



COMPROMIS 2018 KUSOL ALLKENYAN

MOOT COURT COMPETITION (AKMCC)

Dates: **September 2017 – February 2018**

Venue: **KUSOL's State-of-the-Art Moot Facility**

Theme: **“STRIKING THE BALANCE BETWEEN THE RESPECT FOR HUMAN
RIGHTS -AND MAINTAINING NATIONAL SECURITY”**

THE CASE CONCERNING THE SANA FILES

1. Cereke is a developing democratic State with a population of approximately 45 million, which boasts one of the fastest growing free-market economies in the world, and is a predominantly agrarian export economy. It is located in the Eastern part of the African continent and is a member of the East Africa Community [EAC]. Agriculture employs 55% of Cereke's workforce. Many of Cereke top corporations are listed on the Adnawr, Iborian, and Inelolak stock exchanges. Its rapidly-expanding information technology and communications sector is world-renowned.
2. The Cereke Secret Surveillance Agency ("the Agency") engages, *inter alia*, in covert operations and collects intelligence inside and outside of Cereke pursuant to the provisions of the Hush-Hush Reconnaissance Agency Act 1967 ("HHRAA"), as amended. Section 21 of the HHRAA, entitled "Electronic Surveillance," grants the Director of the Agency ("the Director") the power to authorize "electronic surveillance," without a court order, to acquire "local and foreign intelligence." The HHRAA defines "electronic surveillance" as "the installation of an electronic, mechanical, or other surveillance device inside and outside Cereke territory, and/or the acquisition by such a device of the content of or other technical information concerning a wire or radio communication." The statute defines "foreign intelligence" as "any information located or emanating from inside and or outside Cereke territory, which is relevant to the ability of Cereke to protect itself against any actual or potential threat to its national security or the ability of Cereke to conduct its administrative or foreign affairs."

3. Section 32 of the HHRAA, “Minimization Procedures and Structural Safeguards,” sets forth five limitations on the Agency’s surveillance activity. *First*, electronic surveillance may not be authorized by the Director whenever there is a “substantial likelihood” that information acquired thereby will include “any communication to which a national of Cereke is a party.” *Second*, it establishes a five-judge National Security Tribunal (“the Tribunal”), which must review all electronic surveillance conducted under the HHRAA every six months. Proceedings before the Tribunal are closed to the public, but the Tribunal is authorized to call on technical experts, academics, and NGOs to participate as *amicus curiae*. *Third*, a Parliamentary Committee for Surveillance Oversight is created, with access to all information relating to the Agency’s operations, and the capacity to launch independent investigations and to summon the Agency’s Director and other personnel to appear before it. *Fourth*, the statute provides that surveillance of “foreign public officials” may be authorized only when the Director, with the concurrence of the Minister of Foreign Affairs, considers it “necessary.” *Fifth*, the Agency must comply with any regulations issued by the Attorney General concerning legal aspects of any surveillance program.
4. On 17th June 2017, a new website, www.resist.com, was launched. The website invited opposition supporters in Cereke and sympathizers to register online and to utilize its chat rooms to discuss ways to stop the continued government corruption and police brutality arising from peaceful protests organized by SANA the Opposition Coalition in the country. The website quickly gained attention in Cereke and neighboring countries and international media, and at its peak was visited by approximately 400,000 users a day. Conversations on its online forums, which protected users’ anonymity, often focused on lobbying activities in support of draft legislation and organizing of peaceful protests in cities across the country. However, few members also promoted violent actions,

including damage to public property and theft. One anonymous post, which was later reposted onto social media and received widespread attention in Cereke, read: “Our politicians have failed to respond to peaceful initiatives. We must take charge and command attention and promote electoral justice by whichever means necessary.’

5. On the night of 2nd October 2017, several business premises along the main highway of the capital city Iborian were simultaneously set on fire. This was during the procession that was welcoming the main opposition leader back into the country after a being a month out of the country. The police in return opened live fire on the crowd and killed a total of 32 civilians and injured many others. Government reports estimated the damage from the attacks to be in tune of millions of Cereke Shillings.
6. The President of Cereke Attaynek Freedom, was interviewed on the day following the attacks. When asked about the alleged involvement of opposition activists in the attacks, President Freedom responded: “We do not yet have all of the facts concerning these terrible, orchestrated crimes. The police are investigating and will bring the perpetrators to justice. My administration will not tolerate such provocations.”
7. President Attaynek and the Deputy President Arap Singh Otur, discussed the violence and attacks the following day. Deputy President Arap Singh Otur offered Cereke Police Force continued cooperation in combatting what he called “acts of demo-terrorism,” including coordination and sharing of intelligence information, and stressed the importance of continued agricultural trade between counties across the country and the need to maintain peace. Following the call, the Cereke security and intelligence services were ordered to direct their operations against “what appears to be a new, growing, and dangerous threat to the well-being of all counties.”
8. On 16 October 2017, Henry-Paul Ibmajn, the Agency’s Director, met with the Minister of Internal Affairs. He informed the Minister that the Agency had succeeded in identifying a

ring of opposition sympathizers and activists who had been plotting to contaminate a large shipment of maize, intended for consumption in the government's stronghold counties for relief efforts, with a chemically-altered and toxic neonicotinoid. He provided the Minister with the names and locations of the ring members. The following day, Cereke declared a Terrorism Alert pursuant to the Terrorism Act. The Terrorism Alert was reissued in November 2017.

9. On 21 October 2017, the police broke into a garage located in Cereke capital and apprehended three college students. The students had in their possession significant quantities of chemically-altered neonicotinoids and detailed maps of a number of maize storage facilities in Cereke. They admitted to planning an attack (which they insisted would not cause injuries or deaths), and to being part of a group of environmentalists, which they called "The Nyukis. And not opposition sympathizers" The students refused to provide the authorities with the names, locations, or future plans of other members of the group.
10. Yagama Anugim, a national of Cereke, is a former Agency intelligence analyst who had been part of the Agency's terrorism working group, established in early 2014. Yagama had full access to sensitive information relating to Cereke intelligence operations in all the 47 Counties and the neighboring countries. On the morning of 16th December 2017, Yagama drove from the Agency's facilities to Umusik, a city within Cereke but under the territory of the opposition coalition group SANA where he contacted Ognero & Ayogno, a law firm that had previously represented defendants in a number of high-profile whistle-blower and national security cases. Yagama handed lawyers from the firm a USB drive containing nearly 200,000 documents labeled top secret that he said he had directly downloaded from Agency computers. The firm agreed to represent Yagama in relation to any disclosure or dissemination of the materials.

11. On 18 December 2017, accompanied by his lawyers, Yagama met with two reporters from *Nyake Daily*, Cereke most widely-circulated newspaper. He gave the reporters a copy of the USB drive, requesting that the newspaper publish the contents on its website. In a written statement, Yagama explained that *“I have come to realize how surveillance programs, like the ones I was engaged in, threaten individual liberties and sovereign equality. I am compelled to talk about this! If we are going to trade liberty for security, we have to do it with our eyes open. These decisions should be made by the public, not by politicians.”*
12. In January 2018, thousands of documents marked “top secret” were gradually published, unedited and unredacted, on the website of *Nyake Daily*, following what the newspaper termed “a process of authentication and review performed by our reporters and lawyers.” One of the documents, published on 23 January and headed “The Pwani Program,” bore a signature of Henry-Paul Ibmajn. It detailed a May 2016 operation he had authorized, in which a waterproof recording pod was installed on the undersea fiber optic cable that was the primary backbone for Cereke international internet and telephone communications traffic. The device was placed on a section of the cable located in Cereke exclusive economic zone. The pod copied all information that went through the cable and transferred it to the Agency’s servers. According to the document, 1.2 million gigabytes of data were collected and stored daily pursuant to Pwani. The document also noted that, following the declaration by the Opposition leader to be sworn in as President, Agency employees had been instructed to use all of the Agency’s resources “to track the leaders, legislators activists in SANA and other dissenting groups like the Nyukis” relying on specifically tailored search terms, or “selectors.”
13. On 29 January 2018, *Nyake Daily* published on its website a document on the letterhead of the Office of the Attorney General of Cereke, Mannequin Uthig. Dated 10 May 2014,

it detailed regulations issued by the Attorney General regarding the Agency's surveillance. The document provided that all data collected by the Agency through Pwani or related programs, other than as the result of investigation of a specific individual, could be stored for a maximum of two years. It also noted that the Tribunal, in accordance with the HHRAA, had reviewed the Pwani Program every six months since its inception with no participation from outside experts. The Parliamentary Committee for Surveillance Oversight had also reviewed Pwani twice in closed-door hearings, but neither the Tribunal nor the Committee had ever challenged its legality. According to the document, Cereke security authorities had knowingly accepted, on at least 50 occasions, redacted information relating to terrorist activity derived from Pwani.

14. On 2 February 2018, Cereke Inspector General of Police and the Director of Public Prosecution issued a warrant arrest of Yagama, to stand trial for theft and a number of data security offenses. A press statement from the IG emphasized that “any further publication of these materials will have a long-term, damaging impact on trust and cooperation between the government and its citizens and other neighboring nations on their joint campaign against terrorism.”

15. On 6 February 2018, the banner headline of *Nyake Daily* website read: “Duale the Spy!” Another document leaked by Yagama stated that since its inception in 2013, the premises of the VoR station had been used by the Agency to promote its surveillance activities on opposition leaders, the citizens and neighboring countries. The document was printed on the letterhead of the Office of the Agency's Director. According to the document, Avril Duale was part of an operation called “the Single Source of Truth Program,” intended to collect intelligence on high-ranking public figures, civil societies, foreign embassies and private sector leaders. Whenever such individuals came to be interviewed for Duale's Show, they were told that their electronic devices could interfere with the sensitive

wireless microphones used during broadcasts. They were offered the opportunity to place their devices in a locker within their line of sight from the studio. Electronics placed in the locker were removed during the interviews by means of a concealed backdoor. This provided Agency engineers, who doubled as VoR employees, sufficient opportunity to hack into the guests' phones and portable computers and install a rootkit malware referred to in Yagama's documents as "Iagium," which then provided the Agency full remote privileged access to these devices. The information collected from "The Single Source of Truth" was stored and later analyzed in an underground floor within the VoR building, code-named "The Nyayo House."

16. A number of memoranda mentioning "The Single Source of Truth" were also published in raw form on *Nyake Daily's* site. They revealed that over 100 Cereke public figures, businessmen, officials, NGO-directors/board members and diplomats were surveilled under this program, whose primary objective was "to collect information concerning Cereke domestic and foreign policy, in order to advance Cereke political and economic interests in the region." One memorandum contained an image of Elisha Alufaw Itakubehc, Cereke Chairman of the Free Electoral and Boundaries Commission [FEBC], and detailed how The Single Source of Truth operatives had been able to hack his phone and access emails regarding Cereke the organization on the upcoming Presidential General Elections.

17. That evening, lawyers for the opposition coalition SANA applied to a judge under the guise of private prosecution for an emergency warrant to seize all assets and property of VoR pending an investigation into whether criminal offenses had been committed, citing as probable cause the The Single Source of Truth Program documents published by *Nyake Daily*. While the SANA lawyers were in chambers with the judge applying for the warrant, the prosecutors from the DPP office came in and officially took over the matter.

At the same time, VoR's television broadcasting was interrupted and replaced with old reruns of "AM Live with Duale." The judge immediately granted the warrant. Upon execution of the warrant that night, the police found the station unattended, although the TV broadcasting equipment and various other devices and documents had been left untouched. These articles were all catalogued and removed by the police.

18. At 4:15 A.M. the following morning, Cereke Border Patrol, conducting routine operations, encountered Avril Duale and two other Cereke VoR employees on the Standard Gauge Railway [SGR] train crossing into Cereke's neighbouring country. The Border Patrol requested that they present their travel documents for inspection. They refused, and were promptly detained. When the commander of the police unit conducting the investigation into VoR learned of this development, she sought and was granted a warrant for the arrest of the three on suspicion of espionage. There are reports obtained from their lawyers that they cannot be traced even after being seen last in police custody. Two weeks after intense search by their lawyers, Duale's body was found dumped in a forest not far from the capital. The police denied responsibility for the disappearance and subsequent death of Duale.

19. The Leader of Opposition Coalition SANA held a press conference on the morning of 7 February 2018. Before taking questions, he read a prepared statement: I am deeply troubled by reports that successive Cereke governments including the current administration have for decades engaged in a concerted surveillance campaign targeting our citizens and violating our fragile democracy, the country's territorial integrity and political independence. The governments' own documents show that these offenses are against our people's sovereignty and those of the neighbouring countries were purely politically motivated and had no public order implications. Cerekens are entitled to an

explanation. Any claims that such a program is necessary to combat terrorism simply ring hollow.

20. No matter how severe any perceived threat to Cereke national security, there is absolutely no justification for the systematic infringement of our citizens' privacy and basic human rights. Mass electronic surveillance of our people and institutions violates Cereke obligations under the Constitution of Cereke and its Statutes, the U.N. Charter, the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the International Covenant on Economic Social and Cultural Rights, The African Charter on Human and Peoples Rights, the East African Community Treaty, Vienna Conventions on Diplomatic and Consular Relations, the Broadcasting Treaty, and principles of comity between nations. Simply put, gentlemen do not read each other's mail, and friends do not spy on friends." He further while responding to questions from journalists insisted that VoR facilities should be treated as a crime scene.

21. On 8 February 2018, Deputy President Arap Singh Otur rejected the allegations characterized by SANA leader of Cereke and VoR's activities in a televised interview. He explained that Cereke surveillance programs complied with both domestic and international law because they "were prescribed by statutes, structured around minimization procedures, and routinely reviewed by competent authorities with oversight power." He asserted that the methods employed were "both necessary and proportionate," observing that the results of the surveillance "had benefited the national security and interests of Cereke." He ended his statement by saying: We have enjoyed decades of bilateral peaceful cooperation with the neighbouring countries, which is now being severely compromised. We make no apology for our efforts to keep ourselves and our friends safe from acts of terrorism. Meanwhile, the SANA leadership is hardly reciprocating our acts of friendship. It is providing sanctuary to Yagama Anugim, who is accused of very serious crimes, and has expropriated our property and instituted private prosecution against patriotic citizens.

22. Shortly after this interview, the Government of Cereke made it clear that it will not tolerate the publication of leaked confidential information, and that it will do whatever is in its power to disrupt any further threats to national security. With or without its citizens or foreign government support, we will continue our efforts to bring the fugitive Yagama to justice, and to stop the damage that will result from any dissemination of Cereke top secret documents.
23. On 9th February 2015, the computer networks and communication switches at both *Nyake Daily* and Ognero & Ayogno were hacked and disabled. Investigators found that the hackers had used a malicious program to disrupt the operation of the computer systems and to corrupt master boot records, to the extent that nearly 96% of the information was “non-recoverable.”
24. Based on traffic analysis, cyber security experts from the Umusik Institute of Technology concluded: “The malware used in the hacking of the computers has been traced to IP addresses within Cereke territory that are associated with Cereke computer infrastructures belonging to the National Intelligence Service [NIS]. Significant segments of code in the malware are exact replicas of those used in the Agency’s ‘The Single Source of Truth’ program. These code segments are not otherwise known to be in use or available to the general public.” Both Ognero & Ayogno and *Nyake Daily* contracted external appraisers, who have estimated the combined damages related to infrastructure and to unrecoverable data at Ceereke Shillings [CSHs] 5-15 billion. A significant number of proceedings before Cereke courts were delayed for months as a result of Ognero & Ayogno’s inability to access its files. *Nyake Daily* had to shut down its operations entirely; it resumed publication only in June 2017.
25. On 10th February 2018, SANA’s leader of opposition and his deputy together with other principals issued a statement denouncing the cyberattacks, stating that “all of the

evidence points back to the Agency and to Cereke.” He described them as “not only undermining freedom of expression and attorney-client privilege – essential values in and of themselves,” but as an “assault upon the very principles that stand at the core of our society.” In an interview with local news held on 10th February 2018, Attorney General Uthig refused to respond to allegations that Cereke was involved in the attacks.

26. On 11th February 2018, SANA and two local based Non-Governmental Organization that was also a victim of the alleged illegal surveillance, called Katiba Institute and the Kenya Commission on Human Rights [KCHR] filed a Constitutional Petition [together with supporting documents] in Cereke Constitutional and Human Rights Division challenging the governments crack down on free speech and related rights including calling upon the court to shut down the illegal surveillance program.

27. Cereke has a similar and or exact legal system as that of Kenya including its Constitution, all Statutes and the Terrorism Act. It is a member of the African Union (AU)- [has ratified all AU Treaties and Conventions]’, United Nations, and a party to the African Charter on Human and Peoples Rights [ACHPR]; Statute of the International Court of Justice [ICJ]; the Vienna Convention on the Law of Treaties [VCLT]; the International Covenant on Civil and Political Rights [ICCPR]; the International Covenant on Economic, Social, and Cultural Rights [ICESCR]; the Vienna Convention on Diplomatic Relations [VCDR]; the Vienna Convention on Consular Relations [VCCR]; the International Convention for the Suppression of Terrorist Bombings [ICSTB]; and the International Convention for the Suppression of the Financing of Terrorism [ICSFT], together with the Universal Declaration of Human Rights. It has not made any reservations, declarations or understandings with regard to any of these treaties.

28. Prepare heads of arguments both for and against, which are to be based on the Petitioner/Applicant grounds asking the Court to adjudge and declare that:
- i. A ban on publication of the documents earlier and or to be published on the website of *Nyake Daily* is unconstitutional and violates human rights and in any event, they are admissible as evidence before the trial Court;
 - ii. Cereke mass electronic surveillance programs against its citizens, public figures and other nationals revealed in those documents violates international law; and the petitioner/applicants are therefore entitled to an order directing the immediate termination of those programs with assurances of non-repetition;
 - iii. The seizure and forfeiture of the VoR station and its equipment, and the arrest of Avril Duale and the other two VoR employees, did not violate the Broadcasting Treaty, and were in accordance with Cereke other municipal and international law obligations; further the national security apparatus does not also take responsibility of Duale's disappearance and death.
 - iv. The cyber-attacks against the computer systems of *Nyake Daily* and Ognero & Ayogno are attributable to Cereke, and constitute an internationally wrongful act for which the affected parties are entitled to compensation.