



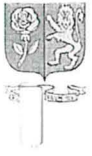
STRATHMORE UNIVERSITY LAW SCHOOL

TRUST AND CONCERN: THE BALANCE BETWEEN PRIVACY IN A DIGITAL AGE
AND COUNTER TERRORISM IN KENYAN LAW

A RESEARCH PAPER SUBMITTED IN PARTIAL FULFILLMENT OF THE
BACHELOR OF LAWS DEGREE

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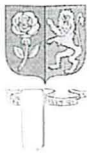
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DECLARATION

I, Tororey Leon Kiptoo, do hereby declare that this dissertation submitted for the degree of Bachelor of Laws has not previously been submitted by me at this or any other University, that it is my own work and that all sources and all referenced material in it have been acknowledged. I have read and understood the regulations governing submission of a Bachelor of Law dissertation, including those relating to length and plagiarism, as contained in the rules of this university, and that this dissertation conforms to those regulations.

Tororey Leon Kiptoo



ACKNOWLEDGEMENTS

My heartfelt appreciation goes to my supervisor, Mukami Wangai, who worked tirelessly with me to guide me through this academic discovery and without whose input, this dissertation would not have been complete. This is a hole in one.

To my Dean, Dr. Luis Franceschi, who advised me to embark on this sphere of law. May your wisdom continue to shine a clear path for the law school.

To Dr. Ambani J. Osogo, Douglas Gichuki and George Kimotho who inspired and formed me, may you inherit the solomonic dynasty.

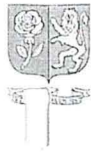
To my family whose never-failing faith and encouragement inspired me to the end; especially my grand-father the late Silvester Kimaru Tororey, who espoused the best of public service and a true man of the law.

To Ben, Robert, Andrew, Timothy, Dan, Mary-leah, Wangechi, Lesly, Kenta, Ombachi, Kena, Jared, Fredrick, Nella, Zippy, Sharon, MaryAnne, Winnie, Lavinia and all other gallant pioneering comrades, I love you all, may you continue the good and noble fight.

To the knights of the hour, and the RBIU cohorts, we shall agree to disagree.

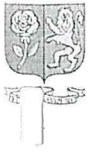
To the Strathmore Law Union in its infancy, may the baby get on to crawl, take a step and eventually conquer the world.

Finally and most importantly to God, who comforted me by the 121st psalm, as sang, "I will lift up my eyes to the hills — from whence comes my help? My help comes from the Lord, Who made heaven and earth. He will not allow your foot to be moved; He who keeps you will not slumber." NKJV



ABSTRACT

This study undertakes to analyze the existing anti-terrorism laws in Kenya, interrogate their application and question whether there is adequate protection against infringement of privacy rights. The study narrows down its review of case studies on areas of surveillance and mobile technology which have defined themselves as the new front lines of privacy protection battles in this digital age. The study canvasses both local and international legislation, case law and the impact of western foreign policy on counter terrorism and its effect on local privacy rights. In the end the study makes a conclusion and recommendations based on the observations discussed.



LIST OF ABBREVIATIONS

ACHPR African Charter on Human and People's Rights

AU African Union

CAP Chapter

CIA Central Intelligence Agency

CCK Communications Commission of Kenya

COSATU Congress of South African Trade Unions CSO civil society organisation

CTC Counter-terrorism Committee

ECHR European Convention on Human Rights

ECtHR European Court of Human Rights

GA General Assembly

HRC Human Rights Committee

ICCPR International Covenant on Civil and Political Rights

ICJ International Commission of Jurists

ITU International Telecommunication Union

OAU Organisation of African Unity

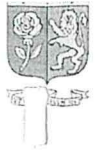
OCHR Office of the High Commission on Human Rights

SC Security Council

UDHR Universal Declaration of Human Rights

UK United Kingdom

UN United Nations



UNHRC United Nations Human Rights Committee

UNGA United Nations General Assembly

US United States of America

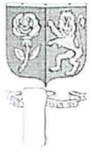


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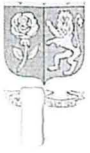
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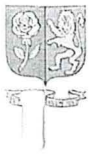
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CHAPTER ONE

“While concerns about national security and criminal activity may justify the exceptional and narrowly-tailored use of surveillance programmes, surveillance without adequate safeguards to protect the right to privacy actually risk impacting negatively on the enjoyment of human rights and fundamental freedoms.” -Navi Pillay¹

Introduction

This Chapter makes a brief introduction into the background of privacy and terrorism in the modern world. It also makes a succinct preview on the approach used in the rest of the work with a breakdown of the chapters. The chapter seeks to show the significance, scope and treatment that the study takes.

1.1 Background of the Study

Since *Entick v Carrington*² it has been affirmed in court rooms and legislative halls that protection of privacy is a fundamental right. However privacy faces a new terror in the state having to protect it, while still ensuring security and in this case, counter terrorism. Terrorism in itself is a unique foe; the quote ‘One man’s terrorist is another man’s freedom fighter’,³ highlights one of the greatest challenges in the fight against terror, that is, definition and conceptualization. The matter of definition and conceptualization is usually a purely theoretical issue a mechanism to work out the appropriate set of parameters for research. The definition the study proposes being that terrorism is the intentional use of, or threat to use violence against civilians or civilian targets in order to make political gain.⁴

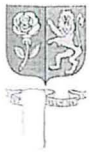
Anti-terrorism legislation has serious implications for privacy. Many of the law’s provisions expand the governments existing ability to intercept wire, oral, and electronic communications relating to terrorism and other crimes, to share criminal investigative information, and to conduct electronic surveillance. While the laws are controversial, and some are of questionable constitutionality, the surveillance provisions of the laws mostly make changes in degree and not

¹ The High Commissioner for Human Rights In July 2013, following revelations about the operation of the National Security Agency of the United States of America, leaked by Edward Snowden.

² *Entick v Carrington & Ors* [1765] EWHC KB J98 (1765)

³ Gerald Seymour, *Harry’s Game*, Hodder Paperbacks (1975)

⁴ Ganor, B ‘Defining Terrorism - Is One Man’s Terrorist another Man’s Freedom Fighter?’ (2010) <http://www.ict.org.il/Article.aspx?ID=1123> (Accessed on 27 February 2015).



kind. Other aspects of privacy remained unchanged. Further events and legislation will affect privacy rights and interests, and some protections may be eroded.⁵

1.2 Approach to the study

The title focuses on the idea of managing privacy and security through a balance, based on the notion that the state has the duty to protect parallel to the individual's right to privacy. However as the risk of imminent danger to the population increases, the state faces the task to maintain public good. No one has an argument for 'anarchy' and consequently the safety of the public gains primacy over certain broad areas on the individual's right to privacy.⁶

Taking consideration that the thesis is based on the lenses of local legislation there is needed to question the objectives of the laws. Counter terrorism legislation having already been formulated, then the first aim is to analyze. In basing the discussion on a balance, the second aim will also be to propose formulation of new laws to preserve the liberties; more specifically the right to privacy, this is indeed if the current formulation is lacking.

1.3 Nature of the study

The dissertation seeks therefore to canvas the following issues:

- I. To analyse the protections to privacy provided in Kenyan law.
- II. To discuss the impact of counter-terrorism efforts against privacy rights.
- III. To propose a balanced framework on the protection of privacy rights without undue sacrifice to the security of citizens.

1.4 Significance of the Study

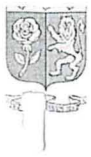
Without a comprehensive Act of parliament outlining limitations on agencies collection, distribution and use of personal information in systems of records; privacy will remain an endangered species in the circle of rights.

As John Dewey observed, "A problem well put is half-solved"⁷ as this affects the parameters of discussion, the emphasis on certain aspects and the relevance of the findings and recommendations. In this regard the study identifies problems with counter terrorism legislation

⁵ G. Robert, *Government Information Quarterly* Volume 19, Issue 3 (2002) 255–264.

⁶ Waldron J. 'Security and Liberty: The Image of Balance' *Journal of Political Philosophy* 11 (2), (2003) 191–210,

⁷ Dewey J. *Logic: The Theory of Inquiry* (Jo Ann Boydston ed. 1991) (1938) 112.



and practices well as analyse the impact of the war on terror with regard to the rule of law and the protection of privacy as a human rights principle in the hope of developing a robust understanding of the protections available and improvements that can be made to the legal regime from best practice to better preserve our rights.

1.5 Chapter Outline

Chapter One has introduced the aims of the study and provided a statement of the problem and a brief background of the problem, the purpose of the study or general objective, specific objectives and rationale of the study.

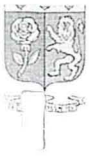
Chapter Two provides theories that provide a perspective or lens through which to examine a topic through a theoretical review.

Chapter Three analyses anti-terrorism legislation in Kenya, with the objective of analysing the compatibility of these laws with privacy rights. The Chapter explores the viability of regional arrangements to fight terrorism and proposes that these should be adopted.

Chapter Four provides a detailed analysis of privacy treatment within the law and government policy. It considers the relationship between the need to protect individuals from terrorist attacks and the need to protect the privacy rights of citizens. The question of balancing security needs of a nation with a respect for human rights is explored.

Chapter Five analyses the international and domestic legal framework of this question of balance, mainly by conducting a case study of the international jurisprudence on terrorism of the UN Human Rights Committee and the effect of western anti-terror policy on African regimes.

Chapter Six provides a conclusion to the study as well as recommendations arising from various issues raised.



CHAPTER TWO

Introduction

This Chapter aims to introduce the main themes of the discussion that is privacy and terrorism. It addresses the different intellectual positions held in the definition, scope and containment of terrorism as a global threat. On privacy it discusses the importance of the right and the criticisms it faces, which often inform the anti-terror laws that suppress its free exercise.

2.1 Terrorism: A Background

On 29th September, 2001 the Security Council adopted Resolution 1373⁸ under Chapter VII of the United Nations Charter obligating States to implement more effective counterterrorism measures at the national level and to increase international co-operation in the struggle against terrorism. The Resolution also established a Counter Terrorism Centre to monitor the issue of terrorism and to receive reports from States on measures taken in implementing counterterrorism measures.

Even at these formative stages of the international framework to fight terrorism, the United Nations High Commission for Human Rights emphasised that the best strategy to isolate and defeat terrorism is by respecting human rights, fostering social justice, enhancing democracy and upholding the primacy of the rule of law.⁹

2.2 Defining Terrorism

Defining terrorism is not as easy as it may seem. At the international level, there are inconsistent definitions of the terms terrorism, international terrorism and terrorist. Thomas Mitchell has observed quite rightly that terrorism is not a monolithic concept.¹⁰ The definition is often used as a political tool - in attempts to deny legitimacy to opponents.¹¹ An example is the treatment of

⁸ Security Council Resolution S/RES/1373 (2001), Threats to International Peace and Security Caused by Terrorist Acts

⁹ Statement of the UN High Commissioner for Human Rights, Sergio de Mello to the Counter Terrorism Centre, October 21, 2002. Available at <http://www.un.org/Docs/sc/committees/1373/HC.htm> (Accessed on 7th November 2015).

¹⁰ See Mitchell T. Defining the Problem in Charters D. (ed) *Democratic Responses to International Terrorism* (1991) 13, *The General International Law of Terrorism* in Higgins R. & Flory M. (eds), *Terrorism and International Law* (1997: London, Routledge), 13, Becker T. *Terrorism and the State: Rethinking the Rules of State Responsibility*, Oxford and Portland, Oregon, Hart Publishing (2006) 83-120.

¹¹ Becker T. *Terrorism and the State: Rethinking the Rules of State Responsibility*, 85



mau mau as terrorists in the 1950 s by British colonial authorities in Kenya¹² while the group was regarded as a legitimate liberation movement by the Africans. An International Convention on Terrorism¹³ is still in the process of being drafted and there is as of yet no internationally uniform recognized definition of the term. Nevertheless at the international and regional level, some effort has been made to define and adopt rules relating to international terrorism. The United Nations has adopted 13 international conventions relating to acts that amount to terrorism.¹⁴

For purposes of this thesis, the following definition of terrorism will be adopted: an act intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a government or an international organization to do or abstain from doing any act.¹⁵ This definition is used to exclude other forms of crime that may be subject to government surveillance as terrorism often has its own set of laws to combat it.

2.3 Literature Review

On privacy as a civil liberty under the surveillance state Ramage (2007)¹⁶ covers the area of privacy and private life as a topical human right issue. The author takes case studies of privacy laws from the United States, Australia and select European Union nations. There is a great critique on the apathy in which society deals with violations of privacy. The biggest argument she presents however is the need for the United Kingdom to have clear privacy laws, as is

¹² Throup D. *Economic and Social Origins of Mau Mau 1945-1953*, Athens, Ohio University Press (1988)

¹³ Becker T. *Terrorism and the State: Rethinking the Rules of State Responsibility*, 89.

¹⁴ These Conventions include Convention on Offences Committed on Board Aircraft, 163, Convention on the Suppression of Unlawful Seizure of Aircraft, 860 U.N.T.S. 105, entered into force Oct. 14, 1971; Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971, 974 U.N.T.S. 178, entered into force January 26, 1973; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents 1973; Convention against the Taking of Hostages G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/46 (1979), entered into force June 3, 1983; Convention on the Physical Protection of Nuclear Material, 1980; Convention on the Suppression of Terrorist Bombing, G.A. Res. 164, U.N. GAOR, 52nd Sess., Supp. No. 49, at 389, U.N. Doc. A/52/49 (1998), entered into force May 23, 2001; Convention on the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc A/54/49 (Vol. I) (1999), S. Treaty Doc. No. 106-49 (2000), 39 I.L.M. 270 (2000), adopted 9 Dec. 1999, entered into force 10 Apr. 2002; International Convention for the Suppression of Acts of Nuclear Terrorism, 2005. The full text of these conventions is available at <http://www.un.org/terrorism/instruments.html>. (Accessed on 13th November 2015)

¹⁵ See United Nations Office on Drugs and Crime, *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols* (2003). Available at <http://www.unodc.org/odccp/terrorism.html?id=11702>. (Accessed on 3rd June 2015)

¹⁶ Ramage S. *Privacy-Law of Civil Liberties*, iUniverse (2007)



similarly proposed for Kenya, to include law of confidence, press intrusion into private life police and other surveillance, police powers and physical integrity.

According to Aronson (2013)¹⁷ the historical context of Kenya's relationship with terrorism on a domestic level, needs to be examined to give a profile for past and future perpetrators, and also explain the reasons that Kenya is a common and attractive target to terrorists. Specifically analyzing criminological and root cause theories while taking into account inherent policy flaws; the author seeks to offer insight into the importance of Kenya's antiterrorism strategy in maintaining global security.

According to authors Mogire and Agade (2011)¹⁸, there is need to critically examine the counter-terrorism (CT) measures that have been taken in Kenya in response to the attacks and threats made on the country. The authors describe the measures, attempts to explain the rationale and motivations behind them and to assess their effectiveness. It is argued that while these measures are aimed at addressing the perceived main causes of terrorism in Kenya, the assumptions upon which they are based are often flawed, do not have domestic support and are externally imposed, primarily by the United States, and hence are often criticised as a tool of US imperialism. Further, the price of these measures has been high in terms of the negation of the civil and human rights and freedoms.

William Rosenau (2005)¹⁹ argues that terrorist recruitment requires at least three elements: "(First) a lack of state capacity, particularly in the areas of police, intelligence, and law enforcement; (second) a 'mobilizing belief,' such as Salafist/jihadist extremism; and (third) 'appropriate agitators' who can propagate these ideas and create an effective terrorist force."²⁰ The first and second elements he argues weighs heavily on the ability of authorities to maintain surveillance on certain individuals.

¹⁷ Arson S. Kenya and the Global War on Terror: Neglecting History and Geopolitics in Approaches to Counterterrorism, *The London School of Economics African Journal of Criminology and Justice Studies (AJCJS)* Vol. 7, Issue 1 &2 (2013)

¹⁸ Mogire E. & Agade K., Counter terrorism in Kenya, *Journal of Contemporary African Studies*, Vol. 29 Issue 4,(2011) 473-491.

¹⁹ Rosenau W. Al Qaida recruitment trends in Kenya and Tanzania. *Studies in Conflict and Terrorism*, 28(1), (2005) 1-10.

²⁰ Rosenau. W. 'Al Qaida recruitment trends in Kenya and Tanzania,' 5.



2.4 Theoretical Framework

The theoretical framework seeks to identify a comparative analytical theoretical framework which consolidates existing knowledge and identifies potential research questions.

The title focuses on the idea of managing privacy and security through a balance, based on the notion that the state has the duty to protect parallel to the individual's right to privacy. However as the risk of imminent danger to the population increases the state faces the task to maintain public good. No one has an argument for 'anarchy' and consequently the safety of the public gains primacy over certain broad areas on the individual's right to privacy.²¹ Therefore there indeed may be parallel lines drawn towards the states obligations but these lines are not of equal girth.

Indeed, balance is not the only thought forwarded in the management of privacy and security. Other scholars as Michaelson (2010) propose proportionality as a probable framework.²² What proportionality generally requires is that there is a reasonable relationship between the means employed and the aims sought to be achieved. Others have suggested a more structured approach based on Constitutional Law and International Human Rights²³. More often than not, the rationale — *or raison d'être* — for adopting a certain regime is based on the community involved and thus the values they hold.²⁴

The approach the study takes of a balance faces criticism that the foundations of the thought are weak. There is an assumption of a common shared understanding on the essence of liberty and security. This in effect forestalls discussions on the definitions and scope of liberties and security. Critics also claim there is the view that the balance metaphor is heavily tilted to the aims of security.²⁵ Even draconian Security Laws are often defended that for liberties to exist there must be such laws thereby tilting the scales further.

²¹ Waldron J. 'Security and Liberty: The Image of Balance' *Journal of Political Philosophy*, 11 (2), (2003)191–210.

²² Michaelson C. 'Reforming Australia's National Security Laws: The Case for a Proportionality-Based Approach' *University of Tasmania Law Review*, 31 (2010).

²³ Michaelson C. 'International Human Rights on Trial — The United Kingdom's and Australia's Legal Response to 9/11' *Sydney Law Review* 275, (2003).

²⁴ MacDonald S. 'Understanding Anti-Terrorism Policy: Values, Rationales and Principles' *Sydney Law Review*; June, Vol. 34 Issue 2. 317.(2012).

²⁵ Carne G. 'Brigitte and the French Connection: Security Carte Blanche or A La Carte?' *Deakin Law Review* 573, 614 (2004).



Taking consideration that the thesis is based on the lenses of local legislation there is needed to question the objectives of the laws. Counter terrorism legislation having already been formulated, then the first aim is to analyze. In basing the discussion on a balance, the second aim will also be to propose formulation of new laws to preserve the liberties; more specifically the right to privacy. This process cannot be successfully traversed or achieved without inclusion of proportionality and other regimes so proffered.

2.5 Research Methodology

The study was conducted through use of various databases in collecting material for research. These databases contain various literature including scholarly articles, journals, cases, statutes and books relevant to my research area. These databases include but were not limited to Jstor, Lexis Nexis, Social Sciences Research Network (SSRN), Hein Online, Nairobi University Portal and KenyaLaw.Org. The study also relied heavily on primary and secondary sources of data. Primary sources of data include legal documents such as the Constitution and various statutes. Secondary sources that include scholarly articles found in journals and books.

2.3 Conceptualizing the Right to Privacy

For any weight to be substantially placed on the merits of the protection of privacy it is important to lay a basis on the value of privacy and the philosophical underpinnings to which its protections lay. Indeed, there are many who view privacy to be a Right that can be infringed on to maintain security and public order, their arguments for that position often begin with a statement as ‘I don’t have anything to hide from the government.’²⁶

However, even to citizens who are most willing to be under government surveillance, there is an amount of intimate information to which they would object to collection and scrutiny. This was expressed by the words of David Flaherty writing on privacy, that, ‘There is no sentient human being in the Western world who has little or no regard for his or her personal privacy; those who would attempt such claims cannot withstand even a few minutes’ questioning about intimate

²⁶ Solove D. “I’ve Got Nothing to Hide” and Other Misunderstandings of Privacy, (2008) Electronic copy available at: <http://ssrn.com/abstract=998565> (Accessed on 5th November 2015).



aspects of their lives without capitulating to the intrusiveness of certain subject matters.²⁷ This would possibly apply for citizens in the African contexts as well.

Privacy as a concept is in itself an ambiguous legal object with different lenses available to view what constitutes an infringement and what does not. This creates a herculean task in establishing and protecting it as a primal right. Robert Post declares that, "Privacy is a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings, that I sometimes despair whether it can be usefully addressed at all."²⁸ This view is shared by Judith Jarvis Thomson who observes that, "the problem with privacy is that nobody seems to have any very clear idea what it is."²⁹ Digging further the grave to which the study aims to excavate from a working concept for privacy discourse.

It is possible however to conceptualize privacy without recourse to strict definition but by *per genus et differentiam* which involves outlining the necessary and sufficient elements that create a frame for what privacy is. Two metaphors in popular culture demarcate the relationship between privacy and government with succinct inferences. The metaphor in George Orwell's 1984³⁰ gives a neat representation on the harms of government surveillance such as inhibition and social control, the metaphor however focuses on collection of intimate information while modern challenges to privacy involve bulk collection of non vital information such as addresses, gender, and marital status and are not particularly sensitive.

The metaphor in Franz Kafka's *The Trial*, gives a complementary focus on privacy, outlining the dangers of bureaucracy with inscrutable purposes that collates data on its citizens for the purpose of decision making at the exclusion of the principle subjects who are the citizens.³¹ The problems traced out by Kafka's metaphor are concern the more administrative aspects of surveillance, the collection, storage, analysis and use of data by the state. Their effect is creating a dissonance between the individual and the state, ceding power to the sovereign and creating a social structure that diminishes the capabilities of an individual in the democratic process.

²⁷ Flaherty D. *Visions of Privacy: Past, Present, and Future*, in *Visions Of Privacy: Policy Choices For The Digital Age*. Colin J. Bennett & Rebecca Grant eds., (1999) 19, 31

²⁸ Post R. *Three Concepts of Privacy*, GEO. L.J., 2087 (2001) 8.

²⁹ Thomson J. *The Right to Privacy*, in *Philosophical Dimensions Of Privacy: An Anthology*, Ferdinand David Schoeman ed., (1984) 272.

³⁰ Orwell G. *1984* Signet Classic (1949)

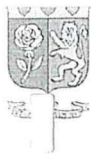
³¹ Kafka F. *The Trial*, Willa & Edwin Muir Trans., Random House 1956) (1937) 50–58



The privacy theorist Daniel Solove proposes taxonomy of privacy to best encompass the different privacy concerns that arise. The taxonomy has four categories of privacy problems. The first general category is information collection, which involves the ways that data is gathered about people. The second general category is information processing. This involves the storing, analysis, and manipulation of data. Information dissemination is the third general category. Disseminating information involves the ways in which it is transferred or threatened to be transferred to others. Finally, the last category involves invasions. Invasions are direct interferences with the individual, such as intruding into her life or regulating the kinds of decisions she can make about her life. He proposes that viewing privacy problems in different categories helps identify the harm caused and protections that are required.

The value of privacy can be viewed as a social right or as an individual right. Thomas Emerson views that privacy “*is based upon premises of individualism that the society exists to promote the worth and the dignity of the individual. . . . The right of privacy . . . is essentially the right not to participate in the collective life—the right to shut out the community.*”³² His views stem from the idea that man in himself has a sphere of sovereignty that ought to be guarded.

³² Emerson T. *The System of Freedom of Expression* (1970) 545, 549.



CHAPTER THREE

Introduction

This Chapter presents a background of terrorist attacks that have occurred on Kenyan soil. It then goes on to detail the different pieces of legislation that protect privacy rights and on the other hand also presents legislation that has been enacted to give government authorities power over privacy rights.

3.1 Terrorism in Kenya

Kenya has faced a number of modern transnational terrorist attacks leading from the first phase on 28th January, 1976 where there was a planned³³ attack on an El Al Israeli airline making a stopover in Nairobi by the Popular Front for the Liberation of Palestine (PFLP) and the Baader-Meinhof group. The second incident occurred four years later on the Israeli owned Norfolk hotel by the PFLP leading to the death of 15 people³⁴. This second incident was as a direct retaliation on Kenya's assistance to Israel to free hostages at Entebbe Airport in Uganda.

The second phase of terrorist attacks emerged from radical Islamists from 1988 with the incident where the American embassy in Kenya was attacked killing over 200 people, 12 being American, and injuring thousands.³⁵ In 2002 terrorist believed to be affiliated to Al-Qaeda and the Nairobi American embassy attack in coordinated assaults in Mombasa fired shoulder-launched missiles at an Israeli commercial aircraft narrowly missing it and minutes later detonated a bomb at the Israeli-owned Paradise hotel in a suicide mission. However, Kenya only became a major entrant in the 'Global War on Terror' after the American twin tower terrorist attacks of September 11, 2001.³⁶ This second phase of terrorist attacks was seen to be largely retaliatory to Kenya's support of Western powers through hosting of their bases and providing a strategic gateway to the horn of Africa.³⁷

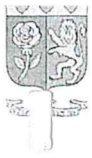
³³ This plot was ultimately thwarted after successful intelligence sharing between Israel and Kenya.

³⁴ Mogire E. & Agade K. Counter terrorism in Kenya, *Journal of Contemporary African Studies*, Vol. 29 Issue 4, (2011) 473-491.

³⁵ Krause, Volker & Otenyo, E., Terrorism and the Kenyan public, *Studies in Conflict Terrorism*, Volume 28 Issue 2, (2005) 99-112.

³⁶ Arson S. Kenya and the Global War on Terror: Neglecting History and Geopolitics in Approaches to Counterterrorism, *The London School of Economics African Journal of Criminology and Justice Studies (AJCJS)*, Vol. 7, Issue 1 & 2 (2013).

³⁷ Davis J. *Africa and The War on Terrorism* (Edited) Trinity Washington University USA, (2007).



The third phase was instigated by the incursion of Kenyan Defense Forces coordinating with Somali military against the Al shabaab terrorist group in Somalia. Between October 2011 and August 2014 Kenya faced over 100 terrorist attacks involving explosives, grenades and firearms resulting to 370 deaths and over 1000 people injured. The most momentous attack being the attack on the Westgate Mall by four gunmen leading to at least 67 deaths and 175 injured. The persistent attacks on Kenyan soil led to the clamor for amendments on anti-terror legislation.

3.2 International obligations on Privacy

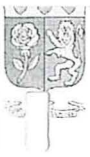
Kenya is bound by international laws on privacy by being a signatory to the Universal Declaration on Human Rights and has ratified the International Covenant on Civil and Political Rights. Article 17 of the ICCPR, which reinforces Article 12 of the UDHR, that provides that *“no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation”*. The Human Rights Committee has noted that states parties to the ICCPR have a positive obligation to *“adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right [privacy].”*³⁸

Further, In *Article 12* of the Universal Declaration of Human Rights it is provided that *“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”* Which is similar to that provided under *Article 17*³⁹ of the International Covenant on Civil and Political Rights (ICCPR), *Article 16* of the Convention in the Rights of the Child, and *Article 14* of the Convention on the Protection of Migrants

Article 2 of Kenya’s Constitution states that the “The general rules of international law shall form part of the law of Kenya.” Further it states that, “any treaty or convention ratified by Kenya

³⁸ General Comment No. 16 (1988), para. 1

³⁹ No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.



shall form part of the law of Kenya under this Constitution.” This effectively makes Kenya a monist state and commits it to observe signed treaties as good law.⁴⁰

4.3 Domestic legislation on privacy

The highest privacy protection in domestic law is guaranteed under Article 31 among the Bill of Rights of the Constitution⁴¹ which provides that every person has the right to privacy, It states:

“Every person has the right to privacy, which includes the right not to have—

(a) their person, home or property searched;

(b) their possessions seized;

(c) information relating to their family or private affairs unnecessarily required or revealed; or (d) the privacy of their communications infringed.”

It is instrumental to note that constitution as the grundnorm is supreme and any laws in conflict with the Constitution are null and void to the extent of the inconsistency. If legislation conflicts with the any provisions of the Constitution, the constitutional provisions prevail and the legislation is regarded as illegal and unconstitutional.

The National Police Service has a Constitutional and statutory mandate to detect and investigate crime. In the course of investigations, the Police are entitled to search premises and seize property without warrants in certain circumstances under authority of the National Police Service Act.⁴² The procedure for obtaining warrants is provided for under the Criminal Procedure Code.⁴³

2009 Kenya Information And Communications Act, includes the following provisions under Section 31

“A licensed telecommunication operator who otherwise than in the course of his business—

⁴⁰Mwagiru M. From Dualism to Monism: The Structure of Revolution in Kenya’s Constitutional Treaty Practise, *Journal of Language, Technology and entrepreneurship in Africa, Vol. 3. No. 1* (2011)

⁴¹ Constitution of Kenya, 2010.

⁴² National Police Service Act (Chapter 84 of the Laws of Kenya)

⁴³ Criminal Procedure Code (Chapter 75 of the Laws of Kenya)



*(a) intercepts a message sent through a licensed telecommunication system; or
(b) discloses to any person the contents of a message intercepted under paragraph ; or,
(c) discloses to any person the contents of any statement or account specifying the telecommunication services provided by means of that statement or account, commits an offence and shall be liable on conviction to a fine not exceeding three hundred thousand shillings or, to imprisonment for a term not exceeding three years, or to both.”*

Section 83 (w) (1)

“Subject to subsection (3), any person who by any means knowingly:—

5 (a) secures access to any computer system for the purpose of obtaining, directly or indirectly, any computer service;

(b) intercepts or causes to be intercepted, directly or indirectly, any function of, or any data within a computer system, shall commit an offence.”

Further Section 93 (1)

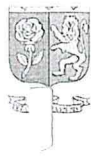
No information with respect to any particular business which—

“(a) has been obtained under or by virtue of the provisions of this Act; and

(b) relates to the private affairs of any individual or to any particular business, shall, during the lifetime of that individual or so long as that business continues to be carried on be disclosed by the Commission or by any other person without the consent of that individual or the person for the time being carrying on that business.”

Section 15 (1) of the Kenya Information And Communications (Consumer Protection) Regulations, 2010, states that,

“Subject to the provisions of the Act or any other written law, a licensee shall not monitor, disclose or allow any person to monitor or disclose, the content of any information of any subscriber transmitted through the licensed systems by listening, tapping, storage, or other kinds of interception or surveillance of communications and related data.”



Kenya's Prevention of Terrorism Act 2012 explicitly allows for the limitation of the rights and fundamental freedoms provided in the Constitution for the purpose of investigating, detecting or preventing a terrorist act, stating that the right to privacy can be limited to allow communications to be 'investigated, intercepted or otherwise interfered with.'⁴⁴ The Act grants courts the right to require communications service providers to 'intercept and retain specified communication of a specified description received or transmitted, or about to be received or transmitted by that communications service provider',⁴⁵ and the right to permit police officers to 'enter any premises and to install on such premises, any device for the interception and retention of a specified communication and to remove and retain such device.'⁴⁶

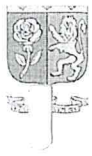
Kenya does not currently have specific data protection legislation as well as many other African states (Annex 1). However, a Data Protection Bill 2013⁴⁷ has been forwarded to the Attorney General for publication and the Cabinet Secretary for Information Communication and Technology. Once law, the Bill will give effect to Article 31(c) of the Constitution, which outlines the right of every person not to have "information relating to their family or private affairs unnecessarily required or revealed" and Article 31(d), the right not to have "the privacy of their communications infringed". It will also regulate the collection, retrieval, processing, storing, use and disclosure of personal data. However the proposed legislation fails to explicitly address the protection of data stored in the "cloud" (synchronised storage centres for digital data), which is a particular concern in the case of storage in cloud repository servers outside Kenya, raising issues of jurisdiction in cases of violations.

⁴⁴ Section 35(3)(iii) Kenya Prevention of Terrorism Act 2012

⁴⁵ Section 36(3)(a) Kenya Prevention of Terrorism Act 2012

⁴⁶ Section (36)(3)(b) Kenya Prevention of Terrorism Act 2012

⁴⁷ Available at: <http://www.cickenya.org/index.php/legislation/item/174-the-data-protection-bill-2012#.U3sfr1hdU01> (Accessed on 30th November 2015)



CHAPTER FOUR

Introduction

This chapter takes on a practical study of commissions by state agencies through legislation and policy that have had a direct impact on the exercise of privacy rights in Kenya. It exposes the means and extents to which a weak legal framework on the protection of privacy rights may affect citizens. It focuses on a current approach of privacy in a digital age

4.1 Communication surveillance

Despite Kenya's efforts to strengthen and embed protection of privacy both in its constitutional and legislative framework, there are increasing concerns over certain surveillance practices and policies, such as the adoption of the Prevention of Terrorism Act 2012, the Network and Early Warning systems (NEWS) in 2012, and the Integrated Public Safety Communication and Surveillance System in May 2014. These measures are often framed within government strategies to combat terrorism, cyber criminality, fraud and corruption

In a report presented at the 23rd session Human Rights Council in May 2013, Frank La Rue, UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, highlighted the close relationship between the right to freedom of expression and the right to privacy.⁴⁸ The report pointed to the need to further study new modalities of surveillance and recommended the revision of national laws regulating these practices to bring them into line with human rights standards. These concerns gained particular salience following the revelations of NSA whistle-blower Edward Snowden from June 2013 onwards. Various UN bodies including the UN General Assembly,⁴⁹ the Human Rights Council⁵⁰ and the High Commissioner

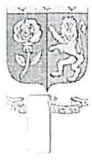
⁴⁸ I A/HRC/23/40, 17 April 2013. Available at:

http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf

(Accessed on 2nd December 2015)

⁴⁹ In November 2013, the Third Committee of the General Assembly approved a resolution titled "Right to Privacy in the Digital Age". The UN General Assembly voted unanimously the resolution on 18 December 2013. In this Resolution, the General Assembly is calling upon Member States to review their procedures, practices and legislation on the surveillance of communications, their interception and collection of personal data, including mass surveillance, with a view to upholding the right to privacy by ensuring the full and effective implementation of all relevant obligations under international human rights law

⁵⁰ The 24th Session of the UN Human Rights Council in September 2013 included a side-event on privacy in the digital age hosted by the governments of Germany, Norway, Austria, Hungary, Liechtenstein and Switzerland during which the International Principles on Application of Human Rights to Communications Surveillance were launched.



for Human Rights,⁵¹ have addressed the right to privacy and its relationship with state surveillance.

Although Kenyan law requires judicial approval for the interception of communications and permits the limitation of privacy only by an Act of Parliament, the Information and Communications (Registration of Subscribers of Telecommunication Services) Regulations grant extensive powers to state authorities to collect and access the data of mobile phone users. However concern is required as these judicial processes can be circumvented, or made mere technical procedures and the privacy of citizens violated.

In March 2012, the telecommunications industry regulator, the Communications Commission of Kenya (CCK), announced⁵² it was operationalising a mechanism for the authorities to monitor incoming and outgoing digital communications. CCK requested that all telecommunication service providers cooperate in the installation of internet traffic monitoring equipment; known as NEWS. The CCK cited a rise in cyber security threats as a justification for this move. NEWS is an initiative of the UN's International Telecommunication Union (ITU)⁵³ and is presented as a tool to identify threats and provide advice on how to respond.

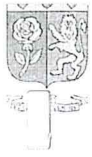
In May 2014, the government announced⁵⁴ that the partially-state owned Kenyan telecommunications agency Safaricom had been awarded a government tender to set up a new telecommunications surveillance system for the Kenyan Police, known as the Integrated Public Safety Communication and Surveillance System, possibly due to its capabilities as a market leader in telecommunications and the need to keep such sensitive data within the authority of a local firm. When the surveillance system was made public, it was announced that the system

⁵¹ In July 2013, following revelations about the operation of the National Security Agency of the United States of America, leaked by Edward Snowden, the High Commissioner for Human Rights, Navi Pillay stated: "While concerns about national security and criminal activity may justify the exceptional and narrowly-tailored use of surveillance programmes, surveillance without adequate safeguards to protect the right to privacy actually risk impacting negatively on the enjoyment of human rights and fundamental freedoms."

⁵² Communications Commission of Kenya, Kenya and ITU sign administrative agreement for KE-CIRT/CC, 17 February 2012. Available at: http://www.cck.go.ke/news/2012/KE-CIRT_signing.html (Accessed on January 2nd 2016)

⁵³ ITU News, Making an IMPACT on global cybersecurity, October 2009, Available at: https://www.itu.int/net/itunews/issues/2009_08_22.aspx (Accessed on January 2nd 2016)

⁵⁴ Press Statement by His Excellency Honorable Uhuru Kenyatta, C.G.H., President And Commander-In-Chief Of the Defence Forces of the Republic of Kenya on 16th May 2014 at State House Nairobi. Available at: <http://www.president.go.ke/press-statement-by-his-excellency-hon-uhuru-kenyatta-c-g-h-president-and-commander-in-chief-of-the-defence-forces-of-the-republic-of-kenya-on-16th-may-2014-at-state-house-nairobi/> (Accessed on 3rd January 2015)



would cost KES 12.3 billion (approximately USD 140 million). There are two elements to the project. First, the system would link-up all security agencies in order to facilitate information sharing and operationalisation of activities. Secondly, it would establish an expensive surveillance camera system consisting of 1800 CCTV cameras. These would be installed in Nairobi and Mombasa and connected to 195 police stations in those two cities through an independent 4G network to keep them connected in real time. The camera surveillance infrastructure would permit facial and movement recognition in real time through the transfer of camera footage to a monitoring centre.

Key concerns include the possibility of data sharing with third parties (including foreign agencies and the private sector), the processing and collection of communications and images without the consent of individuals, the risks of insecure storage facilities and unauthorised external access, and the potential for data to be deleted or modified.

4.2 Access to communications data

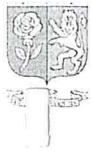
Under section 31 of the Kenya Information and Communication Act, licensed telecommunication operators are legally prohibited from implementing technical requirements necessary to enable lawful interception, and section 15(1) of the Kenya Information and Communications (Consumer Protection) Regulations 2010, states that a licensee (licensed under the KIC Act) “*shall not monitor, disclose or allow any person to monitor or disclose, the content of any information of any subscriber transmitted through the licensed systems by listening, tapping, storage, or other kinds of interception or surveillance of communications and related data*”.

However, the recently adopted Kenya Information and Communications (Registration of Subscribers of Telecommunication Services) Regulations 2014⁵⁵ permit access to private or confidential information on consumers without a court order. Section 13 reads:

“A licensee⁵⁶ shall grant the Commission's officers access to its systems, premises, facilities, files, records and other data to enable the Commission inspect such systems,

⁵⁵ 7 Legal Notice No. 10 to the Kenyan Communications and Information Act, 7 February 2014. Available at: <http://kenyalaw.org/kl/index.php?id=4215> (Accessed on 3rd January 2016)

⁵⁶ Means a person or entity licensed under the Act to own and operate a telecommunication system or to provide telecommunication services or both



premises, facilities, files, records and other data for compliance with the Act and these Regulations.”

The obligation the regulations place on telecommunications service providers to provide access to their systems without a court order violates the right to privacy.

During and in the aftermath of the March 2013 elections, the Kenyan government requested that mobile phone providers block text messages that were deemed to incite violence using a firewall that would detect messages containing key words, identified beforehand, to be further analysed. The National Steering Committee on Media Monitoring of the Ministry of ICTs intercepted 300,000 texts messages during the 2013 elections.⁵⁷ This practice shows the extensive power the government exercises over telecommunication and internet providers and their operations further no information was provided on the use of the personal information gathered or the efficacy the operation.

4.3 Lack of oversight

The Kenya National Intelligence Agency (NIS) was established by the 2012 National Intelligence Service (NIS) Act, and is both the domestic and foreign intelligence agency of Kenya.

Section 36 reads:

“(1) The right to privacy set out in Article 31 of the Constitution, may be limited in respect of a person suspected to have committed an offence to the extent that subject to section 42, the privacy of a person's communications may be investigated, monitored or otherwise interfered with. (2) The Service shall, prior to taking any action under this section, obtain a warrant under Part V.”

Section 45 states:

*“...an officer of the Service the power to obtain any information, material, record, document or thing and for that purpose –
(a) to enter any place, or obtain access to anything;*

⁵⁷ Kenya Human Rights Commission, *The Internet Legislative and Policy Environment In Kenya*, January 2014, pp. 14. Available at: http://www.khrc.or.ke/resources/publications/doc_details/67-the-internet-legislative-and-policy-environment-in-kenya.html (Accessed on 3rd January 2016)

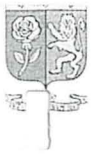


- (b) to search for or remove or return, examine, take extracts from, make copies of or record in any other manner the information, material, record, document or thing;
- (c) to monitor communication; or
- (d) install, maintain or remove anything.”

Kenya lacks legislation to appropriately regulate the powers of public bodies to carry out surveillance. Instead, Article 35 of the Prevention of Terrorism Act 2012 grants extensive powers to state authorities to limit fundamental freedoms and encroach on the right to privacy through surveillance.

Without adequate regulation and oversight of communication monitoring and surveillance programmes, the Kenyan intelligence agencies are failing to ensure that their policies and practices adhere to international human rights standards and adequately protect the rights to privacy and freedom of expression. The *International Principles on the Application of Human Rights to Communications Surveillance*⁵⁸ provide guidance and structure for a review of the NIS, its remit and operations.

⁵⁸ Launched in September 2013 following a year of consultation, the International Principles on the Application of Human Rights to Communications Surveillance set of standards that interpret States’ human rights obligations in light of new technologies and surveillance capabilities. The Principles are endorsed by 410 civil society organisations around the world, over 40 leading experts, academics and prominent individuals, as well as 4 elected officials. The Principles set for the first time an evaluative framework for assessing surveillance practices in the context of international human rights law.



CHAPTER FIVE

Introduction

This chapter makes two broad discussions; the first is on the international juridical treatment of the theoretical framework on a balance between human rights and security while the second is a discussion on the impact of western policy on anti-terrorism law in Africa with examples of Kenya and South Africa.

5.1 The Balance in International Frameworks

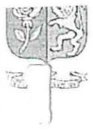
Balance has mainly been achieved through the decisions of various bodies tasked with promoting and protecting human rights. These include regional committees and international courts. Even as the law may be similar it emerges that treatment often depends on a case to case basis and the contexts in which each situation is based.

a) United Nations Human Rights Committee (UNHRC)

The UNHRC is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its State parties. International law and the case-law of human rights treaty bodies and courts contain valuable indications on the type of measures that may be adopted to counteract terrorist acts within the framework of the rule of law and human rights principles. The UNHRC has considered cases in relation to terrorism and counter-terrorism measures and to some extent the impact of these measures on human rights. However, the UNHRC case law on terrorism is limited and restricted to specific human rights violations such as torture or illegal detention and no adequate canvassing of privacy as a right. The case law is also lacking in the sense that it does not establish legal principles concerning the balancing of rights with counter terrorism measures.⁵⁹

The UNHRC fails to set out the legal framework in which states can carry out counter-terrorism measures while respecting their human rights obligations. The UNGA in its Resolution on Human Rights and Terrorism recommended that treaty bodies should take into account the

⁵⁹ M. Sidel, *More Secure Less Free: Antiterrorism Policy and Civil Liberties after September 11, USA*, University of Michigan Press, (2004) 147.



consequences of the acts, methods and practices of terrorist groups.⁶⁰ However, while the HRC has not specifically determined the question of balancing human rights and security interests, the obligation of states to comply with their human rights obligations while countering terrorism is a point that emerges from an analysis of communications.

b) The European Court of Human Rights (ECtHR)

The ECtHR on the other hand has directly addressed the question of balancing a state's security needs with its human rights obligations. In the 1989 case of *Soering v United Kingdom*⁶¹ the ECtHR referred to the search for a fair balance between the demands of the general interest of the community and the requirements of the protection of an individual's fundamental rights.

The ECtHR has gone further to expand the rights to telephone calls and e-mails from a business holding that they fall under 'private life' and 'correspondence', are subject to a reasonable expectation of privacy and that monitoring of these communications constitutes a breach of Article 8 of the European Convention on Human Rights (ECHR).⁶² The Court did, however, leave open the possibility of monitoring in terms of a specific law or where proper notice is given, but the judgment is a timely reminder of the need to protect the privacy of individual communications.

In the 1996 case of *Chahal v United Kingdom*,⁶³ the United Kingdom sought to deport the applicant, who was an Indian citizen, from the UK on grounds of national security. Chahal was seeking asylum in the UK from India on political grounds and he feared his life would be in danger if he returned to India. The UK argued before the ECtHR that the government was entitled to balance the applicant's interest as a refugee against the risk he posed to national security. The court rejected this argument and held that Article 3 of the ECHR prohibiting torture and inhuman and degrading treatment would be violated if Chahal was deported.⁶⁴ The relevance of this case to this discussion is the fact that the Court restricted the UK government's ability to

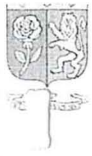
⁶⁰ UN General Assembly in its Resolution on Human Rights and Terrorism, UN GA A/RES/29/185, para 6

⁶¹ *Soering v United Kingdom* (1989) 11 EHRR 413.

⁶² *Copland v UK* [2007] ECHR 253.

⁶³ *Chahal v United Kingdom* (1996) 23 EHRR 413.

⁶⁴ Article 3 of the ECHR prohibits inter alia torture and inhuman and degrading treatment. In *Soering v UK* the European Court held that Article 3 would be infringed if a person was extradited to a country where there were reasonable grounds to believe that he would suffer such treatment



take executive action in the interests of national security.⁶⁵ The Court considered the UK's human rights obligations in this case as superior to the potential threat to the country's national security.

5.2 Western Influence on Anti-terror legislation: Kenya and South Africa

The events of 9/11 shifted global attention from individual rights to national security. In order to combat the threat of terrorism, it was argued, democratic citizens would have to accept legislation placing constraints on their individual freedoms. In addition, the fight against terrorism could not be won by national governments alone; it required countries around the world to embrace similar measures (Annex 2). On 28 September 2001 the United Nations Security Council adopted Resolution 1373 calling on member states to become party to all relevant international conventions on terrorism and to enact the necessary domestic legislation to enforce these agreements.⁶⁶

The US Patriot Act⁶⁷ was the first major anti-terrorism legislation after 9/11. The general effect of this Act was to provide the executive with increased authority to act against forms of crime and terrorism that had been defined very broadly. The Act defines terrorism in sweeping terms to include acts dangerous to human life and intended to influence the policy of the government by intimidation or coercion. This definition has caused some controversy due to its vagueness. This legislation, as well as others following it, has been criticised for its discriminatory treatment of non-citizens, increased violation of the right to privacy through wiretapping of communications and secret searches as well as discrimination against people on ethnic and religious grounds.

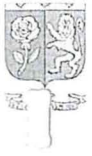
In 2003 Kenya's newly elected government introduced in parliament the Suppression of Terrorism Bill, setting off a firestorm of controversy.⁶⁸ After deadly terrorist attacks on the US Embassy in Nairobi (August 1998) and on the Israeli-owned hotel near Mombasa (November 2002), the anti-terrorism bill generated fervent criticism among members of parliament, human rights advocates, lawyers and religious leaders. Muslim populations felt especially targeted by

⁶⁵ The Rt Hon Lord Phillips, Terrorism and Human Rights, University of Hertfordshire Law Lecture, 19th October 2006. Available at http://www.judiciary.gov.uk/publications_media/speeches/2006/sp191006.htm. (Accessed on 14th September 2015).

⁶⁶ R. Foot, 'Collateral damage: human rights consequences of counterterrorist action in the AsiaPacific', *International Affairs*, 81 (2), pp 411 – 425, (2005).

⁶⁷ The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act. This Act was signed into law by the President on October 26th, 2001.

⁶⁸ Barkan J. 'Kenya after Moi', *Foreign Affairs*, 83 (1) (2004) 87 – 100.



the proposed legislation. Widespread opposition forced the government to withdraw the bill in late 2003. After two years of consultation with lawyers and civil society organisations, a revised anti-terrorism bill was introduced in April 2006.

Although the new draft was widely acknowledged to be much improved, several prominent members of parliament promised to block its passage, their reason, quite simply, is that the bill is promoted by the USA.⁶⁹ Kenyans widely perceive the Bush administration as forcing anti-terrorism legislation on the country, and opponents are happy to reinforce this view. One politician accused the USA of 'drawing a draft and handing it to the Kenyan executive with a demand that it be enacted by Parliament'.⁷⁰ Others have claimed an explicit link (denied by US officials) between passage of anti-terrorism legislation and the lifting of a travel warning imposed by the USA in May 2003 and extended periodically since then. Human rights activists blame the Kenyan government for bowing to US pressure in exchange for aid. In fact, even without a bill's passage, US economic assistance to Kenya increased by 106% and military aid by 220% between 2000 and 2005.⁷¹

In South Africa the debate over a series of proposed anti-terrorism bills was fuelled by both the perceived heavy-handedness of the USA and by the country's own painful history of apartheid. An anti-terrorism bill introduced in 2002 sparked widespread criticism among the usual groups, including human rights activists, civil rights lawyers and media organisations. The politically powerful Congress of South African Trade Unions (COSATU) also emerged as a prominent opponent of the legislation, eventually forcing the government to temporarily withdraw it from consideration in February 2004 by threatening to strike.⁷²

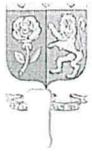
The debate in South Africa centred on the potential for abuse of specific provisions in the bill, including its vague definition of terrorism and restrictions on free speech and state surveillance. Critics also expressed concerns about the US role in promoting the legislation. One editorial

⁶⁹ Whitaker, B. 'Exporting the Patriot Act? democracy and the 'war on terror' in the Third World', *Third World Quarterly*, 28:5(5 Honourable Paul Muite, MP-Kabete, interview with the author, Nairobi, 9 November 2005) 1017 – 1032.

⁷⁰ Honourable Paul Muite, 'State jobs: MPs' verdict must be respected', *Daily Nation*, 3 October 2005. This accusation was flatly denied by several officials at the US Embassy in Kenya.

⁷¹ USAID, US Overseas Loans and Grants. These overall increases were made, despite the mandated suspension of certain categories of economic and military assistance for Kenya's refusal to sign an Article 98 agreement with the USA.

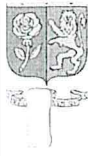
⁷² Duncan J. 'Anti-Terrorism Bill will stamp on human rights', *Sowetan*, (January, 2003) available at <http://fxi.org.za/anti-terrorism.htm> (Accessed on November 3rd 2015)



asked, ‘So what if . . . everyone else is passing these laws . . .? The true nature of the problem is largely hidden from public view, namely that America is using the anti-terrorism drive to further its global imperialist aims’.⁷³ Another argued, ‘Put simply, this Bill is not in the interests of South Africa as it is being forced on weaker states by powerful nations, such as the United States and the United Kingdom, in their prosecution of the so-called “war against terror”’.⁷⁴ In the face of such criticism the government redrafted the bill several times. It was only after major revisions and a name change that the measure finally became law. In late 2004 the Protection of Constitutional Democracy against Terrorist and Related Activities Bill won unanimous support in the National Assembly.

⁷³ Duncan J. ‘Anti-Terrorism Bill will stamp on human rights’, Sowetan.

⁷⁴ Jassat I. ‘US-inspired climatic changes in the form of anti-terror laws: will these rain clouds unleash a torrent of hail?’, (2003), available at <http://www.mediareviewnet.com> (Accessed on 3rd November 2015)



CHAPTER SIX

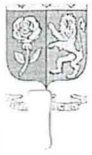
6.1 Conclusion

The right to privacy, as guaranteed in *Article 12* of the Universal Declaration of Human Rights and many other provisions - including *Article 17* of the International Covenant on Civil and Political Rights (ICCPR), *Article 16* of the Convention in the Rights of the Child, and *Article 14* of the Convention on the Protection of Migrants - is a core tenet of democratic societies. Its inclusion in such a variety of provisions demonstrates its significance in relation to the protection of a broad array of other fundamental human rights. Failure to protect this right has a knock-on effect on citizens' abilities to exercise other rights, thus undermining many of the principles upon which democracy is based.

Serious concerns have been raised over the potential for national security overreach when adequate safeguards are not in place to protect against abuse. Several countries have already adopted draconian anti-terrorism laws that present serious challenges to the principles of the proportionality and necessity of surveillance. Notably, Kenya's laws as the Prevention of Terrorism Act 2012 explicitly allows for the limitation of the rights and fundamental freedoms provided in the Constitution for the purpose of investigating, detecting or preventing a terrorist act, stating that the right to privacy can be limited to allow communications to be 'investigated, intercepted or otherwise interfered with.'⁷⁵In the end there is no question about the need to respond to the threat of international terrorism. The question of balance will have to be addressed by the development of local jurisprudence on such questions.

The first chapter has began by an introduction into the modalities of the study, the second chapter has analysed the theoretical framework of the study, the third chapter has given a legal background on elements of the study, the fourth chapter has interrogated practical effects and occurrences that are the basis of the study, the fifth chapter has introduced the international treatment of topics in the study and the effect of foreign jurisprudence in local contexts and finally the sixth chapter will make conclusions and recommendations on the way forward.

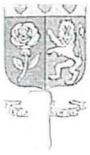
⁷⁵ Section 35(3)(iii) Kenya Prevention of Terrorism Act (2012)



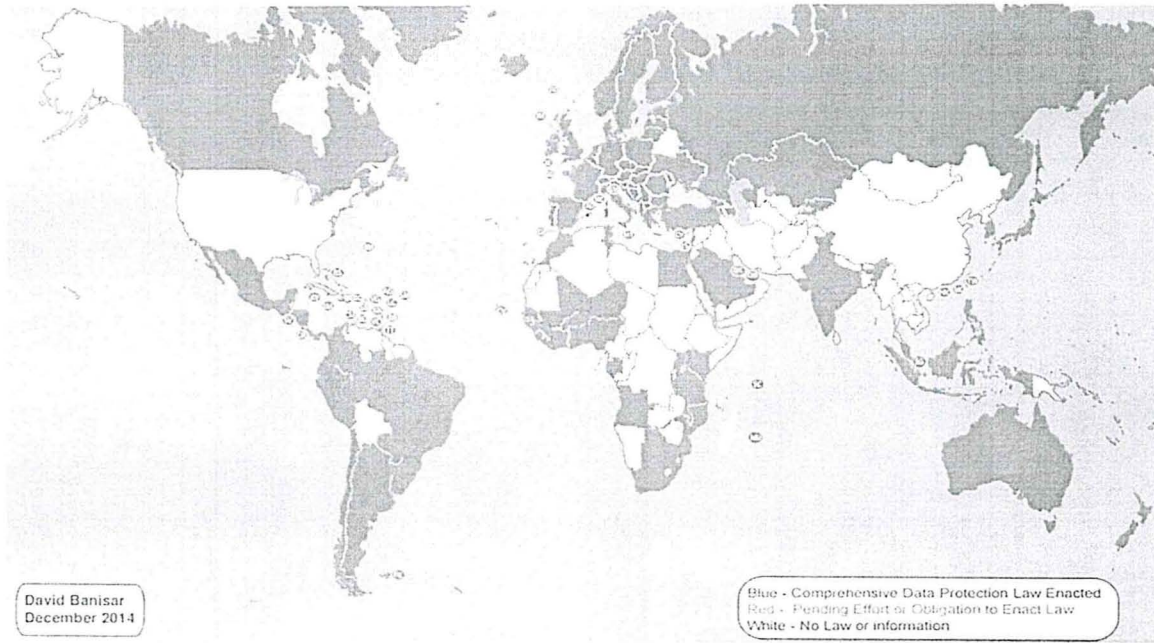
6.2 Recommendations: Moving forward

- I. The legislature and the executive should ensure that the Data Protection Bill, is passed and accented to as law. This will protect the right to privacy of citizens in accordance with international human rights law.
- II. The Attorney General and the Communication Authority should work to introduce regulations and safeguards to ensure that the rights of mobile telephony subscribers in relation to their personal data are guaranteed; this is in the backdrop of requirements towards mobile registration and tracking of internet activities.
- III. Civil rights groups should advocate for the revocation of the Regulations adopted under the 2009 Information and Communications Act which unlawfully limit the right to privacy. This will build on local jurisprudence on the kind of balance we hope to achieve.
- IV. The relevant Attorney General should appoint an independent authority to investigate communications monitoring and surveillance programmes conducted by the Kenyan government and ensure that these practices respect the government's national and international obligations to protect the privacy of its citizens and their personal data;
- V. The recommendations by the authority should take steps to assess communication surveillance national policies and practices with a view to complying with the International Principles on the Application of Human Rights to Communications Surveillance.

Annex 1



National Comprehensive Data Protection/Privacy Laws and Bills 2014



Annex 2

TABLE 1. Anti-terror legislation in the Third World since 9/11 (as at March 2007)

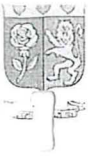
Passed with minimal debate	Passed after extensive debate or controversy	Still pending
Antigua and Barbuda (2001)	Bahamas (2004)	Kenya
Barbados (2002)	Bahrain (2006)	Ghana
Cuba (2001)	Colombia (2003) (overturned 2004)	Namibia
Gambia (2002)	El Salvador (2006)	Nigeria
Jordan (2006)	India (2002) (repealed 2004)	South Korea
Morocco (2005)	Indonesia (2003)	Zimbabwe
Nepal (2002)	Jamaica (2005)	
Qatar (2004)	Mauritius (2002)	
St Vincent and Grenadines (2002)	Philippines (2007)	
Samoa (2002)	Seychelles (2004)	
Singapore (2001)	South Africa (2004)	
Tanzania (2002)	Trinidad and Tobago (2005)	
Tunisia (2003)	Turkey (2006)	
Uganda (2002)		



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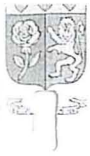
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