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Special Investigation Techniques As A Means Of Investigation Of Complex Crimes, It's Impact On Fundamental Human Rights

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ABSTRACT

As man continues to advance in technology he equally seems to have advanced in the procedure for the commission of complex crime in order to evade punishment. This in turn have made the jobs of investigators and prosecutors tougher to prove the commission of complex crime and sustain conviction. It is for this reason that law enforcement agencies have had to adapt new investigative means by developing special investigation techniques. The current trends show that these enhanced forms of criminal investigation technique have been used in more extended manner. Such extended applications of these technique have become threats to individual rights such as right to privacy, freedom of expression, the right to freedom of association and assembly, the right to freedom of movement. This paper analyses the available justifications, compatibility and ethical sides of these enhanced forms of investigation techniques by police or investigative agencies. It also critically analyses the potential threats and implications of these enhanced forms of criminal investigations on certain basic individual human rights. Under the umbrella of enhanced criminal investigation techniques, there are various special techniques. The scope of this paper is not to deal with the specific nature of each technique, rather it is limited only to the general behaviour or characteristics, their underlying rationales and the possible threats to the rights of individuals. The paper concludes that for special investigation techniques to apply there must be checks and balances.

Keywords: National Security and Special Investigation technique, Rationales

1.0 INTRODUCTION

Rapid technological advancement at the end of the twentieth century has improved our quality of life but sadly this has also been used to the advantage of criminal and terrorist organisations.¹ The beginning of the twenty-first century has been blighted by a resurgence of terrorist attacks on a scale previously unimaginable. To combat terrorism and complex crime, law enforcement agencies have had to adapt their investigative means and develop special investigation techniques. These techniques are

¹ Adedeji Adekunle, Complex Crimes and Challenges to law Enforcement in Administration of Justice and Good Governance in Nigeria (Essays in Honour of Hon. Justice A. Katsina Alu GCON CJN (Rtd) Epiphany Azinge and Adedeji Adekunle (Eds) NIALS 2011, p.85.

used to systematically gather information in such a way that they do not alert the person(s) being investigated, for the purposes of detecting and investigating crimes and suspects.

In this area of the world where crimes of violence are on the increase and means of investigation are in their rudimentary stage of development coupled with the secrecy with which these crimes are committed and the abiding faith in the concealment of facts by whatever means by the perpetrator(s) of these crimes, the responsibility of ensuring security for the lives and property of our citizens demands the detection of the perpetrators of these crimes by all means allowed by law. Detection of crimes is a never-ending task the Police is called upon to perform and in the performance of this task, they ought to be able to beat the suspects in their game of hide and seek... *Per Obaseki JSC in Igbinovia v State*.²

Under certain circumstances like in the time of war or a state of emergency there will be a need to limit the enjoyment of certain rights for the purpose of protecting national security, or the life and property of citizens, physical integrity and fundamental freedom of others. Indeed, the protection of the right to life, and other rights is in itself a human right obligation.³ The African Charter on Human and Peoples Rights was adopted and ratified in Nigeria with some of its provisions introduced into chapter two and chapter four of the Constitution. While the Chapter Two provisions are said to be non-justiciable rights unless when tied to the fundamental rights,⁴ the rights enshrined in Chapter Four are however regarded as fundamental rights. Although chapter four rights are fundamental some of its provisions can be derogated from in times of war, emergency and for national security.⁵ Both international instruments and municipal law make provision for rights that are absolute and non-absolute. Non-absolute rights can be derogated from under special circumstances while absolute rights such as the right to life are rights that cannot be derogated from.

To make a valid critique of the pros and cons of the use of special investigation techniques for the investigation and prosecution of international crimes, this paper first considers non-absolute rights, and the different types of special investigation techniques. The paper further considers the importance of safeguarding lives and property by protecting national security from terrorism and other complex crimes as a justification for the use of special investigation techniques. The legal framework and international instruments from which these rights can be derived as well as our constitutional provisions will be highlighted. In its final analysis, the paper looks at the rationales for the use of special investigation techniques and the pre-conditions to be fulfilled before these techniques can be used. Law enforcement agencies in carrying out their civic responsibility must maintain a balance as the failure to maintain such balance can increase civil unrest and ultimately affect our national security.

2. Clarification of Concept

2.1 Complex Crime

The advancement in technology has played a great role in changing the techniques and tactics of criminal investigation. Criminal investigation can be reactive if it is triggered after a certain criminal wrong is committed or it can also be proactive when it is concerned with preventing the commission of crimes in advance with the help of sophisticated technology.⁶ There are several features that distinguishes a complex crime from crimes generally. The sophistication in the methodology employed stands out, particularly a demonstration of expertise of a system or technology as evident for example in cases of aircraft or sea vessel hijacking or several instances of cybercrimes. However any offence can attain the status of a complex crime going by the modus operandi of the gang where such an offence involves a gang syndicate, or has some form of international dimension or involves misconduct which

² (1981) NSCC 63 at pp 68-69.

³ Akin-Ibidapo Obe: "Human Rights and State Security, the Nigerian Experience," in Akintunde O. Obolade (ed); *A Blueprint for Nigerian Law*, (Faculty of Law, University of Lagos 1995) p. 289

⁴ *Centre for Oil Pollution Watch v. NNPC* (2019) 5NWLJR (Part 1666), at p. 518

⁵ Adedeji Adekunle, *Fair Hearing and Law Enforcement Some Recent Development in Current Themes in the 1999 Constitution: A Tribute to Hon. Justice S.M.A Belgore, D.A Guobadia and E. Azinge* (Eds) NIALS, 2007, p. 315

⁶ Tong, S., Bryant, R. P. & Horvath, M. A. H. *Understanding Criminal Investigation*, 2009, pp. 1-36.

can contribute to the economic adversity of the country. An example of such an offence is kidnapping⁷ which first started with the Niger Delta militants kidnapping expatriates and demanding ransom for their release. The resultant effect was that some foreign companies in Nigeria at the time had to close operations. Although under the general criminal law the offence of kidnapping attracts a penalty of 10 years,⁸ today some states have in response to the outrage of the crime amended their laws by stipulating capital punishment or life imprisonment for kidnapping.⁹ Many forms of organised crimes such as terrorism, fraud, money laundering, counterfeiting, arms and human trafficking apart from the sophistication in the execution of the crime, entail intricate layers of criminal conspiracy and responsibility. Therefore investigation of these kind of complex crimes cannot be routine affairs.¹⁰

Nowadays, the advancement of technology and the sophistication of crimes oblige many countries to use special investigative techniques in their investigation of crime. The most remarkable fields of technologies that have been usually applied and play a prominent role in criminal investigations are, inter alia, “information science”; “molecular biology”; and “social science research”

“Information science”

This involves the use of innovation of advanced information technology such as “broad array” of computers and telecommunication technologies including surveillance technology. These play great role in enhancing criminal investigation through accumulation and sharing of necessary information to investigative officers. For instance where a person is declared missing, telecommunication service providers such as MTN, Airtel etc can be approached to track the missing person's call history i.e who did the person call last or who called the person last and from what locations were these calls made. Sometimes they may require information on the frequency of the call. Again, under exceptional circumstances, phone lines of suspected criminals are tapped into to monitor their conversation. Although this in itself is a violation of the individual right to privacy, the rationale behind this is the overall public interest and safety of lives and property.

“Molecular biology”

This is the result of new biology innovation, basically studying the chemical and genetic basis of human nature or behaviour or mental set up or functioning for identification, testing and screening, using body fluids or tissue for criminal investigation process.¹¹

These technologies, obviously, are undisputable in enhancing law enforcement agents' ability to identify offenders and capture suspects.¹² Put differently, in investigating crimes, identifying suspects, and gathering evidence, special technologies address the quest for easy solutions for law enforcement works and criminal investigations. The process of criminal investigations, however, has a high potential area for abuse of procedure.¹³ Determining which investigation tools to use depends on a variety of factors, including the nature of the alleged violations, the type of investigation to be conducted and the available resources.

In the contemporary world, countries use technologically enhanced criminal investigation techniques for alleged crimes or probable crimes. These advances of technology have its pros and cons on the administration of justice, mainly in crime investigation. The current trends show that those enhanced forms of criminal investigation techniques have been used in a more extended manner. Such extended applications of those techniques have become threats to other rights. However, the scopes of applications of these techniques are required to be clear and legally limited. Furthermore, it is necessary to make a clear demarcation as to which crimes or potential threats should be investigated by such kinds of investigative techniques.

⁷ Schmidile N, “Kidnapping as Business in Nigeria” feature article by the New York Times 4th December 2009 www.nytimes.com accessed 04/07/2020.

⁸ See section 364 Criminal Code Cap C38 LFN 2004.

⁹ See for example, Abia and Imo states (death penalty), Rivers state (Life) and the Terrorism Prevention Act 2013 which has categorized the offence of kidnapping as an act of terrorism.

¹⁰ Adedeji Adekunle, Complex Crimes and Challenges to law Enforcement in Administration of Justice and Good Governance in Nigeria (Essays in Honour of Hon. Justice A. Katsina Alu GCON CJN (Rtd) Epiphany Azinge and Adedeji Adekunle (Eds) NIALS 2011, p.88.

¹¹ U.S. Congress, 1988.

¹² Ibid.

¹³ Harfield, C. The Governance of Covert Investigation. Melbourne University Law Review, Vol.34. 2010, p. 86

Most of the time, countries engaged in special criminal investigation techniques such as various forms of surveillance, eavesdropping, undercover agents, biometrics and the like. These enhanced forms pave the way for silent and invisible intrusions on the privacy of individuals.¹⁴ Such secret and invisible nature limits the individuals to show before the court that they are under some kind of surveillance to get judicial remedies in case of violations of due process rights.¹⁵ The practice has caught great attention and triggered a lot of debate about the use of these special investigative techniques and their ethical concerns.¹⁶ There are countries where their law enforcement officials have proposed the prohibition or utilisation of communication technologies that are more difficult to intercept.¹⁷

2.2 Special Investigation Techniques

Today, crime is being committed in more sophisticated methods and a more organized form. In addition, new types of crime are continuously occurring. Criminal investigation is, essentially, the process of answering questions as to how, where, when, why, and by whom a crime has been committed. For this purpose, investigative law enforcement officers are required to collect information from various sources and arrive at a certain coherent conclusion on a given event.¹⁸ To effectively deal with such situations, investigative agencies are also getting systematized and scientific in terms of organization and investigation methods. In addition to conventional and enhanced, criminal investigation can be also classified as reactive or proactive investigation. Until recently, the highly dominant model of criminal investigation was a reactive kind of investigations. This kind of criminal investigation is always relies on the past history so that it has been highly criticized by its retrospective nature.¹⁹ Whereas proactive criminal investigation mostly used when the law enforcement agents predict a crime is going to be committed, detect and prevent the community from the effects of crime proactively.²⁰ This investigative technique is highly assisted by advanced technologies. However, one should note that though reactive criminal investigation presupposes the commission of crime, it does not mean that enhanced investigative techniques are inapplicable. What makes it different is, its scope of utility i.e. it utilizes less in scope of special investigative techniques as compared to proactive one. In the contemporary world, the most commonly used special investigative techniques are, inter alia, technical aids (e.g. body scanners, iris-scanner, buss, probes, cameras, electronic facial ID software, Automatic Number Plate Recognitions; operational policing tools and systems; profiling techniques such as crime mapping, geographical profiling, offenders profiling, psychological and behavioural profiling); surveillance techniques (e.g. devices like CCTV, drone surveillance, phone tapping, wiretapping, human or electronic eavesdropping, communication data surveillance, pen register, trap and trace device, interception of communication; traffic data surveillance; covert operations such as directed surveillance, intrusive surveillance, electronic surveillance, and surveillance logs); and sources of information (e.g. intelligence database like Automated Fingerprint Identification System, DNA Database etc...). So according to the nature of the alleged crimes, countries may choose the relevant available investigative tools for their crime detection, prevention and investigation.²¹ For the sake of this paper, it is helpful to see the general nature of some enhanced investigative techniques such as, surveillance, wiretapping and eavesdropping.

2.3 Surveillance

Surveillance is the use of electronic devices so as to monitoring, observing or listening to persons, their movements, their conversations or their other activities or communications, recording any of this. This includes surveillance with the assistance of a surveillance device. This type of search and seizure may take various forms such as stationary surveillance, technical surveillance or electronic surveillance which generally includes eavesdropping, telephone tapping, “bugging”, Closed-Circuit Television (CCTV), GPS tracking, electronic tagging, and internet and computer surveillance. The most common

¹⁴ Scheb, J. M, *Criminal Law and Procedure* (7th ed.).2011, Boston, MA: Wadsworth, Cengage Learning.

¹⁵ Scheimin, M. Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. Human Rights Council, 13th Session, A/HRC/13/37, 2009.

¹⁶ Mullikin, A., & Rahman, S. M. (2010). The Ethical Dilemma of the U.S.A. Government Wiretapping. *International Journal of Managing Information Technology (IJMIT)*, 2, 2010, 32.

¹⁷ Ibid.

¹⁸ Ask, K. *Criminal Investigations: Motivations, Emotions and Cognitions in the Process of Evidence*. Doctoral Dissertation at Department of Psychology, Goteborg: Goteborg University, 2006. P. 86

¹⁹ Tong, S., Bryant, R. P., & Horvath, M. A. H. (2009). *Understanding Criminal Investigation*, pp. 1-36.

²⁰ Ibid.

²¹ Caremen, R. V. *Criminal Procedure: Law and Practice* (8th ed., 2010, p) 78.

types of electronic surveillance are aural surveillance (“bugging”) which includes telephone intercepting and listening device; and visual surveillance which can be covert, where it is carried out without the notice of the subject, or overt, where the subjects are aware that device are in use.

2.4 Wiretapping

Wiretapping is an intelligence gathering procedure used to obtain information without being detected. This activity involves tying into a wire or other conductor which is used to transmit some form of message. Mostly it is categorized under surveillance. Wiretapping can be classified into four, i.e. hardwired, soft, record and transmit wiretapping.

2.5 Eavesdropping

Eavesdropping can be carried out by human persons or equipment that are used to listen to the conversations of individuals under walls or windows or the house to get the required information.

Basically, applying these kinds of special investigative tools may increase the ability of the government to observe, control or intervene in the commission of crime; and may enable the government to investigate at a distance or out of sight of both the subject and concerned public interest groups.²² In most cases, the applications of those techniques are blurred. But the most common crimes which are subjected to such type of investigation or detection are: terrorism, organized crimes, money laundering, corruption, drug dealing, hijacking, espionage, treason, white collar crime, human trafficking and the like.²³ This does not mean that the utilisation of these techniques is always limited only to serious crimes. Again substantive seriousness of crimes may vary from jurisdiction to jurisdiction. Mostly, it is highly influenced by the national security matters of a given country and the safety of the community at large.

3. Legal Framework

Under extreme circumstances, states are allowed to derogate from their international obligation in the treaty. However, the circumstance giving rise to the derogation must conform to certain standards such as non-discrimination on grounds of religion or race. There must be a legal basis for the derogation, which must conform to a legitimate aim of maintaining national security, and the safety of life and property. The measure used must be proportionate to the attack or fear of an attack and must be serious. Some of the most fundamental human rights are absolute i.e. non-derogable. ²⁴Such rights include the prohibition on slavery, the prohibition against torture, and prohibition against retroactive criminal laws. The absolute character of these rights means that it is not permitted to restrict these rights by balancing their enjoyment against the pursuit of a legitimate aim.²⁵ The United Nations Convention against torture provides that under no exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. ²⁶A similar provision is made in our constitution, wherein it provides for the respect and dignity of the human person and makes prohibition against torture and inhuman treatment.²⁷

3.1 Fundamental Right

These are rights enshrined in Chapter IV of the Constitution of the Federal Republic of Nigeria, which are covered under Section 33- Section 42. Unlike the Social Economic rights in Chapter 2 of the constitution which are deemed as non-justiciable rights. The rights guaranteed in Chapter IV are justiciable, Breach of which the state can sue or be sued. These rights derive their legality from the African Charter on Human and Peoples Right. State parties to this treaty cannot waive their obligation under the treaty except with the approval of the Secretary General of the United Nations stating the special circumstance necessitating a request for the waiver of a guaranteed right. However, not all rights can be waived.

3.2 Absolute Rights in The International Covenant on Civil and Political Rights

Article 4(2), ICCPR specifies those rights which are non-derogable

²²Herbert, L. C.. Challenging the (Un) Constitutionality of Governmental GPS Surveillance. American Bar Association, Criminal Justice, 26, 2011, p. 11

²³Hall, D. E. Criminal Law and Procedure (4th ed.). Thomson Delmar Learning, West Legal Studies, 2004.

²⁴ See generally Sections 34, and 36 of the 1999 Constitution Federal Republic of Nigeria.

²⁵ Ani Comfort Chinyere; Lawful Limitation of Rights Affected by Special Investigative Techniques in UNODC Training Manual on “Human Rights and Criminal Justice Responses to Terrorism” p. 5

²⁶ See Article 2 of the UN Convention against Torture.

²⁷ Section 34 and 45 of the 1999 Constitution.

- a. Article 6 (right to life)
- b. Article 7 (prohibition on torture, cruel, inhuman or degrading treatment)
- c. Article 8, paragraph 1 and 2 (prohibition of slavery, slave trade and servitude)
- d. Article 11 (prohibition on imprisonment on the basis of inability to pay a contractual obligation)
- e. Article 15 (principle of legality in the field of criminal law)
- f. Article 16 (right to recognition as a person before the law)
- g. Article 18 (freedom of thought, conscience and religion)

According to the Human Rights Committee there are elements in some of the rights not listed in article 4(2) of ICCPR which cannot be lawfully derogated from. Of particular relevance to human rights while dealing with serious crimes like terrorism;

- a. All persons deprived of their liberty shall be treated with humanity with respect for the inherent dignity of the human person (article 10 of ICCPR)
- b. Prohibition against taking of hostage, abduction and acknowledged detention
- c. The fundamental requirements of a fair trial

Most fundamental human rights are however not absolute in character. The Constitution²⁸ and the International human rights law make provisions for derogable and non derogable rights. It provides that under certain circumstance there will be need to legitimately limit the enjoyment of certain human rights for the purpose of protecting goods such as national security, or life, physical integrity and fundamental freedom of others.

Section 45, paragraph 1, of the Constitution permits limitations to the enjoyment of some rights:

1. Nothing in sections 37, (right to private and family life), 38 (right to freedom of thought, conscience and religion), 39 (right to freedom of expression and the press), 40 (right to peaceful assembly and association) and 41 (right to freedom of movement) of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society;
 - (a) in the interest of defence, public safety, public order, public morality or public health; or
 - (b) for the purpose of protecting the rights and freedom of other persons.

By providing that these provisions shall not “invalidate any law that is reasonably justifiable in a democratic society (a) in the interest of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedom of other persons”, section 45 (1), basically sets the same valid limitations as international law, i.e, legal basis, legitimate aim and necessity and proportionality.

An example of a law limiting the right to privacy is section 148 of the Nigerian Communications Commission Act, 2003, which provides that on the occurrence of any public emergency or in the interest of public safety, the Commission may among other things, order that any communication or class of communications to or from any licensee, person or the general public, relating to any communication or its records shall be disclosed to an authorized officer mentioned in the order.²⁹This law provides a legal basis for limiting the right to privacy, but it seems to be couched so broadly that it would seem to open doors to being applied in situations where this is not necessary or proportionate, or “reasonably justifiable in a democratic society.”³⁰

In order to determine whether a right can be derogated from or not, the human right courts and treaty bodies have developed a test to establish whether a measure limiting a non-absolute right is legitimate. The following questions must be asked:

1. Is there a legal basis for the measure limiting the right?
2. Does the limitation on the right pursue a legitimate aim such as respect of the rights or reputations of others, the protection of national security, the maintenance of public order or public health or morals?

²⁸ Chapter 4 of the 1999 Constitution Federal Republic of Nigeria.

²⁹ Akintunde Otubu; “The Regulator and the Regulated: An Examination of the Legal Framework for Telecommunication in Nigeria” available online at [https:// www. Unilag.edu.ng/opendoc](https://www.Unilag.edu.ng/opendoc). Accessed on 26/10/16

³⁰ See section 45 (1) 1999 Constitution.

3. If so, is the limitation necessary to achieve the legitimate aim, and is the extent of the limitation proportionate in pursuit of the identified legitimate aim? The existence and effectiveness of procedural safeguards will be a key aspect of the assessment of whether the limitation of the right is proportionate.

It is only if all of these questions can be answered in the affirmative in a specific case will a restriction on a non-absolute right be permissible under international human rights law.³¹

3.3. Potential Threats of Enhanced Forms of Criminal Investigations

Most complex crimes and organised crimes are, unlike many other crimes because they are shielded in anonymity. They are invariably camouflaged as lawful activity and may occur without any immediate or visible impact on the victim. In some organised crimes like counterfeiting, drug and human trafficking, terrorism and false document racketing, the identity of main perpetrators i.e those that can be called the brains behind such crimes are shielded by secondary perpetrators or foot soldiers who are carrying out the instructions of a baron or clique.³²

The investigation of crimes of this nature must necessarily depend on stealth and confidentiality. Investigators must be equipped with tools that enable the gathering of information without alerting the brains behind a criminal enterprise. Ideally, the investigation of such crimes should not be initiated with an arrest of a minion as this will alert others, particularly the kingpins of the enterprise.³³ Investigators have traditionally relied on informers within a criminal ring to gather intelligence. Sometimes investigators penetrate crime rings working undercover and acting as provocateurs participate in the conception or execution of criminal schemes. Not all such instances are successful however, sometimes the informer or undercover agent is discovered by the criminals and eliminated or compromised.³⁴ Given these risks, less obtrusive techniques like electronic devices to gather intelligence is increasingly resorted to and has proved quite reliable. However, effective use of a wiretap rests on the ignorance of such a device by the subject of investigation. The question for constitutional lawyers is whether this is an unjustified breach of privacy rights guaranteed under section 37 of the 1999 Constitution which unequivocally protects the privacy of persons including specifically telephone and telegraphic communications.³⁵

Since human rights are interrelated and interdependent, right to privacy, in addition to a right in itself, serves as a basis for other rights, such as the right to freedom of expression, the right to freedom of association and assembly and the right to freedom of movement. All of these rights can be affected jointly or independently where law enforcement officials apply special investigative techniques without any checks and balances. It must also be noted that as unlawful interception of wire and postal communications is an offence under the Miscellaneous Offences Act,³⁶ any such act must be specifically authorised by law. In protecting certain guaranteed fundamental rights recourse must be given to the safety of the general public and national security. One respected jurist observed that given the increasing incidence of crimes committed in private (and of evidence derived from private sources) it would be absurd to use breach of privacy to shut out evidence and thus elevate it to a defence in a criminal trial.³⁷

However, in light of the increasing resort to such intelligence gathering devices, clear guidance on circumstances that would warrant a wiretap, including safeguards in carrying out such authorisations is desirable. Admittedly, the right to privacy under the Constitution is not absolute but rather than play the ostrich by condoning illegal procedures the legislature should make provisions that balance the public interest with privacy.

The Constitution³⁸ and the International human rights law makes provisions for derogable and non-derogable rights. It provides that under certain circumstances there will be a need to legitimately limit

³¹See UNODC Training Modules on Human Rights and Criminal Justice Responses to Terrorism.

³² Adedeji Adekunle, *Complex Crimes and Challenges to law Enforcement in Administration of Justice and Good Governance in Nigeria* (Essays in Honour of Hon. Justice A. Katsina Alu GCON CJN (Rtd) Epiphany Azinge and Adedeji Adekunle (Eds) NIALS 2011, p. 90.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Section 1 (1) and 1 (2) Cap M17 LFN 2004.

³⁷ Colin Tapper, *Overhearing and Oversight* (1997) *Journal of Evidence and proof* 162

³⁸ Chapter 4 of the 1999 Constitution Federal Republic of Nigeria.

the enjoyment of certain human rights for the purpose of protecting goods such as national security, or life, physical integrity and fundamental freedom of others.

Section 45, paragraph 1, of the Constitution, permits limitations to the enjoyment of some rights:

2. Nothing in sections 37, (right to private and family life), 38 (right to freedom of thought, conscience and religion), 39 (right to freedom of expression and the press), 40 (right to peaceful assembly and association) and 41 (right to freedom of movement) of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society;
 - (a) in the interest of defence, public safety, public order, public morality or public health; or
 - (c) for the purpose of protecting the rights and freedom of other persons.

By providing that these provisions shall not “invalidate any law that is reasonably justifiable in a democratic society (a) in the interest of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedom of other persons”, section 45 (1), basically sets the same valid limitations as international law, i.e, legal basis, legitimate aim and necessity and proportionality.

An example of a law limiting the right to privacy is section 148 of the Nigerian Communications Commission Act, 2003, which provides that ...

on the occurrence of any public emergency or in the interest of public safety, the Commission may among other things, order that any communication or class of communications to or from any licensee, person or the general public, relating to any communication or its records shall be disclosed to an authorized officer mentioned in the order.³⁹

This law provides a legal basis for limiting the right to privacy, but it seems to be couched so broadly that it would seem to open doors to being applied in situations where this is not necessary or proportionate, or “reasonably justifiable in a democratic society.”⁴⁰

In order to determine whether a right can be derogated from or not, the human right courts and treaty bodies have developed a test to establish whether a measure limiting a non-absolute right is legitimate. The following questions must be asked:

4. Is there a legal basis for the measure limiting the right?
5. Does the limitation on the right pursue a legitimate aim such as respect of the rights or reputations of others, the protection of national security, the maintenance of public order or public health or morals?
6. If so, is the limitation necessary to achieve the legitimate aim, and is the extent of the limitation proportionate in pursuit of the identified legitimate aim? The existence and effectiveness of procedural safeguards will be a key aspect of the assessment whether the limitation of the right is proportionate.

It is only if all of these questions can be answered in the affirmative in a specific case will a restriction on a non-absolute right be permissible under international human rights law.⁴¹ There have been recent attempts to extend the reach of investigation of crimes to electronic or telecommunications data. The Terrorism Prevention Act⁴² provisions are limited to access communication records as distinct from intercepting conversations and mails. The Attorney General of the Federation, the National Security Adviser or the Inspector General of Police can give directions to any communication service provider specifying among other things the maximum period for which a communication service provider may retain communications data.⁴³ This provision would seem to give access to logs of communication (voice data) which a telecommunications service provider routinely keeps for as long as the direction

³⁹ Akintunde Otubu; “The Regulator and the Regulated: An Examination of the Legal Framework for Telecommunication in Nigeria” available online at [http:// www. Unilag.edu.ng/opendoc](http://www.Unilag.edu.ng/opendoc). Accessed @ 10.27am on 26/10/16

⁴⁰ See section 45 (1) 1999 Constitution.

⁴¹ See UNODC Training Modules on Human Rights and Criminal Justice Responses to Terrorism.

⁴² TPA(A)2013

⁴³ Section 24 TPA, 2011.

specifies. Nothing is said however about the interception of communications. The use of wire taps in many jurisdictions is authorised by a judicial body usually upon an ex parte application by the investigator which should be based on reasonable suspicion of the involvement of the targeted person in a specified range of offences and also specify premises to be monitored.⁴⁴ Wire tap authorisations and intelligence gathered are themselves subject to periodic review by the authorising court in order to ensure that the authorisation is still necessary and that investigators have kept within its confines. It is important however to protect the confidentiality of the intelligence gathering method by penalising disclosure to unauthorised persons.

Nigeria has accorded fragmented albeit incremental attention to the investigation of complex or organised crimes. Legislative measures authorising proactive and special investigation techniques are limited to the offence legislated upon.

4. Rationales for the use of Special Investigation Technique

Many technological innovations can offer significant social benefits in general the reduction of crime and the just and equitable administration of justice in particular. Countries may put different justifications to make use of these enhanced forms of criminal investigative techniques in a given circumstance. Three basic rationales most countries rely on as justification for the use of special investigation techniques in the investigation of crime are as follows- technological innovations, national security, and crime prevention.

4.1 Technological Innovations

Two types of technological innovations can be identified information-based technological innovations (soft technology) and material-based technology (hard technology).⁴⁵ The sophistication of crime commissions and the challenge to investigate those crimes on one hand and the opportunity of hard or soft technological innovations that can ease such challenges on the other, create a conducive environment for criminal investigators and forensic practitioners of a given country. Factually, traditional investigation techniques do not compete much better against sophisticated crimes,⁴⁶ and the advancements in surveillance technologies, for instance, have supplied law enforcement with numerous new investigative tools, tactics, and methods. These innovations have been the source of incredible simplifications and ease, providing investigators with time and effort-saving advantages to more traditional painstaking investigative tactics. By nature, the efficacy and efficiency of these enhanced forms of investigation techniques in fighting modern crimes with modern technology would be one of the other rationales. Thus, this advancement creates the opportunity for law enforcement and intelligent agents to utilize those enhanced techniques for their careers.

4.2 National Security

National security or state security revolves around the competing interests of individuals, the state or the community.⁴⁷ This is so because all the rights of the individuals depend for their existence upon the continuance of organized political society, the continuance of the society itself depends upon national security, for without it any society is in danger of collapse or overthrow.⁴⁸ No wonder Onuoha sees national security as: “the capacity of a state to promote the pursuit and the realisation of the fundamental needs and vital interests of man and society and to protect them from threats which may be economic, social, environmental, political, military or epidemiological.”⁴⁹ In the words of the former president Olusegun Obasanjo, Nigeria’s national security shall be to:

Strengthen the Federal Republic of Nigeria, to advance her interests and objectives, to contain instability, control crime, eliminate corruption,

⁴⁴ For a comprehensive review of practices and standards see Hong Kong Law Reform Commission: Report on Privacy; Regulating the interception of Communications 1996 www.info.gov.hk accessed 23/2/11.

⁴⁵ Byne, J., *Technological Innovations in Crime Prevention and Policing: A Review of Research on Implementation and Impact*, 2011.

⁴⁶ See Special Investigative Tools to Combat Transnational organized Crime, 116th International Training Course Reports of the Course, Resource Material Series No.58, at 228.

⁴⁷ Akin-Ibidapo Obe:” Human Rights and State Security, the Nigerian Experience,” in Akintunde O. Obolade (ed); *A Blueprint for Nigerian Law*, (Faculty of Law, University of Lagos 1995) p. 289

⁴⁸ B.O Nwabueze: *Presidentialism in Commonwealth Africa*, (C. Heorst and Co. and Nwamife Publishers 1972) p. 332

⁴⁹ Freedom C. Onuoha:” The Transformation of Conflict in the Niger Delta: in H.A Taiwo: I.O Seniyi, R.A Salaw and A.

Usman (eds), *Nigeria Beyond 2007: Issues, Perspectives and Challenges*, (Faculty of Business and Social Sciences, University of Ilorin 2008) p. 265.

enhance genuine development, progress and growth, and improve the welfare and well being and quality of every citizen.⁵⁰

The term national security, state security, national interest, or public security under the military rule in Nigeria was defined narrowly as it was thought that the parochial and personal interests of the junta were intertwined with the overall interest of the state or government.⁵¹ It is however submitted that the national security concerns of any government may shift from time to time depending on the policy of the government as well as the fundamental objective and directive principles of state policy as provided in the constitution which provides amongst other things that: "security and welfare of the people shall be the primary purpose of government."⁵²

Most countries may take different security measures in seeking to safeguard national security and community safety. To prevent those threats posed on a given country, advanced technologies can be used in proactive and/or reactive investigative techniques. These techniques, for instance, can be justified on future terrorist acts and to obtain foreign counterintelligence information about the individuals and groups engaging in, or preparing to engage in terrorist activities in a certain state.⁵³ These days, criminal organisations are more sophisticated and dynamic than ever before. The challenges for law enforcement agents are to be prepared for this increasing sophistication to reduce the impact of criminal activities on a given state/community. To this end, countries' law enforcement agencies and intelligence agencies need forward-looking, assertive and comprehensive strategies to counteract the threat of multinational crime such as terrorism, kidnapping, money laundering, organized crime, hijacking, drug trafficking, and the like.⁵⁴ Due to these reasons, it is common to see why countries apply the required techniques, inter alia, electronic surveillance, and electronic interception including wiretapping and Global Positioning System (GPS). Moreover, the United Nations Convention against Transnational Organized Crime specifically endorses, where it deems appropriate, the state party to apply special investigative techniques such as electronic or other forms of surveillance and undercover operations by their competent body within their jurisdictions.⁵⁵ Therefore, national security issues are largely used as a kind of justification by States to use special investigation techniques as a protective and detective measure.

4.3 Crime Prevention

Special investigative tools, which are the result of technological advancement, can be used to prevent crime and to improve the performance of the police. The growth of crime and the emerging new technological innovations has brought with it the parallel phenomenon of expansion and specialization of police forces.⁵⁶ Crime prevention, in its present usage is a generic term of vaguely wide term. As the crime prevention trends of different countries shows, it refers to a variety of police actions ranging from patrolling the streets to surreptitious surveillance and under cover activities.⁵⁷ Moreover, it is virtually impossible to organise a complex crime without communicating over public networks, and this is particularly true where there is an international dimension, as is increasingly the case. Interception can exploit this weakness in the criminal structure, providing law enforcement officers with an opportunity to gather intelligence on crimes as they are being planned and providing invaluable insight into the thoughts and intentions of the criminal. In many countries, law enforcement officers and intelligent agents are highly proposed by their government to ban the utilisation of communication devices that are more difficult to intercept such as smartphones.⁵⁸ A highly enhanced intelligence functions and special investigative techniques are, thus, used as an instrument or tools at the guise of the prevention or detection of crime or to prevent public disorder. Therefore, crime prevention strategies can be taken as one of the justifications for using enhanced technologies for criminal investigation among others.

⁵⁰ Olusegun Obasanjo: The Grand Strategy for National Security (Abuja Federal Government Press 2001 pp.2-3)⁵¹ State Security (Detention of persons) Decree 1984

⁵² See section 14(2)(b) Constitution of the Federal Republic of Nigeria 1999.

⁵³ Stutzer, A., Camera Surveillance as a Measure of Counterterrorism? Economics of Security Working Paper 34, Berlin: Economic of Security. 2010

⁵⁴ United Nations Office on Drugs and Crime, 2011.

⁵⁵ UN Conventions against Transnational Organized Crime, 2004.

⁵⁶ Isnard, A. Can Surveillance Cameras be Successful in Preventing and Controlling Anti-Social Behaviours? Australian Institute of Criminology, 2001, p. 7. .

⁵⁷ Cohen, S. A. Invasion of Privacy: Police and Electronic Surveillance in Canada, 1982, p. 56

⁵⁸ Tong, S., Bryant, R. P., & Horvath, M. A. H. Understanding Criminal Investigation, (2009), (pp. 1-36).

5. Preconditions to Use Enhanced Forms of Investigative Tools

The basic issue of how to use those investigative techniques in line with the rule of law and respect for fundamental human rights cannot be universally addressed similarly. Rather, it will rely on the legal system, practice and culture of each country. It is necessary, therefore, to strike the balance as to what extent the privacy and other related rights of individuals can be respected while protecting the State from the effects of crime. For a given criminal justice system to use those investigative tools, with due consideration of the potential threats, it should be covered by a specific law and empower a given body to authorize based on the required probable cause and supervise as to the necessity and proportionality of government's measures. For the utilisation of those techniques to be under the law, it should be foreseeable, backed up by safeguards against misuse and controlling mechanisms should be established.⁵⁹ Whatever forms of special investigative techniques are adopted, there must exist adequate and effective guarantees against abuse.⁶⁰ As indicated in the previous section, the absence of detailed pre-existing legal safeguards that regulate the conditions under which the implementation of those special investigative techniques can be used has been ensured by adequate legislative control. The special investigative techniques should be adequately defined in the national legislation about the circumstances under which the competent authorities are entitled to the use of those techniques.⁶¹ Moreover, such legislative guidelines should prescribe the use of those techniques by law enforcement to the extent of their necessity and appropriateness for efficient criminal investigation. Besides, legislation should also adopt the system of judicial or other independent bodies prior authorization for the sake of ensuring adequate control of the implementation of those special investigative techniques. As the practice of some countries reveals, the government must obtain authorisation in good faith in connection with all offence which permits the use of such special investigation techniques. In this sense law enforcement needs to be warranted to use such intrusive techniques. Secondly, the prosecutor or law enforcement officers who need such kind of investigation techniques are required to show to the authorising court that using such investigative techniques is something of last resort since other investigation procedures have been tried and are unable to address the problem; or they are required to prove that ordinary or conventional investigation techniques realistically appear not likely to be successful or very risky.⁶² Thirdly, the government must support such application with sufficient probable cause that necessitates such kind of investigation. Finally, the government is required to minimize its intrusion on other individuals and irrelevant actions or communications of the person of special interest.⁶³ For law enforcement, for instance under the European Convention on Human Rights, to use those special investigative techniques, they are required to set clear legitimate objectives or aims to restrict fundamental rights and such restriction must be in all circumstances as necessary and proportional as possible to meet the legitimate objective which the state seeks to achieve.⁶⁴ Moreover, there are jurisdictions, for instance, that provide for the requirement of consent of the party to the conversation being recorded i.e. some jurisdictions permit recordings of their discussion with the consent of one party to the conversation and others require the consent of all parties to the conversation.⁶⁵

6. CONCLUSION

Today, criminal investigation techniques are more developed than ever before. Criminal investigation can be reactive if it is triggered after a certain criminal wrong is committed or it can be also proactive, which is concerned much more with preventing the commission of crimes in advance with the help of sophisticated technology. Though reactive criminal investigation presupposes the commission of a

⁵⁹Mooneh, T. Special Investigation Techniques. Data Processing and Privacy Protection in the Jurisprudence of the European Court of Human Rights, *Pace Int'l L. Rev. Online Companion*, 2010, at 97, p. 106.

⁶⁰ *ibid*

⁶¹ Council of Europe Recommendation 10, 2005.

⁶² Pikowsky, R. A. An Overview of the Law of Electronic Surveillance Post September 11, 2001 (p. 605). Moscow: Law Library Journal, University of Idaho Law Library.

⁶³ Abramson, J. M. Challenging Federal Wiretaps, *Criminal Law Newsletter. The Colorado Lawyer*, (2005). 34, 73.

⁶⁴ Taylor, N. A Conceptual Legal Framework for Privacy, Accountability and Transparency in Visual Surveillance System. *Surveillance and Society*, 8, (2011), pp. 455-470.

⁶⁵ Doyle, C. (2012). Wiretapping, Tape Recorders, and Legal Ethics: An Overview of Questions Posed by Attorney Involvement in Secretly Recording Conversation. Congressional Research Service, p. 1.

crime, it does not mean that enhanced investigative techniques are inapplicable. So according to the nature of the alleged crimes, countries may utilise the relevant available investigative tools for their crime detection, prevention and investigation. There are different justifications for various countries to make use of these enhanced forms of criminal investigative techniques. As earlier stated, technological innovations, national security, and crime prevention are some of the justifications. In the prevention and investigation of crimes, states utilise multiple techniques which might violate an individual's right to privacy. However, these techniques have an intrusive nature on the privacy of individuals and other related rights such as to freedom of expression, the right to freedom of association and assembly and the right to freedom of movement. It is necessary, therefore, to strike the balance as to what extent the privacy and other related rights of individuals can be respected while protecting the State from the effects of crime. Basically, for a given criminal justice system to use those investigative tools, with due consideration of the potential threats, it should be covered by specific laws which empowers a given body to authorise and supervise as to the necessity and proportionality of government measures.