# DETENTION WITHOUT TRIAL IN KENYA

## I. INTRODUCTION

Most nations have laws which provide for significant infringement by the government of basic civil and political rights in times of war or other public emergency.[1] These powers usually include the power to detain persons without trial for security reasons. The survival of the nation itself is thought to justify such temporary infringement. Another group of nations (including many former British colonies, such as India, Singapore, Sri Lanka, Nigeria, Tanzania, and Zambia[2]) goes further, however, and provides for government curtailment of civil rights in circumstances less dangerous than those which threaten the life of the nation. The East African country of Kenya falls within the second group. The fact that detention without trial has been sparingly used by the Kenya Government (particularly when contrasted with neighboring governments) does not make it less dangerous as a political weapon. This Note shall explain the workings of Kenya's provisions for detention without trial, and the use of these provisions within the political context since gaining independence in 1963. It will analyze the detention provisions in light of Kenya's international obligations, particularly under the International Covenant on Civil and Political Rights, and will distinguish between Kenya's detention powers and those detention powers of neighboring countries where the "Rule of Law" seems to be taken less seriously. This Note will conclude with suggestions for municipal legal changes which might resolve conflict between Kenya's international obligations and its internal law to bring Kenya's practice more closely in line with the International Covenant on Civil and Political Rights.

## II. HISTORICAL BACKGROUND

Kenya's colonial history was brief and turbulent. At the height of the "Scramble for Africa" during the last quarter of the nineteenth century, two Anglo-German Agreements (1886 and 1890) partitioned East Africa

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[1] For a survey of some of these emergency measures, see Committee of the U.N. Commission on Human Rights, U.N. Doc. E/CN.4/826/Rev.1 (1964) 184-96 [hereinafter cited as U.N. Study].

[2] *Id.* at 192. *See also* AMNESTY INTERNATIONAL REPORT 1977, under separate headings by nation [hereinafter cited as A.I. REPORT]. For a few thorough discussions of detention without trial in other nations *see* Daw, *Preventive Detention in Singapore—A Comment on the Case of Lee Mau Seng*, 14 MALAYA L. REV. 276 (1972); Aihe, *Preventive Detention in Nigeria*, 9 INT'L COMM'N JURISTS REV. 68 (1972); and for an interesting commentary on detention without trial in the United Kingdom itself in light of its international legal obligations, see Rauch, *The Compatibility of the Detention of Terrorists Order (Northern Ireland) with the European Convention for the Protection of Human Rights*, 6 N.Y.U.J. INT'L L. AND POL. 1 (1973).

between Great Britain and Germany, with Kenya going to Great Britain.[3] Attempts to administer the land and its people began immediately and were completed quite successfully under British control by 1914.[4] A wave of white immigrant farmers from South Africa, Great Britain, Canada, and other parts of the British Empire,[5] attracted by the cool, fertile White Highlands, both helped and hindered the colonial government. These settlers, who never numbered as much as one percent of the total population,[6] vociferously asserted the rights to which they were as white citizens accustomed; yet they also persisted in treating both Asians (like themselves, a small immigrant group in Kenya) and Africans as second-class persons.[7]

In response, a dual court system appeared in Kenya: a judicial system for the immigrant races based on the British common law and a rather *ad hoc* administrative system of justice for the indigenous Africans.[8] Whatever the intention of the colonial government in Kenya, the dual system functioned and was perceived to function as a racially discriminatory system which did less to dispense justice than to maintain the status quo, that is, the economic, social, and political superiority of the whites.[9]

However, this system broke down from 1952 to 1956. Kenya's State of Emergency (also known as the "Mau Mau" Rebellion), inspired by land shortage and political grievances, was a period of great civil disorder in the Central Province of Kenya.[10] Wholesale detention without trial occurred and estimates of detainees range up to 80,000[11] with some prisoners being held for as long as eight years.[12] In 1952 Jomo Kenyatta, later to become Kenya's first and only President, was arrested.[13] A few months later he was tried and convicted of management of the Mau Mau, a proscribed society,

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[3] G. WERE & D. WILSON, EAST AFRICA THROUGH A THOUSAND YEARS 177-79 (2d ed. 1972).

[4] B. OGOT & J. KIERAN, ZAMANI: A SURVEY OF EAST AFRICAN HISTORY 259 (1968).

[5] *Id.* at 260-64.

[6] Y. TANDON, PROBLEMS OF A DISPLACED MINORITY: THE NEW POSITION OF EAST AFRICA'S ASIANS 31, app. II (Minority Rights Group 1973).

[7] G. WERE & D. WILSON, *supra* note 3, at 202-07.

[8] Y. GHAI & J. MCAUSLAN, PUBLIC LAW AND POLITICAL CHANGE IN KENYA 131 (1970).

[9] *Id.* at 33-34, 173-74.

> From the African point of view the English law introduced into East Africa was one of the main weapons used for colonial domination, and in several important fields remained so for most of the colonial period, only changing when Africans began to gain political power. The role of the received law then from the beginning of the colonial period in Kenya was to be a tool at the disposal of the dominant political and economic groups.

*Id.* at 34.

[10] G. WERE & D. WILSON, *supra* note 3, at 300.

[11] *Id.* at 299-301; C. ROSBERG & J. NOTTINGHAM, THE MYTH OF "MAU MAU": NATIONALISM IN KENYA 334-47 (1966).

[12] J.M. KARIUKI, 'MAU MAU' DETAINEE 1 (1963). In one security operation alone, 26,000 Africans were rounded up in Nairobi, and detained. G. WERE & D. WILSON, *supra* note 3, at 300.

[13] *Id.*

in what many thought was a politically-inspired trial.[14] In 1959 the person whose testimony convicted Kenyatta, was himself convicted of perjury in the trial of Kenyatta,[15] and it was further revealed that he had been paid £2,500 in cash and services by the colonial government.[16] But the British still refused to free Kenyatta, restricting him to Lodwar in Kenya's northern desert region until 1961. This background may provide some insight into the way Kenya's present leaders perceive Kenya's legal system, in part at least, as a political weapon.[17]

## III. THE PRESERVATION OF PUBLIC SECURITY ACT

### A. *Background*

When Kenya became independent in 1963, the colonial government's Emergency Powers were repealed, but two provisions of the new Constitution gave the new African government special power to deal with the unsettled conditions in the Northeastern Province and to deal with any other emergency situation proclaimed by the President.[18] Such a state of emergency was to be of only two months' duration though extensions were possible and derogations from rights were permitted, but "only to the extent justifiable for dealing with the actual situation."[19] In 1966, amidst political turmoil, a new and stronger measure was passed, The Preservation of Public Security Act.[20]

During the 1950's, as the Emergency made it clear that Kenya would not be another "white man's country" like South Africa, the colonial government began to take fairly rapid steps to transfer power smoothly and peacefully to the people of Kenya.[21] The early phase of this transition (1952-1960) was marked by attempts of the immigrant races to achieve a multi-racial government with over-representation ("reserved seats") of Asians and Europeans and under-representation of Africans.[22] But the two Lancaster House (Constitutional) Conferences in 1960 and 1962 paved the way for African majority rule on a one-person one-vote basis.[23]

In 1960, two African political parties appeared: the Kenya African National Union (KANU), a coalition of Kenya's largest and more educationally and economically advanced tribes; and the Kenya African Democratic

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[14] J. MURRAY-BROWN, KENYATTA 255-76 (1972).

[15] *Id.* at 263. In his summary, the trial judge said: "Although my finding of fact means that I disbelieve ten witnesses for the Defence and believe one for the Prosecution, I have no hesitation in doing so. Rawson Macharia gave his evidence well." *Id.*

[16] *Id.*

[17] *Id.* at 297.

[18] Y. GHAI & J. MCAUSLAN, *supra* note 8, at 430-33.

[19] *Id.* at 433.

[20] Act No. 18 of 1966.

[21] B. OGOT & J. KIERAN, *supra* note 4, at 284-88.

[22] G. WERE & D. WILSON, *supra* note 3, at 301-02.

[23] *Id.* at 302-03.

Union (KADU), a coalition of smaller tribes that feared domination by the large tribes.[24] In addition to the tribal split, KADU wished to see a strong regional system which would tend to protect the smaller tribes from a powerful central government headed by the large tribes.[25] The British, who wished to see the rights of the immigrant races protected through the KADU-favored regional system, ironed out a compromise which tried to provide for both.[26]

But after KANU won the elections of May 1963 with a large majority, and upon achieving internal self-government on June 1, 1963, Kenyatta's KANU Government immediately began to dismantle the regional system and strengthen the central government.[27] On November 10, 1964 KADU dissolved itself, its Members of Parliament crossed the floor to join KANU, and Kenya became a *de facto* one-party state.[28] This show of unity was superficial, however; the tribal split was soon replaced by opposing views of the correct pathway to economic development. Oginga Odinga, the Vice-President and political leader of the second largest tribe (the Luo), called for development along socialist lines and an end to the already large-scale corruption in government.[29] President Kenyatta, leader of the largest tribe (the Kikuyu), and many other political leaders of other tribes, however, favored a capitalist model, relying heavily on capital investment from the West.

Odinga became increasingly isolated from the President. The break came at a KANU Party Conference in 1966 when Odinga's party post as Vice-President was abolished and eight regional Vice-Presidencies were established instead.[30] Shortly thereafter, Odinga led a group of 29 Members of Parliament (MPs) out of KANU[31] to form a new party, called the Kenya People's Union (KPU). The KANU Government, which still had overwhelming control of Parliament, responded immediately. First, a Constitutional Amendment was passed in one day which required MPs who resigned from their Parliamentary Party to vacate their seats and stand for re-election.[32] Three days after this Amendment was passed, Kenyatta

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[24] *Id.*

[25] B. OGOT & J. KIERAN, *supra* note 4, at 288.

[26] *Id.*

[27] G. WERE & D. WILSON, *supra* note 3, at 303-04.

[28] Y. GHAI & J. MCAUSLAN, *supra* note 8, at 212.

[29] The East African Standard, Apr. 15, 1966, *reprinted in* C. GERTZEL, M. GOLDSCHMIDT & D. ROTHCHILD, GOVERNMENT AND POLITICS IN KENYA 143 (1972). For some substantiated examples of the corruption alleged by Odinga, *see* Barry, *Series: Kenya on the Brink* (pt.2) The Times (London), Aug. 17, 1975, at 5, col. a, and The Times (London), Sept. 29, 1974, at 3, col. a.

[30] The East African Standard, Mar. 14, 1966, *reprinted in* C. GERTZEL, M. GOLDSCHMIDT & D. ROTHCHILD, *supra* note 29, at 142.

[31] The East African Standard, Apr. 20, 1966, *reprinted in* C. GERTZEL, M. GOLDSCHMIDT & D. ROTHCHILD, *supra* note 29, at 148.

[32] The Constitution of Kenya (Amendment) Act, No.17 of 1966.

prorogued Parliament, forcing the new KPU MPs to stand for elections. Nine were returned to Parliament.[33] Second, after these elections, the Government pressed for—and received—the greatly expanded powers it wished in the Preservation of Public Security Act (Security Act).[34]

B. *The Kenya Constitution and the Provisions of the Security Act*

Chapter V of the Constitution of Kenya,[35] which is entitled Protection of Fundamental Rights and Freedoms of the Individual, provides extensively for the civil and political rights of Kenya's people. Section 72(1) states that "[n]o person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases. . . ." The situations listed deal with conviction of crime,[36] the execution of contempt of court orders,[37] fulfillment of other legal obligations,[38] securing an appearance in court upon court order,[39] apprehension upon reasonable suspicion of the commission of a crime,[40] securing the education and proper care of youths,[41] controlling disease,[42] control of the insane, drunkards, addicts, and vagrants,[43] extradition,[44] and the control of the movement of certain persons in certain areas.[45]

Section 85(1) of the Constitution provides that "[s]ubject to this section, the President may, at any time, by order published in the *Kenya Gazette*,[46] bring into operation, generally or in any part of Kenya, Part III of the Preservation of Public Security Act or any provisions of that Part of that Act." There is no provision that such an order bringing the Security Act into effect be reasonable under the circumstances or reasonably justifiable in a democratic society; the President may so order, at his sole discretion, at any time. Such an order expires if not approved by the National Assembly within 28 days, during which time the Assembly must be in session.[47] Once such an order is approved though, "it stays in force indefi-

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[33] Okoth-Ogendo, *The Politics of Constitutional Change in Kenya since Independence, 1963-69*, 71 AFR. AFF. 9, 26 (1972).

[34] *Id.* at 26-27.

[35] The KENYA CONST., Act No.5 of 1969.

[36] KENYA CONST. § 72(1)(a).

[37] *Id.* at § 72(1)(b).

[38] *Id.* § 72(1)(c).

[39] *Id.* § 72(1)(d).

[40] *Id.* § 72(1)(e).

[41] *Id.* § 72(1)(f).

[42] *Id.* § 72(1)(g).

[43] *Id.* § 72(1)(h).

[44] *Id.* § 72(1)(i).

[45] *Id.* § 72(1)(j).

[46] The *Kenya Gazette* is a soft-cover weekly publication of limited circulation. It contains legal notices, name changes, bankruptcy notices, tenders, trademark and patent information and the like. The masthead declares that the *Kenya Gazette* is "Published by Authority of the Republic of Kenya."

[47] KENYA CONST. § 85(2).

nitely"[48] unless either the President, by order in the *Kenya Gazette*,[49] or the National Assembly, by a majority of all members,[50] revokes it. In the event of a change of president, any order in force shall expire seven days after the new President assumes office.[51]

Threats to the public security for which measures under the Security Act may be taken include internal political strife, subversion, external aggression, problems related to the economic order, and natural disasters.[52] The Security Act has been called "a difficult and confusing enactment."[53] It makes provisions for both public security measures and *special* public security measures. The latter, to which section 85 of the Constitution makes reference, is a sweeping grant to the Executive of virtually all powers which might be necessary to preserve public security. Pertinent provisions in section 4(2) of Part III allow the President to regulate for the "preservation of public security" by provision for

> (a) the detention of persons;
> (b) the registration, restriction of movement (into, out of or within Kenya), and compulsory movement of persons, including the imposition of curfews . . . .[54]

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[48] Y. GHAI & J. MCAUSLAN, *supra* note 8, at 434.

[49] KENYA CONST. § 85(3).

[50] *Id.* at § 85(4).

[51] *Id.* at § 85(5).

[52] *See* note 20, *supra* at pt. I (2).

[53] Y. GHAI & J. MCAUSLAN, *supra* note 8, at 434-35.

[54] While the concern here is with the executive power to detain persons without trial, some other powers illustrating the broad scope of § 4 (2) include:

> (d) the censorship, control or prohibition of the communication of any information, or of any means of communicating or of recording ideas or information, including any publication or document, and the prevention of the dissemination of false reports;
> (e) the control or prohibition of any procession, assembly, meeting, association or society;
> (f) the control or prohibition of the acquisition, possession, disposition or use of any movable or immovable property or undertaking;
> (g) the compulsory acquisition, requisitioning, control or disposition of any movable or immovable property or any undertaking;
> (h) requiring persons to do work or render services, including the direction of labour and supplies, the conscription of persons into any of the disciplined forces (including the National Youth Service) and the billeting of persons;
> (i) . . . .
> (j) the control and regulation of transport by land, air or water;
> (k) the control of trading and of the prices of goods and services, including the regulation of the exportation, importation, production, manufacture or use of any property or thing;
> (l) amending, applying with or without modification or suspending the operation of any law (including legislation of the East African Common Services Organization) other than this Act or the Constitution;
> (m) any matter, not being a matter specified in any of the foregoing paragraphs

Section 83(1) of the Constitution provides that

> nothing done under the authority of Part III of the Preservation of Public Security Act shall be held to be inconsistent with or in contravention of [section 72 providing for personal liberty] when and in so far as the provision is in operation by virtue of an order made under section 85 of this Constitution.

Subsections (2) and (3) of section 83 set out the rights of detainees, which are more limited than those of persons accused of crime.[55] The detainee's guarantees are:

> (1) the right to be furnished within 5 days of a statement specifying in detail the grounds for detention;[56]
> (2) the government must publish a Notice of Detention within 14 days in the *Kenya Gazette*;[57]
> (3) the case must be reviewed within one month, and at intervals thereafter of not more than six months, by an impartial tribunal which is, however, appointed by the President;[58]
> (4) the right to legal representation, at his own expense, for reviews by the tribunal (which are held *in camera);*[59]
> (5) the tribunal may make recommendations to the authority responsible for detention as to whether or not detention is still necessary. Such recommendations are not binding, however.[60]

When the Security Act was introduced in Parliament the Attorney-General stated that public security might be endangered first by war, second by internal disorder, third by a breakdown of the economic order, and fourth by natural disaster.[61] "The purpose of this bill is to enable the Government, subject to the control of Parliament, and subject to proper constitutional safeguards, to meet quickly and effectively any of those situations menacing the public safety."[62] The Attorney-General elaborated on internal disorder by saying

> [i]nternal disorder may take many forms and be on a large scale or on a small scale. It may be a case of a major attempt to overthrow the legitimate Government. It may be a case of a few fanatics (religious or political) causing unrest leading to riots and local disorders.[63]

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of this subsection, for which provision is necessary or expedient for the preservation of public security.

[55] The extensive provisions for the rights of persons accused of crime are set forth in KENYA CONST. § 77.

[56] KENYA CONST. § 83(2)(a).

[57] *Id.* at § 83(2)(b).

[58] *Id.* at § 83(2)(c).

[59] *Id.* at § 83(2)(e) and 83(4).

[60] *Id.* at § 83(3).

[61] IX OFFICIAL REPORT, H.R. (Part I) (1st Parliament, 4th Sess.) June 2, 1966, *reprinted in* C. GERTZEL, M. GOLDSCHMIDT & D. ROTHCHILD, *supra* note 29, at 232-36.

[62] *Id.*

[63] *Id.*

An order dated July 21, 1966, brought the Security Act into effect as far as sections 4(1), 4(2)(a), and 4(2)(b) are concerned.[64] At that time the order continued in effect for eight months following parliamentary approval. After the original approval by Parliament and one extension of the order,[65] the eight months requirement was finally deleted.[66] Regulations under the Security Act have been promulgated to deal with detention and restriction of persons.[67] An important provision of the regulations is the delegation of detention authority from the President to the Minister for Home Affairs.[68]

### C. *The Use of Detention Without Trial in Kenya*

Despite the Attorney-General's statement in Parliament, it soon became clear that the Security Act was to be used almost exclusively as a weapon against political dissenters. Shortly after the Security Act was brought into operation eight persons were detained, four KPU trade union leaders and four KPU Party officials.[69] In May, 1967, the KANU government detained an MP for the first time. It is thought that Member John Keen was detained for his criticism of the government's failure to bring about an East African Federation with Uganda and Tanzania.[70] Later, the wife of a KPU MP was detained without trial.[71] Then in 1969, after an incident in which stones were thrown at the President's car, the KPU was banned and all seven KPU MPs, along with some KPU party personnel were detained.[72] These detentions appear to be the only ones actually related to real internal disorder.

In 1975, following the murder of dissident MP J.M. Kariuki[73] and a parliamentary committee report which cited government figures in a cover-up and possibly the murder itself,[74] two particularly vocal (MP)

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[64] Y. GHAI & J. MCAUSLAN, *supra* note 8, at 434 n. 81.

[65] *Id.*

[66] Act No. 45 of 1968, cited *id.*

[67] *Legal Notice No. 212, Kenya Gazette, July 25, 1966, at Supp. No. 67, Legis. Supp. No. 41 (Special Issue).*

[68] *See* note 20 *supra*, at pt. II § 3(1), and The Public Security (Detained and Restricted Persons) Regulations 1966 pt. III § 6(1).

[69] C. GERTZEL, M. GOLDSCHMIDT & D. ROTHCHILD, *supra* note 29, at 241; Okoth-Ogendo, *supra* note 33, at 28.

[70] U. Uche, Human Rights and the Kenya National Assembly 1970-1975, 16-17 (1976) (unpublished paper presented at the Third International Conference on Legislative Development, Dublin, Ireland; jointly sponsored by the Comparative Development Studies Center of the State University of New York, Albany, New York and the Institute of Public Administration, Dublin, Ireland).

[71] C. GERTZEL, M. GOLDSCHMIDT & D. ROTHCHILD, *supra* note 29, at 241.

[72] Y. GHAI & J. MCAUSLAN, *supra* note 8, at 523; C. LEGUM, AFRICA CONTEMPORARY RECORD 1969-70, B-126 (1970).

[73] The Times (London), Mar. 12, 1975, at 9, col. h and Mar. 13, 1975, at 7, col. c. A reporter was also detained in 1975; it is thought he was detained for investigating too energetically into Kariuki's slaying. P.E.N., Freedom to Write Global Report, Oct. 28, 1977.

[74] The Times (London), June 5, 1975, at 7, col. h (debate on report); *id.*, June 11, 1975, at

critics of the government were detained.[75] This detention is important since, although Kenya is a one-party state, backbenchers often act as an unofficial opposition group.[76] Then in 1977, another MP who criticized the government and inquired as to the health of the two MPs detained in 1975, was himself detained.[77] This detention resolved any lingering doubts as to parliamentary immunity from detention. Mr. Anyona, the MP in question, was apparently detained solely on the basis of remarks made on the floor in the National Assembly. And his arrest occurred in the Parliament building itself.

And on the last day of 1977, Ngugi wa Thiong'o (formerly James Ngugi), East Africa's foremost novelist and Chairman of the Department of Literature at the University of Nairobi, was detained under the Security Act. His latest novel, *Petals of Blood,* is a harsh criticism of political and economic injustice in post-independence Kenya. It is thought, however, that Ngugi was detained because of his latest play, which shows Africans who supported the colonial regime as becoming rich and powerful, while those patriots who fought the British during the Emergency remain poor and powerless. After a standing-room-only run for a month in Nairobi, the play was banned, and Ngugi was subsequently detained.[78]

President Kenyatta made the government's stand on detention without trial clear in a 1975 speech to the National Assembly the day after the two MPs were detained. He warned that dissidents would not be tolerated and that similar action would be taken against any MP who did not support the government or tried to obstruct it.[79]

The pattern in Kenya is now clear; the Security Act is used to imprison without trial those who go too far in criticizing the government. Since independence, consistent trends can be seen in Kenyan law and politics: increasing power for the Executive, decreasing power for the legislative and judicial branches, "a whittling down [of] the effectiveness of the Bill of Rights,"[80] and the shrinking tolerance of the Executive for dissent. Thus, a most basic right, personal liberty, exists largely at the will of the Executive. One might legitimately wonder whether it is worthwhile to entrench a Bill of Rights in the Constitution if its effect is merely hortatory or "occasionally to require the Government to do indirectly what it cannot

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4, col. g (government attempts to block report); June 12, 1975, at 6, col. g (report adopted).

[75] The Times (London), Oct. 16, 1975, at 1, col. e.

[76] For a discussion of the role of the Parliamentary backbench in Kenya's one-party state, *see* C. GERTZEL, M. GOLDSCHMIDT & D. ROTHCHILD, *supra* note 29, at 266-80.

[77] A.I. REPORT, *supra* note 2, at 77.

[78] *Kenyan Writer's Arrest Raises Fear of Repression,* Wash. Post, Jan. 24, 1978, § A, at 7, col. 1. The story also discusses the effect which detentions have had on students, labor unions, Members of Parliament, and academicians.

[79] The Times (London), Oct. 17, 1975, at 5, col. f. "People appear to have forgotten that the hawk is always in the sky and ready to swoop on the chickens." *Id.*

[80] Y. GHAI & J. MCAUSLAN, *supra* note 8, at 455.

do directly."[81] The Security Act changes the rights of Chapter V of the Constitution into privileges, "the extent and very existence of which [are] wholly dependent upon the Government."[82]

D. *Detention and the Other Branches of Government*

We have seen that the President's Order bringing the Security Act into effect as to detention without trial, will stay in effect indefinitely without further approval.[83] Having noted that MPs critical of the government have been detained, there seems to be little likelihood at the present time that an MP will come forward with a resolution to revoke the order bringing the Security Act into effect, or to repeal the Act itself. The next step then is to inquire into the judicial response.

In the only known case to challenge a detention order to date, *Ooko v. The Republic*, the plaintiff-detainee filed a complaint in the High Court of Kenya under section 84 of the Constitution.[84] This section permits any person who alleges a violation of Chapter V of the Constitution to petition the High Court directly for redress. The High Court has original jurisdiction to hear the complaint and may "make such orders, issue such writs and give such directions as it may consider appropriate," to restore the violated right.[85] While the Court agreed to hear the case, it concerned itself primarily with the procedural guarantees of section 83[86] and did not look to whether the detention was actually necessary for the preservation of public security.

The Court agreed with the plaintiff in finding that the detention was made under the wrong name and the reasons given to the detainee were not sufficiently detailed. However, the court held that these shortcomings were not severe enough to warrant release of the plaintiff.[87] As to the adequacy of government grounds for the detention order when new reasons were given to the detainee, the High Court said "[t]he grounds if true could justify his detention. The truth of those grounds and the question of the necessity or otherwise of his continued detention are matters for the Tribunal and ultimately for the Minister rather than for this court."[88] This now leaves the decision to detain or not entirely with the Executive. What is unfortunate is that the Court was reluctant to order the detainee's re-

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[81] *Id.* at 456.

[82] *Id.* at 454.

[83] *See* text at notes 65-68 *supra*.

[84] Civil Case No. 1159 of 1966 unreported (High Court of Kenya). The case is discussed in Y. GHAI & J. MCAUSLAN, *supra* note 8, at 437-40.

[85] KENYA CONST. § 84(1), (2).

[86] Y. GHAI & J. MCAUSLAN, *supra* note 8, at 439.

[87] *Id.* at 438-39. "It is possible under this decision for the Government to detain a person on vague and general grounds, and then later to look for evidence against him." *Id.*

[88] *Reprinted in* Y. GHAI & J. MCAUSLAN, *supra* note 8, at 439.

lease even for the government's *procedural* irregularities,[89] particularly in light of contrary court decisions in other nations.[90]

## IV. DETENTION WITHOUT TRIAL AND THE COVENANT

### A. *International Covenant on Civil and Political Rights (Covenant)*[91]

On March 23, 1976, the Covenant entered into force in Kenya. Now binding international law for the parties to it, the Covenant provides "detailed guidelines for the conduct of government, specific legal protection for individuals, and an enumeration of instances in which public safety, order, health, morals, etc. can be invoked to limit individual freedoms."[92] The unresolved question is whether Kenya's obligations under the Covenant can be reconciled with its practice of detention without trial under the Security Act. In this regard, article 9(1) of the Covenant states "everyone has the right to liberty and security of the person. *No one shall be subjected to arbitrary arrest or detention.* No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law." [emphasis supplied]

Unlike either the European Convention for the Protection of Human Rights and Fundamental Freedoms,[93] which enumerates the instances in which one may be deprived of one's liberty, or the Kenya Constitution itself,[94] article 9 of the Covenant just states briefly one's right to liberty, and further that if one is deprived of one's liberty it must be in accordance with municipal law. Can a nation's internal law itself violate article 9? One commentator has said that it is "self-evident that the content of this article would, to a large extent, turn on the meaning of the word 'arbitrary.' "[95] A survey of the history of article 9[96] demonstrates that the word "arbitrary" was fully discussed and debated and that many replacements were suggested that were weaker in meaning. The current phrasing itself was

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[89] Unfortunately, the government may now see little need to comply with these procedural guarantees.

[90] The courts of some other nations with detention laws have taken the opposite stand. In Nigeria for example, *see* Aihe, *supra* note 2, at 71, discussing Rotimi Williams v. Majekodunmi (restriction of plaintiff's movement to a circle with a three mile radius was not reasonably justifiable under the circumstances) and at 72, discussing Alhaji Mojeed Agbaje v. The Comm'r of Police Western State (detention order was void for government failure to supply detainee-plaintiff with reasons for detention).

[91] G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. 16, at 52-58, U.N. Doc. A/6316 (1966). Kenya acceded to the Covenant without reservation on May 1, 1972, 15 INT'L LEGAL MAT'LS 217 (1976) [hereinafter cited as Covenant].

[92] Sohn, *The Human Rights Law of the Charter*, 12 TEX. INT'L L.J. 129, 135 (1977).

[93] Covention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 5(1), 213 U.N.T.S. 221, Europ. T.S. No. 5.

[94] KENYA CONST. § 72.

[95] Hassan, *The International Covenant on Civil and Political Rights: Background and Perspective on Article 9(1)*, 3 DEN. J. INT'L & POL'Y 153 (1973).

[96] *Id.*

often denounced as vague, yet in the end 'arbitrary' remained. It was through to add something to the article; to go further than just "illegal" or "unlawful;" to add the idea that the laws of arrest and detention themselves had to be just, fair, and compatible "with principles of justice [and] with the dignity of the human person irrespective of whether it had been carried out in comformity with the law."[97]

"[T]he incorporation of 'arbitrary' can be explained in the context of the desire of the draftsmen to prevent the exercise of absolute powers by government in a despotic manner."[98] Although they realized the vagueness of "arbitrary," the draftsmen left it in, recalling that other great documents which were not very specific have nonetheless "promoted the development of liberty,"[99] and that the term could later be "interpreted by reference to generally accepted principles of justice."[100] But the *travaux préparatoires* of article 9(1), though clearly showing that arbitrary means more than unlawful, still do not clearly show that detention without trial is a violation of the article; a more precise definition would be needed.[101] But even a more precise definition might not help. Detentions in Kenya under the Security Act are not *ipso facto* "arbitrary" since they are effected in accordance with laws to preserve the public security as determined by the Executive.

There is, however, an argument which necessarily leads to the conclusion that detention without trial, and hence the statutory authority for such detention, violates the Covenant; and this argument hinges upon the Covenant taken as a whole. The Covenant makes extensive provisions for the civil rights of those accused of crime in articles 6, 7, 9, 10, 11, 14, and 15. Except for derogation possible in times of emergency under article 4, discussed below, the rights of persons accused of crime are *not* subject to qualification or modification. These rights are in contrast with other civil and political rights (such as freedom of speech, assembly, and religion) which are subject to restrictions, for example, those "imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection

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[97] *Id.* at 181.

[98] *Id.*

[99] *Id.* at 183.

[100] *Id.*

[101] *See* U.N. Study, *supra* note 1, at 7. The Commission adopted this definition:

> an arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of person.

Since Kenya's detention provisions are established by law and since the purpose for the detention provisions is the preservation of public security, which is not "incompatible with respect for the right to liberty," it would seem that this definition permits detention without trial on public security grounds.

*See also* Report of the Ad Hoc Working Group established under resolution 8 (XXXI) of the Commission on Human Rights to Inquire into the Present Situation of Human Rights in Chile, 32 ESCOR (Agenda Item 5) 20, U.N. Doc. E/CN.4/1188 (1976), for a discussion of Article 4 of the Covenant in relation to the State of Siege in Chile.

of public health or morals or the protection of the rights and freedoms of others."[102]

While indefinite detention without trial is not explicitly condemned, it is unlikely that the draftsmen would have made such extensive provisions for criminal defendants, violable only in times of emergency, and yet meant to permit detention for an indefinite period, as long as the government does not formally charge the detainee with a crime. It is not conceivable that a government can escape its responsibilities under Articles 6, 7, 9, 10, 11, 14 and 15 to those whom it deprives of liberty by detaining them under a law which permits imprisonment without charges, proof, trial or judgment by a judicial body. It seems manifestly absurd and unreasonable to suggest that detention without trial for an indefinite period at the discretion of the Executive comports with the Covenant while, for example, a trial which is "unduly delayed"[103] does not. On the basis of the foregoing it is clear that the Covenant, taken as a whole, presupposes and requires that persons deprived of their liberty either be charged and tried, or released.[104]

Support for this view is found in article 5 of the Draft Principles on Freedom from Arbitrary Arrest and Detention of the Committee of the United Nations Commission on Human Rights:[105]

> No one shall be arrested or detained unless there is reasonable cause to believe that he has committed a serious offence for which a penalty involving loss of liberty is prescribed by law, and unless, furthermore, there are grounds to fear that if not taken into custody he would evade the processes of the law or prejudice the results of the investigation.[106]

A Comment elaborated that an "arrest or detention is allowed only if, in the first place, the person to be arrested or detained is reasonably suspected of having committed an offence."[107] Thus, Kenya's detention provisions cannot square with the Covenant unless the Security Act falls within the requirements of article 4, which states in part:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States parties to the present Covenant may take measures derogating from their obligations under the Covenant to the extent strictly required under the exigencies of the situation . . .

There are implicitly three requirements that must be met, the first being the existence of a public emergency. The word "emergency" itself

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[102] Covenant, *supra* note 91, art. 21.
[103] *Id.* art. 14(3)(e).
[104] *Id.* art. 9(3).
[105] U.N. Study, *supra* note 1, at 205-06.
[106] *Id.* at 206.
[107] *Id.*

does not appear in either the Security Act or section 83 or 85 of the Constitution. The Security Act, however, includes as its object situations which might be described as emergencies, *e.g.*, the defense of Kenya, suppression of rebellion and provision of remedial measures during and after natural disasters.[108] Thus, the Act gives the government the power to cope with emergencies. But article 4 requires an *actual* "time of public emergency which threatens the life of the nation." While there have been occasional periods of turbulence, these have not fallen within the language of article 4 so as to justify the government's decade-long power of detention. This conclusion proceeds from the government itself. MPs, Ministers, civil servants and many others in public life, with great regularity, have indicated the existence in Kenya of peace, order, and economic progress.[109] To an outsider, moreover, Kenya is not a nation experiencing an emergency.[110] This lack of emergency in Kenya is even more easily seen when it is observed that no emergency measures have been taken under the Security Act other than detentions. In contrast to the rest of Kenya, the Northeastern Province is an arid area inhabited by nomadic herdsmen with rather violent customs.[111] The province has also been troubled on occasion (seldom in the past ten years) by the guerilla attacks of Somali secessionists.[112] Section 127 of the Constitution gives the President the power to "make such provision as appears to him to be necessary or expedient for the purpose of ensuring effective government."[113] The province is administered in large part through these special regulations.[114]

The second requirement is official proclamation of an emergency to the populace. The people of Kenya know of the detention law, but it is the press rather than the government which is responsible. The *Kenya Gazette,* in which official orders and notices pertaining to the Security Act are published, is not an apt vehicle for public notice. The three large-circulation dailies hence fill this gap.

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[108] *See* note 20, *supra* pt. I, § 2.

[109] *See, e.g., Kenya's Stability Praised,* The East African Standard, Oct. 9, 1972, at 5, col. 1. The article states that:

> The Vice-President, Mr. Moi, said in Nanyuki at the weekend that Kenya's stability since independence had brought about rapid development and people had confidence in the country.
>
> Mr. Moi attributed the achievement to the wise and inspiring leadership of President Kenyatta who had worked relentlessly to bring about prosperity and peace in Kenya.
>
> He asked Kenyans to be grateful to President Kenyatta for having steered the country on the right path . . . .

[110] The author taught in a secondary school in Kenya from January 1976, until July 1977. These conclusions are based on personal experience.

[111] Fisher, *Kenya Says* Harambee, 135 NAT'L GEOGRAPHIC 151, 198 (Feb. 1969).

[112] The Times (London), July 1, 1977, at 9, col. a.

[113] KENYA CONST. § 127(1).

[114] Y. GHAI & J. MCAUSLAN, *supra* note 8, at 431.

The third requirement is that the derogation of the Covenant be required by the exigencies of the situation. But a recent detention order, for example, made for a single dissenting MP, bore no discernible relation to any real or imagined emergency or to any of the purposes for which the Security Act was passed.[115] While some detention orders bear some relation to emergency situations, most have not.[116] As stated above, the government's power to detain persons under the Security Act has been used primarily to stifle dissent voiced by public figures. The government's actions have been taken in periods falling short of article 4 Covenant requirements, under this third criteria.

B. *Other Covenant Articles Violated*

As a consequence of Kenya's detention law violating the Covenant, but not falling within the article 4 exception, other articles are violated. Article 12, which guarantees the "right to liberty of movement and freedom to choose residence,"[117] is violated by detention without trial. Article 14 deals with the rights of defendants in criminal trials; these rights would apply to persons detained if the government complied with the Covenant and preferred charges. Other problems with detention exist because the detainees are denied "a fair and public hearing by a competent, independent and impartial tribunal."[118] There is also no presumption of innocence.[119] There is no "trial."[120] There is no right for the detainee to examine witnesses against him or to obtain the presence of witnesses on his own behalf.[121] There is no right to review of the decision by a higher tribunal.[122]

While *Ooko* established the detainee's right to seek the High Court's help in ensuring government compliance with procedural guarantees, judicial reluctance to order release may make this a rather hollow right. And article 15 of the Covenant, which states that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence . . . at the time when it was committed. . . ." seems to be abused by a law which permits persons to be punished by imprisonment without any assertion of crime. With regard to article 14, an even more fundamental flaw appears in that the entire hearing procedure under section 83 leads not to a decision but to a recommendation to the Minister (who actually decides), thus separating those that hear the evidence from those that make the judgment.

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[115] A. I. REPORT, *supra* note 2, at 77. *See also* The Times (London) Sept. 26, 1977, at 6, col. h.

[116] Notably those made in late October, 1969. *See* notes 69-78 *supra*.

[117] Covenant, *supra* note 91, art. 12(1).

[118] *Id.* art. 14(1).

[119] *Id.* art. 14(2).

[120] *Id.* art. 14(3)(c).

[121] *Id.* art. 14(3)(e).

[122] *Id.* art. 14(5).

A law which permits the government to imprison persons without trial imperils other civil and political rights in the Covenant. Personal liberty is a minimal, crucial right whose violation "chills" and sometimes destroys other rights and freedoms. Some other Covenant freedoms jeopardized by Kenya's detention law are freedom of opinion,[123] freedom of expression,[124] the right of peaceful assembly,[125] freedom of association with others;[126] and all the political rights in article 25 including the rights (a) to take part in the conduct of public affairs, (b) to vote and to be elected, and (c) to have access to the public service. The right to liberty and the security of the person is a lynchpin on which much depends; its absence endangers many other civil and political rights.

Freedom from arbitrary arrest and detention is a right of the first rank. In its *Principles of the Rule of Law,*[127] which commences with the heading "Minimum Conditions of a Juridical System in which Fundamental Rights and Human Dignity are Respected," the International Commission of Jurists state that "[p]ersonal security must be guaranteed. No one may be arrested or detained without a judicial decision or for preventive purposes."[128] And Amnesty International lists as one of its objectives opposition to "the detention of any Prisoners of Conscience[129] or any political prisoners without trial within a reasonable time."[130]

## V. KENYA IN CONTEXT

Despite the inconsistency between Kenya's detention law and the Covenant—and the adverse consequences on freedom generally—it is essential to place Kenya in context, understanding first, the restraint with which detention powers have been used *up to now* and second, the situations in the countries surrounding Kenya. Both the United States State Depart-

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[123] Covenant, *supra* note 91, art. 19(1); *see also* KENYA CONST. § 79(1).

[124] Covenant, *supra* note 91, art. 19(2); *see also* KENYA CONST. §§ 70(b) and 79(1). But after the detention of two MPs in October 1975, The Times (London) noted: "The impression among members is that Parliament is likely to be a much quieter place in the future." The Times (London), Oct. 17, 1975, at 5, col. f.

[125] Covenant, *supra* note 91, at art. 21; KENYA CONST. §§ 70(b) and 80(1).

[126] Covenant, *supra* note 91, at art. 22(1); KENYA CONST. §§ 70(b) and 80(1).

[127] INT'L COMM'N OF JURISTS, THE RULE OF LAW AND HUMAN RIGHTS: PRINCIPLES AND DEFINITIONS 1 (1966).

[128] *Id.* at 5.

[129] Prisoners of Conscience are persons who are "imprisoned, detained, restricted or otherwise subjected to physical coercion or restriction by reason of their political, religious, or other conscientiously held beliefs or by reason of their ethnic origin, colour or language, provided that they have not used or advocated violence." A.I. REPORT, *supra* note 2, at 13.

[130] *Id.*

[131] State Dep't, Country Reports on Human Rights Practices 57 (1978) (Report Submitted to the Committee on International Relations of the House of Representatives in accordance with §§ 116(d) and 502 B(b) of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. §§ 2304 (1976) and 2151n (Supp. VII 1977)).

ment[131] and Amnesty International[132] estimate the number of detainees at present in Kenya to be less than ten, out of a total population of over 14,000,000. There have been no allegations of torture or physical coercion of detainees. Detainees are entitled to some constitutionally guaranteed rights and public opinion has occasionally been used in the past to pressure the government to release detainees.[133] Detainees are rarely held more than five years, though the pattern of released detainees publicly rejoining KANU[134] might lead one to suspect that a promise to do so is a condition for release. In addition, there is a certain predictability to detention in Kenya. Dissenters are generally given indirect or veiled warnings in speeches by a powerful government figure, or private warnings,[135] before being detained.

It is noteworthy, too, that Kenya's press, among the freest in Africa,[136] tends to check the use of detention. When MP George Anyona was detained in May 1977, the news made the front page of Kenya's papers,[137] and put the government on the defensive. And despite the detention of at least a dozen MPs at various times in the past ten years, Parliament continues to be a forum for the discussion of the right to personal liberty.[138] A final point to be made is that a study such as this Note would not be possible of a nation which did not have some respect for the right to personal liberty. The government at present generally complies with the constitutional provisions concerning detainees, for example, dutifully publishing detention orders and releases in the *Kenya Gazette*.[139]

Kenya's East African neighbors are Somalia, Ethiopia, Sudan, Uganda, and Tanzania. All are described as "not free" by Freedom House (Kenya is "partly free").[140] Of Uganda and Ethiopia, Amnesty International said that "torture, massacre of civilians and the government-sanctioned murder of political opponents have proceeded unchecked . . . [and] have now become commonplace."[141] In contrast to Kenya's handful of detainees, of whom four are Amnesty International Prisoners of Conscience, Amnesty International reports that it cannot adopt individual Prisoners of Conscience in Uganda, "mainly for fear of reprisals, but also because very few

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[132] A.I. REPORT, *supra* note 2, at 77.

[133] Uche, *supra* note 70, at 17-18.

[134] *See, e.g.*, The Times (London), Sept. 9, 1971, at 6, col. h, telling how Odinga rejoined KANU five months after his release from detention.

[135] *See, e.g.*, The Times (London), Sept. 26, 1977, at 6, col. h; MP George Anyona was threatened with detention prior to actual detention.

[136] The Times (London), Dec. 14, 1976, at V, col. a. Apart from President Kenyatta and possibly Vice-President Moi, "anybody's tail is there to be twisted." *Id.*

[137] The Daily Nation (Nairobi), May 5, 1977, at 1.

[138] *See* Uche, *supra* note 70, at 16-19.

[139] *See, e.g.*, Legal Notices No. 3480 and 3481 dated Oct. 24, 1975, *Kenya Gazette*, Oct. 31, 1975, at 1247, col. 2, announcing the detentions of MPs Seroney and Shikuku.

[140] FREEDOM AT ISSUE, Jan.-Feb. 1978, at 7.

[141] A.I. REPORT, *supra* note 2, at 58.

detainees survived long after arrest by the security forces."[142] In Somalia, the number of persons detained without trial is unknown, as many detainees are "kept in total solitary confinement without any contact with relatives or the outside world."[143] In Sudan in 1976, following an assassination attempt on the President, 98 people were executed shortly after being sentenced to death by a special court-martial.[144] The use of torture on prisoners has been alleged,[145] and detention without trial is persistently used by the government.[146] To the south in Tanzania, torture has been alleged,[147] and "[t]he number of detainees on mainland Tanzania is estimated to be between 1,000 and 1,500."[148]

Summarizing then, the situation is Kenya is different in degree and in kind from its neighbors. In Kenya modest departures from civil rights are made in the name of public security. This situation may be distinguished from the one which exists in states like Somalia and Tanzania where security justifies a widespread use of detention without trial and dissent is virtually a crime for which the punishment, imposed by the government, is imprisonment without trial. The situation in Kenya may also be distinguished from that of Ethiopia or Uganda where chaos prevails and the Rule of Law is without meaning. The differences between Kenya and its neighbors are substantial; it seems that, despite its use of detention, Kenya more closely follows the Rule of Law than do its neighbors.

## VI. SUGGESTIONS FOR CHANGE

### A. *Status Quo*

It might be argued that detention without trial, used modestly, is an appropriate, temporary half-way station for the government of a nation to adopt as a necessary compromise for the sake of national security. Nevertheless, it is possible to bring Kenyan law closer to the Covenant without sacrificing any of this security. One means would be to keep sections 83 and 85 of the Constitution and the Security Act just as they are, but clearly state the limits of dissent in a regulation made under the Security Act. While at present the rough outlines of the unwritten rules are evident, such a statement would put potential detainees on notice and take some of the force out of an arbitrary detention charge. This change would still permit detention without trial, however, in contravention of the Covenant.

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[142] *Id.* at 110.
[143] *Id.* at 96.
[144] *Id.* at 102-03.
[145] *Id.* at 58.
[146] *Id.* at 104.
[147] *Id.* at 58.
[148] *Id.* at 106.

B. *Modifications*

At least four different modifications might be made upon the Security Act and Constitution sections 83 and 85 which would bring the detention procedure more in line with "generally accepted principles of justice."[141]

Most importantly, after the original detention order is made by the government, the decision to continue to detain or to release might be transferred from the Executive to the Review Tribunal. This change would bring the conduct of hearings of the Tribunal closer to judicial trials. It is also suggested that the Tribunal be appointed by someone *other than* the Executive himself, for example, the Chief Justice of the High Court. This change would mean that the decision to free, or to continue detention would rest solely with the Tribunal hearing the evidence; it would also place a greater burden of proof on the government.

Second, more procedural safeguards for the detainee might be added to the Constitution and the Security Act. Some examples of these are the detainee's right to attorney's assistance throughout detention, the right to review on the merits of the necessity of detention by the High Court of Kenya, the right for a detainee at his hearings to question government witnesses and to have his own witnesses speak on his behalf.

Third, at present, an order bringing Part III of the Security Act into effect, after approval by Parliament, remains in effect indefinitely. A time limit such as the eight months limit in force until 1968 might be reintroduced to the Security Act.

Finally, the discretion of the President to issue an order bringing the Security Act into effect might be curtailed by a requirement that such an order be "reasonable under the circumstances." Such a modification might be accompanied by a further provision requiring review of the order by the National Assembly or the courts.

C. *Repeal*

One further possibility would be to repeal the Security Act and sections 83 and 85 of the Constitution altogether. They might be replaced by a constitutional amendment along the lines of article 4 of the Covenant, but with greater detail. This alternative seems the preferred course, as it eliminates entirely the possibility of detention without trial, which is violative of the Covenant. Presumably this would invigorate other rights in Kenya, such as freedom of expression and opinion and might lead to greater participation in public affairs by all.[150] This alternative does not strip the government of all its weapons though.

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[149] Hassan, *supra* note 95, at 183.

[150] Y. GHAI & J. MCAUSLAN, *supra* note 8, at 257-58. The authors note that "[t]he very existence of these [Security Act] powers has an unhealthy and inhibiting effect on the assertion of democratic rights, and their prolonged use is clearly inimical to the growth of democratic institutions."

If the government of Kenya wishes to bring its municipal law in line with its international obligations but still wishes to contain dissent at the level to which it has grown accustomed, it has two options under present Kenya law, that is, there are at least two ways for the government to control dissent after it repeals the Security Act. Kenya is at present, and for the foreseeable future, a *de facto* one-party state. In view of KANU's legal and extra-legal impediment of the opposition in the past,[151] it is unlikely that an opposition party can form or be recognized. Furthermore, the Constitution requires all sitting MPs to be nominated by a "political party."[152] As there is only KANU, and since there is a virtual identification of party and government leaders as in the communist nations, the government might dispose of its most troublesome critics, the vocal backbench MPs, by withholding or withdrawing the KANU nomination. This maneuver would in effect unseat the MPs.[153]

A second approach lies in the fact that Kenya's Penal Code defines treason[154] and sedition[155] in extremely broad language. A person who "compasses, imagines, invents, devises or intends . . . the death, maiming or wounding . . . of the President [and also] expresses, utters or declares any such compassings, imaginations, inventions, devices or intentions by publishing any printing or writing or by any overt act or deed, is guilty of treason,"[156] for which the punishment is death. Thus, in Kenya it is treason, punishable by death, to imagine aloud that octogenarian President Kenyatta will someday die. The practical effect of this provision is to prevent any public discussion of succession.

Sedition is committed by any person who does or says anything with a seditious intention.[157] The following are some seditious intentions: the intent "to bring into hatred or contempt or to excite disaffection against the person of the President or the Government," "to raise discontent or disaffection amongst the inhabitants of Kenya," and "to promote feelings of ill-will or hostility between different sections or classes of the population of Kenya."[158] Seditious intention has been defined so broadly that "it would cover most acts of criticism of the Government."[159] In view of this

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[151] R. BUIJTENHUIJS, MAU MAU: TWENTY YEARS AFTER 35-36 (1973).

[152] KENYA CONST. § 34(d).

[153] Despite government claims that an MP expelled from KANU does not lose his seat, this is a party safeguard, alterable by a simple party directive, and not a *legal* safeguard. The Constitution itself is silent as to the effect of such an expulsion. C. GERTZEL, M. GOLDSCHMIDT & D. ROTHCHILD, *supra* note 29, at 212.

[154] The Penal Code (Amendment) Act, No. 24 of 1967, § 2, (amending § 40 of the Penal Code).

[155] *Id.*, amending § 56 of the Penal Code regarding seditious intent and § 57(1) of the Penal Code as to the definition of sedition itself.

[156] *See* note 154 *supra*.

[157] *See* note 155 *supra*, at § 57(1).

[158] *Id.* at §§ 56(1)(b), 56(1)(e), and 56(1)(f).

[159] Y. GHAI & J. MCAUSLAN, *supra* note 8, at 453.

constitutional weapon's broad definition, it seems likely that convictions could be easily obtained. Distasteful as it may seem to imprison someone for criticism of the government, it is distinctly preferable to indefinite detention without trial.

## VII. CONCLUSION

In Kenya the government has the legal ability to detain persons without trial. This power brings Kenya's municipal law into conflict with its international legal obligations under the International Covenant on Civil and Political Rights. By necessary implication, the Covenant requires that all persons deprived of their liberty must be tried on criminal charges or released, except in times of public emergency. This conflict of laws, as Kenya's Attorney-General said, "causes concern to Amnesty International and the International Commission of Jurists"[160] and other groups concerned with human rights. Nevertheless, this power to detain has not been extensively used, and within its East African context Kenya is indeed an example for others.

But what the future holds for Kenya is a cause for concern and uneasiness. While President Kenyatta has used the power judiciously his successor may not. It is suggested, therefore, that the powers granted the Executive under the Preservation of Public Security Act be abolished in order, in part, to reconcile Kenyan law with the Covenant. Hopefully this change would bring about greater protection for rights; if not, however, the government still has other means of curtailing dissent which do not conflict with the Covenant. And it is these other means that the Rule of Law demands be used instead.

*Kevin Conboy*

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[160] A.I. REPORT, *supra* note 2, at 77.