

INSTITUTIONAL DEMOCRATIC PRACTICE, HUMAN RIGHTS AND THE POLICE FORCE'S ACCOUNTABILITY IN TANZANIA

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'Law enforcement officials are obliged to know and to apply, international standards for human rights.'

Abstract

This article discusses some aspects of human rights protection and the police force in Tanzania. Essentially, it focuses on the way human rights norms are being or should be implemented within our domestic legal structure and its democratic institutions. The article emphasises on the need for the police forces to respect the fundamental human rights of individuals as well as addressing all forms of human rights violations, this being part and parcel of institutional democratic practice and accountability. In other words, it argues that the role of the police forces in the field of human rights is of two-way traffic: that is to say, they have to promote human rights whenever they execute their roles of policing but, at the same time, they have to guard and act against any violation of the same rights.

Key words: Human Rights, Policing, Institutional Democracy, Accountability

1.0 Introduction

This article is protection of human rights and the practice of police force in Tanzania. Part one of the article deals with introduction. Part two examines the theme of human rights within the context of the day-to-day discharge of duties of the police force. As shall be noted, one essential component of good governance and democracy, is that every institution within a democratic state has to ensure respect for, promotion and protection fundamental human rights of all citizens. Part three discusses the converging themes of democracy, accountability and human rights while parts four, five, six and seven of consider the powers vested on police, how they are used and the extent to which they are restrained by the law. They examine in detail pertinent issues and incidents related to violations of human rights where police powers are not contained or exercised within the ambit of professionalism expected in a democratic institution of the like nature. Part eight is a concluding part, which, among other this, delves on the need to create a balance between security and human rights protections.

¹ The author is an Advocate of the High Court of the United Republic of Tanzania. All views expressed in this article, save where a direct quotation has been made are his own. The article emanates from a revised version of a paper once presented in a workshop on 'Institutional Democratic Practice and Accountability: The Tanzanian Police Force and the Protection of Human Rights'.

United Nations High Commissioner for Human Rights Centre for Human Rights, (UNHCR) 'International Human Rights Standards for Law Enforcement'- *A Pocket Book on Human Rights for the Police*, Geneva, a p.3, (available from <http://www.ohchr.org/Documents/Publications/training5Add1en.pdf>. (Accessed on 25th May 2017).

2.0 The Police Force and Protection of Human Rights

2.1 Defining Human Rights

The term human rights can be briefly construed to mean, those rights which are fundamentally inherent in every person by virtue of being a human being. They are neither given by the law nor bestowed to an individual by the state.² The only thing which the law does is to recognise and protect them against any threat or infringement from either the state, its organs or from the non-state actors. The rights must be respected by all, protected by all and promoted to their fullest enjoyment by all.³ Consequently, respect for, promotion of and protection of human rights as fundamental norms that form the basis of any politically organised society is one of the essential pillars for peace, stability and development.⁴

2.2 Relating the Concept of Human Rights to the Police Force

Perhaps it would be wiser to commence with a question: *'What is the role of police in the context of human rights?'*⁵ Essentially, the role of members of a police force in the maintenance of peace and protection of human rights and freedoms of individuals has always been of paramount importance. In particular, for instance, it has been acknowledged, and drawing from the provisions of the *Universal Declaration of Human Rights* (UDHR) (especially Article 28)⁶ that:

'[t]he role of police is to help achieve [a] social and international order. They must, for example, uphold the laws that safeguard the lives of the citizens.... Policing means protecting human rights.'⁷

In line with the above provision of the UDHR, it has been stated that, as an institution, the police force's role in a democratic society is to 'serve to protect, rather than impede freedoms.'⁸ At its core function, '[t]he very purpose of police is to provide a safe, orderly environment in which these freedoms can be

2 See the case of *Rev. Mtikila v. Attorney General*, [1995] TLR 3. In this case the High Court made it clear that human rights are inherent in an individual and should not be considered to be a creation of the state or its organs. See also F. Viljoen, *International Human Rights Law in Africa*, 2nd edn (Oxford: University Press, 2012) at pp. 4-6, where among other things the author noted the difference between human rights, human rights law and International Human Rights Law.

3 According to Article 29 (1) of the Universal Declaration of Human Rights, (UDHR) 1948: "Everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." (The UDHR was adopted and proclaimed by the General Assembly Resolution 217 A (III) of 10th December, 1948).

4 See 'Economic Development and Human Rights: Towards a Children - Related Human Development', (available from http://www.npasec.gov.ps/economic_development.htm (as accessed on 3rd March 2016). See also S.E. Mchome, 'Human Dignity: The Source of all other Rights and Freedoms' (2003) 1 *Nyerere Law Journal*, 13-20 at 13. It is also reiterated within the *Universal Declaration of Human Rights*, 1948, that 'recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace.' See the Preamble to the Universal Declaration of Human Rights (UDHR), 1948).

5 For a detailed discussion on this, see T. Hopkins, 'Policing in an Era of Human Rights' *Alternative Law Journal* 32 (4) (2007), 224.

6 Article 28 of the Universal Declaration of Human Rights states: "everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised."

7 See Independent Commission on Policing for Northern Ireland, *A New Beginning: Policing in Northern Ireland-The Report of the Independent Commission on Policing for Northern Ireland*, Northern Ireland, (1999) at p.18 (Available from <http://cain.ulst.ac.uk/issues/police/patten/patten99.pdf>. (Accessed on 25th May 2017).

8 *The United Nations International Task Force on Police*, (as quoted in the Commonwealth Human Rights Initiative Report, (hereafter C.H.R.I.'s Report) - 'The Police, The People, The Politics: Police Accountability in Tanzania', C.H.R.I., (2006) at p.1. (Available from http://www.humanrightsinitiative.org/publications/police/tanzania_country_report_2006.pdf. (Accessed on 25th May 2017).

exercised.⁹ These assertions seem to be given legal emphasis by Lord Brown, who, in *R (on the application of Laporte) v. Chief Constable of Gloucestershire Constabulary*,¹⁰ stated that, 'police must take all possible steps to advance rather than thwart a person's human rights.'¹¹ This is correctly so because, while [m]ost actions police take against a person will affect a person's freedom..., the interference with our human rights may have sound policy, legislative or legal justification.'¹²

Currently, however, there have been issues of concern within the law enforcement institutions, not only in Tanzania but also in other African countries. The key issue revolves around the question how these institutions exercise the powers vested on them and whether the culture of accountability and respect for and protection of human rights has been fully entrenched in these institutions. It has been stated, for instance, that, within the police force, one of easily notable problems is that '[t]he police have too much powers and discretion under the law with little or no accountability....'¹³ In a situation like this, it becomes very difficult for the members of the community within which the police force carries out its functions to believe that whenever they are in an encounter with the police they will be given the justice they deserve. Such a situation defies the well noted principle that, for justice to be done it must be transparently seen to be done.¹⁴

Indeed, while it is not intended to argue that each and every piece of information in the hands of police should be shared with the members of the public, it is a settled view that there must be a certain threshold of information disclosure that measures up with the requirements of institutional transparency, given that transparency is an essential precursor to accountability.¹⁵ Moreover, in an institutionalized democratic environment, democratic governance and human rights are inseparable themes which represent a mutually-reinforcing co-existence. Essentially, in such an environment, the levels of transparency, integrity, accountability and respect for human rights on the part of the police force are expected to be of the highest standards. It is pathetic, however, that in most case, the police force has been accused of operating with too much shrouded secrecy and with little or no transparency, accountability and respect for human rights.

The foregoing discussion, however, is well informed and does not lose sight of the fact that, in a free and democratic society, and as a matter of necessity and appropriateness, the police force may be permitted to curtail or impose some restrictions on the individual's enjoyment of certain human rights. In that regard, there should be no conflict between human rights and policing. However, the

9 *Ibid.*

10 [2006] UKHL 55.

11 *Ibid.*, at Para 129.

12 See Hopkins, *Op.cit* fn 6.

13 See R. Makaramba, (as quoted in the C.H.R.I Report, *Op.cit* fn 9, at p.47.) Currently Mr. Makaramba is a Judge of the High Court of Tanzania. By the time the C.H.R.I Report was being prepared he was one of the Commissioners in the Commission on Human Rights and Good Governance (Tanzania).

14 According to the Bureau of Democracy, Human Rights and Labour, citizen's complaints against the police inaction or slowness to investigate and prosecute crimes have been common. (See Country Reports on Human Rights Practices, Bureau of Democracy, Human Rights and Labour. *Tanzania Country Report on Human Rights Practices 2004*, (2005), (available from <http://www.state.gov/g/drl/rls/hrrpt/2004/41630.htm>. (Accessed on 25th May 2017).

15 According to the Independent Commission on Policing for Northern Ireland, 'the police force should take steps to improve its transparency.... The presumption should be that everything should be available for public scrutiny unless it is in the public interest-not the interest of the police- to hold it back.' (See *The Independent Commission on Policing for Northern Ireland*, (*Op.cit* fn 8, at p.36).

methods employed by the police to carry out such legitimate curtailments or limitations may amount to serious infringements of human rights as to be unjustified. In view of this, there must be a balance and, '[g]etting this balance right is partially the task of parliament in creating legislation and the courts in creating and interpreting the common law.'¹⁶ How then should such a balance be created and what should be the converging zone?

3.0 Convergence Zone: Democratic Policing, Accountability and Human Rights

3.1 Democratic Policing, Accountability and Human Rights

Democratic policing, accountability and the respect for human rights are important and intertwined pillars within any democratic society. These components, however, need to be fully understood, nurtured and made to grow. As the Commonwealth Human Rights Initiative (CHRI) correctly noted, '[d]emocratic [and] accountable policing is one of the hallmarks of democracy.'¹⁷

From a global perspective, one may note that there has been a growing attention on the need to strengthen democratic governance, accountability and human rights through awareness campaigns in all institutions of the state power in order to ensure increased respect for, as well as the protection, promotion, fulfilment and enjoyment of all human rights.¹⁸ Equally noted is that, there has been also a strong sense of decrying the culture of impunity and a call for increased accountability for the violation of human rights norms. The norm is that whosoever, violates the basic human rights of individuals must be held accountable.¹⁹

The above progression of events is not without a foundation. Its foundation is the unwavering belief that the respect for, protection and the promotion of human rights is not only one of the essentials of institutional democratic principles but also a bed-rock for rule of law and societal development. In this regard, institutions of state power, such as the police force, must be the right candidate for ensuring respect for, protection of and the promotion of human rights in the country. However, for this to happen, the relevant institutions must be properly converged within a requisite human right-based legal fabric of the society.

3.2 The Convergence Zone

The convergence between the police as an institution and the whole issue of respect for and the protection or promotion of human rights lies within the laws relating to exercise of police powers. These laws define the duties and the extent of police interference with the rights and freedoms of individuals.

¹⁶ *Ibid.*

¹⁷ See the C.H.R.I. Report, (*Op.cit* fn 9, at p.2)).

¹⁸ In Tanzania, the *Legal Sector Reform Programme* (LSRP) has a component that looks onto the needs within the Police Force that should be addressed to make the Police Force more up to date and well aligned with the internationally accepted standards of law enforcement organs.

¹⁹ According to the C.H.R.I Report, the sad part of our case is that most citizens associate the police with impunity. However, the report argues that it is necessary to create a web of accountability through which police must be held responsible. They must be accountable to their government and their community in which they serve. Existence of private as well as institutionalised monitoring mechanisms such as the Human Rights Commission, Commission of Inquiry or other structures such as the police force service commission or an oversight committee of the parliament are all important in ensuring accountability and can restore confidence to the citizenry. (*See, Op.cit* fn 9 at p.1).

According to the Police Force and Auxiliary Police Act, one of the duties of a police includes maintaining law and order.²⁰ The proper implementation of this duty is necessary a human rights issue that needs to be understood within the human rights context. This is due to the fact that enjoyment of human rights demands an environment in which there is full respect for the rule of law and order. Maintenance of peace and order involves coming at cross-roads with those who violates the laws, in other words, the criminals. Under the law, police are empowered to arrest, enter into any premise and make a search, or seize documents or properties connected to an offence. In this regard, the relevance of human rights knowledge to the police force is closely tied to their exercise of all these powers in the course of ensuring peace and order in the society. How the police force carries out its powers is therefore an important issue worth examining.

4.0 Police and the Use of Force: Any Respect to the Legal Standards?

One issue which needs to be closely addressed in the light of the powers vested on the police forces is whether these powers are meant to be used to crush down suspected criminals, in whatever manner the police might have been trained to, when dealing with crimes in the society. Alternatively, should they approach the problem of criminality with the full awareness of the laid down rules and procedures including those in demand for respect and observance of human rights norms and standards?

As it has once been stated, 'it is the procedure that spells much of the difference between the rule of law and the rule of whim and caprice.'²¹ Consequently, in dealing with crimes, the procedural law in any democratic society demands strict observance and respect for human rights and this is a fact that must be observed by the police as one of the law enforcement agencies.

4.1 The Yardstick

As part and parcel of good governance and the rule of law, respect for human rights calls for the institutional observance of the laid down rules and procedures, these being the yardstick that ensures protection of the inherent rights of the individuals.

20 See section 5 of the Police Force Act, [Cap. 322 RE 2002]. It is crucial, however, to state here that currently there is a growing number of private and security (firms) guards that have been trained to function as auxiliary police. These need to be trained in matters pertaining to respect for human rights too. The incident which took place in Geita Gold Mine recently where a school girl was forced by two private security guards to have intercourse with a dog clearly shows how the problem of human rights violation by these private security guards can be immense. Auxiliary police forces are also being employed by various municipalities and they have been rampantly harassing the small businessmen/women (commonly called the "*Machingas*" in Kiswahili language) in an effort to "clean up" neighbourhoods, an exercise that manifestly reveal use excessive force. Such acts of harassment, which involve indiscriminate beating of suspected individuals, are utterly unacceptable ways of treating fellow human beings and constitute a gross violation of human rights and the existing laws.

21 See *Iqbal Ismail Sodawala v. The State of Maharashtra*, (1975) 3SCC 140 (India).

Since Tanzania is a signatory to the various international and regional Human Rights Conventions/Treaties,²² as part of the implementation of its obligations under these instruments, to some extent it has (though not fully) incorporated within its substantive and procedural laws some relevant provisions meant to ensure respect for human rights of the individuals.²³

The *Constitution of the United Republic of Tanzania, 1977*, for instance contains the Bill of Rights. The Bill was incorporated as part of the Constitution in 1984 after a long struggle for human rights in this country.²⁴ Initially, these rights were introduced and spelt out in the preamble to the Independence Constitution of 1961 but they could not be enforced in courts of law since a preamble did not form part of the Constitution.²⁵ Consequently, '[v]iolations of individual rights and freedoms in Tanzania continued unabated...' ²⁶ Since the Bill of Rights is now justiciable and enshrines the basic rights of all individuals, we expect the tradition of trampling on human rights to cease. However, this depends much on the level of awareness among our people and the law enforcement organs such as the police.

Although the law allows the police to use force, the use of force (*as it shall be discussed in part 4.3 below*) excessive use of force by members of our security forces is a common practice in Tanzania. As noted herein above, it is on record that many innocent, and even errant, individuals have suffered harassments in the hands

22 For instance, the *International Covenant on Civil and Political Rights (ICCPR)*, 1966, (Adopted 16 Dec. 1966, entered into force on 23/3/1976, G.A. Res.2200A (XXI), UN Doc.A/6316. (1966), 999 U.N.T.S. 171; *The African Charter on Human and Peoples Rights (AfCHPR)*, 1981, (adopted on June 27, 1981 and entered into force on 21st Oct.1986, O.A.U. Doc. CAB/LEG/67/3 Rev. 1. *The United Nations Convention on the Rights of the Child*, 1989, (adopted on 20th Nov. 1989, entered into force 2nd September 1990, G.A. Res.44/25, 44 UN GAOR, Supp. (No.49), UN. Doc. A/44/49, at 166). There are also other important instrument such as the *Standard Minimum Rules for the Treatment of Prisoners* (Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977) and *The United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)*, 1990, G.A.Res.45/110 of 14 Dec. 1990. It is crucial for the provisions of all these international instruments to be fully reflected within the existing laws in Tanzania if at all our participation in human rights protection is to be sound and effective. The HRC Report has noted that Tanzania has failed to pass the necessary domestic laws to formalise most of its international obligations into law. (See the C.H.R.I. Report's *Op.cit* fn 9, at p.8). For instance, it has failed to ratify *The United Nations Convention Against Torture and Other Cruel and Inhuman or Degrading or Punishment*, 1984, (adopted 10 December, 1984 and entered into force on 26 June 1987, G.A. Res. 39/46, 39 UN GAOR, Supp. No.5, UN Doc.A/39/51, at 197 (1984).

23 For instance, *The Criminal Procedure Act*, 1985 [Cap.20 RE 2002], contains procedural aspects geared at ensuring respect for human rights. A simple example relates to modes of searching a suspected male or female offender under section 26 of the Criminal Procedure Act. The section ensures that human dignity and respect for decency is strictly observed. Only a woman police is allowed to search a female suspect and must strictly do so with regard to decency. Section 33 of the same Act does limit the number of hours within which a person may be detained before being produced in court for trial. Minimum hours to interrogate suspects are also provided for under this law. The problem however may be resting on the actual observance of these procedures.

24 It is crucial to state here that even if the Constitution currently has the Bill of Rights; realisation of what it has guaranteed is a difficult journey which even runs against what it professes. For instance, the jurisdiction to adjudicate matters relating to Human Rights in Tanzania is solely vested on the High Court and worst still the bench must be composed of three judges. (See L.X. Mbunda, 'Limitation Clauses and the Bill of Rights in Tanzania,' *Lesotho Law Journal*, 4(2) (1988) 153; See also the *Basic Rights and Duties Enforcement Act*, 1994, [Cap.3, RE 2002] which provides for the procedural route that ought to be followed in the course of enforcing the basic rights and freedoms. This is yet another complication of what ought to have been simplified due to its sensitivity. See also Maina, *Op.cit* fn 2 (especially pp.3&4 titled 'Independence and the Struggle for a Bill of Rights' where the author in detail explains the struggle for the adoption of the Bill of Rights in our 1977 Constitution.

25 See the cases of *Attorney General v. Lesinai Ndeani & Two Others*, [1980] TLR 214; and *Hatimali Adamji v. E. A.P & T Corporation*, (1973) LRT n.6. For more about the historical part on the Bill of Rights in Tanzania see Maina, *Op.cit* fn 2, at pp. 3 - 14.

26 See L.X. Mbunda, 'The Support Structure Theory and Its Application in Securing Basic Human Rights in Tanzania' - A paper presented at a Human Rights Seminar to commemorate the 40th Anniversary of the Faculty of Law, University of Dar-es-Salaam, 7-9th February, 2002, p. 2.

of security forces famously known as “Sungusungu”, People’s militias and/or auxiliary police.²⁷ Harassment of petty traders commonly known as “Machingas”²⁸ is also a tendency well observed through many places in the country. There are live incidents, some of which are very vivid and readily available on the internet, that portrays gross violations of human rights by the city auxiliary police beating up the ‘Machingas’ to the extent of stripping them off (naked) in the open and at broad day-light and they even confiscate their properties on the pretext of either enforcing the city or municipal by-laws.²⁹

Worse still incidents like the ones cited above have taken (and continue take) place in Dar-es-Salaam city centre where the Police Headquarters are situated, without holding those responsible for these malpractices accountable for gross violation of human rights and the laws of the land. This is a sense of impunity which is contrary to the spirit of good governance and rule of law. It is even documented that the auxiliary police and “Sungusungu” have grossly been involved in human rights violations through the excessive use of force.³⁰

4.2 The Law on Arrest: Its Use and Misuse

The law in Tanzania allows the police, auxiliary police and “Sungusungu” or militia to effect an arrest on any person, whom they, on reasonable grounds and sound judgment, suspect that he/she has committed an offence, is on the verge of committing an offence or is in the very act of committing an offence. Very wide powers to arrest are provided in a number of statutes. These statutes include, but not limited to, the *Criminal Procedure Act*,³¹ the *Police Force and Auxiliary Police Services Act*,³² the *People’s Militia Laws (Miscellaneous Amendment) Act*,³³ and the *Prevention of Terrorist Act, No.21 of 2002*. The *Criminal Procedure Act* is the only procedural law which provides for not only the manner of effecting an arrest but also a detail of what the arresting officer should take into account when arresting a suspect.³⁴ It also provides for some specific offences which police officers or any other authorised person cannot arrest a perpetrator without a valid warrant of

27 According to Maina the word ‘harassment is [generally] defined as troubling or annoying continually.’ See Maina, *Op. cit fn 2*, at p.128. For more noted shortcomings of Sungusungu Maina captures the matter in detail where he has enumerated different malpractice of the Sungusungu in Tanzania (at pp. 512-513).

28 These are the ‘young urban unemployed rural immigrants who are struggling [in the urban centres] for economic survival through petty trade and who are fighting for the rights to have access to national resources’. See G. Mpangala, “Peace, Conflicts, and Democratization Process in The Great Lakes Region: The Experience of Tanzania” Research Report on Research Project, Institute of Development Studies, University of Dar es Salaam (1999) at p.45.

29 Visit Issa Michuzi Blog (at http://issamichuzi.blogspot.com/2008_03_01_archive.html) where a naked ‘Machinga’ features as a victim of gross human rights abuse by the city auxiliary police in Dar-es-Salaam, an incident which took place in March, 2008. (As accessed on 11/03/2009).

30 See A Report presented at the 1st Sub-Saharan Executive Policing Conference International Association of Chiefs of Police (IACP), Durban, South Africa, 27-30 August, 2000 titled: ‘Crime And Policing Issues in Dar Es Salaam Tanzania Focusing on Community Neighbourhood Watch Groups - “Sungusungu”’ at p. iv, (available from http://www.unhabitat.org/downloads/docs/1825_12883_sungusungu.pdf), (as accessed on 25/05/2017). See also the cases of *Ngwengwe s/o Sangija and 3 Others v. Republic*, High Court of Tanzania at Mwanza, Criminal Appeal No.72 of 1987 (Unreported); *Miperesi K.Maingu v.Hamisi Mtongori and 9 Others*, High Court of Tanzania at Mwanza, Civil Case No.16 of 1988 (Unreported) (These cases are fully reproduced in Maina, *op. cit fn 26 at 513&523*).

31 Act No. 9 of 1985 [Cap. 20, RE 2002], see section 11 and section 14.

32 [Cap. 322, RE 2002], see sections 27, 139, section 141.

33 Act No.9 of 1989 [Cap. 111 RE 2002], see section 4 of this law.

34 According to section 11 (1) of this law, when making an arrest, the police officer or other person making the arrest shall actually touch or confine the body of the person being arrested, unless there be a submission to the custody by word or action. It thus means that an arrest could be effectuated by: actual use of force to restrain the individual concerned; stating to the individual that he or she is being arrested; or By words or conduct making it clear that force will be used if necessary in order to restrain the individual.

arrest³⁵ and the minimum time frame within which a person should be detained before being formally charged.³⁶

However, although all procedures of effecting an arrest are explicitly provided under the Criminal Procedure Act (as we shall see in the section below) they are not oftentimes observed. The arresting powers are at times abused to the extent of leading to gross violation of human rights and the right to dignity,³⁷ freedom from torture inhuman or degrading treatment even deaths. For instance, the report presented to the Sub-Saharan Executive Policing Conference [International Association of Chiefs of Police (IACP)]³⁸ noted that due to lack of professionalism some of the “*Sungusungu*” members had infringed the basic human rights of people by way of torture and unlawful detentions on suspects or culprits arrested by them...³⁹

4.3 The Use of Force and the Use of ‘Reasonable Force’

When effecting an arrest an arresting police officer is permitted to use force. However, force used in the course of effecting an arrest must be reasonable. Anything in excess of reasonable force is deemed to be an assault or may lead to any other offence and even a civil suit. It must be borne in mind that misuse or abuse of powers vested on the police is an undemocratic practice best reserved for the old dictatorial and one party regime, thirsty of controlling the masses by force.⁴⁰ In a democratic society, the law limits and discourages use of excessive force. For instance, according to section 11 (2) of the Criminal Procedure Act, No.9 of 1985:

‘If the person to be arrested forcibly resists the endeavour to arrest him, or attempts to evade the arrest, the police officer or other person may use all means necessary to effect the arrest.’

According to the above cited provision, the expression “*use of all means*” signifies the use of force that should be used only as a matter of absolute necessity to achieve the intended purpose and must be reasonable and proportional to the resistance put forth by the suspected offender. This section must be read together with section 21 of the Act which strictly limits the amount of force which a police officer or other person may use in effecting an arrest. Accordingly, the section provides in subsection (1) that:

‘a Police officer or any other person shall not, in the course of arresting a person, use more force, or subject the person to greater indignity, than is

35 For instance an offence of Aiding in acts of mutiny or aiding a prisoner of war to escape, an offence of intimidation, desertion of children and many others enlisted in the first schedule to the Criminal Procedure Act are offences that demand a proper warrant of arrest to be sought from a magistrate or other designated officers under section 13 of the Act before an arrest is effected. However, police are under certain circumstances permitted to arrest without a warrant –see section 14 of the Criminal Procedure Act, [Cap. 20 RE 2002].

36 See sections 30 to 33 of the Criminal Procedure Act (Cap.20, RE 2002). Section 33 provides that Officers in charge of police stations shall report to the nearest magistrate, within twenty-four hours or as soon as practicable, the cases of all persons arrested without warrant within the limits of their respective stations, whether or not such persons have been admitted to bail.

37 See fn 31 and 32 above.

38 *Op. cit* fn 32.

39 *Ibid*, at p. iv.

40 See the C.H.R.I’s Report, *Op.cit* fn 9 at 26.

necessary to make the arrest or to prevent the escape of the person after he has been arrested.

(2) Without limiting the application of sub-section (1), a police officer shall not, in the course of arresting a person, do an act likely to cause the death of that person, unless the police officer believes on reasonable grounds that the doing of that act is necessary to protect life or to prevent serious injury to some other person.'

Section 12 further cement this fact of reasonableness in the use of force and unnecessary prolonged restraint by providing that '[t]he person arrested shall not be subjected to more restraint than is necessary to prevent his escape.'

4.4 What is Reasonable Force and What is not?

The standard measure of what is reasonable and what is unreasonable force in the course of effecting an arrest is based on an objective test. In law, this is referred to as the reasonable man's judgement. For instance, it is grossly unreasonable to beat up a criminal suspect or harass him/her for whatever reason while he/she has complied fully with the arrest order. It is even a crime to do so although, in our laws, some provisions have vested wide powers and immunity on police in some instances, a fact that needs to be re-examined in the course of the existing reforms.⁴¹

In any case, the best standard of what is reasonable is that which adheres to the internationally accepted standard practices as they appear in the United Nations Commission for Human Rights' *Pocket Book for law enforcement officials*,⁴² which largely reflects what the Code of Conduct for Law Enforcement Officials demands.⁴³ In Tanzania, according to section 21(2) of the Criminal Procedure Act, it is strictly prohibited to cause death in the course of arresting a person unless doing so was necessary to save (protect) life or prevent a serious injury on the other person (be it the one arresting or third party). Anything in excess is contrary to law and will (and always does lead to gross violation of human rights or may amount to torture. On such ground, a police officer responsible will be prosecuted according to the demands of the law.⁴⁴

41 For instance, police officers are granted immunity under section 29(6) of the Prevention of Terrorism Act which states that an officer who uses such force as may be necessary for any purpose, in accordance with this Act, shall not be liable, in any criminal or civil proceedings, for having, by the use of force, caused injury or death to any person or damage to or loss of any property. Likewise, section according to section 38 (8) of the same Act police are exonerated from liability of whatever nature that may arise out of seizure of property made in good faith. See also Section, 3 of the Preventive Detention Act, [Cap. 361 RE 2002] Which prevent questioning of any order made under it in court; Section 26 of the Emergency Powers Act, [Cap. 221 RE.2002] which insulate all persons acting under it from criminal proceedings; Section 78 of the Penal Code, [Cap.16, RE. 2002] which provides that authorised people may use all force to disperse a riotous crowd and they will not be criminally or civilly liable for any death or injury occasioned.

42 See the UNHCR Pocket Book, *Op.cit* fn 1 at p.7.

43 See the 'Code of Conduct for Law Enforcement Officials, G.A. res. 34/169, annex, 34 U.N. GAOR Supp. (No. 46)' at 186, U.N. Doc. A/34/46 (1979).

44 This may however be a prolonged route since all criminal cases fall within the purview of the DPP who is an appointee of the President. Although the Criminal Procedure Act provides for a room to undertake private prosecutions, rarely has this door been used by private advocates and even those who might have tried to do so have come across a number of hurdles including threats from anonymous people. (See the C.H.R.I Report, *Op.cit* fn 2 at p.36).

5.0 Torture: Is it a Police Instrument?

5.1 Torture defined

A number of definitions exist regarding the term “torture”. According to the Tokyo Declaration, torture involves ‘deliberate, systematic or wanton infliction of physical or mental suffering by one or more persons acting alone or on the order of any authority, to force another person to yield information, to make a confession or for any other reason.’⁴⁵ The *United Nations Convention Against Torture and other Inhuman or Degrading Treatment*,⁴⁶ defines torture to mean:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.’

Torture should never be used by police as an instrument in their hands to extract information from suspected criminals. Legally, torture of criminal suspects is prohibited internationally and states that are parties to this Convention are required to put in place mechanisms that will curb this atrocity.⁴⁷ However, Tanzania has not ratified this convention and its optional protocol to date.⁴⁸ Even so, the *International Covenant on Civil and Political Rights* (ICCPR) to which Tanzania is a party strictly prohibits all forms and acts of torture.⁴⁹ This fact, notwithstanding, does not absolve the country and its institution from observing international law principles, including the prohibition against torture.

5.2 The Use of Torture and the Law

(a) The Legal Position Under International Law

The legal position internationally with regard to torture and any other inhuman and degrading treatment is that it (they) should be prohibited. Under the Universal Declaration of Human Rights, torture is prohibited. Article 5 of the UDHR declares that “[n]o one shall be subjected to torture or cruel or inhuman or degrading treatment or punishment.” *The United Nations Declaration on*

45 See the Tokyo Declaration made by the World Medical Association, 1975. The definition is also quoted in Maina, *Op.cit. fn 2* at p.84.

46 United Nations, *Treaty Series*, Vol. 1465, p. 85, Adopted by resolution 39/46 of 10 December 1984 at the thirty-ninth session of the General Assembly of the United Nations. The Convention is open for signature by all States, in accordance with its Article 25.

47 See Article 3.

48 In January 2009, the Minister for Home Affairs Hon. Masha has been quoted arguing that the country has not ratified the said Convention because it contradicts with its laws and cited other ‘big’ nations that like the United State have not done so on similar grounds. However, in actual fact it is the laws of this country or those ‘other big states’ that contravene the provisions of this International Convention. See *The Zimbabwean*, ‘Tanzania: “Torture convention contradicts country laws”’. (Available from http://www.thezimbabwean.co.uk/index.php?option=com_content&task=view&id=18132&Itemid=108 or <http://www.ppmedia.com/ipp/guardian/2009/01/30/130601.html> (Accessed on 19th May 2017)).

49 See the ICCPR, Article 7.

the *Protection of All Persons from Torture* 1975 prohibits acts of torture even in exceptional circumstances like a state of emergency.⁵⁰ As noted earlier, torture is also prohibited by many other international instruments including the ones already pointed out.⁵¹

(b) The Legal Position Under the Municipal Law

According to the UN Declaration Against Torture, all States are supposed to, in accordance with the provisions of the Declaration, 'take effective measures to prevent torture and other cruel, inhuman or degrading treatment or punishment from being practised within its jurisdiction.'⁵² They are required to 'keep under systematic review interrogation methods and practices as well as arrangements for the custody and treatment of persons deprived of their liberty in its territory, with a view to preventing any cases of torture or other cruel, inhuman or degrading treatment or punishment.'⁵³

Accordingly, the United Republic of Tanzania Constitution, (1977 as amended from time to time) provides clearly in Article 13 (6) (e) that 'no person shall be subjected to torture or inhuman or degrading punishment or treatment.' Likewise, acts of torture, assault, and /or causing grievous bodily harm are prohibited under the law including the Penal Code.⁵⁴ However, despite of the prohibition under the Constitution, acts of torture and cruel or inhuman or degrading treatment have extensively been documented. At times, the police force uses torture to extract confessions from detainees and at times detainees have died in the hands of the police or other authorised persons who might have arrested them.⁵⁵

Furthermore, there is no automatic rejection of the evidence that might have been extracted from a suspect through illegal means like torture. Section 169 (1) of the Criminal Procedure Act, (CPA) gives courts 'absolute discretion, not admit the evidence unless it is on the balance of probabilities, satisfied that the admission of the evidence would specifically and substantially benefit the public interest without unduly prejudicing the rights and freedom of any person.' Further, section 169 (3) (a) of the CPA requires the court to consider the seriousness of the offence in the course of the investigation of which the provision was contravened, or was not complied with, the urgency and difficulty of detecting the offender, and urgency or the need to preserve the evidence of fact.' Critics have argued, therefore, that as the law currently stands, if a prosecutor can successfully argue public interest, any evidence obtained through torture will sail through.⁵⁶

50 Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975. U.N. Doc. A/10034 (1975) (Available from http://www.unhcr.ch/html/menu3/b/h_comp38.htm. (Accessed on 19th May 2017) Article 3 of this declaration provides that:

No State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

51 For instance, the four Geneva Conventions of 1948 governing the laws of war prohibits it under their common Article 3.

52 See Article 2 of the UN Declaration Against Torture, 1975, *Op.cit* fn 51.

53 *Ibid*, Article 6.

54 Cap. 16. [RE 2002].

55 Maina, has documented at length a number of cases that involved torture perpetrated by security forces and the police in Tanzania. (See Maina, *Op.cit* fn 2, at pp.91-127). In November, 2002, 17 detainees died while in Police Custody in Mbarali, Mbeya Region, Tanzania, due to suffocation.

56 See the C.H.R.I, *Op.cit* fn 9 at 15.

In view of the above, although in theory torture may be prohibited, yet in practice, where responsible organs of the state do not fully observe human rights standards, torture and other forms of inhuman or treatment or punishment continue unabated. In Tanzania, all acts of torture are offences under the Penal Code.⁵⁷ As a way of reducing and finally eliminating this trend, the UN Declaration against Torture emphasises on the need to train legal enforcers and other public officials responsible for those deprived of their liberty on the need to respect rights of the detained persons.⁵⁸ The effects of condoning torture within an institution like the police are profound. As argued earlier, an institution that trumps on human rights loses its credibility and confidence before the eyes of the general public nationally and internationally and this has a negative consequence to peace, order, tranquillity and the overall democratic governance system.

6.0 The Issue of Extra-judicial killings by the Police Force

6.3 What Does Extra-Judicial Killing Mean?

Extrajudicial killing means a deliberate killing not authorised by a previous judgement pronounced by a regularly constituted competent court affording all the judicial guarantees recognised as indispensable by civilised people.⁵⁹ Any act that amounts to extra-judicial killing is against human rights. Nowadays, however, arguments based on *per se* human rights approach hold a view that even a judicially pronounced death penalty is still inhuman hence against human rights. In particular, from such a strict approach, there is no taking issue with the accuracy, technique, or timeliness of an execution. Strictly, simply and unequivocally – death penalty is held to be wrong.⁶⁰

6.4 Incidences of Extra-Judicial Killing in Tanzania

Incidents of extra-judicial killing by Police in Tanzania are notable. In most cases of such killings, there has been a tendency to use excessive force when dealing with armed bandits or at times the whole matter may turn out to be a mob-justice case. However, according to the Commonwealth Human Rights Initiative,⁶¹ there is no evidence of existence of any governmental policy of shoot-and-kill but indeed, bandits are in most cases shot dead by police. As already stated, much as the use of force is permissible, it is crucial to note that force must be reasonably used and necessity of its use must be demonstrable.

The 2003 report of the Legal and Human Rights Centre (LHRC Report) has noted, for instance, that, in that year, one Samweli Mamaya died as a result of excessive

⁵⁷ Cap. 16, [RE 2002].

⁵⁸ See Article 5 of the UN Declaration Against Torture, *op. cit.* note 51, which provides that 'training of law enforcement personnel and of other public officials who may be responsible for persons deprived of their liberty shall ensure that full account is taken of the prohibition against torture and other cruel, inhuman or degrading treatment or punishment. This prohibition shall also, where appropriate, be included in such general rules or instructions as are issued in regard to the duties and functions of anyone who may be involved in the custody or treatment of such persons.'

⁵⁹ See the US law on the protection of torture victims- The Torture Victim Protection Act, 106 Stat.73 (1992), 28 U.S.C.A, S.350, (Notes).

⁶⁰ See Center for Constitutional Rights, 'The Death Penalty is a Human Rights Violation: An Examination of the Death Penalty in the U.S. from a Human Rights Perspective' (Available from <http://ccrjustice.org/sites/default/files/assets/files/CCR%20Death%20Penalty%20Factsheet.pdf>. (Accessed on 25th May 2017).

⁶¹ See the C.H.R.I's Report (*op. cit.* fn 9 at 17).

bleeding and brain damage resulting from beatings administered by the police.⁶² The deceased was accused of stealing a radio. Similarly, the LHRC Report notes that, on 16th July 2009, one Ryba Bwale Mkono was bitten by a member of police force using a club leading to injuries that caused his death on the next day.⁶³ The deceased was accused of stealing maize. All these are incidences of extra-judicial killing which tarnish the image of the police force and reduce public faith or confidence in it.

7.0 Police and Terrorism: Is the Law being Used or Abused?

From a historical standpoint, terrorism is not seen as a new problem.⁶⁴ It is said to be as old as history itself.⁶⁵ However, it has taken diverse forms⁶⁶ and has grown in profile in the recent decades.⁶⁷ Some factors that are said to be behind this include pronounced ethnic and national fragmentation; intensified religious fundamentalism, globalisation, and rapid development of technology and communication facilities.⁶⁸ Due to the sheer size of the problem and its far reaching consequences, no one can deny the fact that terrorism is evil and an affront to human life and universal values of civilisation.⁶⁹ Even so, defining what it is and what it is not has been a problem since then.⁷⁰

Notwithstanding lack of a unanimous definition of the term ('terrorism') or what constitutes it under international law, there are convergences of views on the subject and a number of states have set up definitions in their domestic laws.⁷¹ For instance, the United Kingdom Prevention of Terrorism (Temporary Provisions) Act of 1984, defined terrorism to mean:

"[T]he use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear"⁷²

⁶² See Legal and Human Rights Centre Report, *Annual Report, 2003 – Tanzania*, (2004) at p.5.

⁶³ See Legal and Human Rights Centre Report, *Annual Report, 2003 – Tanzania*, (2003).

⁶⁴ See A. Bhoumik, 'Democratic Response to Terrorism: A Comparative study of the United States, Israel and India,' *Denver Journal of International Law & Policy* 33 (2004-2005), 285.

⁶⁵ See Y. Alexander, (ed) *International Terrorism: Political and Legal Documents*, (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1992) at ix. See also E. Chadwick, *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict*, (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1996) at p.2.

⁶⁶ See M.C. Bassiouni, 'Legal Control of International terrorism: A policy-Oriented Assessment' *Harvard International Law Journal* 43 (2002), 83.

⁶⁷ See De Than, C. & Shorts, E. *International Criminal Law and Human Rights*, Sweet & Maxwell, London, 2003, at p. 231.

⁶⁸ The Human Toll of Terrorism, US Department of State, <<http://usinfo.state.gov>>. Indeed, things like mobile phone technology and the Internet have contributed to the expansion of the international element of terrorism since these (e.g. the internet) have to a great deal demolished the barriers to information and communication and things can be organised very quickly. The bombings of the American Embassies in Nairobi and Dar-es-Salaam in 1998 took place in a very short span of time though the two were located far apart.

⁶⁹ See Alexander, *op. cit.* fn 65.

⁷⁰ See J.A.R. Nafziger, 'The Grave New World of Terrorism: A Lawyer's View' *Denver Journal of International Law & Policy*, 31 (2002-2003) 1-22 at p.8; See also Bhoumik, *Op.cit.* fn 64 at p.287; See also De Than, C. & Shorts *Op.cit.* fn 67 at p. 232.

⁷¹ See A. Cassese, *Terrorism, Politics and Law*, (London and Guildford: Billing & Sons Ltd, 1989), at 5. There is also a reasonable body of precedents from human rights courts such as the European Court of Human Rights (ECHR) in relation to this topic.

⁷² Section 14(1) of the UK Prevention of Terrorism (Temporary Provisions) Act, 1984. (Now repealed and replaced by the 2000 Act).

The United States of America's (FBI) version is that:

"Terrorism is the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives".⁷³

In Tanzania, the Prevention of Terrorism Act⁷⁴ has not given a straightforward definition of the subject either. Section 3 of the Act does not define the concept but defines which acts constitute it by making reference to Section 4 which enlists such acts or omissions labelled as constituting 'terrorist acts' when committed and provides further that the expression "terrorist", shall be construed accordingly. Even so, Section 4, to which reference is made to by Section 3, does not provide a helpful explanation of what constitute terrorism.⁷⁵ All the same, even if there is no agreed definition of this concept, as Cassese contends, any violent act targeted against innocent people intending to force a state, or any other international subject, to pursue a line of conduct that it would not, should be termed as an act of terrorism and terrorism is thus a crime.⁷⁶

7.1 Legal Control of Terrorism: Balancing the Conflicting Interests

There is no doubt that the intensity of terrorists acts and terrorism are on the increase in our times.⁷⁷ Following the September 11 attacks in the United States of America in 2001, there have been efforts in different countries to create legal rules and procedures to curb terrorism.⁷⁸ Some of these laws have been controversial and subject to public outcry due to their ability to open-loose the gateways leading to flagrant violations of human rights.⁷⁹ This fear is well founded. According to Bekink:

'[m]any regard [these laws] to be Orwellian in nature, compromising democratic progress and individual freedoms.... [They] often create tension between established legal rules and principles, on the one hand, and new measures created to prevent acts of terrorism, on the other. The question is often asked: How should states protect their citizens, on the one hand, and allow nationals the full entitlements of their human rights and the law, on the other? Put differently, how should states balance the basic democratic rights of their people but simultaneously maintain and ensure security for the people and the state itself? Should governments be allowed to restrict and limit fundamental rights in an effort to protect the public and curtail the escalating tendencies of violence?'.⁸⁰

⁷³ The Federal Bureau of Investigation's Definition of Terrorism.

⁷⁴ Act No. 21 of 2002.

⁷⁵ However, defining each act that constitutes the offence of terrorism is a kind of approach that has been favoured in many treaties on combating this vice. (See Nafziger, *Op.cit.* fn 70).

⁷⁶ See Cassese, *Op.cit.* fn 71 at p.6.

⁷⁷ See De Than & Shorts, *Op.cit.* fn 67.

⁷⁸ See R.C. Kumar, 'Human Rights Implications of the National Security Laws in India: Combating Terrorism while Protecting Civil Liberties' *Denver Journal of International Law & Policy*, 33 (2003-2004) 195-222.

⁷⁹ See Bekink, B. 'A dilemma of the twenty-first century state: Questions on the balance between democracy and security' *African Human Rights Law Journal* 5 (2005) PP.406-423. Indeed, as De Than & Shorts contends, there is a dilemma in discussing 'the extent to which it is possible or desirable to regard terrorist suspects as having different (or maybe lesser) human rights than other persons.' See De Than & Shorts, *Op.cit.* fn 67 at 252.

⁸⁰ *Ibid.*, at p.408.

Questions raised in the above excerpt are of the highest relevance to a society like ours where acts of terror have been felt and their pains still live within the memories of some of us. They are all challenging since terrorism is a vice that by its nature and consequences violates human rights. At the same time enacting a law that white-washes the basic human rights and other democratic principles in the name of fighting terror is stepping from the ashes to the fire itself. For that reason, since 'states have specific duties and responsibilities towards their citizens, one being to protect and shield them from public and private violence, [there must be a balanced approach between the] tasks of providing security and ensuring democracy.'⁸¹

Although this is a Herculean task and a dilemma of our times,⁸² authors have suggested that it will be possible to reconcile the two competing interests (i.e. that of the state and society against the fundamental rights of an accused terrorist) 'if the basic rights and obligations of a state *per se*, are [established as well as the] lawful safeguards [that] have been created to protect the individual against unreasonable state actions.

7.2 Legal Control of Terrorism: Are the Legal Mechanism Used or Misused?

Whether there is a misuse of the legal control mechanisms in dealing with terror suspects is an issue that is linked to the examination of the extent to which human rights of individuals have suffered in a guise of terror. As earlier noted, dealing with terrorism is a Herculean task of balancing competing interests. In almost all anti-terror legislation, in different jurisdictions that have created them, (especially after *September 11 attacks* in the United States of America in 2001), involve some form of restrictive enjoyment of the rights and freedoms of the individual. These include some form of extended detention of suspects than a far reaching compared to the suspects arrested for other offences.⁸³ As such, the right to liberty and security which is recognised in many Human Rights Conventions is a bit restricted.

However, there are some instances where the legal mechanisms are misused since some human rights obligations which States have assumed include the obligation not to derogate from some rights such as the right to life. In the European continent where death penalty has been abolished and thus right to life is fully enjoyed, where suspects were killed on suspicion of being involved in terrorist acts, the European Court of Human Rights denounced the act as a breach of the obligation and a violation of Article 2 of the European Convention on Human Rights.⁸⁴

81 *Ibid*. This duty is fully recognised by the Universal Declaration on Human Rights, 1948 as it requires governments to protect the people's human rights and puts in place the principles that need to be followed.

82 See De Than & Shorts, *Op.cit* fn 67, at p.231, where it is argued that '[d]emocratic States face a real problem in maintaining their security and safety of their citizens without cutting too far into the human rights of their citizens.'

83 *Ibid*, at p.254. In some countries (e.g. the United States) suspects have been detained in Guantanamo Bay, Cuba, without trial or right to legal representation. This is a controversial move which has seen opposition from various activists who (correctly I suppose) argue that 'protection against terrorism should not be achieved through processes whereby human rights and accepted constitutional principles, such as the rule of law and democracy, are ignored.' (See Benkik, *Op.cit* fn 79 at 409).

84 See the Case of *McCann v. UK*, (1995) 21 EHRR, 97.

In Tanzania, changes in the existing legal framework were effected in 2002. For many societies it is a common practice to change the laws so as to meet a perceived social need if the existing ones no longer meet the same. The laws that existed prior to the enactment of the Anti-Terrorism Act in Tanzania were not silent on acts similar to terrorist acts. The Penal Code, for example, under Part XXV extensively deals with the issue of kidnapping and abduction while Part XXI deals with endangering safety of persons travelling by railway and attempts to injure by explosive substances.⁸⁵

Currently, and notwithstanding such other laws, terrorism falls under the Prevention of Terrorism Act, No. 21 of 2002. The law was enacted 'to provide for comprehensive measures of dealing with terrorism, to prevent and to co-operate with other states in the suppression of terrorism and to provide for related matters.'⁸⁶ The Act seeks to ensure protection of national security and public safety.⁸⁷ For that reason, it prohibits all acts of terror, association with terrorists, knowingly sheltering or financing them or their activities as well as being in possession of articles with a view to carry out terrorist acts.⁸⁸

Under the Tanzanian law on terrorism (The Prevention of Terrorism Act, No. 21 of 2002), police officers of or above the rank of Assistant Superintendent (or below that rank but subject to section 29), or an immigration officer or a member of Tanzania intelligent security service, have been granted powers to search, seize, arrest without warrant any person suspected to be a terrorist.⁸⁹ However, in doing so they are supposed to act reasonably. The Act permits use of force as may be necessary for the exercise of the powers.⁹⁰ The Act stresses that the degree of force which may be used shall not be greater than is reasonably necessary.⁹¹

In most cases, questions regarding police accountability for deaths, injury or damage to property in the course of exercise of their duties under this law are weighed on the balance of reasonableness and the necessity of the amount of force used.⁹² Consequently, liability and waiver of immunity given to the police under this law are matters which depend on the balance of necessity of the force used by the particular member of the police. The court, in my view, will use the reasonable man's test to determine whether one is immune or not and it is the court that will have to interpret what amount force was excessive and unnecessary.

Police have also been given sweeping powers to infringe the privacy of individuals including wire tapping and tracking of communications transmitted by varied methods. However, for them to intercept communications they must have obtained the consent of the Attorney General to that effect and an ex parte

⁸⁵ See Section 244 down to section 253. See also section 224, section 226 and section 236.

⁸⁶ See the Preamble to the Prevention of Terrorism Act, No.21 of 2002.

⁸⁷ See E. Tamila, 'Enacting Law on Terrorism in Tanzania: Examining a New Legislation,' *Nyerere Law Journal*, 1 (2003), 61.

⁸⁸ See Section 5-10 of the Prevention of Terrorism Act, No.21 of 2002.

⁸⁹ See section 28 & 29 of the Act.

⁹⁰ See section 29 (5) of the Act.

⁹¹ See Section 29 (6) of the Act.

⁹² According to section 29 (6) of this law '[a] police officer who uses such force as may be necessary for any purpose, in accordance with this Act, shall not be liable, in any criminal or civil proceedings, for having, by the use of force, caused injury or death to any person or damage to or loss of any property.'

order of the Court.⁹³ The information obtained in the exercise is admissible as evidence of truth-notwithstanding other rules of evidence such as hearsay rule.⁹⁴ Furthermore, the Minister has also granted sweeping powers to declare a person or an entity a terrorist group. This is indeed a wide discretion which may be abused for political gains if not properly checked.

Consequently, from a general viewpoint, the fears regarding misuse of this law and hence criticism against it are based on the argument that it has vested too wide ranging powers over the Police to the extent that there is possibility of abuse that may infringe individual's rights if prudence is not exercised when implementing it. This being the case, there is a great need to balance between the application of the law and according respect to individuals' human rights, especially when executing the provisions of Part V of the Prevention of Terrorism Act, No. 21 of 2002 (which deals with the investigation, arrests and detention of suspected terrorist offenders).

8.0 Conclusion and the Recommendations

8.1 Conclusion

Respect for human rights is one of the basic pillars of democracy which must be manifested in a democratic society. Human rights are inalienable rights which are not bestowed on us by the state or any other institution. Every human being is born fully endowed with these rights and none should be deprived or should deprive or restrict another from the full enjoyment of these rights unjustifiably. Unjustifiable restrictions or interferences with the enjoyment of human rights amount to violations.

Human rights violations, however, are of varied nature including unlawful acts or methods employed by state agencies such as illegal interrogation practices and unreasonable limitations to personal freedom, extrajudicial killings, torture to mention but a few. While all such possibilities need to be taken into account, it is crucial to remember that the law in Tanzania especially the Constitution demands respect for human rights and the dignity of human beings at large. Every individual is equal before the law and has a right to equal protection and benefits of the law. Respect for individual human rights is not for a few people but it is a requirement to be accorded to all universally.

As the society finds itself in the threats of insecurity arising from local and international terrorism and other vices, possibilities that police may misuse their powers vested on them by the law are also very high. In this regard, there must be a balance between dealing with all these vices while at the same time respecting the basic human rights of all individuals. As noted in this article, achieving such a balance may not be an easy task. Nevertheless, human rights should never be sacrificed on the pretext of security since doing so creates more insecurity. Meanwhile, there is a great demand for building a culture of respect for human rights not only to our security forces but also the society at large. The success of

⁹³ See Section 31 of the Act.

⁹⁴ *Ibid.*

this, however, lies on continued efforts to instil and observe respect for human rights within the fabric of the society and its institutions.

8.2 Recommendations

While on the one hand respect for and observance of human rights is a noble duty for every individual within a democratic society, on the other hand, it may be difficult for one to respect what he/she does not value. Valuing something, however, depends very much on the extent of knowledge which one possesses concerning the potential usefulness or vitality of the material thing to be valued.

The above argument adds weight to what many people often, and correctly, acknowledges, that, 'knowledge is power' and 'ignorance is a seedbed of all evils.' Accordingly, and as noted earlier, being fully conscious of human rights is as good as being equipped to defend ones own rights or defend persons own rights as well as those of other people. This is equally important thing to note since the effectiveness of human rights law to protect, prevent and redress human rights abuses is significantly reduced where those who are supposed to ensure enforcement of laws are themselves ignorant of what human rights are and their duties in promoting and respecting these rights.

As noted in this article, although the police are at some point entitled to use force in order to ensure that laws are observed, the use of force should only be used when necessary and inevitable, depending on the surrounding circumstances calling for its use. Otherwise use of force should be delayed up until when it is so necessary. In the course of discharging their duties, police are duty bound to ensure the observance of all procedures and rules that have been lawfully laid down with a view to protect and promote respects for and enjoyment of the basic human rights. Failure to do so exposes the whole institution into a state of public ridicule instead of public ovation. Indeed, the possibility of it being exposed into public ridicule due to abuse of human rights has been great especially at this time when the society bolsters its muscles to fight against terrorism and all of its forms.

With such a fact in mind, in order to avoid sinking into a deplorable situation of human rights violation there is, as a way forward, a need for frequent mounting of human rights awareness campaigns on the part of our police forces as a means to promote the observance and respect of these rights. This indispensable agenda if we intend to create a reformed police force that is more responsible, more democratic and more accountable to service of all Tanzanians. Such frequent programmes would help to re-orient policing onto human rights-based approaches thereby instilling a culture of human rights within the institution. As once observed, '[t]he future prospect of securing human rights in Tanzania lies in cultivating a culture of respect for the rule of law in general, and individual rights and freedoms in particular and building effective support structures and societal support.'⁹⁵

⁹⁵ See Mbunda, *Op.cit. fn 27*, at p.3.