(Conference Draft)

"A Regional Framework to Safeguard Human Rights in Kenya upon an Upsurge of Terrorist Attacks"

Charles A. Khamala[*]

2017 Law and Development Conference

Cape Town, South Africa
September 2017

[*]Africa Nazarene University

A Regional Framework to Safeguard Human Rights in Kenya upon an Upsurge of Terrorist Attacks

Charles A. Khamala[*]

This article proposes an innovative way, namely the intervention by the regional criminal justice system using its complementary jurisdiction, to supplement domestic judiciaries in response to terrorism. It traces the Kenya government's responses to the scourge of Islamic terrorism since the turn of the century culminating into the current escalating progroms stunting economic development. Executive counter-terrorism responses make exceptions to universal human rights enshrined under liberal constitutions and international instruments. However, problems constrain using repressive anti-terrorist legislation to strengthen an anti-terrorism response. Substantively, the lack of a definition of what terrorism is. Procedurally, a dilemma as to whether or not to devise special rules to govern terrorism offences. Both executive- and legislative-driven 'security first' strategies require some individuals to trade-off their own liberties to safeguard the security of others. Such discriminatory treatment is evident in the practice of pre-emptive strikes, torture or targeted killings. Conversely, Al Shabaab's counter-retaliation, following Kenya's 'Operation Linda Inchi' military incursion since 2012, have spiraled into violations of the core human right to life. I argue instead that regional criminal trials of terror suspects constitute a more legitimate response, than either executive, legislative or domestic judicial oversight. This presumes that it unlikely for an international terror suspect to have a fair domestic trial. Moreover, the military response seems based on Samuel Huntington's 'Clash of Civilizations' thesis. I agree that enacting pre-inchoate offences deems Islamist terrorists as being rational actors. Using Madisonian constitutional democracy theory, prosecuting Al Shabaab suspects before the African Court of Justice and Human Rights can facilitate Amisom's dignified 'exit' strategy from Somalia.

Keywords: Kenya (Rep. of), Human Rights, Law and Terrorism, Pre-Inchoate Offences and Preventive Justice, transnational crimes [Security Laws (Amendment) Act 2014, international criminal law, and the Malabo Protocol]

[*]Advocate and Senior Lecturer, Africa Nazarene UniversityLaw School

1. Introduction

Various features of terrorism have led the international community to strategize about counter measures in response to its upsurge. Studies focus on approaches to studying both domestic and international counterterrorism laws as well as human rights safeguards.[1] 'The challenge is to secure democracy against both its internal and external enemies without destroying democracy in the process'.[2] Substantively, pre-inchoate offences seek to provide collective security against future attack but they also create risk to individual security posed by the coercive power of the state'.[3] Hence the procedural need to establish regional criminal courts to legitimize the judicial counterterror stratagem by reducing risks of personal harms posed by the state's counterterrorism laws. This article examines the complex relationship between terrorism's proscription under Kenyan criminal law vis-à-vis condoning targeted killings on one hand; and the violation of constitutional safeguards on the other.

Section 2 begins by constructing a normative framework to critically analyze the justifications underlying substantive and procedural deficiencies in counterterrorism laws and policies under the general part of criminal law. This explains the international community's preference for criminalizing certain acts such as holding hostages or hijacking ships or planes under the special part of the criminal law. It shall also consider the emerging use of preventive justice approaches in developed Western democracies. Both the US and UK's counter-terrorism laws focus on prosecuting pre-inchoate crimes, including solicitation or incitement. Conversely, at the regional level, the European Court on Human Rights consistently protects the human rights of suspects. Section 3 then traces Kenya's debate resisting enactment of the Prevention of Terrorism Act,[4] which legislation subsequently required enhancement through contentious amendments. Ultimately, law is implemented by the judicial branch of government whether through criminal trials seeking to convict suspects or judicial review to safeguard their human rights. Yet, as suggested above, illegitimate terrorism trial can be counter-productive. The article agrees with those who claim that, for legitimacy purposes, unless terror suspects are accorded fair trials, and unless such trials are seen to be fair, some sympathizers may be enticed to enlist for terror causes. This vitality of ensuring that terror suspects receive fair trials increases with the use of pre-inchoate offences. A critical analysis is made of the Constitutional Court decision which struck down parts of Kenya's Security Sector (Amendment) Laws.[5] It indicates that prescribing pre-inchoate crimes is unconstitutional. To contextualize the judiciary's neglect of convicting inchoate offenders, in section 4 a quantitative analysis is undertaken of all crimes committed over the past five years. It reveals that convictions for attempts and conspiracies are significantly fewer than those for completed crimes. This article argues that the very failure to prosecute terror attempts creates a rationale for Kenya's current counterterrorism strategy to resort to military force. President Mwai Kibaki's incursion

[1] Iain Cameron, "Human Rights and Terrorism", in Diana Amneus and Katinka Svanberg-Torpman (eds.) *Peace and Security: Current Challenges in International Law* (Sweden: Student Litteratur, 2004) 193-232.
[2] *Ibid* . p. 210.
[3] Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford: Oxford University Press, 2014).
[4] No. 30 of 2012.
[5] No. 19 of 2014.

into Somalia in 2011, albeit endorsed by Parliament, nowadays attracts the opposition's scathing criticism. However, no extensive discussion shall be made of 'Operation Linda Inchi' whether at home or abroad. Neither shall the African Mission in Somalia's[6] performance be appraised. Instead, the modest objective is to critique the increasing spate of domestic targeted killings of terror suspects, including Kenyan citizens. In conclusion, existing domestic substantive terrorism pre-inchoate offences are inadequate. Moreso, judicial procedures are perceived as illegitimate and thus counterproductive. Section 5 observes that concurrent counter terrorism responsibility by international courts is recognized by Madisonian democratic constitutional theory. [7] However, given that in 1998 the Rome Conference plenipotentiaries excluded the crime of terrorism, recent efforts by the African Union to explore possibilities of its trial before a regional criminal court are commendable.

2. Counter-Terror Legislation, Pre-Inchoate Offences and Preventive Justice

2.1 The Definitional Trouble with Counter-Terror Legislation

2.1.1 Search for a Substantive Definition to Respect the Right to Legality

A common problem with terrorism, according to the literature, lies in determining when ordinary criminal acts amount to terrorist acts. Definitively, 'terrorism comes from the Latin word "*terrere*," meaning "to tremble" combined with the French verb *isme*, referencing to practice it becomes "to practice the trembling",[8] or "to cause or create the trembling" '. Trembling here is a synonym for 'fear, panic and anxiety – what today we would call terror'. To construe a terrorist as an assassin – a murderer – an oppressor', more specifically, we may observe that 'terror works as a political domination instrument for authoritarian States to subdue countries and people'.[9] Various scholars criticize some academic definitions for ignoring state-based terrorism.[10] Sir Edmund Burke 'had a different view. He considered a terrorist to be a *fanatic*. Therefore he inferred that a terrorist does not follow any means of logic to justify his or her actions'. Burke 'employed the words terrorism and terrorists more as labels than definitions'.[11] Such terrorists seek to

[6] The African Union Mission in Somalia (AMISOM) created by the African Union's Peace and Security Council on 19 January 2007, is an active, regional peacekeeping mission operated by the African Union with the approval of the United Nations. The AMISOM mission grew, with Kenya joining in 2011. http://www.globalsecurity.org/military/world/int/amisom.htm accessed on 30 July 2017.

[7] Jamie Mayerfeld, "A Madisonian Argument for Strengthening International Human Rights Institutions: Lessons from Europe" in Luis Cabrera (ed) *Global Governance, Global Government: Institutional Visions for an Evolving World System* (Albany, NY: State University of New York, 2011) 211 at p 212.

[8] Joseph S. Tuman, *Communicating Terror: Rhetorical Dimensions of Terrorism* (2nd ed.) (USA: Sage, 2010) at p. 4; See also David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006); Henry Odera Oruka, *Punishment and Terrorism in Africa: Problems in the Philosophy and Practice of Punishment* (Nairobi: East African Literature Bureau, 1974).

[9] René Ariel Dotti, "Terrorism, Due Process and the Protection of Victims" (2005) *International Review of Penal Law*, 76, 3, 227-250.

[10] Tuman, *supra* note 8 at pp. 9-10.

[11] *Ibid.* p 6.

persuade the state or international organizations to change their political or ideological views. Instead of using democratic means of persuasion, whether through campaigns or protests, however they resort to various acts or uttering words with a subversive intention. These activities are punishable by seven years imprisonment under the Kenyan Penal Code.[12] Subversion includes 'advocating any act or thing prejudicial to public order'.[13] Because such literature is prohibited[14] terrorists cannot freely distribute publications or openly express ideologies of their own. They are forced to operate in secret.[15] Yet to be effective, terrorists need to agree with each other so as to raise funds and organize their activities. Invariably, they form groups like Al Shabaab which is proscribed by domestic law.

Furthermore, the core offence of subversion not only forbids supporting an unlawful society,[16] but may be aggravated by several harmful features. First, in addition to the foregoing offences against public tranquility, terrorist acts are punishable for inciting others to violence. This is because without lawful excuse, their communications or acts, indicate or imply that it is desirable '(a) to bring death or physical injury to any person or to any class, community or body of persons; or (b) to lead to the damage or destruction of any property'.[17] Second, and worse, they may even threaten the very sovereignty of the state. The offence of treason is committed, *inter alia*, by: 'Any person who, owing allegiance to the Republic – (a) levies war in Kenya against the Republic; or (b) is adherent to the enemies of the Republic, or gives them aid or comfort.'[18] Because this most serious public order offence may trigger a state of 'war of all against all', guilty citizens are punishable by the mandatory death penalty[19] while accessories[20] or foreigners[21] may receive life imprisonment. Third, terrorists commit various acts of assault or wounding which endanger human life and health as well as inflict criminal damage to property.[22] They do more. Their acts, fourth, invariably constitute offences against the person such as murder[23] and allied offences, whether attempted murder,[24] suicide pacts[25] or conspiracy to murder, [26] aiding suicide, [27] and the like. Their fifth crime types are that violent extremists seek to force organizations to change their policies by attacking certain characteristics among the civil population. For example, denouncing Christianity not merely offends the public,[28] but violent attacks may offend the international community. They thus constitute

[12] Section 77(1) Penal Code (Chapter 63 Laws of Kenya).
[13] Ibid 77(3)(a).
[14] S 52 (1) ibid.
[15] Cameron, *supra* note 1, p. 213.
[16] S. 77(3)(d), Penal Code.
[17] Contrary to sections 96 (a) and (b), *ibid.*
[18] S. 40 (2) (a) and (b) *ibid.*
[19] S. 40 (3), *ibid.*
[20] S. 42 *ibid.*
[21] S 43 *ibid.*
[22] Division XXII, *ibid.*
[23] S 203 as read with 204, *ibid.*
[24] S 220.
[25] S 209.
[26] S 224.
[27] S 225.
[28] Division III – Offences Injurious to the Public in General, *ibid.*

genocide,[29] or if they are either widespread or systematically perpetrated, crimes against humanity.[30] Moreover, 'acts of terrorism have been considered as war crimes under the statutes of the ICTR and Sierra Leone Special Court for Sierra Leone'.[31] Claudia Martin explains how: 'At the regional level, in general all anti-terrorism instruments gear towards the overall suppression of combating of terrorism…However, a comprehensive definition of terrorism as an international crime has not been provided. This coupled with the need to react against specific acts considered "terrorist" prompted the so-called "piecemeal approach", which led to the adoption of several counter terrorist conventions at the universal level'.[32] She concludes that 'the existing anti-terrorism legal framework shows an overlapping between acts falling within the notion of terrorism and acts of war regulated under international humanitarian law that does not benefit a consistent application of these two areas of law'.[33]

On a substantive level, therefore, there is no agreed global terrorism definition. Neither is it possible for heterogeneous states, given their divergent political orientations – whether democratic, autocratic or totalitarian – to agree on outlawing the use of force. Disagreement persists because some states find terror activities useful as means of repression.[34] Historically, Europe sustained its colonization project by introducing repressive laws to punish liberation movements branded 'terrorists'. As stated earlier, this is official disobedience.[35] Consequently, absent definitional consensus killed efforts to criminalize transnational crimes, such as terrorism under the 1998 Rome Statute establishing a permanent International Criminal Court. Rejecting 'crimes of greed', the delegates settled on four core 'political crimes', namely genocide, crimes against humanity, war crimes and crimes of aggression. Beyond disagreeing on terrorism's definition, the international community has instead criminalized specific terrorist acts in various fields such as maritime, civil aviation, hostages, etc.

Considering that the difficulties of the legal system are due to the lack of reliable studies of the terrorism phenomenon, Cheriff Bassiouni and William Schabas propose a criminological approach to understanding terrorism which may be the best approach to grasping its every facet. They define it as 'a strategy of violence that targets innocent people in the pursuit of political aims. The strategy may be carried out by individuals, groups of individuals or representatives of the state'.[36] However: 'The principle of legality determines that in order to punish people, the definition of the criminal action practiced

[29] Mohamed Elewa Badar, "The Road to Genocide: The Propaganda Machine of the Self-Declared Islamic State (IS)" (2016) *International Criminal Law Review*, (16), 361-411.
[30] Michael Sharf and Mike Newton, "Terrorism and Crimes Against Humanity" in Leila Nadya Sadat (ed.) *Forging a Convention for Crimes Against Humanity* (New York, N.Y.: Cambridge University Press, 2011) 262-278.
[31] Claudia Martin, "Terrorism as a Crime in International Law" in Larissa Van Den Henrik and Nico Schrijver (eds.) *Counter Terrorism Strategies in a Fragmented Legal Order: Meeting the Challenges* (Cambridge University Press, 2013) 639-666, p. 949.
[32] *Ibid*, pp. 639-40.
[33] *Ibid*, p 647.
[34] Cameron, *supra* note 1, p. 200.
[35] Rome Statue negotiations, *supra* note 8.
[36] SOS "Terrorism, Victims and International Criminal Responsibility" Ghislaine Doucet (ed.) (France: SOS Attentas in partnership with the Irish Centre for Human Rights Galway NUI, and the International Institute of Higher Studies, 2003), p 7, cited in Dotti, *supra* note 9.

must be not only prescribed in law, but in a clear and comprehensible way'. Yet in Kenya there is no definition of what terrorism could be. In section 2 of the Prevention of Terrorism Act,[37] mention is merely made of terrorist *acts*. The configuration of the crime of terrorism consequently may depend on a subjective judicial interpretation. In 2004, the UN Security Council not only reaffirmed prior international resolutions on terrorism, they condemned terrorism as a serious threat to peace and strengthened anti-terrorism legislation, thus emphasizing criminality over politicization. It stated as follows:

> criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, and all other acts which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.[38]

2.1.2 Procedural Exceptionalism from the Rule of Law

A second problem remains. It is hardly practical to respond to contemporary terrorist actors directly. This is because, first, its planners, financers and organizers are often located far away from the actual physical perpetrators who may strike civilian or government victims residing in foreign countries. Second, the acts of both primary and secondary parties are performed at different times. Third, while physical perpetrators possess both *actus reus* and *mens rea*,[39] if their suicide mission is successful, they die in the process. Besides, the extensive harm perpetrated is so catastrophic that Andrew Simester argues that 'waiting for these risks to crystallize, waiting until people are completely endangered, is already too late'.[40] Invariably, following a terror incident, there arises acute public pressure for either executive revenge through military retaliation or preemptive strikes to destroy suspected terrorists' capacity to carry out future acts or for the legislature to enact substantive pre-inchoate crimes. What role can the judiciary play?

There is no global consensus, on a procedural level, regarding whether to use ordinary or special criminal procedures in response to terrorist acts. Debate rages as to whether to accord suspected terrorists absolute fair trial rights or whether, for collective security interests, derogation is permissible. For example, under the Kenyan constitution the right to a fair trial is non-derogable. Yet, if a 'zero tolerance' anti-terrorism policy is endorsed, suspects may be profiled and rounded up indiscriminately. Stop and search police action, unlawful seizures, arbitrary arrests or detention entail deprivation of non-

[37] PTA, *supra* note 4.
[38] United Nations Security Council resolution S/RES/1566, adopted unanimously on 8 October 2004, <http://www.un.org/press/en/2004/sc8214.doc.htm> accessed 30 June 2017.
[39] Physical and mental elements of crimes.
[40] Andrew Simester, "Prophylactic Crimes" in G.R. Sullivan and Ian Dennis (eds.) *Seeking Security: Pre-Empting the Commission of Criminal Harms* (UK: Hart Publishing, Oxford, 2012) 59-78, p. 60 cited in Ashworth and Zedner, *supra* note 3, p. 105

absolute human rights. Surveillance or interrogation may even infringe on the right to privacy and be accompanied by lengthy pre-trial custody or even torture,[41] which is a non-derogable human right. In more extenuating circumstances, the judiciary can hardly control the 'collateral damage' or 'spillover effects' which may result forced disappearances, another non-derogable human right, by persons unknown. Yet the *raison d'être* of criminal procedure is that it is better for ten guilty persons to go free than for a single innocent person to be wrongfully punished.[42] Law and enforcement measures may even require declaring a state of emergency. At its most extreme, Jeremy Waldron cautions that when the executive declares a 'war on terror' *some* individuals trade-off their own liberties to safeguard the security of *others*.[43]

Paradoxically, Iain Cameron observes that: 'An important reason why we are willing to accept far reaching police powers of data matching, surveillance, arrest, search and seizure is because the necessity for and proportionality of, these measures will eventually be authoritatively determined in a court'.[44] He concludes that: "Thus a criminal trial is a safeguard not only against the guilt or innocence of the accused, but also as a preventive measure, discouraging overuse of pre-trial coercive measures'. If nonetheless, 'the policy paradigm has shifted somewhat from securing a conviction to disrupting an ongoing criminal conspiracy' then to what extent are liberal democracies justified in sacrificing human rights so as to prevent or punish terrorism? Is it possible for international instruments or regional criminal trials to mitigate human rights violations in the fight against terrorism? The starting point is to construct a theoretical framework for a domestic criminal justice system to respond to terrorism. For regional efforts neither substitute nor supplant but merely supplement domestic trials.

2.2 Punishing Pre-Inchoate Offences

2.2.1 Pre-Inchoate Offences by Secondary Parties

Before examining consolidated anti-terrorism legislation is useful to consider two aspects of the general part of crimes: inchoate crimes[45] and principal offenders comprising both primary and secondary parties.[46] Punishing these actors and aspects, or both of them, provide additional, but necessary, responses for responding to physical perpetrators or primary actors who seem to be but foot soldiers. For example, suicide bombers are indoctrinated to murder, maim, burn, break or destroy property. Unfortunately self-death being their aim, they are undeterred by punitive threats and inaccessible after the act. First, inchoate or incomplete crimes. They are committed by would-be offenders who take all steps towards crime perpetration, but either fail or are thwarted in their penultimate step to

[41] Article 25(a), Constitution of Kenya (Nairobi: the Government Printer, 2010).
[42] Cameron, *supra* note 1, p 211.
[43] Jeremy Waldron, *Torture, Terror, and Trade-offs: Philosophy for the White House* (Oxford University Press, 2010).
[44] Cameron, *supra* note 1, p. 225.
[45] S. 388 Penal Code; Under s. 389, un less otherwise provided, attempters are liable to one-half of such punishment as may be provided for the offence attempted, but if 'punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years'.
[46] S 20 Penal Code.

doing the prohibited act or find that doing it is impossible.[47] Common law legal systems also punish pre-inchoate crimes by actors who prepare,[48] plan or even being in possession of certain property (strict liability)[49]or associating with proscribed groups (status crimes).[50]

Second and equally significantly, assuming that the justification for punishing terrorism goes beyond retribution, but also extends to its prevention, then it becomes more effective for the criminal justice system to punish groups of actors. Agreeing to offend together with others constitutes the offence of conspiracy. However, there are those whose ancillary roles exceed merely planning together – or agreeing to participate – to actually joining into a criminal enterprise.[51] Joint criminals possess a common intention to prosecute a criminal purpose in conjunction with each other.

Various secondary participants play distinct roles of either helping or encouraging primary actors before or during the crimes. For example, international instruments criminalizing the financing of terrorism aim to punish procurers. Under Kenyan Penal Code, both primary and secondary parties are defined as principal offenders[52] and they both attract equivalent culpability. Their distinct roles nonetheless provide grounds for mitigation. One pre-inchoate criminalization approach entails preventing organized or group crimes. For reasons of space, this article is limited to discussing pre-inchoate criminalization involving secondary participants who counsel terrorist acts, i.e. inciters, rather than those who procure or even aid or abet the act.

2.2.2 Justifications for Punishing Pre-Inchoate Offenders

There are four justifications for punishing inchoate crimes. First, subjectivism.[53] This theory is predicated upon the fact that people who attempt to commit offences – but fail, are thwarted or find it impossible – are nevertheless morally equivalent to those who succeed. Consequently, incitement should render secondary parties culpable independently of whether or not a primary actor obeys such counseling. Waldron observes that because of terrorism's heinous nature, extraordinary moral outrage should be shown towards terrorists.[54] Interestingly, this explains why terrorism possess special characteristics. On one hand, I might add, secondary actors should bear the greatest responsibility for inciting. On the other hand, both planners and actual terrorists, by using victims as 'collateral damage' manipulate or instrumentalize them to publicize or symbolize dramatic political or other ends. However while supporting a subjectivist stance, Andrew Ashworth

[47] Jonathan Herring, *Criminal Law* (4th edn, Palgrave Law Masters) (Basingstoke: Palgrave Macmillan, 2002) p. 451.
[48] S 308, Penal Code, *supra* note 12.
[49] E.g. possession of drugs contrary to the Kenyan the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994, Revised Edition 2012; See also Douglas Husak, "Does Criminal Liability Require an Act"? in Antony Duff (ed,) *Philosophy and the Criminal Law: Principle and Critique* (Cambridge University Press, 1998) 60-100.
[50] For example belonging to an unlawful society contrary to section 4(1) The Societies Act (Chapter 108 Laws of Kenya).
[51] S 21, Penal Code, *supra* note 12.
[52] S 20, *ibid.*
[53] Herring, *supra* note 47, p. 452.
[54] Waldron, *supra* note 43, cited in Ashworth and Zedner, *supra* note 3, p. 179.

maintains that the labeling function of criminal law requires that the law should reflect the popularly perceived difference between attempters and successful actors even though in moral terms there is no real distinction.[55]

Second, objectivism[56] or the 'harm principle'.[57] If successful, terrorism inflicts catastrophic harm. Beyond immediate victims, there are also passers-by who are traumatized by the attempt they witness. Hence for Ashworth 'inchoate, preparatory and pre-inchoate offences, crimes of possession, crimes of membership, crimes of concrete and abstract endangerment' are not only crimes against the person, they also breach the peace. Severe punishment is justifiable commensurate with the gravity of harms-to-be-prevented[58] as well as the public fear they create. Regarding preparatory, possessory and membership offences, David Anderson uses a football analogy to justify the 'need to defend further up the field against these forms of incidents'.[59] The problem for Ashworth and Zedner, however, 'is that resistance on liberty in pursuit of harm prevention are, in practice, liable to fall disproportionately on the few to the benefit of the many'.[60]

Third, the 'failure to reassure argument' contends that terrorism threatens state sovereignty. The work of security officials and installations is undermined when individuals lose confidence in the state's ability to preserve national security. Citizens may then take the law into their own hands. According to Peter Ramsey, the defendant's conduct fails to reassure the court, and fellow citizens, that the defendant would not go on to the harm-to-be-prevented'.[61] Because 'preparatory and possession offences increase the risk that some eventual wrongful act shall be completed' and further to restore the public's confidence in the state, therefore pre-inchoate offences may be created to wage a 'war on terror'. After all, why should police wait until after a serious crime is already perpetrated, if they have information which can pre-empt its commission? This approach justifies acts of aggressive interrogations or even torture which may elicit information to facilitate investigations. Such pre-trial procedures derogate from various fundamental freedoms to privacy and the freedom from torture. State authorities justify such derogations on grounds of promoting the greater security of the majority. However 'if we take representative democracy seriously, it becomes difficult to support preemptive offences because they coerce the private sphere and thus undermine the very kind of liberty (of thought and expression) that is essential in a democracy'.[62]

---

[55] Andrew Ashworth, "Defining Criminal Offences without Harm", in P.F. Smith (ed.), *Criminal Law Essays in Honour of J.C. Smith* (London: Butterworths, 1987) 148-169, cited in Herring, *supra* note 47, p. 452.
[56] Herring, *supra* note 47, p. 452.
[57] John Stuart Mill, *On Liberty* (Hammonsworth, Middlesex: Penguin, 1859), cited in Ashworth and Zedner, *supra* note 3, p. 103.
[58] John Feinberg, *Harm to Others* (New York: Oxford University Press, 1984), p. 26 cited in Ashworth *ibid.* 103-4.
[59] David Anderson, "Shielding the Compass How to Fight Terrorism without Defeating the Law" (2013) *European Human Rights Law Review*, p 237, cited in Ashworth, *ibid*, p. 105.
[60] Ashworth and Zedner, *ibid*, p. 104.
[61] Peter Ramsay, "Democratic Limits to Preventive Criminal Law" in Andrew Ashworth and Lucia Zedner and Patrick Tomlin, (eds.) *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013) 214-234, p. 219.
[62] *Ibid*, p 107.

Fourth, the 'reverse harm thesis'[63] argues that decriminalizing inchoate or pre-inchoate crimes would result in increasing perpetration of the actual terrorist offences. They counterfactually emphasize the censure value of having law-in-the-books for educational purposes. We criminalize bribery and fraud for similar reasons. However there is no empirical proof that the population actually learns from the punishment of or existence of pre-inchoate crimes. Additionally, there is no nexus between creating pre-inchoate crimes generally which are remote to a specific terrorist's peripheral acts, anyway. Hence Ashworth and Zedner are unpersuaded by this justification. Nonetheless, they recognize that 'if there are good reasons to create a realm of action and powers with which to prevent primary offences, how much stronger is the case for preventing potentiallycatastrophic harms entailed by terrorist attacks'?[64]

2.3 Preventive Justice in Western Liberal Democracies

This sub-section considers some comparative jurisprudence from advanced democracies. It is useful to compare and contrast on one hand, the UK and US crime control approaches to terrorism, the latter based on its draconian PATRIOT Act,[65] or even 'law and order' under their 'war on terror', with on the other hand, the European Convention on Human Rights' due process model advanced by an activist European Court of Human Rights. Security is a part of the right to life.[66] According to Lord Bingham, many in both the UK and US support the view, paraphrasing Cicero, that 'the first priority of government is to ensure the safety of the national and all members of the public'.[67] Consequently, then Prime Minister 'Tony Blair has rejected the Chilcot inquiry's criticisms of his decision to lead Britain to war in Iraq in 2003, but expressed "sorrow, regret and apology" for some mistakes he made in planning the conflict'.[68] However for Bingham, a preferable view to Cicero's is that 'he who would put security before liberty deserves neither' (attributable to Benjamin Franklin).[69]

The UK's Iraq War Inquiry: 'Chairman Sir John Chilcot said the 2003 invasion was not the "last resort" action presented to MPs and the public. There was no 'imminent threat' from Saddam – and the intelligence case was "not justified" '. Rather 'Blair

[63] John Gardner and Stephen C. Shute, "The Wrongness of Rape" in Jeremy Horder (ed.) *Oxford Essays in Jurisprudence* (Fourth Series, Oxford University Press 2000) 193-217, cited in *ibid.*

[64] Ashworth and Zedner, *supra* note 3, p. 171.

[65] USA PATRIOT, An Act of Congress that was signed into law by President George W. Bush on 26 October 2001. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism <https://www.congress.gov/bill/107th-congress/house-bill/3162> accessed 19 July 2015 cited in Bingham, *supr*a note 65 p 139.

[66] Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton: Princeton University Press, 1980); See also Robert E. Goodin, *Political Theory and Public Policy* (Chicago: Chicago University Press, 1982) cited in *ibid.* p 114.

[67] Gordon Brown, "Foreword", in *The UK's Strategy for Countering Terrorism* (London: HM Government 2009), cited in Tom Bingham, The *Rule of Law* (London: Penguin Books, 2010), p. 136.

[68] "Tony Blair: 'I express more Sorrow, Regret and Apology than you can ever Believe'" https://www.theguardian.com/uk-news/2016/jul/06/tony-blair-deliberately-exaggerated-threat-from-iraq-chilcot-report-war-inquiry<accessed on 23 January 2017>

[69] A.C. Grayling, *Towards the Light of Liberty: The Struggles for Freedom and Rights that made the Modern Western World* (New York, NY: Walker & Company, 2007) quoted in Bingham, *supra* note 65, p. 6.

overstated the threat posed by Saddam Hussein, sent ill-prepared troops into battle and had "wholly inadequate" plans for the aftermath'.[70] Moreover, collateral damage from the Iraq invasion incurred negative human costs even in the US where 'the PATRIOT Act authorized the government to use classified information, presented behind closed doors, to support the freezing of assets of allegedly terrorist organizations and Muslim charities; it exercised the power also against US citizens accused of supporting terrorist groups'.[71]

Part of the explanation is that in the UK as in the US, the catastrophic scale of the 9/11 attacks was deemed to change the legal landscape. Hence 'Blair announced that "the rules of the game have changed". The legal protections of those criminal processes were regarded by many…as too favourable to suspects and obstacles in the pursuit of security'. Rejecting stubborn 'liberal partisans' made it possible to 'avoid the protections of the criminal trial, and the human rights protections that attached to it under Article 6 (of the European Convention on Human Rights enshrining fair trial rights), it was again proposed that preventive measures be pursued in administrative and civil domains'. [72]

Just two months after the 9/11 attacks, the Anti-Terrorism, Crime and Security Act 2001, was passed in the UK criticized as 'a graphic example of what should not happen (since) ACTA was pushed through Parliament in great haste'.[73] Between 2001 and 2004, 17 foreign nationals suspected of terrorists were thus detained in Belmarsh Prison in London, until such detention was ruled unlawful by the House of Lords on grounds that the provision was disproportionate and that it discriminated unfairly against foreign nationals'.[74] 'The matter went to the ECtHR in *A v UK* (2009) in respect of 11 terrorist suspects who had been preventively detained indefinitely. The Court held unanimously that there had been a violation of the right to liberty and security, of the right to have lawfulness of detention decided by a court, and of the right to be compensated for such violations'.[75]

Across the Atlantic, on 11 September 2001, two civilian airplanes were hijacked and converted into improvised explosive devices which crashed into the World Twin Towers at New York. Over 3,000 were killed and thousands more injured. A third aircraft struck the high security Pentagon building with a fourth being shot from the sky as it headed towards the Presidential Camp David retreat site.[76] Then US President George W. Bush declared 'war on terror' and warned the rest of the world that 'you are with us or against us' as he vowed to 'bring justice' to the terrorists. Thereafter the US Congress passed the PATRIOT Act to repress the threat of terrorism. On 7 October, 2001, Bush made good his threat to wage war against Al-Qaeda's terror militia by initiating a counter-military offensive which would swiftly topple the Taliban regime in Afghanistan. Thereafter, to repress the threat of terrorism, the US Congress passed the PATRIOT Act,

[70] Chilcot Report "Tony Blair's Iraq War case not Justified", *BBC*, 6 July 2016, <http://www.bbc.com/news/uk-politics-36712735> accessed on 23 January 2017.
[71] Bingham, *supra* note 65, p 151.
[72] Ashworth and Zedner, *supra* note 3, p. 182.
[73] Cameron, *supra* note 1, p. 211 fn 61.
[74] Ashworth and Zedner, *supra* note 3, p. 182, citing *A and others v Secretary of State for the Home Department* [2004] UKHL 56.
[75] *Ibid*, citing *A and others v UK* [2009] ECHR 301.
[76] Serge Schmemann, "Hijacked Jets Destroy Twin Towers and Hit Pentagon" <http://www.nytimes.com/learning/general/onthisday/big/0911.html> accessed 25 July 2015.

'an Act of Congress that was signed into law…on 26 October 2001, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism'.[77] However David Cole reminds us 'of a repeated pattern: extraordinary powers, first exercised against non-citizens on the ground that they do not enjoy the constitutional protection extended to citizens, and arousing little protest because applied to non-citizens only, are then extended to citizens also'.[78]

Fiona De Longras thus concludes that 'this oversight is most likely to come from the judicial branch' notwithstanding rights depriving judgments like *Korematsu*. She is borne out by a more recent trajectory of the US Supreme Court's decisions in *Rasul v Bush*,[79] *Hamdan v Rumsfeld*,[80] and *Boumediene v Bush*[81] and *Al Odah v United States*[82] which reflect not only the Court's commitment to preventing unchecked executive action, but also the systematic Constitutional failure to provide effective oversight. In conclusion, both the UK and US have enacted repressive inchoate offences as part of their counter terrorism measures. Conversely the ECtHR is at the vanguard of striking down legislation or administrative measures which derogate from regional human rights standards. The question is whether Kenyan courts possess equivalent legitimacy capital to not only dispense justice even-handedly in terror cases, but to be seen to do so. Currently it is arguable that Kenya's criminal justice system neither convicts terror suspects for pre-inchoate offences nor safeguards the rights of persons suspected of pre-inchoate acts from being subjected to targeted killings. Section 3 examines the historical development of Kenya's counter terrorism laws and measures and the resistance of substantive pre-inchoate anti-terrorism offences not only by civil society but also by the judiciary. Subsequently, section 4 turns to expose the Constitutional Court's reasoning when it struck down the proposed pre-inchoate component to the security sector laws. Thereafter, the executive's extrajudicial methods of derogating from to the constitutional rights to life, fair trial and freedom from torture through condoning extrajudicial killings.

3. The Kenyan Constitutional Court's Oversight of Anti-Terrorism Law

'Kenya has been on the vortex of terrorism. Yet, it has the most under-developed counter-terrorism architecture in the region. Tanzania adopted its Prevention of Terrorism Act in 2002 and Uganda enacted the Anti-Terrorism Act in 2002'.[83] Since the early 21st century, Kenyan civil society vehemently opposed the enactment of anti-terrorism legislation on grounds that it introduced PATRIOT Act repression. The essence of their argument was that Islamic extremism was a Western problem which should not be deployed as a guise of

[77] USA PATRIOT, https://www.congress.gov/bill/107th-congress/house-bill/3162 accessed 19 January 2017, cited in *ibid* at p 139.
[78] David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (New York: The New Press, 2003) p. 169, paraphrased in *ibid.*
[79] 542 US 466 (2004).
[80] 548 U.S. 557 (2006).
[81] 553 U.S. 723 (2008).
[82] 553 US 128 S.Ct 2229 (2008).
[83] Peter Kagwanja, "Ruling on Anti-Terrorism Law a Triumph for Kenya's Judiciary", *Daily Nation*, February 28 2015 <http://www.nation.co.ke/oped/Opinion/Security-Laws-High-Court-Ruling-Terrorism/440808-2638706-bhuv6f/index.html> accessed 29 July 2017.

rolling back hard-won gains of the 'Second Liberation' struggle. Moreover, being a post-colonial society Kenyans are acutely aware of the misuse of terrorism suppression measures during the 1950's state of emergency[84] and thus do not trust the executive to use counter-terror discretions to fight terrorists alone. The fear was that unchecked executive powers would be abused to harass the political opposition and stifle democratic space. Belatedly, the upsurge in terror attacks resulted in enactment of the PTA, 2012. However, in 2015 the official opposition party, the Coalition for Reforms and Democracy (CORD) challenged the constitutionality of the Security Laws (Amendment) Act 2014 that sought, *inter alia*, to incorporate pre-inchoate offices into the PTA.

3.1 Kenyan Civil Society's Opposition to Anti-Terrorism Legislation

3.1.1 The Early 21st Century Debate

'On August 7, 1998…al Qaeda operatives detonated truck bombs outside the American Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania, killing 224 people' and 'wound(ing) 5000 thousand more'.[85] Yet in 2003, civil society opposed Kenya's Suppression of Terrorism Bill.[86] Several draconian provisions drew objections. Principally, due to the fact that it was 'alleged to bear similarities with the US Patriot Act'. First, the vague definition of 'terrorism'.[87] Second, it 'reduced trial standards' of prosecution of terror cases to 'reasonable suspicion'. Normally, a prosecutor 'must be satisfied that there is enough evidence to provide a "realistic prospect of conviction" '.[88] Third, it permitted pre-trial detention. Fourth, it granted wide discretionary stop and search powers without warrant and detention of terror suspects without charge. Fifth, it criminalized persons who happen to be dressed so 'as to arouse reasonable suspicion that he is a member of a terrorist organization. Resistance emerged against the Minister for National Security's discretion to 'make exclusion orders only against individuals of dual citizenship'.[89] This 'was perceived as targeting Muslims…descended from immigrants from Somalia, the Arabian Peninsula and South East Asia'. Clearly, counter-terrorism was no priority of Kenya's. Although an 'Anti-Terror Police Unit (ATPU) a special police branch established after the US embassy bombing in 1998…led to raids to round up suspected terrorists'[90] their operations were merely underpinned by policy guidelines, not law.

In 2004, weeks after a missile was launched at an Israel-bound plane, which took off from Mombasa, some terrorists rammed a four-wheel-drive vehicle the Israeli-owned Paradise Hotel, at Kikambala, detonating explosives killing 15 people. However, the 'Al

[84] *Jomo Kenyatta and five Others* v *Regina* [1954] eKLR.
[85] http://caselaw.findlaw.com/us-2nd-circuit/1386237.html accessed on 25 July 2015; See also 1998 U.S. Embassies in Africa Bombings Fast Facts <http://edition.cnn.com/2013/10/06/world/africa/africa-embassy-bombings-fast-facts/> accessed 25 July 2015.
[86] Suppression of Terrorism Bill, 2003 (Kenya), Kenya Gazette Supplement no. 38 of 30 April, 2003 <http://www.ealawsociety.org/> accessed on 25 January 2017
[87] Jude Howell and Jeremy Lind, *Counter-Terrorism, Aid and Civil Society: Before and After the War on Terror* (London: Palgrave MacMillan, 2009), p. 139.
[88] Stephen Forster, Criminal Law & Practice (London: Sweet & Maxwell, 2008) p. 338.
[89] Howell and Lind, *supra* note 82, p. 139.
[90] *Ibid.* p 138.

Qaeda-linked hotel bombing…ended…with acquittals'[91] for prosecutions preferred for ordinary criminal offences under the Penal Code. This revived judicial capacity questions. 'In 2005 Kenya...received special training through the US government's Anti-Terrorism project, which included support for the National Security Intelligence Services…and to establish a National Counter Terrorism Centre that notionally sits within the NSIS (National Security Intelligence Services) but is rumoured to be under the direct operational guidance of Washington'.[92] Discussions on an anti-terrorism legislative framework resumed in 2006 with a revised Anti-Terrorism Bill being circulated in government departments. However, not only did terrorism remain of no 'concern to most Kenyans', but also 'the government did not do a political campaign to generate support for the legislation'.[93] The ATB met similar resistance as had the Suppression of Terrorism Bill. Still, because UN resolution 1373[94] linked money laundering to terrorism, therefore its control became 'a key determinant in the government's resolve to pass anti-terrorism legislation. However, the late 2007 Money Laundering Bill contained 22 provisions lifted 'word for word' reportedly 'from the SOT Bill into the Proceeds of Crime Bill'.

'In early 2007' contemporaneously 'Kenyan authorities thus failed in certain instances to comply with both international human rights law and standards under Kenyan law. Suspects reported being tortured and mistreated, and denied family visits, medical attention, legal counsel, and consular areas'.[95] Muslims alleged that it was more difficult for them 'to obtain identity cards that are required for employment and passports'.[96] Particularly 'along the coast', many Muslims felt 'neglected by Kenya's political establishment and controlled by "upcountry" Kenyans'.[97] Worse still: 'These anti terror measures were introduced in a legal vacuum'.[98]

By 2009, Jude Howell and Jeremy Lind observed that Kenyan 'civil society regarded failure of (the Suppression of Terrorism Bill) as a major victory, Government and some Western authorities as a setback'.[99] Yet: 'Governments have a responsibility for security'. Yet paradoxically, 'if government lacks the legal means it is in an impossible position. It has to act illegally because it lacks measures it requires to tackle the problem'.[100] Pragmatically, they recommended that therefore 'Civil society needs to help

---

[91] Wanjohi Kabukuru, "How idyllic Mombasa lost its groove to the 'war on terror'" <http://newafricanmagazine.com/how-idyllic-mombasa-lost-its-groove-to-the-war-on-terror/>
See also Tom Maliti, "For 3d time in 2 years, terror suspects acquitted in Kenya Hotel bomb case raises questions", Associated Press, June 28, 2005.
<http://www.boston.com/news/world/africa/articles/2005/06/28/for_3d_time_in_2_years_terror_suspects_acquitted_in_kenya/> accessed 25 July 2015.

[92] Howell and Lind, *supra* note 4 p 138.

[93] *Ibid.* p 140.

[94] Adopted by the UN Security Council at its 4385th meeting, on 28 September 2001.
<http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20%282001%29.pdf> accessed 19 July 2015.

[95] Howell and Lind, *supra* note 82, p. 138.

[96] *Ibid.*139.

[97] *Ibid.*

[98] *Ibid.*

[99] Ibid, p. 141.

[100] *Ibid,* p 156.

encourage debate on counter-terrorism that is sensible and proportionate. There is constantly a tension between the balance between security and human rights'.[101]

3.1.2 The Prevention of Terrorism Act 2012

Kenya's 2010 Constitution provides that: 'Every person has the right to freedom and security of the person, which includes the right not to be – (a) deprived of freedom arbitrarily or without just cause'.[102] Yet the enabling anti-terrorism legislation is a typical example containing exceptions to the general rules. The Prevention of Terrorism Act[103] carries offences punishable by a 30-year imprisonment term which, in some instances, exceed the limits on parallel offences in the Penal Code.[104] Another procedural exception is that the period of police custody may even be extended from the usual 24 hours – or beyond 14 days in murder cases – for up to 90 days.[105] Hence, theoretically, terrorist suspects receive inferior protections against deprivation of liberty than other suspects. Nevertheless, some courageous judges and magistrates have laudably risen to the occasion to grant deserving terror suspects pre-trial-bail.[106] However, this issue generates considerable national controversy among scholars and policy makers alike.[107] Under the new law, those convicted for assisting in the commission of terrorist acts or found in possession of property intended for the commission of terrorist acts can be jailed for up to 20 years. The Act also provides stiff penalties for membership to terrorist groups, and recruiting, training and directing of terrorist groups and persons. The Act also amends two extradition laws, making it legal to sent terror suspects abroad for trial. The illegal rendition of suspects has been a major bone of contention with human rights activists in the past.[108]

During Bush's successor, President Barack Obama's historic visit to Kenya, in July 2015, he 'warned against unfairly targeting any one community or restricting freedoms in response to terrorism – saying such marginalization could fuel resentment and encourage extremism'.[109] His host President 'Kenyatta acknowledged the country's counterterror response was evolving. "This is an existential fight for us. This is something that we have not been familiar with. Kenya has always been a country that has respected different religions. This issue of terrorism is new to us and as it is now, we learn with each and

[101] *Ibid.* p. 138; See STA, *supra*, note 81.
[102] Article 29(a) Constitution, supra note 41.
[103] PTA, *supra* note 4.
[104] Penal Code, *supra* note 12.
[105] PTA, *supra* note 4.
[106] Willis Oketch, "State wants Terror Suspects Denied Bail", *East African Standard*, 2 July 2016, <http://www.standardmedia.co.ke/sports/article/2000207328/state-wants-terror-suspects-denied-bail> accessed 23 January 2017
[107] Neville Otuki, "Judiciary seeks views on Bail for Terror Suspects", *Business Daily*, 21 August, 2016, <http://www.businessdailyafrica.com/Judiciary-seeks-views-on-bail-for-terror-suspects/539546-2423226-11f7qkn/index.html> accessed on 23 January 2017; See also Ramadhan Rajab, "Bail for Terror Suspects a 'Failure of Police' – Ghai", The Star, 14 June, 2014, <http://www.the-star.co.ke/news/2014/06/12/bail-for-terror-suspects-a-failure-of-police-ghai_c953512> accessed 23 January 2017.
[108]
[109] Aru Pande, "Obama: US, Kenya United Against Terrorism, Al-Shabab" <http://www.voanews.com/a/obama-meets-with-kenyatta/2878139.html> accessed 24 January 2017

every step'.[110] It may be inferred that both leaders basically agreed that in order to credibly contain the terrorism threat while respecting human rights, it is necessary not only to improve security in Somalia through military force, but also to strengthen the community policing intelligence through the 'Nyumba Kumi' initiative and international policing co-operation and the judiciary. Obama accorded limited plaudits to AMISOM's role in extinguishing the terror threat, to wit: 'We have systematically reduced the territory that al-Shabab (sic) controls, we have been able to decrease their effective control within Somalia and have weakened those networks operating here in East Africa. But that doesn't mean the problem is solved'.

This article agrees with Donatus Githui Mathenge who observes: 'Overall we do favour employing a criminal justice model in countering terrorism and using the law enforcement agencies as the spearhead'.[111] This is 'particularly because of their legitimacy in the eyes of the public and also in relation to their knowledge, of their familiarity with the law and both techniques of criminal investigation, and of their access to international sources of assistance and co-operation'. He proposes prosecuting terrorism 'as crimes against humanity sanctioned through national and international justice institutions. Thus in this regard, a justice strategy would involve less abuse of detainees' human rights, because law enforcement agencies are trained in respecting suspect's rights'.[112]

Clearly, besides physical force, more is needed to win the fight on terror. Therefore the contribution of this article is that terror suspects should not be killing targets. Given that suspect's safety cannot be guaranteed, neither should they face trial in Kenya. Rather, no state's domestic judiciary possesses jurisdiction to conduct *independent* trials of international terrorism suspects. It is claimed in what follows that, the judiciary has a role in delegitimizing the terrorist ideology. However, the right to a fair trial of Al Shabaab suspects can preferably be attained through ceding some sovereignty to the African Court of Justice and Human Rights. The African Court of Justice was originally intended to be the 'principal judicial organ of the Union' with authority to rule on disputes over interpretation of AU treaties. 'It was, however, superseded by a protocol creating the African Court of Justice and Human Rights, which will incorporate the already established African Court on Human and Peoples' Rights and have two chambers – one for general legal matters and one for rulings on the human rights treaties'.[113] Alternatively, the International Criminal Court should deploy its jurisdiction over terrorism cases by construing Al-Shabaab's incitement as genocide. However, since it is unlikely for Assembly of States Parties to agree on a substantive definition of terrorism, the regional option remains.

---

[110] *Ibid.*

[111] Githui Donatus Mathenge, *Ethics in Security Management and Criminal Justice: A Requisite to Solving Ethical Dilemmas in Crime Management and Security Decisions in a Globalized World* (Nairobi: The Jomo Kenyatta Foundation, 2015) p 226.

[112] *Ibid.*

[113] Article 2.2, Protocol of the Court of Justice of the African Union, to set up the Court of Justice adopted in 2003, and entered into force in 2009, <https://en.wikipedia.org/wiki/African_Court_of_Justice> accessed 25 January 2017.

3.1.3 Terror Upsurge and Upward Spiral

'Terrorist attacks on the Kenyan soil…increased steadily from less than 20 at the end of 2011 to an average of 30 in 2012-2014. Nearly a thousand people have lost their lives in terrorism-related violence in the same period. The killing of 28 non-Muslim passengers on a bus on November 22, 2014, and the follow-up massacre of 36 quarry workers on December 2 in Mandera County brought the issue of terrorism to a tipping point. On December 11, the government took the Security Laws (Amendment) Bill, 2014, to the National Assembly.' [114] Most regrettably earlier that year four gunmen laid siege to Garissa University College'.[115] Some details of that grizzly attack are emerging from trial of survivors who participated secondarily. Currently: 'Rashid Charles, a Tanzania national is charged alongside Mohamed Ali Abdikadir, Hassan Aden Hassan, Sahal Diriye and Omar Abdi over the Garissa University terror attack. Which killed over 140 students on April 2 2014'.[116] Furthermore 'Rashid who is the fifth accused in the case is identified as the only surviving Garissa attack terror suspect. The court heard that Rashid was found by police officers who were rescuing students during the attack, hiding under a bed covering himself with a mattress in one of the hostels and when interrogated he lied that he was a student at the institution and could not tell police the course he was undertaking'. Interestingly: 'Earlier, another witness Kolombo Adao who is an Usher at Garissa mosque identified Rashid as one of a group of young men who were planning the attack at the university prior to the incident. He told the court that Rashid started attending prayers at the mosque three days before the attack'. More regrettably, one University of Nairobi law student, Abdirahim Abdullahi, was one of the slain participants during the suicide mission.[117] A pertinent question, from this incident is what causes intelligent youth to sacrifice their promising careers and even lives by joining terror groups?

Three years preceding the Garissa tragedy, the Kenya Defence Force officially entered Somalia, thereby engaging in an unconventional war against the Al-Shabaab terror group. Besides directing military responses to strike terror bases, states are known to either eliminate terror suspects or acquiesce in their killings by persons unknown. It is no coincidence that prominent Muslim clerics 'radicals' Imams Mohamed Aboud Rogo,[118] Sheikh Abubakar Shariff aka 'Makaburi'[119]and moderate Sheikh Mohammed Idriss[120]fell

---

[114] Kagwanja, *supra* note 83.

[115] Aggrey Mutambo and Abdimalik Hajir, "147 Students Killed in Cold-Blooded Raid on Campus", *Daily Nation*, 2 April 2015, <http://www.nation.co.ke/counties/Garissa-University-College-under-attack/1107872-2673506-lp3f2z/index.html> accessed 24 January 2017

[116] Nancy Gitonga, "Varsity Suspects Charged," *The People*, 25 July 2017, p 8.

[117] Bernard Momanyi, "Slain Garissa Terrorist Studied Law at Nairobi University", *Capital News*, 5 April 2014. http://www.capitalfm.co.ke/news/2015/04/slain-garissa-terrorist-studied-law-at-nairobi-university/> accessed 24 January 2017

[118] "Tension in Mombasa as Al-Shabaab Suspect Rogo Killed", *Daily Nation*, 27 August, 2012, <http://www.nation.co.ke/news/1056-1487982-1470glaz/index.html> accessed on 24 January 2017.

[119] Galgalo Bocha, "Radical Cleric Makaburi Shot Dead," *Daily Nation*, 1 April, 2014 <http://www.nation.co.ke/news/1056-2266174-nf03o1z/index.html> accessed 24 January 2017.

[120] "Top Muslim Cleric Mohamed Idris Shot Dead," *Daily Nation*, 10 June 2014, http://www.nation.co.ke/counties/mombasa/Mohamed-Idris-CIPK-chairman-shot-dead/1954178-2342712-p3vyav/index.html.> accessed 24 January 2017.

prey to hails of bullets in broad daylight in public spaces – and save for the latter – seemingly to silence their fiery ideologies preached in madrasas or mosques. No arrests were made of any suspects. Neither has anyone been charged. Yet targeted killings are contrary to both the Kenyan constitution as well as international law. More crucially, such extra-judicial killings fail to address possible the ideological justifications which promote religious extremism underling terrorism. In instances where killings are not investigated, sympathetic sections of the population may justify joining distorted terrorist causes. Thus, illegitimate counter terror responses evidently backfire, instead inspiring random, retaliatory terror attacks. For example, not only against KDF bases in Somalia or by planting improvised explosive devices (IEDs), but more dramatically at Westgate,[121] Mpeketoni,[122] Mandera (severally) and Garissa. It seems unstrategic for a country to deploy troops on neighbouring soil. Overall, if responses to the Al-Shabaab menace are characterized purely as a 'war' and pursued by exclusively random strikes in Somalia which may indiscriminately hit the civilian population, this may undermine Kenyan security. Responsiblizing[123] domestic civil society or other non-state actors through 'Nyumba Kumi' can ill buffer, given the porous border and local potential of disgruntled supporters to feed Al-Shabaab's recruitments. Add poverty and apparent ethno-religious or cultural discrimination experienced by Somali-Kenyans or Arabs. In sum, the current militarization of Kenya's anti-terrorism measures foment an escalating spiral of feudal terrorism. While situational barriers such as a border fence and trench may physically impede unlawful immigrants,[124] to prevent corruption of border security personnel or silent terror supporters within Kenya. An ideological response can be more effective.

Significantly, the planners, financers and organizers of suicide emissaries do not themselves perpetrate the final violent act. Rather these sinister secondary participants behind the scenes encourage pliable youths who are mobilized by seductive, distorted ideologies and instrumentalized for dastardly purposes. In order to stem the recruitment of primary actors is necessary to 'win the hearts and minds' of potential terrorist sympathizers. As part of the 'soft' counter terrorism strategy to accompany the use of force, it is necessary to *inter alia*, *legitimize* criminal trials.

In this regard, President Kenyatta was widely praised in 2013 for substituting Internal Security Cabinet Secretary Joseph Ole Lenku with Maj-Gen. (Rtd.) Joseph Nkaissery and retiring the former Inspector General of Police David Kimaiyo succeeded by Joseph Boinett following Westgate. These new appointees instantly changed tack through announcing strategic amnesties for radicalized youths to return home and a establishing a

[121] "Gunmen Kill Dozens in Terror Attack at Kenyan Mall", *New York Times*, 21 September 2013, http://www.nytimes.com/2013/09/22/world/africa/nairobi-mall-shooting.html<accessed on 24 January 2017>

[122] "Al-Shabaab claim Responsibility for Mpeketoni Attack", *Daily Nation*, 16 June 2014, <http://www.nation.co.ke/news/Al-Shabaab-Mpeketoni-Lamu-Attack-Terrorism/1056-2350568-n8q9u0z/index.html> accessed 24 January 2017.

[123] Katja Franko Aas, *Globalization and Crime* (London: Sage Publications, 2007).

[124] Manase Otsialo, "Kenya-Somalia Fence to keep away Unwanted Elements, says Mandera Governor Ali Roba" <http://www.nation.co.ke/counties/mandera/Kenya-Somalia-border-fence/1183298-3472166-hyn3f6z/> accessed 24 January 2017.

National Counter-Terrorism Centre for 'managing returnees in the country',[125] to confess and be forgiven. Nonetheless, even assuming that there exists political will to treat the escalating violent terror attacks as matters of 'soft diplomacy' rather than exclusive military retaliation, unfortunately, it is not easy for 'justice to be seen to be done' by the domestic judiciary. There is need to increase both investigative and arrest as well as surveillance powers thereby further undermining fair trial rights. Given perceptions of bias and partiality afflicting domestic counterterrorism measures, and further because the international community has declined to criminalize terrorism as a core crime under the Rome Statute, therefore policymakers, lawyers and scholars may explore whether establishing regional criminal courts incorporating better human rights safeguards can legitimize terrorism trials.

3.2 Is a Fair Trial Terrorist of Suspects Possible Here?

'*Nemo iudex in causa sua*', a Latin maxim 'is a principle of natural justice that no person can judge a case in which they have an interest. The rule is very strictly applied to any appearance of a possible bias, even if there is actually none: "Justice must not only be done, but must be seen to be done" '.[126] It safeguards the right to a fair trial. Yet, the Kenyan counter-terrorism strategies are increasingly highly influenced by a 'Security First'[127] foreign policy. First, since 2011, by characterizing extremist terrorist violence as a 'law and order' problem which must be met by force – including targeted killings – principally by the KDF (as part of AMISOM). Second, since 2012, characterizing the Islamophobic threat as requiring law enforcement, thus enacting the PTA.[128] Kenyan legislators subsequently sought amendments containing provisions similar to clauses from the dreaded US PATRIOT Act. While the US Supreme Court convicts torture suspects, the US foreign policy furthers 'American exceptionalism' which exports justice through military power. AMISOM benefits from US support. In addition to enacting Kenya's new preventive legislation, however, the spiraling incidence of organized and systematic terror violent extremist incidents may be attributed to the country have been pushed across the border since 2015. Nonetheless, the army may be congratulated for restricting Al-Shabaab's retaliation to Kenya's 'war on terror' to ambushing KDF bases and IED's at border towns. Nonetheless, the displacement from criminal law to military violence, were amplified by the opposition's vigorous challenge of the government's attempts to reinforce the 2012 legislation with SLAA. Ironically, if the opposition thought that decreasing police powers were likely to reduce civil liberties and human rights, they were mistaken.

This article instead claims first, that the issue of a domestic court's violation of the doctrine of separation of powers vis-à-vis the international terrorism *per se*, was not

[125] Stella Chereono, "Uhuru Launches Counter-Terrorism Strategy, names Special Envoy," *Daily Nation*, 7 September 2016 <http://www.nation.co.ke/news/Uhuru-launches-counter-terrorism-strategy--names-special-envoy/1056-3372608-w4du8t/> accessed 24 January 2017.

[126] "*Nemo iudex in causa sua*" <https://en.wikipedia.org/wiki/Nemo_iudex_in_causa_sua> accessed 24 January 2017, citing *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, [1923] All ER 233, per Lord Denning.

[127] Amitai Etzioni, *Security First: For a Muscular, Moral Foreign Policy* (New Haven and London: Yale University Press, 2007).

[128] PTA, *supra* note 4.

considered by the Kenyan Constitutional Court in its landmark *Security Laws Amendment case*. Rather, both the opposition petitioners as well as the respondent government assumed that under the Kenyan legal system and 2010 Constitution, domestic courts necessarily have such jurisdiction. They overestimated judicial legitimacy. It is trite law that the right to a fair trial demands that no party can be a judge in its own case. Clearly, the domestic judiciary would necessarily offend this principle in cases where the republic as a party, purports to prosecute a terrorist suspect who is a conscientious protestor, whether violent or non-violent, and who thus challenges the legitimacy of the state itself. Second, because, as suggested by circumstances cumulating in the ICC's intervention following Kenya's post-2007 election violence, our courts have a less-than-distinguished post-independence record in safeguarding human rights, generally.[129]

In 2011 the KDF made an incursion into Somalia territory. By 2015 the official opposition called for its withdrawal. Confoundingly, although CORD vociferously campaigned for withdrawal of the troops to the Kenyan side of the border, they simultaneously opposed the use of repressive pre-inchoate offences to detect, arrest, prosecute and punish alleged terrorists. Yet, in the wake of weak PTA framework, not only is the judiciary's conviction task constrained, but ironically, bereft of pre-inchoate offences, the executive must necessarily resort to a militarized response to curb the scourge. While there is no proof of executive's hand in extra-judicial killings, it is hardly a coincidence that fiery Muslim clerics have been assassinated by hitmen without any arrests or prosecutions of any suspects. This article claims that during an emergency such as an upsurge in terror attacks, post-colonial liberal democracies prefer to trust an effective and legitimate judicial response to safeguard human rights rather than trust the executive The executive theoretically prioritizes personal safety of victims or the collective 'security first', over and above suspect's rights.

3.3 Constitutional Anomalies in the Proposed Counter Terrorism Legislation

3.3.1 A Challenging the *Security Laws Amendment Act*

'On December 23, 2014 and won a reprieve when Justice George Odunga of the High Court put on ice eight sections of the new the Security Laws (Amendment) Act, 2014, including sections 12, 15, 26, 29, 48, 56, 58 and 64. However the focus is on the February 23, 2015 ruling by a bench of five High Court Judges'. Peter Kagwanja's critique that that 'judgement is hyped as a victory for the opposition and human rights fundamentalists in civil society and the media'. [130] 'Yet the court left intact 91.2 per cent of the Act'. On security, he notes that 'the judges declared from the outset that they would not hinder the fight against terrorism and insecurity. Accordingly, they retained intact those sections of the Act aimed at bolstering institutional coordination and "chain of command" in the anti-terrorism architecture. On the contrary, the verdict is perhaps one of the most judicious efforts to balance between the imperatives of security and those of civil liberties in the age

[129] Judgment on the appeal of Kenya against the decision of 30 May 2011, *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Situation in the Republic of Kenya, <https://www.icc-cpi.int/CourtRecords/CR2011_13819.PDF> accessed on 29 January 2017.
[130] Kagwanja, *supra* note 83.

of terrorism'. [131] My own misgivings relate to the government's failure to persuade the judges about the role of pre-inchoate crimes in facilitating executive's war on terror so as to reduce the propensity for military response. Indeed, in this bigger picture, the judgment may have exacerbated the violation of human rights problem it sought to prevent.

My analysis begins with a truncated discussion of Kenya's new Constitutional Court's decision by Isaac Lenaola (as he then was), Mumbi Ngugi, Hillary Chemitei, Hedwig Ong'udi and Joseph Onguto JJ. First, a brief background. Three consolidated Kenyan petitioners challenged the constitutionality of The Security Laws (Amendment) Act[132] enacted by the National Assembly on 18 December 2014, and which received presidential assent on 19 December 2014. It entered into force on 22 December 2014. SLAA amended 'the provisions of twenty two other Acts of Parliament concerned with matters of national security and it is these amendments that have precipitated the petitions'.[133]

One matter in issue, which is entirely peripheral to this paper's argument, concerned the judiciary's jurisdiction over matters legislative and executive when constitutional violation is alleged by other branches of government. This article's central issue – of the judiciary's legitimacy vis-à-vis a potential terrors suspects – was not considered. In pertinent part, Kenya's Constitutional Court instead examined: 'Whether determination of the issues raised in this matter is a violation of the doctrine of separation of powers'. All five justices unanimously concluded that: 'The doctrine of separation of powers does not prevent the Court from examining whether the acts of the Legislature and the Executive are inconsistent with the Constitution as the Constitution is the supreme law'.

Second, the Court also considered, *inter alia*: 'Section 26 of SLAA which introduced Section 26A to the Evidence Act is unconstitutional for violating the right to remain silent during proceedings as guaranteed under Article 50(2)(i) of the Constitution'. [134] Third: 'Section 15 of SLAA which introduced Section 36A to the Criminal Procedure Code (CPC) is constitutional and does not breach the right of arrested persons as provided for under Article 49 of the Constitution and the right to fair trial as provided for under Article 50(2) of the Constitution'.[135] Other aspects of that lengthy decision have no relevance to the separation of powers argument advanced in this paper and may be affordably ignored. Of relevance are two SLAA provisions highlighted below.

3.3.2 Striking Down the Criminalization of Encouragements

The petitioners and Article 19 argued that there are several provisions in SLAA that violate the right to freedom of expression and of the media guaranteed under Articles 33 and 34 of

[131] http://www.nation.co.ke/oped/Opinion/Security-Laws-High-Court-Ruling-Terrorism/440808-2638706-bhuv6f/index.html accessed 30 June 2017.
[132] SLAA, *supra* note 5.
[133] *Ibid.*
[134] *Ibid.*
[135] *Ibid.*

the Constitution. They cited in this regard Section 12 of SLAA which amends the Penal Code by adding a new Section 66A.[136] Section 12 is in the following terms:

> The Penal Code is amended by inserting the following new Section immediately after Section 66- 66A.
>
> (1) A person who publishes, broadcasts or causes to be published or distributed, through print, digital or electronic means, insulting, threatening, or inciting material or images of dead or injured persons which are likely to cause fear and alarm to the general public or disturb public peace commits an offence and is liable, upon conviction, to a fine not exceeding five million shillings or imprisonment for a term not exceeding three years or both.
>
> (2) A person who publishes or broadcasts any information which undermines investigations or security operations by the National Police Service or the Kenya Defence Forces commits an offence and is liable, upon conviction, to a fine not exceeding five million shillings or imprisonment for a term not exceeding three years, or both.

The petitioners also aggrieved by the provisions of Section 64 of SLAA which sought to amend PTA by inserting several new sections after Section 30, sections 30A and 30 of which CORD and Article 19 asserted are unconstitutional. The proposed Section 30A was entitled 'Publication of offending material' read as follows:

> 30A. (1) A person who publishes or utters a statement that is likely to be understood as directly or indirectly encouraging or inducing another person to commit or prepare to commit an act of terrorism commits an offence and is liable on conviction to imprisonment for a term not exceeding fourteen years.
>
> (2) For purposes of sub-section (l), statement is likely to be understood as directly or indirectly encouraging or inducing another person to commit or prepare to commit an act of terrorism if- (a) the circumstances and manner of the publications are such that it can reasonably be inferred that it was so intended; or (b) the intention is apparent from the contents of the statement.
>
> (3) For purposes of this Section, it is irrelevant whether any person is in fact encouraged or induced to commit or prepare to commit an act of terrorism.

'The petitioners and Article 19 stated that this section constitutes a prior restraint on the freedom of expression and of the media. The petitioners submitted, in reliance on the decisions in the United States Supreme Court cases of *Near v Minnesota*[137] and *New York Times v United States*[138] that there can be no prior restraints to freedom of the media, and that such restraints are only permissible in very limited circumstances. It was their submission that Sections 12 and 64 of SLAA are unconstitutional in light of Article 33(2) and (3) which provide that:

> 33. (1) Every person has the right to freedom of expression, which includes –
>
> (a) freedom to seek, receive or impart information or ideas;
>
> (b) freedom of artistic creativity; and
>
> (c) academic freedom and freedom of scientific research.
>
> (2) The right to freedom of expression does not extend to –

[136] SLAA Judgment, *supra* note 131, para 215.
[137] 283 US 697 (1931).
[138] 403 US 713 (1971).

(a) propaganda for war;
(b) incitement to violence;
(c) hate speech; or
(d) advocacy of hatred that –
(i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or
(ii) is based on any ground of discrimination specified or contemplated in Article 27 (4).

(3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.'[139]

It was the petitioners' case that Sections 12 and 64 will make illegal the concept of investigative journalism. They submitted that the provisions are also unconstitutional in light of Article 34(2), which takes away the power of the State to legislate on matters relating to freedom of expression and of the media outside the provisions of Article 33(2) and (3). Article 34(2) states in pertinent part:

34. (1) Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33 (2).

(2) The State shall not –
(a) exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or
(b) penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.

Article 19 submitted that 'the chilling effect of the provisions of Section 12 of SLAA…limit the guarantee of freedom of expression by creating a new Penal Code offence criminalizing publication of certain information in vague and overbroad terms, and the imposition of heavy punishments'.[140] In rebuttal, Solicitor General, Njee Muturi, submitted that SLAA was necessitated by the fight against terrorism. Because 'the country is at war, just that a war has not been formally declared' the legislation, therefore, 'is to protect the public from terrorism, and the limitations contained in SLAA are justifiable'.[141] Additionally for, Keriako Tobiko: 'With regard to Section 64 which introduces Section 30A prohibiting publication of offending material, the DPP argued that it captures conduct that encourages or induces others to commit acts of terrorism, and was informed by the methods used by terrorists to create and expand terrorist networks, particularly radicalization. Such 'limitation of rights in the section (which he, again, denied exists) is justifiable under Article 24(1)' of the constitution.[142]

Similarly according to the state: 'Section 30F of the Prevention of Terrorism Act introduced by Section 64 of SLAA' was 'intended to curb the use of media as a propaganda tool for terrorist organizations, maintain the integrity of investigations and security operations, to enhance public peace and to protect victims of terrorist activity'.[143]It

[139] SLAA Judgment, *supra* note 131 para 219.
[140] *Ibid*, para 220.
[141] *Ibid*, para 228.
[142] *Ibid*, para 231.
[143] *Ibid*, para 232.

was also in accord with Article 33(2)'.[144] The question is whether it has met the rest of the criteria set in Article 24 summarized below.[145] The Court noted that: 'The constitutional guarantee of freedom of expression in our Constitution, as in the Constitution of South Africa, is not absolute, and is subject to the limitations set out in Article 33(2) which states that the protection of freedom of expression does not extend to propaganda for war, incitement to violence, hate speech or advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm and is based on any ground of discrimination specified or contemplated in Article 27 (4)'.[146] Moreover, such 'limitations also accord with the provisions of Article 19(3) of ICCPR'.

The Court seemed to elevate, the importance of the right to freedom of expression and of the media to nigh non-derogable human rights. 'It is a right that is essential to the enjoyment of other rights, for implicit in it is the right to receive information on the basis of which one can make decisions and choices'.[147] The judges cited Ronald Dworkin's Freedom's Law[148]:

> (F)reedom of speech is valuable, not just in virtue of the consequences it has, but because…First, morally responsible people insist on making up their own minds what is good or bad in life or in politics, or what is true and false in matters of justice or faith. Government insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to head opinions that might persuade them to dangerous or offensive convictions. We retain our dignity, as individuals, only by insisting that no one – no official and no majority – has the right to withhold an opinion from us of the ground that we are not fit to hear and consider it.

The judges then opined that: 'A media that is cognizant of its role and responsibility to society with regard to terrorism would be expected to exercise restraint in its coverage of terrorism and terrorist activity. Further, a properly functioning self-regulatory media mechanism such as is contemplated under the Media Act, 2013 ought to have and demand strict adherence to clear guidelines on how the media reports on terrorism to avoid giving those engaged in it the coverage that they thrive on, to the detriment of society'.[149] However, on the material that has been placed before them, they could find no rational connection between the limitation on publication contemplated by Section 12 of SLAA and Section 66A of the Penal Code, and the stated object of the legislation, national security and counter terrorism. It(was their) view; therefore, that Section 12 of SLAA which introduces Section 66A to the Penal Code was an unjustifiable limitation on freedom of expression and of the media and is therefore unconstitutional'.[150] In the judges' view, 'the provisions of Section 30A and 30F are unconstitutional for limiting the rights guaranteed under Article 34(1) and (2)'. The State did not meet the test set in Article 24 to wit: 'It did not demonstrate the rational nexus between the limitation and its purpose,

[144] *Ibid*, para 232.
[145] *Ibid*, para 237, citing Art. 24(1), Constitution, *supra* note 41.
[146] SLAA Judgment, *supra* note 131 para 247.
[147] *Ibid*, para 248.
[148] (1996) 200, cited in Iain Currie & Johan de Waal's *Bill of Rights Handbook*, page 360.
[149] SLAA Judgment, *supra* note 131, para 271.
[150] *Ibid*, para 272.

which, was supposedly to be national security and counter-terrorism; did not sought to limit the right in clear and specific terms nor expressed the intention to limit the right and the nature and extent of the limitation; and the limitation contemplated was so far reaching as to derogate from the core or essential content of the right guaranteed under Article 34'.[151] Having found that the provisions of Section 12 of SLAA and Section 66A of the Penal Code as well as Section 64 of SLAA and 30A and 30F of the PTA 'are unconstitutional for being too vague and imprecise, and for not having any rational nexus with the intended purpose' the Court did 'not believe that the question whether there are less restrictive means of achieving the intended purpose can, in the circumstances, arise'.[152]

3.3.3 Critical Analysis of the Court's Reasoning

Notwithstanding Dworkin's assertion that freedom of expression may be 'an essential and "constitutive" feature of a just political society that government treat all its adult members…as responsible moral agents', the question is whether from an African context absolute free speech can be sustained as contained in the 1st Amendment of the US Constitution. In the African context – given widespread poverty and illiteracy and ethically heterogeneous, albeit with strong inter-cultural bonds – inter-ethnic and inter-religious tolerance are low. Kenya's new constitution may safeguard free expression and media. Yet these human rights are not non-derogable and may be qualified under Article 24 in the interests, *inter alia* to safeguard national security. The pre-inchoate terror provisions created by the SLAA were designed to provide a legal framework to repress a certain category of terrorist acts, and the material or circumstances on which such legislation is predicated is the nationwide upsurge of terrorist attacks.

The Constitutional Court argues that recipients of information should take responsibility for receiving novel ideas, it suggests that the state is not entitled to prosecute secondary parties whose pre-inchoate counselling may incite or encourage potential supporters of terror causes to join such groups with a view to performing terrorist acts. Rather that the state should wait until the acts have been attempted or performed before resorting to retributive responses. Perhaps the judges felt that the executive has a responsibility to address wider sociological or environmental causes of terrorism such as removing social disparities which may exist between its Muslims or other minorities such as Somalis or Arabs and the majority indigenous tribes. In addition to perceived marginalization or exclusion, another cause of terrorism may lie in poverty. However, such socio-economic hardships and require welfare redistribution. They are political questions which the executive and legislature are better placed to resolve.

Expressing this overcriminalization dilemma, Retired President of the South African Constitutional Court and former Chief Justice Arthur Chaskalson recalls how:

> The initial steps taken in South Africa in the 1950s laid the ground for further measures including the banning of the African National Congress, the Pan African Congress and over time various other anti-apartheid organizations [98 in all], and

[151] *Ibid.* para 276.
[152] *Ibid.* para 279.

> the draconian security legislation of the 1960s and later years. Political rhetoric set the scene for this and for the legislation that followed.[153]

Because:

> The targets were the communists and the terrorists. The white population remained silent and there was little opposition to the measures. Detention without trial was introduced, the police were empowered to hold detainees incommunicado, and to deny them access to their lawyers and to their own medical advisors….The isolation of detainees and the ousting of the jurisdiction of the courts led to torture, and other abuses, which have been documented in the hearings of the Truth and Reconciliation Commission.

However, this article argues that pre-inchoate offences, their apparent vagueness notwithstanding, and the fact that such offences establish an environment where police powers may subjected to review to determine whether executive action is within the confines of the law, was a positive means for repressing terrorism while upholding or safeguarding suspect's rights. The judicial refusal to recognise the constitutionality of pre-inchoate offences may be reconsidered.

4. Criminal Convictions and Military Counter Terrorism Measures

4.1 Quantitative Convictions for Crimes and Attempts Compared

According to a 2017 Economic Survey for 2012-2016, the Kenyan judiciary convicted a significantly higher number of crimes in 2014 – whether completed offences or mere inchoate crimes (attempts and conspiracies) – than in either of the preceding or subsequent two year periods. But more importantly for purposes of this article, the proportion of convictions for attempts and conspiracies is significantly lower than those of completed crimes, namely either offences as against the public order and administration of lawful authority or those injurious whether to the public or against the person. These quantitative disparities suggest that either the police or the prosecution policies, or both, are directed towards arresting and prosecuting completed crimes, serious or trivial, while neglecting inchoate offences. Alternatively, that the judiciary disproportionately fails to convict mere attempters or conspirators. For it is arguable that individuals who perform inchoate or pre-inchoate acts should logically be predominantly more than the few who successfully complete their criminal acts. By inference, given that the official statistics reflect diminished responses to inchoate offenders it follows that the authorities either ignore the bulk of attempters altogether or dispose of them extra-judicially[154] (see Table 16:17).

[153] Arthur Chaskalson, "The Widening Gyre: Counter Terrorism, Human Rights and the Rule of Law" (2008) *Cambridge Law Journal*, (67)(1), 69-91 quoted in Bingham, *supra* note 65, p. 135.
[154] Kenya Vision 2030, *Economic Survey 2017* (Nairobi: Kenya National Bureau of Statistics, 2017).

Table 16.17: Convicted Prisoners by Type of Offence and Sex, 2012-2016

Number

Type of Offence[1]	2012			2013			2014			2015			2016*		
	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female	Total
Order and administration of lawful authority	5,739	279	6,018	8,862	345	9,207	17,171	415	17,586	10,235	457	10,692	9,113	355	9,468
Injurious to public	2,492	154	2,646	2,947	174	3,121	4,527	188	4,715	3,231	169	3,400	3,127	132	3,259
Against person	3,598	329	3,927	4,838	467	5,305	7,574	496	8,070	5,771	394	6,165	5,084	369	5,453
Related to property	7,148	361	7,509	9,393	374	9,767	13,762	503	14,265	9,382	333	9,715	8,269	334	8,603
Attempts & conspiracies	1,161	81	1,242	1,554	62	1,616	3,720	106	3,826	1,312	75	1,387	1,308	23	1,331
Employment Act	2,274	768	3,042	2,861	611	3,472	4,375	321	4,696	5,851	253	6,104	3,992	297	4,289
Liquor Act	8,203	2,264	10,467	12,309	3,899	16,208	18,828	6,485	25,313	18,292	8,564	26,856	20,967	7,969	28,936
Drugs related	3,292	78	3,370	3,361	59	3,420	5,246	221	5,467	5,174	249	5,423	4,264	114	4,378
Various cases	16,199	1,495	17,694	20,545	1,732	22,277	18,303	1,427	19,730	16,111	1,814	17,925	15,554	1,049	16,603
Registration of persons[2]	..	..	..	2,204	139	..	4,609	208	..	408	40	..	111	2	113
Total by sex	**50,106**	**5,809**	**55,915**	**68,874**	**7,862**	**76,736**	**98,115**	**10,370**	**108,485**	**75,767**	**12,348**	**88,115**	**71,789**	**10,644**	**82,433**

Source: Kenya Prison Service

* Provisional

[+] Revised

[1] As categorised in Appendix 16.2

[2] refers to offences outlined in the Registration of Persons Act Cap 107 such as illegal registrations

Hence the next section begins by noting the executive's official commitment to wage an unconventional war against Al-Shabaab in Somalia, but also explores the existence of a policy to perpetrate or condone targeted killings of criminal suspects which emergent culture negatively impact on the right to life, under the constitutional and international law.

4.2 'Operation *Linda Inchi'* and the Rise of Targeted Killings

'Before KDF swung in, al Shabaab controlled more territory inside Somalia than even the Transitional Federal Government (TFG). This included the semiautonomous Puntland in the northeast and the self-proclaimed Republic of Somaliland in the North'.[155] Considering that the existing security literature scarcely covers developing countries – which may be contrasted with developed countries by virtue of relative poverty – and further given that Kenya and Somalia share a common border, therefore the appropriate approach to Kenya's counter-terrorism strategy may require a different tactics from US responses, notwithstanding that both are multicultural democracies.

> It is by understanding Somalia in the context of Operation Linda Nchi that the campaign planners were able to tread carefully without antagonizing the other Somali nationals. It is through this that KDF was able to discern the al Shabaab from the rest of the Somalis while appreciating the significant role of religion and clan dynamics.[156]

Al-Shabaab retaliatory attacks on KDF inside Somalia include the El Edde base ambush on 15 January 2016 killing 100, and the Kulbiyou ambush on 27 January 2017 killing an estimated similar number.[157] Their planning, organization and financing probably originated from the Somali side of the Kenya-Somalia border. Significantly, because the KDF are part of an African Union led peace keeping mission, AMISOM, therefore suspicions by the ethnic Somali community are 'fueling Shabaab's propaganda' against the African Union's military-led counter-terrorism strategy. Paul Williams and Abdirashid Hashi argue that the 'destructive clan dynamic' is 'a key cause of Somali elites' inability to reach a political settlement'.[158] Clearly, a more effective criminal justice response from the perspective of the suspect population, mainly Somalis whether of Kenyan or Somalian nationality, is contingent upon legitimate policy decisions of whether and how to continue with war, and also whether anti-terror legislation encroaches on human rights of innocent terror suspects. An entry point to situating current legislative approaches relative to judicial

---

[155] Patrick Kariuki, " 'Operation Linda Nchi' – The Official KDF Version", 14 October, 2014, *The Star*, citing Peter Kagwanja and Monica Juma, Operation Linda Nchi, Kenya's Military Experience in Somalia (2014) <http://www.the-star.co.ke/article/operation-linda-nchi-official-kdf-version> accessed 23 January 2017.

[156] *Ibid.*

[157] Dominic Wabala, "Many Dead as Shabaab Attack KDF in Somalia" *The Star*, 28-29 January 2017 at p 4; See also Moses Michira, "Battle Left 68 Patriots dead" *Sunday Standard* 29 January 2017 at p 9.

[158] Kevin J. Kelley, "Failure to Build Somali Forces Blocks Amisom Exit, Study says" *Daily Nation*, 27 February 2016, available at <http://mobile.nation.co.ke/news/Failure-to-build-Somali-forces-blocks-Amisom-exit--study-says/-/1950946/3094292/-/format/xhtml/-/pifcgd/-/index.html> accessed 23 January 2017.

decisions or executive strategies therefore benefits from a brief journey through anti-terror legislative and policy history.

It is opined that to the extent that Kenya's counter-terrorism strategy is increasingly based on a 'high crime control model' then it violates the 'non-derogable' constitutional right to a fair trial. '"Targeted killing" was not a term of art in human rights law or international humanitarian law prior to the 9/11 attacks'. That new term means:

> that lethal force is intentionally and deliberately used, with a degree of pre-meditation, against an individual or individuals specifically identified in advance by the perpetrator. In a targeted killing, the specific goal of the operation is to use lethal force….Under such circumstances it may be legal for law enforcement personnel to shoot to kill based on the imminence of the threat, but the goal of the operation, from its inception, should not be to kill.[159]

Stephen Dycus, and his colleagues explain that:

> Human rights law – international law that constrains governments in their treatment of civilians during peacetime – generally requires some kind of judicial procedure before anyone is executed (hence the oft cited concern about "*extra judicial* killing or imprisonment"). The law enforcement model under human rights law rests on a presumption of innocence, a preference for arrest and detention by due process, and an insistence on credible evidence and fair trial before judicial punishment.

4.3. The Right to Life

4.3.1 Constitutional and International Existential Conditions of the Right to Life

The right to life is guaranteed under the Chapter Four of Kenya's Constitution, entitled 'the Bill of Rights. It provides in pertinent part not only that 'Every person has the right to life', but also that: 'A person shall not be deprived of life *intentionally*, except to the extent authorised by this Constitution or other written law'.[160] This derogable right became entrenched into our post-independence constitution via domestication from the UN Declaration on Human Rights which provides that: 'Everyone has the right to life, liberty and security of person'.[161] Similarly, under the International Covenant on Civil and Political Rights: '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.'[162]Likewise, the African

[159] Stephen Dycus, Arthur L. Berney, William C. Ganks and Peter Raven-Hansen, *National Security Law* (5th ed) (New York: Aspen Publishers/Wolters Kluwer Law & Business, 2010), p. 376, citing Philip Alston, Special Rappoteur on Extrajudicial Killings, Summary or Arbirtary Executions, *Addendum: Study on Targeted Killings (28 May 2010)*
<http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> accessed 24 January 2017.

[160] Clauses (1) and (3), respectively, Article 26 Constitution *supra* note 41 (emphasis added).

[161] Article 3, The Universal Declaration of Human Rights adopted by the United Nations General Assembly (A/RES/217) (Palais de Chaillot, Paris: 10 December 1948).
<http://legal.un.org/avl/ha/udhr/udhr.html> accessed 25 January 2017.

[162] Article 6(1), International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49,

Charter on Human and Peoples' Rights conditionally limits this right so that: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be *arbitrarily deprived* of this right'.[163] Clearly, nowhere is the right to life absolute. The unfortunate question arises as to which existential conditions justify killings.

4.3.2 The Law of Targeted Killings

David Kretzmer interprets the UN Basic Principles on the Under of Force and Firearms by Law Enforcement Officials[164] to mean that 'the imminence of the threat provides the evidence to justify the use of lethal force and obviates the need to prove the target's intention'. Otherwise, 'military personnel would deny a suspected terrorist basic due process, "preventing the target from contesting the determination that he or she is a terrorist, and imposing a unilateral death penalty"'.[165]

Thus: Michael Waltzer applies the just war tradition to the 'war convention'.[166] For him 'randomness is the crucial feature of terrorist activity'.[167] Thus: 'Terrorism "in the strict sense" is "the random murder of innocent people" '. He holds that '"the first kind of aiming – political assassination – is appropriate to a limited struggle directed against regimes and policies", whereas the second – indiscriminate attacks against civilians – "reaches beyond all limits" '. Matthew Evangelista agrees that Waltzer's:

> suggestion that political assassination be excluded from the definition of terrorism has caught on – at least for cases where individuals target state leaders. In that respect the norm against assassination remains strong…given the threat they pose to states. Yet the norm appears to be weakening when it is a matter of states confronting non-state enemies.[168]

'Most legal scholars interpret Article 51(3) of the First Geneva Protocol (1977) to ascertain when civilians lose their protected status: "Civilians shall enjoy protection …unless and

---

<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> accessed on 25 January 2017 (emphasis added).

[163] Article 4, African [Banjul] Charter on Human and Peoples' Rights, adopted 27, June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21, October, 1986. A Protocol to the Charter was subsequently adopted in 1998 whereby an African Court on Human and Peoples' Rights came into effect on 25 January 2005 <http://www.achpr.org/instruments/achpr/#a4> accessed on 25 January 2017> (emphasis added).

[164] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx> accessed on 25 January 2017.

[165] David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' 2005 (16) *European Journal of International Law*, 171 at 182, available at <ejil.org/pdfs/16/2/292.pdf> accessed on 26 January 2017, cited in Dycus, Berney, Ganks and Raven-Hansen, supra note 159, pp. 379-80.

[166] Michael Waltzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977).

[167] Matthew Evangelista, *Law, Ethics, and the War on Terror* (Cambridge: Polity Press, 2008) at p 38.

[168] *Ibid.* at p 43.

for such time as they take a direct part in hostilities" '.[169] Consequently: 'The more permissive a state's rule for targeted killings is, the more likely it is that these components of Article 51(3) ("a direct part" and/or "for such time") will receive the loosest interpretation'. Unlike the Israeli state, Kathleen Cavanaugh adopts the traditional definition of 'direct part' as excluding *planning or dispatching.* She also:

> favored the more limited definition …regarding time: "Civilians who engage in hostilities are lawful targets for the period, and only the period, that they participate directly in hostilities (her emphasis). Otherwise, she argued, civilians who engage in war crimes by becoming unlawful belligerents are denied their rights to a trial.[170]

By contrast for Kenneth Watkin 'such a narrow interpretation appears not only to protect civilians who might be confused with participants in hostilities, but also indirectly to provide cover for actual participants themselves, despite their prior and possible future hostile acts'.[171] Evangelista concludes that: 'The law governing treatment of suspected terrorists is clearly in flux'.[172] Accordingly Mathenge asserts that:

> A discourse that demonizes all terrorists whatever their motivation or strategy, denies an understanding of the terrorist point of view and means that government policies that might have contributed to the grievances of those who have adopted terrorism are not scrutinized. As well it minimizes the likelihood of negotiating with terrorists, even the more "traditional" terrorist groups, encourages the use of force and violence to counter terrorists, and enables governments to exploit fears of the public and overrule any objections to the means employed to respond to and counter terrorists.[173]

His insight coincides with Abdullahi Ahmed An'Na-im's observation that 'justice should be seen to be done' because:[174]

> failure to acknowledge and address the rationality of the terrorists is either to deny their humanity, and thereby to forfeit any possibility to take into serious consideration the grievances articulated by terrorists…without implying that such views justify or legitimize terrorism as a means of redress.[175]

For An-Na'im: 'The aftermath of the attacks of September 11 proves the fallacy of Samuel Huntington's "clash of civilizations" thesis' because:[176]

---

[169] *Ibid.* 97; See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, <https://ihl-databases.icrc.org/ihl/INTRO/470> accessed on 24 January 2017.

[170] *Ibid.* citing Kathleen Cavanaugh, "Rewriting Law: The Case of Israel and the Occupied Territories" in David Wippman and Matthew Evangelista (eds.) *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts* (Ardsley, N.Y., Transnational Publishers, 2005) ch 9 at pp 250-3.

[171] Evangelista, *ibid.* p. 98, citing Kenneth Watkin, "Humans in the Cross-Hairs: Targeting and Assassination in Contemporary Armed Conflict" in Wippman and Evangelista, *ibid.*ch. 6 at pp 156-7.

[172] Evangelista, *ibid.* at p 100.

[173] Mathenge, *supra* note 111, p 216.

[174] Ahmed Abdullahi An-Na'im, "Upholding International Legality against Islamic and American Jihad" in Ken Booth and Tim Dunne (eds.) *Worlds in Collusion: Terror and the Future of Global Order* (Basingstoke: Palgrave Macmillan, 2002) 162-172 p 168.

[175] *Ibid.*

[176] *Ibid* .citing Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York, NY: Simon and Schuster, 1996).

> Instead of standing in solidarity with the Muslims who are alleged to have attacked the US, or the states accused of harbouring or supporting them, as Huntington's thesis would lead one to expect, all governments of predominantly Islamic countries have clearly and consistently acted based on calculations of their own economic, political or security interests…simply the politics of power, as usual..[177]

5. A Regional Framework to Prosecute Terrorism and Safeguard Human Rights

5.1 Global Reach of Constitutional Sovereignty

5.1.1 Madison's Federalism for Constitutional Checks and Balances

A more feasible counter terrorism strategy is proposed by Jamie Mayerfeld who interprets constitutional democracy to mean that international or regional institutions possess 'concurrent responsibility' over international terrorism cases.[178] Mayerfeld opposes Jeremy Rabkin's thesis[179] which attacks 'international human rights law, arguing that it violates sovereignty, thus undermining constitutional government and, ironically individual rights'.[180] Rather for Mayerfeld 'constitutional government requires the backing of a strong international human rights regime, one that places significant limits on state sovereignty'. To this extent 'James Madison argued that a…constitutional democracy calls for international oversight of national policy. He cites the European human rights regime. 'By means of strong supranational institutions, European countries have made themselves mutually accountable for the respect of human rights. Each country has the right and duty to monitor one another's human rights policies'. Mayerfeld observes that: 'Today Europe, rather than the United States is the true standard bearer of Madisonian constitutionalism'.[181]

5.1.2. In Defence of Transnational Governance

'Governance' is a concept which 'means a coherent system for creating, implementing an enforcing binding rules…a transnational human rights regime need not necessarily be global in scope'.[182] For Mayerfeld what is needed for the protection of human rights is a model of shared governance built on the cooperation of international institutions, democratic states, and civil society. What should be avoided is the logic of global sovereignty, whereby decisions are habitually referred to a single authority. Neither a world sovereign nor a system of sovereign states is desirable.

This section lays 'out the essentials of a Madisonian argument for the creation of strong international human rights institutions….Such institutions make states, together

---

[177] *Ibid.*
[178] Mayerfeld, supra note 7, p 212.
[179] Jeremy A Rabkin, *Law Without Nations? Why Constitutional Government Requires Sovereign States* (Princeton, N.J.: Princeton University Press, 2005).
[180] Mayerfeld, *supra* note 7, p. 243.
[181] *ibid.*
[182] *Ibid,* p. 212.

with international organisations and nongovernmental actors, co-guardians of human rights within each national jurisdiction. Such 'concurrent responsibility' is 'a principle of checks and balances that fundamental to democracy itself'.[183]

5.1.3. The International Scope of Constitutional Democracy

The protection of human rights means that 'if internal safeguards are vulnerable, help should be sought from outside'.[184] A commitment to preventing human rights violations by *one's own* government makes the involvement of international human rights institutions also help democracies fulfill their own constitutional commitments. They complete the constitutional order.[185] For instance, the ECtHR is a regional system which protects human rights. Ultimately: 'Madison's chief argument for a union was that it would promote justice and the common good'.[186] This is because: 'Nations like other bodies of men are unfit to be the judge in their own cause. Participation in a strong international human rights regime is one way to heed the judgment of "the impartial world"'.[187]

5.1.4. Concurrent Responsibility as a Democratic Principle

'Concurrent responsibility…refers to a situation in which several actors are committed to a common task, each is independently capable of fulfilling the task of ensuring that it is fulfilled, and even stands ready to do so if the others do not'. For example 'the task of blocking unconstitutional laws is shared by rejection by Parliament, the President will veto it and/or if Parliament overrides his veto the High Courts have a duty to declare it unconstitutional'.[188]

> Another example is the complementarity principle of the International Criminal Court. Under this principle states are expected to prosecute genocide, war crimes and crimes against humanity perpetrated by their citizens or occurring on their territory. However, if they fail to launch criminal proceedings, from a lack of either will or capacity, the ICC is empowered to take action in their stead. One benefit if the ICC's complementarity jurisdiction…is that it will encourage states to take their human rights responsibilities more seriously.[189]

'Concurrent responsibility thus has an educative reforming function. It serves not merely as an insurance mechanism, but as a means of habituating actors into virtuous behavior'.[190] Consequently: 'In Europe: responsibility for protecting human rights within the jurisdiction of each state is held concurrently by that state and other European States'.[191]Furthermore: 'It is necessary to correct the misconception that 'the responsibility for protecting human rights rests with either one side (the state) or another (international

[183] *Ibid*.
[184] *Ibid*, p. 214.
[185] *Ibid.*
[186] *Ibid*, p. 216.
[187] *Ibid.*
[188] *Ibid.*
[189] *Ibid*, p. 218.
[190] *Ibid.*
[191] *Ibid*, p. 219.

institutions)'. This is because: 'International institutions and rights respecting states have endeavored to improve their own performance and that of each other, and in the process have spread the culture of rights over a larger geographic area, increasingly the number of rights respecting states'.[192] Under the EU human rights regime, persistent rights abusers may be suspended.[193]

5.2 Responsiblizing International and Regional Institutions

5.2.1 Challenges of an Anti-Terrorism Legal Framework

> Two key certainties in the way the international community will deal with combating international terrorism in the future…are the strength of states and willingness and intensity of international co-operation…[t]he body of human rights and the rule of law should be respected, as they form the fundamental requirements for developing an effective and comprehensive counterterrorism policy.[194] Three legal…response(s)…might contribute to a greater degree of legitimacy and effectiveness in the battle against terrorism. These challenges are:
>
> (i) The lack of definition of terrorism;
> (ii) The monitoring systems of the implementation of Security Council resolutions;
> (iii) The potential for adjudication of terrorism by an international tribunal.[195]

Although the creation of an international criminal tribunal might not be a major deterrent for terrorists, states that intend to fight terrorism would stand stronger if their trials were fair and their fight legitimate.

> In this regard, three options for an international tribunal for terrorism stand out: (a) an ad hoc tribunal established pursuant to a Security Council resolution; (b) the broadening of the subject matter jurisdiction for the International Criminal Court (ICC); or the setting up of a special court for terrorism. Furthermore, since the governments of certain countries will not have enough control over their territory, these areas will become safe havens for terrorist training camps.[196]

This sub-section assesses bottlenecks and pitfalls identifiable in the counter terrorism system of the UN as we know it today.[197] What are some possible future scenarios?

---

[192] *Ibid*, p.220.
[193] *Ibid*, p. 221.
[194] Bibi van Ginkel, "CombatingTerrorism: Improving the International Legal Framework" in Antonio Cassese (ed.) *RealizingUtopia: the Future of International Law* (Oxford; New York: Oxford University Press, 2010) 461-481, p. 461.
[195] *Ibid.*
[196] *Ibid*, p. 462.
[197] *Ibid*, p, 463.

5.2.2 International Adjudication of Terrorist Crimes

> A proposal for an international criminal court with jurisdiction to deal with the crimes of terrorism was made as early as 1937. This initiative coincided with a draft international convention on the combating of terrorism, which was submitted under the League of Nations. However…there is no legally accepted definition of terrorism.[198]

'Apart from that…it could be an advantage for less developed states, which lack financial resources to prosecute terrorism to be provided with an international forum to prosecute these crimes'.[199]

> After all terrorist cases are likely to be complex, and the evidence trail may run through different states, involving scientific travel, translation and other investigation expenses. Furthermore since in many cases impartiality of states is now doubted, establishing a criminal court with jurisdiction over international terrorism could create a neutral forum for prosecution. In any event, it would offer a solution to the problem that, as a general rule, a country's domestic court only has jurisdiction to prosecute perpetrators who have committed acts of terrorism against its nationals or on its territory and sometimes if the perpetrators are themselves nationals. In this last case, prosecution is, to a great extent, dependent on extradition.[200]

In addition, judicial systems usually vary across nations in regard to the impartiality of courts and the severity of punishments. Hence this might create legal uncertainty as well as friction between states.[201] There is a new African initiative which merits consideration.

5.2.3 Criminalizing Terrorism in the Malabo Protocol

5.2.3.1 Background and Jurisdiction

The Malabo Protocol of 2014 represents a pioneering attempt to extend the yet-to-be-established African Court of Justice and Human Rights' jurisdiction to international as well as transnational crimes. When this treaty is ratified by 15 member states it shall grant criminal jurisdiction to the existing African Court of Human Rights which is proposed to be merged with the African Court of Justice to create an African Court of Justice and Human Rights (ACJHR).[202] That protocol is a product of developments within the continent dating back to the 1970s or 80s 'as well as external developments that precipitated the resolve of the AU to seriously consider the idea of an African regional

[198] Elizabeth Chadwick, "Self Determination, Terrorism and the International Humanitarian Law of Armed Conflict" (The Hague, Martinus Nijhoff Publishers, 1996) p. 97, cited in *ibid.* p. 470.
[199] Mira Banchik, "The International Criminal Court &Terrorism" (2003) *Peace Conflict & Development*, 3, p 9, cited in Ginkel, *ibid.*
[200] Ginkel, *ibid.*
[201] Richard J. Goldstone and Janine Simpson, "Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism" (2003) *Harvard Human Rights Journal*, 6, cited in *ibid.*471.
[202] KPTJ and Africog, *Seeking Justice or Shielding Suspects? An Analysis of the Malabo Protocol on the African Court* (Nairobi: Kenyans for Peace with Truth and Justice/Africa Centre for Open Justice, August 2016), p. vii.

court'.[203] 'The more short-term factor in the above move to create an African penal court is the perceived abuse of universal jurisdiction by judges in European courts'.[204]

Most recently 'Swiss authorities, acting under the principle of universal jurisdiction, took into custody Gambian politician Ousman Sonko, who was in the European country as he applied to Sweden for asylum. Sonko served as Interior minister between 2006 and 2016 in the government of President Yahya Jammeh, defeated in elections early this year. Although 'accused of torture in his home country of Gambia has been arrested and is undergoing trial'[205] in Switzerland. In February 2017, the Appeals Chamber of the Extraordinary African Chambers sitting in Senegal upheld former Chadian President Hissène Habré's life sentence for war crimes, crimes against humanity and torture. 'The Habré trial was a landmark case in that it was the first time the courts of one African country have been used to try the former leader of another. The experimental EAC was a 'hybrid' court blending international and national justice systems. It was established within the Senegalese courts by the African Union in 2013' following 'failed bids to prosecute Habré in Senegal (where he had fled in exile in 1990) and Belgium'. [206]

The Malabo Protocol's principles and values include: respect for human rights and sanctity of life; condemnation, rejection and fighting impunity; strengthening the AU's commitment to promote sustained peace, security and stability; and preservation of serious and massive violations of human rights. Although its geographical scope its restricted to Africa, its subject matter jurisdiction is significantly enhanced. In addition to four core international crimes of genocide, crimes against humanity, war crimes and crimes of aggression, it will have jurisdiction to try 10 other crimes: the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes and the illicit exploitation of natural resources.

For purposes of this article, armed groups and government forces alike are responsible for human rights violations. For example, in Somalia, the Kenya government has encroached into a neighbouring territory to punish acts which were committed by alleged Somali armed groups inside Kenya. Yet such military action cannot distinguish Somali civilians from the terrorists it seeks to exterminate. Without express resolution form the UN Security Council such military incursion would breach international humanitarian law. This is not to say that Al-Shabaab has not committed crimes that may amount to either crimes against humanity or genocide. War crimes would require attacks to be made in the context of war. Similar terrorist-government armed conflicts pit Boko Haram against states in North-Eastern Nigeria and Cameroon. Civil war in South Sudan represents a non-international armed conflict. If the arguments advanced above are valid, i.e. then 'national governments are unwilling or unable to conduct prompt, independent,

[203] Amnesty International, Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded Court (London: Amnesty International, 2016), p. 5.
[204] KPTJ/Africog, *supra* note 202, p 6.
[205] Charles Kerich, "Universal jurisdiction way to go", *The Star*, 24 July 2017, <http://www.the-star.co.ke/news/2017/07/24/universal-jurisdiction-way-to-go_c1600581> accessed 30 July 2017.
[206] Celeste Hicks, "The Habré trial: The future for African justice"? *African Arguments*, 2 May 2017 <http://africanarguments.org/2017/05/02/habre-trial-future-african-justice/ > accessed 30 July 2017.

impartial and effective investigations into allegations of crimes under international law, and ultimately unable to bring all those suspected of criminal responsibility to justice in fair trials before ordinary civilian courts and without recourse to the death penalty. Thus the Malabo Protocol has the potential to fill the accountability gap evident at domestic levels'.[207] However among the most serious structural weaknesses include the provision is controversial Article 46A *bis,* which grants functional immunity from prosecution to sitting heads of state and other senior officials. This means that all suspects are likely to comprise either opposition politicians or non-state actors. This provision gained impetus upon the election of two ICC indictees Uhuru Kenyatta and William Ruto in March 2013 to president and deputy president of Kenya, respectively. Calls have also been made to strengthen the Victims and Witnesses Unit, increase the number of proposed judges to handle the case load, clarify the crimes to be pursued, express commitment to act in tandem with community based organizations and for commitments to better funding sources and public communication.[208]

5.2.3.2 Prosecuting Terrorism before a Regional Criminal Court

Mohamed Badar decries the fact that: 'The international community witnessed devastatingly far-reaching effects of genocidal propaganda through publications such as' in Africa's case '*Kangura* in Rwanda which, combined with many other explicit and implicit forms of incitement saw the combined deaths of (one) million people. If such a situation were to arise where hate speech and propaganda were being used to incite genocide in the present day, such propaganda should be identified as amounting to the crime of direct and public incitement to commit genocide'.[209] His authority for that legal proposition is that: 'The ICTR Appeals Chamber in *Akayesu* concluded that the Trial Chamber was correct in finding certain RTLM broadcasts had directly equated the Tutsi with the enemy, the result of which *permitted* extermination of the Tutsi population'.[210] Similarly the Islamic State (IS) 'have successfully used print and radio media systematically for the dissemination of lethal ideas for the mobilization of the population on a grand scale in order to materialize these ideas'.[211] He observes that the Human Rights Council of the United Nations has acknowledged that the widespread and systematic actions of IS may amount to the crime of genocide' and thus 'emphasizes the need to hold the perpetrators accountable under international law'.[212] Borrowing his words, this article argues that so also Al-Shabaab 'has embarked on a war path of religious extermination as its members pursue the purification of Islam in order to subject the world to their *jihadi-salafi* doctrine'.

Because 'an inchoate offence is effective from the moment it is uttered an published'[213] regardless of its success, clearly, 'criminalization of incitement to genocide

[207] Amnesty, *supra* note 203, p. 5.
[208] KPTJ/Africog, *supra* note 202, p. iv.
[209] Badar, *supra* note 29, p. 363.
[210] *Ibid*, p. 371.
[211] *Ibid*, p. 361.
[212] *Ibid*, p. 364.
[213] *Ibid*, p. 373.

in international law as an inchoate crime, reflects one of the fundamental purposes of international criminal law, namely to criminalize "conduct creating an unacceptable risk of harm"'.[214] Incitement relies on hate speech in order to create a climate in which its poisonous message can flourish'.[215] Its *mens rea* comprises intent to directly prompt or promote another to commit genocide.[216] Badar concludes that extensive hate propaganda sets into motion a continuum of destruction by devaluing and dehumanizing the victim group 'the idea that extermination of a certain group of people is not just acceptable, but necessary'.[217] Procedurally, he assumes that international prosecution of terrorism crimes may be effective. Substantively, he endorses proscribing pre-inchoate offences, particularly incitement to genocide as a terrorism act. From the outset, the Malabo Protocol as a regional court theoretically better placed than domestic courts to facilitate legitimate trials. The above criticisms of its overall design as well as of specific offences may be undertaken by others. This paper is limited to the terrorism provision.

The definition of terrorism in the amended ACJHR Statute is under Article 28G as follows:

> For the purposes of this Statute, "terrorism" means any of the following acts:
>
> A. Any act which is a violation of the criminal laws of a State Party, the laws of the African Union or a regional economic community recognized by the African Union, or by any international law, and which may endanger the life, 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 private property, natural resources, environmental or cultural heritage and is calculated or intended to:
>
> 1. 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
> 2. disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
> 3. create general insurrection in a State.
>
> B. Any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement by any person, with the intent to commit any act referred to in sub-paragraph (a) (1) to (3).
>
> C. Notwithstanding the provisions of paragraphs A and B, the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.
>
> D. Acts covered by international Humanitarian Law, committed in the course of an international or non-international armed conflict by government forces or members of organized armed groups shall not be considered as terrorist acts,

[214] *Ibid*, p. 372.
[215] *Ibid*, p. 375.
[216] *Ibid*, p. 373.
[217] *Ibid*, p. 375.

> E. Political, philosophical, ideological racial ethnic, religious or other motives shall not be a justifiable defence against a terrorist act.[218]

From the outset, the Malabo Protocol may be perceived as ambitious in its scope and breadth. It embraces terrorist acts under each and all the criminal laws of every State Party as well as those under the AU and other sub-regional blocs. It even seems to anticipate future legislation and amendments and adopts such laws in advance. This fails the certainty requirements of the general part of criminal law. Indeed, save impliedly, the entire protocol does not include the legality principle. Any act calculated to create a public emergency is criminalized as terrorism, including those that create general insurrection. Yet a claw-back clause prevents self-determination from inclusion. Here an effort is made to safeguard political opposition or democratic expression from falling foul or being unnecessarily stifled. Most significantly from the theoretical framework of this article, it proscribes all inchoate aspects of terror acts including encouragements. Hence it seeks to restore and revive at the regional level, offences the Kenyan Constitutional Court struck down as unconstitutional at domestic level. Going by the Kenyan Constitutional Court's criticism of pre-inchoate offences as vague and ambiguous and therefore contrary to the principle of legality. How can the Malabo Protocol on one hand, purport to base itself on the criminal laws of every State Party while on the other hand, exceed or contradict some of those laws?

Notwithstanding apparent vagueness in the definition of terrorism under the Protocol it may additionally be possible to prosecute terrorism as war crimes, crimes against humanity or genocide. Hence there remains hope in interpreting the terrorism definition by referring to other international instruments or tribunals. The principal value of this regional court therefore lies in establishing a structural legal framework which is legitimate because of its location on the African soil as well as composition of personnel. Because legitimacy is a key objective, care should be taken to ensure that a majority of trial judge who preside over religious terrorism matters are selected from the offending religion so that the suspects or accuseds as well as the potential supporters or sympathizers are accorded a fairer trial than would emerge from a national court. It has potential to safeguard human rights of accused persons charged before it.

6. Conclusion

This article shows that armed groups and government forces alike are responsible for human rights violations. The trouble is not only that the Kenya government has invaded Somalia, but worse, that targeted killings appear to be endorsed at home. Responding to the terrorism phenomenon is doubly problematic. Substantively, defining it is hard. Procedurally, whether to respect fair trial rights is debatable. The purpose of this article was to describe the role of pre-inchoate offences as effective responses to terrorism acts. On one hand, 'no defensible creation of criminal offences can proceed unless it is possible to articulate precisely the phenomenon to be criminalized'. However, Ashworth asserts that: 'The principle of maximum certainty and fair labeling are predicated on the assumption that offenders are autonomous rational agents who may be deterred by the

[218] Amnesty, *supra* note 203, p 51.

threat of censure and punishment. Suicide bombing is a common characteristic of contemporary terrorism that radically undermines the criminal law's potential deterrent effect'. Likewise for Cameron 'extensive police or intelligence powers can only go so far in defeating terrorism, which sis a crime with a political objective. He concludes that: 'The "real causes" of violence can naturally be anthropological or economic in character. Still, if the political injustice that is the root, or the excuse, for the violence is removed or ameliorated, then at the very least the supply of new recruits will be made more difficult'.[219]

The article distinguished between two broad anti-terror responses adopted by the liberal democratic nation-state – military or criminal justice – with the objective of proposing which between security or liberty, may better suit the African context. 'Security First' theory which places primacy on the core right to life, rather than civil and political or even socioeconomic rights. A comparison was made of the repressive preventive justice under UK and US law with the liberal ECtHR's human rights safeguards. Kenya's response to the upsurge of terror attacks by Al-Shabaab provided an example of how African countries respond to the liberty vs. security dilemma. Proposed substantive pre-inchoate offences contained in the SLAA 2014 were struck down by our Constitutional Court. However the evidence suggests that the 'war on terror' unofficially negates the right to life of terror suspects. There is need to explore whether a third procedure may achieve the best of both rights. The paper disagrees with Ashworth assertion that terrorists are irrational. Rather, to the extent that counter-terrorism criminal trial procedures presume not only that terrorists are irrational, and thus unsuited to negotiations or persuasion, but also that the domestic judiciary can necessarily act as an independent arbiter over international terrorism cases, then pre-inchoate crimes become problematic. Eminent scholars of Sharia law have shown that radical or violent extremist interpretations of Islam are derived from ideological distortions of the duty to do *jihad.*[220] The National Super Alliance opposition Party manifesto entitled 'A Strong Kenya' proposes to pull KDF out of Somalia if it wins the August 2017 general elections. Yet it simultaneously opposed the introduction of SLAA which would have facilitated robust criminal law counter terrorism strategy. If it is true that the existing 'Security First' interventions into Somalia by bombing Al Shabaab's training and recruitment bases potentially invite retaliation to the extent that they may mistakenly strike civilian targets, then the military approach seems to inadvertently decrease domestic security. From a human rights perspective, such repressive strategies seem no better than the very random killings by terrorist bombers themselves attributable to fatalistic suicide. Arbitrary, indiscriminate or disproportionate punishments negate the essence of democratic values that require inequalities to be merited. The lesser evil lies in embracing pre-inchoate offences so that the war on terror is clothed in legality and accused persons may challenge executive excesses before a legitimate judiciary.

Altogether, a denunciatory penal purpose may be more effective in terms of expressing outrage as well as legitimizing retribution. The article concludes that: 'There are enough normative and institutional' modes 'of criminal accountability under international law tribunals established by the United Nations Security Council.

[219] Cameron, *supra* note 1, p. 213.
[220] Javaid Rehman, *Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the Clash of Civilizations' in the New World Order* (Oxford and Portland Oregon: Hart Publishing, 2005).

Alternatively, adopting the European Court of Human Rights' design, the African Union should consider empowering the African Court of Justice and Human Rights with original jurisdiction over international terrorism cases. Such 'concurrent responsibility' can enhance the legitimacy of our counter-terrorism strategy by reducing the terrorists' rationale for retaliating against direct targets in any particular African country which has no direct quarrel with Al-Shabaab. Kenya suffers the brunt of AMISOM's retaliatory attacks merely by virtue of proximity with their Somalia locality. Our citizens thus serve a proxy or intermediate terror targets to communicate a message of revenge directed at the US government (or its perceived allies) on account of exporting their neo-liberal policies into the Islamic world, enforced by the 'war on terror'. Even as support to stabilize Somalia's legitimate government continues, Kenya's interest in reducing terror casualties as well as brining inciters to justice can benefit from ceding some sovereignty through responsibilizing regional judicial institutions to legitimize trials of terror suspects. Despite all its deficiencies and defects, the Malabo Protocol conceives of criminalizing terrorism and these efforts require serious deliberation.