power.³⁶ John Locke observed that human beings have a tendency to

³⁵ A Thurston 'Kenyan Muslims debate Anti-Terror Law' (2012) *The Revealer: A Review of Religion and Media*. Available at: <http://therevealer.org/archives/11981> (accessed 8 June 2014) para 2.

³⁶ *Lawyers for Human Rights v Swaziland* (11 May 2005) Communication 251/002 African Commission on Human and Peoples' Rights.

hold on to power especially when it comes with the authority to make law, enforce it as well as adjudicate disputes or punish culprits who infringe upon the rules.³⁷ Locke consequently advocated for division of the functions of government into the law-making body (legislature) and the enforcers of law (executive).³⁸ Locke contends that the legislature and executive have a fiduciary obligation to carry out their public mandate for the good of the state at large.³⁹ Locke also argues that in instances where the executive branch of government makes certain decisions that are excluded from review, it represents a breach of this fiduciary trust because it increases the chances for abuse of power.⁴⁰ This is an issue of concern because several governments including Kenya and Uganda classify counterterrorism operations as matters of national security which are ordinarily not subject to review.⁴¹ Locke notes that even though the executive is entitled to exercise its prerogative power,⁴² it should always be held accountable by the judiciary in order to avoid abuse of power.⁴³ However, this raises another question as to whether the judiciary in Kenya and Uganda can be considered to be sufficiently independent from the executive in order to objectively review its decisions.⁴⁴ A quick review of Kenya and Uganda's governmental structure reveals judicial institutions that are largely subservient to the executive

³⁷ J Dunn *The political thought of John Locke: An historical account of the argument of the 'Two Treatises of Government'* (1982) 8; JA Fairlie 'The separation of powers' (1923) 21(4) *Michigan Law Review* 393-436.

³⁸ MP Sharp 'The classical American doctrine of 'the separation of powers' (1935) 3 *University of Chicago Law Review* 385-436; J Waldron 'John Locke: Social contract versus political anthropology' (1989) 51 *The Review of Politics* 3-28.

³⁹ D Jenkins 'The Lockean constitution: Separation of powers and the limits of prerogative' (2011) 56(3) *McGill Law Journal/Revue de droit de McGill* 543.

⁴⁰ Jenkins (n 39 above) 543.

⁴¹ Framework principles for securing the accountability of public officials for gross or systematic human rights violations committed in the course of States-sanctioned counter-terrorism initiatives. A/HRC/22/52, 17 April 2013 (accessed 22 October).

⁴² Jenkins (n 39 above) 545. Locke describes the prerogative power of the executive branch of government as the authority to make certain unilateral and extraordinary decisions during emergency situations for example outbreak of violence and natural disasters. These decisions are usually taken without any form of accountability to any institution of the state. However, the executive is still limited by the fiduciary obligation to act in good faith for the benefit of the public which it serves. As such, unreasonable and unlawful decisions taking pursuant to the exercise of prerogative decisions cannot be considered as legitimate.

⁴³ Jenkins (n 39 above) 543.

⁴⁴ Art 38 of the Robben Island guidelines for the prohibition and prevention of torture in Africa. Available at: http://www.achpr.org/files/special-mechanisms/cpta/rig_practical_use_book.pdf (accessed 27 July 2016) 56. The Robben Island Guidelines advocate for an independent judiciary as an essential part of counterterrorism. See also: Paragraph J of the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa. This provision mandates AU member states to protect and guarantee the independence of the judiciary, that is, courts and judges.

branches of government and their self-serving objectives like regime preservation.⁴⁵ There is therefore a need to urgently liberate the judiciary from undue influence in order to ensure that the concept of separation of powers is implemented in practice and not merely theoretical.

The theory of separation of powers was further developed by a French philosopher Baron de Montesquieu who is famous for his writings *De l'esprit des Lois* which translates to The Spirit of the Laws.⁴⁶ Montesquieu strongly argued for a constitutional system with a clear separation of powers and recognition of civil freedoms and liberties. According to Montesquieu, separation of powers entails four principles. There must be a separation of powers into three arms of government (legislature, executive and judiciary); these three arms of government should have separate personnel or employees; the three arms must have different functions that is either to make law, enforce law or adjudicate; and that the three arms of government should be charged with the function of checking the authority of the other (checks and balances).⁴⁷ It is therefore not enough to merely have a theoretical separation of powers. The three arms of government should be clearly distinct both physically and in function in order to constitute effective checks and balances between them that prevent abuse of power.

However, it must be noted that in practice, there is no such thing as a pure separation of powers. In most constitutional states, cabinet ministers who form part of the executive branch of government are also members of parliament.⁴⁸ Nevertheless, the function of the theory of separation of powers is to ensure that no organ of government becomes too powerful to the extent that it ends up abusing its powers. It therefore creates a system of checks and balances that ensures that no arm of government exceeds its scope of authority to the detriment of those who are governed.⁴⁹

⁴⁵ ML Dudziak 'Who Cares About Courts? Creating a Constituency for Judicial Independence in Africa' (2003) 101 *Michigan Law Review* 1622.

⁴⁶ T Persson, G Roland & G Tabellini 'Separation of powers and political accountability' (1997) 112(4) *The Quarterly Journal of Economics* 1163-1202.

⁴⁷ EM Salzberger 'A positive analysis of the doctrine of separation of powers, or: Why do we have an independent judiciary?' (1993) 13(4) *International Review of Law and Economics* 349-379.

⁴⁸ See for example: Art 78(1) (d) of the Constitution of Uganda.

⁴⁹ JT Brand 'Montesquieu and the separation of powers' (1932-1933) 12 *Or. L. Rev.* 175.

2.4 Constitutionalism and the rule of law

The theories of constitutionalism and the rule of law are pertinent to any discussion on counterterrorism and human rights. It should be restated that the constitutions of both Kenya and Uganda recognise and protect human rights.⁵⁰ While these rights and freedoms are beautifully written down in the said constitutions, they do not benefit and citizens if they are not implemented. This therefore gives rise to the issue of the rule of law which emphasizes that a state should be governed in accordance with the rules of law and not the wishes of the incumbent leader.⁵¹ A constitution is defined as a system of fundamental rules, values and principles that determine how a country is governed.⁵² A constitution is therefore considered as the supreme law of the land from which all other pieces of legislation derive their legitimacy.⁵³ As such, any laws and policy which violate the provisions of the constitution for instance the rights and freedoms contained therein cannot be considered to be legitimate.⁵⁴ It is therefore vital for counterterrorism legislation not to violate the provisions of the constitution including the fundamental human rights.

The philosophical foundations of constitutionalism are based on John Locke's political theories.⁵⁵ He noted that a constitution embodies regulations on how government should be structured including the scope of authority of the different branches.⁵⁶ The underlying principle of constitutionalism is that governmental power can be, and ought to be limited in order to protect those who are governed. The legitimacy of governmental actions therefore rests upon its ability to abide by those limitations.⁵⁷ Although constitutional restrictions on governments come in

⁵⁰ See: Chapter four of the Constitution of Uganda; Chapter four of the Constitution of Kenya.

⁵¹ AK Bangura 'The imperative good governance and strong democratic institutions to spur development and prevent the expansion of terrorism in Africa' (2010) in J Davis (ed) *Terrorism in Africa: The Evolving Front in the War on Terror* 199.

⁵² HF Pitkin 'The idea of a constitution' (1987) 37 *J. Legal Educ.* 167.

⁵³ H Wechsler 'The courts and the constitution' (1965) 65 *Colum. L. Rev.* 65; E Meese III 'Law of the constitution' (1986) 61 *Tul. L. Rev.* 979; SA Barber *On what the constitution means* (1984) 5.

⁵⁴ Meese (n 53 above) 980.

⁵⁵ C Fatovic 'Constitutionalism and contingency: Locke's theory of prerogative' (2004) 25 *History of political thought* 2 276.

⁵⁶ See also: Chapter 6, 7 and 8 of the Constitution of Uganda; Chapter 8, 9 and 10 of the Constitution of Kenya.

⁵⁷ A Sajó *Limiting government: An introduction to constitutionalism* (1999) 1-14.

different contexts, most of them encompass the respect of fundamental rights and freedoms in the enactment of legislation and adoption of policies.⁵⁸ As such, laws including counterterrorism legislation as well as policy must conform to human rights protection. Constitutional restrictions also address the scope of authority of different institutions of government which include the duties and powers of office, as well as how such authority should be exercised.⁵⁹ However, the practical application of this principle (limitations on government) gives rise to the following questions: How can government which is the author of law be limited by its own creation? Do constitutions create a stable context for the execution of governmental authority? In order for constitutional limitations to be effective, its provisions must be entrenched and reduced to writing. This makes the provisions of the constitution easily ascertainable and accessible for those whom it is intended for. In addition, reducing the constitution to writing ensures that its provisions are not easily changeable at the pleasure of those whose power it limits especially the executive.⁶⁰ Amending constitutional provisions should always require a higher threshold for instance a super majority vote or a referendum.⁶¹ This ensures that the stability and certainty of the constitution is preserved.

Constitutionalism is also associated with the principle of the rule of law (nomocracy) that was promoted by Albert Venn Dicey in the 19th century.⁶² According to Dicey, the state must be governed according to principles of the law rather than subjective decisions of individual members of government.⁶³ The rationale of the rule of law is that every man, including government officials, must be subject to the same set of rules and regulations.⁶⁴ While one of government's primary functions is to make law, legislation such as counterterrorism must

⁵⁸ CM Fombad 'Challenges to constitutionalism and constitutional rights in Africa and the enabling role of political parties: Lessons and perspectives from Southern Africa' (2007) 55 *The American Journal of Comparative Law* 1.

⁵⁹ RS Turner 'Neo-liberal constitutionalism: Ideology, government and the rule of law' (2008) 1 *Journal of Politics and Law* 2.

⁶⁰ S Gardbaum 'The new commonwealth model of constitutionalism' (2001) 4 *The American Journal of Comparative Law* 707; JR Morss 'Facts, threats and reds: Common Law constitutionalism and the rule of law' (2009) 14 *Deakin L. Rev.* 79.

⁶¹ A Harel 'Why constitutionalism matters: The case for robust constitutionalism' (2014) 1 *Critical Analysis of Law* 32.

⁶² JV Orth 'Exporting the rule of law' (1998-1999) 24 *N.C.J. Int'l L. & Com. Reg.* 71.

⁶³ J Waldron 'The concept and the rule of law' (2008-2009) 43 *Ga. L. Rev.* 1.

⁶⁴ HW Jones 'The rule of law and the welfare state' (1958) 58 *Columbia Law Review* 2 143-156.

conform to provisions and limitations in the constitution which include the basic rights and freedoms.⁶⁵ Government must not infringe on these entrenched rights and freedoms in the enactment, interpretation and application of counterterrorism laws. Government must therefore uphold these rights and freedoms in order to conform to theory of constitutionalism and the rule of law.

2.5 Democracy

Democracy is another concept of governance that is essential for the effective implementation of any counterterrorism strategy. Democracy is defined as a system of governance that derives its legitimacy from the people who established it in the first place.⁶⁶ In other words, it is a system of governance where leaders are accountable to their citizens for the exercise of their public mandate. As has been highlighted throughout this thesis, counterterrorism frameworks serve an important purpose of protecting fundamental freedoms within the state. However, without certain safeguards, such measures also have the potential of negatively affecting the protection and enjoyment of human rights and freedoms. In addition, some counterterrorism laws and policies may also confer upon the executive and law enforcement certain discretions and powers which can be abused if not subjected to effective accountability mechanisms. The democratic theory is also often referred to in conjunction with egalitarianism which is a social philosophy that advocates for the equal treatment of all persons within a society.⁶⁷ In other words, effective democracy cannot be achieved within a state if it is plagued by inequality. In a democratic state therefore, all citizens should have an equal opportunity to participate in the process of governance. Such participation may be exercised in a number of ways for example holding leaders accountable through the prescribed channels and voting them out if they do not deliver.⁶⁸ However, it must be noted that there are certain legitimate restrictions that may be imposed upon such political participation by individuals.

⁶⁵ BZ Tamanaha *On the Rule of Law* (2004) 2.

⁶⁶ JL Walker 'A critique of the elitist theory of democracy' (1996) 60(2) *The American Political Science Review* 285-295.

⁶⁷ K Nielsen *Equality and liberty: A defense of radical egalitarianism* (1984) 5.

⁶⁸ C Brettschneider 'The value theory of democracy' (2006) 5(3) *Politics Philosophy Economics* 259-278.

The philosophy of democracy is rooted in four major theories which include protective democracy, pluralist democracy, developmental democracy and participatory democracy.⁶⁹ The theory of protective democracy which is founded in liberalism holds the ideal that the primary function of government is to protect the rights and freedoms of its citizens.⁷⁰ Pluralist democracy assumes that not all citizens are interested in participating in governance. As a result, those who participate tend to organize themselves in smaller special interest groups which then compete for power.⁷¹ The governmental authority will consequently be vested in the hands of those who emerge as the victors. However, the other groups play an important role of keeping the ruling 'elite' in check.⁷² Developmental democracy on the other hand focuses on what is beneficial for the entire community.⁷³ This ideology is rooted in morality which believes that as citizens engage in leadership, they develop an appreciation for societal needs and their efforts are then geared towards those objectives.⁷⁴ As such, members of society are responsible for electing their leaders as well as overseeing the execution of their mandate.⁷⁵ Lastly, participatory democracy which was proposed by Jean-Jacques Rousseau encourages the involvement of ordinary citizens in the governance process.⁷⁶ This model argues for the participation of citizens in the different institutions and organizations that impact governance.⁷⁷ This ensures that government does not exceed its scope of authority by providing checks and balances which can be exercised by the

⁶⁹ F Cunningham *Theories of democracy: A critical introduction* (2002) 12.

⁷⁰ D Held *Models of democracy* (2006) 70; N Bobbio *Liberalism and democracy* (2005) 94.

⁷¹ CJ Burtenshaw 'The political theory of pluralist democracy' (1968) 21(4) *The Western Political Quarterly* 577-587; Cunningham (n 69 above) 162; C Mouffe 'Democracy in a multipolar world' (2009) 37(3) *Millennium - Journal of International Studies* 549-561.

⁷² PN Ndue 'Africa's turn toward pluralism' (1994) 5(1) *Journal of Democracy* 45-54.

⁷³ Cunningham (n 69 above) 187.

⁷⁴ A Leftwich 'Democracy and development' (2002) 7(2) *New Political Economy* 269-281; A Olukoshi *Towards developmental democracy: A note* (2001) Draft paper prepared for the discussion at the UNRISD meeting on 'The Need to Rethink Development Economics' 7-8 September 2001, Cape Town, South Africa.

⁷⁵ RL Sklar 'Developmental democracy' (1987) 29 *Comparative Studies in Society and History* 686-714; RL Sklar 'Democracy in Africa' (1983) 26(3) *African Studies Review* 11-24; T Carothers 'Democracy assistance: Political vs. developmental?' 20(1) *Journal of Democracy* 5-19.

⁷⁶ Cunningham (n 69 above) 123.

⁷⁷ T Zittel & D Fuchs *Participatory democracy and political participation: Can participatory engineering bring citizens back in?* (2006) 17; BR Barber 'Participatory democracy' (2014) *The Encyclopedia of Political Thought* 2650-2654; C Pateman 'Participatory democracy revisited' (2012) 10 *Perspectives on Politics* 7-19; ME Warren 'Can participatory democracy produce better selves? Psychological dimensions of Habermas's discursive model of democracy' (1993) 14(2) *Political Psychology* 209-234.

people themselves. Democracy is therefore critical for ensuring the protection of human rights and freedoms, and holding leaders accountable for their actions. All these considerations are pertinent to counterterrorism to ensure that the government and public officials alike do not abuse their powers.

While Kenya and Uganda are theoretically considered as democratic states in which citizens elect their leaders who then exercise public mandates such as law making, several aspects of democracy including accountability are often not properly implemented. The governments of Kenya and Uganda have been perceived in many instances to be preoccupied with self-serving motives such as regime preservation rather than citizen welfare.⁷⁸ For example, Kenya and Uganda have experienced political challenges regarding their presidential electoral processes. Kenya concluded a re-run election in October 2017 which was boycotted by the leader of opposition, Raila Odinga amidst widespread demonstrations that resulted in the death of more than 24 people.⁷⁹ The re-run followed a Supreme Court annulment of the previous election citing irregularities that significantly tainted the results.⁸⁰ Uganda on the other hand is currently undergoing constitutional reform which would culminate in the amendment of Article 102(b) which places an upper age limit of 75 years for presidency.⁸¹ This move has been met by widespread protests and excessive police brutality towards any voice of opposition. Museveni who is now 73 years would not be eligible to stand for re-election in the 2021 presidential elections.⁸² These unfortunate incidents could be attributed to the fact that the democratic governmental systems in these countries are relatively young and are still in the developmental

⁷⁸ ML Dudziak 'Who Cares About Courts? Creating a Constituency for Judicial Independence in Africa' (2003) 101 *Michigan Law Review* 1622.

⁷⁹ The Washington Post ((26 October 2017) *Kenya elections rerun marred by clashes and low turnout at polls*. Available at: www.washingtonpost.com/amphtml/world/police-clash-with-protesters-as-kenya-election-re-run-opens/2017/10/26/7c00e56e-b5cc-11e7-9b93-b9743e57a22_story.html (accessed 02 November 2017).

⁸⁰ The Guardian (20 September 2017) *Kenyan election annulled after result called before votes counted, says court*. Available at: www.theguardian.com/world/2017/sep/20/kenyan-election-rerun-not-transparent-supreme-court (accessed 02 November 2017).

⁸¹ Art 102(b) of the Constitution of the Republic of Uganda. A person is not qualified for election as President unless that person is— (a) a citizen of Uganda by birth; (b) not less than thirty-five years and not more than seventy-five years of age; and (c) a person qualified to be a Member of Parliament.

⁸² The Independent (26 September 2017) *Focus back on Parliament as 'Age Limit; debate rages*. Available at: <https://www.independent.co.ug/focus-back-parliament-age-limit-debate-rages/> (accessed 02 November 2017).

phase.⁸³ There is therefore a need to adopt more safeguards in order to ensure greater adherence to the principles of democracy.

2.6 Theories of policing

This last section will examine the various theories of policing that are relevant to law enforcement and counterterrorism. While the theories are relevant to the entire police institution, it must be recalled that counterterrorism law enforcement and security agencies also fall within the broad classification of police. This therefore implies that these theories of policing rightfully apply to their mandate. There are several theories of policing that have been proposed and debated over time, some receiving more support and implementation than others. This section will therefore focus on the following theories: the broken windows policing theory; problem oriented policing theory; community policing theory; and the democratic policing theory. The thesis explores the above-mentioned theories in order to appreciate the different approaches and techniques towards crime adopted by police (including counterterrorism law enforcement) in the execution of their official functions. In addition to this, these theories propose some model principles that can be adopted by law enforcement agencies in order to ensure efficiency, professionalism and accountability.

2.6.1 Broken windows policing

The broken windows theory of policing was proposed by Kelling and Wilson in 1982.⁸⁴ The theory was conceived when the two theorists made an observation that if one window on a building breaks and goes unrepaired, soon enough more and more windows will be broken. They explained that the state of disrepair of one window signified a lack of concern for the building which would entice other individuals to break some more windows.⁸⁵ On the contrary, if the broken window is repaired promptly, it signified an ability of the person responsible to fix the broken window. The broken windows theory therefore requires law enforcement to firstly identify misconduct (in this case terrorism) in its early stages and promptly put an end to it lest it

⁸³ C Ake 'Rethinking African democracy' (1991) 2(1) *Journal of democracy* 32.

⁸⁴ J Wilson & GL Kelling *Broken windows. Critical issues in policing: Contemporary readings* (1982) 395.

⁸⁵ BE Harcourt *Illusion of order: The false promise of broken windows policing* (2009) 5.

becomes a bigger problem requiring more resources. The broken windows theory encourages proactive policing where law enforcement uses all available resources to curb new forms of societal disorder by arresting, cautioning and watching the streets.⁸⁶ The two major assertions of the theory are that minor misdemeanours are discouraged and secondly, more sophisticated crime is prevented. However, the broken windows model of policing is usually associated with authoritarianism and zero-tolerance to crime.⁸⁷ It has therefore been criticized as portraying law enforcement as agents of oppression resulting in distrust by the community.⁸⁸

Zero-tolerance operations have come to characterize law enforcement responses in Kenya and Uganda including counterterrorism operations.⁸⁹ On several occasions, law enforcement has declared heavy handed operations aimed at crushing a particular disorder or crime within the community. Uganda's law enforcement even has a militarized police unit which was first codenamed 'Operation Wembley' with the mandate of quashing crime especially within the capital city, Kampala.⁹⁰ This police unit that has been accused of serious human rights violations was renamed the Violent Crime Crack Unit and currently, the Rapid Response Unit.⁹¹ However, the operations of the Rapid Response Unit have unleashed a great deal of brutality and human rights violation on the people of Uganda. When the community develops animosity towards law enforcement, it becomes impossible for police to function because the success of their work is dependent on community cooperation. It is no wonder that this theory has received serious criticism as discussed below.

Factors other than physical disorder

The broken windows theory mainly attributes the prevalence of crime in the community to disorderliness for example improper disposal of waste, lack of maintenance of streets and

⁸⁶ As above.

⁸⁷ D Dixon 'Broken windows, zero tolerance, and the New York miracle' (1998) 10 *CICJ* 96.

⁸⁸ As above.

⁸⁹ Commonwealth Human Rights Initiative *The police, the people, the politics: police accountability in Uganda* (2006) 5.

⁹⁰ Human Rights Watch Uganda *Open secret, illegal detention and torture by the Joint Anti-terrorism Task Force in Uganda* (2009) 15.

⁹¹ As above.

buildings, and idlers gathering at street corners. However, there are several other factors other than physical disorder that influence criminal behavioural patterns for example the political climate, cultural differences and religious intolerance as in the case of terrorism. It is for this reason that Taylor rightfully argues that the act of 'fixing the windows' (preventing a particular misconduct) does not offer a long lasting solution to crime.⁹² It is but a temporary fix that does not address the root causes of the crime in the first place for example oppression of minority groups, poverty and lack of employment.⁹³ He argues that in order to find long-term solution to problems, there is a need for the relevant stakeholders in the community to address the deeply rooted problems in society that manifest in form of disorder as a result of discontentment. This requires strategic partnerships and consultations between the government and the community in order to identify problematic areas of crime which necessitate more attention, and allocate more resources to solve them.

Inherent prejudice

Sampson also rightfully argues that the basis of physical disorder in the broken windows theory carries some inherent prejudices against certain groups in society on the basis of discriminatory criteria for example race, origin, religion, gender and financial status.⁹⁴ As a result, the zero-tolerance efforts of law enforcement are often unfairly directed towards an entire group that is perceived as a likely aggressor or suspect. This theory of law enforcement therefore has the tendency of reinforcing stereotypes against certain persons based on unsubstantiated criteria.⁹⁵ This has manifested in the counterterrorism policies of Kenya and Uganda where Muslims have been targeted on several occasions simply because terrorism is often associated with violent Islamic radicalism.⁹⁶ There is therefore a real danger that innocent members of the community

⁹² RB Taylor *Breaking away from broken windows: Baltimore neighborhoods and the nationwide fight against crime, grime, fear, and decline* (2001) 286.

⁹³ As above.

⁹⁴ RJ Sampson & SW Raudenbush 'Seeing disorder: Neighborhood stigma and the social construction of broken windows' (2004) 67(4) *Social psychology quarterly* 319.

⁹⁵ RJ Sampson, JD Morenoff, & T Gannon-Rowley 'Assessing neighborhood effects: Social processes and new directions in research' (2002) *Annual review of sociology* 443.

⁹⁶ Immigration and Refugee Board of Canada *Uganda: Evidence of harassment or discrimination against Muslims by government forces (1990s)* (2001) para 7; Human Rights Watch Uganda *Open secret, illegal detention and torture by the Joint Anti-terrorism Task Force in Uganda* (2009) 22.

may be unjustifiably targeted by law enforcement officials based on broad and baseless generalizations. These criticisms reemphasize the challenge of an impaired relationship between law enforcement and the community as a result of their heavy-handedness on citizens. The next subsection will examine the theory of problem oriented policing and how it differs from the broken windows model.

2.6.2 Problem oriented policing

Problem oriented policing was first proposed by Goldstein in 1979 when he argued that effective policing requires proper identification of a problem in order to come up with an appropriate solution. Goldstein advocated for a police force that takes the initiative to investigate, identify and resolve the root causes of crime. Later in 1987, John Eck and William Spelman expounded on Goldstein's theory in developing the Scanning, Analysis, Response, and Evaluation (SARA).⁹⁷ Scanning requires law enforcement to identify repetitive problems in the community; weigh the repercussions of the problem; list the problems according to priority; formulate aims and objectives; and ascertain the actual prevalence of the problem. Analysis involves examining the factors that contribute to the problem; identifying issues which need more scrutiny; investigating existing information on the problem; examining current solutions to the problem together with their weaknesses; and exploring the various ways in which the problem might be solved. The response stage involves devising innovative interventions; examining how other similar communities have handled those kind of issues; outlining the aims and objectives of the plan of action; and finally executing the plan. Finally, assessment is an evaluative process to determine whether the plan of action was executed according to the initial preparations; determining whether the set aims and objectives of the operation were adequately fulfilled; and carrying out a continuous objective assessment on the effectiveness of the plans of action.⁹⁸

Problem oriented policing therefore differs from traditional policing in a sense that it places an obligation upon law enforcement to investigate the root causes of problems/crime in the

⁹⁷ For more information on SARA, see: <http://www.ncjp.org/index.php?q=strategic-planning/justice-applications/sara-problem-solving-model#sthash.L0pjk14v.dpuf> (accessed 30 March 2017).

⁹⁸ As above.

community and devise effective means of solving them. While traditional policing usually focusses on fighting the manifestations of crime within the community, problem oriented policing attempts to solve the cause of the problem in an attempt to find more permanent solution to the challenge.⁹⁹ In addition to solving the root causes of society's problems, problem oriented policing seeks to enhance the relationship between members of the community and law enforcement. Under the problem oriented policing model, the members of the community have more influence on the work and focus of police as opposed to the broken windows theory where law enforcement independently identifies its objectives. As such, law enforcement works together with the community to identify issues and problematic areas that need more attention, draw up priority schedules, and work towards finding a solution for the problem crime within the available resources.

At its core, problem oriented policing may pose a conflict with traditional policing methods because rather than autonomously determining its areas of focus, law enforcement involves the community in the prioritization of its objectives and areas of focus. However, the value of community involvement and the building of law enforcement trust can never be underestimated in the fight against crime especially when it comes to counterterrorism. A community that feels involved in law enforcement initiatives within their society will ultimately have a sense of ownership and responsibility over crime prevention. In addition, with increased involvement of the community under the problem oriented policing, there is an added layer of scrutiny of law enforcement's decisions by the public which results in greater accountability. As such, the probability of abuse of power and unreasonably wide interpretations of discretion by law enforcement officials is greatly diminished. It must be noted that this theory has not been applied in Kenya and Uganda in its pure form. However, a few shared aspects for example the involvement of the community in police operations have been applied but in greater reference to community policing.

⁹⁹ Centre for problem oriented policing. Available at: <http://www.popcenter.org/about/?p=sara> (accessed 30 March 2017).

2.6.3 Community policing theory

The community policing theory was first advanced in the 1970s and has since been adopted in several states around the world including Kenya and Uganda.¹⁰⁰ The founding ideology of community policing is the increased involvement of community members in law enforcement initiatives to fight crime. This stems from the consideration that law enforcement does not carry out its functions in a vacuum but requires the cooperation of the community who often provide invaluable information, leads and suggested solutions to crime which the police might not be privy to.¹⁰¹ Law enforcement therefore should work together with the community in order to find lasting solutions to the challenges of a dynamic society. Unlike the broken windows model where police may be viewed as a heavy-handed force of oppression, community policing advocates for collaboration, partnership, dialogue and information sharing between the community and law enforcement.¹⁰² Under the community policing model, law enforcement officials therefore have the obligation of improving public confidence in the police and security institution through engaging the community in periodic consultations and ensuring a reasonable level of transparency.¹⁰³

Community policing is often associated with Sir Robert Peel's principles of policing by consent.¹⁰⁴ Peel's principles summate the ethics of law enforcement officials who should be viewed as ordinary citizens entrusted with the mandate of serving the interests of their communities. The principles also place a high premium on transparency of operations, professionalism, good relations with the community and accountability of law enforcement to the public. Peel's principles are as follows:¹⁰⁵

1. To prevent crime and disorder, as an alternative to their repression by military force and severity of legal punishment.

¹⁰⁰ NG Fielding 'Concepts and theory in community policing' (2005) 44(5) *The Howard Journal of Criminal Justice* 60.

¹⁰¹ DP Rosenbaum *The challenge of community policing: Testing the promises* (1994) 258.

¹⁰² WM Oliver & E Bartgis 'Community policing: a conceptual framework' (1998) 21(3) *Policing: An International Journal of Police Strategies & Management* 490-509.

¹⁰³ As above.

¹⁰⁴ SA Lentz & RH Chaires 'The invention of Peel's principles: A study of policing "textbook" history' (2007) 35(1) *Journal of Criminal Justice* 69.

¹⁰⁵ As above.

2. To recognise always that the power of the police to fulfil their functions and duties is dependent on public approval of their existence, actions and behaviour, and on their ability to secure and maintain public respect.
3. To recognise always that to secure and maintain the respect and approval of the public means also the securing of the willing co-operation of the public in the task of securing observance of laws.
4. To recognise always that the extent to which the co-operation of the public can be secured diminishes proportionately the necessity of the use of physical force and compulsion for achieving police objectives.
5. To seek and preserve public favour, not by pandering to public opinion, but by constantly demonstrating absolutely impartial service to law, in complete independence of policy, and without regard to the justice or injustice of the substance of individual laws, by ready offering of individual service and friendship to all members of the public without regard to their wealth or social standing, by ready exercise of courtesy and friendly good humour, and by ready offering of individual sacrifice in protecting and preserving life.
6. To use physical force only when the exercise of persuasion, advice and warning is found to be insufficient to obtain public co-operation to an extent necessary to secure observance of law or to restore order, and to use only the minimum degree of physical force which is necessary on any particular occasion for achieving a police objective.
7. To maintain at all times a relationship with the public that gives reality to the historic tradition that the police are the public and that the public are the police, the police being only members of the public who are paid to give full-time attention to duties which are incumbent on every citizen in the interests of community welfare and existence.
8. To recognise always the need for strict adherence to police-executive functions, and to refrain from even seeming to usurp the powers of the judiciary of avenging individuals or the State, and of authoritatively judging guilt and punishing the guilty.
9. To recognise always that the test of police efficiency is the absence of crime and disorder, and not the visible evidence of police action in dealing with them.

Peel's principles of policing by consent discussed above emphasize working good relations between the community and law enforcement officials in order to improve police efficiency. The principles consequently discourage certain behaviours which ultimately cause a rift between the police and members of the society.¹⁰⁶ It is noted that just like in the case of the problem oriented policing, the community plays an ever-increasing participatory role alongside law enforcement in the fight against crime within their communities. However, community policing is even more engaging in that there is more involvement, scrutiny and approval of police activities by the community.

¹⁰⁶ PD Mayhall, T Barker & RD Hunter *Police-community relations and the administration of justice* (1985) 10.

In my opinion, community policing if applied properly can be an asset for any counterterrorism strategy. The community indeed has a vested interest in the area of terrorism because it has adverse negative impacts that have the potential of disrupting lives, creating chaos, damaging property, causing death, and inflicting serious injury among others.¹⁰⁷ It is therefore in the interest of every community to put a stop to such conduct. In addition, members of the community are a goldmine of information and leads that law enforcement requires to detect, investigate and solve crime. Terrorists live within the community and the flow of information and tips regarding such illegal activity requires a good relationship between the community and law enforcement. If law enforcement is perceived as an oppressive institution, the community will bear animosity towards them which impairs the good working relationship. Law enforcement would have to devote more resources to collect intelligence on terrorist activity which would otherwise have been obtained with relative ease.

Uganda has attempted to implement the community policing strategy to improve the effectiveness of its law enforcement.¹⁰⁸ The Community Affairs Office of the Uganda Police designed a training manual which promotes cooperation between law enforcement and the community.¹⁰⁹ However, these attempts have not yielded the intended results. The first form of community policing initiatives was tested in Kampala in 1989 with limited success and was reintroduced in 1993.¹¹⁰ The revived model of 1993 incorporated crime watch programs, neighbourhood watch initiatives, tagging property and community awareness events.¹¹¹ In addition, a post of Liaison Officer was created in each district.¹¹² An evaluation in 2003 revealed that it had minimal impact on the quality of policing in Uganda.¹¹³ However, the current Inspector General of Police (IGP) of Uganda, Kale Kaihura, has prioritized improving relations with the

¹⁰⁷ For the negative impact of terrorism in Kenya and Uganda, see chapter three of this thesis.

¹⁰⁸ Commonwealth Human Rights Initiative *The police, the people, the politics: police accountability in Uganda* (2006) 23.

¹⁰⁹ Uganda Police Force *Community Policing and Crime Prevention Training Manual for Police Trainers and Community Liaison Officers* (2005) Community Affairs Department, Uganda.

¹¹⁰ C Raleigh, K Biddle, C Male & S Neema *Uganda Police Project Evaluation, Evaluation report FV591* (2000) 5.

¹¹¹ Raleigh *et al* (n 110 above) 71.

¹¹² Commonwealth Human Rights Initiative Uganda (n 108 above) 23.

¹¹³ As above.

community by engaging the police force in initiatives like community clean-ups, refurbishment of public buildings, providing medical assistance from their medics, adopting a community care forum to take care of citizens' concerns and providing donations to needy members of the community.¹¹⁴ The objective of these initiatives is to ultimately portray the police officers as friends and partners who have the best interest of the community at heart rather than ruthless individuals as they have come to be known. Such initiatives foster the relationship between the community and law enforcement that is usually perceived an institution of oppression. At the last Uganda Police Day that was held in October 2016, the President of the Republic of Uganda, His Excellency YK Museveni praised the police for the good work that had been done in preventing crime.¹¹⁵ He attributed this success to the adoption of community policing which in his opinion lessened the burden of solving crime due to consorted effort with the community.¹¹⁶

Kenya has also attempted to implement community policing through an initiative known as Community-Based Policing (CBP).¹¹⁷ CBP has yielded significant results and continues to bolster relationships between law enforcement and the community through accountability, transparency and community involvement in police initiatives.¹¹⁸ However, the challenges of insufficient capacity, resources and public mistrust in the law enforcement institution have also limited the implementation of CBP to a significant extent. The problem of mistrust in law enforcement is particularly more pronounced in Kenya's counterterrorism policy where Muslims are constantly harassed and unfairly targeted by ATPU.¹¹⁹ Ordinary members of the public are also constantly harassed and ill-treated by law enforcement which ultimately drives a wedge of mistrust and suspicion. In the absence of such mistrust in the police force, the community policing model would ultimately be more effective in achieving law enforcement objectives.

¹¹⁴ Uganda Police Force (23 June 2017) *Giving back the community*. Available at: www.upf.go.ug/category/community-policing (accessed 15 July 2017) para 3.

¹¹⁵ Uganda Police Force (03 October 2016) *Police commemorates Police-Day*. Available at: www.upf.go.ug/category/community-policing (accessed 15 July 2017) para 4.

¹¹⁶ As above, para 5.

¹¹⁷ J Mbogo et al *Implementing community-based policing in Kenya* (2008) 4.

¹¹⁸ As above.

¹¹⁹ Human Rights Watch Uganda *Open secret, illegal detention and torture by the Joint Anti-terrorism Task Force in Uganda* (2009) 22.

2.6.4 Democratic policing theory

The democratic policing theory requires that law enforcement must carry out all its functions in accordance with the rules and regulations provided for in the law.¹²⁰ Democracy is a system of governance that derives its legitimacy from the people it serves.¹²¹ In other words, it is a system of governance where leaders and governmental institutions are accountable to the people for the exercise of their public mandate. Democracy is often referred to in conjunction with the social philosophy of egalitarianism that advocates for the equal treatment of all persons without distinction.¹²² In other words, effective democracy cannot be achieved if a state is plagued by unjustifiable inequality and discrimination. Democratic policing therefore supposes a scenario where law enforcement serves the interests of everyone in the community without any form of partiality. In addition, law enforcement is subjugated to the will of the majority in the community but without unjustly oppressing and side-lining the minority.

Democratic policing is founded on the philosophy of democracy which is rooted in four major theories which include protective democracy, pluralist democracy, developmental democracy and participatory democracy.¹²³ The theory of protective democracy which is founded in liberalism holds the ideal that the primary function of government is to protect the rights and freedoms of its citizens before anything else.¹²⁴ As such, government officials are considered custodians of human rights and freedoms which they have a duty to protect. Developmental democracy on the other hand focuses on what is beneficial for the community as a whole rather than the interests of certain select members.¹²⁵ This ideology is rooted in an inner morality of law which supposes that when everyday citizens engage in leadership roles, they develop an appreciation for societal needs and their efforts are then geared towards fulfilling those

¹²⁰ CE Stone & HH Ward 'Democratic policing: A framework for action' (2000) 10(1) *Policing and Society: An International Journal* 12.

¹²¹ JL Walker 'A critique of the elitist theory of democracy' (1996) 60(2) *The American Political Science Review* 285-295.

¹²² K Nielsen *Equality and liberty: A defense of radical egalitarianism* (1984) 5.

¹²³ F Cunningham *Theories of democracy: A critical introduction* (2002) 186.

¹²⁴ D Held *Models of democracy* (2006) 70; N Bobbio *Liberalism and democracy* (2005) 94.

¹²⁵ Cunningham (n 69 above) 187.

objectives.¹²⁶ Participatory democracy which was proposed by Jean-Jacques Rousseau encourages the involvement of ordinary citizens in the governance process.¹²⁷ This model argues for the participation of citizens in the different institutions of governance including law enforcement in order to enhance accountability.¹²⁸

Democratic policing therefore offers an effective framework under which law enforcement agencies can be held accountable by their communities on the basis of the law and democracy. The theoretical basis for accountability is rooted in the rule of law which requires all governmental institutions and public officials to be answerable to the public for actions carried out in their official capacity.¹²⁹ It was noted that the mandate of law enforcement in every democracy is to serve and protect the public rather than violate human rights.¹³⁰ Law enforcement therefore has the responsibility of creating and maintaining an environment of safety within the community in which human rights are protected.¹³¹ If law enforcement engages in conduct that is contrary to the very laws which they are entrusted to uphold, such police cannot be considered to be a democratic force.

Democratic policing emphasizes that law enforcement officials must execute their mandate with integrity and in accordance with the principles of the rule of law which include: governmental rule in strict accordance with the law and procedure; equal treatment of all persons before the law; maintenance of law and order; relative stability of law; and the respect of human rights and freedoms.¹³² In order for law enforcement to be considered as a democratic institution, it should

¹²⁶ A Leftwich 'Democracy and development' (2002) 7(2) *New Political Economy* 269-281; A Olukoshi *Towards developmental democracy: A note* (2001) Draft paper prepared for the discussion at the UNRISD meeting on 'The Need to Rethink Development Economics' 7-8 September 2001, Cape Town, South Africa.

¹²⁷ Cunningham (n 69 above) 123.

¹²⁸ T Zittel & D Fuchs *Participatory democracy and political participation: Can participatory engineering bring citizens back in?* (2006) 17; BR Barber 'Participatory democracy' (2014) *The Encyclopedia of Political Thought* 2650-2654; C Pateman 'Participatory democracy revisited' (2012) 10 *Perspectives on Politics* 7-19; ME Warren 'Can participatory democracy produce better selves? Psychological dimensions of Habermas's discursive model of democracy' (1993) 14 (2) *Political Psychology* 209-234.

¹²⁹ T Carothers 'Rule of Law Revival' (1998) 77 *Foreign Affairs* 95.

¹³⁰ As above.

¹³¹ Carothers (n 129 above) 96.

¹³² M Innes 'Policing uncertainty: Countering terror through community intelligence and democratic policing' (2006) 605(1) *The Annals of the American Academy of Political and Social Science* 222-241.

be representative of the entire community, responsive to the will and needs of the people, and it must be accountable to the citizens.¹³³ Law enforcement officials should represent the interests of the community which they serve and uphold the rights of all members of society including those who belong to minority groups such as supporters of opposition political parties.¹³⁴ In addition to representation, law enforcement should adequately respond to the needs, opinions and expectations of the community which it serves in order to maintain good working relations.

In order for democratic policing to be adequately achieved, there must be a strong legal framework that regulates the work of law enforcement.¹³⁵ The laws regulating law enforcement must be drafted in clear language and should be readily available to members of the community. Such regulations must not contain vague clauses that confer unfettered discretion. In addition to having regulations, there must be strong mechanisms that ensure that law enforcement abides by the provisions of law.¹³⁶ In democratic policing, law enforcement misconduct must never go unpunished and there is no room for impunity as has been experienced in Kenya and Uganda's counterterrorism agencies. The existence of impunity within law enforcement reflects a departure from the rule of law and democracy which leaves citizens vulnerable to potential human rights violations.

2.7 Conclusion

Chapter two examined the theoretical framework that constitutes a guide for the study and contextualizes major themes of the research. The purpose for this assessment was to establish the different theories that have been developed over the years that have a direct impact on human rights and counterterrorism. The theoretical framework examined the theory of good law as proposed by Lon Fuller; separation of powers; constitutionalism and the rule of law; democracy; and the different theories of policing.

¹³³ Innes (n 132 above) 224.

¹³⁴ As above.

¹³⁵ CE Stone & HH Ward 'Democratic policing: A framework for action' (2000) 10(1) *Policing and Society: An International Journal of Research and Policy* 11.

¹³⁶ As above.

The theory of good law proposed by Lon Fuller enumerates a criteria by which the legitimacy of laws is supposed to be determined. Fuller proposed eight principles as follows: generality of laws; demands that laws are published; laws must not be retroactive; laws must be clear; consistency of laws; demands that the laws should not impose duties that are impossible to perform; laws should not be changed frequently; and governmental action must be conducted in accordance with the general laws. It must be noted that Fuller does not provide for a criteria or hierarchy for the principles but they should all be given prominence. The next section examined the theory of separation of powers as developed by John Locke. The concept of separation of powers requires that there must be a functional separation between the executive arm of government and the legislature in order to minimize the abuse of power. Baron de Montesquieu further developed the theory of separation of powers adding that separation of power works best within a constitutional system that recognizes civil rights and liberties.

The theoretical framework also assessed the theory of constitutionalism and the rule of law as proposed by Joseph Raz. Raz reasoned that every democratic state must have and be governed by a constitution which is the supreme law of the land. In addition, the constitution must recognise and protect liberties and freedoms. Constitutionalism is usually attained when there is the rule of law rather than the rule of man. It was reasoned that a theoretical constitution does not benefit those whom it seeks to protect. The constitutional provisions must therefore be implemented by all the arms of government in order to protect rights and liberties of their citizens.

A discussion of these concepts was important because they discuss the fundamental principles of good governance including strict observance of the law and accountability of public officials. In addition, the theory of good law offers a framework for the evaluation of legislation in order to determine its legitimacy. Such an evaluation is important in order to combat the abuse of power that the government is entrusted with.

The last part of chapter two examined the theories of policing including the broken windows policing theory; problem oriented policing theory; community policing theory; and the democratic policing theory. The broken windows theory of policing adopts a no-nonsense

approach towards crime prevention. Police assume a proactive role in detecting and weeding out crime in the community before it develops into widespread crime which would require immense resources to combat. This model of policing emphasizes police presence and intolerance to crime. However, this model of policing was criticized for portraying law enforcement as heavy-handed and ruthless tools of oppression who are only pushing a governmental agenda. In addition, it builds mistrust and animosity between law enforcement and the community.

The second model of policing that was discussed was the problem oriented policing model. This model of policing requires the prioritization of police resources in order to identify the problems within the community and respond to them. This model of policing cultivates a proactive police force that is always in the quest to uncover new problems within the community and solve them adequately. In 1987, Eck and Spelman expounded on Goldstein's theory and came up with the SARA approach which requires law enforcement to Scan, Analyse, Respond, and Evaluate (SARA). This model of policing is consequently community centered because society plays a role in identifying the problems and advising on the prioritization of law enforcement responses. It was noted that this model incorporates community involvement in police operations. However, the most community participation and involvement was harnessed under the community policing model.

The community policing theory was described as a theory of policing that involves and encourages community participation in law enforcement operations. It was noted that under this model, law enforcement officers are seen as selected members of the community who then spearhead crime prevention operations in close consultation with the community. The police are therefore seen as partners and friends of the community who are appointed to serve them and have their best interest at heart. It is essential for the police to be seen as fair and impartial in the execution of their mandate. Community policing is often used in conjunction with Sir Robert Peel's principles of policing by consent. These obligations of community policing briefly include: to prevent crime and disorder, to fulfil their functions and duties in accordance with public approval; to secure and maintain the respect and approval of the public; to enhance co-operation

with the public; to seek and preserve public favour, not by pandering to public opinion, but by constantly demonstrating absolutely impartial service to law; to use physical force only when the exercise of persuasion, advice and warning is found to be insufficient to obtain public cooperation; to maintain at all times a relationship with the public that gives reality to the historic tradition that the police are the public and that the public are the police; to refrain from even seeming to usurp the powers of the judiciary of avenging individuals or the State; and to recognise always that the test of police efficiency is the absence of crime and disorder. Community policing has been implemented by Kenya and Uganda with varying levels of success. However, since its implementation the overall effectiveness of the police forces has increased. This is because police in Kenya and Uganda have limited resources that are not proportional to the work load. Cooperation with the public therefore enables them to save some resources which would otherwise have been wasted if they did not have assistance from the community.

The theoretical framework ended by discussing the democratic policing model of policing. This model advocates for police work to conform to the rule of law and not the rule of man. It mandates police to carry out their functions in strict accordance with the provisions of law. Failure to adhere to these rules and regulations results in a breach of law and procedure. Under this model of policing, law enforcement is required to discharge their mandate in accordance with the law without any form of partiality.

These theories of policing play a crucial role in understanding the different attitudes of law enforcement to crime prevention within their communities. Such attitudes ultimately affect behavioural patterns and resource allocation which has a bearing on the overall effectiveness of law enforcement. Some of these theories also contain certain principles which if implemented by Kenya and Uganda would help curb misconduct and enhance the rule of law, professionalism and accountability.

CHAPTER THREE

3. Terrorism in Kenya and Uganda

3.1 Introduction

Chapter three examines the problem of terrorism in Kenya and Uganda, its origins, how it manifests, and the counterterrorism measures that have been adopted by the two countries. Terrorism in East Africa poses a complex challenge not only to individual states but the entire region as a whole. Acts of terror have the capacity to disrupt social, economic and political institutions that are vital for the wellbeing of states and their peoples. Terrorism is associated with great anxiety emanating from a threat which is ambiguous.¹ Terrorism therefore thrives on the fear of the unknown as illustrated in the doctrine of 'kill one, frighten ten thousand.'² Guillaume referred to Judge Rosalyn Higgins who noted that 'terrorism' is a general term that is used to refer to a number of crimes which contain an element of violence and intimidation.³ Terrorism may be carried out by one individual for various motives. However, recent years have seen the rise of terrorist organizations that are motivated by religious and political motives. These organizations have been largely problematic to contain because they are better organized and have access to immense resources and support.

The chapter will examine the influence of Kenya and Uganda's indigenous terrorist organizations and how the governments have responded to their threat. The chapter will also assess the influence of al-Shabaab and their cross-border terrorist incursions into Kenya and Uganda. The last part of the chapter will examine the responses of the Kenyan and Ugandan governments to the threat of both indigenous and international terrorist organizations. This section will focus on some of the legislative interventions against terrorism in Kenya and Uganda as well as some measures that have been taken in order to strengthen law enforcement's capacity to counter acts of terror.

¹ G Guillaume 'Terrorism and international law' (2004) 53(2) *International and Comparative Law Quarterly* 537-548.

² H Prunckun 'The first pillar of terror – kill one, frighten ten thousand: A critical discussion of the doctrinal shift associated with the 'new terrorism' (2014) 87(3) *Police Journal: Theory, Practice and Principles* 178.

³ Guillaume (n 1 above) 541.

3.2 The problem of indigenous terrorist organizations

One of the major sources of terrorist threats in Kenya and Uganda has emanated from terrorist organizations and movements that are native to these two countries. These native organizations may present a serious threat because they have a great understanding of the areas in which they operate in. In addition, such organizations may have a local support from members of the community who will assist them in whatever way they can. This section examines some of the indigenous terrorist organizations in Kenya and Uganda and how the governments of these countries have responded to them.

3.2.1 Uganda's indigenous terrorist organizations

Uganda has had a considerably long history of civil wars and political instability that dates back to the 1980's. This gave rise to rebel factions like the Lord's Resistance Army (LRA)⁴ and the Allied Democratic Forces (ADF)⁵ that have waged war against the Ugandan government in which they have incorporated terrorist techniques. These rebel activities have resulted in the commission of atrocities including mass killings, body mutilations, child abductions and rape. The LRA conflict also resulted in the displacement of over two million people in and out of the borders of Uganda.⁶ In 2005, the Ugandan government referred the LRA violations to the Prosecutor of the ICC under

⁴ F Van Acker 'Uganda and the Lord's Resistance Army: The New Order No One Ordered' (2004) 103(412) *African Affairs* 335; R Doom and K Vlassenroot 'Kony's Message: A New Koine? The Lord's Resistance Army in Northern Uganda' (1999) 98(390) *African Affairs* 5; Unpublished: P Acirokop 'Accountability for Mass Atrocities: The LRA Conflict in Uganda' unpublished PhD thesis, University of Pretoria (2012) 4. The Lord's Resistance Army (LRA) is a rebel faction led by Joseph Kony. The rebel faction was initially started by Alice Lakwena under the Holy Spirit Movement whose aim was to overthrow the government. She was however defeated and exiled. Kony took over the rebel group in 1988 under the name LRA but did not enjoy popularity. The LRA begun abducting children and committed a number of atrocities in northern Uganda. Thousands lost their lives while others were left with serious injuries resulting from their armed activities in the northern region of Uganda.

⁵ L Themner and P Wellensteen 'Armed Conflicts, 1946-2012' (2013) 50(4) *Journal of Peace Research* 515. The ADF is a rebel faction that is situated in western Uganda. The ADF was formed around 1996 and is known to have bases in the Democratic Republic of Congo (DRC). The ADF was comprised of Islamic militants who were funded by Sudan. The ADF were known to ambush restaurants, markets and camps of Internally Displaced Persons (IDPs) amongst many activities. One of the most serious attacks carried out by the ADF was in 1998 when they attacked a school in Kasese in an attempt to abduct children to be used as child soldiers. About 80 students locked themselves in the dormitory to keep the rebels out. The rebels responded by pouring fire accelerants into the dormitory and burning the students alive.

⁶ B Roberts, KF Ocaka, J Browne, T Oyok and E Sondorp 'Factors associated with post-traumatic stress disorder and depression amongst internally displaced persons in northern Uganda' (2008) 8(1) *BMC Psychiatry* 38.

Article 13(a) and 14 of the Rome Statute⁷ and indictments were issued for the LRA's top commanders.⁸ The LRA rebels have been declared terrorist organizations by Ugandan authorities.⁹ The United States has also designated and listed the LRA as a Foreign Terrorist Organization.¹⁰ However, it must be noted that the LRA and ADF are no longer active within Uganda's territory. The LRA were driven out of Uganda between 2008 and 2009 and are reported to be hiding in the south-eastern jungle of Central African Republic (CAR).¹¹ In 2011, the US government deployed approximately 100 personnel as advisers to the UPDF in the endeavour to eliminate the LRA. However, the rebels have proved to be elusive to date and the *New Vision* reports that the LRA remains active and still carries out regular raids on villages in CAR.¹² Similarly, the ADF was ousted from Uganda in 2004 and fled to the Democratic Republic of Congo (DRC).¹³ Remnants of the ADF rebels established camps in Mwalika, Bundiguya and Eringeti regions of DRC.¹⁴ However, the DRC government together with the United Nations Intervention Brigade (FIB) launched a campaign against the ADF remnants in DRC at the beginning of 2014.¹⁵ It must also be noted that the Ugandan military (Uganda Peoples' Defence Forces) has been implicated in several atrocities and human rights violations that were committed during the war against the LRA rebels in Northern Uganda.¹⁶ These human rights violations include for example

⁷ The Referral of the Situation Concerning the Lord's Resistance Army, submitted by the Republic of Uganda, 16 December 2003. Available at: <http://www-rohan.sdsu.edu/~abranh/Current%20Projects/Uganda%20ICC%20Referral%202003.pdf> (accessed 21 August 2014).

⁸ *The Prosecutor v Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen*, (2004) ICC-02/04-01/05.

⁹ Second schedule to the Anti-Terrorism Act of Uganda (2006); E Leonard 'The Lord's Resistance Army: and African Terrorist Group?' (2010) 4(6) *Perspectives on Terrorism* 22; KP Apuuli 'The International Criminal Court (ICC) and the Lord's Resistance Army (LRA) insurgency in Northern Uganda' (2004) 15 *Criminal Law Forum* 396.

¹⁰ Congressional Research Service *The Lord's Resistance Army: The U.S. Response* (2014) 12.

¹¹ Kony's LRA still holding on in Central Africa *The New Vision* 15 August 2014. Available at: <http://www.newvision.co.ug/news/658770-kony-s-lra-still-holding-on-in-central-africa.html> (accessed 21 August 2014).

¹² Kony's LRA still holding on in Central Africa *The New Vision* 15 August 2014. Available at: <http://www.newvision.co.ug/news/658770-kony-s-lra-still-holding-on-in-central-africa.html> (accessed 21 August 2014).

¹³ L Themner and P Wellensteen 'Armed conflicts, 1946-2012' (2013) 50(4) *Journal of Peace Research* 515.

¹⁴ As above.

¹⁵ Inyenyeri News (14 March 2014) *Congo Says Ugandan ADF Rebels Defeated*. Available at: <http://www.inyenyerinews.org/politiki/congo-says-ugandan-adf-rebels-defeated/> (accessed 21 August 2014).

¹⁶ Human Rights Watch (20 September 2005) *Uganda: Army and Rebels Commit Atrocities in the North*. Available at: <https://www.hrw.org/news/2005/09/20/uganda-army-and-rebels-commit-atrocities-north> (accessed 02 June 2015).

the use of child soldiers, rape, murder, torture and unlawful deprivation of property.¹⁷ Several of these violations have never been reviewed by the government and the perpetrators have never been brought to justice.¹⁸

3.2.2 Kenya's indigenous terrorist organizations

Kenya has also experienced significant internal unrest that is associated with various terrorist organizations. The term 'terrorism' in Kenya was first used by the British to describe the *Mau Mau* liberation movement that used violence to fight for Kenya's independence.¹⁹ The 70s and 80s saw the rise of the Maskini Liberation Front (MLF) and the February Eighteen Movement (FEM) that were accused of perpetrating a number of terrorist attacks.²⁰ However, the most notorious groups in Kenya have been the Sabaot Land Defence Force (SLDF) and the Mungiki. It must be noted that the SLDF and Mungiki have not been publicly designated as terrorist groups. Despite this non-designation, the operations of these groups can be classified as terrorist in nature.

The SLDF is a rebel faction that has been operational in the Mount Elgon region since 2005.²¹ The SLDF instituted a parallel system of administration in the Mount Elgon area in which it levied illegal taxes to local residents. Their victims were subjected to torture, bodily mutilation, rape and even death. The activities of the SLDF led to multiple deaths and internal displacement of more than sixty-thousand people. Most of the group's membership was comprised of the Sabaot people who fall under the Kalenjin Tribe.²² In response, the Kenyan government started dealing with the SLDF as a terrorist organization. However, the Kenyan government's crackdown on the

¹⁷ As above.

¹⁸ Human Rights Watch (20 September 2005) *Uprooted and Forgotten Impunity and Human Rights Abuses in Northern Uganda*. Available at: <https://www.hrw.org/report/2005/09/20/uprooted-and-forgotten/impunity-and-human-rights-abuses-northern-uganda> (accessed 02 June 2015).

¹⁹ E Mogire & KM Agade 'Counter-terrorism in Kenya' (2011) 29(4) *Journal of Contemporary African Studies* 474.

²⁰ As above.

²¹ A Oloo, O Wafula & A Ikelegbe 'A Marginalization and the rise of militia groups in Kenya; The Mungiki and the Sabaot Land Defence Force' 2010 University of Nairobi Digital Repository. Available at: <http://erepository.uonbi.ac.ke:8080/xmlui/handle/123456789/30007> (accessed 12 January 2015).

²² Human Rights Watch (2 April 2008) *Kenya: Army and Rebel Militia Commit War Crimes in Mt. Elgon*. Available at: <https://www.hrw.org/news/2008/04/02/kenya-army-and-rebel-militia-commit-war-crimes-mt-elgon> (accessed 07 July 2017).

SLDF was tainted with allegations of gross human rights violations including torture, murder, arbitrary detention and even rape.²³

The Mungiki on the other hand was founded in the 80s with the aim of protecting the Kikuyu farmers in their land disputes with the Maasai.²⁴ However, the influence of the Mungiki in recent times has spread into different areas of trade for instance the taxi business (matatu) and construction. Mungiki is best described as a street gang involved in organized crime and utilizes terrorism and violence to assert its influence.²⁵ Although the Mungiki is most active in Mathare which is Nairobi's second biggest slum, its influence can be felt in many areas of the country. Mungiki has been known to utilize terrorist measures such as torture, kidnappings and even beheading to assert their authority.²⁶ Residents in the Mungiki strongholds were illegally compelled to pay tax in exchange for protection and the right to conduct business. In 2002, the government of Kenya banned the Mungiki which was followed by a crackdown on its members between 2002 and 2007. The government's response was ruthless with the police and military being responsible for over eight-thousand deaths and four-thousand disappearances.²⁷

Although the influence of the Mungiki was greatly contained after 2007, there are fears that since 2012, the deadly sect has begun regrouping in Nairobi.²⁸ In June of 2012, the police in Kigumo district were put on high alert following reports that the Mungiki intended to extort more money from matatus (commuter taxis) that operated on the Kaharati-Kigumo-Mairi route.²⁹ The area District Commissioner, Albanus Ndiso, promised to apprehend any members of the Mungiki who tried to disrupt public transport in the area and deal with them accordingly.³⁰ More reports in

²³ Oloo (n 21 above); Human Rights Watch (n 22 above) para 4. The Human Rights Watch documented a number of cases including murder, rape and inhumane treatment by both the SLDF rebels and the Kenyan military on civilians.

²⁴ Mogire & Agade (n 19 above) 474.

²⁵ Landinfo: Country of Origin Information Centre *Kenya: Mungiki – abusers or abused?* (2010) 5. Available at: http://www.landinfo.no/asset/1123/1/1123_1.pdf (accessed 12 January 2015).

²⁶ O Greene & N Marsh *Small arms, crime and conflict: Global governance and the threat of armed violence* (2013) 132-133.

²⁷ As above, 13; BBC News (24 May 2007) Profile: Kenya's secretive Mungiki sect. Available at: <http://news.bbc.co.uk/2/hi/africa/6685393.stm> (accessed 06 July 2017).

²⁸ AllAfrica (03 June 2012) Kenya: Kigumo DC Claims Mungiki Is Regrouping. Available at: <http://allafrica.com/stories/201206050678.html> (accessed 06 July 2017).

²⁹ AllAfrica (n 28 above).

³⁰ As above.

mid-2016 emerged claiming that the illegal gang was re-grouping and the community was living in fear that they may once again be subjected to its gruesome reign of terror and brutality.³¹

3.3 The rise of al-Shabaab in Somalia and beyond

The instability of Somalia has played a critical role in the increase of terrorist activity in the East African region. Somalia was declared a failed state³² in 1991 following the overthrow of General Mohammed Siad Barre. Barre seized power by coup in 1969³³ and established a ruthless dictatorship government.³⁴ In 1978, a coup was attempted against Barre's administration and the government executed most generals who allegedly participated in it.³⁵ Those who evaded capture fled the country and formed armed groups.³⁶ Finally in 1991, a civil war erupted and Barre's regime was overthrown.³⁷ Barre's fall created a power vacuum that was filled by warlords who controlled the economy, weapons trade and smuggling.³⁸ The warlords became notorious for murder, torture, terror and human rights abuse.³⁹ In 2001, the warlords formed an alliance called the Somali Reconciliation and Restoration Council (SRRC).⁴⁰

The Transitional National Government (TNG) was established in May 2000 under the Transitional National Charter to counteract the influence of the SRRC⁴¹ but lacked resources and *de facto*

³¹ N Kiman (14 July 2016) 'Kenyans fear re-emergence of the banned Mungiki sect and its deadly reign of terror' *Mail and Guardian* Available at: <https://mg.co.za/article/2016-07-14-00-kenyans-fear-re-emergence-of-the-banned-mungiki-sect-and-its-deadly-reign-of-terror> (accessed 02 June 2017).

³² A failed state can be defined as a nation whose government has lost effective control over the territory. *For further reading see:* BG Jonesa 'The global political economy of social crisis: Towards a critique of the 'failed state' ideology' (2008) 15(2) *Review of International Political Economy* 180-205.

³³ C Besteman 'Violent politics and the politics of violence: The dissolution of the Somali nation-state' (1996) 23 *American Ethnologist* 579.

³⁴ ExecutedToday.com (3 July 2010) *1972: Three Somali officers for an attempted coup* available at: <http://www.executedtoday.com/2010/07/03/1972-somalia-coup-siad-barre/> (accessed 12 May 2015); P Bridges *Safirka: An American Envoy* (2000) 102. In 1972, two generals who attempted to conspire against Barre were publically executed. In 1975, ten Sheikhs who opposed Barre's grant of equal rights to women were also executed.

³⁵ P Briggs *Somaliland: With Addis Ababa & Eastern Ethiopia* (2012) 18.

³⁶ As above; A Sheik-Abdi 'Ideology and leadership in Somalia' (1981) 19(1) *Journal of African Studies* 168.

³⁷ A Vinci 'An analysis and comparison of armed groups in Somalia' (2006) 15(1) *African Security Review* 79.

³⁸ K Menkhaus 'State collapse in Somalia: second thoughts' (2003) 30(97) *Review of African Political Economy* 405.

³⁹ R Marchal 'Warlordism and terrorism: How to obscure an already confusing crisis? The case of Somalia' (2007) 83 *International Affairs* 1091.

⁴⁰ F Soderbaum & R Tavares *Regional Organizations in African Security* (2013) 78.

⁴¹ K Menkhaus 'Governance without government in Somalia: Spoilers, state building, and the politics of coping' (2007) 31(3) *International Security* 74-106.

control over the territory of Somalia.⁴² The TNG was later succeeded by the Transnational Federal Government (TFG) in 2004 which was established under the Transitional Federal Charter.⁴³ However in 2006, armed conflict broke out between Ethiopian, the TFG and Somali forces from Puntland on one side, and the Islamic Court Union (ICU) and other militias on the other side.⁴⁴ The ICU gave Ethiopia an ultimatum to exit Somalia within one week,⁴⁵ a warning which was not heeded, and the conflict culminated in the Battle of Baidoa in December 2006.⁴⁶ Ethiopian and the TFG forces successfully captured the nation's capital (Mogadishu) with military support of the United States Special Forces.⁴⁷ After its defeat in the 2006 war, the ICU split up into other smaller groups giving rise to the notorious al-Shabaab whose main objective is the establishment of an Islamist state in Somalia.⁴⁸ Al-Shabaab immediately rejected the TFG on the grounds that it had endorsed a non-Islamic transitional government and declared a jihad against the 'enemies of Islam' (infidels) including the TFG which accepted secular intervention from the African Union Mission to Somalia (AMISOM).⁴⁹ Al-Shabaab continued utilizing *jihadist* ideologies and techniques employed by violent radical Islamist terrorist organizations emerging from the Middle East like al-Qaeda,⁵⁰ the Taliban, and Islamic State of Iraq and the Levant (ISIS/ISIL) to mention but a few.⁵¹

Recent times have seen enhanced cooperation and logistical support between extremist Islamic terrorist organizations. In March 2009, Osama bin Laden released a recording entitled '*Fight On*,

⁴² K Menkhaus 'Political Islam in Somalia' (2002) 9(1) *Middle East Policy* 117.

⁴³ H Verhoeven 'The self-fulfilling prophecy of failed states: Somalia, state collapse and the Global War on Terror' (2009) 3(3) *Journal of Eastern African Studies* 405-425; SJ Hansen *Al-Shabaab in Somalia: The history and ideology of a militant Islamist group* (2013) 2005-2012; BJ Hesse 'Introduction: The myth of Somalia' (2010) 28(3) *Journal of Contemporary African Studies* 252; J Prendergast & C Thomas-Fensen 'Blowing the Horn' (2007) 86 *Foreign Affairs* 59.

⁴⁴ K Menkhaus 'The crisis in Somalia: tragedy in five acts' (2007) 106(204) *African Affairs* 357.

⁴⁵ Menkhaus (n 44 above) 369.

⁴⁶ As above.

⁴⁷ Menkhaus (n 44 above) 379.

⁴⁸ J Davis 'Evaluating counterterrorism in Africa' (2010) in J Davis (ed) *Terrorism in Africa: The Evolving Front in the War on Terror* 212.

⁴⁹ T Murithi 'The African Union's evolving role in peace operations: the African Union Mission in Burundi, the African Union Mission in Sudan and the African Union Mission in Somalia' (2008) 17(1) *African Security Review* 69.

⁵⁰ Al-Qaeda is a global terrorist organization based in the Middle East but has carried out worldwide operations.

⁵¹ JP Bialke 'Al-Qaeda & Taliban: Unlawful combatant detainees, unlawful belligerency, and the international laws of armed conflict' (2004) 55 *Air Force Law Review* 1.

*Champions of Somalia*⁵² in which he commended al-Shabaab's efforts to assert Islam in Somalia, and rallied support for the organization.⁵³ Al-Shabaab's ideology is rooted in Islamic *jihadism*⁵⁴ and the organization's main objective is to establish *sharia* in Somalia.⁵⁵ Al-Shabaab has utilized methods like suicide bombing and indiscriminate shootings in the fight against its supposed enemies. After the death of bin Laden, al-Shabaab swore allegiance to al-Zawahiri and vowed to implement all the instructions given by al-Qaeda's new leader.⁵⁶ Since then, al-Shabaab has waged war against the official Somali government and all other states involved in Somali domestic affairs including Kenya and Uganda. The interventions taken by the governments of Kenya and Uganda in relation to al-Shabaab are discussed later in this chapter.

3.4 The challenge of cross-border terrorism in Kenya and Uganda

Al-Shabaab has not shied away from taking the battle outside Somalia right into the homelands of Kenya and Uganda. Such incidents include the 2010 Kampala World Cup bombings⁵⁷ and the 2015 Garissa University College attack.⁵⁸ One factor that has facilitated al-Shabaab's terrorist attacks in Kenya and Uganda is inadequate border control.⁵⁹ Okumu notes that border management is a responsibility of the government that includes customs, policing and

⁵² L Vidino, R Pantucci & E Kohlmann 'Bringing global jihad to the Horn of Africa: Al Shabaab, Western fighters, and the sacralization of the Somali conflict' (2010) 3(4) *African Security* 222.

⁵³ For an English translation of the recording, see: <http://triceratops.brynmawr.edu/dspace/bitstream/handle/10066/4694/OBL20090319.pdf?sequence=4> (accessed 20 August 2014).

⁵⁴ *Jihadism* is an extremist Islamist ideology that encourages the threat or use of violence in resisting non-Muslim interference within areas that are historically and traditionally Islamic. See: JM Brachman *Global Jihadism: Theory and Practice* (2009) 4.

⁵⁵ AM Ali *The Al-Shabaab Al-Mujahidiin—A profile of the first Somali terrorist organisation. Çalıştay sunumu: IGAD Capacity Building Program against Terrorism (ICPAT), Jinja, Uganda* (2008) 28; JM Brachman *Global Jihadism: Theory and practice* (2009) 4. *Jihadism* is an extremist ideology that encourages violence in resisting non-Muslim interference in areas that are traditionally Islamic.

⁵⁶ S Shay *Somalia in Transition since 2006* (2014) 10; P Kimunguyi *Terrorism and Counter terrorism in East Africa* (2010) available at: <http://artsonline.monash.edu.au/radicalisation/files/2013/03/conference-2010-terrorism-counter-terrorism-eafrica-pk.pdf> (accessed 06 March 2015) 7. Kimunguyi noted that al-Qaeda considers Somalia as the Southern Gate to Jerusalem which makes the country strategic.

⁵⁷ Open Society Foundations *Counterterrorism and human rights abuses in Kenya and Uganda* (2013) 19.

⁵⁸ B Brumfield (6 April 2015) *Garissa university attack: The problems plaguing Kenya's security efforts* CNN International. Available at: <http://edition.cnn.com/2015/04/03/africa/garissa-attacks-kenya-security/> (accessed 24 April 2015).

⁵⁹ Kimunguyi (n 56 above) 365; A Vines 'Combating light weapons proliferation in West Africa' (2005) 81(2) *Issue International Affairs* 341–360; TM Sanderson 'Transnational terror and organised crime: Blurring the lines' (2004) 24(1) *SAIS Review of International Affairs* 49–61.

immigration to control the movement of people and products across borders.⁶⁰ These measures are carried out with the aim of maintaining peace, security and development while minimizing crime and other illegal activities.⁶¹ Okumu further noted that poor border management in Uganda has contributed to several crimes including terrorism, human trafficking, criminal syndicates, auto theft, mercenaries, drug smuggling and illicit weapons trade.⁶² As a result, al-Shabaab has exploited the weakness of border control in Kenya and Uganda. The terrorist organization has successfully moved weapons and human resources across state lines in order to facilitate terrorist attacks.

Allen conducted an observation of the Kenya-Uganda border crossing at Busia town in 2012 and the findings indicated a worrying laxity in the regulation of the border.⁶³ The study revealed that residents of the border town (Busia) on either sides frequently crossed the border to trade or visit relatives without having to produce any form of identification or documentation.⁶⁴ More interestingly, Allen noted that *boda-bodas* (motorcycles and bicycles for commercial transportation of goods and passengers) loaded with huge sacks of cargo often ride across the border without presenting any importation documentation or being subjected to customs inspection.⁶⁵ The contents of the uninspected cargo could include contraband or even illegal weapons which could be used to arm terrorists. In addition, corruption is also rampant at the border crossings with customs officials taking bribes from individuals to allow free and unhindered movement of goods or persons without proper documentation.⁶⁶ This unlawful conduct and irregularities leave the border crossings prone to infiltration by terrorists who would otherwise be more constrained if there was proper border screening. It is very important that

⁶⁰ W Okumu *Border management and security in Africa* (June 2011) available at: <http://concordis.international/resources-2/concordis-papers-and-briefings/> (accessed 7 July 2015).

⁶¹ Okumu (n 60 above) 3.

⁶² As above, 8-10.

⁶³ W Allen *Going through border places: Security practices and local perceptions of insecurity as filtration at the Kenya-Uganda boundary* (2012) available at: <http://www.qub.ac.uk/research-centres/CentreforInternationalBordersResearch/Publications/WorkingPapers/CIBRWorkingPapers/Filetoupload,284821,en.pdf> (accessed 7 July 2015).

⁶⁴ Allen (n 63 above) 10.

⁶⁵ As above.

⁶⁶ Okumu (n 60 above) 11.

the procedures prescribed by law for the protection of borders are observed in order to preserve the security and integrity of the state. Regular monitoring customs officials is important to ensure that they carry out their functions without undue influence, bribery and corruption.

Kimunguyi also notes that the same situation exists at the Kenya-Somali border which the Kenyan government has been struggling to secure since the collapse of Somalia.⁶⁷ Al-Shabaab has exploited the weakness of the border to carry out its cross-border attacks.⁶⁸ Following the Garissa University College attack, the Kenyan government proposed radical measures to attempt to strengthen its border security. Firstly, the government ordered the closure of the Dabaab refugee camp in Kenya which hosts about 350,000 Somali refugees.⁶⁹ The refugee camp has been considered by the Kenyan government as a breeding ground for al-Shabaab.⁷⁰ The proposal to close the camp and repatriate its occupants was opposed by the UNHCR and NGOs.⁷¹ On 9 February 2017, the High Court of Kenya ruled against the directive to close down the camp and repatriate all the Somali refugees occupying it.⁷² The High Court ruled that the forceful repatriation of the two hundred and sixty thousand refugees would amount to group persecution.⁷³

In addition, Kenyan authorities embarked on a radical plan to construct a separation wall along the Kenya-Somali border to control the flow of people and illegal products that could be used for terrorism. Regardless of the controversy surrounding the construction of a border wall, it must be noted that in certain instances border walls have delivered some positive results.⁷⁴ An example of this partial success has been the construction of a wall at sensitive parts of the US-

⁶⁷ Kimunguyi (n 56 above) 366.

⁶⁸ As above.

⁶⁹ S Jones *Dabaab refugee camp closure would risk 350,000 Somali lives, warns Amnesty* (17 April 2015) available at: <http://www.theguardian.com/global-development/2015/apr/17/dabaab-refugee-camp-closure-risk-350000-somali-lives-amnesty> (accessed 8 July 2015).

⁷⁰ Jones (n 69 above) para 3.

⁷¹ As above.

⁷² BBC News (09 February 2017) *Kenyan closure of Dabaab refugee camp blocked by high court*. Available at: <https://www.google.co.za/amp/www.bbc.co.uk/news/amp/38917681> (accessed 16 July 2017).

⁷³ As above.

⁷⁴ F Martel (17 April 2015) *Kenya begins construction on border wall to keep Somalis out*. Available at: <http://www.breitbart.com/national-security/2015/04/17/kenya-begins-construction-on-border-wall-to-keep-somalis-out/> (accessed 8 July 2015).

Mexican border to control the flow of illegal immigrants, the movement of drugs and other illicit imports into the country.⁷⁵ However, the US-Mexican border has been criticized for being too expensive to build and maintain. In addition, the US-Mexico has been criticized for being easy to circumvent for example the construction of tunnels under it and even destruction by use of explosives or wire cutters.⁷⁶ In my view, the Kenyan-Somali border wall can be completely circumvented by resorting to the air or water where border walls cannot be constructed. The Kenya-Somali border spans across a long distance and the construction of a barrier across the entire border would be extremely costly. The Kenya-Somali Border wall will also require a lot of resources, technology and man-power to watch the wall because on its own, it cannot prevent individuals who wish to get themselves over, through or under it. Regardless of the challenges regarding the construction and maintenance of the wall, the plans to continue with its construction were still on course with a projected completion period of the end of 2017.⁷⁷ As at November 2017, several parts of the 700 kilometre wall had been constructed. Despite expectations of a brick wall, most sections of the wall are constructed with posts and barbed wire with a ditch running alongside the boundary.⁷⁸

3.5 Improved relations with the West on counterterrorism

With the increase of terrorist activity in and around Kenya and Uganda, the two states have developed strategic partnerships with Western states and in particular the US in order to unite against terrorism and its devastating outcomes. One of the reasons for this partnership is that Kenya and Uganda play a strategic role when it comes to fighting terrorism in the East and Central African region, and the Horn of Africa. Davis notes that Kenya's relations with the United States and the West have thrived throughout the regimes of Jomo Kenyatta, Daniel arap Moi, Mwai

⁷⁵ MJ Garcia *Barriers along the U.S. borders: Key authorities and requirements* (2016) 12.

⁷⁶ As above.

⁷⁷ See: SF Agnon *Kenya-Somalia border wall construction progress*. (2017) Available at www.intelligencebriefs.com/kenya-somalia-border-wall-construction-progress/ (accessed 02 November 2017); Kenya News Agency (02 December 2016) *KDF to fast track construction of Kenya/Somalia border security wall*. Available at: <http://kenyanewsagency.go.ke/en/kdf-to-fast-track-construction-of-kenyasomalia-border-security-wall/> (accessed 31 December 2016).

⁷⁸ Agnon (n 77 above) 2.

Kibaki and Uhuru Kenyatta.⁷⁹ Kenya is the economic hub of the region and is the gateway to East and Central Africa, and the Horn. Kenya's strategic location has enabled the nation to become one of the region's major points of entry.⁸⁰ Davis further argues that in addition to its economic might, Kenya has established herself as a political powerhouse in the region. Several peace negotiations for example Sudan's peace agreement and the TFG for Somalia were carried out with the help of Kenya.⁸¹ Kenya is also a host to a number of diplomatic missions including one of the four major global UN complexes.⁸² The US Embassy in Nairobi has taken a central role in the region for example monitoring the Sudan peace process⁸³ as well as Somalia.⁸⁴ Kenya has received considerable support from the US that has not been limited to military aid.⁸⁵ The Kenyan and the US governments concluded the US-Kenyan access agreement that grants the US access to Kenya's Mombasa seaport and Nairobi International Airport at short notice.⁸⁶ It must be noted that Kenya's relations with the European Union were slightly strained when the Kenyan president, Uhuru Kenyatta was charged by the International Criminal Court in March 2013 for his role in the election violence.⁸⁷ However, this did not significantly impair ties between Kenya and the West and the indictment has since been dropped.⁸⁸

On the other hand, Uganda's relations with the US and the West were severely strained during the despotic regime of Idi Amin in the 1970's. Amin's regime openly opposed and threatened US embassy officials⁸⁹ and even expelled the Marines whose duty was to protect US assets and

⁷⁹ J Davis 'Evaluating counterterrorism in Africa' in J Davis (ed) *Terrorism in Africa: The Evolving Front in the War on Terror* (2010) 212.

⁸⁰ See for example: B Hoyle & J Charlier 'Inter-port competition in developing countries: an East African case study' (1995) 3(2) *Journal of Transport Geography* 87.

⁸¹ L Doswald-Beck *Human rights in times of conflict and terrorism* (2011) 20.

⁸² J Carson 'Kenya: The Struggle against Terrorism' in J Davis (ed) *Terrorism in Africa: The Evolving Front in the War on Terror* (2010) 176.

⁸³ As above.

⁸⁴ As above.

⁸⁵ LP Blanchard 'U.S.-Kenya Relations: Current Political and Security Issues' (2013) 12.

⁸⁶ As above.

⁸⁷ SD Mueller 'Kenya and the International Criminal Court (ICC): Politics, the election and the law' (2014) 8(1) *Journal of East African Studies* 25.

⁸⁸ BBC News (5 December 2014) *ICC drops Uhuru Kenyatta charges for Kenya ethnic violence*. Available at: www.bbnews.com/news/world/world-africa-30347019 (accessed 06 August 2017)

⁸⁹ See: US Department of State *Uganda (06/02)*. Available at: <http://www.state.gov/outofdate/bgn/uganda/21951.htm> (accessed 11 March 2015).

personnel.⁹⁰ This led to the closing of the US embassy in 1973 amidst the already strained relations.⁹¹ Uganda's relations with the US remained tense under the next regimes until Museveni took over power in 1986. Since then, Uganda has continuously become a focal point of political power in East Africa as well as the African continent. In 2001, the US reopened its embassy in Uganda and has channelled efforts towards better healthcare, education, nutrition as well as security including counterterrorism.⁹² Uganda's ties with the US have been further strengthened in light of the Somali conflict. Uganda and Kenya were among the African states that sent troops in support the AMISOM mandate. Fisher argues that Uganda's decision to deploy forces in Somalia under AMISOM was motivated by the need to maintain good relations with donors.⁹³ Whatever the motivation was, the deployment of troops in Somalia has attracted retaliation from al-Shabaab who have attacked and continue to threaten Kenya and Uganda.⁹⁴ As a result, these two countries present themselves as an appealing target to terrorist organizations who wish to hurt Western interests for example in the 1998 US Embassy bombings in Kenya and Tanzania. It is therefore important for Kenya and Uganda to properly implement international, regional and sub-regional counterterrorism frameworks in order to fight the crime of terrorism.

3.6 Kenya and Uganda's counterterrorism police agencies

With the infiltration of al-Shabaab in the territories of Kenya and Uganda, there was a need for the governments of the respective countries to constitute specialized security agencies to curb its influence. These specialized counterterrorism agencies are very important for the coordination of counterterrorism efforts including collecting intelligence and analysing it in order to effectively combat terror attacks. Regular law enforcement departments often deal with several operations which all compete for their limited resources and focus. Terrorism which is a global acknowledged challenge may have serious ramifications if it is not checked. It requires

⁹⁰ S Decalo 'African Personal Dictatorships' (1985) 23 *Journal of Modern African Studies* 213.

⁹¹ PFB Nayenga 'Myths and Realities of Idi Amin Dada's Uganda' (1979) 22(2) *African Studies* 127.

⁹² Blanchard (n 85 above) 13.

⁹³ J Fisher 'Managing donor perceptions: Contextualizing Uganda's 2007 intervention in Somalia' (2012) 111(444) *African Affairs* 404.

⁹⁴ The July 2010 Kampala terrorist attacks targeted crowds watching the world cup final match. Two venues were attacked these being the Ethiopian Village restaurant and the Kyadondo Rugby Club in Nakawa.

intricate planning, investigation, coordination of intelligence and specialized resources which are not always at the disposal of regular police forces. It therefore necessitates the creation of specialized counterterrorism law enforcement agencies to deal exclusively with the threat of terrorism and ensure peace and stability. Such measures are in line with the objectives of community policing that require law enforcement to identify areas of concern to the community and adequately addressing them.

3.6.1 Uganda's counterterrorism police and Joint Anti-Terrorism Taskforce (JATT)

In order to counter the spread of terrorism, the government created a division within the Police Force known as the Counter Terrorism Police Unit whose primary role is to defuse bombs, conduct hostage negotiation and rescue, and capture terrorists.⁹⁵ The actual number of the members within the Counter Terrorism Police Unit is not publicly known. Reporting directly to the Uganda Police Force Directorate of Counterterrorism, the Counter Terrorism Police Unit also carries out terrorist investigations.⁹⁶ This unit of police is constituted by ordinary law enforcement officers who receive specialized counterterrorism training.⁹⁷ However, inadequate training, lack of equipment and understaffing poses a great challenge to the overall effectiveness of the police unit to detect, investigate and respond timeously to threats of terrorism.⁹⁸ In addition, most of the Counter Terrorism Police Unit's resources and efforts are concentrated in the capital city, Kampala, leaving the rest of the broader territory largely unattended. This invariably limits the flow of intelligence and resources to other parts of the country.⁹⁹ In addition, it potentially allows for terrorist elements to thrive anywhere in the country which would indeed be a very dangerous situation. Despite its shortcomings, the Uganda Police Force still maintains the Counter Terrorism Police Unit as one of its major departments within the force.

⁹⁵ See: www.upf.go.ug/directorate/ (accessed 02 November 2017); Responses to information requests. Available at: <https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/07/UGA102830.E.pdf> (accessed 31 December 2016).

⁹⁶ As above.

⁹⁷ U.S. Department of State: Diplomacy in Action. Chapter 2. *Country Reports: Africa Overview*. Bureau of Counterterrorism and Countering Violent Extremism. Country Reports on Terrorism 2015. Available at: <https://www.state.gov/j/ct/rls/crt/2015/257514.htm> (accessed 31 December 2016).

⁹⁸ As above.

⁹⁹ As above.

With the ever-evolving threat of terrorism, the Police Force constituted a counterterrorism interagency known as the Joint Anti-terrorism Task Force (JATT) that specifically deals with the problem of terrorism in Uganda.¹⁰⁰ The JATT therefore operates alongside the Counter Terrorism Task Force in the fight against terrorism. JATT has successfully foiled several terrorist plots within the country and has carried out several legitimate arrests of persons of interest.¹⁰¹ The agency has undoubtedly contributed to the security of the nation by coordinating intelligence on terrorism and acting timeously on it. Despite its positive contribution, JATT's negative perception within Uganda and beyond has overshadowed its achievements.¹⁰² The JATT secretly operates with minimal supervision and accountability from its headquarters in Kololo, a wealthy suburb in the capital city, Kampala. Baker notes that the paramilitary agency's mandate is not codified and this presents a major challenge in ascertaining their scope of operation.¹⁰³ The lack of a constitutive mandate may facilitate abuse of power and unlawful erosion of constitutionally guaranteed rights and freedoms. The JATT which is mainly comprised of personnel picked from security agencies, the army and police forces, has developed a fearsome reputation for arbitrary detention and brutal torture of suspects who are mainly of the Muslim faith.¹⁰⁴ The agency is known to carry out arbitrary arrests by undercover personnel with no proper identification documents. Moreover, the agency's personnel usually operate with unmarked cars and those arrested are taken to secret locations where they are interrogated without regard to legal

¹⁰⁰ All Africa (8 December 2005) *Uganda: JATT is normal*. Available at: www.allafrica.com/stories/200512080746.html (accessed 02 November 2017).

¹⁰¹ A Habib *Police* (14 September 2014) *foil terror attack on Kampala installations, arrest several suspects with explosives*. Available at: www.galaxyfm.com.co.ug/2014/09/14/ (accessed 02 November 2017); New Vision (7 April 2015) *Uganda arrests two terror suspects*. Available at: www.newvision.co.ug/new_vision/news/1323705/uganda-arrests-terror-suspects (accessed 01 November 2017).

¹⁰² The Observer (29 June 2015) *Witness reveals JATT's ugly torture methods*. Available at: www.observer.ug/news-headlines/38490-witness--reveals-jatt-s-ugly-torture-methods (accessed 01 November 2017).

¹⁰³ U.S. Department of State *2009 Human rights report: Uganda* (2010) para 5-10; B Baker 'Multi-choice policing in Uganda' (2005) 15(1) *Policing and Society: An International Journal of Research and Policy* 19; United States Department of State *Country Reports on Terrorism 2011 - Uganda* (2012) available at: <http://www.refworld.org/docid/501fbc9928.html> (accessed 29 July 2014).

¹⁰⁴ Human Rights Watch Uganda *Fresh torture accusations leveled against Uganda's police* (2017) available at: <https://www.hrw.org/news/2017/05/14/fresh-torture-accusations-levelled-against-ugandas-police> (accessed 02 November 2017); Human Rights Watch Uganda *Uganda: Torture, extortion, killing by police unit* (2011) available at: <https://www.hrw.org/news/2011/03/23/uganda-torture-extortion-killings-police-unit> (accessed 01 August 2017) para 16; AL Sage *African Counterterrorism Cooperation: Assessing Regional and Subregional Initiatives* (2007) 85.

procedures.¹⁰⁵ While some detainees are ultimately charged with terrorism, treason or some other crime, most are set free without ever being charged or even appearing before a judicial officer if they are fortunate to survive their harrowing ordeals.¹⁰⁶

The JATT personnel are reported to batter suspects with any object at their disposal including chairs, whips, hammers, belts and even butts of guns during interrogation. Other inhuman techniques included the spraying of chili powder into the eyes, ears and noses of suspects; prolonged starvation; depriving suspects from decently relieving themselves; and electric shocking amongst many others.¹⁰⁷ There have been several reported cases of extreme torture by the JATT that has eventually resulted in the deaths of several detainees during the brutal interrogation.¹⁰⁸

The irregularities of JATT's counterterrorism operations reveal a disturbing trend of unfettered discretion, impunity and a gross disregard for the rule of law. This is not surprising because Uganda's law enforcement in general is plagued by gross irregularities and problems such as corruption, insufficient resources, inadequate knowledge, impunity and disregard for the welfare of citizens.¹⁰⁹ In 2013, Mount wrote an article which revealed that one of the major human rights violators in the country was the Uganda Police Force. Some of the alleged violations included

¹⁰⁵ VV Ramraj, M Hor & K Roach *Global anti-terrorism Law and Policy* (2012) 590; Refugee Documentation Centre *Information regarding abuses carried out by the ISO in Uganda* (2010); J Rone 'State of pain: Torture in Uganda' (2004) 16(4) *Human Rights Watch* 4; S Pavic & J Kyriazis *Presumed innocent, behind bars: The problem of lengthy pre-trial detention in Uganda* (2011) International Human Rights Program. Available at: http://www.asf.be/wp-content/uploads/2014/06/ASF_UG_Pre-trial-detention-report-Univ-Toronto_2011.pdf (accessed 29 July 2014).

¹⁰⁶ Pavic & Kyriazis (n 105 above).

¹⁰⁷ S Lamwaka *Preventing torture in Uganda* (2011) The Finnish NGO Foundation for Human Rights, available at: <http://projects.essex.ac.uk/ehrr/V6N2/Lamwaka.pdf> (accessed 29 July 2014); The Redress Trust *Torture in Uganda: A Baseline Study on the Situation of torture Survivors in Uganda*. Available at: http://www.redress.org/downloads/publications/TortureUganda_Apr%2007.pdf (accessed 29 July 2014).

¹⁰⁸ Daily Monitor (24 May 2017) *Parliament tells Uganda govt to close Nalufenya torture chambers* Available at: <http://perilofafrica.com/parliament-tells-uganda-govt-close-nalufenya-torture-chambers/> (accessed 10 June 2017); S Lubwama (26 May 2017) *Kaweesi suspects reveal torture, death at Nalufenya*. Available at: <http://www.monitor.co.ug/News/National/Kaweesi-suspects-reveal-torture--death-at-Nalufenya/688334-3942506-bpvrki/index.html> (accessed 31 July 2017); Human Rights Watch Uganda *Open secret, illegal detention and torture by the Joint Anti-terrorism Task Force in Uganda* (2009) 15.

¹⁰⁹ Commonwealth Human Rights Initiative *The police, the people, the politics: police accountability in Uganda* (2006) ISBN: 81-88205-29-X. Available at: http://www.humanrightsinitiative.org/publications/police/uganda_country_report_2006.pdf (accessed 10 September 2014) 8-10.

torture and cruel, inhuman or degrading treatment or punishment.¹¹⁰ Mount attributed the high prevalence of human rights violations by the police to inadequate training, lack of equipment and under resourcing. However, she argued that the number one factor that facilitates such abuse of power is impunity.¹¹¹ The lack of investigation of acts of indiscipline and accountability facilitates abuse of office. Mount emphasized that accountability is the cornerstone of any criminal justice system. These issues manifest across all police force units and agencies revealing an institution that is in need of radical overhaul in order to ensure delivery of quality police services to the community. However, one factor that makes counterterrorism law enforcement agencies particularly susceptible to human rights violations is the limited application of oversight and monitoring measures due to the consideration of national security.¹¹²

3.6.2 Kenya's Anti-Terrorism Police Unit (ATPU)

Mogire and Agade argue that the situation in Kenya is no different from the case of Uganda in which police and security operatives often torture suspects of terrorism severely.¹¹³ The Kenyan government constituted the Anti-Terrorism Police Unit (ATPU) to specifically deal with counterterrorism investigations and operations.¹¹⁴ The ATPU is a police agency that was constituted under the national police force in direct response to the 1998 U.S. Embassy bombings. The ATPU has been accused of unfairly targeting Muslims and Somalis, as well as actively abusing human rights.¹¹⁵ In 2013, the Open Society Foundations wrote a provocative report calling upon Kenya to stop abusing human rights in the name of counterterrorism through the ATPU. The report contained chilling accounts of raids, arrests, torture, unlawful killings and

¹¹⁰ S Mount (15 May 2013) *Policing and human rights: Time for real change in Uganda*. Available at: <http://www.monitor.co.ug/OpEd/Commentary/Policing-and-human-rights--Time-for-real-change-in-Uganda/689364-1852782-5oap1wz/index.html> (accessed 8 September 2014).

¹¹¹ As above.

¹¹² B Baker 'Multi-choice policing in Uganda' (2005) 15(1) *Policing and Society: An International Journal of Research and Policy* 19; United States Department of State *Country Reports on Terrorism 2011 - Uganda* (2012) available at: <http://www.refworld.org/docid/501fbc9928.html> (accessed 2 September 2016).

¹¹³ E Mogire & KM Agade 'Counter-terrorism in Kenya' (2011) 29(4) *Journal of Contemporary African Studies* 473.

¹¹⁴ BE Whitaker 'Reluctant partners: Fighting terrorism and promoting democracy in Kenya' (2008) 9 *International Studies Perspectives* 254.

¹¹⁵ J Lind & J Howell 'Counter-terrorism and the politics of aid: Civil society responses in Kenya' (2010) 41(2) *Development and Change* 336.

disappearances.¹¹⁶ Davis argues that the methods used by the ATPU are far much worse than those employed by the U.S. in Guantanamo Bay against the terror suspects.¹¹⁷ According to Davis, while counterterrorism measures may be legitimately justifiable, the interpretation and application has posed serious challenges to the protection of human rights. In May 2017, the African Commission's Rapporteur on Kenya and the Chairperson of the Working Group on the Death Penalty and Extrajudicial Killings made an appeal to the President of Kenya regarding the lack of accountability of law enforcement for extrajudicial killings. It was noted that between January and March of 2017 alone, sixty people lost their lives at the hands of law enforcement.¹¹⁸ However, the actual number of people who lost their lives during counterterrorism operations is not known given the secrecy under which operations are conducted.

Just like in the case of Uganda, APTU conducts its operations with minimal oversight and this makes counterterrorism operations more prone to human rights violations.¹¹⁹ Amnesty International expressed serious concern over the impunity for various human rights violations committed by law enforcement. It was argued that there was insignificant investigation of allegations, lack of disciplinary action and criminal charges for the perpetrators.¹²⁰ Contrary to the interests of justice, the executive in many cases attempted to justify the wrongdoing of culprits. Amnesty International interviewed a small-scale trader in Kibera who noted that the public in Kenya lack protection from the state. He recalled his ordeal with law enforcement when he was unlawfully arrested and detained for one year, tortured and threatened with death. He was offered his freedom in return for a 'small' bribe. According to the respondent, law enforcement acts with impunity and can get away with any wrong doing including murder.¹²¹

¹¹⁶ Open Society Foundations *We're tired of taking you to court: Human rights abuses by Kenya's Anti-terrorism Police Unit* (2013) 24.

¹¹⁷ J Davis 'Evaluating counterterrorism in Africa' in J Davis (ed) *Terrorism in Africa: The Evolving Front in the War on Terror* (2010) 212.

¹¹⁸ African Commission on Human and Peoples' Rights *Letter of appeal to the Republic of Kenya*. Available at www.achpr.org/news/2017/06/d290 (accessed 14 June 2017).

¹¹⁹ Open Society Foundations (n 116 above) 25.

¹²⁰ Amnesty International *Police Reform in Kenya: 'A Drop in the Ocean'* (2013). Available at: www.amnesty.org (accessed 9 September 2014) 18.

¹²¹ Amnesty International (n 120 above) 18, para 4.

It is important to note that Kenya's counterterrorism laws and policies may have the effect of limiting the rights of ordinary citizens.¹²² Human Rights Watch wrote to the UN High Commissioner for Human Rights addressing the human rights violations committed by Kenya under the pretext of counterterrorism.¹²³ The letter highlighted several acts of unlawful killings without any investigation into these deaths by government, abductions, enforced disappearances, torture, discriminatory profiling, sexual abuse and extortion amongst many others. Redress and Reprieve argues that the lack of judicial oversight over the actions of the ATPU has fuelled the abuse of human rights.¹²⁴ Amnesty International restates that law enforcement officials have the right to apply force in the execution of their duties including deadly force.¹²⁵ However, these circumstances are limited to exceptional situations which must be necessary and proportional to the threat.¹²⁶ This should ensure that law enforcement officers exercise due diligence in the execution of their mandate.

3.7 Kenya and Uganda's legislative intervention

Acting on the obligation under Article 2 of the OAU Convention on the Prevention and Combatting of Terrorism, Kenya and Uganda have enacted legislation that criminalizes support or direct participation in acts of terrorism. In 2002, Uganda enacted the Anti-Terrorism Act¹²⁷ while Kenya passed the Prevention of Terrorism Act¹²⁸ in 2012. While Uganda's Anti-Terrorism

¹²² ICJ Eminent Jurists Panel *Terrorism, counter-terrorism and human rights* (2004) 4, Available at: <http://www.icjcanada.org/en/news/ICJEminentJuristsPanelBrochure.pdf> (accessed 8 June 2014); CC Joyner 'The United Nations and Terrorism: Rethinking Legal Tensions between National Security, Human Rights, and Civil Liberties' (2004) 5 *International Studies Perspectives* 241; B Golder & G Williams 'Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of terrorism' (2006) 8(1) *Journal of Comparative Policy Analysis: Research and Practice* 43; MD Kielsgard 'A Human Rights Approach to Counter Terrorism' (2006) 36 *California Western International Law Journal* 249.

¹²³ For the full text, see: www.hrw.org/news/2014/05/29 (accessed 28 August 2014).

¹²⁴ Redress and Reprieve (2009) *Kenya and Counterterrorism, A Time for change*. Available at: www.voltaire.org (accessed 28 August 2014).

¹²⁵ Amnesty International (n 120 above) 11.

¹²⁶ See: UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth UN Congress in Havana, Cuba, 27 August to 7 September 1990; Code of Conduct for Law Enforcement Officials, adopted by General Assembly resolution 34/169 of 17 December 1979; PAJ Waddington 'Police use of deadly force, Policing and Society' (2012) 22(4) *International Journal of Research and Policy* 538; Amnesty International (n 120 above) 11.

¹²⁷ Act No 14 of 2002.

¹²⁸ Act No 30 of 2012.

Act was enacted without many hurdles, Kenya's path to its Prevention of Terrorism Act was not a smooth and straight-forward process. In 2003, the proposed Suppression of Terrorism Bill was rejected by the Kenyan Parliament, human rights organizations and civil society organizations because it allegedly infringed on the freedom of movement, expression, religion and liberty unjustifiably.¹²⁹ A second revision of the Bill in 2006 similarly experienced strong opposition from Parliament and the Muslim community on the grounds that it still embodied serious violations of human rights and unfairly targeted individuals of the Muslim faith.¹³⁰ These concerns seriously delayed the adoption of a specific counterterrorism legislation for Kenya for the next six years. However, Kenya successfully enacted the Prevention of Terrorism Act in 2012 which comprehensively dealt with the crime of terrorism and its associated offences. It is however important to emphasize that the final enacted Prevention of Terrorism Act of 2012 was not drastically different from the Bills that had been initially opposed by Parliament, CSOs and the Muslim Community.

3.7.1 Terrorist organizations under Kenya and Uganda's laws

In addition to constituting counterterrorism agencies, Kenya and Uganda have adopted additional legislative measures that discourage and make it more difficult to participate in and plan acts of terror. These measures include but are not limited to outlawing organizations whose aims and objectives are the commission or facilitation of terrorism. The counterterrorism Acts of Kenya and Uganda both criminalize the formation of organizations or groups whose objectives are the planning and facilitation of terrorism. The reason for outlawing terrorist groups is because these organizations constitute a forum for sharing intelligence, conspiring, recruitment, indoctrination as well as sourcing resources for the commission of acts of terrorism. It is therefore imperative for governments to prevent such meetings whose subject matter is the commission of the crime of terrorism.

¹²⁹ J Mulama 'Kenya's Anti-Terrorism Bill raises concern' (2005) iol news. Available at: http://www.iol.co.za/news/africa/kenya-s-anti-terrorism-bill-raises-concern-1.252804#.U5RBAoGSz_E (accessed 8 June 2014).

¹³⁰ A Thurston 'Kenyan Muslims debate Anti-Terror Law' (2012) *The Revealer: A Review of Religion and Media*. Available at: <http://therevealer.org/archives/11981> (accessed 8 June 2014).

The Anti-Terrorism Act of Uganda prohibits the establishment, operation and logistical support of any institution whose objectives are the promotion of terrorism; publication and dissemination of information for terrorism purposes; and the training or recruitment of people to carry out terrorism.¹³¹ Any person who engages in such activities with the intention of carrying out or facilitating acts of terror is guilty of an offence.¹³² The Act also declares the organizations listed in the Second Schedule to be terrorist organizations.¹³³ The Second Schedule lists four terrorist organizations which include the Lords' Resistance Army (LRA), Lord's Resistance Movement (LRM), Allied Democratic Forces (ADF) and al-Qaeda.¹³⁴ The Act empowers the Minister to amend the Second Schedule by way of statutory instrument subject to Cabinet approval.¹³⁵ The Anti-Terrorism Amendment Act that was adopted by Parliament in June 2015 amended of the Second Schedule to include Boko Haram, al-Shabaab and Islamic Maghreb as terrorist organizations for the purposes of the Act.¹³⁶

Just like in the case of Uganda, Kenya's Prevention of Terrorism Act of 2012 prohibits membership to terrorist groups, a crime which carries a penalty of imprisonment not exceeding thirty years.¹³⁷ The Act prohibits several other acts related to terrorist groups including: dealing with property that is controlled or owned by terrorist groups;¹³⁸ providing or sourcing logistical support for terrorist groups;¹³⁹ harbouring terrorists;¹⁴⁰ providing or sourcing weapons to be used for terrorist activities;¹⁴¹ facilitating the commission of terrorist acts;¹⁴² recruitment of members for a terrorist group;¹⁴³ training and instructing terrorist groups;¹⁴⁴ and convening meetings with the

¹³¹ Sec 9 of the Anti-Terrorism Act of Uganda (2002).

¹³² Sec 9(c) of the Anti-Terrorism Act of Uganda (2002).

¹³³ Sec 10 of the Anti-Terrorism Act of Uganda (2002).

¹³⁴ See the Second Schedule to the Anti-Terrorism Act of Uganda (2002); Human Rights Watch Uganda *Open secret, illegal detention and torture by the Joint Anti-terrorism Task Force in Uganda* (2009) 72.

¹³⁵ Sec 10(2) of the Anti-Terrorism Act of Uganda (2002).

¹³⁶ Para 7 (5) of the Anti-Terrorism Amendment Bill of Uganda (2015)

¹³⁷ Sec 24 Prevention of Terrorism Act of Kenya (2012).

¹³⁸ Sec 8 Prevention of Terrorism Act of Kenya (2012).

¹³⁹ Sec 9 Prevention of Terrorism Act of Kenya (2012).

¹⁴⁰ Sec 10 Prevention of Terrorism Act of Kenya (2012).

¹⁴¹ Sec 11 Prevention of Terrorism Act of Kenya (2012).

¹⁴² Sec 12 Prevention of Terrorism Act of Kenya (2012).

¹⁴³ Sec 13 Prevention of Terrorism Act of Kenya (2012).

¹⁴⁴ Sec 14 Prevention of Terrorism Act of Kenya (2012).

agenda of terrorism.¹⁴⁵ All the aforementioned actions are considered as terrorism and are consequently prohibited in the Act. These provisions have been applied by courts in Uganda to convict persons involved in terrorism and terrorist organizations. In 2016 for example, Hussein Agade and others were charged under the Anti-Terrorism Act and found guilty by the High Court in Uganda for committing terrorism, belonging to a terrorist organization, causing death with malice aforethought and attempted murder during the 2010 World Cup bombings in Kampala.¹⁴⁶

In my view, the prohibition of terrorist organizations/groups is a vital step in the fight against terrorism. The permanent disbanding of terrorist cells will ultimately prevent the spread of terrorist ideologies, resources as well as resources that facilitate acts of terror. However, Kenya and Uganda need to be cautious of suppressing legitimate associations when counteracting terrorist organizations. This measure can easily result in the unfair targeting of innocent groups, societies and religions that may easily be mistaken for terrorist organizations. It is for this reason that Kenya's initial bills on terrorism before the current Act were strongly opposed by Muslims and human rights NGO's for unfairly targeting the Islamic community that has been stereotyped as advocates of terrorism.¹⁴⁷

3.7.2 Suppression of terrorism financing under Kenya and Uganda's laws

As was noted in the previous section, running terrorist operations requires significant resources. It has therefore become a strategy in counterterrorism to target and suffocate the funding of terrorist organizations in order to cripple their operations. The Anti-Terrorism Act of Uganda criminalizes the provision or reception of finances or property intended for the support of terrorism.¹⁴⁸ If any individual has reason to believe that certain finances or property is intended for terrorism, he/she may disclose this information in writing to the Director of Public Prosecutions, a police officer or other authorized public official of such suspicion.¹⁴⁹

¹⁴⁵ Sec 25 Prevention of Terrorism Act of Kenya (2012).

¹⁴⁶ Uganda v Hussein Hassan Afande & 12 others UGHCI CD 1 [2016].

¹⁴⁷ Thurston (n 130 above) para 2.

¹⁴⁸ Sec 12(1) Anti-Terrorism Act of Uganda (2002).

¹⁴⁹ Sec 15(1) Anti-Terrorism Act of Uganda (2002).

The Anti-Money Laundering Act of Uganda (2013) created the Uganda Financial Intelligence Authority (UFIA)¹⁵⁰ to combat money laundering in Uganda. UFIA has the responsibility of analyzing information disclosed to it by individuals and institutions and relay it to the relevant authority; monitor institutions and businesses that could be channels for money laundering; make determinations on the assets of convicted money launderers; facilitate inter-agency co-operation in order to curb money laundering; to deal with extraditions related to money laundering; and other matters related with money laundering including financing of terrorism.¹⁵¹ The Anti-Money Laundering Act mandates an accountable person to pay attention to complex, large and unusual transactions that may be used for illicit activities like terrorism.¹⁵² Such suspicious transactions must be promptly reported to UFIA for further investigation and determination.¹⁵³ UFIA therefore plays a central role in the surveillance of financial transactions in Uganda in order to reduce the transfer of finances for funding of terrorist operations. This is indeed an important measure in the fight against terrorism once finances to terrorists are cut out, it essentially cripples their operations.

The Prevention of Terrorism Act of Kenya similarly criminalizes the collection and provision of property and funding to any person or group for the purposes of terrorism.¹⁵⁴ It must also be noted that an attempt to collect or provide resources to a terrorist group or individual for the purposes of terrorism amounts to an offence under the Act.¹⁵⁵ In addition to collecting or providing resources, the Act prohibits the possession of property for the commission of acts of terror.¹⁵⁶ Any dealings in such property including concealing, removal outside Kenya and transfer also constitutes an offence.¹⁵⁷ Any person with information relating to property of terrorist groups has a duty to disclose such information to the Financial Reporting Centre.¹⁵⁸ The issue of

¹⁵⁰ Sec 18 Anti-Money Laundering Act of Uganda (2013).

¹⁵¹ Sec 19, 20 & 21 Anti-Money Laundering Act of Uganda (2013); Financial Intelligence Authority available at: <http://www.fia.go.ug/> (accessed 15 July 2015).

¹⁵² Sec 9 Anti-Money Laundering Act of Uganda (2013).

¹⁵³ Sec 9(c) (2) Anti-Money Laundering Act of Uganda (2013).

¹⁵⁴ Sec 5 Prevention of Terrorism Act of Kenya (2012).

¹⁵⁵ Sec 5(1) Prevention of terrorism Act of Kenya (2012).

¹⁵⁶ Sec 6 Prevention of terrorism Act of Kenya (2012).

¹⁵⁷ Sec 7 Prevention of Terrorism Act of Kenya (2012).

¹⁵⁸ Sec 42 Prevention of Terrorism Act of Kenya (2012).

financing of terrorism is also supplemented by the Proceeds of Crime and Anti-Money Laundering Act of Kenya.¹⁵⁹ The Act criminalizes money laundering and adopts measures for the identification, prevention, freezing and forfeiture of proceeds of crime including terrorism. Under the Act, receiving, utilizing and possession of proceedings of crime with knowledge of the crime constitutes an offence.¹⁶⁰ Part III of the Act establishes the Financial Reporting Centre (FRC) with its headquarters in Nairobi.¹⁶¹ The FRC has a principal objective of facilitating the identification of criminal proceeds in order to combat money laundering and financing of terrorism.¹⁶² The FRC is empowered to collect, receive and analyse reports of suspicious transactions and information disclosed to its members under Section 42 of the Prevention of Terrorism Act.¹⁶³ If the information received reveals suspicious activity indicative of money laundering or financing of terrorism, the FRC then shares this evidence with relevant authorities, law enforcement agencies, intelligence agencies or supervisory bodies for further action.¹⁶⁴ The Proceeds of Crime and Anti-Money Laundering Act was amended in 2012 to introduce guidelines for different institutions aimed at strengthening measures that prevent money laundering and financing of terrorism.¹⁶⁵

Kenyan law also establishes a committee known as the Counter Financing of Terrorism Inter-Ministerial Committee to implement the measures that prohibit the financing of terrorism.¹⁶⁶ The role of the Committee is to implement UN Security Council resolutions on the suppression of terrorism financing, weapons of mass destruction and other relevant resolutions;¹⁶⁷ formulate and oversee the implementation of the National Strategy and Action Plan on Counter Financing of Terrorism;¹⁶⁸ as well as other functions assigned to it by any other piece of legislation.¹⁶⁹ Under

¹⁵⁹ Proceeds of Crime and Anti-Money Laundering Act of Kenya No. 9 of 2009.

¹⁶⁰ Sec 4 of the Proceeds of Crime and Anti-Money Laundering Act of Kenya.

¹⁶¹ Sec 21 and 22 of the Proceeds of Crime and Anti-Money Laundering Act of Kenya.

¹⁶² Sec 23(1) of the Proceeds of Crime and Anti-Money Laundering Act of Kenya.

¹⁶³ Sec 24 of the Proceeds of Crime and Anti-Money Laundering Act of Kenya.

¹⁶⁴ Sec 24(b) of the Proceeds of Crime and Anti-Money Laundering Act of Kenya.

¹⁶⁵ Proceeds of Crime (Anti-Money Laundering and Terrorist Financing) Guidelines of Kenya (2012).

¹⁶⁶ Sec 4(1) Supplement to the Prevention of Terrorism Act (no. 30 of 2012) the Prevention of Terrorism (implementation of the United Nations Security Council Resolutions on Suppression of Terrorism) Regulations, 2013.

¹⁶⁷ Sec 5(1) (a) Supplement to the Prevention of Terrorism Act (no. 30 of 2012) Regulations.

¹⁶⁸ Sec 5(1) (b) Supplement to the Prevention of Terrorism Act (no. 30 of 2012) Regulations.

¹⁶⁹ Sec 5(1) (c) Supplement to the Prevention of Terrorism Act (no. 30 of 2012) Regulations.

Section 5(2) of the Supplement to the Prevention of Terrorism Act Regulations, the Committee has the power to identify individuals and organizations for designation; inter-agency cooperation with foreign countries; processing requests for de-listing designated organizations; and the performance of its functions under the Regulations.¹⁷⁰

It is submitted that the measures against terrorism financing are a very important part of counterterrorism measures in Kenya and Uganda. However, there is a need to continue striving towards better detection techniques and quicker action on transactions suspected to be for the purpose of financing acts of terrorism. On 27 February 2015, the Financial Action Task Force (FATF)¹⁷¹ noted that Uganda was not making tangible progress in curbing the problem of money laundering regardless of its commitments to that effect.¹⁷² The FATF indicated dissatisfaction with the anti-money laundering programs that had been adopted and called upon Uganda to take more effective counter measures. The FATF recommended the creation of a functional financial intelligence unit to curb money laundering and prevent financing of terrorism.¹⁷³ This unit would aid in better detection of money laundering and development of measures to curb the problem. However, up until now, Uganda has not made any changes to the Uganda Financial Intelligence Authority structure to improve its capabilities as was proposed by the FATF. It is important for Uganda to orient herself with the minimum global standards for the suppression of terrorism financing by adopting the measures that are proposed by the FATF. It is not beneficial to be a member of an international organization like the FATF but avoid implementing the measures and recommendations proposed by them.

In 2010, the FATF placed Kenya on the watch list of countries that constitute a high risk for money laundering due to lack of adequate legislative interventions.¹⁷⁴ This list is reserved for countries

¹⁷⁰ Sec 5(2) Supplement to the Prevention of Terrorism Act (no. 30 of 2012) Regulations.

¹⁷¹ The FATF is an inter-governmental organization created in 1989 by the Ministers of its member states. FATF standardizes and monitors money laundering, financing of terrorism and other challenges to the international financial system. See: <http://www.fatf-gafi.org/pages/aboutus/> (accessed 16 July 2015).

¹⁷² S Rubinfeld 'FATF calls out Uganda for failures on anti-money laundering' (2015) *Risk & Compliance Journal* available at: <http://blogs.wsj.com/riskandcompliance/2015/03/02/fatf-calls-out-uganda-for-failures-on-anti-money-laundering/> (accessed 16 July 2015).

¹⁷³ Rubinfeld (n 172 above) para 2.

¹⁷⁴ See <http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/> (accessed 16 July 2015).

that lack proper regulations and mechanisms to fight against money laundering and the financing of terrorism.¹⁷⁵ After its listing in 2010, Kenya took positive steps towards the adoption of measures against terrorism including financing through the enactment of the Prevention of Terrorism Act as well as the Regulations in the Supplement to the Act. The introduction of measures to detect money laundering, creation of a financial intelligence committee and the criminalization of money laundering as well as terrorism financing led to the removal of Kenya from the FATF's high risk list in 2014.¹⁷⁶ The delisting of Kenya from the high-risk list marks an achievement in its counterterrorism framework. However, Zhao argued that the removal of Kenya from the high risk list does not indicate a change in the state of affairs of the country in relation to the problem of money laundering and financing of terrorism.¹⁷⁷ It was further argued that it was still relatively easy to launder money into the country that can be used to finance terrorism in Kenya through the establishment of phony companies.¹⁷⁸ This analysis shows that Kenya and Uganda still have to improve their legislative framework as well as institutional oversight of financial institutions in order to curb the challenge of money laundering and financing acts of terrorism.

It must be noted that the suppression of terrorist financing may also pose a human rights challenge regarding individuals and organizations whose finances and assets may be seized without sufficient scrutiny. In my view, individuals and organizations who possess opposing views from the government may also be targeted under these interventions. In order to prevent abuse of these measures, there is a need for clarity of laws and procedures regarding the seizure of property and finances. In addition, the process of seizure should be open and transparent allowing for review before an independent institution. Without such vital safeguards, the provisions on suppression of terrorist financing may be open to abuse.

¹⁷⁵ As above.

¹⁷⁶ M Mumo 'Kenya taken off watchlist on money laundering, terror financing' (2 July 2014) *Business Daily* available at: <http://www.businessdailyafrica.com/Kenya-cleared-on-cash-laundering-watchlist/-/539552/2369350/-/85lq91/-/index.html> (accessed 16 July 2015).

¹⁷⁷ G Zhao 'Kenya's removal from FATF's gray list doesn't mean much' (14 July 2014) *Global Financial Integrity* available at: <http://www.gfintegrity.org/kenyas-removal-fatf-gray-list/> (accessed 16 July 2015).

¹⁷⁸ Zhao (n 177 above) para 6.

3.7.3 Extradition of terrorist suspects between Kenya, Uganda and Tanzania

Extradition is a legal process by which an individual who has either been charged or convicted of an offence is apprehended in another state and forcibly returned back to the state where the alleged offence was committed for trial or to serve the punishment.¹⁷⁹ Joyner notes that although a harbouring state does not have a binding obligation to extradite an individual to the requesting state, the practice of extradition of criminals and suspects has become common place today.¹⁸⁰ This practice reflects Hugo Grotius' view in which he believed that a harbouring state had a duty to either prosecute or extradite any offender who is found within its jurisdiction at the request of another state.¹⁸¹ One of the key strategies of counterterrorism is to apprehend, prosecute and punish those who are found guilty of perpetrating terrorism in various capacities. The challenge of a suspect skipping the jurisdiction of the country in which the crime was committed is a very real reality which necessitates international cooperation to bring such individuals to justice.¹⁸² It must also be noted that the unreasonable refusal of an extradition request might amount to a state condoning crime. The counterterrorism legislation of Kenya and Uganda provides for extradition as discussed in the next paragraph.

The Anti-Terrorism Act of Uganda provides any request for extradition must be carried out in accordance with the procedures set out in the Extradition Act of Uganda (1964). Similarly, Kenyan law designates terrorism as an extraditable offence under the Prevention of Terrorism Act by amending the Extradition (Contiguous and Foreign Countries) Act of 1987 (revised in 2012) to include terrorist offences. The designation of terrorism as an extraditable offence by both Kenya and Uganda is a positive step that ensures that terrorist offenders who commit offences and skip the jurisdiction do not get away with wrong doing. It therefore ensures that if apprehended, they must be sent back to the requesting state to be prosecuted and punished if

¹⁷⁹ CC Joyner 'The United Nations and Terrorism: Rethinking Legal Tensions between National Security, Human Rights, and Civil Liberties' (2004) 5 *International Studies Perspectives* 241.

¹⁸⁰ As above.

¹⁸¹ International Law Commission *The obligation to extradite or prosecute (aut dedere aut judicare)*. Final Report of the International Law Commission (2014) Adopted by the International Law Commission at its sixty-sixth session, in 2014, and submitted to the General Assembly as a part of the Commission's report covering the work of that session, para 1(2).

¹⁸² International Law Commission (n 181 above), para 1(1).

found guilty. Without proper mechanisms of extradition of terrorist offenders, such criminals would escape justice with impunity. It must be emphasized that extradition must be carried out in accordance with the provisions of the law.

In 2010, a total of eleven terrorist suspects from Kenya, Uganda and Tanzania were apprehended and remanded in Uganda following the 2010 World Cup terrorist bombings that took place in Kampala.¹⁸³ There are contradicting accounts regarding how the Kenyan and Tanzanian suspects were taken into Ugandan custody. The Kenyan suspects were allegedly rounded up and immediately driven to the Ugandan border where they were handed over to Ugandan security forces without engaging in any formal procedures.¹⁸⁴ On 29 July 2010, Hassan Elijuma Agade filed a writ of habeas corpus for his missing son and the Anti-Terror Police Unit admitted to apprehending and handing him over to Ugandan authorities.¹⁸⁵ The Tanzanian suspects were also allegedly arrested and extradited to Uganda without proper procedure.¹⁸⁶ In October 2014, the suspects filed a petition in the Constitutional Court in which they challenged their arrest, detention, extradition, interrogation and torture.¹⁸⁷ Despite the allegations of torture and irregularities regarding their extradition to Uganda, the Constitutional Court ruled that the irregularities of Kenyan and Tanzanian authorities could not be attributed to Ugandan security personnel.¹⁸⁸ The Court also held that the offences were serious and the petitioners posed a significant security risk to life and property in Uganda and abroad.¹⁸⁹ As such, their application was unsuccessful.

This case clearly highlights the challenges regarding the process of extradition. There are rules of procedure laid down in the law which ought to be followed during any extradition process.

¹⁸³ N Gisesa 'Four years agony as Kenyan terror suspects extradited to Uganda cry out for justice' (12 July 2014) *Standard Media* available at: <http://www.standardmedia.co.ke/article/2000127933/four-years-agony-as-kenyan-terror-suspects-extradited-to-uganda-cry-out-for-justice> (accessed 18 July 2015).

¹⁸⁴ As above.

¹⁸⁵ Gisesa (n 183 above) para 4.

¹⁸⁶ H Nsambu 'Terror suspects challenge extradition to Uganda' (16 November 2011) *The New Vision* available at: <http://www.newvision.co.ug/news/30070-terror-suspects-challenge-extradition-to-uganda.html> (accessed 18 July 2015).

¹⁸⁷ *Omar Awadh & 10 Others v Attorney General of Uganda* [2014] UGCC 18. Constitutional Court of Uganda Consolidated Constitutional Petition Numbers 55 and 56 of 2011.

¹⁸⁸ *Omar Awadh & 10 Others v Attorney General of Uganda* (n 187 above) ruling i (d).

¹⁸⁹ *Omar Awadh & 10 Others v Attorney General of Uganda* (n 187 above) ruling i (b).

However, there were clear irregularities in the extradition of both the Kenyan and Tanzanian terrorism suspects to Uganda. As was seen in the court ruling above, it suggests that given the grave nature of terrorism and indeed several other crimes, courts may not willingly release suspects who are already in police custody on account of some irregularities in their apprehension and extradition. Such an order would most likely be unpopular with members of the public who have been or are likely to be affected by terrorism. However, laws and regulations are enacted to protect members of the public and to regulate the powers of public officials. It is therefore unacceptable for officials to simply disregard rules of procedure because they are meant to protect the rights and freedoms of individuals.

3.8 Conclusion

This chapter focused on the situational analysis of the problem of terrorism in Kenya and Uganda. The chapter started by examining the extent of the problem of terrorism in Kenya and Uganda and how it has been fuelled by al-Shabaab's conflict in Somalia. It was highlighted that the major reason why al-Shabaab has staged terrorist attacks in Kenya and Uganda is due to the deployment of troops in Somalia under the AMISOM intervention. Just like other terrorist organizations like al-Qaeda, al-Shabab is opposed to the deployment of foreign troops in Somalia, a country that is considered to be traditionally Islamic. Al-Shabaab has therefore taken the fight into the territories of these two countries in an endeavour to disincentivize their 'interference' in Somali affairs.

These cross-border acts of terror have been partially fuelled by the lax border control at the Kenya-Somali border as well as the Kenya-Uganda border. The lack of proper control of goods and persons crossing state lines has effectively allowed for relatively easy passage of terrorists as well as illicit cargo and weapons used in carrying out terrorist attacks. In response to this problem, Kenya and Uganda have adopted a number of measures aimed at minimizing the threat of terrorism in their homelands. These measures have include the constitution of specialized counterterrorism agencies to deal with the threat of terrorism, prohibition of terrorist organizations, suppression of terrorist financing and extradition of terrorist suspects between Kenya and Uganda to answer charges for crimes committed.

In the case of Uganda, it was noted that the police Uganda Police Force Directorate of Counterterrorism created the Counter Terrorism Police Unit whose role is to deal with hostage situations, bomb defusal and apprehension of terrorists. However, lack of proper training, resources and proper intelligence sharing hindered the overall effectiveness of the unit. While retaining the Unit, the Ugandan government formed a specialized counterterrorism agency known as the JATT in order to better respond to the ever-increasing threat of terrorism. While the agency has been effective in detecting and preventing threats of terrorism, its operations have been overshadowed by irregularities of gross violations of human rights. The agency has been cited in several cases of violations of human rights including torture, illegal detention and even arbitrary deprivation of life. The JATT's biggest shortfall this far has been the problem of impunity surrounding its operations and accountability. This has also been the same in the case of Kenya that commissioned the ATPU to take the lead in its counterterrorism operations. However, ATPU's counterterrorism operations have been criticized by a number of human rights organizations and defenders as being inhumane and having complete disregard for human life and dignity.

The major challenge with impunity of law enforcement involved in counterterrorism is that the role of police in any democracy is to uphold the law, and to protect and serve in the first place. It is therefore immoral for the police force to contravene the same laws which they are commissioned to uphold. There is indeed a serious need to rework and enforce a proper framework that ensures accountability of law enforcement for their actions during the discharge of their duties.

This chapter also examined Kenya and Uganda's legislative responses to the problem of terrorism including the prohibition of terrorist organizations/groups; the suppression of terrorism financing; and the extradition of terrorism suspects. Under Kenya's Prevention of Terrorism Act and Uganda's Anti-Terrorism Act, the two jurisdictions criminalize terrorism and list an extensive number of offences which constitute terrorism. The Acts also prohibit the formation and operation of terrorist organizations as well as recruiting members, training and dealing in property that is intended to further the objectives of the terrorist group. This is undoubtedly a

very important step of countering terrorism. However, it was noted that care must be taken in the prohibition of terrorist groups lest it leads to the suppression of legitimate societies and movements.

In addition to the prohibition of terrorist groups, Kenya and Uganda have also adopted measures that seek to suppress the financing of terrorism. It was noted that terrorists require resources to implement their objectives and therefore, it would be an effective step to cut off such funding which then stifles their operations. The two countries have also established supervisory bodies that are charged with the mandate of combatting money laundering and financing of terrorism. However, the FATF in February 2015 noted that Uganda was not making progress in combating money laundering and the financing of terrorism. Kenya on the other hand was removed from the FATF's grey list of high risk countries but continues to be a safe haven for money laundering. Therefore, despite the adoption of laws that seek to minimize terrorism financing, there is a need for Kenya and Uganda to implement as well as improve on the current regulations in order to curb the problem.

The final part of the chapter dealt with the issue of extradition of terrorist suspects between Kenya and Uganda to face charges for the crimes they are accused of. It was highlighted that while there is no duty to extradite suspects, the practice has become common today. However, just with any legal process, there is a formal procedure that should be followed before an individual is extradited. The major challenge is that such procedures are hardly followed by law enforcement as was illustrated in the case of the Kenyans and Tanzanians who were bundled up and smuggled into Uganda. When this extradition was challenged, the court was reluctant to nullify the extradition given the serious nature of the crime for which the accused persons were indicted for.

CHAPTER FOUR

4. International and regional counterterrorism frameworks and their implications for Kenya and Uganda

4.1 Introduction

Terrorism and its negative effects have devastated the entire world including Kenya and Uganda claiming scores of lives, destroying property and disrupting lives. While international awareness on terrorism and its consequences was heightened in the wake of the 2001 terrorist attacks on the United States,¹ the influence of terrorist organizations has spread throughout the world including the East African region. In 2006, the United Nations adopted the UN Counter-Terrorism Strategy which has become an international blueprint for the effective prevention of terrorism.² The Strategy enumerates a number of measures that are vital for effectively countering terrorism including the respect for the rule of law and human rights.³ This Strategy is also instructive to Kenya and Uganda's counterterrorism frameworks that seek to prevent acts of terror, radicalization of individuals with terrorist ideals, as well as punish individuals who are found guilty of perpetrating terrorism.

Acting on the strength of the UN Counter-Terrorism Strategy, the UN has continued pioneering global efforts to combat terrorism while respecting human rights. These initiatives have also been implemented at regional and sub-regional level. The African Union and the East African Community have consequently played a more significant role in formulating frameworks, policies and guidelines on the prevention of terrorism. This chapter therefore examines the international, regional and sub-regional counterterrorism frameworks and their implications on Kenya and Uganda.

¹ B Hoffman 'Rethinking terrorism and counterterrorism since 9/11' (2002) 25(5) *Studies in conflict & terrorism* 304.

² Adopted by the UNGA on 8 September 2006 by resolution and an annexed Plan of Action (A/RES/60/288) available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/504/88/PDF/N055_0488.pdf?OpenElement (accessed 23 October 2014).

³ As above.

4.2 Implications of the UN Global Counter-Terrorism Strategy for East Africa

The UN Counter-Terrorism Strategy (UNCTS)⁴ adopts a global strategy in the fight against terrorism which includes equipping law enforcement and security agencies to better handle threats of terror.⁵ In addition to emphasizing respect for human rights and the rule of law, the UNCTS calls upon states to address factors that might promote terrorism including poor governance, economic and social inequality and poverty.⁶ The UNCTS addresses both preventive measures and the root causes of terrorism. It is submitted that any counterterrorism strategy that squarely focuses on the manifestations of terrorism while completely ignoring its root causes will not yield a long-lasting solution.⁷ This has been particularly true for terrorist organizations in East Africa like al-Shabaab and Mungiki that have lured unemployed youth into terrorism with a promise of financial stability.⁸ Terrorists have also been known to bribe security and immigration officers who often turn to corruption to supplement their insufficient incomes and improve their living conditions.⁹ Until the problem of corruption, lack of employment and poverty is addressed, such terrorist organizations may present the next best source of income and livelihoods.¹⁰

Botha argues that concentrating on targeting and prosecuting perpetrators is not an effective strategy for counterterrorism in Africa.¹¹ She contends that most counterterrorism strategies concentrate on the manifestations of terrorism rather than addressing the underlying causes of terrorism in the first place.¹² Kanu also puts forth an Afrocentric argument in which he reasons

⁴ Adopted by the UNGA on 8 September 2006 by resolution and an annexed Plan of Action (A/RES/60/288) available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/504/88/PDF/N055_0488.pdf?OpenElement (accessed 23 October 2014).

⁵ UN Counter-Terrorism Strategy (2006), para 10.

⁶ UN Counter-Terrorism Strategy (2006), para 49.

⁷ C Goredema & A Botha 'African commitments to combating crime and terrorism: A review of eight NEPAD countries' (2004) *African Human Security Initiative*, Paper 3.

⁸ P Kimunguyi *Terrorism and Counter terrorism in East Africa* (2010) available at: <http://artsonline.monash.edu.au/radicalisation/files/2013/03/conference-2010-terrorism-counter-terrorism-eafrica-pk.pdf> (accessed 06 March 2015) 17.

⁹ DH Shinn 'Fighting terrorism in East Africa and the Horn' (2004) *Foreign Service Journal* 38.

¹⁰ UN Counter-Terrorism Strategy (2006) Annex Plan of Action, para I (5-6).

¹¹ A Botha 'Challenges in understanding terrorism in Africa: A human security perspective' (2008) 17(2) *African security Review* 34.

¹² C Goredema & A Botha 'African commitments to combating crime and terrorism: A review of eight NEPAD countries' (2004) *African Human Security Initiative*, Paper 3.

that counterterrorism measures must be suited to African realities in order to be effective.¹³ He argues that one of Africa's major problems is poor management of resources which sometimes leads to armed conflict and crime including terrorism for example South Sudan and Somalia. Over population puts a strain on already stretched resources which leaves some members of society disgruntled.¹⁴

Africa is a continent that is endowed with several natural resources for example gold, silver, diamonds, platinum and oil.¹⁵ However, these resources have in many cases become a cause of conflict and it is no wonder that Feldman and other scholars have referred to this problem as 'Africa's curse of resources.'¹⁶ Several terrorist organizations for example al-Shabaab in Somalia have risen to claim a share of the resources which in most instances benefits only a select few.¹⁷ Sabiti noted that resource allocation in Uganda is a political function that entails a number of processes for example budgeting, development of infrastructure, improvement of education and 'dividing the national cake.'¹⁸ However, Africa's political climate is characterized by poor

¹³ Al Kanu 'The African Union' in G Nesi (ed) *International Cooperation in Counter-Terrorism: The UN and Regional organizations in the fight against terrorism* (2006) 175-176.

¹⁴ RL Feldman 'The root causes of terrorism: Why parts of Africa might never be at peace' (2009) 25(4) *Defense & Security Analysis* 356.

¹⁵ As above

¹⁶ L Nadira 'The resource curse revised: Conflict and Coltan in the Congo' (2007) 29 *Harvard International Review* 3; AYE Ahali & I Ackah 'Are they predisposed to the resources curse? Oil in Somalia' (2015) 5 *Economics and Policy* 1.

¹⁷ R Marchal 'A tentative assessment of the Somali Harakat Al-Shabaab' (2009) 3 *Journal of Eastern African Studies* 3; SJ Hansen *Al-Shabaab in Somalia: The History and Ideology of a Militant Islamist Group* (2013) 2005-2012; D Gartenstein-Ross 'The strategic challenge of Somalia's Al-Shabaab: Dimensions of Jihad' (2009) 16(4) *Middle East Quarterly* 25-36; MV Hoehne 'Resource conflict and militant Islamism in northern Somalia (2006-2013)' (2014) *Review of African Political Economy* 2. Available at: <http://dx.doi.org/10.1080/03056244.2014.901945> (accessed 24 April 2015). Hansen argues that acts of terrorism carried out by al-Shabaab in and outside Somalia's borders can be attributed to disagreements over the control of mineral resources. For example, Puntland's attempt in 2006 to drill oil and mine mineral resources in the territory of the Warsangeli clan led to disagreements between the two clans. The clans sought to resolve the conflict peacefully but Puntland together with other foreign prospecting companies continued exploring areas of Warsangeli that were rich in oil and minerals. Warsangeli militias that were affiliated to al-Shabaab attempted to fight the Puntland forces with little success. Al-Shabaab officially took over the battle for the minerals in 2012 and started attacking the Puntland leaders strengthening the organization's influence over resources in Somalia. This influence was compromised by the intervention of AMISOM troops that are seeking to restore an effective government in the state of Somalia. As a result, al-Shabaab resorted to terrorism inside and outside Somalia in an attempt to preserve their authority in the country.

¹⁸ B Sabiti *In Uganda, politics affect the impact of open data on resource allocation* (21 June 2013) available at: <http://www.opendataresearch.org/content/2013/465/uganda-politics-affect-impact-open-data-resource-allocation> (accessed 6 July 2015).

governance that is often riddled with dictatorships, corruption, favouritism and lack of the rule of law.¹⁹ The 2014 corruption perception index shows that on a scale ranging from the least to the most corrupt counties, Uganda came in at number 142 while Kenya ranked number 146 out of a total of 175.²⁰ Nepotism, corruption and favouritism are some of the challenges that transcend all the vital state institutions including the judiciary, police and governmental ministries of Kenya and Uganda and this affects the objectivity of the resource allocation process.²¹ The plight of disadvantaged persons driven by the desire to have a slice of 'the national cake' resulted in the rise of terrorist organizations like the ADF and LRA in Uganda,²² and the Mungiki and SLDF in Kenya.²³

Citing the challenge of the root causes of terrorism, the UNGA under the UNCTS and its annexed Plan of Action adopted measures that address factors that contribute to the prevalence of terrorism.²⁴ The UNGA in the annexed Plan of Action identified the following factors as some of the issues that have led to persistence of terrorism: unsettled civil wars and other forms of conflict; inhumane treatment of terror suspects; lack of respect for the rule of law; violation of fundamental rights and freedoms; unequal treatment of persons; religious discrimination; poor governance; and political exclusion.²⁵ In order to counteract these deeply rooted problems that contribute to terrorism, it was resolved that there is a need to re-examine and bolster the UN's role in conflict resolution including prevention, reconciliation, rehabilitation, negotiation, peace-

¹⁹ RL Feldman 'The root causes of terrorism: Why parts of Africa might never be at peace' (2009) 25(4) *Defense & Security Analysis* 364; S Rose-Ackerman 'The challenge of poor governance and corruption' (2005) *Especial 1 Direito GV L. Rev.* 207; M Moore 'Political Underdevelopment: What causes 'bad governance'?' (2001) 3(3) *Public Management Review* 385-418; DA Bräutigam & S Knack 'Foreign aid, institutions, and governance in Sub-Saharan Africa' (2004) 52(2) *Economic Development and Cultural Change* 255-285.

²⁰ Transparency International *Corruption perceptions index 2014* (2014) available at: <https://www.transparency.org/cpi2014/results> (accessed 03 March 2015).

²¹ KA Elliott 'The problem of corruption: A tale of two countries' (1997-1998) 18 *Nw. J. Int'l L. & Bus.* 524.

²² Second schedule to the Anti-Terrorism Act of Uganda (2002); F Van Acker 'Uganda and the Lord's Resistance Army: The New Order No One Ordered' (2004) 103(412) *African Affairs* 335; L Themner and P Wellensteen 'Armed Conflicts, 1946-2012' (2013) 50(4) *Journal of Peace Research* 515.

²³ A Oloo, O Wafula & A Ikelegbe 'A Marginalization and the rise of Militia Groups in Kenya; The Mungiki and the Saboot Land Defence Force' 2010 University of Nairobi Digital Repository. Available at: <http://erepository.uonbi.ac.ke:8080/xmlui/handle/123456789/30007> (accessed 12 January 2015).

²⁴ UN Counter-Terrorism Strategy (2006) Annex Plan of Action, para I.

²⁵ As above.

building and mediation among other measures to ensure lasting peace.²⁶ This plan of action is essential for Kenya and Uganda that have both had a longstanding history of civil war and internal militias like the Mungiki and SLDF in Kenya and the LRA and ADF in Uganda who have been designated as terrorist organizations.²⁷ In addition to promoting effective conflict resolution, the UNGA emphasized the need for the UN to develop frameworks that encourage social, cultural, political and religious tolerance within communities.²⁸ The realities of certain ethnicities and religions being side-lined from mainstream society have bred anger and animosity resulting in the emergence of terrorist groups that seek to level the playing ground through violence. It is with this consideration that the Plan of Action called upon the UN Educational, Scientific and Cultural Organization (UNESCO) to spearhead faith-based dialogue between communities to ensure peace and awareness in all institutions.²⁹ UNESCO has consequently identified several religious organizations and communities which it has partnered with in an effort to improve their welfare and ensure sustainable development.³⁰

It must be noted that the UNCTS does not create a completely new framework on counterterrorism. It consolidates the otherwise fragmented counterterrorism mechanisms contained in several resolutions, measures and frameworks into one document. By including an outline that addresses the causes of terrorism, the UNCTS obligates state parties to expand their focus from a law enforcement centered approach to a socio-economic, political and human rights framework.³¹ This perspective has ultimately taken into consideration the realities of African

²⁶ UN Counter-Terrorism Strategy (2006) Annex Plan of Action, para I (1).

²⁷ A Oloo, O Wafula & A Ikelegbe 'A Marginalization and the rise of militia groups in Kenya; The Mungiki and the Saboot Land Defence Force' 2010 University of Nairobi Digital Repository. Available at: <http://erepository.uonbi.ac.ke:8080/xmlui/handle/123456789/30007> (accessed 12 January 2015); Second schedule to the Anti-Terrorism Act of Uganda (2006); E Leonard 'The Lord's Resistance Army: and African Terrorist Group?' (2010) 4(6) *Perspectives on Terrorism* 22; KP Apuuli 'The International Criminal Court (ICC) and the Lord's Resistance Army (LRA) insurgency in Northern Uganda' (2004) 15 *Criminal Law Forum* 396; Congressional Research Service *The Lord's Resistance Army: The U.S. Response* (2014) 12.

²⁸ UN Counter-Terrorism Strategy (2006) Annex Plan of Action, para I (2).

²⁹ UN Counter-Terrorism Strategy (2006) Annex Plan of Action, para I (3).

³⁰ UNESCO (2017) *Education*. Available at: www.unesco.org/new/en/education/themes/leading-the-international-agenda/education-for-sustainable-development/partners/faith-based-organizations/ (accessed 16 July 2017).

³¹ UN Counter-Terrorism Strategy (2006) para 26.

states whose economies are plagued by the above discussed social, political, cultural and economic hardships.³² It is therefore necessary for governments, strategists, stakeholders and donors to realign the focus of their policies to include economic, social, political and cultural initiatives that are geared towards uplifting the status of their citizens. In order to achieve this, there is a need to utilize the vast UN network of resources in order to provide an opportunity for states to be able to implement the UNCTS. This also calls for an involvement of UN agencies whose mandates are not directly linked with counterterrorism, but are responsible for the implementation of some of the aspects that were identified as the causes of terrorism including conflict, poverty, and lack of employment, human rights violations and religious intolerance amongst others.³³

4.3 African Union framework for counterterrorism

The major challenge with the UNCTS framework is that it supposes a 'one size fits all' approach when dealing with the challenge of terrorism. The significance of developing an African regional system for counterterrorism is that it firstly takes into account African realities of terrorism and secondly, it breaks down an otherwise broad and extensive framework into manageable phases which are more practical for African states. With Africa's long history of civil wars, rebellions and liberation struggles, there is a need for Africa's counterterrorism strategy to strike a delicate balance between human rights and state security.

4.3.1 African counterterrorism framework before the OAU terrorism convention

In 1992, the OAU adopted the *OAU Resolution on the Strengthening of Cooperation and Coordination among African States* which called upon African States to strengthen unity among themselves through cooperation, coordination and sharing of information.³⁴ The Resolution

³² See: Kanu (n 13 above) 176.

³³ United Nations *Conditions conducive to the spread of terrorism*. Available at: <https://www.un.org/counterterrorism/ctitf/en/conditions-conducive-spread-terrorism> (accessed 08 January 2017).

³⁴ *OAU Resolution on the Strengthening of Cooperation and Coordination among African States*. Adopted by the Assembly of Heads of State and Government of the Organization of African Unity, meeting in the Twenty-eight Ordinary Session in Dakar, Senegal from 29 June to 1 July 1992. AHG/Res. 213 (XXVIII). Available at: <http://caert.org.dz/AU-Res-Dec-Decl/AHG-Res-213-Dakar.pdf> (accessed 08 January 2017).

further called upon states to respect each other's sovereignty, non-interference in internal affairs, and mutual support for freedom, justice and peace.³⁵ Although the Resolution was not directly addressing counterterrorism, it addressed some issues that are critical towards countering terrorism. The OAU resolved not to tolerate any organizations using religion, ethnicity and other socio-cultural justifications to engage in hostilities.³⁶ In addition, African states resolved not to offer any assistance to any group or organization that would threaten the peace and stability of any other member state.³⁷ This Resolution set the platform for the adoption of counterterrorism frameworks and in 1994 the OAU adopted the *Declaration on a Code of Conduct for Inter-African Relations* which directly addressed the problem of terrorism in Africa.³⁸ It was emphasized in the Code of Conduct that all forms of extremism, fanaticism and terrorism that are motivated by ethnicity and religion, threaten the peace, security and stability of states.³⁹ In order to combat terrorism and extremism, the Code of Conduct mandated state parties to strengthen regional cooperation and dialogue in an effort to address socio-economic, cultural and political challenges within the continent.⁴⁰ The Code of Conduct also expressed support for the UN's role of facilitating peace-building processes and ensuring global security. It was further reiterated the OAU member states have an obligation to implement the UN principles and guidelines on counterterrorism.⁴¹

The African Heads of State strongly condemned all forms of terrorism⁴² and affirmed their determination to fight this crime by adopting frameworks that prohibit religious and ethnic intolerance while upholding human rights and freedoms.⁴³ In addition, the Heads of State

³⁵ See the preamble to the *OAU Resolution on the Strengthening of Cooperation and Coordination among African States*.

³⁶ OAU Resolution on the Strengthening of Cooperation and Coordination among African States, para 1.

³⁷ As above.

³⁸ OAU Declaration on a Code of Conduct for Inter-African Relations. Adopted by the thirtieth ordinary session of the Assembly of Heads of State and Government at the thirtieth ordinary session 13 – 15 June, 1994 Tunis, Tunisia AHG/Decl. 1-6 (XXX) AHG/Res. 228-233 (XXX). Available at: <https://issafrica.org/ctafrica/uploads/OAU%20Declaration%20on%20the%20Code%20of%20Conduct%20for%20Inter-African%20Relations.PDF> (accessed 08 January 2016).

³⁹ See the preamble to the *OAU Declaration on a Code of Conduct for Inter-African Relations*.

⁴⁰ *OAU Declaration on a Code of Conduct for Inter-African Relations*, 10, para 1.

⁴¹ *OAU Declaration on a Code of Conduct for Inter-African Relations*, 10, para 3.

⁴² *OAU Declaration on a Code of Conduct for Inter-African Relations*, 11, para 10.

⁴³ *OAU Declaration on a Code of Conduct for Inter-African Relations*, 11, para 5.

restated their obligation to refrain from funding, facilitating, harbouring, prompting and setting-up organizations whose aims and objectives are related to the commission of acts of terror.⁴⁴ In this regard, member states pledged to ensure that their territories and resources are not made available for terrorist organizations to carry out training, indoctrination and set up strongholds from which to carry out terrorist attacks against another member state.⁴⁵ Finally, the Heads of State restated their commitment to fulfil the obligations placed upon them by international law to ensure that individuals who participate in acts of terror are held accountable for their actions.⁴⁶ Where the crime was committed against another member state, the Code of Conduct mandated that such an individual be extradited to the states where the crime was committed to face justice.⁴⁷ All these factors are aimed strengthening African states' capacity to fight terrorism while respecting fundamental human rights and freedoms.

The discussion above highlights a constant commitment of African states to fight against extremism, religious intolerance and terrorism in all its forms. The Heads of States have repeatedly pledged their commitment to fight terrorism within their territories and cooperate with other states in bringing terrorists to justice. This is a commendable commitment because the effects of terrorism consequently constitute a violation of human rights in the first place. However, it must be noted that these early commitments made by African states to fight terrorism did not emphasize the need to respect human rights while fighting terrorism. This was indeed a major deficiency in the instruments discussed above.

4.3.2 OAU Convention on the Prevention and Combating of Terrorism

The Organization of African Unity (OAU) adopted the OAU Convention on the Prevention and Combating of Terrorism in 1999⁴⁸ to serve as the principal counterterrorism framework on the African continent. The OAU Terrorism Convention consolidated African efforts, structures and

⁴⁴ OAU Declaration on a Code of Conduct for Inter-African Relations, 15, para 12.

⁴⁵ As above.

⁴⁶ OAU Declaration on a Code of Conduct for Inter-African Relations 16, para 12.

⁴⁷ As above.

⁴⁸ Adopted in Algiers, Algeria on 14 July 1999 and entered into force on 6 December 2002. Available at: <http://www.au.int> (accessed 20 March 2014); C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2013) 90.

initiatives on the fight against terrorism. It must also be noted that Kenya and Uganda have both ratified the OAU Terrorism Convention.⁴⁹

The Convention notably adopts a definition for the act terrorism,⁵⁰ a task which most international treaties have completely avoided. Article 1(3) of the OAU Terrorism Convention defines terrorism as any crime which has the potential of endangering life, occasioning bodily injury, causing death and endangering private or public property.⁵¹ However, the factor that distinguishes terrorism from any other ordinary crime is the intention for the commission of the criminal act. The crime must be coupled with the intention to cause fear to a population or government in order to force them to adopt or abstain from a position or action; to disrupt delivery of services; and to cause insurgency and instability in a state.⁵² The intention to cause the above listed outcomes must therefore be proved if an individual is to be charged with terrorism. The OAU Terrorism Convention also makes it an offence to aid and abet the commission crimes of a terrorist nature. Aiding and abetting includes encouraging, financing, conspiring and recruiting individuals to commit acts of terrorism.⁵³

The Convention calls upon state parties to criminalize terrorism under their national laws and punish all perpetrators with appropriate sanctions.⁵⁴ Just like in the OAU Code of Conduct, the OAU Terrorism Convention places an obligation upon state parties to refrain from supporting,

⁴⁹ For the full list of African Countries that have signed and ratified the OAU Convention on the Prevention and Combating of Terrorism, see the status list available at: <https://au.int/en/treaties/oau-convention-prevention-and-combating-terrorism> (accessed 03 November 2017).

⁵⁰ Art 1(3) of the OAU Terrorism Convention. 'Terrorist act means: (a) any act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to: (i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or (iii) create general insurrection in a State. (b) any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in paragraph (a) (i) to(iii).'

⁵¹ Art 1(3) (a) of the OAU Convention on Terrorism.

⁵² As above.

⁵³ Art 1(3) (b) of the OAU Convention on Terrorism.

⁵⁴ Art 2(a) of the OAU Convention on Terrorism.

arming, financing and harbouring terrorist organizations.⁵⁵ In light of this obligation, states must develop early detection methods of terrorist acts; strengthen border and immigration controls; improve security of person including foreign diplomatic missions; and improve intelligence sharing among states.⁵⁶

The Convention also places an obligation upon states to extradite persons charged for terrorism to the country where the crime took place at the request of the state in conformity with the provisions of the Convention⁵⁷ discussed in this paragraph. State parties must therefore include terrorism as an extraditable offence in any existing extradition agreements.⁵⁸ Extradition requests must be made in writing⁵⁹ through diplomatic channels or the appropriate authorities.⁶⁰ The request must be accompanied by an original copy of the sentence, warrant or order; a description of the offence; and a description of the wanted person.⁶¹ In cases of urgency, the requesting state may request the other state to apprehend the person while the extradition procedure is being finalized.⁶² The Convention under Part V also provides for mutual legal assistance and extraterritorial investigations also known as *commission rogatoire*. Under these provisions, one state may request for assistance to carry out investigations on its territory.⁶³ Such investigations may include questioning of witnesses; examining transcripts and statements; opening of investigations; gathering of information; inspecting relevant evidence; conducting searches and seizures; and serving judicial notices.⁶⁴ Any extraterritorial investigation must be conducted in accordance with the requested state's laws.⁶⁵

It must be noted that just like any other counterterrorism strategy, the OAU Terrorism Convention may have an adverse impact on the enjoyment of human rights and freedoms in the

⁵⁵ Art 4(1) of the OAU Convention on Terrorism.

⁵⁶ As above.

⁵⁷ Art 8(1) of the OAU Convention on Terrorism.

⁵⁸ Art 9 of the OAU Convention on Terrorism.

⁵⁹ Art 11 of the OAU Convention on Terrorism.

⁶⁰ Art 10 of the OAU Convention on Terrorism.

⁶¹ Art 11(a-c) of the OAU Convention on Terrorism.

⁶² Art 13 of the OAU Convention on Terrorism.

⁶³ Art 14 of the OAU Convention on Terrorism.

⁶⁴ Art 14(a-g) of the OAU Convention on Terrorism.

⁶⁵ Art 16 of the OAU Convention on Terrorism.

event that adequate safeguards are not adopted and implemented. The preamble to the OAU Terrorism Convention notes that the act of terrorism in itself is a human rights violation because it deprives victims of several entitlements including but not limited to bodily integrity, freedom, life and security.⁶⁶ As such, the counterterrorism measures adopted in the Convention are essential towards safeguarding human rights in the first place. However, the OAU realized that the measures in the Convention may be invoked to unlawfully limit fundamental human rights and freedoms. It is for this reason that the Convention emphasizes that no provisions adopted therein should be interpreted as derogating from international humanitarian law and human rights as contained in the ACHPR.⁶⁷ This provision is very important for guiding African states in the interpretation of the Convention in order to ensure that human rights are not unlawfully infringed upon.

The AU adopted the Protocol to the OAU Terrorism Convention pursuant to Article 21 of the Convention which entered into force on 8 July 2004.⁶⁸ Kenya and Uganda have only gone as far as signing the Protocol to the OAU Convention on the Prevention and Combating of Terrorism.⁶⁹ The purpose of the Protocol is to implement Article 3(d) of the Protocol relating to the Establishment of the Peace and Security Council of the African Union.⁷⁰ The Protocol also lists certain commitments which states undertake to implement and these include: adopting measures to protect human rights; prohibit terrorist organizations; prohibit terrorist financing; enhance international intelligence sharing; punish mercenaries; align national laws with international law; cooperate on the topic of weapons of mass destruction; submit state reports to the PSC on counterterrorism measures; report terrorism to the PSC; ratify international counterterrorism conventions; and prohibit torture, inhuman and degrading treatment.⁷¹ The

⁶⁶ Preamble to the OAU Convention on Terrorism, 2, para 2.

⁶⁷ Art 22(1) of the OAU convention on Terrorism.

⁶⁸ Protocol to the OAU Terrorism Convention. Available at: <http://www.peaceau.org/uploads/protocol-oau-convention-on-the-prevention-combating-terrorism-en.pdf> (accessed 05 June 2017).

⁶⁹ List of countries that have ratified the Protocol available at: http://www.au.int/en/sites/default/files/PROTOCOL_OAU_CONVENTION_ON_THE_PREVENTION_COMBATING_TERRORISM.pdf (accessed 21 October 2014).

⁷⁰ Art 2(2) of the Protocol to the OAU Convention of Terrorism.

⁷¹ Art 3(1) of the Protocol to the OAU Convention of Terrorism.

Protocol also establishes the regional mechanisms,⁷² provides for settlement of disputes⁷³ and extradition of terrorist suspects.⁷⁴ All these measures are aimed at improving the capacity of states to effectively combat terrorism.

4.3.3 AU Plan of Action on the Prevention and Combating of Terrorism

The Convention also allows for special protocols, agreements and supplements to be made if necessary.⁷⁵ Acting on this provision, the AU High-Level Inter-governmental Meeting on the Prevention and Combating of Terrorism in Africa adopted the AU Plan of Action on the Prevention and Combating of Terrorism in Algiers on 14 September 2002.⁷⁶ The Plan of Action contains measures that identify and propose solutions to African challenges on counterterrorism. The Plan of Action emphasized that the task of eliminating terrorism required an undertaking by member states in the areas of information sharing, cooperation on expertise; technical assistance; and improving individual capacity on anti-terrorism.⁷⁷ In addition to these initiatives, the Plan of Action mandated states to coordinate joint efforts on border surveillance; strengthening border control; and fighting the flow of illicit ammunition that could be used for terrorist attacks.⁷⁸

In order to comply with the obligations, member states were mandated to ratify and domesticate the OAU Convention on Terrorism. In addition, the Plan of Action adopts measures that specifically enhance the effectiveness of law enforcement and border control.⁷⁹ These measures include increasing surveillance at borders in order to minimize use of fake travel and identity documents; ensuring security features on documentation to prevent forgery; maintaining a watch-list of people of interest; inspection of all travel and identity documentation to ascertain

⁷² Art 6 of the Protocol to the OAU Convention of Terrorism.

⁷³ Art 7 of the Protocol to the OAU Convention of Terrorism.

⁷⁴ Art 8) of the Protocol to the OAU Convention of Terrorism.

⁷⁵ Art 21(1) of the OAU Convention on Terrorism.

⁷⁶ AU Plan of Action on the Prevention and Combating of Terrorism in Africa. Mtg/HLIG/Conv.Terror/Plan. (I). Available at: <http://bibliotecavirtual.clacso.org.ar/ar/libros/iss/pdfs/oau/PoAfinal.pdf> (accessed 23 Oct. 14).

⁷⁷ See the Preamble to the Plan of Action.

⁷⁸ Plan of Action, para 4.

⁷⁹ Plan of Action, para 11.

authenticity; and to train immigration officers on profiling techniques and identification of false documentation.⁸⁰ The Plan of Action also called upon states to adopt legislative and judicial measures including the amendment of laws on the granting of bail, terrorism and criminal procedure; and harmonization of laws on the prevention of terrorism.⁸¹ Other measures in the Plan of Action include the suppression of terrorist financing;⁸² enhancing the sharing of intelligence between states and relevant agencies;⁸³ and coordination of regional and international efforts to combat terrorism.⁸⁴

The Plan of Action also addresses the role of the Peace and Security Council (PSC) in the fight against terrorism.⁸⁵ The African Union in partnership with African Regional Economic Communities (RECs) established the African Peace and Security Architecture (APSA).⁸⁶ The main organ in the APSA is the Peace and Security Council (PSC) which was established by the Protocol Relating to the Establishment of the Peace and Security Council of the African Union.⁸⁷ The PSC is charged with the mandate of maintaining peace and security including coordinating African efforts to combat terrorism.⁸⁸

The AU Plan of Action focuses on improving the capabilities of law enforcement to fight terrorism; tighten border control; improve legislative and judicial interventions; suppressing terrorism financing, exchange of intelligence on terrorism as well as coordinating regional efforts on counterterrorism. The Plan of Action also advocates for judicial and legislative reforms in the area of counterterrorism in order to prevent acts of terror. It is interesting to note that the Plan of Action does not make any reference to human rights safeguards in relation to counterterrorism mechanisms. This is concerning because the Plan of Action completely ignores

⁸⁰ Plan of Action, para 11(a-k).

⁸¹ Plan of Action, para 12.

⁸² Plan of Action, para 13.

⁸³ Plan of Action, para 14.

⁸⁴ Plan of Action, para 15.

⁸⁵ Plan of Action, para 16.

⁸⁶ U Engel & JG Porto 'The African Union's new peace and security architecture: Toward an evolving security regime?' (2009) 2(2-3) *African Security* 82.

⁸⁷ Adopted at the AU inaugural meeting in Durban, 26 December 2003 by the African leaders and came into force on 26 December 2003.

⁸⁸ Art 2(2) and 4 of the Protocol Relating to the Establishment of the Peace and Security Council of the AU.

the subject of human rights and freedoms. In comparison, the UN Counter Terrorism Strategy expressly provides for mechanisms through which human rights should be protected during counterterrorism.⁸⁹ The UN Counter Terrorism Strategy emphasizes that the respect for human right and the rule of law are essential to every counterterrorism strategy. Nevertheless, the duty of protecting human rights is carried out by the African Commission on Human and Peoples' Rights as discussed in the next sub-section.

4.3.4 The African Commission on Human and Peoples' Rights

The African Commission was created under Article 30 of the African Charter on Human and Peoples' Rights as the main supervisory body of the Charter. The African Commission has two major functions which include promoting and protecting human and peoples' rights.⁹⁰ Under the promotion mandate, the African Commission has the responsibility collect information, conduct research, convene workshops, support local human rights organizations and make recommendations to governments.⁹¹ The African Commission should also formulate regulations for the resolution of challenges relating to human and peoples' rights upon which African states may base their legislation.⁹² Lastly, the African Commission must encourage cooperation between African and international institutions whose mandate is in line with the protection of human rights.⁹³

In addition to promoting human and peoples' rights, the African Commission is clothed with a protective mandate over the rights contained in the African Charter. Under this mandate, the Commission is empowered to carry out investigations,⁹⁴ receive communications⁹⁵ and individual complaints.⁹⁶ The Commission is also empowered to receive state reports every two years on

⁸⁹ UNCTS available at: <http://www.un.org/en/terrorism/ctitf/pdfs/A%2066%20762%20English.pdf> (accessed 05 June 2017).

⁹⁰ Art 30 of the African Charter.

⁹¹ Art 45(1) (a) of the African Charter.

⁹² Art 45(1) (b) of the African Charter.

⁹³ Art 45(1) (c) of the African Charter.

⁹⁴ Art 46 of the African Charter.

⁹⁵ Art 47 of the African Charter.

⁹⁶ Art 56 of the African Charter.

the measures taken to enforce the human and peoples' rights protected in the Charter.⁹⁷ It must be noted that these mechanisms of enforcement under the African Commission bear a striking similarity to the procedures and mechanisms utilized by the various treaty bodies under the UN system.

Acting on the mandate of Article 45(1) (b) of the African Charter,⁹⁸ the African Commission adopted the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa⁹⁹ which are modelled upon African laws, treaties, resolutions and other international and regional instruments. The Guidelines impose a number of obligations upon AU member states including refraining from terrorism, preventing terrorism, protecting citizens from terrorism, ensuring accountability of public officials, provision of effective remedies to victims of human rights violations and ensuring judicial independence.¹⁰⁰

4.4 Implementing international and regional frameworks in East Africa

This section will examine how other regional and sub-regional bodies can contribute to the implementation of counterterrorism frameworks in Kenya and Uganda. Several parts of Kenya and Uganda have suffered the devastating effects of terrorism and it is therefore imperative to implement the international and regional counterterrorism strategies into action.¹⁰¹ This implementation can be actualized much faster and more effectively if there is cooperation between international, regional and civil society organizations on issues of counterterrorism.¹⁰² Fragmented governmental efforts will not achieve as much results as a unified front of various stakeholders and partnerships advocating for a customized counterterrorism strategy that addresses the unique circumstances of each country.

⁹⁷ Art 62 of the African Charter.

⁹⁸ Art 45(1) (b) of the African Charter. 'The function of the Commission shall be to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations.'

⁹⁹ Adopted by the African Commission on Human and Peoples' Rights during its 56th Ordinary Session in Banjul, Gambia (21 April to 7 May 2015).

¹⁰⁰ Part 1 of the African Commission adopted the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa.

¹⁰¹ E Rosand, A Millar, & J Ipe *Implementing the UN global counter-terrorism strategy in East Africa* (2008) 10.

¹⁰² As above.

The UN, AU and EAC have consequently created an elaborate network of bodies that play the critical role of supporting state parties in implementing different aspects of the respective counterterrorism strategies. These bodies emphasize important aspects including adopting measures that underscore the respect for human rights during the fight against terrorism. These bodies collaborate with regional organizations which play an important role with regard to counterterrorism. Terrorism and its effects have different impacts on different regions and countries. Social, economic, political and cultural differences require well-coordinated efforts from regional and sub-regional bodies to supplement on the aims of the counterterrorism strategies

4.4.1 The East African Community (EAC)

The East African Community (EAC) is an intergovernmental organization that has its origins in the Customs Union between Kenya and Uganda in 1917. The EAC was subsequently formed in 1967 but later collapsed in 1977.¹⁰³ However, the EAC was revived by the signing of the Treaty for Establishment of the East African Community on 30 November 1999.¹⁰⁴ The EAC Treaty came into force on 7 July 2000 after the three original Partner States (Kenya, Uganda and Tanzania) ratified it. However, the EAC community has since expanded its membership from three to six countries with the admission of Rwanda, Burundi and South Sudan.¹⁰⁵ The vision of the EAC is to create a 'prosperous, competitive, secure, stable and politically united East Africa.'¹⁰⁶ The EAC mission is to:¹⁰⁷

...widen and deepen Economic, Political, Social and Culture integration in order to improve the quality of life of the people of East Africa through increased competitiveness, value added production, trade and investments.

¹⁰³ East African Community *History of the EAC* available at: http://www.eac.int/index.php?option=com_content&view=article&id=44&Itemid=54 (accessed 23 June 2015).

¹⁰⁴ For more information, see: <http://www.eac.int/treaty/> (accessed 23 June 2015).

¹⁰⁵ The Republic of Rwanda and the Republic of Burundi acceded to the EAC Treaty on 18 June 2007 and became Members from 1 July 2007. South Sudan deposited its instruments of ratification on the Accession to the EAC Treaty on 5 September 2016.

¹⁰⁶ East African Community *About EAC* available at: http://www.eac.int/index.php?option=com_content&id=1:welcome-to-eac&Itemid=53 (accessed 24 June 2015).

¹⁰⁷ As above.

Although the main aim of the EAC is the promotion of trade between Partner states, the regional block has developed to recognize the role of human rights. In order for a state to be admitted into the EAC, the prospective partner must have regard for universal principles of 'good governance, democracy, the rule of law, observance of human rights and social justice.'¹⁰⁸ The EAC Treaty of 1999 also provides for principles that govern the operation of the Community. Under these provisions, Partner States make an undertaking to respect principles of good governance, democracy, the rule of law, social justice and human rights.¹⁰⁹ However, the record of human rights and the rule of law of EAC member states leaves a lot to be desired. As was noted in chapter 3, Kenya and Uganda's counterterrorism law enforcement have been involved in several human rights violations with impunity. Regardless of provisions on good governance, the other EAC member states remain silent which seemingly condones such illegalities.

The EAC Treaty also provides for cooperation in political matters which involves the eventual adoption of a Political Federation and the establishment of common foreign and security policies.¹¹⁰ One of the purposes of the adoption of common foreign and security policies is to strengthen security, democracy, the rule of law, human rights and fundamental freedoms.¹¹¹ Although there seems to be a genuine desire for the formation of the East African Federation, the negotiation of the terms of integration will not be a simple task. Regardless of this, the emphasis on human rights within the EAC Treaty shows the importance of these rights and freedoms towards the strengthening integration within the Community.

With the increase of terrorist activity in the East African region, the EAC has taken proactive steps to minimize its impact because it has a negative bearing on the peace, wellbeing and security of the region. The Ministers representing the partner states of the EAC ratified the *East African Community Protocol on Peace and Security* on 15 February 2013 which addresses the issue of terrorism. The Peace and Security Protocol notably provides a definition for terrorism¹¹² and

¹⁰⁸ Art 3(3) (b) of the EAC Treaty of 1999.

¹⁰⁹ Art 7(2) of the EAC Treaty of 1999.

¹¹⁰ Art 123(1) of the EAC Treaty of 1999.

¹¹¹ Art 123(3) (c) of the EAC Treaty of 1999.

¹¹² Art 1 of the EAC Peace and Security Protocol. (a) any act which is a violation of the criminal laws of a Partner State and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any

counterterrorism.¹¹³ According to the Protocol, terrorism is defined as an act that in violation of criminal law which may threaten life, safety or result in death. Terrorism also includes striking fear in a community in order to coerce government to act or refrain from acting in a particular way.¹¹⁴ It must be noted that the definition in the EAC Protocol on Peace and Security is identical to the definition of terrorism adopted by Article 1 of the OAU Terrorism Convention.¹¹⁵ On the other hand, counterterrorism refers to methods, measures and frameworks adopted by states in order to prevent acts of terror.¹¹⁶ Article 2 places an obligation upon EAC member states to cooperate with regional and international organizations to ensure peace in the region;¹¹⁷ develop measures and enter agreements to enforce the Protocol;¹¹⁸ and cooperate in the area of counterterrorism.¹¹⁹ State cooperation is very important because it eliminates timewasting formalities and facilitates the harmonization of counterterrorism procedures and measures across the region.

Rosand rightfully argues that the EAC has limited resources, the bulk of which is allocated to economic development.¹²⁰ If the EAC community is to make significant progress in the area of counterterrorism, it is imperative to establish collaborations with other stakeholders and organizations which share the same objectives.¹²¹ Some of these vital partnerships are discussed in the next sub-sections.

person, any member or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to: (i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment of any of these, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency or create general insurrection in a Partner State; (b) any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organising, or procurement of any person, with the intent to commit any act referred to in paragraph (a)(i) and (ii).

¹¹³ Art 1 of the EAC Peace and Security Protocol. Counter-terrorism means practices, tactics, techniques, and strategies that Governments, militaries, police departments and corporations of Partner States adopt in response to terrorist threats or acts, both real and imputed.

¹¹⁴ As above.

¹¹⁵ See Art 1(3) of the OAU Terrorism Convention.

¹¹⁶ Art 1 of the EAC Peace and Security Protocol.

¹¹⁷ Art 2(1) of the EAC Peace and Security Protocol.

¹¹⁸ Art 2(2) of the EAC Peace and Security Protocol; Art 6 of the EAC Peace and Security Protocol.

¹¹⁹ Art 2(3) (c) of the EAC Peace and Security Protocol.

¹²⁰ E Rosand, A Millar & J Ipe *Implementing the UN global counter-terrorism strategy in East Africa* (2008) 26.

¹²¹ As above.

4.4.2 Intergovernmental Authority on Development (IGAD)

The Intergovernmental Authority on Drought and Development (IGADD) was an intergovernmental body that was formed in 1986 by six Eastern African countries including Kenya, Uganda, Somalia, Djibouti, Ethiopia and Sudan to tackle the serious problem of drought and natural disasters in the Eastern African region.¹²² In 1995, the Heads of State at a meeting decided to revamp IGADD's mandate to include cooperation on aspects of development, peace and security. Later in 1996, IGADD was restructured and took on a new mandate and slightly different name, the Intergovernmental Authority on Development (IGAD). The revitalized IGAD therefore has a vision of achieving prosperity, peace, security and regional integration amongst its member states. IGAD's membership has also grown to include two more countries which are Eritrea and South Sudan who became member states in 1993 and 2011 respectively.

IGAD has a number of objectives including promoting peace and stability of the region and the formulation of mechanisms for preventing and managing conflict.¹²³ The organization's functions have widened since it was first constituted from drought and natural disasters into the area of peace, security and also counterterrorism. IGAD has consequently implemented the Security Sector Program that deals with several security functions within the Eastern African region including counterterrorism.¹²⁴ The counterterrorism pillar of the Security Sector Program is

¹²² Intergovernmental Authority on Development. Available at: <https://igad.int/about-us> (accessed 28 March 2017).

¹²³ As above. The objectives of IGAD include: working with the Member States and the development partners to: Promote joint development strategies and gradually harmonize macro-economic policies and programs in the social, technological and scientific fields; harmonize policies with regard to trade, customs, transport, communications, agriculture, and natural resources, and promote free movement of goods, services, and people within the region; create an enabling environment for foreign, cross-border and domestic trade and investment; achieve regional food security, as well as encourage and assist efforts to collectively combat drought and other natural and man-made disasters and their natural consequences; initiate and promote programs and projects to achieve regional food security and sustainable development of natural resources and environmental protection; develop and improve a coordinated and complementary infrastructure, in the areas of transport, telecommunications and energy in the region; promote peace and stability, as well as create mechanisms for the prevention, management and resolution of inter-State and intra-State conflicts in the region through dialogue; mobilize resources for the implementation of emergency, short-term, medium-term and long-term programs within the framework of regional cooperation; facilitate, promote and strengthen cooperation in research development and application in science and technology; and promote and realize the objectives of the African Economic Community.

¹²⁴ IGAD's Security Sector Program. Available at: <http://www.igadssp.org/index.php/components-mainmenu/counter-terrorism> (accessed 28 March 2017).

aimed at enabling member states to combat terrorism, extremism and radicalization. This is achieved by emphasizing respect for the rule of law and human rights in accordance with the principles of international law. IGAD also builds its capacity to combat terrorism by cultivating partnerships with regional and international organizations. IGAD has held a number of workshops and trainings on the following areas: criminal justice capacity and cooperation to counter terrorism; countering the financing of terrorism; human rights and counter terrorism; countering radicalization; countering violent extremism; national, regional and international legal instruments for countering terrorism; investigation and prosecution of terrorism; mutual legal assistance and extradition; national, regional and international cooperation, coordination and collaboration in countering terrorism; good practices for effective counterterrorism; and intelligence operations in countering terrorism.¹²⁵ Through these specialized trainings, counterterrorism law enforcement across the region has benefitted valuable knowledge and support in the fight against terrorism.

In September 2016, the Security Sector Program held a training workshop on electronic surveillance as a good practice in preventing and countering terrorism in the Horn and Eastern Africa region.¹²⁶ During the workshop, it was highlighted that electronic surveillance played an important role in the prevention, detection, investigation and prosecution of various crimes for example terrorism. The need for electronic surveillance has been brought about by the progression of technology, escalation of terrorist threats, analysis of human rights, and the ownership of telecommunication companies.¹²⁷ Electronic surveillance also presents a human rights issue relating to the breach of the right to privacy. The workshop also addressed the safeguards which must be implemented to protect the right to privacy while conducting

¹²⁵ As above.

¹²⁶ Available at: <http://www.igadssp.org/index.php/80-news/166-training-workshop-on-electronic-surveillance-as-a-good-practice-in-preventing-and-countering-terrorism-in-the-horn-and-eastern-africa-region> (accessed 28 March 2017).

¹²⁷ As above. The workshop examined several issues surrounding the use of electronic surveillance including: lawful forms of: wiretapping; tracking devices; and other tracking devices; the role of electronic surveillance in preventing terrorism; processes of initiating and conducting electronic surveillance; presenting evidence derived electronic surveillance in the court of law; assessing domestic laws that authorize electronic surveillance; electronic surveillance and issues of human rights: the balance between security and civil liberties; international cooperation in electronic surveillance: opportunities and challenge.

electronic surveillance during counterterrorism.¹²⁸ Some of the safeguards include the requirement for probable cause before surveillance can be authorized and collecting of relevant information only. Electronic surveillance should not also be carried out on information that is designated as privileged. From these activities, it is clear to see that regional organizations like IGAD are in a good position to participate in counterterrorism through both education as well as creating partnerships geared at addressing the factors that promote terrorism.

In order to better with the issue of terrorism in the Eastern African region, IGAD set up the Intergovernmental Authority on Development, Capacity Building Program against Terrorism (ICPAT) in 2006.¹²⁹ ICPAT which is still active to date mainly supports state and regional capacity to fight terrorism through promoting the capacity of the judiciary; enhancing cooperation between law enforcement departments; improving border security; carrying out training for relevant stakeholders on counterterrorism; and facilitating intelligence sharing.¹³⁰ ICPAT also hosts specialized training for law enforcement in the area of counterterrorism in order to improve their capacity to fight against this crime.¹³¹ State cooperation on counterterrorism ultimately presents a unified front against terrorism. This enables counterterrorism law enforcement agencies across states to exchange information and resources. This makes law enforcement more effective as opposed to situations where they rely on their own fragmented efforts to fight against a crime that now functions at a multinational level.

4.4.3 East African Police Chiefs Cooperation Organization (EAPCCO)

The EAPCCO is another intergovernmental sub-regional body that plays a crucial role in the areas of security and counterterrorism within the East African sub-regional block. The main objective of the EAPCCO is to enhance cooperation between the law enforcement agencies of its member states in an effort to prevent transnational and organized crime including terrorism.¹³² The organization which was established in 1998 is comprised of the following member states:

¹²⁸ As above.

¹²⁹ For more information on ICPAT, see: <http://www.igadregion.org/icpat/> (accessed 30 March 2017).

¹³⁰ As above.

¹³¹ See also: <http://www.igadregion.org/icpat/> (accessed 30 March 2017).

¹³² For more information on the EAPCCO, see: <http://www.smallarmssurvey.org/tools/ro-poa/profiles-of-regional-organizations/africa/eapcco.html> (accessed 30 March 2017).

Uganda, Seychelles, Rwanda, Kenya, South Sudan, Tanzania, Sudan, Burundi, Eritrea, Djibouti, Ethiopia and Somalia. The headquarters of the organization are situated in the Interpol sub-regional Bureau in Nairobi, Kenya. EAPCCO member states are mandated to make certain financial contributions towards its day-to-day operations. It must be noted that although the member states make financial contributions, they are still insufficient to cover the organization's operational needs. The EAPCCO receives additional support from INTERPOL to supplement its financial shortfall.¹³³

The EAPCCO coordinates several regional police efforts including investigating cross-border crime, maintenance of a consolidated criminal record database and conducting regular training of law enforcement on crime prevention including counterterrorism. In addition to INTERPOL, the EAPCCO cooperates with other regional and international organizations which provide additional support for example IGAD.¹³⁴ This support comes in various form including financial, intelligence and expert assistance. Such partnerships are important in order to strengthen the region's capacity to fight terrorism.

4.5 Conclusion

The first part of chapter four discussed the international, regional and sub-regional frameworks for fighting against counterterrorism. The first part examined the international counterterrorism framework which is pioneered by the United Nations under the UN Global Counter-Terrorism Strategy. It was noted that the UNSC has passed several resolutions which are geared at improving countries' capacities under law enforcement to fight terrorism. The UN itself adopted the UN Global Counter-Terrorism Strategy to consolidate global efforts to fight against terrorism which contains a number of measures aimed at increasing member states' capacities to fight terrorism. It was noted that particular attention is paid towards improving the capability of law enforcement agencies to fight against terrorism by ensuring global coordination, mutual assistance, exchange of intelligence, and training of law enforcement in the area of counterterrorism. In order to oversee the implementation of the UN Global Counter-Terrorism

¹³³ As above.

¹³⁴ E Rosand, A Millar & J Ipe *Implementing the UN global counter-terrorism strategy in East Africa* (2008) 25.

Strategy, the UN constituted the UN Counter-Terrorism Implementation Task Force which is assisted by different specialized working groups.

Factors like the geographical location, political climate, culture, religion and history play a very important factor in understanding the trends of terrorism and indeed other forms of crime within a particular area. In response to this, the African regional block under the auspices of the AU adopted the OAU Convention on the Prevention and Combating of Terrorism which takes into account African realities when approaching terrorism on the African continent. In addition, the AU adopted the AU Plan of Action on the Prevention and Combatting of Terrorism that adopts various measures such as border surveillance, border control and the control of the flow of illicit ammunition between countries. The *AU Plan of Action on the Prevention and Combatting of Terrorism* establishes the *AU Peace and Security Council* which is the organ that oversees the implementation of counterterrorism in Africa. The Peace and Security Council works with other regional and sub-regional bodies like the African Centre for the Study and Research of Terrorism. The aim of these bodies is to consolidate information databases on terrorism for use by member states, international partners and other authorized entities. They additionally conduct training of law enforcement on counterterrorism techniques and convene symposia for relevant stakeholders.

In addition to the international and regional counterterrorism frameworks, the Eastern African sub-region has also adopted some strategies to combat terrorism within its member states. This was mainly seen through the efforts of intergovernmental organizations like the EAC, IGAD and the EAPCCO who have channelled substantial efforts into the fight against terrorism. The greatest advantage is that these organizations do not only have the cooperation and full commitment of member states, but they also have an understanding of the different economic, social and political differences of the individual member states. As such, they can be able to propose more suitable solutions to East Africa's problem of terrorism and in particular, Kenya and Uganda.

CHAPTER FIVE

5. Life, non-discrimination, opinion, religion and privacy

5.1 Introduction

The previous chapter discussed international, regional and sub-regional frameworks for the protection of human rights while countering terrorism. The major frameworks that were examined were the UN counterterrorism strategy, the African counterterrorism system and the East African counterterrorism framework. The most important measures adopted under those frameworks was the adoption of counterterrorism measures, improving law enforcement capacity to respond to threats of terrorism, and improving state cooperation on sharing intelligence, resources and provision of support. However, it was noted that these interventions have the capacity to negatively impact on the protection of human rights during counterterrorism which maybe unreasonably limited. There is therefore a need to examine the rights which are most likely to be affected by counterterrorism operations and examine whether Kenya and Uganda has adopted necessary safeguards to prevent such violations.

This chapter consequently examines the protections on the right to life; freedom from discrimination; the freedom of expression and opinion; and the freedom of thought, conscience and religion. Emphasis is placed on the protection of these rights at international, regional and national level. The chapter therefore examines the relevant international and regional conventions, and the interpretations that have been given to the rights therein by the enforcement bodies (agencies) and special procedures. The chapter further examines national laws in order to gauge the level of compliance with international standards with special focus on counterterrorism measures. The two countries of focus (Kenya and Uganda) will be examined in comparison to determine the degree of compliance as well as identify any positive practices that can be emulated. The aim of this assessment is to assess whether Kenya and Uganda's counterterrorism legislation complies with international human rights law. In addition this section examines the conduct of law enforcement and security agencies to determine whether they comply with human rights safeguards.

5.2 The right to life

This subsection examines the right to life and its protection during counterterrorism in Kenya and Uganda. In addition, this subsection will focus on the international and national protection of the right to life in Kenya and Uganda, and the accountability of law enforcement during counterterrorism operations. The right to life may be understood as an entitlement founded upon the conviction that every human being has a right to their existence which they should not be arbitrarily deprived of. This right is often described as the most fundamental/supreme human right that accrues to all individuals.¹ However, there are a number of cases in Kenya and Uganda documenting unexplained loss of life of terrorist suspects in custody and during counterterrorism operations.

In the case of Uganda, the Joint Anti-terrorism Task Force (JATT) which is the country's principle counterterrorism agency operates secretly from its headquarters in Kampala without a written constitutive mandate.² The absence of a written mandate means the JATT functions in the shadows with minimal accountability.³ The agency has since its inception developed a ruthless reputation for brutality against terror suspects leading to the arbitrary deprivation of life⁴ as illustrated in the two prominent cases discussed briefly hereunder.

One of the most prominent cases of an extrajudicial killing by the JATT was Saidi Lutaaya who worked as a hawker at the Kampala Taxi Park in 2007.⁵ The reasons for Lutaaya's arrest were never publicized. Mr Lutaaya was later taken to hospital with severe injuries on his whole body including puncture wounds to his head. Witnesses reported that he had been beaten severely

¹ African Commission General Comment 3, para 5; J Kratochvil 'The Right to Life in the Perspective of the Human Rights Committee and the European Court of Human Rights' (2006) available at: <http://dx.doi.org/10.2139/ssrn.951225> (accessed 27 June 2016).

² U.S. Department of State *2009 Human rights report: Uganda* (2010) para 3; B Baker 'Multi-choice policing in Uganda' (2005) 15(1) *Policing and Society: An International Journal of Research and Policy* 19; United States Department of State *Country Reports on Terrorism 2011 - Uganda* (2012) available at: <http://www.refworld.org/docid/501fbc9928.html> (accessed 29 July 2014).

³ AL Sage *African Counterterrorism Cooperation: Assessing Regional and Subregional Initiatives* (2007) 85.

⁴ VV Ramraj, M Hor & K Roach *Global anti-terrorism Law and Policy* (2012) 590; J Rone 'State of pain: Torture in Uganda' (2004) 16(4) *Human Rights Watch* 4.

⁵ Human Rights Watch Uganda *Open secret, illegal detention and torture by the Joint Anti-terrorism Task Force in Uganda* (2009) 15.

and even struck on the head with a hammer. When he passed away in hospital, his body was taken away by soldiers and was never given to his family for proper burial. In December 2009, Lutaaya's family sought a court order for the institution of an investigation into his death which was commendably granted by the High Court in February 2010.⁶ The court order required the Minister of Internal Affairs to appoint an independent coroner to conduct an investigation into the death of Lutaaya within three months. Despite the court order, the Government failed to provide funding for the coroner's inquest into the death and the investigation never materialized.⁷ When the executive branch of government blatantly ignores court rulings, it indicates a gross erosion of the rule of law and an undesirable undermining of the power of the judiciary as a whole.⁸ The state consequently failed in its duty to discharge the burden of proof imposed by the presumption of state responsibility for deaths and disappearances of persons held in custody.⁹

Another controversial extrajudicial killing was the case of Isa Kiggundu who was arrested in 2000 for his supposed participation in the 1998 Kampala bombings. He reportedly confessed to having participated in the 1998 terror plot that led to the death of 35 people and the injury of 148 others.¹⁰ Kiggundu was charged with terrorism but was subsequently granted amnesty in 2001 and was released from custody.¹¹ Six years later in 2007, four vehicles carrying armed men in civilian attire drove to Kiggundu's house where they immediately proceeded to shoot indiscriminately into the dwelling. Kiggundu emerged out of the house carrying his baby daughter where he was met with an overwhelming barrage of bullets. He was killed instantly but the baby miraculously survived. The JATT claimed that it had lawfully eliminated a notorious thief, criminal and rebel.¹² Unfortunately, there are several cases similar to the two incidents

⁶ *Sumaiya Saidi Lutaaya v Attorney General* held in the High Court of Uganda, HCT-00-CV-MC-0063-2010.

⁷ As above.

⁸ See also: *James Katabazi and 21 others v Secretary General of the East African Community and the Attorney General of the Republic of Uganda* held in the East African Court of Justice at Arusha, Case no. 1 of 2007, para 68.

⁹ African Commission General Comment 3, para 37.

¹⁰ Human Rights Watch Uganda *Open secret, illegal detention and torture by the Joint Anti-terrorism Task Force in Uganda* (2009) 37.

¹¹ As above

¹² Human Rights Watch (n 10 above) 38.

discussed above that demonstrate the unfettered discretion and impunity of the JATT in regard to the death of terrorism suspects.¹³

Kenya's Anti-Terrorism Police Unit (ATPU) was similarly constituted to fight and suppress acts of terror.¹⁴ Just like in the case of Uganda's JATT, ATPU has contributed to a number of gross human rights violations including the arbitrary deprivation of life.¹⁵ Some of the so-called terrorist groups that have been identified by law enforcement have been ruthlessly dealt with by ATPU including the notorious Saboot Land Defence Force (SLDF) which has been operating in the Mount Elgon area,¹⁶ and the Mungiki terrorist group that mainly operates in Mathare, Kenya's second largest slum.¹⁷ In the period between 2002 and 2007, the Kenyan government responded to the Mungiki threat with overwhelming deadly force leading to the death of over eight thousand people.¹⁸ Law enforcement was never held accountable for the deaths that resulted from these counterterrorism operations and no independent review was carried out.¹⁹ With the issue of impunity of law enforcement being apparent especially in respect of arbitrary deprivation of life during counterterrorism in Kenya, it is imperative to examine the position of international law in this regard.

¹³ United States Department of State *Country Reports on Terrorism 2011 - Uganda* (2012) available at: <http://www.refworld.org/docid/501fbc9928.html> (accessed 2 September 2016); Human Rights Watch (n 10 above) 36. Tayebwa Yasin was charged with terrorism in 2008 and remanded to Luzira prison for his association with the ADF rebels. According to fellow in-mates, Tayebwa was severely beaten by the JATT to a point that he lost his mobility. The cause of death was never disclosed; Human Rights Watch (n 10 above) 38. Abdu Semugenyi was detained by the JATT also on allegations of connections with the ADF rebels. He was reportedly electrocuted and tortured to death.

¹⁴ BE Whitaker 'Reluctant partners: Fighting terrorism and promoting democracy in Kenya' (2008) 9 *International Studies Perspectives* 254.

¹⁵ J Lind & J Howell 'Counter-terrorism and the politics of aid: Civil society responses in Kenya' (2010) 41(2) *Development and Change* 335; African Commission on Human and Peoples' Rights *Letter of appeal to the Republic of Kenya*. Available at www.achpr.org/news/2017/06/d290 (accessed 14 June 2017).

¹⁶ A Oloo, O Wafula & A Ikelegbe 'A Marginalization and the rise of militia groups in Kenya; The Mungiki and the Saboot Land Defence Force' 2010 University of Nairobi Digital Repository. Available at: <http://erepository.uonbi.ac.ke:8080/xmlui/handle/123456789/30007> (accessed 23 November 2015).

¹⁷ O Greene & N Marsh *Small arms, crime and conflict: Global governance and the threat of armed violence* Routledge 2013 132-133.

¹⁸ Landinfo: Country of Origin Information Centre *Kenya: Mungiki – abusers or abused?* 2010 5. Available at: http://www.landinfo.no/asset/1123/1/1123_1.pdf (accessed 23 November 2015).

¹⁹ J Lind & J Howell 'Counter-terrorism and the politics of aid: Civil society responses in Kenya' (2010) 41(2) *Development and Change* 335.

5.2.1 The right to life under international law

The right to life is a fundamental human right that is protected by Article 3 of the UDHR²⁰ and Article 6(1) of the ICCPR²¹ within the UN human rights system. Similarly, the African Charter protects the right to life under Article 4 which states that ‘every human being shall be entitled to respect for his life.’²² In order to expound on the right to life under Article 6 of the ICCPR, the Human Rights Commission (HRC) adopted General Comment 6 in 1982.²³ Paragraph 1 of General Comment 6 states that life is the most supreme right and cannot be derogated from even in cases of emergencies of state.²⁴ It is noted in General Comment 6 that while states have the obligation to prevent and punish unlawful deprivation of life by criminal acts, they are also responsible for arbitrary loss of life caused by their own agencies and state organs including the judicial, executive and legislature.²⁵

The HRC also noted in paragraph 4 that disappearances of individuals had become common and states have an obligation to prevent such occurrences and establish mechanisms for effective investigation of missing persons.²⁶ In addition, human rights bodies have held that in instances where a person who was last seen with state officials ends up dead, the onus to prove that his/her right to life was not violated rests upon the state.²⁷ Enforced disappearances are considered as a very serious human rights violations that is integrated with the right to life.²⁸ Enforced disappearances are defined as an arrest, detention or abduction by state agents that is coupled

²⁰ ‘Everyone has the right to life, liberty and security of person.’

²¹ ‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.’

²² Art 4 of the African Charter; Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa. Available at: http://www.achpr.org/files/special-mechanisms/human-rights-defenders/principles_and_guidelines_on_human_and_peoples_rights_while_countering_terrorism_in_africa.pdf (accessed 26 July 2016) 17, para A.

²³ HRC General Comment 6, Article 6 (The Right to Life) HRI/GEN/1/Rev.9 (Vol. I) (1982), para 1. *See also*: UN General Assembly Resolution (1993) Human rights and terrorism, 20 December 1993, A/RES/48/122. The UNGA reiterated that the life is the most essential and basic human right and must be protected during counterterrorism.

²⁴ General Comment 6, para 1.

²⁵ General Comment 6, para 3.

²⁶ General Comment 6, para 4.

²⁷ Art 1 of UN Declaration on the Protection of all Persons from Enforced Disappearances, para 2.

²⁸ Art 1 of the ICED.

with a refusal to acknowledge custody of the detainee.²⁹ Enforced disappearances are usually followed by a concealment of the whereabouts of the victim and his/her fate.³⁰ Enforced disappearances may end in the death of the victim at the hands of state security agents or law enforcement which gives rise to the issue of responsibility for deaths within detention. In such cases, the state is under an obligation to investigate the disappearance. Failure to investigate suspicious deaths and enforced disappearances constitutes a violation of the right to life as envisaged under Article 6 of the ICCPR.³¹

General Comment 6 also dealt with the issue of the judicial death penalty (capital punishment) at length. However, the operation of judicial death penalties is not being investigated in this thesis and is beyond the scope of the current research. It must also be noted that General Comment 6 is a very brief instrument and does not contain any comprehensive framework for promoting and protecting the right to life during law enforcement operations. It must be noted that the HRC is in the process of developing a new General Comment 36 on the right to life which was tabled for discussion in April 2015.³² The draft General Comment 36 has not yet been adopted to-date.

The African Commission adopted General Comment 3 on the right to life which offers a more comprehensive protective framework for the right.³³ Just like in the HRC General Comment 6, the right to life is considered as the most important right without which, all other rights will be meaningless.³⁴ The African Commission re-emphasized the obligation placed upon states by the African Charter to prevent arbitrary deprivation of life caused by their own state security

²⁹ Art 2 of the ICED. 'For the purpose of this Convention, enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the state or by persons or groups of persons acting with authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.'

³⁰ As above.

³¹ Part 2B (ii) of the African Commission adopted the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa; L Doswald-Beck *Human rights in times of conflict and terrorism* (2011) 233.

³² See: Draft HRC General Comment 36 (1 April 2015) CCPR/C/GC/R.36. Available at: www.ohchr.org/documents/CCPR (accessed 16 July 2017).

³³ African Commission General Comment 3 on the Right to Life (Article 4) 57th Ordinary Session, November 2015.

³⁴ African Commission General Comment 3, para 1.

agencies³⁵ including individuals held in lawful custody.³⁶ The Commission emphasizes the duty of the state to conduct prompt investigations into such deaths and ensure that the perpetrators are held responsible.³⁷ States must therefore adopt effective frameworks that promote and protect the right to life.³⁸ These should include measures to ensure that law enforcement is accountable and that there are sufficient independent oversight mechanisms.³⁹ In addition, states are under an obligation to prevent excessive use of force by law enforcement.⁴⁰ In cases where deadly force is applied, such action must conform to the principles of necessity and proportionality. States should therefore train and equip law enforcement officers with an assortment of both lethal and non-lethal weapons.⁴¹ By definition, arbitrary deprivation of life under General Comment 3 means any deprivation of human life that is not permissible under international law.⁴²

The African Commission also stated that when an individual die in law enforcement custody, there is a presumption of state responsibility⁴³ and the state bears the burden to prove through an impartial and prompt inquiry that the death was not arbitrary.⁴⁴ It must also be emphasized that the state has the obligation to make funds available for such an inquiry. Several states allow for the use of lethal force or grant law enforcement wide discretionary powers that contradict international standards.⁴⁵ Under the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, the use of force is only permissible in self-defence or defence of another person where there is an imminent threat to life or injury; the prevention of perpetration of

³⁵ African Commission General Comment 3, para 2.

³⁶ African Commission General Comment 3, para 36.

³⁷ As above, African Commission General Comment 3, para 2.

³⁸ African Commission General Comment 3, para 7.

³⁹ African Commission General Comment 3, para 16.

⁴⁰ African Commission General Comment 3, para 27.

⁴¹ African Commission General Comment 3, para 30.

⁴² African Commission General Comment 3, para 12.

⁴³ African Commission General Comment 3, para 37.

⁴⁴ As above; Part 2B (ii) of the African Commission adopted the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa.

⁴⁵ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns. Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms Extrajudicial, summary or arbitrary executions (2014) A/HRC/26/36 para 86.

serious crime that poses a threat to life; in order to effect an arrest of a person posing danger or resisting arrest; and to prevent the escape of such person or a detainee.⁴⁶ Principle 9 further restricts the use of force to situations where less extreme measures are inadequate to achieve those objectives, and where the lethal use of firearms are unavoidable.⁴⁷ Necessity imposes an obligation upon law enforcement to only use deadly force in instances where it is absolutely necessary.⁴⁸ The principle of proportionality on the other hand requires a balance between the threat posed and the amount of force to be applied.⁴⁹

On this issue, the UN recommended that law enforcement should be equipped with a broad range of weapons including non-lethal ones.⁵⁰ In addition, law enforcement must not only be equipped with these weapons but should be adequately trained in their proper function. Where the use of lethal force is unavoidable, the officer has to exercise restraint and minimize injury to the victim.⁵¹ Should circumstances permit, he must identify himself giving sufficient warning that deadly force is about to be applied if the warning is ignored.⁵² If such warning is not heeded and death or injury is caused as a result of the use of force, the incident must be promptly reported to law enforcement superiors for evaluation.⁵³ Having discussed the international law position, I now turn to examine the national laws of Kenya and Uganda to determine whether they comply with international standards on accountability.

5.2.2 Constitutional protection of the right to life in Kenya and Uganda

The Constitution of Uganda protects the right to life by prohibiting arbitrary deprivation of life under Article 22.⁵⁴ The said provision also creates an exception under which life may be lawfully

⁴⁶ As above; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, para 9.

⁴⁷ As above.

⁴⁸ Heyns (n 45 above) para 87.

⁴⁹ As above.

⁵⁰ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, para 2.

⁵¹ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, para 5.

⁵² Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, para 10; Part 2B of the African Commission adopted the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa.

⁵³ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, para 6.

⁵⁴ Art 22(1) of the Constitution of Uganda.

taken in execution of a sentence in respect of a criminal offence pronounced by a competent court.⁵⁵ It must be emphasized that the imposition of the death penalty under any other criminal law must be subject to a fair trial and confirmation of the conviction and sentence by the highest appellate court (due process of law) in the concerned state.⁵⁶ In dealing with limitations on fundamental and other human rights, Article 43 of the Constitution of Uganda prohibits the infringement of other people's rights in the enjoyment of one's own right.⁵⁷ As such, an individual's rights including life may be lawfully limited in the interest of the public subject to what is acceptable and demonstrably justifiable in a free and democratic society.⁵⁸

The Constitution of Kenya also recognizes and protects the right to life of every individual within the republic.⁵⁹ The Constitution prohibits the arbitrary deprivation of life except in particular circumstances that are sanctioned by the Constitution or any other written law.⁶⁰ Article 24(1) of the Constitution of Kenya sets out the requirements for a lawful limitation of a fundamental human right or freedom including the right to life.⁶¹ It states that any limitation must be sanctioned by law and must be reasonably justifiable in an open and democratic society taking into account the right in question and the purpose of the limitation.⁶² It must be noted in this regard that Article 25 of the Kenyan Constitution lists rights that are not subject to limitation under any circumstances and the right to life is not one of them.⁶³ This implies that the right to life in the context of Kenya may be subjected to certain lawful limitations. For example, although the death penalty is not expressly provided for in the Constitution of Kenya, it is one of the lawful sentences under Article 26(3) which can be imposed on a guilty person in accordance with the provisions of law.

⁵⁵ As above.

⁵⁶ As above.

⁵⁷ Art 43(1) of the Constitution of Uganda.

⁵⁸ Art 43(2) (c) of the Constitution of Uganda.

⁵⁹ Art 26(1) of the Constitution of Kenya.

⁶⁰ Art 26(3) of the Constitution of Kenya.

⁶¹ Art 24(1) of the Constitution of Kenya.

⁶² As above.

⁶³ Art 25 of the Constitution of Kenya. The rights which cannot be limited under any circumstances include: torture and cruel, inhuman or degrading treatment; slavery or servitude; fair trial; and *habeas corpus*.

5.2.3 The use of lethal force by law enforcement in Kenya and Uganda

The Police Act of Uganda clearly states the circumstances under which a law enforcement officer may use arms. These include circumstances where a person who is charged or convicted of a felony escapes from lawful custody; any individual who forcefully rescues another person from lawful custody; and a person who forcibly prevents the lawful arrest of himself or other person.⁶⁴ An officer may also use force in dispersing an unlawful assembly after it has been dissolved.⁶⁵ The application of lethal force is subject to the officer warning the subject that such force is about to be applied should the caution be ignored.⁶⁶ The provisions of Kenyan Police Act provides for similar regulations. It states that a police officer may lawfully use arms against an individual who attempts to escape from lawful custody;⁶⁷ in cases where an individual attempt to break another out of lawful custody;⁶⁸ and in instances where a person attempts to block lawful arrest of himself or any other person.⁶⁹ Such use of force is also conditional upon the officer or any other person being in danger of grievous bodily harm. The officer must warn the subject that deadly force is about to be applied and such warning is not heeded.⁷⁰ It must be noted that the JATT and ATPU counterterrorism agencies are categorized as specialized police units whose members are appointed from regular police.⁷¹ Therefore, the guidelines and laws regulating the use of lethal force by law enforcement officers are also binding upon them.

It is submitted that under the laws Uganda, there are no regulations requiring a law enforcement officer to adhere to the principles of necessity and proportionality in the application of lethal force.⁷² However, this is not the same case for Kenya whose legal position has changed. In 2009, the then Special Rapporteur on extrajudicial, summary or arbitrary executions Philip Alston,

⁶⁴ Sec 28 of the Police Act of Uganda.

⁶⁵ Sec 36 of the Police Act of Uganda.

⁶⁶ Sec 28(2) (c) of the Police Act of Uganda.

⁶⁷ Sec 28(a) of the Police Act of Kenya.

⁶⁸ Sec 28(b) of the Police Act of Kenya.

⁶⁹ Sec 28(c) of the Police Act of Kenya.

⁷⁰ See the proviso to Sec 28 of the Police Act of Kenya; National Police Service Standing Orders of Kenya (2014) 661.

⁷¹ AL Sage *African Counterterrorism Cooperation: Assessing Regional and Subregional Initiatives* (2007) 85.

⁷² Heyns (n 45 above) para 86; Basic Principles on Use of Force and Firearms by Law Enforcement Officials, para 9.

submitted a report on his mission to Kenya.⁷³ The Special Rapporteur noted that Kenyan law did not comply with international law on the use of lethal force which required adherence to the principles of necessity and proportionality.⁷⁴ Alston recommended a revision of Kenyan law in order to align it with international law. In 2014, the Office of the Inspector-General of Kenya's National Police Service issued Service Standing Orders that impose restrictions on the use of force by the police.⁷⁵ Among these restrictions are ensuring proportionality, minimizing injury, and reporting the use of force immediately to superiors for investigation.⁷⁶

The *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* also require that when lethal force is applied by a law enforcement officer, the steps that must be taken include reporting the use of lethal force to superiors promptly; minimizing harm and injury to the victim and other individuals; notifying family members or the next of kin of the victim; and instituting an inquiry into the use of deadly force by the officer as required by international law.⁷⁷ These measures are crucial for safeguarding the sanctity of life as well as creating channels for accountability of law enforcement for use of deadly force. Without these vital procedures, a culture of impunity is created within law enforcement and especially the counterterrorism agencies where their members may arbitrarily deprive individuals of their lives without fear of any disciplinary or criminal sanction.⁷⁸ There is therefore a need for the laws of Uganda to be revised to include these vital safeguards and to ensure that they are enforced. Having discussed the right to life in Kenya and Uganda, the next subsection will examine the right to equality and the protection against discrimination.

⁷³ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston. Addendum: Mission to Kenya. (26 May 2009) A/HRC/11/2/Add.6.

⁷⁴ Alston (n 73 above) 11, para 71.

⁷⁵ National Police Service Standing Orders of Kenya (2014) 661.

⁷⁶ As above, 661-662.

⁷⁷ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, para 6; Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa. Available at: http://www.achpr.org/files/special-mechanisms/human-rights-defenders/principles_and_guidelines_on_human_and_peoples_rights_while_countering_terrorism_in_africa.pdf (accessed 26 July 2016) 17, para B.

⁷⁸ See: African Commission General Comment 3, para 15.

5.3 The right to equality and protection against discrimination

The right to equality and protection against discrimination is contained in almost every human rights treaty. This right contains two obligations which include non-discrimination in the enforcement of human rights and equal treatment of all persons before the law.⁷⁹ While this is the ideal position of law, several CSOs have reported that the Muslim community in Kenya and Uganda has experienced significant discrimination in regard to counterterrorism.⁸⁰ This may be attributed to the fact that radical extremist terrorist groups like al-Shabaab and al-Qaeda use Islam as a justification for their horrific acts of terror.⁸¹ As such, there is a false presumption within members of the community and even law enforcement that all Muslims are potential terrorists and should be treated with caution.⁸² This stereotype has also been evident in the treatment of the Muslim community by law enforcement during counterterrorism operations.⁸³ The majority of persons targeted, arrested and detained in relation to terrorism are Muslims.⁸⁴ This is of concern because a significant proportion of Kenya's and Uganda's population is made up of Muslims.⁸⁵

In addition to discrimination based on religion, some people of Arabic and Somali descent living in Kenya and Uganda have been unofficially profiled by law enforcement on racial grounds as

⁷⁹ L Doswald-Beck *Human rights in times of conflict and terrorism* (2011) 49-50; Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa. Available at: http://www.achpr.org/files/special-mechanisms/human-rights-defenders/principles_and_guidelines_on_human_and_peoples_rights_while_countering_terrorism_in_africa.pdf (accessed 26 July 2016) 14, para G.

⁸⁰ J Haynes 'Islam and democracy in East Africa' (2006) 13(3) *Democratization* 490.

⁸¹ Shinn, DH 'Fighting terrorism in East Africa and the Horn' (2004) *Foreign Service Journal* 36.

⁸² G Mythen *et al*; 'I'm a Muslim, but I'm not a terrorist: Victimization, risky identities and the performance of safety' (2009) *British Journal of Criminology* 32; Open Society Foundations *Counterterrorism and human rights abuses in Kenya and Uganda* (2013) 21.

⁸³ P Gathara (14 April 2014) *Kenya: The perils of racial profiling* Aljazeera News available at: <http://www.aljazeera.com/indepth/opinion/2014/04/kenya-perils-racial-profiling-2014413151031267839.html> (accessed 02 July 2016)

⁸⁴ Immigration and Refugee Board of Canada *Uganda: Evidence of harassment or discrimination against Muslims by government forces (1990s)* (2001) para 7; Human Rights Watch Uganda (n 10 above) 22.

⁸⁵ African Studies Center *Kenya – Religion*. Available at: <https://www.africa.upenn.edu/NEH/kreligion.htm> (accessed 07 January 2017).

having a high propensity to commit terrorism.⁸⁶ These profiles have been relied upon for a number of measures including surveillance, restriction of movement, arrest, interrogation, extradition and deportation to mention but a few.⁸⁷ Citing the problem of discrimination based on religious and racial backgrounds during counterterrorism in Kenya and Uganda, it is important to discuss the position of international law in relation to the issue.

5.3.1 International law and the prohibition of discrimination

The UDHR states that all human beings are born free and equal in dignity and rights.⁸⁸ This implies that in the implementation and enjoyment of human rights, all individuals should be given equal treatment. The UDHR further states that no one may be discriminated against on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁸⁹ Any discrimination on the basis of political, jurisdictional or international status of the country/territory to which a person belongs is prohibited. The UDHR also provides that everyone is equal before the law and is entitled to the protections of law without regard to any discriminatory criterion.⁹⁰ The provisions of Article 26 of ICCPR and Article 2 of ACHPR on the right to equality and non-discrimination are almost identical to the provisions of Article 2 of UDHR.⁹¹ The emphasis on the right to equality and non-discrimination throughout all international instruments buttresses its importance under international law.

⁸⁶ HM Abukar (23 June 2014) *Kenya's Somalis: Caught between power and profiling* African Arguments available at: <http://africanarguments.org/2014/06/23/kenyas-somalis-caught-between-power-and-profiling-by-hassan-m-abukar/> (accessed 02 July 2016).

⁸⁷ Gathara (n 83 above) para 4; Open Society Foundations (n 82 above) 28.

⁸⁸ Art 1 of the UDHR.

⁸⁹ Art 2 of the UDHR.

⁹⁰ Art 7 of the UDHR; Art 26 of the ICCPR.

⁹¹ Art 2, para 1 of ICCPR: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'; Art 26 of ICCPR: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'; Art 2 of the ACHPR: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status'; Art 3(1) of the ACHPR: 'Every

The Human Rights Committee adopted General Comment 18 in respect to non-discrimination which serves as a guideline for state parties in the elimination of all forms of discrimination.⁹² It was noted that non-discrimination, equality before the law and equal protection of the law form a core principle that is essential for the protection of human rights and freedoms.⁹³ Therefore, states have an obligation to ensure that all persons within their jurisdictions are treated equally without distinction.⁹⁴ While ICCPR does not contain a definition of discrimination,⁹⁵ the HRC adopted the definition of racial discrimination in Article 1 of CERD which states as follows:⁹⁶

... any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.⁹⁷

The former Special Rapporteur on the promotion and protection of human rights and freedoms while countering terrorism, Martin Scheinin, submitted a report in 2007 on terrorist profiling which by law enforcement may amount to discriminatory treatment.⁹⁸ He defined a terrorist profile as:⁹⁹

...a set of physical, psychological or behavioural variables, which have been identified as typical of persons involved in terrorist activities and which may have some predictive value in that respect.

These so-called physical, psychological or behavioural characteristics that are used in the identification of potential terrorists like the Somalis and Arabs in Kenya and Uganda, constitute a guide for law enforcement.¹⁰⁰ It must be noted that in principle, it is acceptable for law

individual shall be equal before the law'; Art 3(2) of the ACHPR: 'Every individual shall be entitled to equal protection of the law'.

⁹² HRC General Comment 18, Non-discrimination HRI/GEN/1/Rev.9 (Vol. I) (1989).

⁹³ HRC General Comment 18, para 1.

⁹⁴ As above.

⁹⁵ HRC General Comment 18, para 6.

⁹⁶ Art 1 of CERD.

⁹⁷ HRC General Comment 18, para 7.

⁹⁸ Profiling in the context of countering terrorism. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin. (2007) A/HRC/4/26.

⁹⁹ Scheinin (n 98 above) para 32.

¹⁰⁰ Scheinin (n 98 above) para 33.

enforcement to rely on profiles during crime prevention provided that they are based on credible information.¹⁰¹ However, profiling that is based on broad and unsubstantiated generalizations may result in the unlawful interference of human rights.¹⁰² In other words, stereotypical profiling that treats an entire ethnicity (Somalis) or religious group (Muslims) as terror suspects is inconsistent with the principle of non-discrimination.¹⁰³ Despite this position, it was noted by the Special Rapporteur that erroneous terrorist profiles based on race, origin and religion have been used by states to collect extensive personal data; implement immigration policies and controls including fingerprinting, photographing and interviewing; as well as conducting random stop searches.¹⁰⁴ Inappropriate terrorist profiling may have adverse effects on those affected¹⁰⁵ and could lead to humiliation, intimidation, degradation, victimization and stigmatization.¹⁰⁶ This inevitably portrays law enforcement as untrustworthy oppressors of the community fuelling racial and ethnic tensions.¹⁰⁷

In light of this challenge, the Special Rapporteur proposed that profiling based on behavioural patterns was a better criterion for profiling terrorists rather than broad generalizations based on race, origin and religion that are indeed discriminatory.¹⁰⁸ However, law enforcement agencies have to utilize these behavioural characteristics in an impartial manner and not as a front for propagating religious or ethnic discrimination.¹⁰⁹ In addition, successful counterterrorism is highly dependent on good relations between members of the community and the police as was noted in the discussion of community policing under chapter two of this thesis. As such, states need to improve cooperation and trust between law enforcement and members of the community. Discriminatory profiling of certain members of the community creates a counterproductive rift between law enforcement and the community who will perceive the

¹⁰¹ As above.

¹⁰² Scheinin (n 98 above) para 34.

¹⁰³ As above.

¹⁰⁴ Scheinin (n 98 above) para 35-37.

¹⁰⁵ Scheinin (n 98 above) para 56.

¹⁰⁶ Scheinin (n 98 above) para 57.

¹⁰⁷ As above.

¹⁰⁸ Scheinin (n 98 above) para 60.

¹⁰⁹ As above.

police as an oppressive institution.¹¹⁰ The next subsection will therefore examine the protection against non-discrimination in Kenyan and Ugandan law as well any limitations on the enjoyment of the right, if any.

5.3.2 Non-discrimination under Kenyan and Ugandan law

Article 21 of the Constitution of the Republic of Uganda recognises the right to equal treatment of all persons before the law regardless of status.¹¹¹ The Constitution also provides that no person may be discriminated against on grounds of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.¹¹² The Constitution defines discrimination as follows:¹¹³

...discriminate means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

The Constitution allows for limitations on certain fundamental human rights and freedoms in the interest of the public.¹¹⁴ Public interest in this context excludes political persecution, unlawful detention, and any limitation that is not acceptable and justifiable in a free and democratic society.¹¹⁵ However, it is submitted that it is not permissible to have a limitation on the right to equality and non-discrimination except in instances specifically provided for by the constitution. This is supported by the position that this right has attained the status of *jus cogens*¹¹⁶ and may not be subject to any limitations except in cases of positive discrimination. In addition, the ICCPR allows states to derogate from some conventional obligations provided that such measures are non-discriminatory.¹¹⁷ A state may therefore not abandon its obligations under the right to equal

¹¹⁰ Scheinin (n 98 above) para 62.

¹¹¹ Art 21(1) of the Constitution of Uganda.

¹¹² Art 21(2) of the Constitution of Uganda.

¹¹³ Art 21(3) of the Constitution of Uganda.

¹¹⁴ Art 43 of the Constitution of Uganda.

¹¹⁵ Art 43(2) of the Constitution of Uganda.

¹¹⁶ *Barcelona Traction, Light and Power Co. Ltd. (Belgium v Spain)*, 1970 ICJ Reports 3, 32; L Weiwei *Equality and non-discrimination under international human rights law*, (2004) 19-20.

¹¹⁷ Art 4(1) if ICCPR.

treatment and non-discrimination except in implementation of affirmative action.¹¹⁸ The Anti-Terrorism Act (2002) of Uganda does not make mention of discrimination and neither does it provide for any circumstances under which discrimination may be permissible. This further strengthens the assertion that the law does not permit any form of discrimination in the fight against terrorism.

The Constitution of the Republic of Kenya under Article 10 recognizes equality and non-discrimination as one of the key national values and principles of governance that are binding upon all institutions and public officials.¹¹⁹ The emphasis on these rights and principles signifies their importance in all spheres of everyday life including governance. Article 27 of the Constitution specifically provides for the right of equality and freedom from discrimination.¹²⁰ The same article guarantees the right to equal protection and benefit of law.¹²¹ Article 27(2) states that equality includes full and equal enjoyment of all rights and fundamental freedoms.¹²² The right to equality applies to all regardless of gender and the state may not discriminate against any individual on the basis of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.¹²³ It must also be noted that the Kenyan Constitution provides for the limitation of certain human rights for the purposes of a terrorist investigation.¹²⁴ However, those limitations are only permitted in regard to the right to privacy.¹²⁵ As such, any purported limitations on the right to equality and non-discrimination are not permissible under Kenyan law. It must also be noted

¹¹⁸ Art 32 of the Constitution of Uganda. It states as follows: '(1) Notwithstanding anything in this Constitution, the State shall take affirmative action in favor of groups marginalized on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them. (2) Parliament shall make relevant laws, including laws for the establishment of an equal opportunities commission, for the purpose of giving full effect to clause (1) of this article.'

¹¹⁹ Art 10(2) (b) of the Constitution of Kenya.

¹²⁰ Art 27 of the Constitution of Kenya.

¹²¹ Art 27(1) of the Constitution of Kenya.

¹²² Art 27(2) of the Constitution of Kenya.

¹²³ Art 27(4) of the Constitution of Kenya.

¹²⁴ Art 35 of the Constitution of Kenya.

¹²⁵ Art 35(3) of the Constitution of Kenya.

that there is no mention whatsoever of the right to equal treatment under the Kenya's Prevention of Terrorism Act.

In applying the laws and principles discussed above to the situation in Kenya and Uganda, it must be emphasized that powers and duties of law enforcement and indeed all public officials, must be carried out in strict accordance with the law. The laws of both Kenya and Uganda prohibit all forms of discrimination as noted above even during counterterrorism. However, it has been highlighted in chapter two of this thesis that the Muslim community in Kenya and Uganda has on several occasions been targeted and labelled as terrorists.¹²⁶ One case that has highlighted the issue of Muslim profiling in Uganda is the case of *Uganda v Kamoga Siraje & 13 Others*.¹²⁷ Sheikh Mohammad Yunus Kamoga who was the leader of the Tabliq Islamic group and 13 others were arrested and charged with the murder of other Muslim group leaders and terrorism. The case also included an allegation of the murder of Joan Kagezi, a prosecutor who was handling the case of the 2010 World Cup bombings in Kampala. The Sheikh was acquitted of the murder charges but was convicted of terrorism and sentenced to life imprisonment. It has been argued that this case is a classic example of the on-going unfair targeting and profiling of Muslims by the government.¹²⁸ While profiling based on behavioural patterns for the purpose of identification of suspects may be permissible, the systematic victimization of Muslims and Somali nationals as perpetrators of terrorism should not be tolerated in a democratic state. This is in direct violation of the constitutions of Kenya and Uganda that prohibit ethnic and religious based discrimination regardless of the intended outcome. Such illegal practices do not only constitute a breach of human rights but also suppose a gross disregard for the rule of law.¹²⁹

¹²⁶ J Lind & J Howell 'Counter-terrorism and the politics of aid: Civil society responses in Kenya' (2010) 41(2) *Development and Change* 335.

¹²⁷ Criminal Case No HCT-00-ICD-CR-SC-No 4 of 15.

¹²⁸ Aljazeera (25 August 2017) *Uganda jails Muslim leader Sheikh Kamoga over 'terror.'* Available at: www.aljazeera.com/amp/news/2017/08/uganda-jails-muslim-leader-sheikh-kamoga-terror-170825041419400.html (accessed 08 November 2017).

¹²⁹ Open Society Foundations (n 82 above) 29.

5.4 Freedom of opinion, expression, association and assembly

The freedom of opinion and expression also known as freedom of speech is the entitlement to hold and communicate views, opinions and thoughts without unlawful interference.¹³⁰ It must be noted that this protection is extended to members of the media who play a vital role in the dissemination of information.¹³¹ The enjoyment of this right is of great importance to any anti-terrorism strategy because terrorism is an ideology that must be communicated in order to be effected. The ability to hold and express opinions consequently affords terrorists the means to impart information, recruit new members and radicalize. States have therefore focused a lot of efforts to monitor and limit free speech especially when it embodies hate, radical and terrorist undertones. In attempting to fight terrorism by restricting the spread of radical ideologies, there is a danger that states might unlawfully limit or erode the freedom of opinion and expression all together. This situation has been real in Uganda and Kenya's counterterrorism practices where law enforcement has been accused of subduing opinions; raiding, detaining, torturing and bringing bogus charges against members of the press;¹³² and using excessive force in dispersing peaceful assemblies in the name of fighting terrorism and maintaining law and order.¹³³ It is therefore important to explore the scope of the freedom under international law and how it may

¹³⁰ T Mendel 'Freedom of information as an internationally protected human right' (2003) 1 *Comparative Media Law Journal* 39.

¹³¹ General Comment 34, para 13.

¹³² Human Rights Network for Journalists Uganda (24 September 2015) *Counter Terrorism Police arrest journalist*. Available at: <https://hrnjuganda.wordpress.com/> (accessed 06 July 2016). On the 24th of September 2015, Derrick Kiyonga, a court reporter was arrested, detained and interrogated by the Counter Terrorism Police accusing of doing work that he was not assigned. The journalist had reportedly passed a note from the terrorist suspects on trial to their lawyer. This was common practice in court because journalists are usually positioned in the area between suspects and lawyers. It was only after the intervention of the trial judge that the suspect was released one and a half hours later. In Kenya, it has also been reported that journalists may be arrested for reporting on counterterrorism investigations. In December 2014, a journalist had to go into hiding after he received threats from the Anti-Terrorism Police Unit. For more, see: Committee to Protect Journalists (22 December 2016) *In Kenya, press curbed as government seeks to fight terrorism*. Available at: <https://cpj.org/blog/2014/12/in-kenya-press-curbed-as-government-seeks-to-fight.php> (accessed 07 July 2016).

¹³³ Human Rights Watch (18 October 2015) *Uganda: End police obstruction of gatherings*. Available at: <https://www.hrw.org/news/2015/10/18/uganda-end-police-obstruction-gatherings> (accessed 06 July 2016). The Counter Terrorism Police of Uganda have often used excessive force in dispersing peaceful gatherings. This had been the case for assemblies involving the former presidential candidate Dr Kizza Besigye who has been previously charged for terrorism unsuccessfully. See: News24 (24 November 2005) *Besigye charged with terrorism*. Available at: <http://www.news24.com/africa/news/besigye-charged-with-terrorism-20051124> (accessed 06 July 2016).

be lawfully limited by government in the face of terrorism.

5.4.1 International protection on opinion, expression, association and assembly

The right to freedom of opinion and expression is guaranteed under Article 19 of the UDHR¹³⁴ and Article 19 of ICCPR.¹³⁵ This right confers the freedom to hold opinions without interference from the state, as well as the right to disseminate those ideas through any form of available media.¹³⁶ The freedom of opinion and expression is interrelated with the right to peaceful assembly and association.¹³⁷ The exercise of this right carries duties and responsibilities and may be limited in certain necessary circumstances.¹³⁸ These circumstances include respect for other people's rights and reputations, and in the interest of national security, public order, health and morals.¹³⁹ However, such limitations must be authorized by law and should be necessary in democratic society.¹⁴⁰

The HRC has adopted General Comment 10 of 1983¹⁴¹ and General Comment 34 of 2011¹⁴² in relation to the freedom of opinion and expression. General Comment 10 categorically emphasized that the right to opinion could not be limited under any circumstances.¹⁴³ In addition, restrictions placed upon the right of expression must not erode the core of the right and must comply with Article 19(3).¹⁴⁴ Article 19(3) states that limitations must be sanctioned by law; in the interest of national security, public order, health, and the rights of others; and must

¹³⁴ Art 19 of UDHR states that '*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*'

¹³⁵ Art 19(1 & 2) of ICCPR states that '*1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*'

¹³⁶ As above.

¹³⁷ Art 20 of UDHR.

¹³⁸ Art 19(3) of ICCPR.

¹³⁹ Art 19(1)3a) (3b) of ICCPR

¹⁴⁰ Art 21 of ICCPR.

¹⁴¹ HRC General Comment 10, Article 19 (Freedom of opinion) Nineteenth Session (1983).

¹⁴² HRC General Comment 34, Article 19 (Freedom of opinion and expression) CCPR/C/GC/34 (2011).

¹⁴³ General Comment 10, para 1.

¹⁴⁴ General Comment 10, para 4.

be necessary in a democracy.¹⁴⁵ General Comment 10 was brief and lacking in content necessitating the adoption of a more comprehensive general comment. In 2011, the HRC adopted General Comment 34 which emphasized that the freedom of opinion and expression is fundamental for every civilization and necessary for the development of all individuals.¹⁴⁶ It is also important for ensuring transparency and accountability of the state.¹⁴⁷ As such, the freedom of opinion and expression is binding upon all state organs (executive, legislature and judiciary) and public officials.¹⁴⁸ The HRC reemphasized that the right to hold opinions was not subject to any limitations¹⁴⁹ and an individual is entitled to change and communicate his/her opinions freely without threat of detention, harassment or prosecution.¹⁵⁰

The Committee also elaborated on the freedom of expression which includes the right to search, collect and disseminate information in the various forms of media whether oral, written¹⁵¹ or electronic.¹⁵² This freedom also covers expressions that may be considered offensive although such expression may be limited in the interest of public safety, health, morality and national security.¹⁵³ The protections of this right are extended to journalists because they play a critical role in every democratic society and therefore, the media should be free to collect information¹⁵⁴ on political, social and economic issues and report on them without unlawful censorship or limitation.¹⁵⁵ States have an obligation to prevent efforts aimed at suppressing the freedom of expression through the use of unlawful arrests, intimidation, threats, torture and killings.¹⁵⁶

The African Charter also protects the freedom of opinion in a very brief provision.¹⁵⁷ Article 9

¹⁴⁵ Art 19(3) of ICCPR; General Comment 34, para 21-22.

¹⁴⁶ General Comment 34, para 2.

¹⁴⁷ General Comment 34, para 3.

¹⁴⁸ General Comment 34, para 7.

¹⁴⁹ General Comment 34, para 9.

¹⁵⁰ General Comment 34, para 10.

¹⁵¹ General Comment 34, para 11.

¹⁵² General Comment 34, para 12.

¹⁵³ General Comment 34, para 11.

¹⁵⁴ General Comment 34, para 13.

¹⁵⁵ As above.

¹⁵⁶ General Comment 34, para 23.

¹⁵⁷ Art 9 of ACHPR.

also guarantees the right to seek information held by a public officer or institution.¹⁵⁸ The African Charter also guarantees the right of assembly subject to limitations provided for by law including protecting national security, public safety, health and the rights of other individuals.¹⁵⁹ It must be noted that the African Commission has not adopted any General Comment expounding on the freedom of opinion and expression. However, the African Commission on Human and Peoples' Rights adopted the *Declaration of Principles on Freedom of Expression in Africa*.¹⁶⁰ Although the Declaration is not detailed in regard to how the right should be implemented, it recognises the freedom of expression and prohibits arbitrary interference of the right.¹⁶¹ The freedom of expression is considered in the Declaration as a foundation of any democratic society that ensures the protection of human rights.¹⁶² The Declaration imposes a duty on the state to promote diversity including minority groups.¹⁶³ The freedom of opinion and expression includes the freedom of information. The Declaration stated that public institutions hold information on behalf of the public who are entitled to access this information subject to certain procedures.¹⁶⁴ Having discussed international law, it is important to examine the position of Kenyan and Ugandan law on the right to freedom of opinion and expression.

5.4.2 Opinion, expression, association and assembly under Kenyan and Ugandan law

Article 29 of the Constitution of Uganda provides that every individual including as well the media have a right to free speech and expression.¹⁶⁵ The Constitution also guarantees the right of association with any group and participate in their lawful practices including the right to assemble unarmed and peacefully demonstrate.¹⁶⁶ The Constitution allows for the limitation of human

¹⁵⁸ Art 9(1) of ACHPR.

¹⁵⁹ Art 11 of ACHPR.

¹⁶⁰ Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, 32nd Session, 17-23 October, 2002: Banjul, The Gambia.

¹⁶¹ Part I & II of the Declaration of Principles on Freedom of Expression. *See also*: Part 6D of the African Commission adopted the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa.

¹⁶² See the Preamble to the Declaration of Principles on Freedom of Expression, para 1.

¹⁶³ Part III of the Declaration of Principles on Freedom of Expression.

¹⁶⁴ Part IV of the Declaration of Principles on Freedom of Expression.

¹⁶⁵ Art 29 of the Constitution of Uganda.

¹⁶⁶ Art 29(1) (c-d) of the Constitution of Uganda.

rights in the interest of the public.¹⁶⁷ However, public interest does not permit political persecution, unlawful detention and unjustifiable limitation as a method for censoring the freedom of opinion and expression.¹⁶⁸ The Anti-terrorism Act does not place any limitations on the freedom of opinion. In this regard, the Act complies with the interpretation of the HRC in General Comment 34 which does not permit any limitations on the freedom of opinion.¹⁶⁹ However, the Act criminalizes the operation of any form of organizations that promote terrorism; disseminate terrorist information or material; and recruit members to participate in acts of terror under the pretext of religion.¹⁷⁰ This is consequently a limitation on the freedom of association and assembly where the subject or agenda of such association and gathering is the facilitation of terrorism. In addition, the Act provides for the interception of communication and conduct surveillance for the purpose of facilitating a terrorist investigation by an authorized security agent.¹⁷¹ The power of law enforcement to intercept communication and conduct surveillance may indeed have some adverse effects on the right of expression and opinion especially in relation to members of the media.

The Kenyan Constitution protects the freedom of opinion¹⁷² and expression.¹⁷³ The Constitution also protects the right to seek, receive and impart such information to third parties.¹⁷⁴ Article 24 of the Constitution allows for the limitation of rights and freedoms where such limitation is authorized by law, and is reasonable and justifiable in a democratic society.¹⁷⁵ In limiting a right, Parliament must carefully consider the nature of the right; the necessity of the limitation; the nature of the limitation; the rights of others; and the proportionality of the limitation.¹⁷⁶ A limitation must categorically state the right it limits and the extent of the limitation¹⁷⁷ without

¹⁶⁷ Art 43(1) of the Constitution of Uganda.

¹⁶⁸ Art 43(2) of the Constitution of Uganda.

¹⁶⁹ General Comment 34, para 9.

¹⁷⁰ Sec 9(1) of the Anti-terrorism Act of Uganda.

¹⁷¹ Sec 19(1) of the Anti-terrorism Act of Uganda.

¹⁷² Art 32 of the Constitution of Kenya.

¹⁷³ Art 33 of the Constitution of Kenya.

¹⁷⁴ Art 33(1) of the Constitution of Kenya.

¹⁷⁵ Art 24(1) of the Constitution of Kenya.

¹⁷⁶ As above.

¹⁷⁷ Art 24(2) of the Constitution of Kenya.

eroding the core of the right.¹⁷⁸ The enjoyment of the freedom of expression is not extended to advocacy for war; incitement of violence; hate speech; and discrimination.¹⁷⁹ The limitation of the freedom of expression in relation to the aforementioned types of expression is necessary for the maintenance of peace, order and security. The right to association allows all individuals to join a group of their choice; participate in its activities;¹⁸⁰ and assemble unarmed to peacefully demonstrate.¹⁸¹ However, it must be noted that the Security Laws (Amendment) Act which includes provisions and amendments to the Prevention of Terrorism Act, introduces radical measures which severely limit the right to free speech.¹⁸² Under this Act, it is a crime to utter a statement that may be directly or indirectly understood to encourage terrorism.¹⁸³ In addition, it is prohibited for anyone to publish information that undermines an ongoing terrorist investigation without proper police authorization.¹⁸⁴ Just like in the case of Uganda, National Security Organs are empowered by law to intercept communication and conduct surveillance after complying with certain procedures.¹⁸⁵ However, as has been noted in this thesis, law enforcement officials in Kenya and Uganda do not always comply with lawful procedures.

In applying the above mentioned international law and domestic laws to the situation in Kenya and Uganda regarding the freedom of opinion, expression, association and assembly, it must be emphasized that any limitation on these rights must be expressly provided for by law and must be justifiable in a democratic society. While the legal framework adequately protects the rights to freedom of opinion, expression, association and assembly, the major challenges identified in both countries are the questionable practices of law enforcement including harassment of members of the community as well as the media and the subduing of certain opinions that are considered to be anti-government rhetoric.¹⁸⁶ In addition, law enforcement officials have been

¹⁷⁸ Art (2) (c) of the Constitution of Kenya.

¹⁷⁹ Art 33(2) of the Constitution of Kenya.

¹⁸⁰ As above.

¹⁸¹ Art 37 of the Constitution of Kenya.

¹⁸² Security Laws (Amendment) Act (2014) of Kenya.

¹⁸³ Sec 30A (1) of the Security Laws (Amendment) Act of Kenya.

¹⁸⁴ Sec 30F (1) of the Security Laws (Amendment) Act of Kenya.

¹⁸⁵ Sec 36A (1) of the Security Laws (Amendment) Act of Kenya.

¹⁸⁶ Human Rights Network for Journalists Uganda (24 September 2015) *Counter Terrorism Police arrest journalist*. Available at: <https://hrnjuganda.wordpress.com/> (accessed 06 July 2016).

criticized for blocking, interrupting and being heavy-handed when dispersing lawful public assemblies and protests.¹⁸⁷ This conduct leaves a lot to be desired because the role of police in a democratic society is to serve and protect the citizens and not to unlawfully interfere in the enjoyment of their rights. It is submitted the practice of unlawful limitation of these rights is not only unlawful but also unjustifiable in any democracy. While such unlawful actions may produce results in form of ensuring public compliance and subduing opposition, it is imperative that law enforcement carries out their functions in strict accordance with principles of the law. This ensures that the safeguards that are built into the law to protect ordinary citizens are respected in order to avoid injustice.

5.5 The freedom of thought, conscience and religion

This section examines the freedom of thought, conscience and religion. The assessment will involve examining international, regional and national protections on the freedom of thought, conscience and religion. This section will also assess whether the counterterrorism legislation in Kenya and Uganda contains provisions that safeguard the freedom of thought, conscience and religion in accordance with international law standards. In addition, this section will also assess the practice of counterterrorism law enforcement agencies in Kenya and Uganda to determine whether it contributes to the violation of the freedom of thought, conscience and religion during their operations.

The freedom of thought, conscience and religion are fundamental rights and freedoms that pertain to a single individual but are often implemented or exercised in concert with other likeminded persons who share the same convictions or beliefs.¹⁸⁸ In several countries, the state

¹⁸⁷ Human Rights Watch (2015) *Uganda: End police obstruction of gatherings*. Available at: <https://www.hrw.org/news/2015/10/18/uganda-end-police-obstruction-gatherings> (accessed 07 January 2017). The Human Rights Watch documented the overwhelming brutality by which police in Uganda crush protests with excessive force including the use of toxic tear gas, rubber bullets, whips and sometimes live rounds.

¹⁸⁸ J Murdoch (2012) *Protecting the right to freedom of thought, conscience and religion under the European Convention on Human Rights* Council of Europe human rights handbooks Council of Europe Strasbourg. Available at: http://www.coe.int/t/dgi/hr-natimplement/Source/documentation/hb09_rightfreedom_en.pdf (accessed 11 April 2016) 10; Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa. Available at: http://www.achpr.org/files/special-mechanisms/human-rights-defenders/principles_and_guidelines_on_human_and_peoples_rights_while_countering_terrorism_in_africa.pdf (accessed 26 July 2016) 14, para I.

is considered to be secular because of the separation between state institutions/organs and the different religious establishments.¹⁸⁹

Conscience may be understood to mean an individual's moral compass or perception of what is right or wrong which in turn regulates his or her conduct.¹⁹⁰ An individual's conscience therefore aids a person's rationalization of situations and aids their decision making process.¹⁹¹ A person's conscience is closely related to his/her religious conviction which is an individual's belief in a supernatural power/force that justifies their existence, reveals their purpose for living, and guides them throughout their lifetime.¹⁹² Religion is consequently considered as one of the strongest forces ever known to man because it strikes at the very heart of an individual's existence and conviction.¹⁹³ It is submitted that once an individual affiliates themselves to a particular religion or faith, they usually adopt the way of life that conforms to that particular faith. They may also internalize the ideologies of the faith and they tend to defend its beliefs and practices with unwavering passion.¹⁹⁴ Religious discipleship often involves indoctrination in the canons and expectations of a particular faith and once grounded, a radicalized individual may even be willing to lay down their lives for the sake of the faith as has been the case of suicide bombers working with terrorist organizations such as al-Shabaab.¹⁹⁵ The issue of religion is therefore of significance to counterterrorism because extremist terrorist groups thrive on radical religious ideals and interpretations that unreasonably justify the use of violence. Regardless of this, states are still under the obligation to respect and promote all religions including minority faiths at all times.¹⁹⁶ However, this obligation has not been fully adhered to by Kenyan and Ugandan law enforcement during counterterrorism.

¹⁸⁹ As above.

¹⁹⁰ T Govier 'What is conscience' (2004) 37(151) *Humanist in Canada* 34-36; DP Sulmasy 'What is conscience and why is respect for it so important?' (2008) 29(3) *Theoretical medicine and bioethics* 135-149; E D'Arcy *Conscience and its right to freedom* (1961).

¹⁹¹ See: Bible Study Tools *Conscience*. Dictionaries – Baker's Evangelical Dictionary of Biblical Theology – Conscience. Available at: www.biblestudytools.com/dictionary/conscience (accessed 16 July 2017).

¹⁹² DM Wulff *Psychology of religion: Classic and contemporary views* (1991) 640.

¹⁹³ A Flew 'Indoctrination and religion' (1972) *Concepts of indoctrination* 106.

¹⁹⁴ Wulff (n 192 above) 641.

¹⁹⁵ Flew (n 193 above) 106.

¹⁹⁶ Art 18 of the UDHR.

It must be noted that the Islamic faith is a minority religion in both Kenya¹⁹⁷ and Uganda.¹⁹⁸ However, members of the Islamic faith are often labelled as terrorists¹⁹⁹ and are regularly targeted by security forces²⁰⁰ as was seen in the discussion under the protection against discrimination. Such labelling is based on the stereotype that Muslims are radicals who believe in the use of violence to advance their influence.²⁰¹ The plight of Muslims has not only ended at mere stereotypical categorization and name calling. Several accounts have been documented in which security forces have detained, tortured and even killed Muslims under the pretext of investigating terrorism.²⁰² Kenya in particular has experienced a rise in home-grown terrorist groups.²⁰³ In 2014, law enforcement officials received information that certain mosques in the Kisauni region were recruiting youths and indoctrinating them into jihadism.²⁰⁴ The police conducted a raid on three mosques and seized a number of weapons including machetes, knives, hand grenades, petrol bombs, bomb detonators and jihadist literature.²⁰⁵ The result of this discovery led to the temporary closure of the mosques and increased surveillance on the Muslim

¹⁹⁷ Kenya 2012 international religious freedom report (2012) available at: <http://www.state.gov/documents/organization/208372.pdf> (accessed 28 April 2016) 1. Muslims are a minority religion in Kenya accounting for roughly ten percent of the total population although the exact figure is disputed by the Muslim community. The majority religion in Kenya is Christianity.

¹⁹⁸ Uganda Bureau of Statistics *2002 Uganda Population and Housing Census*. Available at: <http://www.ubos.org/onlinefiles/uploads/ubos/pdf%20documents/2002%20Census%20Final%20Reportdoc.pdf> (accessed 16 April 2016) viii. According to the Uganda Bureau of statistics, Islam is a minority religion in Uganda accounting for twelve percent of the total population. The majority religion in Uganda is Christianity while other faiths constitute minorities such as Hinduism and Baha'i.

¹⁹⁹ R Jabendo (11 April 2015) *Stop labelling Muslims as 'terrorists' because of al-Shabab*. Available at: <https://ugandansatheart.org/2015/04/11/stop-labeling-muslims-as-terrorists-because-of-al-shabab/> (accessed 25 April 2016).

²⁰⁰ J Lind & J Howell 'Counter-terrorism and the politics of aid: Civil society responses in Kenya' (2010) 41(2) *Development and Change* 335; AL Sage *African Counterterrorism Cooperation: Assessing Regional and Subregional Initiatives* (2007) 85.

²⁰¹ J Sides and K Gross 'Stereotypes of Muslims and Support for the War on Terror' (2013) 75(3) *Journal of Politics* 583.

²⁰² As above.

²⁰³ T McConnell (2014) *Kenya's case study in homegrown terrorism* available at: <http://www.globalpost.com/dispatch/news/regions/africa/140609/kenyas-case-study-homegrown-terrorism> (accessed 30 April 2016).

²⁰⁴ W Mwangi (2014) *Two more Mombasa mosques closed after dawn raid* available at: <http://www.nation.co.ke/counties/mombasa/Two-mosques-in-Mombasa-closed-after-another-dawn-raid/-/1954178/2527980/-/91myeq/-/index.html> (accessed 30 April 2016).

²⁰⁵ As above.

community.²⁰⁶ Law enforcement has been accused of planting informants within certain mosques to monitor Muslims; prohibiting discussions of political nature during prayers; conducting raids and closing mosques; conducting searches and arrests on Muslim leaders (imams); restricting hours of worship; strict regulation on Islamic organizations, and the arrest, torture and even killing of Muslims suspected of involvement in terrorism.²⁰⁷ The conduct of law enforcement offensive to Muslims and has the effect of diminishing the right to religion. It is therefore important to examine the position of international law in relation to the protection of the freedom of conscience and religion.

5.5.1 International protection of the freedom of conscience and religion

The UDHR states that all persons are gifted with the power of thought and conscience²⁰⁸ and individuals have an obligation to treat each other with consideration.²⁰⁹ The UDHR protects the right to freedom of thought, conscience and religion²¹⁰ which includes the right change religion, and to participate in worship, teaching, rituals and observances.²¹¹ The right to religion is also guaranteed by the ICCPR²¹² and the African Charter.²¹³ The African Charter does not permit any limitation on the right to religion except where such limitation is necessary for the preservation of law and order.²¹⁴

The HRC adopted General Comment 22²¹⁵ in which the Committee emphasized that the right to freedom of thought, religion and conscience is a fundamental right which covers thought on all

²⁰⁶ G York (2015) Anti-terror tactics targeting Muslim leaders provoking tensions in Kenya available at: <http://www.theglobeandmail.com/news/world/anti-terror-tactics-targeting-muslim-leaders-provoking-tensions-in-kenya/article25236344/> (accessed 30 April 2015).

²⁰⁷ As above.

²⁰⁸ Art 1 of the UDHR.

²⁰⁹ As above.

²¹⁰ Art 18 of the UDHR.

²¹¹ As above; Art 18(1) of the ICCPR.

²¹² Art 18 of the ICCPR.

²¹³ Art 8 of the African Charter.

²¹⁴ As above; Art 27(2) of the African Charter. *See also:* Part 1G of the African Commission adopted the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa.

²¹⁵ HRC General Comment 22, Article 18 (Freedom of Conscience, thought and Religion) U.N. Doc. HRI/GEN/1/Rev.1 (1994).

issues, beliefs and allegiance to a religion.²¹⁶ The Committee noted that the protection of the right extends to theistic beliefs (belief in the existence of the supernatural), nontheistic and atheism (the belief that there is no god).²¹⁷ As such, the terms belief and religion must not be construed in a restrictive sense. The Committee noted that the freedom of thought, conscience and belief is an absolute right and no limitations are permissible whatsoever.²¹⁸ This includes the right to adopt a particular religion, belief in it, change to another religion, and freedom from any form of coercion that affects any decision relating to religion.²¹⁹ However, this absolute nature does not extend to the freedom to manifest religious beliefs.²²⁰ Manifestation was interpreted to include attending teachings, worship, rituals, wearing distinctive apparel, displaying religious symbols and the use of certain language associated with that particular religion amongst others.²²¹ However, the freedom to manifest religion must not include advocacy for war, hatred, discrimination, hostility or violence.²²² States are under an obligation to enact necessary laws that outlaw such acts.²²³ The justifications for the necessity of a limitation are public order, safety, morals, health, and the protection of others' rights.²²⁴

In 2014, the UN Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt submitted a report on preventing violence committed pursuant to religious beliefs.²²⁵ He noted that religious violence is a complex phenomenon²²⁶ that takes the form of attacks on the public for example terrorism, mass killings and suicide attacks.²²⁷ Such attacks are mainly attributed to non-state actors such as rebels, vigilantes, and terrorist organizations.²²⁸ The Special Rapporteur

²¹⁶ General Comment 22, para 1.

²¹⁷ General Comment 22, para 2.

²¹⁸ General Comment 22, para 3.

²¹⁹ General Comment 22, para 5.

²²⁰ As above.

²²¹ As above.

²²² General Comment 22, para 7.

²²³ As above; General Comment 22, para 8.

²²⁴ Art 18(3) of the ICCPR.

²²⁵ Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt (29 December 2014) A/HRC/28/66.

²²⁶ Bielefeldt (n 225 above) para 1.

²²⁷ Bielefeldt (n 225 above) para 2.

²²⁸ As above.

identified some non-exhaustive factors that have fuelled religious violence construed interpretations of religions, mistrust of public institutions, policies that result in the exclusion of some religions, and trivialization of the concerns of some religious denominations by public officials.²²⁹ He further noted that religious violence has been narrowly construed to support attacks against non-members.²³⁰ This is because religious beliefs can drive followers into doing extreme acts in order to reaffirm their allegiance.²³¹ Certain individuals therefore prey on the gullible to carry out their heinous agendas in the guise of religion.²³² This is particularly true for countries like Kenya and Uganda where some state institutions are either defunct or serve the interests of select individuals.²³³ The public therefore resort to non-governmental support systems in order to make ends meet.²³⁴ Terrorist groups therefore use this as an opportunity to recruit new members especially unemployed youths who would be duty-bound to implement their radical ideals.²³⁵

In addition, some government organs that tend to operate with impunity and inefficiency.²³⁶ In some states, law enforcement officials do not respond to disturbances with urgency and disrespect places of worship and sacred objects.²³⁷ If such incidents occur, government officials may deliberately ignore or attempt to cover-up such incidents without dealing with the deeply rooted causes and effects of such manifestations.²³⁸ The constant suppression of grievances results in a culture of silence which results in a disgruntled and volatile population waiting to erupt in violence.²³⁹ Such incidents should be avoided if the state is to restore trust between the community and its organs. Having examined the international and regional protection of the freedom of religion, thought and conscience, the next subsection examines Kenyan and Ugandan

²²⁹ Bielefeldt (n 225 above) para 21.

²³⁰ As above.

²³¹ As above.

²³² Bielefeldt (n 225 above) para 22.

²³³ Bielefeldt (n 225 above) para 25.

²³⁴ As above.

²³⁵ Bielefeldt (n 225 above) para 26.

²³⁶ Bielefeldt (n 225 above) para 34.

²³⁷ As above.

²³⁸ As above.

²³⁹ Bielefeldt (n 225 above) para 36.

legislation on the protection of this right.

5.5.2 The right to religion under Kenyan and Ugandan law

Kenya and Uganda are both secular states that do not recognise a religion of state.²⁴⁰ The Constitution of Uganda guarantees the right of conscience and religion in a single and rather convoluted provision that also provides for the freedom of expression, movement, assembly and association.²⁴¹ Article 29 also recognizes the freedom of belief and academic freedom.²⁴² According to the Ugandan Constitution, the freedom of religion encompasses the right to be part of a religious organization and participate in its religious practices provided such acts are consistent with the provisions of the Constitution.²⁴³ This implies that the freedom of religion may be subject to certain limitations. Article 29 does not state the circumstances under which the freedom of religion may be limited. Nevertheless, Article 43 provides the human rights may be limited if their enjoyment prejudices others' rights, public order, and public safety.²⁴⁴ It is therefore submitted that where religious practices do not impede any other person's rights or jeopardise public order and safety, no limitations are permissible. It must be noted that the Anti-Terrorism Act does not provide for any limitations on the freedom of religion in the context of anti-terrorism.

The Constitution of Kenya recognizes the right to freedom of conscience, thought and religion²⁴⁵ and this freedom includes the right to manifest beliefs through worship, teaching or observance and participate in rituals either individually or in communion with other individuals.²⁴⁶ In addition, the Constitution prohibits religion based discrimination for the purposes of gaining access to an institution, employment or the enjoyment of any rights,²⁴⁷ and no person may be

²⁴⁰ Art 7 of the Constitution of Uganda; Art 247 of the Constitution of Kenya.

²⁴¹ Art 29 of the Constitution of Uganda.

²⁴² Art 29(1) (b) of the Constitution of Uganda.

²⁴³ Art 29(1) (c) of the Constitution of Uganda.

²⁴⁴ Art 43(1) of the Constitution of Uganda.

²⁴⁵ Art 32(1) of the Constitution of Kenya.

²⁴⁶ Art 32(2) of the Constitution of Kenya.

²⁴⁷ Art 32(3) of the Constitution of Kenya.

compelled to act contrary to his/her religious beliefs.²⁴⁸ The Constitution states that the human rights recognized in the Bill of Rights are fundamental to the wellbeing and development of every individual and are only subject to the limitations set out in the Constitution.²⁴⁹ In order for a limitation on a fundamental right to be constitutional, it must be provided for by law, and it must be reasonable and justifiable in a democratic society.²⁵⁰ It suffices to note that there is currently no limitation on the freedom of religion within Kenyan law including the Prevention of Terrorism Act which is Kenya's prime counterterrorism law.

The above discussion of international law on the right to religion highlights some serious problems with the practices of law enforcement during counterterrorism in Kenya and Uganda. The religious group that has been mostly victimised are the Muslims who are often unjustifiably linked with terrorism. As was noted earlier, this is because several radical groups that have carried out acts of terror use Islamic principles as a justification. This victimization has manifested in the form of discrimination, stereotypical profiling, arrest, detention, searches (individuals, homes and mosques), interrogation and surveillance.²⁵¹ This kind of treatment is discriminatory and fundamentally inconsistent with both international and constitutional law.²⁵² The violation of the rights of Muslims on the basis of their religious affiliations should not be tolerated in a democratic society.

It is submitted that the move by governments to monitor Muslim activities may be justifiable if it is based on reliable intelligence. Law enforcement has a duty to ensure law and order which includes the prevention of terrorism. It is important for law enforcement to identify and investigate potential threats to public order and peace in an effort to prevent them from

²⁴⁸ Art 32(4) of the Constitution of Kenya.

²⁴⁹ Art 19(3) (c) of the Constitution of Kenya.

²⁵⁰ Art 24(1) of the Constitution of Kenya.

²⁵¹ J Sides and K Gross 'Stereotypes of Muslims and Support for the War on Terror' (2013) 75(3) *Journal of Politics* 583. The plight of Muslims has not only ended at mere stereotypical categorization and name calling. Several accounts have been documented in which security forces have detained, tortured and even killed Muslims under the pretext of investigating terrorism.

²⁵² See also: Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa. Available at: http://www.achpr.org/files/special-mechanisms/human-rights-defenders/principles_and_guidelines_on_human_and_peoples_rights_while_countering_terrorism_in_africa.pdf (accessed 26 July 2016) 14, para I.

occurring. This is part and parcel of proactive policing which is necessary in every state to prevent unnecessary loss and disruption of life. However, some interventions such as prohibiting the discussion of political issues during prayer, restricting times of worship, strict monitoring of Muslim organizations and the arrest, torture and killing of Muslims and their leaders cannot be said to be consistent with the freedom of religion. In addition, any limitation on the freedom of religion must be authorized by law and must be necessary for the preservation of public order.²⁵³ Clearly, some of the regulations imposed by law enforcement are not specifically provided for by law. Those limitations are consequently inconsistent with the law and should not be acceptable. It is for this reason that several Muslims and civil society organizations have called for more accountability during counterterrorism especially when it comes to the treatment of Muslims.²⁵⁴ Despite strong advocacy for respect of the freedom of religion during counterterrorism, law enforcement continues to violate the right with impunity.

5.6 The right to privacy of the person, home and other property

This subsection discusses the protection of the right to privacy in the context of Kenya's and Uganda's counterterrorism strategies. The enjoyment of the right to privacy of the person, home and other property is of concern to every state particularly in the fight against terrorism. While this is a fundamental right that must be respected, there is a danger that absolute privacy can obstruct investigations. This is particularly true for Kenya and Uganda that are grappling with the problem of terrorism. In an endeavour to fight terrorism, the two states have constituted police units charged with the responsibility to prevent and investigate terrorism. These units of law enforcement have been criticized for unlawfully limiting the right to privacy through conducting unauthorized surveillance, phone tapping,²⁵⁵ searches on individuals and buildings, seizing property (including information excluded by law for example privileged information) and

²⁵³ Art 18(3) of the ICCPR.

²⁵⁴ A Thurston 'Kenyan Muslims debate Anti-Terror Law' (2012) *The Revealer: A Review of Religion and Media*. Available at: <http://therevealer.org/archives/11981> (accessed 8 June 2014).

²⁵⁵ R Kakungulu-Mayambala *Phone-tapping & the right to privacy: A comparison of the right to privacy in communication in Uganda & Canada* (2008) 9.

intercepting communication.²⁵⁶ These counterterrorism law enforcement agencies have even gone to the extent of planting intrusive informational collection devices and programs such as spyware and malicious software in the computers of their targets.²⁵⁷ It is therefore submitted that such practices lead to the gradual unlawful erosion of the right to privacy if not carried out in accordance with law and procedure. It is consequently essential to examine the position of international law on the protection of the right to privacy, and how this human right may be negatively affected by counterterrorism legislation, policy and law enforcement operations.

5.6.1 International law framework for the protection of the right to privacy

The right to privacy is a fundamental entitlement which is protected by Article 12 of the UDHR.²⁵⁸ The right to privacy is also protected by Article 17 of the ICCPR and applies to all individuals without distinction.²⁵⁹ No individual may be subjected to unlawful interference of his/her privacy including the privacy of his/her home, property, correspondence and reputation. The HRC adopted General Comment No. 16²⁶⁰ in 1988 which elaborates on the protection of the right to privacy under Article 17 of the ICCPR. The Committee noted that Article 17 places an obligation upon states to refrain from unlawful and arbitrary interference of the right to privacy.²⁶¹ It must be noted that the African Charter does not provide for the right to privacy. However, the *Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa* require that searches on the person and home must be provided for by law.²⁶² Such searches are

²⁵⁶ A Botha 'Challenges in understanding terrorism in Africa: A human security perspective' (2008) 17(2) *African Security Review* 34.

²⁵⁷ Privacy International (2015) *For God and my president: State surveillance in Uganda*. Available at: https://www.privacyinternational.org/sites/default/files/Uganda_Report_1.pdf (accessed 08 July 2016); Privacy International (2016) *State of surveillance: Kenya*. Available at: <https://www.privacyinternational.org/node/735> (accessed 08 July 2016).

²⁵⁸ Art 12 of the UDHR states that 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation.'

²⁵⁹ Art 17 of the ICCPR states that 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.'

²⁶⁰ Human Rights Committee General Comment No. 16 Article 17 (The right to respect of privacy, family, home and correspondence, and protection of honor and reputation). HRI/GEN/1/Rev.9 (Vol. I) 8 April 1988.

²⁶¹ General Comment 16, para 1.

²⁶² *Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa*. Available at: http://www.achpr.org/files/special-mechanisms/human-rights-defenders/principles_and_guidelines_on_human_and_peoples_rights_while_countering_terrorism_in_africa.pdf (accessed 26 July 2016) 36, para A.

restricted to collection of relevant evidence and must be conducted with dignity and without harassment.²⁶³ However, this has not been the case with Kenyan and Ugandan counterterrorism police who have in several instances raided homes and work premises.²⁶⁴ Some of these raids have been conducted in the middle of the night during which the residents are intimidated or even beaten up by law enforcement. This conduct is definitely unlawful and is inconsistent with the principles of international law that require searches to be done in a manner that maintains the dignity of the persons being searched.

In 2009, UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin submitted a report elaborating on the protection of the right to privacy during counterterrorism.²⁶⁵ The Special Rapporteur re-stated the international law position that the right to privacy is not an absolute protection but may be subject to certain lawful limitations.²⁶⁶ The test for the legitimacy of restrictions on the right to privacy requires that such limitations must be provided for by law; the law must be accessible; it must not completely erode the right to privacy; the limitation must be necessary in a democratic society; discretion when implementing the restriction must not be unfettered; the limitation must be necessary; limitation measures must be proportional, appropriate and least intrusive; and the limitation must be consistent with other rights.²⁶⁷ In order for states comply with these requirements, the Special Rapporteur recommended the following measures: national law must recognize international standards on privacy and other rights;²⁶⁸ there must be independent oversight mechanisms over surveillance mechanisms;²⁶⁹ privacy impact assessments must be carried out for all counterterrorism policies;²⁷⁰ safeguards

²⁶³ As above.

²⁶⁴ Human Rights Watch (2014) Kenya: *Killings, Disappearances by Anti-Terror Police*. Available at: <https://www.hrw.org/news/2014/08/18/kenya-killings-disappearances-anti-terror-police> (accessed 08 July 2016).

²⁶⁵ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin. Adopted by the Human Rights Committee of 28 December 2009. A/HRC/13/37.

²⁶⁶ Scheinin (n 265 above) para 13.

²⁶⁷ Scheinin (n 265 above) para 17.

²⁶⁸ Scheinin (n 265 above) para 61.

²⁶⁹ Scheinin (n 265 above) para 62.

²⁷⁰ Scheinin (n 265 above) para 63.

must be developed to govern inter-state information sharing;²⁷¹ regulations must be developed to limit government access to information held by third parties;²⁷² counterterrorism legislation language must be restrictive for that purpose;²⁷³ governments should motivate their policies to show how surveillance is proportional and necessary;²⁷⁴ watch lists must include due process safeguards;²⁷⁵ and privacy enhancing research must be promoted.²⁷⁶

Kenya and Uganda's counterterrorism police units function with minimum accountability²⁷⁷ dominated by cover-ups of wrongdoing to the detriment of the victims.²⁷⁸ Most of the unreasonable infringement on the right to privacy has manifested in unauthorized searches of individuals, property and correspondence as noted above.

5.6.2 The right to privacy under Kenyan and Ugandan law

The constitutions of Kenya and Uganda both recognise the right to privacy of the person, home and other property.²⁷⁹ These provisions prohibit the unlawful search of the person, home or property, and the unlawful seizure of property, information relating to their family or private affairs, and communication.²⁸⁰ However, the right to privacy may be limited provided such limitations are demonstrably justifiable in a free and democratic society.²⁸¹ The Anti-Terrorism Act of Uganda provides for the powers of investigation²⁸² and security officers.²⁸³ An investigation officer can only conduct a search after obtaining a warrant from a magistrate who

²⁷¹ Scheinin (n 265 above) para 64.

²⁷² Scheinin (n 265 above) para 65.

²⁷³ Scheinin (n 265 above) para 66.

²⁷⁴ Scheinin (n 265 above) para 67.

²⁷⁵ Scheinin (n 265 above) para 69.

²⁷⁶ Scheinin (n 265 above) para 71.

²⁷⁷ J Lind & J Howell 'Counter-terrorism and the politics of aid: Civil society responses in Kenya' (2010) 41(2) *Development and Change* 335.

²⁷⁸ As above.

²⁷⁹ Art 31 of the Constitution of Kenya; Art 27 of the Constitution of Uganda.

²⁸⁰ As above.

²⁸¹ Art 43(2) (c) of the Constitution of Uganda; Art 24(1) of the Constitution of Kenya.

²⁸² Sec 1 Third Schedule to the Anti-Terrorism Act of Uganda (2002).

²⁸³ Sec 18 Anti-Terrorism Act of Uganda (2002). See also Sec 1 Third Schedule to the Anti-Terrorism Act of Uganda (2002). According to Sec 1 of the Third Schedule, an investigation officer is designated as a police officer who is not below the rank of Superintendent of Police or a public officer authorized in writing by the Director of Public Prosecution.

determines whether the material sought to be seized is not designated by law as privileged information.²⁸⁴ In principle, the officer's powers are limited to the conditions set out in the warrant. This creates a balance between protecting privacy and countering terrorism. The powers of an investigation officer are relatively limited compared to a security officer. A security officer is appointed by the Minister from the Ugandan Army, Police Force, or Security Organization²⁸⁵ and has the power to conduct surveillance; searches; intercept communication including letters, parcels, phone calls, faxes and emails;²⁸⁶ monitor electronic activities; and access banking information.²⁸⁷ In addition, a security officer may further carry out any other necessary action during a terrorist investigation under Section 19(6). The open-ended language of this provision confers unfettered discretion upon a security officer which opens up the possibility of unlawful erosion of the right and abuse of power. There is always need for oversight by an independent body for example a court over counterterrorism measures such as surveillance.²⁸⁸ In some states, parliament or some other independent body is charged with the mandate of reviewing the necessity and lawfulness of surveillance methods carried out during counterterrorism operations.²⁸⁹

Terrorist investigations in Kenya may be conducted by a police officer who holds a rank of Chief Inspector or any other higher rank.²⁹⁰ Such a police officer has the powers to intercept communications provided he/she has obtained prior consent from the DPP or Inspector General,²⁹¹ and has subsequently made an *ex parte* application to the High Court and has been granted an interception of communications order.²⁹² The High Court also has the power to set

²⁸⁴ Sec 7(1) (a) Third Schedule to the Anti-Terrorism Act of Uganda (2002). Excluded materials include privileged information held in confidence for example client-attorney correspondence, trade or employment records, human tissue taken for diagnosis, and journalistic material. See: Sec 7; Sec 2; Sec 3 of the Third Schedule to the Anti-Terrorism Act of Uganda (2002).

²⁸⁵ Sec 18 Anti-Terrorism Act of Uganda (2002); Sec 2 Anti-Terrorism Act of Uganda (2002).

²⁸⁶ Sec 19(1) Anti-Terrorism Act of Uganda (2002).

²⁸⁷ Sec 19(4) Anti-Terrorism Act of Uganda (2002).

²⁸⁸ Scheinin (n 265 above) para 62.

²⁸⁹ Scheinin (n 265 above) para 56.

²⁹⁰ Sec 36 Prevention of terrorism Act of Kenya (2012).

²⁹¹ Sec 36(2) Prevention of terrorism Act of Kenya (2012).

²⁹² Sec 36(1) Prevention of terrorism Act of Kenya (2012).

additional conditions for the interception order.²⁹³ An interception order may be issued if the Court is satisfied that the information sought relates to the commission of an offence under the Prevention of Terrorism Act.²⁹⁴ The Act also makes provision for the seizure of property used in the commission of terrorist acts²⁹⁵ as well as orders for seizure and restraint of property.²⁹⁶ Under Section 37, the Inspector General may make an *ex parte* application to the High Court for an order to seize property that has been or is being used for terrorism.²⁹⁷ In cases of urgency, the Inspector General may seize the property and subsequently make an application to the High Court not later than 72 hours.²⁹⁸ Before issuing the order, the High Court must grant audience to every person who has an interest in the property.²⁹⁹ Section 43 of the Act also makes provision for the power to seize and restrain property upon an *ex-parte* application to the appropriate court of law and such an application must be supported by an affidavit.³⁰⁰

It is submitted that terrorism investigations under the Prevention of Terrorism Act of Kenya are subjected to the independent oversight of courts of law which ensure that the right to privacy is not unlawfully violated or completely eroded altogether. In principle, this is a very important check and balance on the authority of law enforcement during counterterrorism operations. The courts in this instance play the important role of defenders of human rights by ensuring that due process is followed before law enforcement can legitimately interfere with the enjoyment of the right to privacy. This is a commendable position of law that can inform reform in the appointment of security officers and the monitoring of their powers in the case of Uganda. Judicial oversight and transparency in the investigation of terrorism which potentially affects the right to privacy cannot be overlooked. However, while law provides for judicial oversight, law enforcement in practice does not always adhere to the regulations. Anti-Terrorism Police Unit (ATPU) has been implicated for carrying out indiscriminate raids and searches of people, homes

²⁹³ Sec 36(3) Prevention of terrorism Act of Kenya (2012).

²⁹⁴ Sec 36(4) Prevention of terrorism Act of Kenya (2012).

²⁹⁵ Sec 37(1) Prevention of Terrorism Act of Kenya (2012).

²⁹⁶ Sec 43(1) Prevention of Terrorism Act of Kenya (2012).

²⁹⁷ Sec 37(1) Prevention of Terrorism Act of Kenya (2012).

²⁹⁸ Sec 37(2) Prevention of Terrorism Act of Kenya (2012).

²⁹⁹ Sec 37(3) Prevention of Terrorism Act of Kenya (2012).

³⁰⁰ Sec 43(1) (a) Prevention of Terrorism Act of Kenya (2012).

and businesses without adherence to the law.³⁰¹ There is an urgent need to ensure that laws are not blatantly disregarded by the executive branch of government so as to afford citizens with the protections therein.

Government surveillance may pose a risk of abuse of sensitive information through improper use, manipulation and leaks to unauthorized persons.³⁰² This ultimately has the potential of jeopardizing both the privacy and security of members of the public.³⁰³ However, in this age of terrorism, there is a need to strike a balance between privacy and security concerns.³⁰⁴ The threat of terrorist activity in Kenya and Uganda has had the effect of disrupting peace, security, trade and other aspects of everyday life.³⁰⁵ In order to prevent such attacks, it is critical for the state to adopt laws that are crucial in fighting terrorism including the right to privacy.³⁰⁶ An effective democracy should be able to guarantee human rights and security which are particularly compromised by acts of terrorism.³⁰⁷ However, when law enforcement acts outside the scope of the law, such conduct should not be tolerated under any circumstances.

5.7 Conclusion

Chapter five focused on five substantive rights: the right to life; the right to equality and the protection against discrimination; freedom of opinion, expression and association right to free speech); freedom of thought, conscience and religion; and the right to privacy. The aim of this assessment was to establish the various protections of these rights at international law and the interpretations and guidelines that have been issued by treaty bodies, the HRC and special mandates. In addition to the international protections, the chapter examined regional protections as well as the laws of Kenya and Uganda.

³⁰¹ Open Society Foundations *We're tired of taking you to court: Human rights abuses by Kenya's Anti-terrorism Police Unit* (2013) 24.

³⁰² D Lyon *Theorizing surveillance* (2006) 292-283.

³⁰³ As above.

³⁰⁴ J Rosen 'The naked crowd: Balancing privacy and security in an age of terror' (2004) *46 Arizona Law Review* 607.

³⁰⁵ C Goredema & A Botha 'African commitments to combating crime and terrorism: A review of eight NEPAD countries' (2004) African Human Security Initiative, Paper 3.

³⁰⁶ J Rosen 'The naked crowd: Balancing privacy and security in an age of terror' (2004) *46 Arizona Law Review* 607.

³⁰⁷ BB Esquita, GW Downs & A Smith 'Thinking inside the box: A closer look at democracy and human rights' (2005) *49 International Studies Quarterly* 439-457.

In the discussion of the right to life, it was determined that there are a number of protection of the right to life under international law. This being the most important right, several efforts at international law have been channelled to ensure that states not only recognise, but also implement it. The constitutional and legislative framework of Kenya and Uganda are quite elaborate when it comes to the right to life and its protections. However, it was determined in the case of Uganda that there are no regulations that require law enforcement to adhere to the principles of proportionality and necessity when lethal force is applied. This is a vital oversight which needs to be attended to with urgency to ensure conformity to international law as well as the protection of the right to life. The discussion also highlighted some conduct of discrimination against Muslims in particular based on stereotypical profiles which was determined to be unconstitutional and also in contravention of international standards.

The chapter examined the counterterrorism laws of the two countries to examine how they affect the enjoyments of these rights. In addition, the chapter examined the practice of law enforcement in order to determine whether in implementing counterterrorism legislation, these security officers respect and protect human rights. While the laws dictate a particular procedure to be followed in certain matters, law enforcement seems to act in a completely opposite manner that contravenes the law with impunity.

The assessment uncovered several situations where human rights are violated mainly by counterterrorism law enforcement and all channels to seek recourse hit a dead end. This is mainly attributed to the absence of proper accountability channels to ensure that law enforcement officer conduct their duties in accordance with the provisions of the law. In addition, there is inadequate oversight and supervision of law enforcement especially during counterterrorism operations resulting in unlawful deprivation and violation of human rights of terrorist suspects. This conclusion is worrying especially with human rights at stake and steps must be taken to ensure accountability of law enforcement.

Chapter six will focus on the rights affecting an individual's liberty including the rights of detained persons. These will include the right to liberty and personal security; prohibition against arbitrary arrest; right to know the reason of arrest; right to counsel/representation; right to remain silent;

prohibition of forced confessions; right to dignity (prohibition against torture, inhuman and degrading treatment); right to be brought before court within a reasonable time (arbitrary detention); and the right to fair trial.

CHAPTER SIX

6. Liberty, personal security and the rights of detainees

6.1 Introduction

Chapter six examines the right to liberty of the person, personal security, as well as the rights of persons held in law enforcement custody. The operation of this class of rights ensures that individuals who are accused of crimes are protected from violation by the state and that they may be able to adequately defend their innocence before the courts of law. The integration of both the police and judiciary in the administration of justice invariably creates a system of checks and balances with various procedures to ensure the protection of detainees. This analysis therefore assesses the protection of these rights at international, regional and state level and how the enjoyment of these rights is affected by counterterrorism legislation. The rights of detained persons ensure that individuals held in custody are protected from abuse and that due process of law is followed. In addition, these rights in theory guarantee that there is no bias against any individual during the trial process. The proper recognition and enforcement of these rights ensures that all individuals receive fair treatment within the justice system without distinction of any kind.

6.2 The right to liberty and personal security

The right to liberty and personal security places an obligation upon states not to arbitrarily deprive citizens of their freedom and to respect their physical security. The first aspect of the right which is 'liberty' relates to the physical freedom of the individual with associated protections that safeguard all persons from any forms of detention that are not sanctioned by law.¹ On the other hand, the right to security of the person relates to the physical integrity of the person and protects individuals from intentional physical trauma that is unlawfully directed

¹ Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa. Available at: http://www.achpr.org/files/special-mechanisms/human-rights-defenders/principles_and_guidelines_on_human_and_peoples_rights_while_countering_terrorism_in_africa.pdf (accessed 26 July 2016) 19, para A.

towards their person. The right to liberty and security of the person may be categorized as omnibus rights that have several other rights subsumed under them including the right not to be arbitrarily detained, arrested or exiled; the right to remain silent (non-self-incrimination); the right to counsel/legal representation; the right to know the reason for detention; the right to be brought promptly before a judicial officer; the freedom from torture, degrading and inhuman treatment; the right to apply for release from unlawful custody; the right to trial within a reasonable time; and the right to apply for compensation for unlawful detention.

Within the context of Kenya and Uganda's counterterrorism policies, the right to liberty and personal security is arguably the most affected of all rights. This is because almost every terrorism investigation which implicates a suspect is likely to result in an arrest for the purposes of trial or further investigation. This has been particularly true in these two countries where a large number of individuals have been detained for terrorism and related offences by law enforcement.² The JATT and ATPU have been known to carry out arrests in line with their function of suppressing and preventing terrorism in both Kenya and Uganda. While the powers of arrest themselves are not in question, some of the circumstances and methods in which arrests have been effected by counterterrorism law enforcement has been questionable. These security agencies have been known to effect arrests using excessive and unnecessary force.³ During these arrests, suspects are most likely to be assaulted with some individuals unfortunately losing their lives in the process.⁴ Legal procedures of lawful arrest are generally ignored and as a result detainees are not informed of the reasons for arrest. In addition, the suspects are usually held in secret locations that are not designated as a detention centres for extended periods without being charged with any crime.⁵ Law enforcement is often tight-lipped about the whereabouts or

² Open Society Foundations *We're tired of taking you to court: Human rights abuses by Kenya's Anti-terrorism Police Unit* (2013) 24.

³ VV Ramraj, M Hor & K Roach *Global anti-terrorism Law and Policy* (2012) 590; Refugee Documentation Centre (Ireland) *Information regarding abuses carried out by the ISO (Internal Security Organisation) in Uganda* (2010).

⁴ J Rone 'State of pain: Torture in Uganda' (2004) 16(4) *Human Rights Watch* 4. Isa Kiggundu was gunned down in front of his house by counterterrorism police in Uganda during an arrest. It seemed the mission was not to arrest but kill him. Four police cars approached the house and police immediately opened fire on the house.

⁵ Amnesty International *Police Reform in Kenya: 'A Drop in the Ocean'* (2013). Available at: www.amnesty.org (accessed 9 September 2014) 18, para 4: An interview with a small scale trader from Kibera, Kenya (13 December

status of detainees claiming that a leak in such sensitive information might jeopardize their investigations and put certain persons at risk.⁶ While some of these detentions are in fact legitimate, a considerable number of them have been tainted with gross irregularities that lack of a clear legal basis.⁷

In some cases where justifications were given, such explanations may not disclose a legitimate reason for arrest. For example, in 2015, Derrick Kiyonga who was a journalist at a terrorism trial was arrested and interrogated by counterterrorism police in Uganda for doing ‘work which was not his.’ The journalist had passed a note from the accused person to his lawyer at the trial.⁸ Other journalists noted that this was common practice because members of the media are often seated between the dock and bar in the courtroom. When the matter was brought before the trial judge by defence counsel, Justice Alphonse Owiny Dollo ordered for the immediate and unconditional release of the journalist before proceedings could continue.⁹ It is quite unfortunate that there might be many individuals who are enduring unlawful detention based on such flimsy grounds as the one discussed above. Such petty arrests may speak towards the level of training and understanding of the law which in turn is a reflection of the quality of law enforcement services in Kenya and Uganda.

Counterterrorism police have also earned a reputation for brutality towards detainees in an effort to extract information or confessions. Uganda’s counterterrorism police has used gruesome torture techniques including battering, electrocution, suspension in chains, pepper spraying and even maiming.¹⁰ Kenya’s ATPU has also utilized horrific torture techniques for

2012). A trader recalled that he was arrested, detained and tortured for one year without any trial. He was told that he could be released if he paid a bribe. He was later released with a warning not to speak of his ordeal.

⁶ S Pavic & J Kyriazis *Presumed innocent, behind bars: The problem of lengthy pre-trial detention in Uganda* (2011) International Human Rights Program. Available at: http://www.asf.be/wp-content/uploads/2014/06/ASF_UG_Pre-trial-detention-report-Univ-Toronto_2011.pdf (accessed 29 July 2014).

⁷ J Rone ‘State of pain: Torture in Uganda’ (2004) 16(4) *Human Rights Watch* 4. Saidi Lutaaya was arrested by counterterrorism police at the taxi park in 2007. He was arrested for alleged connections with terrorism but was never informed of the reasons of his arrest. Sadly, Mr Lutaaya was tortured to death by his captors.

⁸ Human Rights Network for Journalists Uganda (24 September 2015) *Counter Terrorism Police arrest journalist*. Available at: <https://hrnjuganda.wordpress.com/> (accessed 06 July 2016).

⁹ As above.

¹⁰ S Lamwaka *Preventing torture in Uganda* (2011) The Finnish NGO Foundation for Human Rights, available at: <http://projects.essex.ac.uk/ehrr/V6N2/Lamwaka.pdf> (accessed 29 July 2014); The Redress Trust *Torture in Uganda*:

example covering a detainee's head with a metallic drum and firing bullets at it.¹¹ In fact, the torture of terror suspects by ATPU officials is said to be more brutal than the cases of torture that were documented at Guantanamo Bay by the Americans against the suspects of terrorism.¹² This undesirable conduct signifies heavy-handedness, gross impunity and lack of knowledge on basic human rights by law enforcement officials.

6.2.1 The protection against arbitrarily arrest and detention

The UDHR recognizes the right to liberty and security of the person under Article 1¹³ and 3.¹⁴ The Declaration proclaims that all human beings are born free and equal in dignity and rights,¹⁵ and this underlies the importance of liberty to all individuals.¹⁶ The African Charter also recognizes the right to liberty and notes that no individual may be arbitrarily deprived of their freedom.¹⁷ In the same spirit, ICCPR recognizes the right to liberty and personal security¹⁸ and according to Article 9(1) of the ICCPR, no individual may be subjected to unlawful or arbitrary detention outside the confines of law.¹⁹ Article 9 expounds on the conditions for a lawful arrest and these are that the detainee must be informed of the reason(s) of arrest at the time of apprehension;²⁰ he/she should be promptly brought before court or a judicial officer;²¹ detainees should have unhindered access to courts that will determine the lawfulness of their arrest;²² and that victims of unlawful arrest have a right to sue for compensation in a competent court.²³

A Baseline Study on the Situation of torture Survivors in Uganda. Available at: http://www.redress.org/downloads/publications/TortureUganda_Apr%2007.pdf (accessed 29 July 2014).

¹¹ BE Whitaker 'Reluctant partners: Fighting terrorism and promoting democracy in Kenya' (2008) 9 *International Studies Perspectives* 254.

¹² J Davis 'Evaluating counterterrorism in Africa' (2010) in J Davis (ed) *Terrorism in Africa: The Evolving Front in the War on Terror* 212.

¹³ All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

¹⁴ Everyone has the right to life, liberty and security of person.

¹⁵ Art 1 of the UDHR.

¹⁶ Art 1 of the UDHR.

¹⁷ Art 6 of the African Charter.

¹⁸ Art 9 of the ICCPR.

¹⁹ Art 9(1) of the ICCPR.

²⁰ Art 9(2) of the ICCPR.

²¹ Art 9(3) of the ICCPR.

²² Art 9(4) of the ICCPR.

²³ Art 9(5) of the ICCPR.

The right to liberty is not absolute and may be legitimately limited in certain circumstances that must be provided for by law²⁴ and non-arbitrary.²⁵ As held by the UN Human Rights Committee, 'unlawfulness of an arrest signifies a contravention of a particular law(s) while arbitrariness includes broader characteristics of unfairness, unreasonableness and lack of regard to due process.'²⁶ Procedures for arrest must therefore be expressly provided for by law including who may carry out an arrest; where and how individuals should be detained; and when they should be produced before the courts of law.²⁷ The *ACHPR Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa* provide procedural guidelines for effecting a lawful arrest.²⁸ According to the Guidelines, arrests must be effected by an authorized official who has either obtained a warrant, or upon reasonable grounds that implicate a suspect in a crime.²⁹ The official must identify himself using his identity card and all vehicles used in the arrest must clearly display their license plates.³⁰ In addition, the use of force must be strictly a last resort and must be necessary and proportional to any threat posed by the suspect.³¹ Where no resistance is put up by the suspect, the arrest should otherwise be peaceful and should not involve unnecessary force. It is clear to see that the practice of counterterrorism law enforcement in Kenya and Uganda is the total opposite of the principles of international law. There is therefore a need to examine whether the domestic laws of these countries comply with international law principles.

The Constitution of Uganda recognises the right to liberty and personal security.³² Article 23(1) states the conditions under which an individual may be deprived of liberty. The conditions

²⁴ HRC General Comment 35, Article 9 (Liberty and security of the person) CCPR/C/GC/35 (2014) para 10; Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa. Available at: http://www.achpr.org/files/special-mechanisms/human-rights-defenders/principles_and_guidelines_on_human_and_peoples_rights_while_countering_terrorism_in_africa.pdf (accessed 26 July 2016) 19, para A.

²⁵ General Comment 35, para 11.

²⁶ General Comment 35, para 12.

²⁷ General Comment 35, para 23.

²⁸ ACHPR Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa. Available at: http://www.achpr.org/files/instruments/guidelines_arrest_detention/guidelines_on_arrest_police_custody_detention.pdf (accessed 26 July 2016) para 3. *See also:* Part 3A of the African Commission adopted the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa.

²⁹ ACHPR Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, para 3.

³⁰ ACHPR Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, para 3a.

³¹ ACHPR Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, para 3c.

³² Art 23 of the Constitution of Uganda.

relevant to this discussion include arrest; the execution of a court order; securing the person's appearance before a court; and arrest for the purpose of extradition.³³ A detainee must be remanded in a place authorized by law³⁴ and a next-of-kin should be informed of the detention when requested.³⁵ The Anti-terrorism Act³⁶ and Penal Code³⁷ of Uganda both criminalize acts of terrorism and as such, the provisions of the Constitution on arrest apply to arrests made pursuant to acts of terror. According to the Anti-Terrorism Act, an arrest may be carried out by a security or investigation officer upon reasonable suspicion of the commission of an act of terrorism or that such act is about to be committed.³⁸ On the other hand, the Kenyan Constitution also recognizes the right to liberty and personal security, and prohibits unlawful deprivation of liberty.³⁹ Under the Prevention of Terrorism Act, a police officer may also apprehend an individual where there are reasonable grounds of suspicion that a crime has or is about to be committed.⁴⁰

While this is the position of the law, the practice of counterterrorism law enforcement as stated at the beginning of this section exposes a worrying trend of disregard for legal procedures with impunity. It is also concerning that while the law requires detainees to be kept at areas designated for detention and the next-of-kin to be informed, none of this happens in some cases and law enforcement attempts to hide under the guise of national security in order to justify its wrongdoing. In addition, several arrests are effected by unidentified personnel contrary to the *ACHPR Guidelines on arrest*. Clearly, these actions fall short of the required international and domestic threshold making them both unlawful and arbitrary. The protection against arbitrary arrest and detention is closely linked to two rights including the right to apply for release from unlawful detention and the right to compensation for arbitrary detention. These two rights will be briefly discussed in the next subsections.

³³ Art 23(1) of the Constitution of Uganda.

³⁴ Art 23(2) of the Constitution of Uganda.

³⁵ Art 23(5) of the Constitution of Uganda.

³⁶ Sec 7 of the Anti-Terrorism Act of Uganda.

³⁷ Sec 23 of the Penal Code of Uganda.

³⁸ Sec 1 of the Third Schedule of the Anti-Terrorism Act; Sec 18 Anti-Terrorism Act of Uganda.

³⁹ Sec 29 of the Kenyan Constitution.

⁴⁰ Sec 31 of the Prevention of Terrorism Act.

6.2.2 The right to apply for release from unlawful detention

Having examined the protection against arbitrary arrest and detention, it is important to note that an individual has the right to apply to court for release from arbitrary or unlawful detention. This right is recognized by Article 9(4) of the ICCPR. The right to apply for release from unlawful custody is expounded on by HRC General Comment 35 which states that anyone who is unlawfully detained has a right to apply to a court to decide the lawfulness of their detention.⁴¹ This right also encapsulates the principle of *habeas corpus*.⁴² It must be noted that the right to apply for release applies to all forms of detention sanctioned by law enforcement regardless of the crime which the detainee is charged for.⁴³ In addition, an order for release may become applicable in instances where the initial detention was lawful but subsequently becomes unlawful for the reason that the detainee has served his/her lawful sentence, and that there is no more evidence that is sufficient to keep the person under detention.⁴⁴ However, Article 9(4) does not apply in situations where a prisoner is serving part of a sentence that has been decided by a competent court of law.⁴⁵

It must be noted that the purpose of this right is to secure the immediate release of the individual who is being detained unlawfully from custody. As such, it is important for the application to be made before a court of competent jurisdiction with revisionary powers.⁴⁶ The right to bring an application for release before court applies immediately after the individual is apprehended and there is no waiting period before which the application may be brought.⁴⁷ Where an order for release is issued by a competent court, the detainee becomes entitled to immediate release.⁴⁸

⁴¹ HRC General Comment 35, Article 9 (Liberty and security of the person) CCPR/C/GC/35 (2014) para 39.

⁴² As above.

⁴³ HRC General Comment 35, para 40. The right to apply for release applies to all forms of detention including detention in connection with criminal proceedings, military detention, security detention, counter-terrorism detention, involuntary hospitalization, immigration detention, detention for extradition and wholly groundless arrests. It also includes vagrancy or drug addiction, detention for educational purposes of children in conflict with the law and other forms of administrative detention.

⁴⁴ HRC General Comment 35, para 43.

⁴⁵ As above.

⁴⁶ HRC General Comment 35, para 41.

⁴⁷ HRC General Comment 35, para 42.

⁴⁸ HRC General Comment 35, para 41.

It must be noted that Article 9(4) of the ICCPR protects the right of a detainee to bring an application for release before a court of law within the traditional judiciary system at his or her election.⁴⁹ It must be emphasized that the option to institute the application remains at the discretion of the applicant and therefore does not take place automatically. The detainee may also elect to institute the application for release from unlawful detention through someone else acting on his/her behalf.⁵⁰ However, paragraph 4 also makes provision for exceptional proceedings for release before specialized tribunals which are established by law other than the traditional courts.⁵¹ The underlying condition for such tribunals is that they must be either independent of executive and legislative arms of government or have judicial independence in determining issues of a judicial nature.⁵² Any law, policy or measure that purports take away a detainee's right to bring an application for release from unlawful custody is considered to be inconsistent with Article 9(4) of the Covenant.⁵³ Detainees should be allowed to consult with their legal representatives and should be advised of this right in a language they understand.⁵⁴

The right to apply for release from unlawful custody does not end at mere access to courts but also entitles the detainee to receive a decision from the court whether it is in their favour or against them.⁵⁵ A court that wilfully or otherwise refuses to deliver a decision on an application for release violates the Covenant.⁵⁶ In addition, an application for release from unlawful custody must be heard expeditiously by the court in order to ascertain the applicant's claim. Any delay that is brought about by the applicant's own doing or negligence to institute the application timeously will not be attributable to court.⁵⁷ The recognition of this right is very important in as far as protecting the right to liberty and personal security is concerned as it invariably prevents the continuation of an unlawful detention.

⁴⁹ HRC General Comment 35, para 45.

⁵⁰ HRC General Comment 35, para 46.

⁵¹ HRC General Comment 35, para 45.

⁵² As above.

⁵³ HRC General Comment 35, para 46.

⁵⁴ As above.

⁵⁵ HRC General Comment 35, para 47.

⁵⁶ As above.

⁵⁷ As above.

Under the Constitution of Kenya, the right to apply for release from unlawful custody is expressly provided for under Article 49(1) (g).⁵⁸ On the other hand, Uganda's Constitution does not expressly provide for the right to apply to be released from unlawful custody. However, it may be implied from Article 23(7) that provides that a person who is unlawfully detained is entitled to compensation from the state or agency that detained him or her.⁵⁹ While such claims are sustainable before the courts, the institution of this right is usually rendered impractical on account of law enforcement who usually detain terrorist suspects in secret locations for excessive periods without access to anyone including legal counsel.⁶⁰ This reveals that the major concern is not that there are no legislative safeguards on human rights, but that they are not implemented in practice.

6.2.3 The right to compensation for unlawful detention

The right to apply for release from unlawful custody is closely related to the right to compensation for unlawful detention. This right is protected by Article 9(5) of the ICCPR and is substantiated by HRC General Comment 35. The right to compensation entitles any person who has been subjected to unlawful detention to an effective remedy from court.⁶¹ This effective remedy often takes the form of monetary or financial compensation paid to the victim of unlawful detention.⁶² States are under the obligation to implement a framework under which compensation may be paid out to victims of human rights violations.⁶³ Article 9(5) of the ICCPR does not dictate the procedure and amounts of compensation to be paid to victims of unlawful detention. This determination is left the state to decide on conditions for compensation.⁶⁴ The only condition that is attached is that the compensation framework must be effective.

⁵⁸ Art 49(1) (g) of the Constitution of Kenya states that '...at the first court appearance, to be charged or informed of the reason for the detention continuing, *or to be released.*' [My emphasis]

⁵⁹ Art 23(7) of the Constitution of Uganda.

⁶⁰ See for example the case of the small-scale trader in Kibera (Kenya) who was detained for close to one year without charge discussed in Chapter 2, section 2.6.2 of this thesis; Amnesty International (n 5 above) 18, para 4.

⁶¹ HRC General Comment 35, para 49.

⁶² As above.

⁶³ HRC General Comment 35, para 50.

⁶⁴ As above.

Unlawful detention may ultimately arise out of criminal proceedings, non-criminal proceedings or no criminal proceeding at all in the first place. The unlawfulness of the detention emanates directly from the unlawful conduct or breach of procedure by law enforcement officials or the arresting authority.⁶⁵ Lastly, monetary compensation provided for under Article 9(5) of the ICCPR covers both financial and non-financial harm suffered by an individual as a result of the unlawful detention.

The right to receive compensation for the breach of human rights is upheld by the constitutions of Kenya and Uganda. The Constitution of Kenya provides for the payment of compensation for breach, violation or infringement of human rights including the right to liberty and personal security.⁶⁶ A review of Kenyan case law reveals a wealth of cases where the courts have awarded damages for unlawful arrest and detention. One such case is *Kenya Fluorspar Company Ltd. v William Mutua and the Attorney General of Kenya*⁶⁷ in which Mutua had been granted general damages for injury, unlawful arrest and detention in the Magistrates Court. Kenya Fluorspar Company Ltd. appealed the decision on the grounds that the arrest had been carried out by the police and yet the damages had been ordered jointly against them and the Attorney General.⁶⁸ Although the Court partially absolved Kenya Fluorspar of liability, it upheld the damages that had been ordered against the Attorney-General for the unlawful breach of Mutua's rights (unlawful arrest and detention).⁶⁹ This is indeed a commendable attitude that the courts in Kenya have adopted with regard to enforcing human rights is concerned.

The Constitution of Uganda also provides for the payment of compensation where a person has been held, arrested or detained unlawfully.⁷⁰ The obligation to compensate the victim is placed upon the person or institution who conducted the unlawful detention.⁷¹ The payment of

⁶⁵ HRC General Comment 35, para 51.

⁶⁶ Art 23(3) (e) of the Constitution of Kenya.

⁶⁷ *Kenya Fluorspar Company Ltd. v William Mutua and the Attorney General of Kenya*, High Court of Kenya held at Eldoret, Civil Appeal No. 118 of 2010.

⁶⁸ *Kenya Fluorspar Company Ltd. v William Mutua and the Attorney General of Kenya*, appeal judgment para 1.

⁶⁹ *Kenya Fluorspar Company Ltd. v William Mutua and the Attorney General of Kenya*, appeal judgment holding para (a).

⁷⁰ Art 23(7) of the Constitution of Uganda.

⁷¹ As above.

compensation not only acts as a deterrent against unlawful detention but also enables the victim to recover from any harm that he/she may have suffered while in custody. In *Mukasa and another v Attorney General of Uganda*, the High Court of Uganda had occasion to determine a case of unlawful arrest and detention in which compensation was claimed.⁷² The Court determined that the arrest which was effected by a Local Councillor was unlawful since it did not fall within the scope of his official duties. The Councillor had therefore acted unlawfully in detaining the plaintiff. However, the Local Councillor's actions were imputable upon the Attorney General since his office formed part of the local government structure.⁷³ The Court found that the applicant's rights to privacy, liberty, life and protection against torture had been unlawfully infringed upon.⁷⁴ The learned judge consequently ordered for compensation of ten million Uganda Shillings to be paid to the applicant for the breach of her rights.⁷⁵ This judgment like several others, clearly shows a willingness and ability of courts to enforce the right to receive compensation in order to secure the protection of human rights in Uganda.

6.2.4 The right to know the reasons for detention

One of the major irregularities that characterize arrests made by counterterrorism law enforcement in Kenya and Uganda is the failure to notify detainees of the reasons for arrest at the time of arrest or within a reasonable period of time.⁷⁶ The obligation to notify the detainee of the reasons of arrest raises three issues which include the time at which the reason should be communicated; the nature and scope/extent of explanation (charges) to be given; and, the method in which the individual is supposed to be informed (language which they understand). One factor that contributes to the inability to inform the detainees of the reasons of arrest is the chaotic manner in which police sometimes conducts arrests in Kenya and Uganda.⁷⁷ It is

⁷² *Mukasa and another v Attorney General of Uganda*, High Court of Uganda held at Kampala, Civil Division, Misc Cause No. 24/06 (22 November 2008).

⁷³ *Mukasa and another v Attorney General of Uganda*, para 39.

⁷⁴ *Mukasa and another v Attorney General of Uganda*, para 42.

⁷⁵ *Mukasa and another v Attorney General of Uganda*, para 43.

⁷⁶ Amnesty International (n 5 above) 18, para 4.

⁷⁷ T McConnell (2014) *Kenya's case study in homegrown terrorism* available at: <http://www.globalpost.com/dispatch/news/regions/africa/140609/kenyas-case-study-homegrown-terrorism> (accessed 30 April 2016).

interesting to note that even in circumstances that do not justify such conduct, law enforcement operations are characterized by exaggerated dramatizations in which persons of interest are theatrically bundled up and whisked away at breakneck speed.⁷⁸ Such unwarranted excitement even in cases where the detainee does not offer up resistance often creates an environment of commotion rendering it impractical to inform the suspect of the reason(s) for arrest at the time of apprehension.

Article 9(2) of the ICCPR mandates law enforcement and other authorized personnel to notify suspects of the reasons for arrest at the time of apprehension.⁷⁹ This is a duty placed upon law enforcement to safeguard citizens from violation of rights and freedoms. It must be noted that the African Charter is silent on the right to know the reasons of arrest. However, the *Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa* provide that any person who is detained must at the time of arrest, be informed of the reasons for arrest in a language they understand.⁸⁰ In cases where the detainee does not understand the official language of communication, the onus to provide an interpreter within a reasonable time falls upon the state.

Article 9(2) of the ICCPR emphasizes the requirement for law enforcement to inform the suspect of the reason of arrest and the charge laid against them.⁸¹ The rationale of this obligation is to enable the detainee to contest his arrest if the reasons are invalid and to prepare his/her defense.⁸² The requirement for immediacy in informing the suspect is mandatory except in exceptional circumstances for example the lack of an interpreter and where there is violence during the arrest (where the detainee puts up considerable resistance).⁸³ In such exceptional circumstances, the suspect should be informed of the reasons promptly (as soon as reasonably

⁷⁸ Human Rights Network for Journalists Uganda (24 September 2015) *Counter Terrorism Police arrest journalist*. Available at: <https://hrnjuganda.wordpress.com/> (accessed 06 July 2016).

⁷⁹ Art 9(2) of the ICCPR.

⁸⁰ *Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa*, 20, para 3 B(ii); ACHPR Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, para 4(b).

⁸¹ General Comment 35, para 24.

⁸² General Comment 35, para 25.

⁸³ General Comment 35, para 27.

possible).⁸⁴ It is therefore important to establish whether the requirement to inform detainees of the reasons of arrest is protected under Kenyan and Ugandan law.

The constitutions of Kenya⁸⁵ and Uganda⁸⁶ both recognize the right of an arrested person to be informed of the reasons of arrest in a language which he understands. It must be noted that both constitutions do not address the factor of immediacy or informing the detainee within a reasonable time as stipulated in General Comment 35. Nevertheless, the basic protection of the right to inform a detainee of the reason for his/her arrest is present in the constitutional law. The National Police Standing Orders of the Kenyan Police Force requires a person who is arrested to be promptly informed of the reasons of arrest in a language that they understand.⁸⁷ However, it has been illustrated above that law enforcement in Kenya and Uganda do not always follow the rules of procedure.

The challenge is that the practice of not informing detainees of such reasons for extended periods of time is still persistent within law enforcement in Kenya and Uganda.⁸⁸ It is submitted that the practice of not informing suspects of the reasons of arrest or the charges brought against them violates both constitutional and international law. While the regulations clearly provide for suspects to be informed of these reasons, law enforcement seems to operate without regard to procedure. This clearly points to a pattern of impunity by which law enforcement carries out their functions outside the ambit of the law. Law enforcement cannot break the same body of law that it is constituted to uphold in the first place. There is therefore a need to develop mechanisms that ensure the accountability of law enforcement.

6.2.5 The right to be brought promptly before a judicial officer

The right to be brought promptly before a judge is a legal requirement that ensures judicial supervision over all forms of detention carried out by law enforcement officials or security

⁸⁴ General Comment 35, para 30.

⁸⁵ Art 49(1) of the Constitution of Kenya.

⁸⁶ Art 23(3) of the Constitution of Uganda.

⁸⁷ Art 49(i) (a) of the National Police Service Standing Orders of Kenya (2014).

⁸⁸ Human Rights Network for Journalists Uganda (n 78 above).

agents.⁸⁹ It is important to note that the right encompasses two major obligations which are to be brought before a competent court of jurisdiction; and to be brought timeously (within a reasonable time). One example of an accused person being charged before a court that lacked jurisdiction was in the case of *Dr Kizza Besigye & others v Attorney General of Uganda*.⁹⁰ Rather than being brought before the High Court, the accused persons were charged with a number of crimes including terrorism before the Court Martial which does not have jurisdiction to adjudicate the crime of terrorism.⁹¹ The Constitutional Court therefore dismissed all the charges against the accused based on several irregularities including lack of jurisdiction of the Court Martial. Law enforcement consequently has an obligation to produce the detainee in a court that is competent to adjudicate the offence of terrorism.

The requirement for judicial supervision over detention ensures that the law enforcement does not abuse the power and discretion that they are entrusted with. In addition, courts of law also ensure that due process as well as the rules against bias are implemented at trial. However, it has become fairly common practice for counterterrorism law enforcement in Kenya and Uganda to detain suspects for extended periods of time without producing them before any court of law.⁹² In one extreme case, a terrorist suspect in Kibera (Kenya) was detained for one whole year and released after being tortured without ever being charged for any crime or being brought before a court.⁹³ In such instances, the suspects are consequently denied the opportunity of contesting their innocence before a competent court of law. The most disturbing reality is that in some cases, law enforcement blatantly disregards court rulings.⁹⁴ These occurrences go to prove that the judiciary's authority has been somewhat diminished and the whole institution is seemingly subservient to the executive. This situation ultimately undermines the principles of

⁸⁹ Life, Liberty and Security of Person in *Human rights in New Zealand*. Available at: https://www.hrc.co.nz/files/8214/2388/0502/HRNZ_10_Life_Liberty_and_Security.pdf (accessed 22 July 2016).

⁹⁰ Constitutional Petition No.7 of 2007 [2010] UGCC 6 (12 October 2010).

⁹¹ As above, judgment (issue no. 4).

⁹² Amnesty International (n 5 above) 18, para 4.

⁹³ As above.

⁹⁴ *James Katabazi and 21 others v Secretary General of the East African Community and the Attorney General of the Republic of Uganda* held in the East African Court of Justice at Arusha, Case no. 1 of 2007. See also: *Constitutional Petition No.18 of 2005 Uganda Law Society vs Attorney General*. The Constitutional Court condemned these actions as a violation of the Constitution.

democracy, rule of law and separation of powers in which the judicial system is supposed to defend and protect. It is imperative to examine the international law protection on the right to be brought before a competent court of law.

The ICCPR provides that any person who is arrested on a criminal charge must be promptly brought before a judicial officer within a reasonable time.⁹⁵ According to the same provision, the detainee shall be entitled to either be released from incarceration or to be tried within a reasonable time.⁹⁶ The importance of this procedure is laid down by the African Commission in the *ACHPR Fair Trial Guidelines* which states that the purpose of judicial review over detention includes: an assessment of whether there are reasonable grounds for detention; determination whether pre-trial detention is required; an assessment of whether the detainee should be released and any conditions of the release if necessary; a determination of the safety of the detainee; safeguarding the rights of the detainee; and providing the detainee an opportunity to contest the lawfulness of his detention.⁹⁷ The assessment above constitutes both an objective and subjective consideration which takes into account the peculiar circumstances of the detention. This criterion gives rise to the question of what constitutes 'reasonable time.'

The meaning of 'reasonable time' can be found in paragraph 7(b) (ii) of the *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa*.⁹⁸ According to the guidelines, any incarcerated person must be brought physically⁹⁹ before a judicial officer within 48 hours except where such time is extended by court.¹⁰⁰ The judicial officer must then determine whether the suspect should be set free or remanded further for investigation or trial on the basis of the facts and arguments laid out before him/her.¹⁰¹ A detainee also has the right to institute proceedings before a competent court challenging the lawfulness or arbitrariness of

⁹⁵ Art 9 of the ICCPR.

⁹⁶ As above.

⁹⁷ ACHPR Fair Trial Guidelines, para M (3).

⁹⁸ ACHPR Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, para 7(b) (ii).

⁹⁹ See also: General Comment 35, para 34.

¹⁰⁰ As above. See also: Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 (1994) para 2; General Comment 35, para 33.

¹⁰¹ General Comment 35, para 36.

his/her detention.¹⁰² The institution of such proceedings may even happen before formal charges are brought against the individual.¹⁰³ International law is very clear on the conditions for bringing a suspect before the courts. Any conduct to the contrary as in the case of Kenya and Uganda's law enforcement constitutes a violation of international law which should not be tolerated in any democratic society.

In principle, both the constitutions of Kenya and Uganda require detainees to be promptly produced in person before competent courts of law. While both constitutions require detainees to be brought before a judicial officer, they differ on the maximum timing within which they should be produced before a judicial officer. The Constitution of Uganda provides for a maximum permissible time of forty-eight hours¹⁰⁴ while the Kenyan Constitution stipulates twenty-four hours.¹⁰⁵ It is submitted that although there is a difference in the maximum times between Kenya and Uganda, both states are within the maximum forty-eight hours prescribed by the *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa*.¹⁰⁶ The fact that Kenya has legislated for an even higher standard of twenty-four hours is commendable. It is permissible for the state to legislate a lesser time within which a detainee should be produced before a judicial officer. However, as illustrated above, the practice of law enforcement does not always comply with the principles of law. There is still considerable impunity when it comes to the disregard for the right to be brought promptly before a judicial officer. One of the reasons for such impunity is the lack of accountability and oversight of law enforcement operations.¹⁰⁷

6.2.6 The right to remain silent (non-self-incrimination)

The right to silence which is at times referred to as the protection against self-incrimination¹⁰⁸ is the entitlement of a detainee not to speak or answer any questions during interrogation or

¹⁰² Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, 20, para B (v).

¹⁰³ General Comment 35, para 31.

¹⁰⁴ Art 23(4) (b) of the Constitution of Uganda.

¹⁰⁵ Art 49(f) (i) of the Constitution of Kenya.

¹⁰⁶ ACHPR Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, para 33.

¹⁰⁷ For in-depth discussion on accountability of law enforcement, see Chapter seven of this thesis.

¹⁰⁸ The right to remain silent is comparable to Miranda rights as they are known in the US. See also: <http://www.mirandawarning.org/whatareyourmirandarights.html> (accessed 02 January 2017).

trial.¹⁰⁹ This right is closely related to the prohibition of forced confessions that are usually obtained through the infliction of a considerable degree of physical or mental torture.¹¹⁰ It is for this reason that confessions must be voluntary and taken before a judicial officer who must verify that the detainee is not being coerced into making a false confession.¹¹¹ The danger of encroaching on the right to silence is that innocent suspects may be forced to say, confirm or admit certain wrongdoing during interrogation which results in miscarriage of justice. Regardless of this consideration, law enforcement officials at times continue to coerce detainees into revealing certain information and evidence by all means necessary including torture.

In Kenya and Uganda, self-incrimination, forced confessions and torture to obtain information has been seemingly favoured by counterterrorism law enforcement who have employed unorthodox means to implicate suspects and extract information.¹¹² Such methods often involve lengthy detentions, beatings and interrogations aimed at extracting information and confessions using any and all possible means. During interrogation, those who choose to remain silent are perceived to be guilty or hiding information which only attracts more attention and torture.¹¹³ In light of this challenge, it is important to examine the protections of the right to silence under international law.

It must be noted that most international and regional law treaties do not specifically provide for the right of a detainee to remain silent during the time of arrest, interrogation and trial. However, this right has been articulated by the African Commission in the *Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa*.¹¹⁴ The African Commission noted that the right to silence of all persons being questioned by law enforcement

¹⁰⁹ UK Essays (November 2013) *What is the right to silence administrative law essay*. Available at: <http://www.lawteacher.net/free-law-essays/administrative-law/what-is-the-right-to-silence-administrative-law-essay.php?cref=1> (accessed 29 July 2016) para 1.

¹¹⁰ As above, para

¹¹¹ Art 3(g) of the ICCPR.

¹¹² Rone (n 7 above) 4.

¹¹³ As above.

¹¹⁴ *Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa*. Available at: http://www.achpr.org/files/special-mechanisms/human-rights-defenders/principles_and_guidelines_on_human_and_peoples_rights_while_countering_terrorism_in_africa.pdf (accessed 26 July 2016).

has to be respected at all times of detention and trial.¹¹⁵ It is unacceptable for law enforcement to force a suspect to confess, implicate himself or give testimony against another suspect against his/her own freewill.¹¹⁶ This right is further elaborated in the ACHPR *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa*.¹¹⁷ In addition to affirming the right to remain silent, the guidelines prohibit the use of torture, mistreatment, force/coercion, threats or any other methods that interfere with an individual's free will¹¹⁸ and all confessions must also be taken before a judicial officer.¹¹⁹ All these regulations protect accused persons in detention from exploitation and self-incrimination.

This resonates with the presumption of innocence which is a sacrosanct principle of the criminal justice system. Presumption of innocence requires that in any criminal trial, an individual must be presumed innocent until proved guilty by a competent court of law or other authority recognized by law.¹²⁰ The presumption of innocence was held by the HRC to be non-derogable even in a state of emergency.¹²¹ The presumption of innocence gives rise to another principle of criminal law which places the burden of proof of the accused's guilt upon the state.¹²² It must be emphasized that in criminal cases, the state must prove the guilt of the accused beyond reasonable doubt.¹²³ The reason for this high standard is that criminal sanctions for example terrorism carry potentially severe and life altering sentence. It would be a grave miscarriage of justice if even one innocent individual is punished for a crime which he/she did not commit. It must be noted that this burden does not shift from the state to the accused and is only dispensed with after the accused has been found guilty by a competent court of law. The accused therefore does not have to say anything because the onus rests upon the state to prove his/her guilt.

¹¹⁵ *Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa* para 3B (iv) 20.

¹¹⁶ As above.

¹¹⁷ ACHPR, *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa*. http://www.achpr.org/files/instruments/guidelines_arrest_detention/guidelines_on_arrest_police_custody_detention.pdf (accessed 10 August 2016).

¹¹⁸ ACHPR, *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa* 9(c).

¹¹⁹ ACHPR, *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa* 9(d).

¹²⁰ Art 4(2) of the ICCPR.

¹²¹ HRC General Comment 29, para 11.

¹²² HRC General Comment 32, para 30.

¹²³ As above.

The right of a detained person to remain silent during arrest, interrogation and trial stage is protected by the Constitution of Kenya.¹²⁴ On the other hand, the Constitution of Uganda does not provide for the right of an accused person to remain silent. Other pieces of Uganda's legislation including criminal codes are equally silent on the protection of the right to remain silent. The Prevention of Torture Act of Uganda¹²⁵ only goes as far as prohibiting evidence obtained through torture¹²⁶ which supposes that a suspect was coerced into making certain representations. It must also be noted that the right to remain silent has been omitted in most human rights treaties. This could be used as a justification for its non-inclusion in the Constitution of Uganda. However, it must be noted that the Constitution of Uganda provides that the bill of rights is not exhaustive and therefore does not exclude rights and freedoms that are not specifically mentioned therein.¹²⁷ The right to remain silent therefore remains part and parcel of the right to a fair trial which ensures that a detainee or suspect does not suffer injustice resulting from self-incrimination.¹²⁸ In addition, if this right is not recognized and protected, it opens up the possibility for many other human rights violations for example forced confessions. The recognition of this right also gives detainees a legal basis to challenge some aspects of the trial for example the admissibility of evidence that may have been obtained illegally. It is therefore submitted that the right to silence is indeed part of Uganda's legal framework.

6.2.7 The right to counsel/legal representation

The right to counsel/legal representation is an entitlement to be represented by a legal practitioner in criminal and civil proceedings. Article 14 of ICCPR provides that in the preparation of their defense, accused persons have the right to have adequate time and facilities as well as communication with a legal representative of their choice.¹²⁹ The same provision is echoed in

¹²⁴ Art 49(1) and Art 50(2) (i) of the Constitution of Kenya

¹²⁵ Prevention and Prohibition of Torture Act of Uganda of 2012.

¹²⁶ Sec 14 of the Prevention of Torture Act of Uganda.

¹²⁷ Art 45 of the Constitution of Uganda.

¹²⁸ T Van Der Walt 'The right to pre-trial silence as part of the right to a free and fair trial: An overview' (2005) 1 *AHRLJ* 70.

¹²⁹ Art 14(3) of the ICCPR. 'The rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned.'

Article 7(1) of the African Charter on Human and Peoples' Rights. The right to legal representation is elaborated by the African Commission in the *ACHPR Principles and guidelines on the right to a fair trial and legal assistance in Africa*.¹³⁰ According to the guidelines, states must ensure equal access to a lawyer of the detainee's choice without regard to any discriminatory criteria.¹³¹ The requirement of access to a lawyer applies immediately after arrest without any delay, interception or censorship.¹³² Where the accused person cannot afford a lawyer of his/her choice at their own expense, the state has the obligation to provide him/her with one where the interest of justice is at stake.¹³³ The issue of interest of justice in criminal matters must be determined based on the seriousness of the charge and the weight of the sentence that the crime potentially carries.¹³⁴ It must also be added that any correspondence between a person in detention and his lawyer must be treated as strictly confidential at all stages of the proceedings. The *UN Body of Principles on Detention* emphasize that correspondence and interviews between a detained person and his/her legal counsel may be monitored within sight of the detaining authorities but never within a listening range.¹³⁵

In March of 2016, the African Court on Human and Peoples' rights had occasion to adjudicate the case of *Onyango and Others v the Republic of Tanzania*¹³⁶ which touched on several rights including the right to legal representation.¹³⁷ The accused persons who were Kenyan citizens were captured by law enforcement in Mozambique and unlawfully extradited back to Tanzania to face charges of murder and armed robbery.¹³⁸ The accused persons initially had legal counsel who represented them for part of the criminal proceedings. However, at a certain point in the

¹³⁰ ACHPR Principles and guidelines on the right to a fair trial and legal assistance in Africa. Available at: <http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/> (accessed 13 August 2016); Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, para 3B (iii) (accessed 23 November 2016).

¹³¹ *ACHPR Fair Trial Guidelines*, para G (a). 'All arrested, detained or imprisoned persons shall be [able] to communicate with a lawyer, without delay, interception or censorship and in full confidentiality.'

¹³² As above.

¹³³ *ACHPR Fair Trial Guidelines*, para H (a).

¹³⁴ *ACHPR Fair Trial Guidelines*, para H (b).

¹³⁵ *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, UNGA Res 43/173 (9 December 1988) para 18(4).

¹³⁶ *Onyango and others v Tanzania*, AfCHPR. App. No. 006/2013, Judgment of 18 March 2016.

¹³⁷ *Onyango and others v Tanzania*, para 2.

¹³⁸ As above.

trial, the lawyer unceremoniously abandoned them in the middle of proceedings without explanation. They argued that Tanzania had the responsibility to provide legal aid given the severity of the charges against them.¹³⁹ In concluding that Tanzania had the duty to provide legal counsel for the accused persons, the African Court on Human and Peoples' Rights held that the applicants were entitled to legal counsel at every stage of court proceedings in accordance with Article 7(1) of the ACHPR.¹⁴⁰

Interestingly, the African Commission notes that the accused has a right to contest the choice of his state appointed lawyer on the grounds of competence.¹⁴¹ In addition to ensuring legal representation for accused persons, the state must also take steps to ensure independence of lawyers.¹⁴² This obligation includes ensuring that lawyers are not hindered, intimidated or harassed during the course of their professional duties. While this position of law and policy reflects what ought to be, Kenya and Uganda have fallen short of their obligations to create an environment under which defense lawyers especially for persons charged with terrorism can perform their duties freely without fear of repercussions.¹⁴³ Law enforcement is always interfering in the duties of legal counsel for example denying them the opportunity to consult with their clients. International law reinforces the position that the intimidation of lawyers in the execution of their duties is completely intolerable.

The constitutions of both Kenya and Uganda provide for the right to legal representation of the detainee's choosing and the appointment of free counsel where the charges and sentence are of a serious nature (in the interest of justice).¹⁴⁴ In addition, the Constitution of Uganda expressly states that when an individual is charged with an offence that carries a life sentence or death penalty, it is mandatory for the state to provide free counsel where the accused cannot afford an attorney of his choice.¹⁴⁵ It must be recalled that in the case of Uganda, the crime of terrorism is

¹³⁹ *Onyango and others v Tanzania*, para 156.

¹⁴⁰ *Onyango and others v Tanzania*, para 182.

¹⁴¹ *ACHPR Fair Trial Guidelines*, para H (d).

¹⁴² *ACHPR Fair Trial Guidelines*, para I (a).

¹⁴³ Open Society Foundations (n 2 above) 37-38.

¹⁴⁴ Art 50(2) (g-h) of the Constitution of Kenya; Art 23(3) of the Constitution of Uganda.

¹⁴⁵ Art 28(3) (e) of the Constitution of Uganda.

considered serious and carries a maximum sentence of the death penalty upon conviction by a competent court of law.¹⁴⁶ The accused person should therefore be afforded reasonable access to their appointed legal representative without any form of intimidation by law enforcement officials or any other person.¹⁴⁷

The biggest challenge in enforcing the right to legal representation is often presented during the pre-trial stage which involves discovery of evidence, interrogation and preparation for trial. Often, detaining authorities hold detainees in undisclosed locations for extended periods of time without access to any other person outside the detention center. These issues manifested in the handling of the Kampala World Cup bombing suspects who were extradited from Kenya to Uganda.¹⁴⁸ The detained persons were often denied consultations with their legal representatives and in some cases, there was intimidation of the accused persons and their attorneys. When the suspects were extradited to Uganda, they were produced in court without any legal representation.¹⁴⁹ Shortly after their appearance in court, a Kenyan human rights advocate travelled to Uganda to organize legal representation for the accused persons. He was arrested and detained for nearly one year after which he was released without any charge whatsoever.¹⁵⁰ Law enforcement often justifies its actions by alleging that external contact with the accused persons may jeopardize the terrorism investigations. In the case *Uganda Law Society v Attorney General*, it was actually documented that when the accused persons were re-arrested, they together with their lawyer received a thorough beating from security officers.¹⁵¹ This uncovers an issue of serious intimidation and actual torture of legal counsel. This not only strikes fear but discourages lawyers from engaging clients who have been charged under similar circumstances. The practice of intimidating lawyers is clearly unconstitutional and unjustifiable under all circumstances. Such conduct constitutes misconduct and unprofessionalism on the part of law enforcement.

¹⁴⁶ Sec 7(1) (a) of the Anti-Terrorism Act of Uganda.

¹⁴⁷ *ACHPR Fair Trial Guidelines*, para I (b) (1).

¹⁴⁸ Open Society Foundations (n 2 above) 34.

¹⁴⁹ As above.

¹⁵⁰ Open Society Foundations (n 2 above) 37-38.

¹⁵¹ *Uganda Law Society v Attorney General* Constitutional Petition No.18 of 2005.

In addition, as was seen in the above-mentioned example of the case of *Onyango and Others v The Republic of Tanzania*,¹⁵² the suspects were presented to court on charges of murder which is a capital offence under Tanzanian law without legal representation. Clearly this was a blatant breach of international law and legal procedure which should not be tolerated within the judicial system. There is a need for established laws and procedures to be respected and observed and there can be no justification for such breaches of procedure. Law enforcement should consequently strive to ensure that accused persons derive full benefit of the rights that pertain to them.

6.2.8 The right to trial within a reasonable time or to release

The right to a trial within a reasonable time is an integral human right in any criminal justice system around the world. The present chapter has dealt with several rights of detainees but it is important to briefly examine the important protection of the right to trial within a reasonable time. Article 9(3) of the ICCPR states that any person who is arrested or detained on criminal charges has the right to a trial within a reasonable time in a competent court of law.¹⁵³ It is important to note that the African Charter does not provide for the right to a trial within a reasonable time. However, the Fair Trial Guidelines provides that any person who is detained or arrested is entitled to a trial within a reasonable time or to release from custody.¹⁵⁴ The basic principle for a trial within a reasonable time is written into every international instrument that addresses the right to liberty. The rationale of this right is to prevent inordinate delays in the institution of proceedings against accused persons. This is because persons who have not been found guilty of any crime still derive benefit from the common law principle of presumption of innocence.¹⁵⁵ The presumption of innocence states that anyone who is accused of committing a crime must be considered innocent until proven guilty beyond reasonable doubt by a competent court of jurisdiction.¹⁵⁶

¹⁵² *Onyango and others v Tanzania*, AfCHPR. App. No. 006/2013, Judgment of 18 March 2016.

¹⁵³ Art 9(3) of the ICCPR.

¹⁵⁴ ACHPR *Fair Trial Guidelines* section M, para 3(a).

¹⁵⁵ L Doswald-Beck *Human rights in times of conflict and terrorism* (2011) 290.

¹⁵⁶ HRC General Comment 29, para 11.

The HRC also held that pre-trial detention should always be treated as an exception rather than the general practice and should be kept as minimal as possible.¹⁵⁷ The undesirable inclination towards automatically detaining persons who are pending trial for lengthy periods of time was also condemned by the Special Rapporteur on torture, inhuman and degrading treatment.¹⁵⁸ This practice invariably leads to overcrowding in prisons and detention centers that are already way beyond their intended structural capacities.¹⁵⁹ Doswald-Beck rightfully notes that the grounds that qualify a suspect to be kept in pre-detention trial include: the risk of flight from the jurisdiction of the court; the risk of repeat offending; the risk of conspiracy; the risk of interference with witnesses and tampering with evidence; and the seriousness of the crime that the offender is charged with.¹⁶⁰

The Constitution of Kenya recognises the right to liberty and provides that no person may be detained without trial.¹⁶¹ Although Kenyan law does not provide for the right in detail, the Kenyan courts have on several occasions emphasized the right to trial within a reasonable time. In *Republic v Attorney General and 3 others ex parte Kamlesh Pattni*¹⁶² the High Court held that the right to fair trial includes the right for the trial to be instituted and concluded without unreasonable delay. The Court reasoned that should a delay occur, the accused is likely to suffer prejudice in the form of memory loss by witnesses, and even the misplacement of certain documents.¹⁶³ The Court therefore held that a delay of fourteen years in instituting fresh charges constituted an inordinate delay.¹⁶⁴ While there is no prescribed period that has been determined to constitute reasonable time, courts in Kenya have interpreted it to equate to different standards. In the case of *Julius Kamau Mbugua v Republic*¹⁶⁵ the High Court determined that an eight months delay in instituting proceeding amounted to unreasonable delay.¹⁶⁶ The courts in

¹⁵⁷ HRC General Comment 8, para 3.

¹⁵⁸ Interim Report of the Special Rapporteur. UN Doc A/62/221 (13 August 2007) para 55.

¹⁵⁹ As above.

¹⁶⁰ Doswald-Beck (n 155 above) 290-291.

¹⁶¹ Art 29(b) of the Constitution of Kenya.

¹⁶² *Republic v Attorney General and 3 others ex parte Kamlesh Pattni* High Court of Kenya held at Nairobi J.R. Misc. Civil Application No. 305 of 2012.

¹⁶³ *Republic v Attorney General and 3 others ex parte Kamlesh Pattni* para 9.

¹⁶⁴ *Republic v Attorney General and 3 others ex parte Kamlesh Pattni* par 12.

¹⁶⁵ *Julius Kamau Mbugua v Republic* High Court of Kenya held at Nairobi H.C.CR.A. No. 12 of 2006.

¹⁶⁶ As above, 6.

Kenya have therefore been apt to the task of ensuring that criminal cases are tried within a reasonable time. In my view, it is not appropriate to have a fixed period beyond which would constitute unreasonable delay. The determination of whether there is an unreasonable delay must be made on a case-by-case basis taking into account the individual circumstances of the case for example the parties, the nature of the crime and the progression of investigations.

The Constitution of Uganda states that in the enjoyment of human rights, it shall be against public policy for any individual to be detained without trial.¹⁶⁷ Article 28(1) of the Constitution also emphasizes that in civil and criminal cases, every person shall be entitled to speedy trial before a competent court of law.¹⁶⁸ Article 126(2) (b) of the Constitution also emphasizes that in criminal and civil cases, justice must not be delayed.¹⁶⁹ Just like in the case of Kenya, Ugandan law does not prescribe a fixed time that constitutes reasonable time within which an accused person must be tried. This remains a subjective assessment to be determined on the merits of each case.

6.3 Prohibition against torture, inhuman and degrading treatment

The prohibition against torture, inhuman and degrading treatment or punishment is intrinsically linked to the dignity of every human being. This prohibition has derived *jus cogens* status¹⁷⁰ that is binding upon all states regardless of whether they have adopted human rights treaties or not.¹⁷¹ It therefore follows that the act of torture is universally prohibited regardless of the intended outcome or prevailing socio-political situation in the particular state. Regardless of this standard, torture, cruel and inhuman or degrading treatment continues to persist in Kenya and Uganda especially during the interrogation of terrorist suspects.¹⁷² Counterterrorism police

¹⁶⁷ Art 43(2) (b) of the Constitution of Uganda.

¹⁶⁸ Art 28(1) of the Constitution of Uganda.

¹⁶⁹ Art 126(2) (b) of the Constitution of Uganda.

¹⁷⁰ E De Wet 'The prohibition of torture as an international norm of *jus cogens* and its implications for national and customary law' (2004) 15(4) *European Journal of International Law* 97.

¹⁷¹ Robben Island guidelines for the prohibition and prevention of torture in Africa. Available at: http://www.achpr.org/files/special-mechanisms/cpta/rig_practical_use_book.pdf (accessed 27 July 2016) 7.

¹⁷² Redress Trust (2006) *Torture in Uganda: A baseline study on the situation of torture survivors in Uganda*. Available at: http://www.redress.org/downloads/publications/TortureUganda_Apr%2007.pdf (accessed 29 July 2014); Rone (n 8 above) 4.

have frequently employed gruesome torture techniques during interrogation to either extract more information or confessions.¹⁷³ The most common torture techniques include beating, starving, chaining, electrocution, douching with water, spraying with chili pepper and bodily injury amongst many other forms of cruel treatment.¹⁷⁴ The next sub-section will examine international law principles on the prohibition of torture, inhuman and degrading treatment.

6.3.1 The prohibition of torture under international law

The UDHR and ICCPR both prohibit torture, cruel, inhuman or degrading treatment or punishment against any person.¹⁷⁵ This protection extends to detainees who must be treated with dignity.¹⁷⁶ Under Article 4(2) of the ICCPR, the prohibition against torture is absolute and cannot be derogated from by the state even during public emergency. The HRC has noted that there is no justification whatsoever for the violation of Article 7 of the ICCPR.¹⁷⁷ The same position on the absolute nature of this prohibition is echoed in Article 2(2) of the CAT.¹⁷⁸ The CAT defines torture as:¹⁷⁹

... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

This definition presents some important elements of the prohibition against torture, inhuman and degrading treatment. These elements include the following: there is infliction of physical

¹⁷³ S Lamwaka *Preventing torture in Uganda* (2011) The Finnish NGO Foundation for Human Rights, available at: <http://projects.essex.ac.uk/ehrr/V6N2/Lamwaka.pdf> (accessed 29 July 2014); The Redress Trust *Torture in Uganda: A Baseline Study on the Situation of torture Survivors in Uganda*. Available at: http://www.redress.org/downloads/publications/TortureUganda_Apr%2007.pdf (accessed 29 July 2014); Open Society Foundations *We're tired of taking you to court: Human rights abuses by Kenya's Anti-terrorism Police Unit* (2013) 24.

¹⁷⁴ J Davis 'Evaluating counterterrorism in Africa' (2010) 212.

¹⁷⁵ Art 5 of the UDHR; Art 7 of ICCPR.

¹⁷⁶ Art 10 of the ICCPR.

¹⁷⁷ HRC General Comment 20, Article 7 (Forty-fourth session, 1992), U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994) para 3.

¹⁷⁸ Art 2(2) of the CAT.

¹⁷⁹ Art 1 of the CAT

pain and suffering to the person of the detainee; the infliction must be intentional for a particular purpose; and the infliction of the pain must be carried out with the consent of a person acting in official capacity.

The treatment of suspects by Kenya and Uganda's counterterrorism law enforcement stated above clearly falls within the category of torture which is prohibited. CAT places an obligation upon states to prevent torture committed by state agents¹⁸⁰ as well as private actors.¹⁸¹ States therefore have a duty to enact legislation that criminalizes all forms of torture with appropriate punitive action against perpetrators.¹⁸² The determination of whether a particular act constitutes torture must be done on a case by case basis taking into account necessity and proportionality,¹⁸³ gender, health and the age of the victim.¹⁸⁴ However, when it comes to detainees or persons who are under the effective control of law enforcement, there is no test for necessity and proportionality. Any physical or mental trauma directed towards detained persons will constitute inhuman treatment.¹⁸⁵ In cases where a detainee alleges that he/she has been tortured, the state is under an obligation to investigate the allegation impartially.¹⁸⁶ States are also under an obligation to regularly inspect detention facilities through qualified and independent body to ensure that the living conditions do not fall below the minimum standard which would otherwise constitute torture.¹⁸⁷

It is also important to note that some poor physical conditions of detention may in themselves amount to torture, inhuman and degrading treatment depending on the severity of the poor conditions. The UN HRC in the case of *Mukong v Cameroon* noted that there are certain minimum standards which must apply to detention in prison facilities which must be observed by all

¹⁸⁰ Art 16 of the CAT.

¹⁸¹ General Comment 20, para 13.

¹⁸² Art 4 of the CAT.

¹⁸³ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc. E/CN.4/2006/6 (23 December 2005), para 39.

¹⁸⁴ General Comment 20, para 2.

¹⁸⁵ M Nowak and E McArthur 'The distinction between torture and cruel, inhuman or degrading treatment' (2006) 16(3) *Torture* 147–151.

¹⁸⁶ Art 2 and 3 of the CAT.

¹⁸⁷ *UN Body of Principles on Detention* para 29(1).

states.¹⁸⁸ Each detainee is entitled to sanitary facilities, minimum space allowance, food, medical treatment, bedding and clothing regardless of the economic constraints that the country might be facing.¹⁸⁹ Any conditions that fall below the minimum requirements will invariably constitute a violation of the detainee's right against torture, degrading and inhuman treatment. It goes without saying that the duty to provide these minimum conditions of detention is placed upon the state.

The major challenge in Kenya and Uganda's counterterrorism policy is the recurrence of incidents of torture and inhuman treatment.¹⁹⁰ The implementation of this prohibition requires education and training of law enforcement. The obligation to train law enforcement on acceptable methods of arrest, interrogation and treatment of detainees is the duty of the state.¹⁹¹ In addition to educating and training law enforcement on acceptable conduct, procedure and proper interrogation practices, states are under an obligation to promptly investigate all allegations of torture against law enforcement.¹⁹² This will enable the state to identify the culprits and take necessary punitive action.

The ACHPR also prohibits all forms of torture, inhuman and degrading treatment and obligates states to adopt legislation that prohibits such unlawful treatment regardless of the intended outcome.¹⁹³ State parties also have the duty to educate law enforcement officials on the prohibition of torture, inhuman and degrading treatment and investigate all allegations of violations.¹⁹⁴ In order to enforce Article 5 of the ACHPR, the African Commission collaborates with different NGOs and one of the major landmarks of these efforts has been the formulation

¹⁸⁸ *Mukong v Cameroon* HRCte Com 458/1991, para 9(3).

¹⁸⁹ As above.

¹⁹⁰ Rone (n 8 above) 4.

¹⁹¹ Art 10 of the CAT.

¹⁹² Art 12 of the CAT.

¹⁹³ Art 5 of the ACHPR: every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited; Part 3D (i) of the African Commission adopted the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa.

¹⁹⁴ See Art 6 of the ACHPR.

and adoption of the African Union's Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines).¹⁹⁵

The first section of the Robben Island Guidelines places a duty upon African states to adopt and domesticate international instruments that outlaw the use torture, inhuman and degrading treatment as well as promote regional and international cooperation on the elimination of torture. The second section of the guidelines discusses the most critical stages of the justice system that are most susceptible to the use of torture, inhuman and degrading treatment. These stages include the time of arrest, pre-trial detention and incarceration pursuant to a sentence of a court or other national authority which has the powers to sentence an individual to imprisonment.¹⁹⁶ In response to this, the Guidelines propose education of member of law enforcement and mechanisms of oversight that minimize the occurrence of torture. The last part of the Robben Island Guidelines propose response measures that include medical attention, damages and rehabilitation for victims of torture. In order to oversee the implementation of the Robben Island Guidelines, the Committee for Prevention of Torture in Africa was constituted.¹⁹⁷ The next subsection will examine how Kenyan and Ugandan law deals with the issue of torture, inhuman and degrading treatment.

6.3.2 The prohibition of torture under Kenyan and Ugandan law

The constitutions of both Kenya¹⁹⁸ and Uganda¹⁹⁹ prohibit any forms of torture, inhuman and degrading treatment or punishment. This prohibition is also considered absolute in both constitutions and no derogations are permissible including in a state of emergency.²⁰⁰ The police acts of Kenya and Uganda also prohibit the torture of individuals by law enforcement and

¹⁹⁵ Robben Island guidelines for the prohibition and prevention of torture in Africa. Available at: http://www.achpr.org/files/special-mechanisms/cpta/rig_practical_use_book.pdf (accessed 27 July 2016).

¹⁹⁶ Sec 2 of the Robben Island Guidelines.

¹⁹⁷ ACHPR/Res 158(XLVI) 09.

¹⁹⁸ Art 29(d-f) of the Constitution of Kenya.

¹⁹⁹ Art 24 of the Constitution of Uganda.

²⁰⁰ Art 25(a) of the Constitution of Kenya; Art 44(a) of the Constitution of Uganda.

emphasize that any errant officer who engages in such unlawful conduct shall be criminally charged.²⁰¹ The acts also provide for a prompt independent investigation in instances where the detainee alleges that he/she has been tortured by law enforcement.²⁰²

Uganda has an act that specifically prohibits the use of torture known as the Prevention and Prohibition of Torture Act.²⁰³ The Act defines torture as any act or omission that causes severe pain and suffering to the victim whether physically or mentally.²⁰⁴ Such pain and suffering must be inflicted intentionally for the purpose of: forcibly extracting information from an individual(s);²⁰⁵ punishing someone for any act;²⁰⁶ and, coercing someone into doing or refraining from doing something.²⁰⁷ According to the Act, acts constituting torture²⁰⁸ include but are not limited to: infliction or the threat of physical pain;²⁰⁹ the use or threat of use of mind-altering substances;²¹⁰ death threats;²¹¹ and, threats of any kind relating to a third party.²¹² The Act also unequivocally states that all forms of torture are prohibited and no derogation is acceptable.²¹³ In addition, anyone who is charged with torture may not invoke state of war; political instability; public emergency; or orders from superiors as a defence.²¹⁴ As such, torture is a criminal offence punishable by law.²¹⁵ Any person has a right to complain to the Police Commissioner or other authority that torture has taken place whether or not they are themselves victims.²¹⁶ The Act goes a step further to impose a duty upon all persons who suspect that torture has/is taking place, to report such activities/suspicious to the Police or Commissioner.²¹⁷ All complainants,

²⁰¹ Sec 14A (2-3) of the Kenya Police Act; Sec 25 of the Uganda Police Act.

²⁰² As above.

²⁰³ Prevention and Prohibition of Torture Act of Uganda of 2012.

²⁰⁴ Sec 2 of the Prevention and Prohibition of Torture Act of Uganda.

²⁰⁵ Sec 2(1) (a) of the Prevention and Prohibition of Torture Act of Uganda.

²⁰⁶ Sec 2(1) (b) of the Prevention and Prohibition of Torture Act of Uganda.

²⁰⁷ Sec 2(1) (c) of the Prevention and Prohibition of Torture Act of Uganda.

²⁰⁸ See also: Sec 1 of the Second Schedule to the Prevention and Prohibition of Torture Act of Uganda.

²⁰⁹ Sec 2(2) (a) of the Prevention and Prohibition of Torture Act of Uganda.

²¹⁰ Sec 2(2) (b) of the Prevention and Prohibition of Torture Act of Uganda.

²¹¹ Sec 2(2) (c) of the Prevention and Prohibition of Torture Act of Uganda.

²¹² Sec 2(2) (d) of the Prevention and Prohibition of Torture Act of Uganda.

²¹³ Sec 3(1) of the Prevention and Prohibition of Torture Act of Uganda.

²¹⁴ Sec 3(2) of the Prevention and Prohibition of Torture Act of Uganda.

²¹⁵ Sec 4 of the Prevention and Prohibition of Torture Act of Uganda.

²¹⁶ Sec 11 of the Prevention and Prohibition of Torture Act of Uganda.

²¹⁷ Sec 20 of the Prevention and Prohibition of Torture Act of Uganda.

victims and witnesses of torture are entitled to protection from the state against retribution and intimidation.²¹⁸ Where such a complaint is made, there must be a prompt investigation into the allegations and the culprits must be arrested where such claims are proved.²¹⁹ It must also be noted that any form of evidence that has been obtained by means of torture is inadmissible before court.²²⁰ Any person who uses such evidence during prosecution knowing that it was obtained by torture is guilty of an offence.²²¹

While the enactment of the Prevention and Prohibition of Torture Act was very important for strengthening the legislative framework on the prevention of the use of torture in Uganda, it has not had a drastic impact on the reduction of such cases. Law enforcement and JATT continues to subject citizens to acts of torture as was noted in chapter three of this thesis. There are several safe houses and detention facilities that are dedicated for torture of suspects by law enforcement for example JATT's headquarters in Kololo, the Special Investigations Unit in Kireka,²²² and the notorious Nalufenya high security prison that is located in Jinja, Uganda.²²³ In May 2017, leaked photos showed severely wounded detainees in Nalufenya who had been subjected to the most gruesome forms of torture including the Mayor of Kamwege, Godfrey Byamukama.²²⁴ The UHRC immediately investigated the use of torture at the facility but they were only granted minimal access to the premises and detainees.²²⁵ Throughout the investigation, the police insisted that their operations at these facilities were lawful. Following the investigation, the UHRC and Parliament recommended that the facility be shut down immediately. However, the police never

²¹⁸ Sec 21 of the Prevention and Prohibition of Torture Act of Uganda.

²¹⁹ Sec 11(b) of the Prevention and Prohibition of Torture Act of Uganda.

²²⁰ Sec 14 and 15 of the Prevention and Prohibition of Torture Act of Uganda.

²²¹ As above.

²²² Human Rights Watch Uganda *Uganda: Torture, extortion, killing by police unit* (2011) available at: <https://www.hrw.org/news/2011/03/23/uganda-torture-extortion-killings-police-unit> (accessed 01 August 2017) para 16.

²²³ Daily Monitor (24 May 2017) *Parliament tells Uganda govt to close Nalufenya torture chambers* Available at: <http://perilofafrica.com/parliament-tells-uganda-govt-close-nalufenya-torture-chambers/> (accessed 10 June 2017).

²²⁴ S Lubwama (26 May 2017) *Kaweesi suspects reveal torture, death at Nalufenya*. Available at: <http://www.monitor.co.ug/News/National/Kaweesi-suspects-reveal-torture--death-at-Nalufenya/688334-3942506-bpvrki/index.html> (accessed 31 July 2017).

²²⁵ S Lubwama (26 May 2017) *Kaweesi suspects reveal torture, death at Nalufenya*. Available at: <http://www.monitor.co.ug/News/National/Kaweesi-suspects-reveal-torture--death-at-Nalufenya/688334-3942506-bpvrki/index.html> (accessed 31 July 2017).

heeded to the recommendation and the facility remains operational.²²⁶ This goes to show that the Prevention and Prohibition of Torture Act has not been adequately implemented in Uganda. The actions of law enforcement still contravene the law openly.

On the other hand, Kenya had a longstanding Bill on the prevention of torture since 2011 which had remained a contentious issue until April 2017.²²⁷ The Bill proposed to introduce a penalty of imprisonment, a fine, or both for acts of torture.²²⁸ In June 2016, the Kenyan Human Rights Commission wrote an open letter in which it called upon the government to enact the Prevention of Torture Bill of 2014.²²⁹ Another version of the Prevention of Torture Bill was drafted in 2016. The Bill defined torture as any act which inflicts severe physical or mental pain for the purpose of obtaining information, punishing an individual or intimidating him/her to do or not do something.²³⁰ The Bill criminalizes torture²³¹ and designates it as a non-derogable protection.²³² In addition, aiding and abetting of torture also constitutes an offence under the Bill.²³³ Finally in April 2017, the bill was passed into law and was celebrated as a milestone in Kenya's endeavour to root out the evil of torture.²³⁴ The provisions of Kenya's Prevention of Torture Act are strikingly similar to the Ugandan Act and will potentially go a long way in providing a legislative framework for the prevention of torture in Kenya. However, Kenyan authorities would have to emphasize enforcement of this law in order to avoid a scenario similar to Uganda where the law prohibits torture but law enforcement openly contravenes it.

²²⁶ As above.

²²⁷ Daily Nation (14 May 2013) *Govt on the spot over Torture Bill*. Available at: <http://www.nation.co.ke/news/Govt-on-the-spot-over-Torture-Bill/1056-1852668-14jkc8/index.html> (accessed 07 February 2017).

²²⁸ As above.

²²⁹ Kenya Human Rights Commission (30 June 2016) *Open Letter to The President of The Republic of Kenya on The Enactment of the National Coroners Service bill, 2015 and the Prevention of Torture Bill, 2014*. Available at: <http://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/545-open-letter-to-the-president-of-the-republic-of-kenya-on-enactment-of-the-national-coroners-service-bill-2015-and-the-prevention-of-torture-bill-2014.html> (accessed 05 February 2017).

²³⁰ Sec 4 of the Prevention of Torture Bill of Kenya 2016.

²³¹ Sec 5 of the Prevention of Torture Bill of Kenya 2016.

²³² Sec 6 of the Prevention of Torture Bill of Kenya 2016.

²³³ Sec 7 & 8 of the Prevention of Torture Bill of Kenya 2016.

²³⁴ P Kiama (10 May 2017) *Why the Prevention of Torture Act, 2017 is a milestone in Kenya's progressive reforms*. Available at: www.standardmedia.co.ke/mobile/amp/article/2001239184/why-the-prevention-of-torture-act-2017-is-a-milestone-in-kenya-s-progressive-reforms (accessed 8 November 2017).

While the Prevention and Prohibition of Torture Act of Uganda and the Prevention of Torture Act of Kenya provide a framework for the prevention and reporting acts of torture, victims may not be forthcoming with complaints especially when they are still under custody of the perpetrators. In my view, they may in fact suffer more torturous treatment in retaliation for reporting law enforcement. In addition, with the culture of impunity permeating most institutions of Kenya and Uganda's public sector, investigations against law enforcement hardly ever materialize.²³⁵ In light of the above, it is submitted that although the Prevention and Prohibition of Torture Act of Uganda is a vital piece of legislation, it has not been largely implemented in practice. Law enforcement officers also tend to cover-up the wrongdoings of their peers.²³⁶ In order to combat this vice, the *Robben Island Guidelines* propose some measures that if implemented will ensure the effective prohibition of torture, inhuman and degrading treatment within Africa's law enforcement.²³⁷ These measures that are by all means non-exhaustive include: adopting measures that seek to eliminate impunity of law enforcement officials; ensuring the independence of the judiciary which serves as a forum for the administration of justice; training and educating law enforcement officers and security personnel on the proper treatment of detainees and acceptable interrogation techniques; introducing and strengthening monitoring and oversight mechanisms over law enforcement operations; and introducing measures aimed at improving the conditions of detention.²³⁸

Uganda's Prevention and Prohibition of Torture Act takes into account a bulk of the *Robben Island Guidelines* by prohibiting and punishing the use of torture including instances in which it is used for the extraction of confessions and information during interrogation by law enforcement.²³⁹ This is indeed a commendable step in the prevention of torture, inhuman and degrading treatment upon terrorist suspects who are held in custody. However, the Act has been largely

²³⁵ United States Department of State *Country Reports on Terrorism 2011 - Uganda* (2012) available at: <http://www.refworld.org/docid/501fbc9928.html> (accessed 2 September 2016);

²³⁶ Human Rights Watch Uganda *Open secret, illegal detention and torture by the Joint Anti-terrorism Task Force in Uganda* (2009) 36.

²³⁷ Robben Island guidelines for the prohibition and prevention of torture in Africa. Available at: http://www.achpr.org/files/special-mechanisms/cpta/rig_practical_use_book.pdf (accessed 27 July 2016).

²³⁸ As above, 7-8.

²³⁹ Sec 1 of the Second Schedule to the Prevention and Prohibition of Torture Act of Uganda.

theoretical and has not been adequately implemented by law enforcement who continue blatantly torturing detainees. There is a need to strengthen enforcement measures to ensure that the provisions of the Act are respected by law enforcement in order to safeguard the dignity of detainees in Uganda.

The situation regarding the torture of detainees by the Kenyan police has not been different from Uganda. This is clear from how ruthlessly ATPU handles suspects of terrorism. This may be attributed to the previous lack of a comprehensive legislative framework on the prevention of torture. However, the new Prevention of Torture Act promises to fill in any gaps that may have been missed in other pieces of legislation regarding the prohibition of torture. However, this important piece of legislation is still relatively new and it is still too early to ascertain whether it has made a significant impact on the prevention of torture in Kenya. Regardless of this, the enactment of this act is very important in the face of allegations of gross human rights violations by law enforcement. However, as was noted above, more must be done to secure compliance of the law by law enforcement officials who on several occasions blatantly disregard legal principles of law with impunity.

6.4 Conclusion

Chapter six focused on the right to liberty and personal security of detainees who are accused of terrorism. The operation of these rights guarantee the physical freedom of individuals from unlawful detention and bodily physical integrity. It is a major concern of every justice system that all persons who are accused of any crime are afforded certain basic human rights. These rights are protected in order to ensure that all detainees receive a fair trial while preserving human dignity. It was noted that the right to liberty and personal security is an omnibus right with several other rights subsumed under it. These rights include the protection against arbitrary detention, the right to know the reasons of arrest, the right to be brought promptly before a competent court, the right to remain silent (rule against self-incrimination) and the right to legal representation. In addition to these rights is the prohibition against torture, cruel, inhuman and degrading treatment or punishment against any person.

The United Nations has been instrumental in protecting and overseeing the implementation of these rights through the various treaties, treaty bodies and special mechanisms (working groups, panels of experts and special rapporteurs). In addition, several instruments have been formulated and adopted that expound on the various rights under the right to liberty and personal security. In addition, state parties have an obligation to enact the proposed human rights safeguards in their national laws. The African Union has also spearheaded a number of African initiatives that aim at ensuring that all individuals in the region are afforded the above mentioned rights. These African efforts have been aimed at identifying the most troublesome and persistent breaches of the rights of detained persons. This has resulted in the adoption of various instruments and appointment of various bodies to oversee the rights associated with the right to liberty and personal security.

It was also noted that constitutions of both Kenya and Uganda recognize the right to liberty and personal security although certain standards for example in relation to the time in which a detainee should be presented before a court is concerned are different. Regardless of this, both constitutions fall within the maximum timeframe of 48 hours that is stipulated under international law. In addition to the constitutions, other pieces of legislation such as the criminal procedure codes, police acts, penal codes and standing orders expound on these rights.

The major challenge in Kenya and Uganda regarding the right to liberty and security of the person of terror suspects has been the breach of procedure by counterterrorism law enforcement. While the laws are clear on how arrests, detention and treatment of suspects should be carried out, counterterrorism law enforcement in practice seem not to be bothered by rules of procedure. Firstly, the method in which arrests are effected demonstrate a disregard for human life and dignity. Suspects are usually beaten up during arrest before being thrown into unmarked vehicles where they are driven to various detention centers some of which are not designated for that purpose. When they arrive at these centers, the agony of torture continues during interrogation and some detainees end up suffering grievous bodily harm, disability and even death in some cases. Some detainees are never presented before a judicial officer in a court of law. The most troubling fact about this practice is that the culprit law enforcement members are

seemingly never charged for their wrongdoing. This reflects a worrying level of impunity and a compromise of rule of law which is truly undesirable in any democratic country.

Kenya and Uganda both have laws that are specifically enacted to prevent acts of torture. However, members of law enforcement agencies continue to torture detainees in an effort to extract confessions and intelligence. This blatant disregard for the law shows a decline in the rule of law. The whole operation of human rights is aimed at creating a system of accountability for public officials including law enforcement for their actions. Repeated violation of human rights that goes unpunished invariably creates a culture of impunity that is undesirable. There is therefore a need to establish strong accountability measures that tackle the problem of impunity among law enforcement which will be the major focus of the next chapter.

CHAPTER SEVEN

7. Accountability for law enforcement breaches of human rights during counterterrorism

7.1 Introduction

Chapter five and six focused on the recognition and protection of various human rights and freedoms during counterterrorism in Kenya and Uganda. This exercise uncovered an unsettling trend under which counterterrorism law enforcement frequently violate the human rights of terror suspects and the community at large with impunity. The most common forms of human rights violations include unlawful arrest and detention; torture; intimidation; discrimination; forced confessions; suppression of opinions; breach of privacy; and even arbitrary deprivation of life.¹ Unfortunately, it was shown that these occurrences happen frequently and have become common in the interaction between counterterrorism police and alleged suspects of terror. In fact, counterterrorism police in Kenya and Uganda have developed a reputation for chilling brutality that strikes fear within the community and inspires a lack of confidence in the entire police force.²

The role of law enforcement in any democracy is to uphold law and order and ensure that human rights are respected in the course of their duties.³ The effectiveness of any police force should not be measured by how ruthless law enforcement is towards members of the community. As

¹ Commonwealth Human Rights Initiative *The police, the people, the politics: police accountability in Kenya* (2006) 25; Centre for Human Rights and Policy Studies (CHRIPS) & African Policing Civilian Oversight Forum (APCOF) 2014 *Local policing accountability in Kenya: Challenges and opportunities for action*. Available at: <http://www.chrips.or.ke/docs/publications/local-policing-accountability-in-kenya.pdf> (accessed 8 September 2016) 14; Commonwealth Human Rights Initiative *The police, the people, the politics: police accountability in Uganda* (2006) 5; African Commission on Human and Peoples' Rights *Letter of appeal to the Republic of Kenya*. Available at www.achpr.org/news/2017/06/d290 (accessed 14 June 2017). See also: Chapter five and six of this thesis which discuss the different human rights affected by counterterrorism.

² Commonwealth Human Rights Initiative Uganda (n 1 above) 5; Commonwealth Human Rights Initiative Kenya (n 1 above) 25.

³ R Crawshaw, S Cullen & T Williamson *Human rights and policing* (2006) 20. See also: Community policing theory under chapter two of this thesis.

such, the operations of law enforcement should be strictly guided by rules and procedures dictated by law.⁴ Law enforcement officials should therefore be held accountable for their actions to minimize the likelihood of abuse of power and breach of law. If the unlawful actions of law enforcement go unchecked, there is a real danger that a culture of impunity will be created which insulates errant members from being accountable for their unlawful behaviour.⁵ This challenge has indeed manifested in the counterterrorism law enforcement members of Kenya and Uganda who have developed a reputation for operating outside the limitations of law. These agencies have even gone to the extent of disregarding court rulings which signifies a gradual decline of the rule of law.⁶ In addition, Kenya's and Uganda's law enforcement has not been accountable for its actions.

Law enforcement in these two countries still retains outdated principles of policing which are more akin to the broken windows theory of policing.⁷ Under this system of policing, police maintain a zero-tolerance outlook on crime within society. As such, they are perceived as oppression propagators who are heavily influenced by the executive branch of government.⁸ As a result, law enforcement tends to enforce laws, policies and directives that favour the incumbent regime at the expense of the general population.⁹ It is no wonder that there is a perception that counterterrorism laws in Kenya and Uganda have to a certain extent been used to silence political opposition.¹⁰ It is undeniable that there is indeed a pressing need for reform to ensure that counterterrorism police in Kenya and Uganda are held accountable for actions carried out in their official capacity as well as violations of rights.

⁴ JT Walker *Policing and the Law* (2002) 23.

⁵ M Daruwala & A Chaltin *Stamping Out Rights: The Impact of Anti-terrorism Laws on Policing* (2007) 40.

⁶ *James Katabazi and 21 others v Secretary General of the East African Community and the Attorney General of the Republic of Uganda* held in the East African Court of Justice at Arusha, Case no. 1 of 2007.

⁷ For in-depth discussion of the broken windows model of policing, please see the theoretical framework of this thesis under chapter two.

⁸ Commonwealth Human Rights Initiative Uganda (n 1 above) 1.

⁹ As above.

¹⁰ News 24 (24 November 2005) *Besigye charged with terrorism* available at: <http://www.news24.com/africa/news/besigye-charged-with-terrorism-20051124> (accessed 1 September 2016). In 2005, the main leader of opposition in Uganda, Colonel Dr Kizza Besigye was charged with terrorism and other crimes, a move that has been widely interpreted as an attempt to silence opposition in Uganda. See also: A Oloo, O Wafula & A Ikelegbe 'A Marginalization and the rise of militia groups in Kenya; The Mungiki and the Sabaot Land Defence Force' (2010) University of Nairobi Digital Repository. Available at: <http://erepository.uonbi.ac.ke:8080/xmlui/handle/123456789/30007> (accessed 1 September 2016).

This chapter therefore explores the various factors that contribute to the lack of accountability within the counterterrorism law enforcement officials in Kenya and Uganda. Accountability in this chapter will be limited to the responsibility of law enforcement officers for human rights violations that occur during counterterrorism operations, interrogation and detention. In other words, this assessment will include violations committed during prevention and investigation of terrorism cases; the arrest of terror suspects; and those committed against suspects held in custody. The chapter also examines the effectiveness of the current accountability mechanisms; the perceptions of counterterrorism law enforcement within community; and propose a suitable agenda for reform.

7.2 The role of accountability within law enforcement

The principle of accountability underlies every democratic state and requires that all public officials should be held responsible for actions carried out in their official capacity.¹¹ The importance of accountability of public officials including counterterrorism law enforcement is emphasized in the constitutions of both Kenya¹² and Uganda.¹³ Accountability mechanisms ensure that public officials are answerable to the community for the exercise of public authority.¹⁴ This process therefore creates the necessary checks and balances that seek to eliminate the likelihood of abuse of power and bring culprits to justice.¹⁵ It must be recalled that law enforcement institutions are entrusted with immense powers to enable them carry out their functions. However, if such powers are not monitored, they can easily be abused for various reasons. It is therefore imperative that the exercise of such powers must be subjected to a certain level of scrutiny in order to ensure accountability.

¹¹ Art 10(2) (c) of the Constitution of Kenya.

¹² As above; Art 73(2) (d) of the Constitution of Kenya.

¹³ National objectives and directive principles of state policy, Objective XXVI of the Constitution of Uganda.

¹⁴ M Bovens *Public accountability* (2003) Paper for the EGPA annual conference, Oeiras Portugal September 3-6, to be presented in workshop 8 (Ethics and integrity of governance) 2003. Available at: <http://www.law.kuleuven.be/plaatsingsdienst/integriteit/egpa/previous-egpa-conferences/lisbon-2003/bovens.pdf> (accessed 18 January 2015).

¹⁵ A Schedler, LJ Diamond & MF Plattner *The self-restraining state: Power and accountability in new democracies* (1999) 13.

In order for accountability mechanisms to be considered effective, such mechanisms must include both internal and external measures.¹⁶ Internal measures are comprised of mechanisms within the police institution itself that ensure that the officers operate according to the set law and policies. These include supervision and monitoring by higher-ranking officers, investigation and punishment of any form of misconduct, and systematic assessment or periodic review of performance amongst others.¹⁷ Internal accountability mechanisms afford law enforcement the opportunity to prevent, supervise, investigate and address cases of misconduct using procedures established within the institution itself. Internal mechanisms are essentially an introspective means to self-examination of the police force of its own members with different tiers of independence. On the other hand, external accountability mechanisms refer to avenues and institutions other than those within the law enforcement institution that can be utilized to hold the police answerable for their actions.¹⁸

Members of law enforcement especially those involved in counterterrorism operations play a vital role in the preservation of law and order in the community. They investigate and prevent acts of terrorism, arrest and question suspects, and ensure that those who violate counterterrorism laws are brought to justice. In the execution of this mandate, law enforcement must not violate human rights but rather serve and protect members of the community to the best of their ability. However, counterterrorism law enforcement in Kenya and Uganda has been implicated in many cases of human rights violations. As was noted in the previous chapters, the violation of human rights by counterterrorism law enforcement is not largely attributable to weak legislative and policy framework structures but rather blatant disregard of legal procedures and regulations with impunity.

Auerbach argues that accountability of law enforcement is a process that entails a hierarchy of authority; complaint mechanisms; supervision of subordinates; access to justice through the courts; freedom to request for information; transparency of procedures and operations;

¹⁶ DS Walker *Police accountability: Current issues and research needs* (2012) 1.

¹⁷ Walker (n 16 above) 2.

¹⁸ Commonwealth Human Rights Initiative Uganda (n 1 above) 35.

responsibility; and adhering to the rule of law.¹⁹ According to Auerbach, adhering to only one value for example responsibility would not necessarily result in proper accountability of law enforcement. He further argues that in order to achieve proper accountability, there are three values that have to be adhered to.²⁰ These are popular accountability; legal accountability; and transparency. Under popular accountability, Auerbach argues that law enforcement must be accountable to the people. This entails election of leaders by the people to whom law enforcement is subordinated to and frequent liaison between law enforcement and the public.²¹ The second value is legal accountability. Under this value, Auerbach argues that law enforcement must comply with the law in the execution of their mandate. He argues that it is illogical for those who are charged with the mandate of enforcing the law, to be the very ones who contravene it.²² Lastly, Auerbach argues that transparency as a value is essential for ensuring proper accountability of law enforcement for their actions. He argues that there should be processes put in place that scrutinize all information on police operations when required subject to sensitivity. He further argues that fortifying police operations in secrecy only promotes impunity and non-accountability of law enforcement.²³

In his report of April 2013, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, discussed the principles for securing accountability of public officials who violate human rights under state authorised counterterrorism measures.²⁴ These principles included the prohibition against gross or systematic human rights violations including those that are state-sanctioned; the right to truth under international human rights law; the principle of accountability; the principle against impunity;²⁵ and, the improper invocation of national security and state secrets doctrine.²⁶ The

¹⁹ JN Auerbach 'Police accountability in Kenya' (2003) 3 *African Human Rights Law Journal* 279.

²⁰ Auerbach (n 19 above) 280.

²¹ Auerbach (n 19 above) 280.

²² N 19 above, 280-281.

²³ Auerbach (n 19 above) 282.

²⁴ Framework principles for securing the accountability of public officials for gross or systematic human rights violations committed in the course of States-sanctioned counter-terrorism initiatives. A/HRC/22/52, 17 April 2013 (accessed 22 October).

²⁵ As above, 13.

²⁶ As above, 15.

Special Rapporteur noted that the right to truth and accountability is recognised by the HRC and must be observed by all state parties. As such, it is imperative that all arms of government especially the judiciary must uphold and defend the rule of law.²⁷ In December 2013, the Special Rapporteur submitted another report on the protection of human rights while countering terrorism.²⁸ The report which built upon the principles for securing accountability of public officials discussed important principles that must guide states in their endeavour to fight terrorism.

The African Commission noted that the police in Africa play a critical role in ensuring compliance of the law, and enforcing order, justice, and the rule of law.²⁹ Policing is therefore necessary for preservation of law and order, democracy, and human rights within a state. The African Commission expressed concern over the lack of adequate policing oversight mechanisms which are essential for curbing misconduct and abuse of authority by law enforcement. The Commission further stressed the need for effective accountability mechanisms within law enforcement in order to restore public confidence in police and security institutions. The *Resolution on Police Reform, Accountability and Civilian Police Oversight in Africa*³⁰ called upon state parties to take measures to ensure that their law enforcement officers treat members of the public with dignity while executing their mandate as well as adopt the *Robben Island Guidelines*.³¹ The *Robben Island Guidelines* placed an obligation upon states to develop measures for the prohibition of torture, cruel and degrading or inhuman treatment or punishment in the context of law enforcement. The next subsections discuss some of the factors that have contributed to the violation of human rights during counterterrorism operations by law enforcement officials.

²⁷ As above, para 38.

²⁸ Protection of human rights and fundamental freedoms while countering terrorism. Resolution adopted by the General Assembly on 18 December 2013, (A/62/456/Add.2). 68/178.

²⁹ Resolution on Police Reform, Accountability and Civilian Police Oversight in Africa, adopted in Banjul, The Gambia on 15-29 November 2006.

³⁰ As above.

³¹ Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa. Adopted by the African Commission meeting at the 32nd ordinary session, held in Banjul, The Gambia on the 23rd October 2002.

7.2.1 Inadequate oversight and unfettered discretion

Counterterrorism legislation by nature limits the enjoyment of certain human rights and freedoms in an endeavour to minimize acts/threats of terrorism.³² The overall consideration is that where the enjoyment of a right by one person affect the rights of many, the right of the one may be lawfully limited. Counterterrorism law enforcement is therefore charged with the mandate of enforcing these laws and this duty confers certain discretion in their interpretation and implementation. It is submitted that whenever discretion is conferred upon a public official, there must be sufficient oversight or review of the use of such discretion.³³ Unfettered discretion always opens up the possibility for abuse of power. This situation should be prevented regardless of whether the abuse actually happens or not.

It was noted in chapter three of this thesis that Uganda's primary counterterrorism agency, JATT, does not have a codified mandate by which it operates.³⁴ It is no wonder that most of their operations are conducted in secret and outside the scrutiny of the law. This makes it difficult for any independent body to carry out any meaningful supervision or review over the agency's actions because their operations are shrouded in secrecy. In addition, the Anti-Terrorism Act of Uganda grants the Minister sole discretion to appoint a security officer.³⁵ A security officer who is appointed under this provision is empowered with the power to conduct surveillance as well as unfettered discretion to carry out any other act that he/she deems fit in a terrorist investigation.³⁶ The Act does not make provision for channels of review or supervision over the exercise of this discretion. This undoubtedly opens up the possibility for violation of human rights as was noted in chapter five and six. The requirement for oversight and review over

³² A Roberts 'Counter-terrorism, armed force and the laws of war' (2002) 44(1) *Survival: Global Politics and Strategy* 8; L Lustgarten 'National security, terrorism and constitutional balance' (2008) 75(1) *The Political Quarterly* 4.

³³ M Mutua 'Terrorism and human rights: power, culture and subordination' (2002) *Buffalo HRLR* 302; J Fitzpatrick 'Speaking law to power: The war against terrorism and human rights' (2003) 14(2) *EJIL* 241.

³⁴ U.S. Department of State *2009 Human rights report: Uganda* (2010); B Baker 'Multi-choice policing in Uganda' (2005) 15(1) *Policing and Society: An International Journal of Research and Policy* 19; United States Department of State *Country Reports on Terrorism 2011 - Uganda* (2012) available at: <http://www.refworld.org/docid/501fbc9928.html> (accessed 2 September 2016).

³⁵ Sec 18 Anti-Terrorism Act of Uganda (2002).

³⁶ Sec 19(6) Anti-Terrorism Act of Uganda (2002).

counterterrorism measures cannot be overstressed.³⁷ It is therefore of utmost importance that the powers of a security officer under Section 19 of the Anti-Terrorism Act of Uganda are subjected to independent review to avoid the possibility of abuse of power and unlawful infringement of human rights. In my view, a good practice that can be adopted is subjecting the powers of a security officer to the scrutiny of court. This would be equivalent to the case of an investigation officer who must seek a warrant from a Magistrate under Section 7 of the Anti-Terrorism Act of Uganda.

In comparison to Uganda's JATT, Kenya's ATPU is constituted under the national police force to enforce counterterrorism legislation.³⁸ While Kenya has a working counterterrorism framework, law enforcement often operates outside these guidelines with little to no oversight from the police institution itself and independent institutions like the judiciary and parliament.³⁹ The lack of sufficient oversight, supervision and review over counterterrorism operations vitiates the constitutional duty of accountability that is found in both Kenya's and Uganda's constitutions. It is the duty of the state to ensure that there are adequate accountability measures over counterterrorism operations and that they function as intended. There is also a need to review the legislative provisions that grant counterterrorism law enforcement unfettered discretion in order to better protect human rights.

The duty to investigate human rights violations is obligatory upon all state parties in order to ensure accountability.⁴⁰ While there is no duty to investigate human rights violations in the various human rights treaties, this obligation is established by treaty bodies and the duty of the state to promote and protect all human rights.⁴¹ There is therefore a need to look into every claim of human rights violation in order to establish whether there is any wrongdoing. If

³⁷ Ten areas of best practices in countering terrorism. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (2010) UN Doc A/HRC/16/51, para 62.

³⁸ BE Whitaker 'Reluctant partners: Fighting terrorism and promoting democracy in Kenya' (2008) 9 *International Studies Perspectives* 254.

³⁹ Redress and Reprieve *Kenya and Counterterrorism, a Time for change*. (2009) Available at: www.voltaire.org (accessed 28 August 2014).

⁴⁰ L Doswald-Beck *Human rights in times of conflict and terrorism* (2011) 185.

⁴¹ As above.

wrongdoing is established in an alleged violation, the alleged perpetrator must face prosecution as a deterrent as well as to ensure justice.⁴²

7.2.2 Lack of police independence

It must be noted from the onset that law enforcement is legally and legitimately under the administrative control of the executive arm of government. In Uganda, the President appoints the top leader of the police forces known as the Inspector General of Police (IGP).⁴³ In principle, law enforcement should be independent and must carry out its day-to-day functions free of undue influence of the members of the executive or indeed, any other branch of government.⁴⁴ The idea of independence of police dictates that members of the police force should have autonomy in the decision-making process which is free of any form of undue control.⁴⁵ This essentially means that in the discharge of their duties, law enforcement's actions and decisions should not be unjustifiably influenced by any person, group or institution. Once constituted, law enforcement's primary duty is to serve and protect the members of the community as a whole and not the privileged few.

While this is what ought to be, a review of law enforcement in Kenya and Uganda depicts a besieged institution that serves the selfish interests of members of the executive (ruling parties) at the expense of the community.⁴⁶ Hills rightfully argues that police commissioners in several African countries and in particular Uganda, have been used by presidents to push their political and personal agendas.⁴⁷ It is no wonder that counterterrorism law enforcement in Kenya and

⁴² As above.

⁴³ Art 213(2) of the Ugandan Constitution. The President appoints the leader of police who is known as the Inspector General of Police; Art 245(2) of the Kenyan Constitution. The President also appoints the Inspector General of National Police.

⁴⁴ M Brogden *The police: Autonomy and consent* (2014) 1; P Stenning *The idea of the political 'independence' of the police: international interpretations and experiences'* (2007) *Inquiry research paper*. Available at: https://www.attorneygeneral.jus.gov.on.ca.3pdns.korax.net/inquiries/ipperwash/policy_part/meetings/pdf/Stenning.pdf (accessed 5 September 2016) 1.

⁴⁵ As above, 2.

⁴⁶ Commonwealth Human Rights Initiative Uganda (n 1 above) 17.

⁴⁷ A Hills 'Police commissioners, presidents and the governance of security' (2007) 45(3) *The Journal of Modern African Studies* 403.

Uganda has been used by the executive to fortify political control and strike fear within members of opposition. For example, the JATT has been engaged in subduing and even eliminating individuals who are perceived to be political opponents.⁴⁸ The governments of Kenya and Uganda have also shown reluctance in holding members of counterterrorism law enforcement accountable for the gross violation of human rights even where the violations are of a serious nature.⁴⁹ The police and the executive seemingly regard each other as partners in crime who cover up each other's wrongdoing which is undesirable in any democratic society that upholds equality and justice for all. This situation raises serious concern because the executive is the organ that is supposed to spearhead accountability of any public office and institution. However, even in circumstances when independent investigations of rights violations are carried out by human rights organizations, NGOs, and the media, their findings and recommendations are simply ignored or even scorned at as anti-government sentiment aimed at tarnishing government's image in the international community.⁵⁰

7.2.3 Lack of education/knowledge on human rights

It is essential if not obvious that any member of law enforcement should have some basic knowledge of human rights because they have a constitutional duty to uphold those rights.⁵¹ It must be noted that in the case of Kenya, the ATPU is a division of the regular national police

⁴⁸ News 24 (24 November 2005) *Besigye charged with terrorism* available at: <http://www.news24.com/africa/news/besigye-charged-with-terrorism-20051124> (accessed 1 September 2016). In 2005, the counterterrorism law enforcement of Uganda brought bogus charges of terrorism against the leader of opposition in 2005 in order to destabilize his campaign. This strategic move was carefully planned by the ruling party to arrest and detain the leader of opposition as well as his supporters.

⁴⁹ AL Sage *African Counterterrorism Cooperation: Assessing Regional and Subregional Initiatives* (2007) 85; S Lamwaka *Preventing torture in Uganda* (2011) The Finnish NGO Foundation for Human Rights, available at: <http://projects.essex.ac.uk/ehrr/V6N2/Lamwaka.pdf> (accessed 29 July 2014); The Redress Trust *Torture in Uganda: A Baseline Study on the Situation of torture Survivors in Uganda*. Available at: http://www.redress.org/downloads/publications/TortureUganda_Apr%2007.pdf (accessed 29 July 2014); Open Society Foundations *We're tired of taking you to court: Human rights abuses by Kenya's Anti-terrorism Police Unit* (2013) 24; Redress and Reprieve *Kenya and Counterterrorism, a Time for change*. (2009) Available at: www.voltaire.org (accessed 28 August 2014).

⁵⁰ J Butty (27 October 2015) *Uganda minister denies police brutality allegations* Voice of Africa. Available at: <http://www.voanews.com/a/uganda-minister-denies-police-brutality-allegations/3024406.html> (accessed 5 September 2016); Human Rights Network for Journalists Uganda (24 September 2015) *Counter Terrorism Police arrest journalist*. Available at: <https://hrnjuganda.wordpress.com/> (accessed 06 July 2016).

⁵¹ Art 244(d) of the Constitution of Kenya; Art 212 of the Constitution of Uganda.

service.⁵² The members of ATPU are picked from the police force who receive a once off education in human rights during training.⁵³ In Kenya's 2012 National Mid-Term Report submitted under the Universal Periodic Review of the United Nations Human Rights Council, it was reported that the National Task Force on Police Reforms appointed by the President had yielded significant results.⁵⁴ The reforms adopted by the Task Force included restructuring the command structure of the Police Service; implementing the constitutional principles of efficiency, transparency, accountability and discipline within the police; and ensuring that human rights are respected at all times during the discharge of police duties.⁵⁵ As a result, the Kenyan Police Service curriculum was revised in 2011 to include special courses on human rights and freedoms.⁵⁶ Following these major reforms, the National Police Service started actual training of its members across the country on the different crucial aspects of human rights especially during arrest and detention prior to trial.⁵⁷ It is therefore safe to assume that human rights violations committed by ATPU are not attributable to lack of knowledge in human rights.

In comparison, Uganda's previous police curriculum did not place emphasis on human rights. However, the revised police program of 2016 includes training modules on different aspects of human rights and rights and freedoms.⁵⁸ The Uganda Human Rights Commission together with

⁵² BE Whitaker 'Reluctant partners: Fighting terrorism and promoting democracy in Kenya' (2008) 9 *International Studies Perspectives* 254.

⁵³ Kenya National Commission on Human Rights Public Education and Training Department. Available at: <http://www.knchr.org/Departments/PublicEducationTraining.aspx> (accessed 15 February 2017).

⁵⁴ National Mid-Term Report of Kenya (2012). Universal Periodic Review of the United Nations Human Rights Council. Available at: https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKEwiliMeU7o_SAhWFXRQKHZ5sBokQFgg3MAE&url=http%3A%2F%2Flib.ohchr.org%2FHRBodies%2FUPR%2FDocuments%2FSession8%2FKE%2FKenya_mid-term_UPRReport.doc&usq=AFQjCNFTcg9fgW_-RnyNstuWuJy_fHM6Ag (accessed 15 February 2017), 6.

⁵⁵ As above.

⁵⁶ B Momanyi (28 March 2011) *Kenya Police gets new syllabus*. Available at: <http://www.capitalfm.co.ke/news/2011/03/kenya-police-gets-new-syllabus/> (accessed 15 February 2017).

Kenya National Commission on Human Rights Public Education and Training Department. Available at: <http://www.knchr.org/Departments/PublicEducationTraining.aspx> (accessed 15 February 2017).

⁵⁷ International Commission of Jurists Kenya (2017) *Kenya Police Service to promote human rights*. Available at: <http://www.icj-kenya.org/news/latest-news/62-icj-kenya-kenya-police-service-to-promote-human-rights> (accessed 15 February 2017).

⁵⁸ Cedovip (9 October 2016) *Schooling the police: Introducing the new police curriculum*. Available at: <http://www.cedovip.org/index.php/news-events/latest-news/112-schooling-the-police-introducing-the-new-police-curriculum> (accessed 5 September 2016).

the United Nations have also developed a human rights pocketbook for the Ugandan Police that is intended to be used as a handy reference.⁵⁹ The handbook explains what human rights are, their nature, as well as their legal basis in both international and Ugandan law.⁶⁰ The different human rights protected by the Constitution of Uganda are listed in the handbook⁶¹ together with the circumstances under which they may be lawfully limited.⁶² Emphasis is also placed upon the rights that are not subject to limitation under any circumstances.⁶³ The result is a comprehensive yet precise handbook that touches on the important aspects of human rights. The handbook that has been made available to the police is a valuable resource that they can use to acquaint themselves with human rights.⁶⁴ It must be noted that while the handbook is made available, evidence of its actual use cannot be easily ascertained because the police are not subject to any assessment on its contents. Nonetheless, provision of information, education and training of police in human rights is important because it ensures basic knowledge of its principles in the execution of their duties. However, it is submitted that there are other controversial para-police forces who carry out police functions (including supporting counterterrorism law enforcement) in Uganda.⁶⁵ One such example is Uganda's Crime Preventers who are a subsidiary of police passed into service after minimal and inadequate training. The emphasis of their training is placed on discipline and subordination rather than human rights and it is no wonder that crime preventers have been implicated in several cases of brutality and misconduct.⁶⁶

The Anti-Terrorism Act of Uganda also empowers the Minister to appoint a Security Officer for the purposes of conducting counterterrorism.⁶⁷ A Security Officer may be appointed from the Ugandan Army, Police Force, or Security Organization.⁶⁸ However, the Act does not make it

⁵⁹ A pocket book for police on basic human rights standards. Available at: <http://www.ug.undp.org> (accessed 5 September 2016).

⁶⁰ As above, 6-7.

⁶¹ As above, 8-9.

⁶² As above, 11-12.

⁶³ As above, 12.

⁶⁴ Cedovip (n 58 above).

⁶⁵ Human Rights Watch (12 January 2016) *Uganda: Suspend 'Crime Preventers'* available at: <https://www.hrw.org/news/2016/01/12/uganda-suspend-crime-preventers> (accessed 5 September 2016).

⁶⁶ As above, 3.

⁶⁷ Sec 18 Anti-Terrorism Act of Uganda (2002).

⁶⁸ Sec 2 Anti-Terrorism Act of Uganda (2002).

mandatory for the Minister to ensure that a person appointed as Security Officer under the said section has knowledge in human rights. In fact, there is no requirement for security organizations to train their staff in human rights. Since some members of the JATT do not have human rights training, violations such as torture and not informing detainees of their rights and reasons of arrest are bound to occur. It is imperative that all individuals involved in any form of law enforcement and especially counterterrorism, must be trained/educated in human rights. There is a need to include the requirement of knowledge in human rights in the regulations regarding appointment of security officers since their duties involve decisions that have an impact on human rights.

Having discussed the factors that have led to human rights violations committed by counterterrorism law enforcement, the next subsection will examine the current accountability mechanisms (internal and external) in Kenya and Uganda's law enforcement that are most relevant to counterterrorism. The section will also make an evaluation on whether these mechanisms are effective.

7.3 Internal accountability of law enforcement in Kenya and Uganda

Internal accountability refers to checks and balances within law enforcement institutions that ensure efficiency of the police force. Internal accountability mechanisms come in the form of for example progress reports, supervision, spot checks, investigations and disciplinary hearings. These mechanisms are built into the police institution and are readily available for the quick resolution of cases of indiscipline, wrongdoing, as well as lack of performance.⁶⁹ There are specialized internal accountability mechanisms within the Kenyan and Ugandan Police Force which are examined below.

7.3.1 Police disciplinary codes of conduct

The Uganda Police Disciplinary Code of Conduct is established under the disciplinary section of the Uganda Police Act.⁷⁰ It is important to note that the code of conduct is applicable to police

⁶⁹ Commonwealth Human Rights Initiative Uganda (n 1 above) 31.

⁷⁰ Part VI, Sec 44 of the Uganda Police Act.

officers, individuals in the police academy, members of local police administrations, members of security organizations under the command of the Inspector General of Police, and any person who accepts any duties within the police force.⁷¹ This implies that officers who are appointed to the counterterrorism unit of law enforcement as well as specialized counterterrorism police agencies are also subject to the code of conduct. The prohibited forms of conduct within law enforcement are set out in the Schedule to the Police Act of Uganda.⁷² The most relevant prohibited form of misconduct for the present purposes is the intentional deprivation of human rights and liberties of any person without reasonable cause.⁷³ Members of law enforcement who are found guilty of violating the code of conduct may be prosecuted in the police disciplinary courts which include the police council appeals court; regional police courts; regional police courts; and subordinate police courts.⁷⁴

Kenya also has a code of conduct known as the Police Regulations under the Kenyan Police Act for the discipline of its police forces.⁷⁵ The Police Regulations of Kenya are notably more detailed than those in the Police Act of Uganda.⁷⁶ However, Kenya's Police Regulations puts more emphasis on discipline and subordination of officers rather than knowledge of human rights and freedoms. The only right addressed in all the forty-one regulations is the offence of using unlawful violence against any person during the discharge of police functions.⁷⁷ This supposes that the use of various forms of violence including torture is prohibited in the course of duty. However, this has not been the case as discussed in chapter six where law enforcement often engages in torture. The regulations completely ignore the violation of human rights as an act of

⁷¹ Sec 45 and the Schedule of the Uganda Police Force.

⁷² Sec 2 of the Schedule to the Uganda Police Act. 'A member of the force shall - not use the authority of his or her office for undue gain; not take away the liberty or rights of any person without reasonable cause; not convert property of any person or any property which comes into his or her custody by virtue of his or her office; treat humanely all persons at his or her disposal without discrimination; not receive any undue gratification for services he or she is expected to render by virtue of his or her employment; conduct himself or herself in a most decent and dignified manner at all times as an example for orderliness and law abiding; not compromise law enforcement on account of relationship, patronage or any other influence; (h) treat all diplomats and foreign nationals with courtesy; (i) not consume alcohol in a public drinking place, while on duty, or in uniform or in possession of a weapon.'

⁷³ As above.

⁷⁴ Sec 50 of the Uganda Police Act.

⁷⁵ The Police Regulations under Sec 65 of the Police Act of Kenya.

⁷⁶ Sec 3 of the Police Regulations of Kenya.

⁷⁷ Sec 3(17) of the Police Regulations of Kenya.

indiscipline for which an officer should be held accountable. In this regard, it is submitted that the regulations are ill-equipped to handle cases of violation of human rights by law enforcement. It is also important to note the role of the National Police Service Commission (NPSC) of Kenya whose mission is the transformation and management of the police human resources to ensure effectiveness and efficiency.⁷⁸ The NPSC strives to achieve transparency, accountability, independence, integrity and ensure equality and diversity within the police force.⁷⁹ The NPSC develops conditions of service, procedures for recruitment and disciplinary measures for police officers.⁸⁰ It directly receives civilian complaints against members of the police force and forwards them to the Independent Policing Oversight Authority, National Commission of Human Rights, Director of Public Prosecutions or the Ethics and Anti-Corruption Commission for further investigation and prosecution.⁸¹ The accountability system for the police force created by the NPSC is undoubtedly a potential avenue for the resolution of complaints of human rights violation. It provides a channel by which misconduct by law enforcement can be reported and addressed.

7.3.2 Complaints from the public against officers

The public complaints procedure is established under Section 70 of the Police Act of Uganda. Under this accountability mechanism, any member of the public may submit a written complaint against any police officer who is accused of human rights violations, misconduct and unprofessional conduct to the most senior police officer in charge of the district.⁸² The form to be filled when filing this complaint (Police Form 105) requires the complainant to provide his/her particulars, the alleged misconduct, and the identification details and/or description of the officer whom the complaint is made against.⁸³ The senior officer to whom the complaint is addressed is under an obligation to institute an independent investigation into the matter and respond to

⁷⁸ See: www.npsc.go.ke/index.php/about-us/mission-vision-corevalues (accessed 03 November 2017).

⁷⁹ As above.

⁸⁰ Sec 3 of the National Police Service Commission Act of Kenya No. 30 of 2011.

⁸¹ See: www.npsc.go.ke/index.php/about-us/functions-of-the-commission (accessed 03 November 2017).

⁸² Sec 70(1) of the Uganda Police Act.

⁸³ Police Form 105 of the Uganda Police Service available at: <http://www.upf.go.ug/complaints/> (accessed 20 February 2017).

the complainant with an opinion and conclusion. The senior officer may then take further action following the outcome of the investigation as may be required.⁸⁴ It must be noted that this procedure is entirely an internal investigation and the statistics on its use are not published. It involves the highest senior ranking officer in the district singly investigating the misconduct of one of his/her own officers. On top of that, after the investigation, the senior officer takes a decision on the course of action to be taken solely on his/her sole discretion. This cannot be considered to be an efficient procedure to handle cases of serious violation of human rights.

In comparison, Kenya's Police Act does not expressly provide for complaints by the public against police officers for the violation of human rights. It must be emphasized that the Police Act prohibits an officer from inflicting cruel, inhuman or degrading treatment upon any person.⁸⁵ Any officer who contravenes this provision is guilty of a felony under subsection three. However, the Act is silent on the complaints procedure which is a very important part of accountability unlike the Ugandan Police Act that provides for an investigation into every complaint. The Act merely provides that a police station must keep a record of all complaints and charges.⁸⁶ This leaves a lot to be desired of the Kenyan legal position on complaints against police officers who violate human rights. The actual use and effectiveness of this mechanism cannot easily be ascertained because such records are not readily available and cannot be easily accessed.⁸⁷

7.3.3 Ineffectiveness of internal accountability measures

Internal accountability measures of law enforcement addressing police misconduct and abuse of power appear within the legislative framework of Uganda. However, the glaring reality as discussed throughout this thesis is that law enforcement in Kenya and Uganda continue to violate human rights and engage in misconduct with impunity. In fact, counterterrorism enforcement agencies in Kenya and Uganda have become synonymous with violence, brutality, torture and gross violation of human rights. The fact that these violations continue to persist regardless of

⁸⁴ As above.

⁸⁵ Sec 14A (2) of the Police Act of Kenya.

⁸⁶ Sec 18(1) of the Police Act of Kenya.

⁸⁷ The difficulty of attaining the requisite permissions to examine such law enforcement records is highlighted in the limitations of the study.

the accountability measures in place means that they are non-effective. One of the major downfalls of these measures is the lack of transparency and openness in the disciplinary process. Since these mechanisms are exclusively internal, the proceedings of such processes are rarely made known to the public. The purpose of making these proceedings public would otherwise ensure transparency and facilitate review.

Another major factor that renders internal accountability measures ineffective is the incitement of misconduct within the police force by senior police officers. It has been noted that senior police officials in Kenya and Uganda often incite junior officers into carrying out unlawful actions.⁸⁸ In several instances, senior police officers instruct their juniors to perform acts that are contrary to the law in the discharge of their duties. In July 2016 for example, the Inspector General of Police (IGP) of Uganda, Kale Kaihura, instructed police officers to beat up supporters of the leader of opposition with sticks and batons during the presidential campaigns.⁸⁹ Although there was widespread criticism of police actions, there was no legal action or responsibility placed upon the IGP for the questionable orders given to junior field officers. The fact that the brutality against citizens was sanctioned by the Inspector General of Police gave field officers the confidence that no legal consequences would follow since the police courts are presided over by police officers themselves.⁹⁰ Senior police officers must therefore be careful with the directives they issue as they may easily be interpreted as sanctioning misconduct.

The situation has been the same for Kenya where police commissioners have repeatedly issued shoot to kill orders on suspects. An example of such an unlawful order was issued by the Mombasa County Police Commissioner in which he ordered police officers to shoot-to-kill terrorist suspects.⁹¹ The Commissioner claimed that it was counterproductive to prosecute

⁸⁸ Commonwealth Human Rights Initiative Uganda (n 1 above) 34.

⁸⁹ Daily Monitor (15 July 2016) *Police okayed beating of citizens, says Kayihura*. Available at: <http://www.monitor.co.ug/News/National/Police-okayed-beating-of-citizens--says-Kayihura/688334-3295338-v2yu4vz/index.html> (accessed 8 September 2016).

⁹⁰ Sec 49 of the Police Act of Uganda.

⁹¹ S Mwachanga 'Police issue shoot to kill order on terrorism suspects' (26 March 2014) Standard Digital. Available at: <https://www.standardmedia.co.ke/article/2000107870/police-issue-shoot-to-kill-order-on-terrorism-suspects> (accessed 13 March 2014).

terror suspects in the judicial system because it is difficult to find witnesses. He argued that witnesses are afraid of the consequences of testifying against terrorists because of the repercussions that may follow.⁹² In my opinion, this order violates international law principles that require any suspect of a crime to be tried before an independent court. Without such due process, there is a risk that innocent individuals may illegitimately lose their lives. In addition, the discretion to limit the right to life is placed in the hands of law enforcement officers who may end up abusing such power. In such instances where unlawful police conduct and lack of due process is sanctioned by senior officers, it becomes impractical to expect internal accountability measures to yield any results. It is important to re-examine the internal accountability measures in law enforcement institutions to ensure that they accomplish the purpose for which they were created. This can be achieved when senior police officers emphasize an ethic of discipline, professionalism and the rule of law among their juniors in the course of their duties.

Internal accountability has greatly improved the overall effectiveness of law enforcement in some states of the US. Before law enforcement embarks on any operation, they are first briefed on the aims, objectives as well as expectations.⁹³ This constitutes the first layer of supervision by senior police officers. During the operations, law enforcement officers maintain contact with the headquarters through radio communication.⁹⁴ In addition to radio contact, cameras are fitted onto police cars as well as the persons of the police officers in order to capture crucial footage which is used as evidence as well as review the conduct of the officers.⁹⁵ At the end of every operation, there is a debriefing session where the successes and failures of the operation are reviewed with the aim of improving police efficiency. By creating all these layers of oversight, supervision and accountability, the probability of wrongdoing by law enforcement is greatly reduced. Although these mechanisms are based on new technologies that may be expensive to acquire, they can significantly improve the overall effectiveness of the Kenyan and Ugandan

⁹² As above.

⁹³ S Walker *Police accountability* (2001) 199-214.

⁹⁴ See also: S Holdaway *Inside the British police: A force at work* (1983) 2; FM Costa et al 'Communication system with improved safety feature' (7 February 2017) US Patent No. 9,564,042.

⁹⁵ B Ariel, WA Farrar, & A Sutherland 'The effect of police body-worn cameras on use of force and citizens' complaints against the police: A randomized controlled trial' (2015) 31(3) *Journal of quantitative criminology*, 509-535.

police during counterterrorism operations. It would be ideal for the two states to invest in such technologies in order to improve police efficiency.

7.4 External accountability of law enforcement in Kenya and Uganda

In order for internal accountability measures to be more effective, there is a need for external accountability measures to review the actions of law enforcement. While there is a possibility for internal accountability measures to be effective on their own, external accountability measures create an extra layer of oversight that reinforces the process of accountability in form of review.

External accountability measures are mechanisms that are established outside the law enforcement institution. External accountability mechanisms are therefore independent of the law enforcement institution and serve the purpose of scrutinizing whether law enforcement officers are indeed held accountable for their actions. Such avenues include the parliament, the court system as well as organizations such as human rights institutions and NGOs. It is submitted that external mechanisms play a complementary role to internal accountability mechanisms. In addition, they have an advantage of independence from the influence of law enforcement while carrying out the function of review. However, it must be noted that NGOs and CSOs are often small organizations that are understaffed and work within restrictive budgets.⁹⁶ This often makes their work challenging because they have to cover more ground with inadequate resources and this may affect the quality of their output. Regardless of this limitation, they still play a very important role in ensuring that law enforcement complies with the rule of law in the execution of their duties and that those involved in misconduct are brought to justice.

7.4.1 The court system (judiciary)

The court system is often referred to as the administration of justice because of the role it plays in every democracy. The courts are an important avenue through which victims of human rights violations can seek redress.⁹⁷ Victims of human rights violations have the right to bring an action

⁹⁶ A Ebrahim 'Accountability in practice: Mechanisms for NGOs' (2003) 31(5) *World development* 817.

⁹⁷ Art 50(1) of the Constitution of Uganda; Art 23(1) of the Constitution of Kenya.

before the courts of law in order to seek a resolution. The accessibility, independence and effectiveness of the court system is therefore pivotal towards the enforcement of human rights. It must be noted that law enforcement officers are also subject to the jurisdiction of the courts and are not immune from prosecution should they violate the law in the course of their duties. While the courts are an important avenue for seeking redress for human rights violations by law enforcement, the challenge is how to ensure that errant law enforcement officers are charged.

The first challenge with the court system is that the judiciary is a formal forum with several complex procedures and rules that often require literacy, knowledge of the law, and finances to facilitate the lawsuit. Many victims of human rights violation at the hands of counterterrorism law enforcement are poor and illiterate members of the community.⁹⁸ This already poses an access challenge which bars many victims of human rights violation from seeking redress by virtue of their personal circumstances.

The second issue relates to the independence of the judiciary from external influence. Independence of the judiciary is a cornerstone of every democracy that seeks to uphold the rule of law and constitutionalism.⁹⁹ In order to carry out its function of administering justice, the judiciary should not be subject to undue influence from the other branches of government.¹⁰⁰ However, Mutua argues that the judiciary in Kenya has been serving the interest of the executive since independence. The judiciary has not excelled in maintaining the rule of law and its inclinations have leaned towards the interests of the government.¹⁰¹ Mutua argues that the reason for this inclination is because the government in the past has been quick to sack or discipline members of the judiciary whose affiliations were not with the ruling party. The judiciary in most African states has been reduced to an agent of the executive.¹⁰² As noted

⁹⁸ Commonwealth Human Rights Initiative Uganda (n 1 above) 35.

⁹⁹ M Mutua 'Justice under siege: The rule of law and judicial subservience in Kenya' (2001) 23(1) *Human Rights Quarterly* 96.

¹⁰⁰ M Perry 'Protecting human rights in a democracy: What role for the courts' (2003) 38 *Wake Forest Law Review* 635.

¹⁰¹ Mutua (n 99 above) 97.

¹⁰² ML Dudziak 'Who cares about courts? Creating a constituency for judicial independence in Africa' (2003) 101 *Michigan Law Review* 1622.

earlier, the executive is also heavily influential in law enforcement. In fact, there is evidence to show that the decisions made by courts are often undermined by the executive and even the police themselves. This undermines the principle of separation of power as discussed in chapter two. The President of Uganda has on several occasions been critical of certain members of the judiciary accusing them of being unpatriotic and biased towards him and the ruling party (NRM).¹⁰³ The President has even vowed in the past not to follow some court decisions which he thought were not made in his favour.¹⁰⁴ The fact that the President can choose which decisions to follow and which ones to disregard signifies that the decisions of the courts are of no consequence to the executive. Law enforcement has followed the lead of the executive in disregarding court rulings for example in the case of *James Katabazi v Secretary General of the EAC and the AG of Uganda*.¹⁰⁵ In this case, the High Court of Uganda granted bail to the accused persons who were charged with terrorism. Immediately after proceedings, the accused persons were illegally recaptured by counterterrorism law enforcement contrary to the bail application order and were prosecuted in the Court Martial for the same charges.¹⁰⁶ The EACJ held that in disregarding the ruling of High Court, Uganda had violated the principles of the rule of law and independence of the judiciary.¹⁰⁷ This blatant disregard of court rulings ultimately shows a gradual decline in Uganda's rule of law which may result in the loss of confidence in the judicial system. There is a need to ensure the independence of the judiciary which is one of the foundations of separation of powers as well as improve the enforcement of court rulings.

Due to lack of a strong judiciary in Kenya, Mutua argues that there is no effective way of implementing human rights safeguards which the government has gradually eroded.¹⁰⁸ Although the Bill of Rights guarantees the basic fundamental rights, the government has habitually justified their infringement using limitations. Courts in Kenya have avoided carrying out their

¹⁰³ Commonwealth Human Rights Initiative Uganda (n 1 above) 34.

¹⁰⁴ As above.

¹⁰⁵ *James Katabazi and 21 others v Secretary General of the East African Community and the Attorney General of the Republic of Uganda* held in the East African Court of Justice at Arusha, Case no. 1 of 2007.

¹⁰⁶ As above, para 68.

¹⁰⁷ See also: *Constitutional Petition No.18 of 2005 Uganda Law Society vs Attorney General*. The Constitutional Court condemned these actions as a violation of the Constitution.

¹⁰⁸ As above.

constitutional function which is to protect human rights.¹⁰⁹ The courts have abdicated their duty to review political decisions even in instances where human rights were the object of contention. Mutua notes that some persons have been charged with crimes which are clearly politically motivated for example sedition and treason. However, the judiciary over the years has allowed the prosecutions to carry on without addressing the constitutional values at risk. This anarchy was exemplified in the remarks of the former Attorney General, Amos Wako in 1991, who boldly declared in Parliament no one is above the law except the president. Mutua suggests that this statement was testament to the submissiveness of the Attorney General to the persuasions of the executive that has been characterized by corruption and gross violation of human rights.¹¹⁰ Paul Muite who was the chairman of Kenya's bar association, made the following cautionary remarks which were intended to guide the executive in its interaction with other arms of government and its agencies:¹¹¹

The greatest danger to public security is the Kenyan government itself. It can remove that danger by adhering to the constitution, both in theory and practice. By faithfully subscribing to the rule of law, democracy and respect for human rights, threat to public security will become a thing of the past.

Mutua rightfully concludes that regardless of such important cautions, the situation with the judiciary had not changed by the year 2001. However, Mutua did not apportion all blame squarely upon the executive. He noted that in some cases, members of the judiciary had gone out of their way to please the executive in exchange for favours like job security, financial incentives and political reward.¹¹² Several judges in Kenya had acted as though they were civil

¹⁰⁹ Mutua (n 99 above) 113 *citing* Art 23 of the 2010 Constitution of the Republic of Kenya. The article states that, 'The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.'

¹¹⁰ Mutua (n 99 above) 100.

¹¹¹ Profile: Kenyan Attorney Builds a Case against Rights Abuse: Paul Muite has had his passport seized and faces continual government harassment. But that hasn't stopped the head of the Kenyan Bar Association from speaking out against the creeping repression in the one-party state. *Los Angeles Times* 26 March 1991. Available at: http://articles.latimes.com/1991-03-26/news/wr-1051_1_paul-muite-gitobu-imanyara-kenya-government (accessed 28 August 2014).

¹¹² Mutua (n 99 above) 113.

servants and only a handful had desisted from exhibiting political affiliations. It must however be noted that since 2010, the Kenyan judiciary under the former Chief Justice Willy Mutunga embarked on a number of reforms aimed at improving effectiveness.¹¹³ Some of the reforms included decentralization of court and liaison with different stakeholders such as civil society, the police, prisons and the Ministry of Justice among others.¹¹⁴ These reforms carry with them a glimmer of hope that the judiciary will eventually become free from the clutches of the executive arm of government.

In 2003, Dudziak wrote an article entitled 'Who cares about courts? Creating a constituency for judicial independence in Africa.' This article analyzed the role of the judiciary in the establishment and maintenance of the rule of law in Africa.¹¹⁵ Dudziak makes reference to Widner who studied the role of the judiciary and the rule of law in several developing countries around the world. Dudziak noted that in many developing countries, the judiciary is perceived as an agent of political leaders.¹¹⁶ Dudziak also noted that there had been significant tensions between the executive and the judiciary in Uganda.¹¹⁷ She argued that the independence of the judiciary right from the regime of former president Idi Amin had been compromised. She cites the example of former Chief Justice Benedicto Kiwanuka who defiantly gave judgments against the gross violation of human rights in Uganda during Amin's era. For his criticism of the state of human rights during Amin's regime, the Chief Justice paid with his life and was reportedly executed.¹¹⁸ This sent a stern warning to the judiciary of the consequences of standing up against the government in Amin's regime. Although there has been a considerable improvement in the state of human rights in Uganda since Museveni assumed power in 1986, Dudziak argues that the judiciary is still subjugated by the executive to a large extent.¹¹⁹

¹¹³ W Mutunga (2011) *Critical reforms taking place in the judiciary*. Available at: www.kenyalaw.org/kenyalawblog/critical-reforms-taking-root-in-the-judiciary/ (accessed 03 November 2017).

¹¹⁴ As above.

¹¹⁵ ML Dudziak 'Who Cares About Courts? Creating a Constituency for Judicial Independence in Africa' (2003) 101 *Michigan Law Review* 1622.

¹¹⁶ As above, 4.

¹¹⁷ Dudziak (n 115 above) 4.

¹¹⁸ R Martin 'Judicialism in Commonwealth Africa: the Role of the Courts in Government by BO Nwabueze London and Enugu, Hurst, 1977. Pp. xii + 324. £9.50.' (1979) 17 *The Journal of Modern African Studies* 141.

¹¹⁹ Dudziak (n 115 above) 9.

In addition, the merits of appointed judges in Uganda has been questionable and this has compromised the confidence of the public in the judicial system. In Uganda's Presidential elections of 2011, Museveni was declared the victor by 68.38%.¹²⁰ The victory gave Museveni an additional 5 years which would bring his total years in power to thirty. However, the leader of the main opposition political party, Col. Dr Kiiza Besigye, was not satisfied with the results which he described as a sham.¹²¹ Dr Besigye emphasized the fact that the protective measures that seek to prevent malpractices had been rendered impractical. The leader of the opposition restated that there was no point in going to court because the judiciary had become unreliable by the recent appointments. He concluded that he would explore all constitutional channels available to him rather than seeking redress in the courts of law.¹²² A repeat of the same scenario was seen in the 2016 Ugandan presidential elections in which Museveni was yet again declared the winner in the face of glaring irregularities. The main leader of opposition, Dr Besigye, never attempted to challenge the election outcome in court.¹²³ This clearly shows that the people still lack confidence in the courts as an effective avenue for vindicating their rights.

7.4.2 The right to an effective remedy from courts and administrative bodies

Most human rights treaties obligate states to provide an effective remedy for individuals whose human rights have been violated. The right to an effective remedy is integral to the duty of state parties to respect and promote human rights in accordance with the international law and the rule of law.¹²⁴ The right to an effective remedy is recognized and protected by Article 2(3) of the ICCPR. The provision provides that any claimant of an effective remedy has the right to have his/her claim heard and decided before a competent court of law, national authority or administrative body that derives its mandate from the law.¹²⁵ In addition to granting an effective

¹²⁰ D Mpuga 'Uganda's Museveni Wins Re-election as Opposition Cries Foul' (19 February 2011) *Voice of America* available at: <http://www.voanews.com/content/ugandas-museveni-wins-re-election-as-opposition-cries-foul-116563223/157483.html> (accessed 8 September 2014).

¹²¹ Mpuga (n 120 above) para 3.

¹²² Mpuga (n 120 above) para 10.

¹²³ As above.

¹²⁴ L Doswald-Beck *Human rights in times of conflict and terrorism* (2011) 57.

¹²⁵ Art 2(3) (b) of the ICCPR.

remedy, the ICCPR mandates the state to ensure that competent authorities enforce any orders for remedies issued by courts.¹²⁶

For a remedy to be considered effective, it must contain the two following elements: there must be access to a competent court of jurisdiction; and there must be reparation or compensation paid to individuals whose rights have been violated. These two considerations are laid out in the *UN Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* which provide as follows:¹²⁷

...Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms.

The aspect of access to justice was elaborated by the African Commission in the case of *Kenneth Good v Botswana*.¹²⁸ The African Commission adopted the position that Article 7(1) (a) of the ACHPR permits any individual who feels his/her rights have been violated, to apply before a competent court of jurisdiction or national authority for an effective and prompt remedy. In terms of the reparations that may be awarded, international law provides for the various categories which may be paid including compensation, rehabilitation, restitution, satisfaction and a commitment that the violation will not recur.¹²⁹ Doswald-Beck rightfully argues that the third aspect of access to relevant information concerning violations of human rights and reparation

¹²⁶ Art 2(3) (c) of the ICCPR.

¹²⁷ *UN Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Res 60/147. Adopted by the UN General Assembly on 16 December 2005, para 11.

¹²⁸ *Kenneth Good v Botswana* Communication 313/05 African Commission on Human and Peoples' Rights 26 May 2007, para 163.

¹²⁹ UN Principles of the Right to a Remedy (n 127244 above) para 19.

mechanisms does not introduce a whole new right. It simply ensures that the first and second aspects of the right to a remedy (access to justice and adequate, effective and prompt reparations) are effectively met.¹³⁰

The right to an effective remedy cannot be understated because of the serious effects that a breach of human rights can have on the life and wellbeing of the individual. In fact, the HRC noted that regardless of the fact that the right to an effective remedy is not included in Article 4 of the ICCPR as a non-derogable right, the obligation to compensate victims of human rights violations remains operational even in a state of emergency.¹³¹ In cases of a state of emergency, it is permissible for a state to introduce adjustments to the calculation and procedures of determining and paying compensation.¹³² However, complete suspension of the right to an effective remedy whether temporarily or permanently is not permissible. It is therefore important for the law to provide for the payment of reparations to affected parties in order to assist them offset any negative consequences that might arise out of human rights violations. Such negative consequences of rights violations could range from financial loss, loss of property, to bodily harm.

It must be noted that the right to a remedy for violation of human rights is protected by the constitutions of both Kenya and Uganda. Article 50 of Uganda's Constitution makes provision for the enforcement of human rights and freedoms by the courts of law. It states that any person who has a claim for human rights violation may apply to a competent court for redress which may include compensation.¹³³ This provision is similar to the position adopted by the Constitution of Kenya on the right to claim a remedy. Article 23 of the Constitution Kenya empowers the High Court to adjudicate over applications for redress of violations of human

¹³⁰ Doswald-Beck (n 124157 above) 60.

¹³¹ HRC General Comment 29, para 14. Paragraph 14 reads as follows: "... it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a state party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the state party must comply with the fundamental obligation to provide a remedy that is effective."

¹³² As above.

¹³³ Art 50(1) of the Constitution of Uganda.

rights.¹³⁴ In the exercise of these constitutional powers, the High Court has the power to grant the following types of relief at its discretion: a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; an order for compensation; and an order of judicial review.¹³⁵ However, this right is hardly exercised in relation to victims of violations arising out of counterterrorism. In many instances, victims are arrested by unknown officials, tortured and detained for lengthy periods before being released without charge.¹³⁶ Some victims who make it out alive are even warned not to speak of their encounters.¹³⁷ Such threats intimidate victims from seeking redress for the violations.

7.4.3 Human rights commissions

The human rights commissions of Kenya and Uganda are both constitutional bodies that are charged with the mandate of promoting, protecting and monitoring the implementation of human rights in the respective countries.¹³⁸ In the promotion and protection of human rights, these institutions investigate allegations of violations, carry out site visits and interviews with detainees, conduct research on different aspects of human rights, and oversee the implementation of human right by government and its various institutions including law enforcement.¹³⁹ Human rights commissions may institute a human rights violation investigation either on their own motion or upon receipt of a complaint drawing their attention to a particular allegation.¹⁴⁰ The human rights commissions of Kenya and Uganda have been instrumental in investigating and highlighting violations of human rights committed during counterterrorism, as well as seeking a proper remedy for victims.

¹³⁴ Art 23(1) of the Constitution of Kenya.

¹³⁵ Art 23(3) of the Constitution of Kenya.

¹³⁶ See for example the case of the small scale trader in Kibera, Kenya who was arrested in relation to terrorism and detained for one year. He was tortured and offered to be released in exchange for a bribe with a warning to keep silent. Amnesty International (n 56 above) 18, para 4.

¹³⁷ As above.

¹³⁸ Art 59(1) of the Constitution of Kenya; Art 51(1) of the Constitution of Uganda.

¹³⁹ Art 52 of the Constitution of Uganda; Art 59(2) of the Constitution of Kenya.

¹⁴⁰ Art 52(1) (a) of the Constitution of Uganda; Sec 7 of the Uganda Human Rights Commissions Act; Art 59(2) (e) of the Constitution of Kenya; Sec 28 of the Kenya National Commission on Human Rights Act.

The Kenya National Commission on Human Rights (KNCHR) has been vocal in highlighting the violation of human rights committed by law enforcement during the course of counterterrorism. In September 2015, the KNCHR documented several accounts of human rights violations that were committed by various security agencies during counterterrorism in Kenya.¹⁴¹ The individual complaints of human rights violations documented by the KNCHR included arbitrary arrests and detention of terrorist suspects, extrajudicial killings, extortion, burglary, sexual harassment, illegal extradition and deportations, torture, inhuman and degrading treatment.¹⁴² In its findings, the Commission found that these violations were collectively committed by the Kenyan army, police and Counterterrorism police (ATPU) during counterterrorism operations.¹⁴³

In comparison, the functions and findings of the KNCHR is similar to those of the Uganda Human Rights Commission (UHRC).¹⁴⁴ In 2009, the UHRC investigated nineteen cases of human rights violations carried out by the JATT in the course of the duties including torture, cruel and degrading treatment, arbitrary detention, unlawful dispossession, unlawful, arrest, and confinement in places that are not gazetted as detention centres.¹⁴⁵ These violations on human rights contravene the Constitution which requires that any person who is arrested or detained must be confined in a place that is designated for that purpose by law.¹⁴⁶ More recently in May 2017, the UHRC investigated complaints about serious torture allegations in Nalufenya high security prison that is located in Jinja, Uganda. The notorious detention facility that mainly houses terrorist suspects caused a public outcry following the release of photos of a badly mutilated detainee.¹⁴⁷ However, the UHRC were only given limited access to the facility and detainees. Following the release of the UHRC's report on the detention condition, Parliament

¹⁴¹ Kenya National Commission on Human Rights (September 2015) *The Error of Fighting Terror with Terror*. Available at: <http://www.knchr.org/Portals/0/CivilAndPoliticalReports/Final%20Disappearances%20report%20pdf.pdf> (accessed 9 September 2016).

¹⁴² Kenya National Commission on Human Rights (n 141 above) 4.

¹⁴³ As above, 6.

¹⁴⁴ Uganda Human Rights Commission (2009) *12th Annual Report of the Uganda Human Rights Commission to the Parliament of the Republic of Uganda*. Available at: <https://www.google.com/search?q=uganda+human+rights+commission+terrorism+investigation&ie=utf-8&oe=utf-8> (accessed 9 September 2016).

¹⁴⁵ Uganda Human Rights Commission (n 144 above) 12.

¹⁴⁶ Art 23(2) of the Constitution of Uganda.

¹⁴⁷ Daily Monitor (24 May 2017) *Parliament tells Uganda govt to close Nalufenya torture chambers* Available at: <http://perilofafrica.com/parliament-tells-uganda-govt-close-nalufenya-torture-chambers/> (accessed 10 June 2017).

called for the closure of the notorious torture facility.¹⁴⁸ However the Nalufenya detention facility still remains open.¹⁴⁹

The KNCHR highlighted some challenges that are faced during the execution of their mandate which are also applicable to the UHRC. These included insecurity in some areas where violations occurred hindering access; intimidation of victims and witness to silence them; threats to employees of the Commission; and denial of access to information, restricted areas and victims in custody.¹⁵⁰ Regardless of these challenges which may affect the quality of work of the commissions in one way or another, one advantage that ensures their impartiality is constitutional independence.¹⁵¹ The independence of human rights commissions ensures that they execute their mandate free from control of any institution or individual. As a result, their investigations, findings and recommendations are often impartial and free from undue influence. This makes human rights commissions in Kenya and Uganda an important external accountability mechanism that are equipped to investigate human rights violations committed by counterterrorism law enforcement.

7.4.4 Civil society organizations

Civil society refers to the collection of various non-governmental organizations, pressure groups and institutions that advocate for the interests and spirit of the common citizenry. Civil society organizations (CSOs) play a very important role in every democracy to ensure the rule of law, transparency and democracy, service delivery, protection of human rights and accountability among many other objectives.¹⁵² There are several civil society organizations operating within Kenya and Uganda with the main objective of ensuring the promotion and protection of human

¹⁴⁸ As above.

¹⁴⁹ Chimp Reports (20 July 2017) 'Age limit debate: Police clarify on 50 activists held at Nalufenya.' Available at: www.chimpreports.com/age-limit-debate-police-clarify-on-50-activists-held-at-nalufenya/amp/ (accessed 07 August 2017).

¹⁵⁰ As above, 38.

¹⁵¹ Art 54 of the Constitution of Uganda; Art 59(2) (g) of the Constitution of Kenya.

¹⁵² KPMG (2011) *Civil society and accountability – should donors try to influence civil society efforts to strengthen accountability?* Available at: http://www.kpmg.com/eastafrica/en/services/Advisory/Development-Advisory-Services/Thought_Leadership_at_DAS/Documents/DAS_Paper_3%20-%20Governance.pdf (accessed 10 September 2016) 2.

rights. When it comes to accountability of law enforcement, the civil society organizations whose mandates fall within this area may be classified under two categories: organizations that focus on human rights violation by law enforcement; and organizations that focus on reform within the law enforcement institution.¹⁵³ CSOs like Human Rights Watch and the Commonwealth Human Rights Initiative have been very instrumental in highlighting human rights violations committed in relation to counterterrorism. These CSOs carry out investigations on human rights violations; conduct interviews with victims; examine deficiencies in the law, probe misconduct within law enforcement; and promote peace, love and tolerance.¹⁵⁴

One of the most notable efforts was the formation of the Inter-Religious Council of Uganda (IRCU) in 2001¹⁵⁵ whose membership is representative of all religious denominations. Its main objective is to promote peace and conflict transformation, sustainable human development and cooperation between the different religious groups, communities, women and also the youth.¹⁵⁶ IRCU seeks to create collaborative dialogue among the different religious groups with the aim of achieving peace, reconciliation, good governance and empowerment.¹⁵⁷ This mandate makes the IRCU and similar NGOs relevant in the counterterrorism process. The NGO has made a number contributions including peace advocacy, leadership meetings and political from an inclusive religious perspective.¹⁵⁸ This inclusive approach is effective in ensuring that views from all religious groups are heard in an effort to build a peaceful and prosperous country. In my view, the recommendations made by IRCU are likely to be morally binding upon Ugandans since they are birthed out of a collaboration which embraces all religious denominations. All these factors make NGOs like IRCU to be a favourable forum for creating unity, religious tolerance, breaking stereotypes and addressing human rights violations.

¹⁵³ Commonwealth Human Rights Initiative Uganda (n 1 above) 41.

¹⁵⁴ See Chapter 1 of this thesis, section 1.9.

¹⁵⁵ The IRCU is a local Ugandan NGO that was formed to tackle issues that are common to all religious denominations in Uganda. The IRCU is an inclusive NGO that together with Roman Catholics, the Church of Uganda, the Orthodox Church, the Muslim Supreme Council, Seventh-day Adventist Church, the Born Again Church, Pentecostal Church and Evangelical Church. The IRCU also works closely with other minority religious groups like the Spiritual Assembly of Baha'i, the Lutheran Church, and the Methodists. For more information, please see <https://ircu.or.ug/>.

¹⁵⁶ As above.

¹⁵⁷ As above. See mission and vision of IRCU.

¹⁵⁸ <https://ircu.or.ug/work/#achievements> (accessed 27 April 2016).

While civil society organizations are often a promising avenue for addressing human rights protection due to their independence and focus on the interests of society, they are often underfunded and lack expertise due to limited resources.¹⁵⁹ In addition, CSOs are often treated with suspicion by the government depending on their source of funding, the countries of origin and the objectives they seek to achieve. These organizations also face opposition from the governments themselves who often perceive them as having certain ulterior motives which are intended to tarnish the image of the government.¹⁶⁰ For example, in April 2014 Kenyan authorities gave police orders to shoot-to-kill suspected terrorists.¹⁶¹ The authorities also went as far as warning NGOs and human rights organizations to keep off their crackdown on terrorists and radical Muslim organizations/societies.¹⁶² The reason for this warning is that CSOs and human rights organizations have been very instrumental in publicising contentious human rights violations carried out by the state, information which the concerned state officials would want to remain concealed.¹⁶³ Government officials in Kenya and Uganda have even gone as far as threatening, freezing bank accounts, searching homes and offices, and decommissioning some CSOs and human rights organizations for their role in uncovering human rights violations.¹⁶⁴ For as long as CSOs and human rights organizations are viewed as anti-governmental agencies and are constantly targeted by government, they cannot adequately carry out their protective mandate to promote human rights and publicize such violations. CSOs effectively carry out their

¹⁵⁹ A Fowler 'The role of NGOs in changing state-society relations: perspectives from Eastern and Southern Africa' (1991) 9(1) *Development policy review* 53.

¹⁶⁰ Commonwealth Human Rights Initiative Uganda (n 1 above) 41.

¹⁶¹ Kimaiyo Warns NGOs to Keep off Government's Crackdown on Terrorists and Radical Muslims – We Will Finish Them (7 April 2014) *Kenyan Daily Post*. Available at: <http://www.kenyan-post.com/2014/04/kimaiyo-warns-ngos-to-keep-off.html> (accessed 28 August 2014).

¹⁶² As above.

¹⁶³ Human Rights Watch (08 July 2016) *NGO employees surveilled, threatened in Uganda*. Available at: www.rightsindevelopment.org/uganda-ngos-employees-surveilled-threatened/ (accessed 03 November 2017); Human Rights Watch (10 January 2016) *Uganda: Intimidation of media, civic groups*. Available at: www.hrw.org/news/2016/01/10/uganda-intimidation-media-civic-groups (accessed 03 November 2017); G Atuhaire (06 April 2015) 'Threats to Ugandan activists' *DANDC*. Available at: www.dandc.eu/en/article/human-rights-groups-uganda-are-threatened-and-so-are-journalists-who-write-about-human (accessed 02 November 2017).

¹⁶⁴ S Allison (22 November 2016) 'Kenya: Top official threatens civil society activist at ICC' *Daily Maverick*. Available at: www.dailymaverick.co.za/article/2016-11-22-kenya-top-official-threatens-civil-society-activist-at-icc/#.Wfw-yZ-xWBY (accessed 02 November 2017); Human Rights Watch *Kenya: End harassment of rights groups* (2015) available at: <https://www.hrw.org/news/2015/06/10/kenya-end-harrasment-rights-groups> (accessed 03 November 2017).

mandate in a political environment that encompasses openness and dialogue between government and stakeholders.

7.4.5 The media

The media is a collective term for all forms of mass communication including radio, TV, newspapers, internet, magazines, billboards, mail and telephone. The media plays an important role in any democracy and they are often referred to as the watchdogs of democracy and the principles it stands for.¹⁶⁵ In the course of their duties, the media exposes misconduct including human rights violations, implicates errant officers, and provides the public with more information which the police and government might want to conceal as it would tarnish their image.¹⁶⁶ Due to the effectiveness of the media in uncovering cases of human rights violations, the governments of Kenya and Uganda have in some cases desperately attempted to curtail the freedom of the press in order to conceal their wrongdoing.¹⁶⁷ It is no wonder that some members of the media are often targeted for their role in publicising certain information. Some members of the media have been subjected to raids and confiscation of material; suspension of operation licences; prosecution; as well as enactment of laws that effectively limit freedom of press and expression.¹⁶⁸ Regardless of these attempts to silence the media, journalists continue pressurizing government and its agencies to abide by the principles of democracy and rule of law.

It is also submitted that today's age of technology has seen the development of social media which has particularly been facilitated by the advancement of internet based websites and media sharing platforms like Facebook, Twitter and Instagram.¹⁶⁹ These platforms enable any individual with a compatible device to instantly share content which can go viral in a matter of seconds. Social media is therefore an important tool in information sharing including breach of human

¹⁶⁵ J Schultz *Reviving the fourth estate: Democracy, accountability and the media* (1998) 3.

¹⁶⁶ Commonwealth Human Rights Initiative Uganda (n 1 above) 42.

¹⁶⁷ D Ziegler & MK Asante *Thunder and silence: The mass media in Africa* (1992) 2; J Butler 'Evolving political accountability in Kenya' (2013) 10 *The Political Economy of Development and Underdevelopment in Africa* 93.

¹⁶⁸ As above.

¹⁶⁹ JH Kietzmann et al 'Social media? Get serious! Understanding the functional building blocks of social media' (2011) 54(3) *Business horizons* 241.

rights. As such, ordinary citizens become more capable human rights watchdogs because of the power of information which is essentially a click away.

The downside of social media is that it has recently become a target in which governments frequently shutdown the internet for various reasons. One example of such a shutdown happened on 13 May 2016 during elections amidst wide spread allegations of election rigging by the Museveni administration.¹⁷⁰ In addition, these private social media platforms just like mainstream media, have to be treated with caution due to the possibility of falsification of information. Social media is essentially a mix of information, opinions and personal accounts which are not authenticated by any institution or establishment.¹⁷¹ As such, this information is prone to hoaxes, exaggeration and unsubstantiated analysis that may be misleading the public.¹⁷² While social media may have its weaknesses, it remains an important platform for sharing information and building awareness on a particular subject. As such, it constitute a very important avenue for raising awareness on human rights and maintaining accountability of public officials.

7.5 Conclusion

Chapter seven examined the accountability mechanisms of law enforcement for breaches committed by law enforcement during counterterrorism. The major challenges that affect the accountability of law enforcement include inadequate oversight and unfettered discretion; lack of police independence; and lack of education/knowledge on human rights. In addition, Kenya and Uganda's accountability mechanisms especially in relation to counterterrorism law enforcement were determined to be ineffective. In order for law enforcement to be adequately accountable, there is a need to strengthen democracy, separation of powers, the rule of law, as well as procedures that ensure that such laws are followed during counterterrorism operations.

¹⁷⁰ All Africa (13 May 2013) 'Uganda: Government shuts down social media again.' Available at: www.allafrica.com/stories/201605130317.html (accessed 07 August 2017).

¹⁷¹ J Leskovec 'Social media analytics: tracking, modeling and predicting the flow of information through networks' *Proceedings of the 20th international conference companion on World wide web*. ACM, 2011.

¹⁷² AM Kaplan & H Michael 'Users of the world, unite! The challenges and opportunities of social media' (2010) 53(1) *Business horizons* 59.

This approach would ultimately capture the essence of community and democratic policing whose major aims are ensuring the effectiveness and accountability of law enforcement by respecting the rule of law and bolstering good relations with members of the community. Improving the respect for the rule of law ensures that law enforcement conducts its operation in strict accordance with the law and procedure. This would eventually reduce the prevalence of illegal and unprofessional conduct within law enforcement such as corruption and bribery which police have notoriously engaged in.

Kenya and Uganda's law enforcement institutions have adopted internal accountability mechanisms. In addition to these mechanisms, law enforcement in both countries are also subject to a number of external independent accountability mechanisms. Internal accountability measures include police disciplinary codes of conduct and public complaints procedures against police. It was noted that internal accountability mechanisms enable the law enforcement institution to assess its members and take necessary action when needed. This includes investigation and punishment of errant members. While the law provides for these procedures, most of them are merely contained on paper with little applicability in practice. The practice is that members of law enforcement conduct a significant proportion of their operations without regard for human rights, wrongs which often go un-investigated and unpunished. Internal accountability mechanisms are therefore rendered ineffective due to impunity of law enforcement.

On the other hand, external accountability measures include but are not limited to the judiciary; human rights commissions; civil society organizations; and the media. External accountability mechanisms offer an independent oversight mechanism that effectively scrutinizes the operations of law enforcement and ensures that they comply with the law and procedure. They essentially carry out the role of watchdogs over police operations. While external accountability mechanisms may be effective in ensuring accountability of law enforcement, some are hampered by lack of resources and lack of cooperation from law enforcement and the executive itself. Although these mechanisms are somewhat affected by these challenges, they remain an

independent accountability mechanism that is an invaluable oversight and review mechanism over the existing internal accountability mechanisms.

Having discussed the various accountability measures (internal and external) of law enforcement in Kenya and Uganda, the next chapter will therefore conclude the thesis as well as propose some recommendations that can ensure a higher level of accountability of law enforcement.

CHAPTER EIGHT

8. Conclusion and recommendations

8.1 Summary of findings

This thesis examined the extent to which counterterrorism legislation and practice in Kenya and Uganda affects the enjoyment of fundamental human rights and freedoms. The thesis highlighted the threats of terrorism that are facing the two East African countries. Although Kenya and Uganda have had several home-grown terrorist organizations for example the SLDF, Mungiki, ADF and LRA, the single most troublesome source of terrorist activity in recent times has been al-Shabaab. Al-Shabaab is a Somali Islamist militant group that swears allegiance to al-Qaeda. Al-Shabaab has waged war against the government of Somalia in an effort to assert sharia law in the territory. However, this agenda has been particularly hindered by the deployment of AMISOM troops in Somalia, which is also comprised of Kenyan and Ugandan troops. In retaliation of this deployment, al-Shabaab resolved to wage war on Kenya and Uganda right in their homelands and thus the acts of terror for example the 2010 Kampala World Cup bombings and the 2015 Garissa University attack among many. Al-Shabaab's ability to perform cross-border acts of terror has been particularly facilitated by weak border control that is overwhelmed by inefficiency, lack of manpower and corruption.

In response to the challenge of terrorism posed by both al-Shabaab and home-grown terrorist groups, it was noted that the governments of Kenya and Uganda have adopted a number of measures including the adoption of counterterrorism legislation. The counterterrorism legislation notably criminalizes terrorism, prohibits the operation of terrorist organizations, suppresses terrorist financing, stipulates procedures for terrorist investigations and create bodies that are charged with the mandate of fighting terrorism. In addition to these interventions, Kenya and Uganda have constituted counterterrorism agencies and police units whose primary role is to identify, react to and prevent terrorism. However, these agencies have been implicated in human rights violations during the execution of their functions with a high degree of impunity.

These counterterrorism frameworks were born out of the need to control terrorist organizations and their influence across borders. Terrorism consciousness was heightened after the 2001 September terrorist attacks on the US that left scores of innocent people dead, injured or affected. The UNSC immediately took measures through the adoption of several resolutions that pioneered the 'war on terror.' The UN took center stage of counterterrorism with the adoption of the UN Global Counter-Terrorism Strategy which at its core represents the international blueprint for fighting terrorism. The UN created the UN Counter-Terrorism Implementation Task Force to oversee the implementation of the UNCTS and bolster cooperation among member states. The Task Force is assisted by a number of specialized working groups. While the UNCTS presents a very important framework for the prevention of terrorism in the world, it mainly focuses on strengthening law enforcement to terrorism through intelligence sharing, training and surveillance among other interventions. It was noted that any counterterrorism strategy that focuses squarely on the outward manifestations of terrorism and steers clear of addressing the root causes of terrorism in the first place, only provides momentary relief rather than a long-lasting solution.

Citing the peculiar effects of terrorism on the African continent, it became important for the OAU (as it then was) to adopt an effective counterterrorism strategy that takes into account Africa's peculiar circumstances for example the differences in culture, geographical location, natural resources and history of conflict. This resulted in the adoption of the OAU Convention on the Prevention and Combating of Terrorism which contains several measures for fighting terrorism. This Convention gave rise to a number of other regional instruments which address a number of issues including increasing the capacity of law enforcement to fight terrorism and dealing with factors that contribute to the prevalence of terrorism.

The thesis also examined a number of human rights in order to determine whether it is a problem of weak legal frameworks or a blatant disregard of these regulations by law enforcement agencies. This exercise involved examining international and regional human rights safeguards, as well as constitutional and other legislative safeguards. It was noted that there are indeed adequate human rights safeguards in international law in the form of treaties, conventions,

resolutions, guidelines and interpretations by treaty bodies and special mechanisms. In addition, the state laws of Kenya and Uganda also provide human rights safeguards therein. However, there were a number of deficiencies that were found within state law that may compromise the protection of human rights during counterterrorism. These deficiencies include for example lack of adequate supervision and oversight during operations; unfettered discretion; and lack of a proper accountability channels.

While several safeguards exist within international and state law, counterterrorism operations often seem to be carried out without regard to law and procedure. Members of these counterterrorism agencies operate with a conviction that they are above the law and can do as they please without fear of any consequences. Even in circumstances where they openly violate human rights, no repercussions are seen to follow regardless of regulations that require prompt investigation. This has invariably created a culture of impunity in which law enforcement gets away with the most heinous of human rights violations including torture, maiming and even murder. This situation ultimately reflects a gradual decline in the rule of law and democracy of Kenya and Uganda. It was therefore with this consideration that the thesis examined the factors affecting the accountability of law enforcement for their actions carried out in their official capacities.

An assessment of the accountability mechanisms revealed a lack of emphasis on human rights violations. While there are a number of internal accountability mechanisms, a number of them are either defunct, ineffective or totally inoperable. It is worrying that the police codes of conduct in both Kenya and Uganda place an emphasis on discipline, subordination and desertion of duty rather than punishing human rights violations committed by members of police. Even in the case of external accountability mechanisms for example the judiciary and CSOs, their rulings and findings are often ignored by the police. In fact, it was illustrated that the police forces in Kenya and Uganda have lost their independence to the executive branch of government. Rather than carrying out the primary function of serving and protecting the members of the public, the police force is an institution that has become subservient to the executive. A significant bulk of their operations are aimed at fortifying the control and influence of ruling parties while

suppressing any form of political opposition that threatens the longevity of the current governments.

Law enforcement in Kenya and Uganda has also been more associated with the broken windows policing theory in which police is usually heavy-handed on the community as discussed in the theoretical framework. Law enforcement under this approach adopts a zero tolerance to crime within the community and channels most resources into identification of new sources of crime and eliminates them. Although this method may enjoy certain successes, the biggest challenge is that it portrays the police as an oppressive force and this creates animosity within members of the community. In order to counteract some of the negative perceptions against their police forces, Kenya and Uganda have attempted to implement community policing which helps foster better relations between police and the community. The result of this exercise has yielded some positive result. However, more needs to be done in as far as strengthening community policing efforts is concerned in both countries.

8.2 Recommendations on legislative reforms

As has been highlighted throughout this thesis, a number of deficiencies in the law have been identified. Such deficiencies result in a weaker framework for the protection of human rights during counterterrorism operations and may in themselves aid in the violation of rights. The following legislative reforms will therefore result in a stronger framework for the protection of human rights while countering terrorism.

8.2.1 Suspend and codify the mandate of Uganda's JATT

As was noted in this thesis, Uganda's JATT that operates alongside the Counterterrorism Police Unit does not have a constitutive mandate.¹ Although the JATT has in fact contributed to the prevention of terrorist activities in Uganda², the scope of its operations, powers and chain of

¹ All Africa (8 December 2005) *Uganda: JATT is normal*. Available at: www.allafrica.com/stories/200512080746.html (accessed 02 November 2017).

² A Habib (14 September 2014) *Police foil terror attack on Kampala installations, arrest several suspects with explosives*. Available at: www.galaxyfm.com.co.ug/2014/09/14/ (accessed 02 November 2017); New Vision (7 April

command is not formally codified. This definitely presents serious challenges in ascertaining the agency's scope of operation and accountability. This has already manifested in the numerous human rights violations with impunity that have been carried out by JATT during their operations.³ It is therefore important for the Government of Uganda to immediately suspend the operations of the agency pending the definition and codification of the mandate of JATT in order to avoid further violation of human rights. Such codification should contain regulations on the powers of the JATT; the chain of command; appointment of members; disciplinary measures; and accountability mechanisms. This measure will ensure the protection of civilians against the arbitrary mandate that has enabled JATT to unleash untold brutality in the name of counterterrorism.

8.2.2 Amend Uganda Police Act to include proportionality in the use of force

International law requires that the use of force by the police must conform to the principles of necessity and proportionality. The principle of proportionality demands that the police officer must balance between the threat posed by the subject, and the amount of force that is to be applied.⁴ The role of this principle is to prevent the use of excessive force and to preserve life.

In 2009, the former Special Rapporteur on extrajudicial, summary or arbitrary executions Philip Alston, submitted a report on his mission to Kenya.⁵ In his report, he noted that Kenyan law on the use of lethal force did not comply with international law because it did not provide for necessity and proportionality.⁶ In response to the report, the Office of the Inspector-General of Police introduced new regulations in 2014 imposing the principles of necessity and proportionality. However, Uganda's Police Act does not require a law enforcement official to adhere to the principle of proportionality. It is therefore recommended that the Police Act of Uganda should be amended to introduce a provision that clearly requires police officers to

2015) *Uganda arrests two terror suspects*. Available at: www.newvision.co.ug/new_vision/news/1323705/uganda-arrests-terror-suspects (accessed 01 November 2017).

³ The Observer (29 June 2015) *Witness reveals JATT's ugly torture methods*. Available at: www.observer.ug/news-headlines/38490-witness--reveals-jatt-s-ugly-torture-methods (accessed 01 November 2017).

⁴ As above.

⁵ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston. Addendum: Mission to Kenya. (26 May 2009) A/HRC/11/2/Add.6.

⁶ Alston (n 5 above) 11, para 71.

comply with the principle of proportionality. The introduction of this regulation will help in the prevention of the use of excessive force and punishing officers who contravene this important principle of law.

8.2.3 Amend Section 19 of the Anti-Terrorism Act of Uganda

Section 18 of the Anti-Terrorism Act of Uganda empowers the Minister to appoint a security officer from the military, police or a security organization.⁷ A security officer appointed under Section 18 has the power to conduct surveillance; searches; intercept communication including letters, parcels, phone calls, faxes and emails;⁸ monitor electronic activities; and access banking information.⁹ A security officer may further carry out any other necessary action during a terrorist investigation under Section 19(6). The open-ended language of this provision confers unfettered discretion upon a security officer which opens up the possibility of unlawful erosion of the right and abuse of power. There is always need for oversight by an independent body for example a court over counterterrorism measures such as surveillance.¹⁰

One way in which Kenya has avoided conferring unfettered discretion on terrorism investigation officers is by subjecting their operations to the scrutiny of courts. Terrorist investigations in Kenya may be conducted by a police Chief Inspector or any other higher rank.¹¹ Such a police officer may intercept communications provided he/she has obtained prior consent from the DPP or Inspector General,¹² and has subsequently made an *ex parte* application to the High Court and has been granted an interception of communications order.¹³ It is submitted that terrorism investigations under the Prevention of Terrorism Act of Kenya are subjected to the independent oversight of courts which ensures that the right to privacy is not unlawfully eroded. In principle, this is a very important check and balance on the authority of law enforcement. The courts in

⁷ Sec 18 of the Anti-Terrorism Act of Uganda.

⁸ Sec 19(1) Anti-Terrorism Act of Uganda (2002).

⁹ Sec 19(4) Anti-Terrorism Act of Uganda (2002).

¹⁰ Ten areas of best practices in countering terrorism. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (2010) UN Doc A/HRC/16/51, para 62.

¹¹ Sec 36 Prevention of terrorism Act of Kenya (2012).

¹² Sec 36(2) Prevention of terrorism Act of Kenya (2012).

¹³ Sec 36(1) Prevention of terrorism Act of Kenya (2012).

this instance play the important role of defenders of human rights by ensuring that due process is followed before law enforcement can interfere with the enjoyment of the right to privacy. This is a commendable position of law that can inform reform of the powers of security officers in the case of Uganda. Judicial oversight and transparency in the investigation of terrorism that affects the right to privacy cannot be overlooked.

8.2.4 Legislate for the right to remain silent and release from unlawful custody (Uganda)

The right to remain silent and the right to release from unlawful custody are very important in protecting the liberty of all persons. The danger of encroaching on the right to silence is that innocent suspects may be forced to say, confirm or admit certain wrongdoing during interrogation which results in miscarriage of justice.¹⁴ The right of a detained person to remain silent during interrogation and trial is protected by the Constitution of Kenya.¹⁵ The Constitution of Kenya also protects the right to apply for release from unlawful custody is expressly provided for under Article 49(1) (g).¹⁶ However, the Constitution of Uganda does not expressly provide for these two rights. In this regard, it must be noted that the Constitution provides that the bill of rights is non-exhaustive and the non-mention of certain rights does not exclude them.¹⁷ Regardless of this consideration, these rights are vital for the protection of the liberty of individuals. It is therefore imperative that these rights are expressly provided for in the Constitution of Uganda in order to ensure that they are enforceable.

8.3 Recommendations for law enforcement agencies

It must be noted from the onset that every agenda for reform must be initiated with a workable legislative framework that serves as a reference point. The legislative framework must place emphasis on accountability mechanisms that clearly stipulate acceptable conduct and measures

¹⁴ UK Essays (November 2013) *What is the right to silence administrative law essay*. Available at: <http://www.lawteacher.net/free-law-essays/administrative-law/what-is-the-right-to-silence-administrative-law-essay.php?cref=1> (accessed 29 July 2016) para 1.

¹⁵ Art 49(1) and Art 50(2) (i) of the Constitution of Kenya

¹⁶ Art 49(1) (g) of the Constitution of Kenya states that ‘...at the first court appearance, to be charged or informed of the reason for the detention continuing, *or to be released.*’ [My emphasis]

¹⁷ Art 45 of the Constitution of Uganda.

for disciplining law enforcement officials. Such mechanisms must be subject to a plurality of enforcement mechanisms comprising of both internal and external measures which constitute an added layer of accountability. The effectiveness of the various accountability mechanisms hinges on how robust each of them is, and independent they are of one another. This enables the mechanism to operate without undue influence from another thus improving on its objectivity when they are applied. In addition, the following proposed areas need to be adequately and promptly addressed in order to ensure a more independent and effective police force in Kenya and Uganda.

8.3.1 Secure the independence of police from undue political intrusion

The current situation of the police forces in Kenya and Uganda depicts significant subservience to the executive arm of government. Under chapter two of this thesis, the concept of separation of governmental powers into the executive, legislative and judiciary was discussed. It was noted that the importance of separation of powers is to ensure that no branch of government abuses its power.¹⁸ There is indeed a tendency for individuals to abuse authority especially when such authority empowers them to make law and enforce it, as well as adjudicate over non-compliance of such laws.¹⁹ It must be emphasized that law enforcement is legally under the effective control of the democratically elected government. In most jurisdictions, the executive appoints the top leadership of the police forces and work hand in hand with them in the execution of their mandate.²⁰ The executive therefore exercises legitimate control over law enforcement. However, law enforcement in Kenya and Uganda have been used by the executive to advance their private and political agendas including censoring of opinions, oppression of opposition, as well as intimidation of members of the public. Article 239(3) of the Constitution of Kenya prohibits national security organs from acting in a partisan manner.²¹ The Constitution of Uganda

¹⁸ *Lawyers for Human Rights v Swaziland* (11 May 2005) Communication 251/002 African Commission on Human and Peoples' Rights.

¹⁹ J Dunn *The political thought of John Locke: An historical account of the argument of the 'Two Treatises of Government'* (1982) 8.

²⁰ Art 245(2) of the Constitution of Kenya. Under this provision, the Inspector-General of Police is appointed by the President of Kenya. See also: Art 213(2) of the Constitution of Uganda which provides for the same.

²¹ Article 239(3) of the Constitution of Kenya.

also mandates the police force to remain nationalistic, professional, disciplined and competent while respecting human rights.²²

A study carried out by Amnesty International revealed that several officials in the various sectors of the governments in Kenya and Uganda often used the police force as an instrument of repression. Rather than carrying out their lawful mandate, the police are used to disperse legitimate gatherings, suppress opinions and weed out any form of government opposition.²³ This practice is facilitated by corruption that plagues law enforcement which is often underpaid and living in less than favourable conditions.²⁴ In addition, several police operations are heavily influenced by members of government who are often self-serving. This is usually done to protect the interests of the ruling governments and to derive some sort of undue benefit to the detriment of the public. Given the authority and discretion conferred by counterterrorism legislation upon law enforcement for example the power to conduct surveillance, intercept communication and carry out searches on people and property, it is undesirable for the institution to be subject to any form of undue influence. As such, it is important to free the police of political influence. Section 14A(1) of the Police Act of Kenya clearly states that the police force shall be under the overall direction, supervision and control of the Commissioner of Police who shall ensure impartiality on objectivity in all matters.²⁵ The Police Act of Uganda also contains a similar provision under Section 5.²⁶ Once the president has appointed the inspector general of police, the force must maintain institutional independence. The tendency for the police force in Kenya and Uganda to be inclined towards protecting interests of the executive is therefore not attributable to a deficiency in the law. A possible explanation for such inclinations may be attributed to the fact that the position of inspector general is appointed by the president. The president would then appoint someone who will ultimately protect the interests of the regime. There is no quick solution to this challenge since the appointment of the police chiefs is the constitutional function of the president. However, it is important for police to have

²² Art 211(3), 221 of the Constitution of Uganda.

²³ Amnesty International *Police Reform in Kenya: "A Drop in the Ocean"* (2013). Available at: www.amnesty.org (accessed 9 September 2014) 16.

²⁴ As above.

²⁵ Sec 14A(1) of the Police Act of Kenya.

²⁶ Sec 5 of the Police Act of Uganda.

independence in executing their functions with minimal interference. When certain police activities are dominated by unreasonable executive directives, it becomes impossible for the police force to maintain objectivity.

8.3.2 Ensure accountability before, during and after assignments

Law enforcement operations are often characterized by assignments and tasks that require careful scrutiny and monitoring in order to ensure the power is not abused. It is therefore essential for authorities to identify and punish any officers who indulge in misconduct. It must be noted that law enforcement officials mainly operate through directives from senior officials. It is therefore important for accountability to begin right from the summit of police leadership and flow down to the junior officials. This will ensure that the rule of law, due process and human rights are protected. This tier of accountability can be referred to as accountability before an assignment. Law enforcement officials set the ground rules for the engagement by drawing out a proper plan that is consistent with the law and procedure and emphasizing the need to follow instructions. This step is aimed at ensuring that law enforcement officers are instructed on what to do and the method in which to carry it out before they embark on the particular task.

The second aspect is that there must be accountability during the execution of the task to ensure that law enforcement officials do not abuse their power or act contrary to the instructions given in the first place. In order for this step of accountability to be realized, there is a need to implement some sort of checks which will minimize the possibility of indulgence in misconduct for example the violations of human rights. The most common method of ensuring accountability during the execution of an operation is subjecting law enforcement operations to supervision. This involves sending law enforcement officers of different ranks to execute a task for example a group of junior officers with one or two senior officers to oversee their actions during the execution of the task. This ensures that law enforcement officers are kept in check during the execution of tasks which is the most common time when most violations occur. One method that has been effective in keeping the police in check during the execution of tasks is fitting police vehicles and at times the police officers themselves with video recorders to film their activities while they carry out their functions. This footage is later reviewed by superiors in order to

determine whether the law enforcement officers conducted themselves in a professional manner during the operation. The recordings can also be vital pieces of evidence which can be used in investigation and trial.

The last point of the previous paragraph touches on the aspect of ensuring police accountability after the task is completed. This normally refers to some sort of review by either senior officers or another independent body to ascertain whether law enforcement conducted itself in accordance with the law and procedure in carrying out their orders. This stage of accountability begins with an assessment of the task and how it was executed with emphasis on the conduct of law enforcement. This process gives law enforcement an opportunity to reflect on its achievement, failures and lessons learned in order to make subsequent operations a success. Accountability at this stage also requires law enforcement officials to identify any misconduct that might have occurred while carrying out an operation and punishing the culprit accordingly. Punishing errant officers sends out a strong message to other officers that misconduct within law enforcement during operations cannot be tolerated under any circumstances. It must be noted that this mechanism will be even more effective in instances where there is an established procedure for complaints against police officers. Members of the public whose rights have been violated should be provided with a proper and safe platform through which they can voice out their complaints. If there is not proper complaints procedure, a lot of law enforcement misconduct will go unreported and this will only breed a culture of impunity within the force.

8.3.3 Police must be educated and trained on human rights

Police operations are usually associated with human rights in one way or another. In the execution of their primary function which is to maintain law and order, they are constantly called upon to make critical decisions that more often than not have an impact on the enjoyment of human rights. It is therefore mandatory for all law enforcement officials especially counterterrorism police to have some basic knowledge on the protection and promotion of human rights without exception. However, one of the challenges of police forces in Kenya and Uganda is the lack of adequate training and education on human rights. It was not until recently that the police curricula in both countries were revised to include human rights education.

Regardless of the inclusion of human rights into the police curricula of Kenya and Uganda, human rights violations that still occur on a daily at the hands of police officers with impunity. In 2013, Amnesty International carried out an assessment on the accountability of the Kenyan Police Force which noted that there was a problem with the implementation of legislation on accountability.²⁷ Law enforcement officers were in fact shockingly ignorant of laws which included restrictions on the use of force, detention of suspects and internal accountability mechanisms of police officers.²⁸ It was for this reason that the UN Committee against Torture called upon Kenya and all state parties to punish law enforcement officials who break the law during the course of their duty and ensure that the police are adequately trained especially in human rights and freedoms.²⁹

This is particularly worrying because a bulk of police work involves the enforcement and protection of human rights. A police force that is not adequately educated and trained in human rights is ill-equipped to handle the needs of the community. It is no wonder that some human rights violations that occur would have otherwise been avoided if law enforcement was knowledgeable on the subject. The same priority that is placed of discipline, weapons training and combat should be extended to knowledge on human rights and freedoms.

8.3.4 Police working and living conditions must be improved

It was noted in chapter four of this thesis that law enforcement in Kenya and Uganda are usually underpaid and live in unfavourable conditions.³⁰ This usually leads law enforcement into unethical practices such as bribery and corruption in order to support themselves and their dependants.³¹ Police and counterterrorism law enforcement in particular play a very important

²⁷ Amnesty International (n 23 above) 16.

²⁸ As above, 13.

²⁹ Committee against Torture. Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Kenya. Concluding observations of the CAT. Forty-first session 3-21 November 2008, para 12.

³⁰ See chapter three of this thesis under the challenge of cross-border terrorism. It was noted that poor wage rates were driving border and customs officials to take bribes in exchange for unhindered crossing of illicit goods and undocumented persons.

³¹ Under chapter one of this thesis, corruption was identified as one of the major problems that was plaguing Kenya and Uganda's public institutions. See also: Transparency International *Corruption perceptions index 2014* (2014) available at: <https://www.transparency.org/cpi2014/results> (accessed 03 March 2015).

role of keeping communities safe in every country. Not only do they maintain law and order but they also take on a number of assignments that are potentially dangerous and even life threatening in order to protect their societies. Given the function they carry out in the community, it is no doubt that law enforcement is indeed a distinguished profession worthy of accolades for their sacrifice, bravery, relentlessness and determination to prevent crime and protect the people they serve. If police were to be suspended even for a short period of time, societies would degenerate into a state of lawlessness, anarchy and survival for the fittest. It is no wonder that conflict torn societies for example parts of Somalia, Democratic Republic of Congo and South Sudan do not constitute a favourable environment to live and work. Police officers therefore make it possible for all other institutions of state to operate by creating a favourable environment on which development can thrive.

While the police force carries out a very important function in society, it is no secret that law enforcement in Kenya and Uganda is generally perceived as an institution that absorbs individuals who fail to attain the minimum scores to get into tertiary, university and vocational institutions.³² The result of this perception is that the police are viewed as poor, undignified and desperate individuals who are trying to forge a life for themselves. The living and working conditions of police officers are often unfavourable with most of them surviving on a minimum wage that is often not paid on time.³³ It also appears to be a norm for police barracks/quarters to be overpopulated with poor sanitation facilities.³⁴ The result of this is that law enforcement officers are forced to resort to illegal means to supplement their incomes for example bribery and corruption in order to make up for the shortfall of income. In addition, many police officers are subject to improper working conditions which have a negative impact on their health for example

³² The educational requirements for joining the Uganda Police Force Training Academy is Uganda Advanced Certificate of Education (UACE) which is form 6 or A-level as its ordinarily known. See: www.ugfacts.com/training-requirements-joining-uganda-police/ (accessed 17 July 2017). The Uganda academic requirements are comparable to Kenyan police recruitment that require a C- in Kenya Certificate of Secondary Education (KCSE) <http://www.advance-africa.com/grade-requirements-for-kenya-police-recruitment.html> (accessed 17 July 2017).

³³ New Vision (24 November 2015) *Police officers decry poor pay*. Available at: http://www.newvision.co.ug/new_vision/news/1412084/police-officers-decry-poor-pay (accessed 17 July 2017).

³⁴ Daily Monitor (27 May 2016) *24,000 police officers lack houses – audit report*. Available at: <http://www.monitor.co.ug/News/National/24-000-police-officers-lack-houses--audit-report/688334-3220496-v8mlo9z/index.html> (accessed 17 July 2017).

standing in the sun for the whole day directing traffic on busy streets. Some of these frustrations affect the productivity of the police which are in turn taken out on innocent members of the public. There is therefore an urgent need to improve the working conditions of police as well as improve on their allowances and/or their pay. This will indeed raise the moral of law enforcement which will translate into a more motivated, effective and productive police force with less irregularities during the course of their operations for example the wilful breach of human rights and freedoms.

8.4 A framework for an effective police force

The police play a very important role in every society including ensuring peace, security, order, upholding human rights and preventing crime among other duties. Without a properly functioning police force, the community would degenerate into lawlessness and anarchy where survival is for the fittest. This consideration therefore dictates that the respect of human rights should not be viewed as a conflict or hindrance to police duty. It is therefore submitted that in order for a police force to be effective in its mandate, the following considerations should be emphasized at all times.

- The police should be answerable to the people
- The police should protect and serve members of the community
- Police should not be seen to be partisan in the execution of their mandate
- Police operations should be conducted with transparency
- Police should be able to respond to the concerns and needs of the community
- Human rights should be respected at all times

The effective implementation of these principles helps to build public confidence in the police institution as the guardians of law and order. Where the police fail to execute their mandate in accordance with the law, the whole justice system collapses. The respect for human rights and freedoms is essential because in the course of their functions, the police are empowered to use force as well as limit the rights of citizens. The police must therefore minimise the possibility of violation of human rights regardless of the motivation.

In order to prevent violation of human rights and freedoms, there is a need to bolster accountability mechanisms for law enforcement officers. There is a need for proper accountability provisions in the law that clearly stipulate how the process is supposed to occur. These provisions should include effective internal and external accountability measures as discussed in chapter seven. There is also a serious need to implement these regulations in practice because unimplemented regulations that merely exist only on paper do not benefit anyone. The rule of law must be respected and there must be a good relation between law enforcement and the community.

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