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COMPARATIVE CONSTITUTIONAL SUPERVISION OF EXECUTIVE AUTHORITY: LESSONS FOR UGANDA FROM BENIN

Fred Sekindi*

ABSTRACT

This article compares the supervision of executive authority under the 1995 constitution of the Republic Uganda and the 1990 constitution of the People's Republic of Benin. The article argues that the constitution of Benin provides adequate constitutional constraints against presidential authority in order to prevent its abuse, while that of Uganda fails in this regard. The article also provides recommendations for establishing a constitutionally limited presidency for Uganda. The aim is to provide lessons for Uganda and other African states that are afflicted by executive excess in developing constitutional mechanisms, which deter the misuse of presidential authority. The article is a product of desk research.

I. INTRODUCTION

In 1991 and in 1989, Uganda and Benin, respectively, embarked on processes of adopting new constitutions in order to avert the misuse of state power, disregard for the rule of law, and constitutional disparagement, among other things, that both countries had suffered during their previous regimes. These processes resulted into the development of the 1995 Uganda constitution and the Benin constitution of 1990 in efforts to usher in new constitutional dispensations. This article analyses the legally unencumbered nature of the constitutional construction of the presidency in Uganda since the country became a British Protectorate in 1894 to the present. It also shows that the presumption that the presidency is entitled to unfettered state powers has fostered misrule, one-man regimes, and dictatorship, to mention a few of the problems in Uganda.

This article demonstrates that the 1990 Benin constitution provides sufficient mechanisms that deter the misuse of presidential authority compared to the 1995 Uganda constitution. Therefore, unlike Uganda, Benin achieved its aim of preventing the abuse of executive power. The main aim of this article is to draw

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lessons for Uganda and any other African countries that are afflicted by presidential constitutional excess on how to develop mechanisms that provide adequate checks and balances on presidential authority in order to avoid its abuse and misuse. Thus, this article also makes recommendations for regulating presidential authority. Methodologically, the article is a product of desk research including a review of primary sources (cases, constitutions, and statutes) and secondary documents (books, journals, and newspapers).

II. THE LEGALLY UNRESTRICTED NATURE OF PRESIDENTIAL AUTHORITY IN UGANDA

The exercise of state power by heads of state in Uganda has had no actual legal constraints since the creation of the Uganda Protectorate by the British in 1894. Starting with the authority of the colonial governor, who in modern constitutional terms may be referred to as the head of state, the powers of the governor were not subjected to any legal scrutiny. Two cases highlight the unlimited authority of the colonial governor over Uganda. In *Rex v. Besweri Kiwanuka,*[1] the High Court of Uganda sought directions from the British Secretary of State for Colonies on the jurisdiction of his Majesty over Uganda. In his reply, the Secretary of State asserted that: "By the Uganda Ordinance in Council, His Majesty had made manifest the extent of His jurisdiction in Uganda. Such may be referred to as an act of state unchallengeable in any court or may be attributed to state power given under the Foreign Jurisdiction Act'.

In the second case of *Rex v. Crewe Ex. P. Sekgome,*[2] the British Court of Appeal held that by virtue of the Foreign Jurisdiction Act 1890, the Crown's powers in any of its protectorates could not be legally challenged because it was an act of the state. Thus, the British made it clear that state authority, then exercised by the governor, could not be questioned in any court.

The main constitutional arrangements that established the legal authority of the colonial governor over the protectorate of Uganda, namely the Buganda Agreement 1900 and the New Order-in-Council 1902, also augment the authoritarian nature of the colonial governor. For example, the New Uganda Order-in-Council gave the colonial governor the sole power to make ordinances for the administration of justice, raising of revenues and generally for the peace, order and good governance for all persons in Uganda.[3] The only notable attempt at

1. High Court Criminal Appeal No.38 of 1937.
2. [1910] 2 QB.576.
3. New Uganda Order-in-Council 1902 (The New Oder-in Council), Art. 16.

moderating the colonial governor's authority was in the Buganda Agreement, which allowed for the establishment of a native legislature (Lukiiko). However, its members were appointed by the king (Kabaka) subject to the consent of the colonial governor.[4]

The British also created brutal armed and police forces in Uganda whose purpose was to sustain the colonial enterprise and the armed forces suitably named the Kings African Rifles (KAR). Grace Ibingira describes the KAR as an army that did not reflect the ethnic diversity of the country.[5] He depicts the armed forces as an occupation for illiterate, prospect-less northerners, formed on the principle of divide-and-rule that sustained the colonial regime.[6] Oloka-Onyago recounts the role of the police during the colonial period as follows:

> Rather than playing the role of the neutral arbiter over actions of a criminal nature, the police under colonialism was a central element in the struggle over resources, power, and authority. Its primary responsibility was the suppression of political opposition while the prevention of crime was regarded only as a supplementary function.[7]

Because both the armed and police forces' primary purpose was to stifle dissent to colonial rule, they were affixed to the colonial governor as their commander–in-chief. Thus, all institutions of state power were subordinated to the authority of the colonial governor. This authoritarian construction of the head of state provided a template for presidential models that Uganda would adopt after the colonialists departed.

It is therefore not surprising that following Uganda's independence in 1962, fundamental laws have styled the presidency in the image of the colonial governor by granting it uncircumscribed powers. They have bestowed on a head of state

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4. Buganda Agreement 1900, Art. 11.

5. G. IBINGIRA, THE FORGING OF AN AFRICAN NATION: THE POLITICAL AND CONSTITUTIONAL EVOLUTION OF UGANDA FROM COLONIAL RULE TO INDEPENDENCE 1894-1962, VIKING PRESS (1973) at 201.

6. *Id*.

7. J. Oloka-Onyango, Taking Orders From Above: Police Powers, Politics and Democratic Governance in Post-Movement Uganda, Human Rights and Peace Centre (HURIPEC) Working Paper No. (2011), at 22.

command of the armed forces;[8] immunity from legal proceedings;[9] powers to dissolve parliament;[10] to remit any punishment imposed on any person for any offence and any penalty; [11] to promulgate ordinances;[12] to appoint heads of the civil service;[13] as well as other unlimited privileges and powers.[14]

There has been no attempt to question the basis, legal or otherwise, for allocating such untrammelled powers to a president and, therefore, no attempt has been made to impose constitutional limits on presidential powers. Also, the manner in which political power has been transferred explains why heads of state have sought to commandeer instruments of state power. For example, since independence, Uganda has had eight heads of state,[15] seven of whom came to power through armed violence and, therefore, unconstitutional means. In this context, the armed forces have been the final arbiter of political conflicts and the 'king-maker'. As a result, fundamental laws have granted the ultimate authority over the armed forces to a head of state. Omara-Otunnu aptly defines the role of the armed forces in Uganda's politics as follows:

> The usurpation of state power by the army dealt a series of devastating blows to the democratic process in the country. The distinctive features of the system of government and administration which became established were the devaluation of human lives, the use of force in social interactions, the presentation by the power élite of political problems as being essentially military in nature, and the domination of civilian institutions by the armed forces.[16]

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8. Constitution of the Republic of Uganda 1967 (Republic Constitution), Art. 34; Constitution of the Republic of Uganda 1995 (1995 Constitution), Art.98 (1); Uganda (Independence) Order-in-Council 1962 (Independence Constitution), Art. 34 (1).

9. Independence Constitution, *id,* Art. 34 (2); 1995 Constitution, *id,* Art. 98 (4); Republic Constitution, *id.,* Art. 34 (2).

10. Republic Constitution, *id,* Art. 73.

11. Independence Constitution, *supra* note 8, Art. 84; 1995 Constitution, Art. 121(4); Republic Constitution, *id.,* Art. 86 (1) (d).

12. Republic Constitution *id*, Art. 38.

13. Independence Constitution, *supra* note 9, Art. 91(1); 1995 Constitution, *supra* note 8, Art. 120 (1).

14. For example, under Article 39(2) of the Republic Constitution, courts were prohibited from scrutinising acts of the president.

15. These were: Sir Edward Mutesa II (1962-1966); Apollo Milton Obote (1966-1971 & 1980-1985); Idi Amin Dada (1971-1979); Godfrey Lukongwa Binaisa (1979-1980); Paulo Muwanga (1980); Lule Yusuf (1979); Tito Okello Lutwa (1985-1986); Yoweri Kaguta Museveni (1986-to-date).

16. A. Omara-Otunnu, *The Struggle for Democracy in Uganda*, 11(2) JOURNAL OF MODERN AFRICAN STUDIES (1992), at 295.

Every change of government since independence has been facilitated by the armed forces. Similarly, only two of the eight heads of state did not have the support of the armed forces and therefore served the shortest tenures.[17] Uganda's constitutional history also explains why fundamental laws have bestowed unlimited power over the presidency. Five out of the eight heads of state have either imposed a fundamental law on the country or dictated the contents of the fundamental law while indulging in a bogus popular constitution-making exercise.[18] Therefore, they had an overbearing influence over fundamental laws adopted under their leadership. Such fundamental laws were designed for the principal aims of entrenching in power heads of state under whose leadership they were adopted, and to legitimise power acquired through unconstitutional means. It is for these reasons that they granted heads of state unlimited power. Accordingly, they were not cast in the norms of constitutionalism that seeks to limit the authority of any person exercising state powers. The problem, however, is that presidential authority as commonly conceived in Uganda has emerged out of such fundamental laws.

The Report into the Investigation of Violations of Human Rights in Uganda from 1962 until 1986, when Museveni's NRM seized power, estimated that 2,000,000 Ugandans died at the hands of the state and between 750,000 and 1,000,000 people were exiled from the country by oppressive regimes that held power during this period.[19] It further noted that in an effort to seize power and to hold on to it permanently, heads of state wantonly exercised unrestrained authority, which allowed them to commit human rights abuses and to kill Ugandans extra-judicially.[20] Thus, vesting unrestrained powers in a head of state does not only depart from the principles of constitutionalism, but it has also had a devastating impact on the Ugandan society.

The legally unrestricted presidential authority as tailored by and for heads of state has been the basis upon which presidents in Uganda have asserted their hegemonic and illegitimate control over the country. This has been applied as a tool for subjugating citizens, abusing human rights and for impeding the peaceful transfer of political power. This has been achieved through the exclusive making and issuance of fundamental laws by heads of state.

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17. These were Binaisa and Lule.

18. These were Amin, Lule, Mutesa, Museveni and Obote.

19. The Republic of Uganda, The Report of Commission of Inquiry into Violations of Human Rights: Findings, Conclusions and Recommendations, *Ministry of Justice and Constitution Affairs* (1994) at 465-511 (Oder's Report).

20. Id., at 488.

Such fundamental laws created all-powerful heads of state with unlimited powers, and who do not require the mandate of the people to rule. Almost every head of state has issued their supreme law and repealed or disregarded provisions of any supreme laws that attempt to limit their power. Three examples illustrate the superiority of Uganda's heads state over fundamental laws. First, after seizing power in 1986, following a five-year civil conflict, Museveni's National Resistance Movement (NRM) embarked on the first ever countrywide consultative and participatory constitution-making process in Uganda, which yielded the 1995 constitution. I have argued elsewhere that this constitution, which was sponsored and adopted under the leadership of President Museveni's NRM government, has been erroneously conceived as the first home-grown constitution because it was adopted under Museveni's overbearing influence and, therefore, many of its provisions were dictated by the NRM sympathisers.[21]

This may be seen from the legal instrumentalities that were established by the NRM government for purposes of adopting the constitution which were tipped in favour of the NRM government. In addition, the blatant disregard of the majority proposals for constitutional reforms by the framers of the constitution, specifically on the design of the presidency, indicated a determination to establish a fundamental law under which President Yoweri Museveni and the NRM would exercise ultimate and enduring power. In 2005, article 105 (2) was repealed from the 1995 constitution in order to pave way for President Museveni to run for more terms in office. The provision provided for a maximum of two terms of five years each for a person serving as president. At the time of the amendment, the president was serving his last term. Museveni has since emerged victorious in the presidential elections held in 2006, 2001, 2011 and most recently in 2016.

In December 2017, the members of parliament further voted to remove article 102(b) of the constitution, which capped the maximum age for one to be elected president at 75 years.[22] At the time, President Museveni was reported to be 72 years of age.[23] Removing the constitutional age cap therefore allows Museveni to run for the highest office and thus create the possibility of a president-for-life. It is, therefore, reasonable to conclude that the 1995 Constitution is subordinate to President Museveni since any of its provisions could be altered to suit his ambitions.

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21. F. Sekindi, A Critical Analysis of the Legal Construction of the Presidency in Post-1995 Uganda (PhD Thesis, *Brunel* University, 2015).

22. S. Kaaya, *Presidential Age Limit Key to NRM Push for Reforms*, THE OBSERVER, 11 July 2016, at 3.

23. S. Kafeero, *Museveni Marks Low Key 72nd Birthday*, DAILY MONITOR, 16 September 2016, at 2.

Secondly, after President Obote seized power from the first post-independence president, Mutesa II, in 1966, he abolished the 1962 independence constitution and instructed parliament to adopt the 1966 interim constitution whose contents they did not know, while the army surrounded the parliament building.[24] Obote's government later introduced and adopted the 1967 Republic Constitution, which declared him the president[25] for five years after which an election would be held.[26] Ugandans who expected to hold elections in 1967 as was envisioned by the 1962 independence constitution had to wait for another four years. The republic constitution also abolished the position of prime minister and created the first full executive president,[27] thereby ending the constitutional role of the prime minister in supervising the presidential authority.[28] It also permitted the president to promulgate such ordinances as he required.[29] In this regard, the powers of the presidency were expanded at the expense of the legislative role of national parliament. The republic constitution also provided that the exercise of the powers of the presidency would not be subject to legal scrutiny.[30] The establishment of President Apollo Milton Obote as superior to the fundamental law, to whom all instruments of power were beholden and that enjoyed unshackled state powers, was complete.

Thirdly, President Idi Amin took power by a *coup d'état* in 1971 in continuation of the method of acquiring power through unconstitutional means set by Obote. He suspended by decree parts of the republic constitution including those that relate to its supremacy, provisions for elections, and the presidency as well as those that provided for the legislative powers of parliament; and he declared the republic constitution subordinate to the decrees of the supreme law-maker—President Amin.[31] Amin declared himself president-for–life.[32] In this regard, like Obote before him and Museveni after him, President Amin's government established its fundamental law that validated its exercise of power. President Amin also issued the Constitution Modification Decree No. 5 1971, which had the effect of vesting all privileges, prerogatives, powers and functions enjoyed by all arms of government in the chairman of the Defence Council, a position that

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24. Oder's Report, *supra* note 19, at 588.
25. Republic Constitution 1967, Art. 36(6).
26. *Id*., Art. 50.
27. *Id*., Art. 35(1).
28. Under Article 91(1) of the Independence Constitution of 1962, a president would appoint the head of the judiciary in consultation with the prime minister.
29. The Republic Constitution of Uganda 1967, Art. 38.
30. *Id.,* Art. 39(2).
31. Republic of Uganda, Legal Notice No. 1 1971 (Legal Notice No.1 of 1971) para 1.2.
32. Oder's Report, *supra* note 19, at 327.

was also occupied by Amin. Thus, during Amin's seven-year rule, the fundamental law of Uganda were the decrees issued by President Amin.

Uganda's heads of state have been able to abrogate, amend and usurp any constitutional order at will. Thus after 1962, heads of state have commonly validated their exercise of power by commandeering constitutional order through military might rather than subjecting themselves to the existing constitutional order and the electorate. Uganda's leaders do not believe in constitutional rule and limitations to power. The paradox is that instead of controlling the powers of the executive, fundamental laws have been created to serve heads of state and to maintain them in power.

To this end, successive heads of state have not governed under fundamental laws that limit their powers, advance conditions of plural political competition and allow for institutions which are insulated from executive manipulation, and which promote and protect human dignity. As a result, post-independent Uganda has never had a peaceful and democratic hand-over of power from one head of state to another, or from one government to another.[33] Only violent political contestations and fundamental laws designed to keep leaders in power have determined who governs the country.

The unbounded exercise of state power explains the presidential patrimonial constitutional logic found in fundamental laws, institutionalisation of political violence as an instrument for the sustenance of political power, and the disdain of constitutional order by Uganda's leaders. The instruments of power were personalised. Heads of State have had no restraints to their authority. As a result, the overarching need to create a legally unfettered presidency in order to remain in power has taken precedence and made the country a hostage of presidential patronage and a victim of military coups, corruption, tribal and armed conflicts, human rights abuses and constitution disparagement.

It is against a history of one-man regimes, unconstitutional rule, seizure and retention of power, extensive human rights abuses, misuse and abuse of state powers which have plagued the country as a result of all-powerful heads of state, that this article contends that Uganda needs to develop adequate mechanisms for supervising presidential authority. One of the ways of achieving this aim is to draw lessons from another African country, namely Benin, which has experienced similar problems of presidential excesses in the past and overcame them through adopting suitable constitutional tools for supervising executive authority.

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33. The only expectation is the transfer of power from the Military Commission to Obote's second regime following the highly disputed 1980 elections.

III. A BRIEF BACKGROUND TO THE CONSTITUTIONAL REFORMS IN BENIN

Like Uganda, from 1963 to 1989, Benin experienced *coup d'états*,[34] constitution abrogation,[35] political instability,[36] military rule, ethnicisation and personalisation of state power.[37] In addition, similar to Uganda, every head of state came to power through unconstitutional means and imposed on the country their fundamental law that allowed them to dominate state power.[38] Towards the end of President Mathieu Kérékou's first regime, the country agreed to the idea of a first national conference as part of the so-called third wave of democratisation.[39] The renowned *Conférence des Forces Vives de la Nation* was held in February 1990. Liberal democracy, the rule of law, separation of powers and human rights were at the heart of this new era of democratic revival, which the country sought.[40]

In the pursuit of these objectives, the new fundamental law—the 1990 Constitution of Benin—emerged out of a popular endeavour.[41] The debates on the adoption of the constitution focused on democratisation and the protection of fundamental rights due to the grave violations of the past. The new constitution also addressed the problems of minimising excessive powers exercised by previous heads of state.

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34. Between 1963 and 1972, Benin experienced eight coups. *See*, M. MARSHAL AND B. COLE, CONFLICTS TRENDS IN AFRICA, CENTRE FOR SYSTEMIC PEACE PUBLICATIONS (2005), at annex B.

35. Benin adopted ten fundamental laws which were all sponsored by the different regimes that were in power from 1963 to 1972. These were: the Constitutions of 28 February 1959; 26 November 1960; 11 January 1964; the Charters of 1 September 1966; 11 April 1968; the Ordinances of 26 December 1969; 7 May 1970; 18 November 1974; the Fundamental Law of 26 August 1977 amended by the Constitutional Act of 6 March 1984 and the Constitutional Act of 13 August 1990, which served as the constitution for transition to democracy. *See,* B. Magnusson, *Testing Democracy in Benin*, in STATE, CONFLICT AND DEMOCRACY IN AFRICA (R. Joseph ed.,1999,) at 207.

36. Benin had 11 governments between 1963 and 1972. Each of these governments came to power through a coup. The country also had the unusual phenomenon of a collegial presidency with three heads of state known as 'Presidential Triumvira' between 1970 and 1972. See also, Magnusson *id.,* at 208.

37. President General Mathieu Kérékoutook power in October 1972 and ruled for 17 years. Majority of the government positions were occupied by his tribe mates and he imposed a tight ban on freedoms. The regime actively abused the human rights of its citizens and transformed the country into a police state, sending the opposition underground. See, Magnusson *id.,* at 221.

38. *Id.,* at 204.

39. C. Fombad and N. Inegbedion, *Presidential Term Limits and their Impact on Constitutionalism in Africa*, in FOSTERING CONSTITUTIONALISM IN AFRICA (C. Fombad and C. Murray eds, 2010), at 1& 8.

40. Magnusson, *supra* note 35, at 218.

41. Fombad & Inegbedion, *supra* note 39, at 4.

As John Heilbrunn observes, the Constitution Commission was tasked with drafting a new constitution that emphasizes a strong rejection of dictatorship, one-man power, and disrespect for the rule of law, which were the main features of the previous governments.[42] I will now compare the mechanisms for supervising executive authority in the 1990 constitution of Benin to similar attempts in the 1995 constitution of Uganda.

A. Lessons from Benin

1. Checks and balances on the president in Benin and Uganda—Similar to the 1995 constitution of Uganda,[43] the 1990 constitution of Benin opted for an executive presidential system.[44]However, Benin's model embodies common features of modern constitutionalism unlike that of Uganda. It is grounded in the doctrine of separation of powers, the rule of law and liberal democracy, which are reflected in many of its provisions. The presidency shares the initiative of enacting laws with the National Assembly.[45]A state of siege and of emergency may only be decreed by the presidency 'after the advice' of the National Assembly,[46] and it may only be extended beyond fifteen days with the approval of the National Assembly.[47]

A presidential decree may only be issued in exceptional measures required by the circumstances; however, constitutional rights may not be suspended.[48] In the case of *DCC 27-94*,[49] the Constitutional Court of Benin held that the powers to issue decrees in exceptional measures constitute a discretionary act of a president, an act of government which may not be subject to constitutionality checks except as to the form in which it is exercised. The court declared that presidential decreeing authority may only be exercised within the forms prescribed by the constitution.

To avoid the misuse of a president's power to issue decrees, two caveats are provided in the constitution. First, parliament is empowered to determine the period within which a president may issue a decree.[50] Thus, the court has pronounced in

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42. J. Heilbrunn, *Social Origins of National Conferences in Benin and Togo*, 3(1) JOURNAL OF MODERN AFRICAN STUDIES (1993), at 281.
43. UGANDA CONST., 1995, Art. 99.
44. Benin Constitution 1990, Art. 54.
45. *Id.,* Art. 32 & 57.
46. *Id.,* Art. 101(3).
47. *Id.,* Art. 101(4).
48. *Id.,* Art. 68.
49. 24 August 1994.
50. Constitution of Benin 1990, Art. 69(2).

the case of *DCC 96-023*[51] that such powers may be exercised within the parameters of what parliament permits. Secondly, the use of presidential decree powers may only be aimed at quickly providing public and constitutional institutions the means to discharge their duties,[52] accordingly defining the purpose for which a decree may be issued by a president.

In Uganda, the presidency 'in consultation' with the cabinet may declare a state of emergency if it is satisfied that circumstances exist that justify the need to do so.[53] A president is required to lay before parliament, for approval, as soon as possible, but not later than fourteen days, a proclamation declaring the state of emergency and any state of emergency may be extended by parliament for a period not exceeding ninety days at a time.[54] The power to declare a state of emergency is also closely monitored by the Human Rights Commission.[55]

The provisions governing the state of emergency in the constitution of Benin differ from those under the constitution of Uganda in three major ways. First, the cabinet of Uganda consists of ministers who are appointed by a president with the approval of parliament[56] and can also be dismissed by him/her.[57] They may also be censured by parliament.[58]In reality, parliament's purported role in scrutinising presidential appointments is negligible. In 2012, only two of the forty-three presidential appointments[59] were vetoed by the Parliamentary Committee on Presidential Appointments for lack of integrity.[60] Therefore, Uganda's parliament has no credible role in vetting presidential appointments. This has granted the president a free hand in appointing members of the cabinet. A cabinet appointed by a president cannot be relied upon to exercise an independent view from that of the appointing authority to whom it owes allegiance.

In relation to parliament's role in granting approval and extension to a state of emergency, Uganda's legislature pays allegiance to the president and this has

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51. 26 April 1996.
52. Constitution of Benin 1990, Art. 69(1).
53. UGANDA CONST., 1995, Art. 110 (1).
54. *Id.,* Art. 110(3)-(8).
55. *Id.,* Art. 48.
56. *Id.,* Art. 113(1).
57. *Id.,* Art. 116(a).
58. *Id.,* Art. 118(1).
59. These are: Pascal Odoch and Gideon Mudunga who were nominated by the President for the membership of the National Planning Authority.
60. Parliament of Uganda, The Official Report of the Parliament of Uganda, *Hansard* (December 2012), retrieved from www.parliament.go.ug/new/index.php/documents-and-reports/daily-hansard (accessed 30 July 2016).

contributed to its infectiveness in controlling executive excesses.[61] The other institution established to monitor the declaration of a state of emergency, namely the Human Rights Commission, is also not insulated from presidential influence. Its chairperson and commissioners are appointed by the president.[62] Therefore, in mandating that the president can only authorise a state of emergency 'after the advice' of the National Assembly, although the president is not bound to follow such advice, the constitution of Benin requires that the advice of a less partisan body—the National Assembly of Benin—must be sought before a state of emergency is declared, as opposed to the cabinet of Uganda, parliament and the Human Rights Commission, which are organs that are subservient and indebted to the presidency.

Secondly, the use of the term "after the advice" in the constitution of Benin does not defer in literal meaning from the term "in consultation" that is used in the Ugandan constitution. It is intended to be a caveat that ensures that advice, albeit not consent of the National Assembly, is sought, before such a declaration is made. In the case of Benin, where such advice is not sought or ignored without good reason by a president, the Constitutional Court of Benin is mandated to step in on its own motion in order to ensure that a president conforms to the constitutional obligation.[63] The Constitutional Court of Uganda has no such powers.

Thirdly, in allowing the presidency a maximum of thirteen days before it is compelled to put the proclamation declaring the state of emergency before parliament for approval and further extension, the constitution of Uganda provides the presidency with a thirteen-day discretion period that could be used to misuse the state of emergency powers.

The Constitution of Benin provides parliament with various tools for bringing the executive to account. These include oral questions with or without debate, written questions, interpellations, and a Parliamentary Commission of Enquiry.[64] The interpellation mechanisms empower parliament to summon a president to appear before it to explain government actions and the president is duty-

61. It was widely reported that in 2005, President Museveni provided financial inducements to Members of Parliament to repeal the presidential term limits from the 1995 Constitution to allow him to run for more terms. *See*, Charles Mpagi et al, *I got Shs 5 Million for Kisanja – Buturo*, THE MONITOR, 31 October 2006, at 2; also see, Daniel Posner and Daniel Young, *The Institutionalization of Political Power in Africa*18 JOURNAL OF DEMOCRACY (2007) 126, 130; Civil Society Coalition for the Restoration of the Presidential Term Limits, 'Together We Must' (Civil Society Coalition for the Restoration of the Presidential Term Limits Publication No. 2, 2012) 3.

62. UGANDA CONST., 1995, Art. 51(2).

63. Article 119 of the 1990 Constitution of Benin provides that all acts, decisions and actions of the Executive and its agencies, the Legislature and the Judiciary are reviewable by the Constitutional Court.

64. *Id.*, Art. 113.

bound to attend or instruct a minister to appear.[65]

In contrast, the constitution of Uganda mandates the president to deliver to parliament an address on the state of the nation at the beginning of each session of parliament, and to address parliament from time to time, on any matter of national importance.[66] The interpellation mechanisms in the constitution of Benin emphasise parliament's role in bringing a president to account in so far as parliament can summon a president to appear before it to be questioned on matters of national importance.

In an effort to curtail another common practice by African leaders of misappropriating state assets, a president, directly or through an intermediary, is prohibited to purchase or lease state assets without the approval of the Constitutional Court under conditions prescribed by law.[67] Similarly, the president is required to declare personal wealth on commencing, and at the end of the presidency.[68] The president may be impeached where it is proven that they authored, co-authored or was an accomplice in embezzlement, corruption, or illegal enrichment.[69] There are no such constraints on the president of Uganda. Such a provision in the constitution of Uganda would have, at least on paper, indicated a constitutional intention for a president to adhere to the principles of good governance in order to manage the country's resources responsibly for the benefit of all the people of Uganda.

In a further expression of a clear demarcation of powers of the three arms of government, the constitution of Benin provides that judicial power is independent of legislative power and of executive power,[70] and it is exercised by the Supreme Court and other courts and tribunals established in accordance with the constitution.[71] Members of parliament, also known as 'deputies', are elected by universal suffrage for a four-year term and may be re-elected.[72] The two main constitutional functions of parliament as expressed in the constitution of Benin are to make laws[73] and to control government action.[74] Parliament may also refer the president to the High Court of Justice for impeachment proceedings,[75] thus allowing controls over the

65. *Id.,* Art. 71.
66. Benin Constitution 1990, Art. 101.
67. *Id.,* Art. 52.
68. *Id.*
69. *Id.,* Art. 75.
70. *Id.,* Art. 125 (1).
71. *Id.,* Art. 125(2).
72. *Id.,* Art. 80.
73. *Id.,* Art. 96.
74. *Id.,* Art. 79(2).
75. *Id.,* Art. 77.

executive and subjecting that control to judicial scrutiny by the other arms of government.

Unlike in Uganda where the Chief Justice and the three Justices of the Supreme Court, who preside over presidential impeachment proceedings,[76] are appointed by the president acting on the advice of the Judicial Service Commission with the approval of parliament,[77]in Benin, three of the six Constitutional Court judges who preside over the same[78] are appointed by the National Assembly and the other three by the president.[79] The president of the Constitutional Court is appointed by his or her peers from magistrates and the jurist members of the court for a term of five years.[80] Thus, the judicial examination of the impeachment process in Benin is carried out by a judiciary that is not indebted to the presidency for their positions.

Unlike the Constitution of Uganda,[81] the constitution of Benin does not insulate a serving president from legal proceedings during their tenure of office. In addition, where the president is indicted for high treason, an insult to the National Assembly, injury to honor, and honesty, they may be suspended from duties and if convicted, they may forfeit the office.[82] Actions of the deputies and of the president carried out in the course of their constitutional duties enjoy 'parliamentary immunity' and as such, they may not be investigated, arrested, detained, or prosecuted for opinions issued in the discharge of their duties.[83]

In Uganda, cabinet ministers who are appointed by the presidency with the approval of parliament may also serve as members of parliament,[84] thereby increasing the interest group of the executive in the legislature. In an added affirmation of separation of powers, the constitution of Benin prohibits deputies to hold ministerial positions.[85] Members of the cabinet may also not hold parliamentary positions.[86] A deputy's right to vote in parliament is personal and they may do so only in a term vote on political lines.[87]

These provisions in the Ugandan Constitution would control the powers of the president in two significant ways. First, the president has used cabinet ministers

76. UGANDA CONST., 1995, Art. 107 (3) & (4).
77. *Id.,* Art. 142.
78. Benin Constitution 1990, Art. 137.
79. *Id.,* Art. 115.
80. *Id.,* Art. 116.
81. UGANDA CONST., Art. 98 (4).
82. Benin Constitution 1990, Art. 138.
83. *Id.,* Art. 90. Exceptions are also provided therein.
84. UGANDA CONST., Art. 113(1).
85. Constitution of Benin 1990, Art. 92.
86. *Id.,* Art. 54.
87. *Id.,* Art. 93.

who are members of parliament to carry his motions in the legislature, most notably the amendment to repeal the term limits on the re-election of the president from the constitution in order to allow him to contest more presidential elections. Second, the personal right to vote in parliament would have guarded legislative matters against partisan approaches and, therefore, insulated parliamentarians from being bullied by the president to implement his wishes.

2. The Constitutional Court's supervision of the presidency—The constitution of Benin establishes a powerful Constitutional Court charged with examining the constitutionality of laws, guaranteeing fundamental human rights and public liberties and which also acts as the regulator for the functions of constitutional institutions and all the activities of public authorities.[88] The court plays a major role in checking and balancing the powers of the presidency. For example, government bills which may be initiated by a president[89] must obtain the legal opinion of the court before they are introduced.[90] Also, laws may only be promulgated after the court has declared them consistent with the constitution.[91] The court may on its own motion carry out a review of any laws that are likely to infringe on human rights.[92] It is also vested with the powers to declare laws enforceable where a president fails to promulgate a law that has been passed by the National Assembly.[93] Laws declared unconstitutional by the court may not be promulgated or enforced.[94]

Decisions of the Constitutional Court are not appealable[95] and they are binding on public authorities and all civil, military, and jurisdictional authorities.[96] The court has pronounced its independence from the executive arm of government. In the case of *DCC 01-018*,[97] the court held that an order by the Minister of Justice to release a detainee constituted an interference with the judiciary and, therefore, a violation of the constitution. A further illustration of the court's independence and competence over the executive can be found in the case of *DCC 07-175*[98] in which it

88. *Id.*, Art. 114.
89. *Id.*, Arts. 32 & 57.
90. *Id.*, Art. 105.
91. *Id.*, Art. 117(1).
92. *Id.*, Art. 121(2).
93. *Id.*, Art. 57.
94. *Id.*, Art. 124(1).
95. *Id.*, Art. 124(2).
96. *Id.*, Art. 124(3).
97. 9 May 2001.
98. 27 December 2007.

affirmed that a presidential decree suspending the execution of a court order was in violation of the constitution, as it interfered with the independence of the judiciary.

The Constitutional Court's commitment to checking legislative and executive powers and to protecting the sanctity of the constitution is also demonstrated through its scrutiny of constitutional amendments. In the case of *DCC 06-074*,[99] the court dismissed attempts to amend the constitution on the grounds that the fundamental law had been adopted by the people through a national consensus reached at the 1990 National Conference. The logic being that constitutionalism at a minimum requires that national consensus ought to preside over major amendments to the constitution. As the constitution was created following national consensus, it can only be amended the same way. The case concerned an amendment instigated by members of parliament to extend their term of office from four to five years. The court also rejected the economic arguments in the cases of *DCC 05-139*[100] and *DCC 05-145*[101] as not constitutionally justified in extending the tenure of President Mathieu Kérékou. The arguments were advanced to seek an amendment to the constitution in order to extend the limits to the re-election of a president, towards the end of President Kérékou's second term.

The 1995 Uganda constitution, under Articles 259 to 263, outlines the different procedures for amending the constitution. All amendments require an act of parliament.[102] Some require the approval of district councils.[103] Parliament is authorised to amend the most fundamental provisions including the sovereignty of the people as the source of power[104] as well as the provision relating to prohibition of derogation from particular human rights and freedoms,[105] the two-term limits on the re-election of a president[106] and the political system.[107] A referendum, however, must be held for changing a political system,[108] extending the term of five years that a president may serve,[109] and for repealing the supremacy of the constitution.[110] By authorising most of the core constitutional values to be amended by politicians, without the involvement of the citizenry and/or the supervision of an independent

99. 8 July 2000.
100. 17 November 2005.
101. 1 December 2005.
102. Uganda Const., Art. 259(2).
103. *Id.,* Art. 261.
104. *Id.,* Art. 260.
105. *Id.,* Art. 44.
106. *Id.,* Art. 105.
107. *Id.,* Art. 74(1).
108. *Id.,* Art. 260(1) (d).
109. *Id.,* Art. 260 (1) (f).
110. *Id.,* Art. 259 (2) (b).

judiciary, the 1995 constitution allowed President Museveni to manipulate the legislature into removing the two-term limit on the re-election of a president, thereby creating the possibility of a president-for-life.

The Constitutional Court also adjudicates all matters relating to the functioning of state organs such as designations and dismissals of holders of public office, including the office of the president.[111] It determines the constitutionality of laws including proposed laws before promulgation.[112] Thus, the constitutionality of the laws may be reviewed *a priori*—before a bill is enacted, and *a posteriori,* when an existing law may be brought before the court for constitutional scrutiny.[113] All decisions and actions of the executive and its agencies—the legislature and the judiciary— are reviewable by the Constitutional Court.[114] The court also has a mandate over all disputes arising from the relationship between branches of the state.[115]

The mechanism through which Benin's Constitutional Court reviews the exercise of powers by all arms of government, particularly the executive, is a rare innovation in African constitutionalism. In the case of Uganda, the Constitutional Court's role to interpret the constitution[116] does not allow it to initiate reviews of proposed or enacted legislation or the constitutionality of amendments to the constitution in the interest of the people. Furthermore, Uganda's Constitution does not compel the executive or the legislature to seek the prior approval of the Constitutional Court on the constitutionality of proposed laws. This has allowed President Museveni and his NRM government to smuggle in repressive laws in order to criminalise and to stifle political challenges to their government as well as to enact laws that violate human rights.[117]

For example, in the case of *Muwanga Kivumbi v. Attorney General,*[118] the Constitutional Court declared unconstitutional section 32 of the Police Act (Cap

111. Constitution of Benin 1990, Art. 118(2).

112. *Id.,* Art. 118 (3).

113. *Id.,* Art. 118 (4).

114. *Id.,* Art. 118(1).

115. *Id.,* Art. 121(1).

116. UGANDA CONST., 1995, Art. 137(1).

117. These include the Anti-Homosexuality Act 2014, which divides homosexual behaviour into two categories: "aggravated homosexuality", for which an offender would receive life imprisonment and "the offence of homosexuality" for which a first time offender would receive 14 years in jail. In *Oloka-Onyango & 9 Ors v. Attorney General* (Constitutional Petition No. 08 of 2014.) [2014] UGCC 14 (1 August 2014), Uganda's Constitutional Court annulled the Anti-Homosexuality Act because it was passed illegally without the required quorum of parliament. In addition, the Anti-Pornographic Act 2014 imposes a *de facto* dress code on women.

118. Constitutional Petition No. 9 of 2005 [2008] (27 May 2008).

303). This provision allowed the Inspector General of Police, who is a presidential appointee, to prohibit the convening of any assembly. Soon after the court's judgment, the NRM government introduced and enacted the Public Order and Management Act, 2013 to restore the powers of the Inspector General of Police. The act clearly imposes conditions which are inconsistent with the enjoyment of the freedom of assembly.[119] It has been used to prohibit peaceful demonstrations against the NRM government.

Moreover, the constitution prohibits parliament to pass laws that alter the decision or judgment of any court.[120] The enactment of such a law does not only symbolise the use of repressive laws to stifle political dissent but also parliament's contempt of the constitution. It also evidences the NRM government's ability to bully legislators into submission. Under the 1990 Constitution of Benin, the constitutionality and human rights compliance of such legislations would have been reviewed by the Constitutional Court *a priori*. The constitutional prohibition to pass laws for the purposes of defeating the decision of a court would certainly render the enactment of the Public Order and Management Act, 2013 unconstitutional, as would some of its provisions undoubtedly be found incompatible with human rights.

The other laudable novelty is the power of Benin's Constitutional Court to enact laws that have been passed by parliament but not assented to by a president.[121] It may be argued that the provision interferes with the legislative role of parliament. However, as parliament would have already passed the bill, enactment by the court prevents the presidency from using its power to veto bills unjustly, as it has sometimes been the case in Uganda.[122]

The supervisory powers of the Constitutional Court also serve as a constant reminder to a president of Benin that the exercise of executive powers is under

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119. The Public Order and Management Act, 2013 was passed during the Walk-to-Work (W2W) protests that were led by the opposition leader Dr. Kizza Besigye. The Act fails to establish a presumption in favour of the exercise of the right to freedom of peaceful assembly, or the duty on the State to facilitate peaceful assemblies and it criminalises organisers of assemblies for the unlawful conduct of third parties among others.

120. Uganda Const., 1995, Art. 92.

121. Constitution of Benin 1990, Art. 57.

122. For example, the Marriage and Divorce Bill 2009 was passed by Parliament but it took four years awaiting President Museveni to assent to it. Article 91 of the 1995 Constitution provides that a Bill of Parliament must be signed by the president within thirty days or be returned to Parliament to be amended. Where the Bill is returned to Parliament for the third time and it receives the support of at least two-thirds of the members of Parliament, it shall become law without the president assenting to it. After the bill was passed by Parliament and sent to the President, it was neither signed nor returned to Parliament in accordance with the Constitution. *See,* UGANDA ASSOCIATION OF WOMEN LAWYERS (FIDA-U), WOMEN'S RIGHTS IN UGANDA: GAPS BETWEEN POLICY AND PRACTICE (2013), at 11.

constant judicial scrutiny. Thus, the court acts as a deterrent to the misuse and abuse of executive powers.

C. Presidential appointment authority—The 1995 constitution of Uganda authorises the presidency to appoint top civil servants.[123] The only supervision of presidential appointments consists of the ineffectual constitutional constraints which stipulate that such appointments must 'acquire the approval of Parliament'. Some of the positions such as the appointment of the Commissioner of Prisons require parliamentary approval[124]while for others a president 'acts on the advice' of institutions such as the Judicial Service Commission in appointing top judicial officers.[125]

The defined roles of the institutions such as the Judicial Service Commission and Parliament, by the use of terms such as "acting on the advice" or "acquire the approval of", suggest that a president is bound to accept or follow the advice given, and the approval by the relevant institution must be given. Such constitutional constraints are founded on constitutionalism which aims to regulate the president's powers of appointment. They are inspired by the idea of installing separation of powers in a constitution in order to limit executive excesses. Their purpose is to control arbitrary appointments by a president. Such institutions are therefore supposed to be insulated from presidential influence in order for them to effectively perform their functions of ensuring that presidential authority is exercised for the purposes envisaged by constitutionalism. However, in a manner that subordinates all constitutional institutions to the presidency, the 1995 constitution allows the presidency to appoint and nominate six out of the 10 members of the Judicial Service Commission subject to the approval of parliament.[126]

It is therefore not surprising that many of the appointments in the civil service have been made at the personal whim of President Museveni. According to a survey conducted by *The Observer* newspaper in Uganda, 397 out of 826 highest public civil service jobs are held by persons of the same tribe with President Museveni, who are also supporters of his NRM party, while a similar number are held by persons different from his tribe but who are supporters of his party.[127] This has resulted in the creation of a civil service comprised of NRM loyalists. Paragraph

123. Uganda Const., Arts. 5(1(2), 111(3), 120 (1), 142(1) and 163(1).
124. *Id.,* Art. 216(1).
125. *Id.,* Art. 142(1).
126. *Id.,* Art. 146.
127. S. Kaaya, West Dominates State Jobs, THE OBSERVER, 14 July 2014, at 3.

5 of the Code of Conduct and Ethics for Uganda Public Service 2005 sets out standards of behaviour for public officials, which include prohibiting public officers to engage in active politics, canvassing political support for candidates, participating in public political debates and displaying party symbols. However, it is difficult to imagine how the statutory prohibition on political partisanship for civil servants can ensure impartiality, objectivity, transparency and guarantee the integrity of public officers in the performance of their duties when the majority of them are aligned to the ruling party—the NRM.

Similar to the position in Uganda, the 1990 constitution of Benin also allows the president to appoint senior civil servants 'following an advisory opinion' from the National Assembly.[128] The wording 'following an advisory opinion' makes it mandatory that such appointments may only be made not only after the advice has been sought but also to conform to the recommendations of the National Assembly. This may be inferred from the wording of other provisions such as "after the advice", which suggest that the advice sought by the president is only meant to guide in the exercise of those powers.[129] Unlike in Uganda, where a president fails to seek or follow the advice on appointments, the Constitutional Court of Benin has the power to intervene.[130]

In Benin, a president may only appoint three of the seven members of the Constitutional Court for a five-year term, renewable only once.[131] The limitation on the number of members of the Constitutional Court that a president is allowed to appoint deserves notable attention, given the court's competence in checking and balancing executive authority. It appears that the *proviso* is intended to ensure that members of the Constitutional Court are not beholden to a president for their positions whose constitutional functions they are intended to supervise among the court's other duties.

The independence of the judiciary in Benin is guaranteed by the constitution, which provides that judges, in the exercise of their duties, are subject only to the authority of the law, and sitting judges cannot be removed.[132] Further safeguards are found in domestic legislation governing the recruitment, tenures, training, appointment, and career management of the judiciary.[133] In *DCC 06-063,*[134]

128. Constitution of Benin 1990, Art. 54.

129. *Id.,* Art. 47.

130. *Id.,* Art. 119.

131. *Id.,* Art. 56.

132. *Id.,* Art. 126.

133. Loi No 2001-37 du 27 août 2002, Portant Organisation Judiciaire en République du Bénin and Loi No 2001-35 du 21 Février 2003, Portant Statut de la Magistrature en République du Bénin.

134. 20 June 2006.

the court declared unconstitutional the posting of judges without their prior consent.

At the same time, the Constitutional Court has protected the presidency's role in the appointment of the judges. The court declared in *DCC 00-054*[135] that an expressed account by a president is required to confirm the appointment of a judge and silence on a president's part cannot constitute approval to appoint, as such an appointment would be a violation of the constitution.

In Uganda, the independence of the judiciary from the presidency has been questioned from within the judiciary.[136] The Constitutional Court of Benin establishes mechanisms that ensure that presidential appointment authority is not exercised to create a civil service whose members are devoted to a president. Similar features in the constitution of Uganda would have ensured that the president exercises appointment powers for the purposes they were granted and envisioned by the constitution.

D. Managing the armed forces—Given the military's historical role in meddling in the country's politics and in competing for political power illegally, the constitution of Benin prohibits any attempt to seize power by the personnel of the armed forces and of the public security, and it defines such act as a breach of duty, and a crime against the nation, punishable in accordance with the law.[137] It also prohibits members of the armed forces to stand for public office[138]and to sit in the cabinet.[139] Only retired or resigned members of the armed forces may participate in elections for public office.[140] In the case of *EL 07-001,*[141] the Constitutional Court ruled that the intervention of the military to support election management by transporting material compromised the integrity of the electoral process and, in so doing, it declared the army's participation in the electoral process unlawful, and it affirmed the independence of the National Autonomous Electoral Commission.[142]

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135. 2 October 2000.

136. In the case of *Rtd. Col. Kizza Besigye v. Electoral Commission and Yoweri Kaguta Museveni* (Presidential Election Petition No.1 of 2006) (Election Petition No.1 Of 2006) [2007] UGSC 24 (30 January 2007), in which the petitioner unsuccessfully challenged the outcome of 2006 presidential election, in a dissenting opinion, Justice Kanyeihamba questioned the independence of the quorum from President Museveni.

137. Constitution of Benin, Art. 65.

138. *Id.,* Art. 64.

139. *Id.,* Art. 54 (4).

140. *Id.,* Art. 64(1).

141. 22 January 2007.

142. Also see, *DCC 10-116* of 8 September 2010 in which the Court declared that any intervention of the army in any public function must remain within its constitutional perimeters.

Although a president is the commander-in-chief of the armed forces, its composition, organisation and operation are established by law.[143] Also, the declaration of war in which the armed forces can be deployed is authorised by the National Assembly.[144] In subjecting the military forces' operation, composition and organisation to the law, the 1990 constitution of Benin puts its responsibilities and structure in the arms of the legislature, thereby insulating it from the executive. In a clear expression of the rejection of illegal acquisitions of power, any president that acquires power through unconstitutional means is prohibited to access the presidential pension.[145]

The 1995 constitution of Uganda designates a president who is also the commander-in-chief of the armed forces.[146] Subjecting the armed forces to the command of the president is ill-advised given the historical role the armed forces have played as an instrument of repression and the final arbiter of political disagreements in Uganda. In this regard, the constitution bestows on the presidency excessively disproportionate powers over the incumbent's political competitors and the citizenry, by placing the armed forces, a potent and brutal weapon of political coercion and historically an instrument for accessing and retaining power, at the president's disposal to be called upon to settle political disputes and to retain power.

Although the constitution sets out one of the functions of the armed forces as to preserve and defend the sovereignty and territorial integrity of Uganda,[147] the historical role of the armed forces in Uganda indicates that they have been used more as a 'kingmaker', a tool for unconstitutional change of government, a brutal instrument for stifling political dissent, and the final arbiter for political conflicts, rather than an institution for maintaining the territorial sovereignty of the country.[148] This has led to a widely-held belief that any president who does not have the support of the armed forces, cannot hold power.

Furthermore, placing the armed forces under the authority of a president and a political leadership that created it cannot be conducive to good governance. The

143. Constitution of Benin 1990, Art. 62.

144. *Id.,* Art. 101.

145. *Id.,* Art. 48(3).

146. Uganda Const., 1995, Art. 98(1).

147. *Id.,* Art. 209(a).

148. Since Uganda attained independence in 1962, the country's armed forces have only been involved in interstate combat in the following countries: in Congo in 1966; against the Tanzanian forces in 1979; in the Democratic Republic of Congo in 1992; in hunting down the Lord's Resistance Army rebels in South Sudan, the Central African Republic and the Democratic Republic of Congo; as part of the African Union Mission in Somalia (AMISOM) in 2007; and in 2014 and 2016 in response to the civil war in South Sudan.

National Resistance Army (NRA), which is the military wing of the NRM that waged the armed conflict which brought President Museveni to power, is now the Uganda's People Defence Force (UPDF) - the national army. Its top leadership is comprised of veterans of the guerrilla war which brought President Museveni to power.

When President Museveni assumed power in 1986, there was no attempt to restructure the army in order to make it a national army as opposed to one that was created by and which serves the President and the NRM. A survey conducted by the *The Independent* newspaper in 2009 revealed that 23 of the highest-ranking positions in the armed forces were occupied by persons from the president's tribe.[149] This is despite the 1995 constitution calling for the creation of a non-partisan army, which is national in character, patriotic, professional and which is subordinate to civilian authority.[150] An army whose high command is made up of a president's tribe helps the incumbent in several ways: it reduces discontent in the inner circle of the power and it enhances loyalty, and most importantly it cements the president's control over the traditional instrument of power—the armed forces.

Furthermore, it creates a group of loyal high-raking army officers with a subjective interest in the president holding power. In addition, under Article 78(1)(C)of the 1995 constitution, parliament consists of members of the armed forces who are appointed by the president, thereby increasing the interest group of the executive in the legislature.

It would have been prudent to include a provision in the constitution prohibiting persons who attempt to access state power through armed violence to acquire public office. This would amount to a further rejection of armed seizures of power and of the involvement of the army in the country's politics. Any person affected by the provision would, of course, have the right to challenge their political isolation before a court.

Unlike Uganda, Benin—which has also experienced military *coups*—has constitutionally prohibited a president to bring a member of the armed forces in politics.[151] Ideally, the armed forces respect the constitution that has been agreed upon by the people and does not lend its weight to the promotion or the entrenchment of the power of a particular leader or a government. It must also be committed to defending the sovereignty of the people according to the framework of the constitution and must, therefore, be prepared to serve under any government that

149. S. Mukasa, *Family Rule in Uganda: How Museveni's Clan Runs Government*, THE INDEPENDENT, 25 March 2009, at 3.

150. UGANDA CONST., 1995, Art. 208(2).

151. *Id.*, Art. 64.

is freely and lawfully elected by the people.

However, when his alleged plan to transfer the presidency to his son Brigadier Muhoozi Kainerugaba was challenged, President Museveni was quoted as declaring that the armed forces would not permit destabilisation of the country and would not allow his authority to be challenged.[152] In this context, according to the president, the armed forces of Uganda are his personal possession and their primary purpose is to maintain him in power. It is, therefore, reasonable to conclude that President Museveni's possession of the ultimate authority over the armed forces makes him reluctant to submit to the people or the constitution and makes him reliant on the army for his power. Evidence of the president's sole ownership of the institution of the armed forces may be further deduced from its deployment in South Sudan in January 2014 without parliament's approval in contravention of the constitution.[153]

Similar to the King's African Rifles (KAR) army created by the British colonialists, the purpose of the armed forces in Uganda continues to be the preservation of the head of state in power regardless of whether they have a popular mandate to rule. There has never been any change in the operation and public perception of the army in Uganda. The idea of a head of state as the supreme commander of armed forces is aimed at allowing the bearer of the office authority over a brutal instrument of coercion, which they can call upon to quash any challenge to their power. To address this challenge, constitutional provisions should have been adopted to ensure that the army is insulated from the influence of the head of state or a government. One of the ways of achieving this is to ensure that the law provides for the qualifications of membership of the army and that its ethnic composition is proportionate to the various tribes of Uganda. This would minimise the opportunity of distorting the ethnic structures of the armed forces in order to create a military that is loyal to a head of state and a government.

IV. RECOMMENDATIONS FOR ESTABLISHING A CONSTITUTIONALLY LIMITED PRESIDENCY IN UGANDA

The supervision of executive authority remains one of the most difficult problems in Uganda's constitutional frameworks. Consequently, the failure to build effective

152. *See*, A. Kasoma, *Museveni Should Explain the Army Takeover – UPC*, THE INDEPENDENT, 23 January 2013, at 2.

153. Article 210 of the 1995 Constitution provides that Parliament's approval must be sought by the president for any deployment of the armed forces outside Uganda.

constitutional mechanisms for superintending presidential authority continues to foster autocracy, absolutism, and kleptocracy, among other forms of misrule in Uganda, and many other African countries. The 1995 Uganda constitution represents the first attempt at promulgating a popular fundamental law in Uganda; however, similar to those before it, it fails to take up the challenge of providing sufficient constraints on the presidency. In this regard, an opportunity was missed to rethink the reasons for granting the powers and privileges to the presidency that were previously assigned by erstwhile fundamental laws. The recommendations that follow are aimed at ensuring that presidents are not allocated inordinate powers and privileges in order to prevent the possibility of their abuse. These recommendations may also be very relevant for other African countries trapped in a similar situation of presidential dominance.

A. Insulate the instruments of powers and arms of government from executive manipulation

The instruments of power such as the armed and security forces and the electoral management body, as well as the other arms of government such as the judiciary and the legislature should be insulated from domination by the presidency. For example, members of the electoral management body could be appointed by a president from a list of recommended nominees submitted to parliament by all registered political parties. This would protect the integrity of the electoral process. To unshackle the executive chains on the National Assembly and to avoid partisan approaches towards issues of national importance, the constitution should allow legislators to only once in a year be required to vote on any motion in parliament in support of their party. Also, a Constitutional Court with supervisory powers over the functions of all arms of government, most importantly the presidency, similar to the one in the Republic of Benin, should be established.

B. Strengthen the capacity of institutions that supervise presidential appointments

Caveats that seek to provide checks and balances on presidential authority such as those that require democratic constitutional bodies such as parliament, and expert constitutional bodies such as the Judicial Services Commission to scrutinize the appointments of heads of public service bodies, should be fastened sufficiently in order to ensure that these supervisory institutions are adequately empowered to perform their constitutional duties. This could be achieved in several ways.

First, save for cabinet ministers who may be appointed by the president, within minimum scrutiny, a president's powers of appointment should be exercised "following the advice" of the supervisory body to ensure that a president is guided but not bound by the advice of such a body. However, before an appointment is confirmed, the Constitutional Court, the advice of the supervisory body and detailed reasons for the president's appointment should be made available to the Constitutional Court and the public. The Constitutional Court on its motion may block any appointment where it is satisfied that the person appointed by the president is not fit for public office, where such an appointment appears to be partisan or where in a constitutional petition originating from a member of the public successfully challenges the suitability of an appointment before the Court. The concerned appointee and the president may appeal the Constitutional Court's decision to block an appointment before the Supreme Court.

In relation to judicial appointments, a president may be constitutionally authorised to appoint not more than four of the 11 justices of the Supreme Court who may not include the Chief Justice, and not more than three of the seven justices of the Constitutional Court who again may not be the head of the court. A president's role in judicial appointments is justified by the mandate that the electorate have given them as the head of the administration of the country. However, such a mandate should not allow for the creation of a judiciary that is beholden to a president. The other justices of the Supreme Court and of the Constitutional Court could be appointed by the Judicial Service Commission.

It should be recalled that all appointments may also be blocked by the Constitutional Court and may also be challenged by the public. To insulate the supervisory bodies from the influence of a president, their members could be appointed 'following the advice of' the Parliamentary Committee on Public Service Appointments, which is made up of all political parties in parliament, and on which every political party is represented corresponding to its membership in the legislature. The term "following the advice" mandates that such appointments should be made in adherence to the advice of the Parliamentary Committee on Public Service Appointments. Therefore, it would be for the parliamentary committee to forward the names of the nominees to a president for appointment. Where a president finds that a candidate nominated by the parliamentary committee is not suitable, they may refer the matter to the Constitutional Court to determine. It should be noted that in relation to the appointment of cabinet ministers, the parliamentary committee may 'approve' such appointments and it may only veto a minister where it is satisfied that the appointee is not fit for public office. In this regard, a president has more of a freehand in appointing members of the executive

branch that would assist him in delivering his mandate.

C. Moderate the presidency's authority over the armed forces

Domestic law should provide for the qualifications and other requirements for judicial appointments and for the membership of expert bodies. A president should have the overall command of the armed forces; however, its operations should be approved by parliament. As the leader of the administration of the country, whose responsibilities include protecting the citizens and the territorial integrity of the country, a president's command of the armed forces is justified because of the nature of the national security issues and operations in which the armed forces may be involved. The Parliamentary Committee on Security Agencies constituted in a similar manner as the one for appointing public servants should appoint the leadership of the armed forces. Such appointments may only be confirmed by the Constitutional Court in line with the procedures for approving members of the civil service discussed above.

Similar to the judiciary, domestic law should provide for the qualifications and other requirements for the leadership of the armed forces. It should also provide that the ethnic composition of the armed forces must reflect the population of Uganda. This could be achieved through statutory provisions which stipulate the number of persons who may be recruited into armed forces from the different regions of the country. These procedures should also apply to the police, prison, and other state security services.

D. A president should not be insulated from legal proceedings and the impeachment process should be revised to make it more effective

A president should not be provided with immunity from legal proceedings on account of acts or omission carried out as an individual. They may, however, be granted immunity for acts committed while acting in their capacity as a president. Acts and omissions carried out in the presidential capacity are those that relate to a president's constitutional role. Nonetheless, a president should be impeached for acts or omissions carried out in the exercise of their constitutional role which violate the constitution and domestic law. A motion raised by a registered voter which intends to seek legal proceedings against a president should be filed with the Constitutional Court and it should be approved by the court. Legal proceedings against a president may also be commenced in the Constitutional Court. Parliament, the Constitutional Court on its own motion and any person who is a registered voter

may initiate impeachment proceedings against a president for acts amounting to the violation of domestic law or the constitution.

Impeachment proceedings against the president initiated by the Constitutional Court may be supported by at least three of the seven members of the Court and should be heard by the Supreme Court. A parliamentary motion seeking to impeach the president should be supported by half of the members of parliament, while that from the citizenry should be supported by at least 100,000 registered voters and both should be approved by the Constitutional Court. Impeachment proceedings against a president initiated by parliament and the citizenry may also be heard by the Constitutional Court. A decision of the Constitutional Court not to commence impeachment or legal proceedings against a president maybe appealed by the citizenry or parliament to the Supreme Court. Decisions of the Supreme Court may not be appealable. The Constitutional Court may suspend a president from office while impeachment or legal proceedings are being investigated if it deems it necessary to do so in the interest of justice. The decision of the Constitutional Court to suspend the president may be appealed by the president to the Supreme Court. A president may also temporarily, on own accord, stand down pending the outcome of legal or impeachment proceedings. Where a president is suspended from office, or where they stand down temporarily, the constitution should provide for a procedure for an acting president to take over the office of the president.

E. Reinstate constitutional limits on the re-election of a president

In order to facilitate fair competition for the presidency and to stave off the entrenchment of one-man regimes, the two-term limits of five years each on the re-election of a president should be reinstated in the 1995 constitution. This is because a five-year term renewable once allows a president sufficient time to carry out the mandate for which they were elected. Also, provisions of the constitution which aim to protect core constitutional values such as presidential term limits should be fastened to avoid being abused by politicians. For example, a motion to repeal the term limits on the re-election of a president or to remove the presidential age cap should be supported by one-third of the registered voters and approved by the Constitutional Court.

V. CONCLUSION

In Uganda, the heads of state enjoy all state powers and privileges almost without any legal limits. This means that they have hardly enjoyed the legitimacy to rule which is gained through plural laws, but have depended on presidential patrimonial constitutional logic as well as the gun for their power. In other words, they have ruled according to the law and their military might but not by the rule of law. This mode of governance has been instrumental in keeping Uganda's heads of the state in power because it allows them to subjugate and terrorize the citizenry.

Fundamental laws in Uganda contain, to a large extent, nothing but lofty declarations of objectives and descriptions of organs of government in terms that import no enforceable restraint upon a president. All instruments of power are subservient to the presidency. It is under this presidential model that heads of state have ravaged Uganda since its creation and its people have become victims of military coups, corruption, and one-man regimes, among other things. Thus, since independence, Uganda has only witnessed one smooth transfer of power following a highly disputed general election in 1980. Military coups and fundamental laws designed to entrench individuals in power have determined who holds power and the manner in which power it is exercised.

Benin makes an exception. Under the country's 1990 constitution, presidential authority is moderated by constitutional restraints that deter a president from misusing the power and privileges of their office. The presidential model provided for by the constitution is designed to provide for a 'strong presidentialism'. This is evidenced by the provisions which afford a president strong prerogatives to both make laws and to 'exert influence' on public administration, the armed forces and the judiciary. However, the strong presidency was constitutionally shackled to create a limited president. The constitution of Benin illustrates that it is possible to craft an accountable and constrainable presidency under which the holder of the office requires the mandate of the people to hold power, and institutions that serve the country and not a president or a government.

The Constitution of Benin has facilitated and promoted smooth transfers of political power and brought stability to the country because its foundations were cast in the foundations of constitutionalism, which is intended to minimize misuses of state power. A purposefully empowered Constitutional Court has played a major role in supervising the role of the president. The court has both strengthened and protected constitutionalism and positioned the country as a democratic model. The plague of authoritarian presidential models, which has afflicted Uganda's fundamental laws, was overcome by, among others, provisions for checking and

balancing the presidency's powers of appointment and its influence over instruments of power.

An analysis of the designation of the executive president as provided for in the 1990 constitution of Benin reveals that the constitution balances the distribution of powers by moderating executive presidentialism, thereby avoiding a 'presidential monocracy'. It serves as a good model for Uganda and other African countries.

THE RESPONSIBILITY TO PROTECT IN AFRICA: A PROACTIVE PERSPECTIVE TO ARTICLE 4(h) OF THE AFRICAN UNION CONSTITUTIVE ACT

Justin Ngambu Wanki*

ABSTRACT

The responsibility to protect (R2P) implemented by the African Union as Article 4(h) supposedly suggests that many options to suppress the emergence of mass atrocity crimes are contemplated ranging from prevention, reaction and rebuilding. Nonetheless, the threshold provided especially by the above Article for intervention betrays their contention for exclusive military intervention. Given that most mass atrocities committed in Africa are symptoms of structural violence and injustice, it has been suggested in this article that Article 4(h) be reconstituted and be grounded in social justice and elimination of structural violence so that the current Article 4(h) is only maintained as an exceptional and complementary measure of the anticipated reconstituted Article 4(h). The structural injustices proposed to be addressed are amongst others the tenets of constitutionalism, justiciability of socio-economic rights, citizenry participation in governance and provision for genuine democratic institutions. It is suggested that if the root causes that lead to mass atrocities are addressed, then military intervention will only be complementary in the anticipated provision for contingency sake.

I. INTRODUCTION

The feet-dragging intervention of the United Nations (UN) in the Rwandan genocide of 1994 opened the floodgates to the emergence of a response against the occurrence of mass atrocities which became known as the responsibility to protect (R2P).[1] This concept was the brainchild of the International Commission on Intervention and State Sovereignty (ICISS), established by the Government of Canada and other major foundations after the concept was announced at the September 2000 General

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1. C. Applegarth & A. Block,*Acting against atrocities: A strategy for supporters of R2P,* in MASS ATROCITY CRIMES: PREVENTING FUTURE OUTRAGES (R.I. Rotberg, ed., 2010), at 128.

Assembly.[2] This concept was later overwhelmingly endorsed by consensus by the participating states at the UN World Summit in 2005, by Resolution A/60/1 of the United Nations (UN) General Assembly, as the responsibility to protect masses from crimes against humanity, war crimes, genocide, and ethnic cleansing in its paragraphs 138 and 139.[3] As a matter of fact, the ICISS clarified the fact that the R2P should not be seen as limited to the duty to react and by extension military intervention, but rather as a continuum of obligations, to wit, the responsibility to prevent, the responsibility to react, the responsibility to rebuild.[4]

Moreover, the report of the outcome document of the UN World Summit sets out a three-pillar institutional plan committed to the R2P.[5] Firstly, the primary responsibility rests on the state to protect its masses from the four crimes. Secondly, the international community has the responsibility to assist the state to achieve this goal, and thirdly, where the state is unwilling to protect the masses, the international community has the duty to undertake timely and decisive action, in conformity with chapters vi, vii and viii of the UN Charter.[6] Support for the R2P has since found traces in Article 4(h) of the African Union (AU), given that under this article, the issue at stake is not the commission of egregious crimes, but that these crimes are orchestrated or involve government's action against its own people.[7] In this article, "mass atrocity crimes" refers exclusively to war crimes, genocide and crimes against humanity. Article 4(h) of the AU Constitutive Act states: "The right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."

I argue that "intervention pursuant to 'grave' circumstances" suggests paradoxically that a huge number of civilians would have lost their lives before action is taken.[8] The same mass atrocity crimes that Article 4 (h) seeks to avert will

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2. REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY: THE RESPONSIBILITY TO PROTECT FORWARD VII-VIII (2001).

3. D. Gierycz, *The responsibility to protect: A legal and rights-based perspective,* in THE RESPONSIBILITY TO PROTECT AND INTERNATIONAL LAW (A.J. Bellamy, S.E. Davis & L. Glanville eds., 2011), at 101.

4. G. Evans, *From humanitarian intervention to the responsibility to protect,* 24 WISCON INT'L L J (2006), at 709.

5. M. Serrano, *The responsibility to protect – true consensus, false controversy,* in DEVELOPMENT DIALOGUE: DEALING WITH CRIMES AGAINST HUMANITY (H. Melber ed., 2011), at 106.

6. Report of the Secretary-general on Implementing the responsibility to protect A/63/677, 12/1/2009 A/60/L 1, 20/9/2005 ¶ 138-140.

7. D. KUWALI, THE RESPONSIBILITY TO PROTECT: IMPLEMENTATION OF ARTICLE 4(H) INTERVENTION 88-89 (2011).

8. D. Kuwali, *Persuasive prevention towards a principle for implementing Article 4 (h) and R2P by the African Union,* CURR AFRI ISS 47 (2009), at 47.

be incited or result from such a circumstance. Therefore, the scope of Article 4(h) seems to be so narrow to be able to fulfil the anticipated and desired mass atrocity prevention outcome. Impliedly, the primary objective of Article 4(h) is prevention first, which in my opinion should be interpreted as including the addressing of structural injustices and developing good relationships between the African people and their governments. Secondly, there is an urgent need to pre-empt the brutal killing of civilians subject to unforeseen contingencies. Furthermore, structural justice must be addressed because conflict leading to mass atrocities emerges from structural violence to direct violence.[9] As a matter of fact, the activators of military intervention in a target society are deeply ingrained and as a result cannot be fundamentally transformed by the armed forces of the international community. Nevertheless, this intervention can create room for the root factors—deeply ingrained— to be addressed.[10]

The purpose of the establishment of human rights norms, principles and institutions is to circumvent the violation of these human rights. Consequently, any mechanism attempting to suppress mass atrocity crimes by concurrently ignoring structural justice, yet riding roughshod over human rights to such a degree as suggested by the current Article 4 (h), "grave circumstances" must be seen as a paradox and a counterproductive measure. Any measure meant to tackle human right violations, yet which measure itself is entrenched in massive human rights violation, is an antithesis to the prevention and protection from mass atrocity crimes.

More so, the mass atrocity crimes that Article 4(h) contemplates will only emerge in a situation where African governments neglect the building of sustainable structural justice. This article argues that Article 4(h) should be evident as a measure to enforce sustainable structural justice and military intervention. It is merely complementary to the provision to ensure that an unforeseen circumstance requiring pre-emption to avert an emerging genocidal or mass atrocity situation is not overlooked. In other words, while this discussion suggests that Article 4 (h) should be couched as a complementary measure to sustainable structural justice, the military or pre-emption part must be read and understood as an exception in the anticipated or reviewed Article 4 (h).

While other provisions of the Constitutive Act such as Articles 3 (f, g, j and k) and 4 (m, n) reluctantly and sparingly address the issue of sustainable structural justice, nevertheless, these provisions do not suggest that the act has consciously and holistically addressed the protection of negative and positive human rights in a

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9. H. Melber, *The responsibility to protect? An introduction,* in DEVELOPMENT DIALOGUE: RESPONSES TO MASS VIOLENCE, MEDIATION, PROTECTION, AND PROSECUTION (H. Melber ed., 2011), at 78.

10. Kuwali, *supra* note 8, at 13.

complementary and proactive manner. Rather, these rights (under Articles 3 [f, g, j and k] and 4 [m and n]) are expressed loosely, aloof and in a vague and controversial manner that conclusively suggests that the Constitutive Act ultimately appoints military intervention as the exclusive means of addressing mass atrocity crimes despite mentioning prevention and rebuilding. The Constitutive Act's deficit to functionally address structural justice and human rights in a single comprehensive provision calls for the harmonisation of the same into a single provision so that Article 4(h) is a balanced and concerted provision.

In other words, I propose the assumption of a two-pronged approach to achieving Article 4(h) in a proactive manner. The measures are to address structural justice to avoid a spillover into mass atrocity crimes and to timely involvement of the military to pre-empt the emergence of mass atrocity crime in a situation where prior structural preventive measures appeared to be inadequate to provide lasting human rights protection and resulted in confrontation.

Both the R2P and Article 4(h) need to be reconceptualised or reconstituted to be rooted in structural justice and pre-emption though military intervention may be engaged when necessary, rather than addressing the issues in isolation as the present Article 4(h) does. As earlier demonstrated, Article 4(h) did not contemplate building structural justice as a means of pre-empting and proactively preventing mass atrocity crimes, but only anticipated exclusive military intervention, which of course only occurs when structural justice is ignored. Yet, it is clear that most of the conflicts that result in mass atrocity crimes emerge from structural injustice. These conflicts are rooted in struggles for political power, ethnic privilege, scarce resources and national prestige.[11] *Grosso modo*, the review this article suggests is that of integrating Article 4 (h, m, n) into Article 4(h). As a result, the proposed proactive article 4(h) will read thus:

> The Union promotes respect for democratic principles, the rule of law and promotion for social justice. Nevertheless, the Union will reserve the right to pre-empt in member states grave circumstances, namely: war crimes, genocide and crimes against humanity pursuant to a decision of the Assembly.

This article has been divided into seven parts. It begins with the introduction of the article, the basis for a proactive approach on Article 4(h) of the AU Constitutive Act, reviewing Article 4(h) as a mitigation to the effects of direct or military intervention,

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11. M. Ndulo, *The democratization process and structural adjustment in Africa,* INDI J L STUD (2003), at 316.

questioning the feasibility and expediency of Article 4(h) as a means of protecting citizens, challenges in empowering what institution has the mandate to determine when a gross violation requires intervention, the way forward and concluding remarks.

II. THE BASIS FOR A PROACTIVE APPROACH ON ARTICLE 4 (H) OF THE AU CONSTITUTIVE ACT

Firstly, the entry point of this article is to establish the preponderance of human security/rights protection in Africa over state protection and political interests. In this regard, the article postures on the pre-eminence of the protection of African peoples in general and civilians in particular within the context of a military operation which has as its objective the pre-emption and prevention of mass atrocity crimes and violations obtained as a result of AU or African states' failure to proactively react by addressing structural justice, resulting in severe human rights violations. In order to properly comprehend this position, I examine, among others, the lacuna that exists in Article 4(h) as a mechanism to implement the R2P in Africa. Article 4(h) puts in more succinct terms, the threshold of intervention as follows: "the right of the AU to intervene in a member country pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."[12] In other words, Article 4 (h) can only apply in an event where the violation of human rights has become systemic. I argue that if the AU will tarry for human rights violations to attain such a despicable threshold before action can be taken, then Article 4(h) is a counter-reproductive human rights measure given that:

(i). Every single life matters—Every single life matters and if the threshold of "grave circumstances" must be attained, too many lives would have been lost before intervention. To avoid such a dilemma, African governments must transcend structural violence by focusing more on strengthening democratic structures and ensuring service delivery to the people as the AU may not be apt in the military intervention Article 4(h) anticipates.

(ii). Military intervention—Intervention at such a level can only be military intervention to pre-empt further loss of lives. Yet, the case of Libya-NATO has proven that military intervention for the purpose of protecting human rights results in more lives lost during the intervention.

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12. Article 4 (h) of the African Union Constitutive Act.

(iii). African states and AU failing to address human rights—Military intervention occurs as a result of the state or the AU having failed to address the most important and basic human rights which ensure structural justice. The failure to achieve these basic necessities frustrates the people and inspires them to channel their grievances through an alternative means such as violence. This violence then threatens the Article 4(h) crimes. At this juncture, only military intervention to pre-empt further killings can stop the violence.

As a matter of fact, mass atrocity crimes are symptoms of inadequate attendance to structural justice and justify the reason why I propose that Article 4(h) should be analysed from a proactive perspective. While I acknowledge that efforts have been made to address both preventive and reactive duties of R2P by the AU, I however attempt to assert that overemphasis on the duty to react of the R2P rather than on the duty to prevent as the AU Constitutive Act suggests, with exception to Article 23(2) of the act, evinces that what the AU understands and promotes in Article 4(h) is exclusively military intervention. Consequently, the adoption of this position of the AU begs for a review that will align Article 4(h) with the putative province of the R2P which should be to protect human rights without causing further harm including collateral damage.

This will require addressing structural injustices so as to minimise the possibility of conflict degenerating into a level where military intervention becomes indispensable. The review anticipated would enable the prevention of coercive intervention which is vastly reactive and rather encourage persuasive intervention[13] and transcending of structural injustices which are largely proactive measures.

In other words, Article 4(h) should be expressly constructed as providing a dual solution to the evolution of mass atrocity crime. The ultimate intention should be to address the root causes of mass atrocity crime. Where an unforeseen contingency results in a violent conflict, then swift military intervention must be engaged exceptionally to halt the evolution of genocidal crimes. This implies that human rights violations will not be allowed to attain the level of "grave circumstances" according to the wording of Article 4(h), but would rather call for summary cessation of arms or ceasefire at whatever level confrontation occurs by drawing a truce line that will enable the stakeholders to address the root causes for the purpose of transcending the emergence of "grave circumstances."

These root causes in Africa consist of the dysfunctionality of democracy; lack of genuinely and properly functioning democratic institutions; disregard for the

13. Kuwali, *supra* note 8, at 32.

rule of law and inappropriate and inadequate human rights systems; non-justiciability of socio-economic rights; and above all the non-participation of the people in democratic processes, among others.

Intervention in respect of grave circumstances suggests that these variables as highlighted above were disregarded or neglected which then culminated in grave circumstances. The missing link is the neglect of structural violence and injustices which then translate into direct violence for Article 4(h) crimes to occur. I contend that the AU should enjoin and assist all state parties to exhaustively address their structural issues so that the dangers raised in Article 4(h) are timely transcended and the likelihood for military intervention as suggested by the present Article 4 (h) is negligible.

The whole point is that "interventions in grave circumstances" require military intervention. However, military intervention to protect human rights and avoid mass atrocity crimes only culminates in misery and further violation of human rights as the Libyan and even Iraqi interventions have suggested. The so called military intervention to protect human rights from a vicious regime in Libya led to more human rights violation than those registered between the apparent brutal regime and the rebels.

The AU, in applying the R2P in Africa as per its Article 4 (h), has been very restrictive in its province of application by practically giving more attention to the duty to react, while giving insufficient attention to prevention in particular and rebuilding as well. The statutes emphasize "the right to intervene in respect of grave circumstances, namely, war crimes, crimes against humanity and genocide." These crimes most often than not occur in conflict situations.[14] Impliedly, the putative measure of intervention in such circumstances as earlier mentioned can only be intervention by the military. Yet, a proactive measure such as addressing structural injustice by African governments is the best means of pre-empting the occurrence of grave circumstances or instances. If this approach is adopted, the vision of the current Article 4(h) may fizzle out, requiring the reformulation or reconstitution of the article in question to posture more on prevention while military intervention becomes complementary or contingent.

Moreover, it could again be confirmed in the language of other AU organs supporting the R2P such as the African Commission on Human and Peoples' Rights that what the AU understood and promoted in the noble concept was military

14. Kuwali, *supra* note 7, at 88.

intervention than prevention.[15] Nevertheless, prevention will still be of paramount importance since in respect of the wording of the AU Constitutive Act on when to intervene, the international community would have to wait until an unmatched number of human rights abuses occur before intervention is engaged,[16] which by itself is a paradox to the mandate and duty of the R2P.[17]

Yet, lending credence to the time-honoured adage "prevention is better than cure," it becomes imperative to recall the fact that international human rights has State conduct as its prime sphere of focus. Prevention of these mass atrocity crimes which are caused by state[18] will preserve the human rights inherent in citizenry which cannot be usurped by governments or states.[19]

I have also attempted to demonstrate the connection between bad governance and the rise of violent conflict between governments against its citizens. My intention in doing this lies in my desire to reveal how the R2P could be engaged to enforce and promote the obligation of states to respect the rule of law, democratic governance and human security, as a proactive means of avoiding and addressing Article 4 (h) crimes.

The perspective I have adopted is that which questions the wording of the intervention clause Article 4(h) and proposes that African governments invest additional efforts in addressing structural or root causes of mass atrocity crime. African governments' wherewithal hitherto has been military intervention. Nevertheless, it is an indisputable fact that if the AU and its Constitutive Act were visionary and had tactically persuaded and constrained African governments to build genuine democratic structures, then the likelihood of human rights violations such as mass atrocity crimes resulting in military intervention would be minimal, given that military intervention is evidence that structural injustice and prevention in general were not addressed. However, military intervention will be resorted to where the employment and deployment of any other measure will be inappropriate.

Structural justice and prevention in general include the proper supervision of democracy. This will require upholding the rule of law, the legitimacy of the

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15. J. Sarkin, *The role of the United Nations, the African Union and Africa's sub-regional organisations in dealing with Africa's human rights problems: Connecting humanitarian intervention and the responsibility to protect,* 53 J. AFRI L (2009), at 19.

16. D. MEPHAM & A. RAMSBOTHAM, SAFEGUARDING CIVILIANS: DELIVERING ON THE RESPONSIBILITY TO PROTECT IN AFRICA 44 (2007).

17. Gierycz, *supra* note 3, at 167.

18. D. Kuwali, *Old crimes, new paradigms: Preventing mass atrocity crimes,* in Rotberg, *supra* note 1, at 28.

19. S. Rosenberg, *Responsibility to protect: A framework for prevention,* in Bellamy *et al, supra* note 3, at 165.

constitution-making process and the resultant constitution thereof, constitutionalism, independence of the judiciary, the justiciability of socio-economic rights, and the respect for the right to development and corruption eradication. However, good governance should be properly managed as it has the potential of becoming a neo-liberal and imperialist tool which could further impoverish Africa and hence inspire more mass atrocity crimes.

A. Legitimacy of constitution-making in Africa

Legitimacy of constitution-making in Africa will help in averting or preventing violent conflict. This is a viable proactive means of averting the issues Article 4(h) is designed to address. It is conceded that for the constitution to be accepted as legitimate, the rule of law requires a just legal system in order to function properly.[20] Legitimacy of a constitution-making process includes popular sovereignty or democratic governance, which identifies the people as the basis of governmental power.[21] The exercise of constitution-making is focused on legitimate constitutional outcomes, rather than a bare constitutional text.

Essentially, constitution-making does not simply imply the reproduction of certain foundational principles that particular polities must have found in operation, but rather "specific political undertakings" that must consider past experiences and also future aspirations.[22] All efforts should be geared towards the empowerment of the African people as a means of excluding or avoiding the emergence of violent conflicts as a result of structural injustice and which may result in mass atrocity crime. The bottom-up approach which is premised on the wishes and aspirations of the people themselves will guarantee structural and even direct peace than a top-down constitution-making process which ignores the people completely. Ignoring the input of the people is a clear recipe for violent conflict resulting from the dissatisfaction and disapproval of the people.

B. Upholding the rule of law

Upholding the rule of law is another viable means of proactively addressing the challenges of Article 4(h). Most African presidents have become 'big men' and

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20. *Id.*, at 17.

21. *Id*., at 15.

22. H. OKETH-OGENDO, CONSTITUTIONS WITHOUT CONSTITUTIONALISM: REFLECTIONS ON AN AFRICAN POLITICAL PARADOX IN STATE AND CONSTITUTIONALISM: AN AFRICAN DEBATE ON DEMOCRACY (I. Shivji ed., 1991), at 6.

therefore undermine the rule of law with impunity. By not being able to be held accountable by the African constitutions, the 'big men' can commit human rights atrocities and escape accountability. Therefore, addressing the undermining of the rule of law by presidents will minimise the potential to experience human rights atrocities. The rule of law refers to the preponderance of ordinary law as opposed to the use of brute force or arbitrary powers by government. A citizen can only be punished for an existing infraction and cannot be punished for what the law has not anticipated.[23] But most especially, the pre-determined laws must be just and democratic at the very least. And all citizens are equal before the law regardless of position or rank. Moreover, an independent judiciary is a formal element of the rule of law.

C. Independence of the judiciary

The proper institution of independence of the judiciary is a means of devolution of power to avoid one state organ to command absolute power. If absolute power is realised then abuse of power will be inevitable, resulting in human rights atrocities by the executive. For democracy to be pragmatic there is need for another organ that would censor the activities of the other bodies and interprets the law.

The doctrine of the separation of powers is another principle that contributes to the enhancement of the independence of the judiciary. This doctrine concedes that for citizens' freedom to be assured and for executive abuses to be curtailed, the concentration of power should be avoided by means of dividing governmental power into legislative, executive, and judicial powers.[24] In this manner, the powers of the various organs can be kept in check and the concentration of power in the hands of one organ is avoided. In the absence of this measure, the organ where power is concentrated becomes a potential human rights threat.

D. Constitutionalism

Constitutionalism is also one of the elements required in a constitutional democracy as a means of protecting human rights and minimising the potential for any mass atrocities. Constitutionalism refers to the content and the values entrenched in the constitutional provisions.[25] The existence of a constitution that ignores

23. A.C. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 202 (1959).
24. *Id.*, at 84.
25. *Id.*

constitutionalism makes the constitution illegitimate.[26] Constitutionalism connotes: a limitation on government; constitutionalism as the antithesis of arbitrary rule; and a government conducted by predetermined rules, and not according to the vagaries of the rulers or an authoritarian government.[27] In other words, constitutionalism is tantamount to the judiciary being shielded from executive and legislative powers to avoid the concentration of powers in the hands of the same parties.[28] Constitutionalism also connotes separation of powers because if the same person or body exercised the executive and legislative power, the end result could be the enactment of tyrannous and oppressive laws.

E. Justiciability of socio-economic Rights

More so, given that most African countries experienced colonialism which robbed the state of development and left the citizens impoverished, the implementation of the justiciability of socio-economic rights will enable the citizenry to improve their standards of life. Article 22 of the African Charter on Human and Peoples' Rights enjoins states to adopt a collective and individual duty to fulfil this human right. The fulfilment of this human right is a *conditio sine qua non* to addressing root causes of violent conflicts which result in the human rights atrocities Article 4 (h) seeks to address.

F. Remoteness of democracy in Africa

The remoteness of democracy in Africa also facilitates the emergence of Article 4 (h) crimes. Article 28E of the Malabo Protocol on the unconstitutional changes of democratic governments addresses issues such as coup d'état against a democratically elected government (DEG), intervention by mercenaries against a DEG, replacement of a DEG by use of armed dissidents through political assassinations, refusal by incumbent governments to relinquish power, and its amendment or revision of constitutional or legal instruments and substantial modification of electoral laws without consultation with the people. All these factors constitute a breeding ground for human rights atrocities. Addressing these

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26. J. OLOKA-ONYANGO, CONSTITUTIONALISM IN AFRICA: YESTERDAY, TODAY AND TOMORROW IN CONSTITUTIONALISM IN AFRICA: CREATING OPPORTUNITIES, FACING CHALLENGES (J. Oloka-Onyango ed., 2001), at 94.

27. O. Nwabueze, A constitutional democracy and a democratic constitution in Democracy and the law (Paper presented at the second conference of the body of Attorneys-General in the Federation 9 -12 Sept. 1991, Abuja Nigeria), at 1.

28. *Id.*

issues then is a proactive way of avoiding the degeneration of a situation into violence leading to Article 4(h) crimes.

The transformation of governance structures is by far the most efficient and proactive way of avoiding mass atrocity crimes once and for all, because military intervention is always very contentious.[29] It exacerbates the situation by killing more civilians and the imposition of other coercive measures, including economic sanctions, are usually borne by the people than the government perpetrating the onslaught, making it tantamount to genocide in terms of the repercussions *vis-a-vis* the genocide convention. The 12 years of sanctions against Iraq by the UN is a quintessence of this position.[30]

Nevertheless, the emergence of a conflict into mass atrocity crimes requires resort to military intervention, but with a UN Security Council authorisation[31] which may also tolerate approval as a matter of urgency, *ex post facto*.[32] As a matter of fact, mass atrocity crimes are symptoms of structural violence. In other words, if these symptoms are addressed, the probability of a breakout of mass atrocity crime resulting from human rights violation or structural injustices would have been minimised. It is for this reason that I propose a review that focuses on the prevention of the breakout of mass atrocity crime by combining the prevention of structural causes which requires the proper institution of democratic institutions to serve the needs of the people. Military intervention is then only an additional intervention which must be acknowledged in the case where stringent measures are applied in addressing structural violence and yet direct violence causing mass atrocity crimes still occurs.

I accentuate a paradigm shift from military intervention as propounded by the AU Constitutive Act in Article 4(h)[33] to a primarily preventive agenda based not on deterrence solely, but also on addressing root causes of mass atrocity crimes so as to ensure sustainable peace.[34] Moreover, to also objectively shift from state security to human security because African states guarded their sovereignty jealously as articulated by the Charter of the defunct Organisation for African Unity (OAU) as a

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29. D. Kuwali, *Protect responsibility: The African Union's implementation of Article 4 (h) intervention,* 11 Y.B OF INT'L HUMAN L (2008), at 70.

30. D. Halliday, *Responsibility to protect – why not*?, in Melber, *supra* note 10, at 84.

31. F. Dove, *The responsibility to protect,* in Melber *id*., at 78.

32. Kuwali, *supra* note 7, at 143.

33. *Id*., at 26-27.

34. M. ANSTEY, NEGOTIATING CONFLICT 91-92 (1991). See also, M. Parlevliet, *Bridging the divide: Exploring the relationship between human rights and conflict management,* 11 TRACK TWO 10-11 (2002).

result of their nascent independence from colonialism,[35] by reinforcing state sovereignty.

However, the deterioration of international human rights in most of these countries including Bokassa's Central African Republic, Amin's Uganda and Rwanda 1994 as described by Welch resonated in the conduct "hear no evil, speak no evil, see no evil."[36] This could not therefore leave the international community indifferent, to see governments killing their own citizens, given that a state is now understood to be its people's servant and not the contrary.[37]

After the apocalypse happened in Rwanda in 1994, Deng and associates argued that sovereignty entailed a responsibility to protect its citizens from mass atrocity crimes and not just a right. Whenever a government fails to live up to its responsibility, it loses its sovereignty.[38] This was later reiterated in the AU's Constitutive Act as the "right to intervene" connoting the acceptance of African countries to uphold democracy, good governance and international human rights.[39]

For the purpose of deterring the commission of Article 4(h) crimes, I have also contemplated the integration of the universal jurisdiction into the AU's implementation and enforcement of R2P agenda. To render Article 4(h) more engaging requires the omitted link, universal jurisdiction to endeavour the extra-territorial prosecution of those responsible for the commission of mass atrocity crimes in member countries.[40] This will serve like a deterrent to the commission of such crimes. As a matter of fact, Article 4(h) has a temporal limitation in that the mechanism efficiently works in Africa only. However, internalising the universal jurisdiction mechanism into the instrument will extend the scope of operation of the instrument and enable it to have a far reaching effect on any human rights transgressors in Africa. The fear for being apprehended anywhere in the world as a result of the commission of Article 4(h) crimes will discourage human rights transgressors to a reasonable degree.

In this article, I question the expediency of Article 4(h) of the AU Constitutive Act as a viable mechanism for the implementation of the R2P. Furthermore, I have asserted that the R2P and Article 4(h) have a common ambition, since their thresholds for intervention are the same: crimes against humanity, war

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35. Kuwali, *supra* note 7, at 63.

36. *Id.*

37. *Id.*, at 472.

38. L. Glanville, *The antecedents of sovereignty as responsibility*, 17(2) EURO J. OF INT'L RELATIONS (2011), at 1-2.

39. Kuwali, *supra* note 7, at 64.

40. *Id.*, at 472.

crimes, and genocide (mass atrocity crimes).[41] However, it is necessary to assert that although I have established the connectivity between the R2P and Article 4(h) in this discussion, nevertheless I also acknowledge some key differences between the two, to wit, (a) the implementation of the R2P is endorsed through the approval of the UN Security Council, whereas, Article 4(h) has not mentioned anything concerning Security Council approval before engagement; (b) the R2P could be triggered when the states in whose territory violation or abuses are happening are apparently failing or unwilling to protect their populations. Meanwhile, the AU on its part could intervene with or without prior knowledge of the member states in question; (c) Article 4(h) is a legal obligation, while the R2P is a political commitment.[42]

In international human rights law, the state has no rights but rather obligations or duties since the primary duty to protect human rights rests on the state.[43] This is the reason why, if the state fails in this obligation, its authority is temporarily transferred to the international community through the R2P or Article 4(h) of the AU is triggered. It is also an accepted position in the recent past that the erstwhile concept of the sacrosanct nature of state sovereignty or sovereignty as control has now diminished to sovereignty as responsibility.[44] States can no longer evade accountability under the canopy of sovereignty, if the state of human rights in that state is "shocking to the conscience of mankind".[45]

States are duty bearers and the people are rights holders. It is important to understand that bad policies and refusal of categories of human rights to a segment of the population constitutes structural violence which has the potential of a latent conflict. This latent conflict is what translates into direct conflict with the potential to result into Article 4(h) crimes. This explains the connection between structural injustice and human rights violations. In order to transcend direct violence, structural prevention must be engaged.

What is structural prevention? Prevention as contemplated by the agenda of the R2P direct prevention which entails pre-empting where crimes against humanity might occur and taking preventive measures including peacekeeping to mitigate mass murder. However, prevention in this Article termed structural prevention as a sweeping word which also encapsulates addressing hidden issues in a state with potential violence than the visible ones, such as: corruption, embezzlement, bad

41. Kuwali, *supra* note 18, at 25.

42. *Id.,* at 44 and 46.

43. K. Kindiki, Humanitarian intervention in Africa: The role of intergovernmental organisations (LL.D Thesis, University of Pretoria, 2002), at 4.

44. ICISS Report, *supra* note 2, at 13.

45. *Id.,* at 31.

governance, the lack of structures to support democracy and good constitutional frameworks. In other words, R2P and Article 4(h) converge constitutional law and international law in order to transcend mass atrocity crimes.

The international law theory espouses that the primary actor in international law is the state. The state is therefore vested with political and territorial sovereignty. Force is forbidden in conducting relations with other states, but as per Article 2(4) of the UN Charter, a state will resort to self-defence if force is being directed on it. However, sovereignty is now generally understood to be a responsibility than a right, "re-characterisation of sovereignty." As a result if a state is manifestly failing to protect its citizens or is itself perpetrating crimes against its own citizens, then it shall lose its sovereignty temporarily to the international community.

Under international law, three branches address the issue of mass atrocity crimes. These are international human rights regime, international criminal law regime and international humanitarian law regime. In terms of international human rights law theory, the state is the prime duty holder[46] and has the obligations to prevent, protect, promote and fulfil the rights of citizens. This is known as obligations *erga ormnes*. Under these rights, there are categories like life and torture which are absolute rights.

International humanitarian law: war is prohibited between states in their international relations, but if war should occur as a last resort, that should be in alignment with Article 51 of the UN Charter. In the course of the armed conflict, the conduct of the combatants should be such that regard is given to the lives of civilians. This means certain rules and regulations would be respected in order to avoid the commission of certain crimes that might rather jeopardise international peace in general and continental peace in particular.

Furthermore, international law generally and international criminal law theory specifically affirm that there are certain categories of crimes known as *jus cogens,* which are peremptory norms and can never be negotiated by the state. As a result, those who bear the greatest individual responsibility for abusing human rights must be prosecuted and brought to justice. While it is a good thing the AU contemplated the need for Article 4(h), it is important to scrutinise the mechanism so as to ascertain its feasibility and expediency in protecting human rights.

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46. J. Brunnee and S.J. Toope, *The responsibility to protect and the use of force: Building legality*?, in Bellamy *et al., supra* note 3, at 63.

III. QUESTIONING THE FEASIBILITY AND EXPEDIENCY OF ARTICLE 4 (H) AS A MEANS OF PROTECTING CIVILIANS AND PEOPLE IN GENERAL FROM ARTICLE 4 (H) CRIMES-MASS ATROCITY CRIMES

It is important to understand the negative rights perspective, as in the case of *Velasquez-Rodriguez* v. *Honduras*[47] where the state is supposed to back off encroaching on civil and political rights.[48] Nevertheless, it must be admitted that military intervention as a means to protect people or to prevent large scale atrocities in respect of "the right of humanitarian intervention"[49] to relieve the civilian populace from the scourge of indiscriminate killings[50] is contentious and at best a questionable means of relief as this means of intervention may lead to the killing of an even greater number of civilians.

Again, reluctance of the state to encourage or force non-state actors to desist from violating human rights as was the case of the Janjaweed in Sudan[51] is in itself a gross disregard of the negative right perspective by the state. As a matter of fact, prevention is also supposed to accommodate positive rights from the state to ensure socio-economic rights and objectives[52] in the form of addressing structural issues like human security, food, housing, health care, and good national policies. This is because desperation as a result of lack of these human needs fuels grounds for civil wars, revolutions, and by implication mass atrocity crimes.[53]

Considering that most states in the developing world including Africa are known as fragile or failed states, although they have never really been states in the first place,[54] what the AU and its Article 4(h) need to prioritise is "structural preventive intervention" or proactive intervention in member countries through the creation, monitoring and strengthening of genuine institutions of democracy, promotion of human rights, independence of the judiciary, the rule of law, and anti-corruption strategies, good state policies, which of course are also features of R2P.[55]

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47. *Inter-American Court of Human Rights (Ser.C) no 4, judgment of July 29 1988, ¶ 172.*

48. ICCPR 1966.

49. Kuwali, *supra* note 7, at 90.

50. E. Straus, *A bird in the hand is worth two in the bush – On assumed legal nature of the responsibility to protect,* in Bellamy *et al., supra* note 3, at 45.

51. Rosenberg, *supra* note 3, at 167.

52. ICESCR 1966.

53. L. Schirch, *Linking human rights and conflict transformation: A peace building framework,* in HUMAN RIGHTS AND CONFLICT: EXPLORING THE LINKS BETWEEN RIGHTS, LAW, AND PEACE BUILDING (J. Mertus & J.W. Helsing eds., 2006), at 72.

54. M.S. Lund, *Human rights: A source of conflict, state making, and state breaking,* in Mertus & Helsing *id.,* at 49.

55. ICISS Report, *supra* note 2, at 11.

These factors guarantee greater prospects of building peace and proactively preventing the emergence or commission of mass atrocity crimes than military intervention, because most often the AU is inept and inadequately prepared to undertake robust military operations against mass atrocity crimes.[56] Generally, in a bid to curb mass atrocity crimes through military intervention, more civilian lives are lost, defeating the purpose for intervention which is to minimise the killing and maiming of the civilian population.

Consequently, Article 4(h) could be questioned or scrutinised for its viability to protect or prevent violation of mass atrocity crimes or human rights. While R2P has generally been hailed as a novel dimension in guiding concerted international action to prevent and respond to mass atrocities, criticisms have also arisen for its primary focus on the duty to react as is the case with Article 4(h) of the AU Constitutive Act. Two of its key elements—the duty to prevent and rebuild – have been neglected, and the duty to react has become nearly synonymous with R2P in mainstream discussion of the doctrine.[57]

It is interesting to understand that most humanitarian interventions—military intervention with the mandate to protect human rights – have ended up rather in a humanitarian crisis. An illustration on point is the R2P intervention in Libya in 2011.

Annie Machon, a former M15 operative, noted that NATO's intervention plunged Libya back into a stone age.[58] She further pointed out that while the living standards in Libya were slightly better than those in the UK and US in addition to free health and education, with the military intervention of NATO, all these privileges have become history.[59]

Many observers have held the view that if NATO intervention in Libya was for the purpose of "protecting civilians" and saving human lives, then their mission

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56. The AU lacks a permanent force which has experience in the suppression of mass atrocity crimes. The ASF is not a specialised force trained in specific skills. These drawbacks will hamper the efforts of the AU's intervention.

57. G. Lopez, Responsibility to protect at a crossroad: The crises in Lybia, *Humanity in Action Press* (2015), retrieved from file://localhost/F:/Responsibility%20to%20Protect%20at%20a%20Crossroads_%20The%20Crisis%20in%20Libya%20by%20Giselle%20Lopez%20_%20Humanity%20in%20Action.html (accessed 10 January 2017).

58. T. Wiseman, Civilian cost of NATO victory in Libya (2011), retrieved from file://localhost/F:/Civilian%20cost%20of%20NATO%20victory%20in%20Libya%20—%20RT%20News.html (accessed 20 January 2017).

59. *Id*.

was a catastrophic failure.[60] The death toll resulting from NATO's intervention in Libya ranged between 10,000 to 50,000 people and an unbelievable number of these being civilians. In addition to the death toll, a number of civilians were wounded, abducted, raped, maimed and molested. This number of calamities resulting from military intervention brings back into question the feasibility and expediency of Article 4(h) of the AU as a protection mechanism from mass atrocity crimes.

However, there are situations wherein all preventive and even persuasive measures have been engaged to avoid the occurrence of these crimes, yet they still occur, in such circumstances coercive intervention will be appropriate to pre-empt and save the lives of innocent civilians faced with the menace of mass murder or mass atrocity crimes.[61] Given this context, Article 4(h) is appropriate to be applied without any alteration or review to its formal wording,[62] as an exceptional strategy to avoid further calamities.[63] Nevertheless, it is vital to point out that states may only be confronted with such a circumstance mostly in an event where structural violence was not given adequate attention, which then gave room for the situation to progress into confrontation and then spill over into direct violence.

At this juncture, only military intervention alone is appropriate to curb further incursions. My argument on addressing structural injustices or violence as a means of avoiding Article 4(h) crimes is predicated upon the views that these kinds of crimes occur to a greater degree in Africa and to a very lesser degree in central Europe. European democracy has been properly developed and promoted, structural injustices have been addressed and these measures have diminished the likelihood of the emergence of mass atrocity crimes for so many decades in Central Europe. However, Africa has an appalling record of huge structural injustices which serve as an ignition to, or can flare up Article 4(h) crimes.

Given that the current Article 4(h) talks of the threshold of intervention pursuant to grave circumstances, the next section will serve to determine what institution and how the said institution would justify that the threshold for intervention has been met.

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60. S. Milne, If the Libyan war was about saving lives, it was a catastrophic failure (2011), retrieved from file://localhost/F:/If%20the%20Libyan%20war%20NATO%20%20was%20about%20saving%20lives,%20it%20was%20a%20catastrophic%20failure%20_%20Seumas%20Milne%20_%20Opinion%20_%20The%20Guardian.html (accessed 20 January 2017).

61. K. Kindiki, *The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security: A critical appraisal*, 3 AFRI HUM RTS L J 96-117 (2003), at 110.

62. Art 4 (h) of the African Union Constitutive Act.

63. ICISS Report, *supra* note 2, at 32.

IV. CHALLENGES IN EMPOWERING THE INSTITUTION WITH THE MANDATE TO DETERMINE THE THRESHOLD FOR GROSS VIOLATIONS REQUIRING INTERVENTION

My main argument has been that Article 4(h) should be reconstituted to focus more on structural justice so that military intervention only becomes supplementary. However, where the circumstances make military action indispensable for the purpose of pre-empting further human rights violations, then an organ must be created to determine when the violations have hit the required threshold for military intervention. Hence, there is a necessity for a juridical process to be engaged to ascertain when a R2P violation has been orchestrated[64] in the first place, so as to ignore the political viciousness of powerful nations who seek to use this concept to legitimise their selfish interests[65] rather than the protection of civilian populations. This requires the revision of Article 15(1) of the International Criminal Court (ICC) to officially empower the court to determine when a R2P principle has been violated and to institute investigations, even when blocked by the Security Council.[66]

Secondly, the implementation of the Rome Statute establishing the ICC in Africa will serve like a deterrent[67] on states from committing mass atrocity crimes with regard to its Articles 27—which prohibits the immunity of state officials committing mass atrocity crimes—and 39—that promotes the transfer of those responsible for mass atrocity crimes without stratification based on their official capacity.[68] The mass atrocity crimes which are subject of the R2P are within the purview of the ICC mandate as defined in Articles 5, 6, 7, and 8 of the Rome Statutes of the ICC.[69] However, one could become critical about the fact that all the sanctioning powers rest with the Western nations and Africans are the majority who have been prosecuted by the court. This debate has now revived the neo-colonial theory *vis-a-vis* the ICC and Africa. There has been a growing perception that the court is targeting Africans. In a few cases, the UN Security Council referred Africans to the court while in others the Courts' prosecutor invoked his powers *proprio motu*.

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64. M. Contarino & S. Lucent, *Stopping the killings: The International Criminal Court and juridical determination of the responsibility to protect,* in Bellamy *et al., supra* note 3, at 195.

65. *Id*., at 201.

66. *Id.*, at 202.

67. J.N. Wanki, Conflict resolution in post-conflict DRC, Rwanda and Sierra Leone: Towards a synergy of the rights-based and interest-based approaches to conflict resolution (LL.M mini-dissertation, Pretoria University, 2011), at 41-42.

68. The Rome Statutes of the International Criminal Court, Arts. 5, 6, 7 and 8.

69. *Id*.

However, looking at most of the other cases, it could be concluded that the role of the ICC has been reduced to politics given that most of the cases referred by the African states parties to the ICC were only done after the ICC impliedly assured the states that their interests would be preserved.[70] This position is reaffirmed by two extreme observations: the DRC and Uganda welcomed the investigations of the ICC because in the latter (the DRC), the ICC's investigation of Jean-Pierre Bemba for crimes committed in the Republic of Central Africa, and a main presidential challenger in past elections, was an advantage to the sitting president if Bemba was cleared off the way by the ICC.

In the case of Uganda, the indictment of the leader of the Lord's Resistance Army (LRA)—Joseph Kony—by the ICC was going to benefit President Museveni against whom the former had been pursuing a civil war for the last 26 years.[71]

In other situations, where state officials were to be targeted by the ICC, state institutions were less inclined to cooperate or collaborate with the ICC in terms of investigations against impunity. Such an instance could be seen in the Kenyan post-elections case, where the Kenyan state institutions were less willing to work in collaboration with the ICC simply because a number of state officials were under investigation.[72] This is a clear indication that collaboration by states parties with the ICC is prompted by interests and not the resolution to eliminate impunity. This is confirmation of the ICC's partial role in Africa.

In addition, even though majority of the world's conflicts occur in Africa, no African country is a permanent member on the Security Council. This gives Africa the impression that they are not part of decision-making and are being told what to do by the West; which to them is a violation of their sovereignty as states. The ICC may never have had the total confidence of its members, primarily because every nation-state at the Rome Conference had a wildly different image of whom the court would go after and for what. This lack of confidence and agreement is reflected in the way that Western nations hesitate at the prospect of holding US citizens accountable at the court while the same West overtly uses the ICC to advance its goals in Sudan through the Bashir indictment, which Africa vehemently rejects.[73]

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70. T. Dunn, The ICC and Africa: Complementarity, transitional justice, and the rule of law (2014), available http://www.e-ir.info/2014/07/12/the-icc-and-africa-complementarity-transitional-justice (accessed on 12 February 2017).

71. *Id.*

72. *Id.*

73. N.anjala Nyabola, *Does the ICC have an African problem*?, retrieved from https://www.globalpolicy.org/international-justice/the-international-criminal-court/general-documents-analysis-and-articles-on-the-icc/51456-does-the-icc-have-an-africa-problem.html (accessed 30 January

The question becomes, which body or court then can be empowered to determine when a R2P principle has been violated and to institute investigations even when blocked by the Security Council? Some commentators and scholars have proposed that the answer may lie in investing universal jurisdiction in various African supreme or high courts, simply by passing statutes that give these courts authority to try cases related to the most egregious violations of human rights on the continent. This proposition is defended by referring to how judiciaries of smaller states in Africa having succeeded in earning the confidence of their people and provides an alternative that takes suspected transgressors out of the immediate context of the crimes but then promotes the idea of "African solutions for African problems." Mauritius, Namibia, Botswana, Ghana are all nations with the capacity (albeit with significant assistance) to set up special chambers comparable to those in Cambodia to try such cases.[74]

In this article, I have adopted this approach not for the purpose of getting an alternative criminal court for Africa as a result of its dissatisfaction with ICC, given that the Protocol on the Amendment to the Protocol on the Statute of the African Court of Justice and Human Rights is to that effect, but rather for the purpose of determining when the R2P principle has been violated and to institute investigations so as to avoid impunity. This position is adopted based on the lack of trust in the ICC as it is seen to be biased towards Africa. It must be highlighted that in order to fulfil this task in Africa, independence of the judiciary shall be reformed, most especially in Francophone Africa where the judiciary is treated more as an authority rather than a power.

Ethnic cleansing is not mentioned among the list of Article 4(h) crimes, but could constitute the three crimes (*jus cogens*) generally, since the three crimes could be committed as a result of the ambition to foster ethnic cleansing. Lastly, if states within the AU adopt a universal jurisdiction, then they will be less likely to commit mass atrocity crimes for fear of being prosecuted anywhere.[75] This will therefore do great favour to prevention. Engaging military intervention suggests that inadequate attention was given to structural justice or prevention in the first place.

Secondly, in this article, I disagree with the AU's prime concern on direct intervention in circumstances of massive violation of human rights, which suggests military intervention,[76] and posit that what causes mass atrocity crimes are structural issues than direct causes. To tackle these crimes and avoid the slaughtering of

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2017).

74. *Id*.

75. Kuwali, *supra* note 18, at 47.

76. Kuwali, *supra* note 7, at 3.

innocent civilians, the AU should concentrate on improving governance structures of member countries with the assistance of the international community through its preventive organs to uphold constitutional changes and to promote visionary leadership. The present terms of Article 4(h) suggest that the AU is not forward-looking and lacks vision and has not proactively sought to protect human rights. Failure to seek a means of proactively addressing human rights violations will culminate in repeated military intervention, given that where there is bad governance or leadership, mass atrocity crimes are almost inevitable.

V. THE WAY FORWARD

Generally, the R2P consists of three pillars, namely: the primary responsibility to protect citizens is vested in the sovereign state itself; the international community has to assist states in fulfilling this obligation; and whenever the state is unable or manifestly unwilling to discharge its duty, this will warrant the international community to intervene.[77] The concept operates by encouraging prevention of mass atrocity crimes through political, diplomatic, economic, and legal means right up to coercive measures like threatened punishment against the state concerned, and military involvement as a last resort.[78] While coercive and military intervention are said to only be engaged as a last resort, when no commitments are taken by governments to address structural violence, and which is always the case with African governments, these last resort measures will almost be unavoidable.

Furthermore, structural prevention could be substituted with the commitment under Article 4(h) to transcend mass atrocity crime in that poverty, political oppression, lack of economy prosperity, inequity in the distribution of natural resources and bad state policies are the triggers of mass atrocity crimes.[79] Therefore, structural prevention by means of strengthening the rule of law, promoting the independence of the judiciary, engaging government accountability to the people and impartiality in the enforcement of law, respecting the rights of minorities and indigenous people, and institutions reinforcing the respect for human rights in general[80] would create an environment incongruent with the emergence of mass atrocity crimes.

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77. A. Bellamy and R. Reike, *The responsibility to protect and international law,* in Bellamy *et al., supra* note 3, at 88.

78. ICISS Report, *supra* note 2, at 23.

79. *Id.,* at 22.

80. *Id.,* at 23.

While military intervention suggests that structural violations were not attended, in the face of exceptional circumstances, where there is assurance that if military measures were to be disregarded, severe and irreparable damage of massive nature to human life would be the outcome or likely to ensue,[81] then the present Article 4(h) must be activated. More so, Article 4(h) in its current form could also be applied in an instance where, if pre-emptory action is ignored, the international community would be compelled to withdraw and witness massive violation of human rights before intervening to curtail the killings.[82]

The integration of the universal jurisdiction principle in Article 4(h) will go a long way to re-enforce prevention of mass atrocity crimes in Africa. The Assembly of the AU expressly recognised the principle of universal jurisdiction in these words:

> Universal jurisdiction is a principle of international law whose purpose is to ensure that individuals who commit grave offences such as war crimes and crimes against humanity do not do so with impunity and are brought to justice, which is in line with Article 4 (h) of the Constitutive Act of the African Union.[83]

Moreover, while African states might be reluctant to implement the 1998 Rome Statute to prevent mass atrocity crimes and preserve the ambition of the R2P and Article 4(h) of the AU Constitutive Act, the universal jurisdiction mechanism could substitute it for the purpose of deterring the commission of mass atrocity crimes. The AU acknowledges and recognises the principle as earlier demonstrated. According to the Rome Statutes, those guilty of committing genocide, crimes against humanity and war crimes irrespective of their official standing have to be accountable. The state has the primary duty to prosecute those guilty of these crimes, but if they are unwilling then the ICC will do that.[84] However, apparent bias of the ICC on Africa has jeopardised the potential of African states cooperating with the court to root out impunity.

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81. *Id.,* at 32.
82. Art 4 (h) African Union Constitutive Act.
83. The AU Assembly of heads of state and government.
84. Contarino & Lucent, *supra* note 64, at 196.

VI. CONCLUSION

I have argued for the reconstitution of Article 4(h). My argument has been a persuasive appeal to African states through the AU to reconstitute Article 4(h) as an emergency measure of the anticipated provision. The inclusion of the terms of the present provision in the anticipated provision would only serve to pre-empt further massive deaths and manage the scourge of despicable atrocities in contingent circumstances and as a complement to other structural measures the article would be founded upon. Even though the Constitutive Act provides for additional measures to protect human rights such as Articles 3 (f, g, j, k), and 4 (m, n), the language of other AU organs supporting the R2P such as the African Commission on Human and Peoples' Rights, however, suggests that what the AU understood and promoted in the noble concept – Article 4(h) was military intervention than any other manner of prevention or proactive measures to evade mass atrocity crimes as mentioned above.

More so, it would appear the present Article 4(h) of the AU Constitutive Act has been crafted as a measure of last recourse and not the primary means of avoiding mass atrocity crimes. Nevertheless, the very inclusion of Article 4(h) as a provision of the Constitutive Act of the AU in itself suggests that the AU is aware most African governments misdirect their resources to achieve other engagements at the expense of human rights promotion and protection. This acknowledgment of misplaced priorities suggests that Article 4(h) has consequently been couched as an emergency response to latent and structural violence which African governments anticipate could emerge into direct violence due to their negligence or lack of reasonable foreseeability to timely address.

Mass atrocity crimes emerge in two ways, to wit, firstly as an effect of structural injustice and secondly when this root cause is not promptly addressed and results in confrontation when military intervention is engaged. In the course of military operations, more human lives are lost and the likelihood for the commission of mass atrocity crimes looms. As a result, while trying to address the root cause of mass atrocity crimes by engaging preventive measures, it is only wise to equally engage reactive measures to deter African governments from committing the same in their attempt to quell uprisings emerging from unaddressed structural challenges. Both therefore sum up into the proactive measures I reflect upon in this article.

If African governments are truly committed to democracy and responsible leadership, they would be amenable to structural justice as a means of proactively avoiding the emergence of mass atrocity crimes. Given that the AU is ill prepared and ill-equipped to undertake successful military interventions that would minimise the indiscriminate killing of unarmed civilians in the course, I have actually

suggested that the AU should rather enjoin or persuade all African governments to genuinely prioritise building strong relationships with their citizenry, structural justice, building of strong and genuine democratic institutions and adherence to constitutional tenets such as rule of law, constitutionalism, justiciability of socio-economic rights and independence of the judiciary, among others.

The poor state of socio-economic rights, social justice and democracy in Africa only culminate in the perception that the enunciation of the same in the AU Constitutive Act is a mere travesty. The focus of African states on the enumerated duties and commitments would fulfil the wishes and aspirations of the people and these efforts will result in averting the emergence of any mass atrocity crimes. Consequently, Article 4(h) would be rendered redundant as it will simply exist as an exceptional measure of the provision for the purpose of pre-empting further massive killings which may still occur as an act of God.

PRIVATE PROSECUTIONS IN ZANZIBAR

Jamil Ddamulira Mujuzi*

ABSTRACT

In this article, the author deals with the question of private prosecutions in Zanzibar. The following issues are discussed: locus standi to institute a private prosecution; appeals in cases of private prosecution; the need for the private prosecutor to have a prima facie case before instituting a private prosecution; whether the DPP has to decline to prosecute before a private prosecution is instituted; the costs for conducting a private prosecution; the costs in the event of a successful or unsuccessful private prosecution; and the DPP's intervention in private prosecutions.

I. INTRODUCTION

In Zanzibar, private prosecutions are governed by several laws.[1] These are the constitution,[2] the Criminal Procedure Act,[3] the Office of the Director of Public Prosecutions Act, and the Prosecutions Act.[4] Research shows that there is no reported or unreported case of a private prosecution in Zanzibar.[5] The laws on private prosecutions in Zanzibar raise interesting issues that in practice are likely to provide challenges for the Director of Public Prosecutions (DPP) and the courts. These issues are discussed in this article and proposals are made on how some of the challenges could be dealt with should they arise in practice. In the light of the fact that some of the issues which are yet to be dealt with in practice in Zanzibar have been dealt with in other countries or jurisdictions, this article is enriched by referring

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1. Article 2(1) of the Constitution of the United Republic of Tanzania provides that 'The territory of the United Republic consists of the whole of the area of Mainland Tanzania and the whole of the area of Tanzania Zanzibar, and includes the territorial waters.' The Constitution of Zanzibar also draws a distinction between Tanzania Zanzibar and Mainland Tanzania. See Articles 69(1)(d), 101(1)(a) and 101(3).

2. The Constitution of Zanzibar, 1984.

3. The Criminal Procedure Act, Act No.7 of 2004.

4. Office of the Director of Public Prosecutions Act, Act No. 2 of 2010.

5. In an email dated 21 February 2017 (on file with the author), The Office of the Registrar, High Court Zanzibar, informed the author that no private prosecution case had ever been instituted in Zanzibar since the enactment of the 2004 Criminal Procedure Act.

to legislation or jurisprudence from these jurisdictions, inter alia, to suggest ways through which the private prosecution regime in Zanzibar could be strengthened.

In this article, the author deals with the following issues relating to private prosecutions in Zanzibar: locus standi to institute a private prosecution; appeals in cases of private prosecution; the need for the private prosecutor to have a *prima facie* case before instituting a private prosecution; whether the DPP has to decline to prosecute before a private prosecution is instituted; the cost of conducting a private prosecution; the costs in the event of a successful or unsuccessful private prosecution; and the DPP's intervention in private prosecutions.

Many of these issues are also dealt with in the laws relating to private prosecutions in Mainland Tanzania[6] and the author compares and contrasts the relevant Zanzibar and Mainland Tanzania legislation on private prosecutions. Case law from the Court of Appeal of Tanzania, whose jurisdiction also extends to Zanzibar,[7] and in some instances case law from the High Court of Mainland Tanzania, is discussed or referred to in order to strengthen some of the arguments put forward in this article. The issues of *locus standi* and the right to institute a private prosecution will be discussed first.

II. LOCUS STANDI AND THE RIGHT TO INSTITUTE A PRIVATE PROSECUTION

As mentioned above, private prosecutions are provided for in the constitution of Zanzibar, the Criminal Procedure Act and the Prosecutions Act. Article 56A(3) of the constitution provides that the DPP may take over a private prosecution.[8] However, it does not provide for the right of a person to institute a private prosecution. The constitution is also silent on the question of whether or not a private prosecution may only be instituted by a victim of crime. It is also silent on the question of whether juristic persons, such as companies, may institute private prosecutions. Article 56A(10)(d) of the constitution provides that '[t]he House of Representatives may enact laws regarding…procedure of commencing or instituting

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6. Apart from the fact that this term is used in the Constitutions of both Zanzibar and Mainland Tanzania, it is also used in some pieces of legislation discussed in this article. See for example, sections 327, 340, 390(1)(a) of the Criminal Procedure Act; section 2 of the National Prosecutions Service Act, 2008

7. Article 117 of the Constitution of the United Republic of Tanzania.

8. For a brief discussion of the insertion of Article 56A in the Constitution, see Chris Maina Peter, *Recent Developments in Zanzibar: From Miafaka to Maridhiano and Government of National Unity*, in ZANZIBAR: THE DEVELOPMENT OF THE CONSTITUTION (Chris Peter Maina & ImmiSikandeds., 2011), at 202.

a criminal case by a private individual or government and non-government institutions.'

On the basis of Article 56A(10)(d) of the constitution, it could be argued that there is a possibility for juristic persons to be able to institute private prosecutions – if the House of Representatives enacts such legislation. This means that, unlike in some jurisdictions where the right to institute a private prosecution is based on common law,[9] in Zanzibar it has to be conferred by statute.

There are two pieces of legislation which provide for private prosecutions in Zanzibar: the Criminal Procedure Act and the Prosecutions Act. Section 102(1) of the Criminal Procedure Act provides that "[t]he Director Public Prosecutions may on application or *suo motto* permit the prosecution or an appeal of any case to be conducted by a private person." The application "to conduct a private prosecution must be supported by an affidavit of the applicant and attached with a brief of evidence which may establish a *prima facie* case."[10] Section 15(1) of the Prosecutions Act provides that the DPP "may, on application or *suo motto* permit prosecution of any case or appeal to be conducted by a private person." Section 15(2) provides that the "application to conduct private prosecution shall be supported by an affidavit of an applicant and attached with a summary of evidence to be relied upon during the trial."

The Criminal Procedure Act and the Prosecutions Act, like the constitution, do not provide for the right to institute a private prosecution. They are very clear that a private prosecution may be instituted in one of two circumstances: if the DPP approves the application for the institution of a private prosecution; or if the DPP, of his own volition, allows a person to institute a private prosecution. These pieces of legislation are silent on two questions: first, whether a private prosecution may only be instituted by a victim of crime; and secondly, whether a juristic person may also institute a private prosecution. To answer these questions one may have to look at the definition of a private prosecutor in these pieces of legislation.

The general interpretation section of the Criminal Procedure Act, section 3, does not define a private prosecutor or a private prosecution. A private prosecutor is defined in section 320 of the Criminal Procedure Act which deals with the issue of costs in the event of a successful or unsuccessful private prosecution. Section 320(4) of the Criminal Procedure Act defines a private prosecutor, for the purpose of

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9. This is the case, for example, in Vanuatu. *See*, *Jessop v. Public Prosecutor* [2010] VUSC 134; Civil Case 114 of 2009 (2 July 2010), para 16; and in the United Kingdom, see Virgin Media Ltd, R (on the application of) v. Zinga [2014] 1 WLR 2228, Gujra, R (on the application of) v. Crown Prosecution Service [2013] 1 Cr App R 12, [2012] 3 WLR 1227, [2013] 1 All ER 612.

10. Section 102(4).

section 320, to mean "any prosecutor other than a public prosecutor."

There are two possible ways to approach this definition. One, it could be argued that this definition is only applicable to section 320 because it is clear that sub-section 4 states that "in this section 'private prosecutor' means any prosecutor other than a public prosecutor." If the legislators wanted that definition to be applicable to the whole act, nothing would have prevented them from stating expressly that "in this Act" private prosecutor means any prosecutor other than a public prosecutor. This is the same approach that was adopted in section 3 of the Act to define words used in the act. The legislators adopted three approaches on the issue of interpreting words used in the Act. The first one is that some interpretations are limited to specific sections, for example, the definition of a private prosecutor under section 320(4), the definition of 'Higher Court' under section 13,[11] the definition of a 'child' under section 37(2)[12] and the definition of 'thing' under section 136(2).[13]

The second approach is that some definitions are applicable to some parts of the Act, for example, the definitions of 'appellate court' and 'appellant' under section 349 of the Act. The third and final approach is that a definition applies to the word wherever it is used in the act "unless the context otherwise requires," under section 3 of the Act.

The challenge with limiting the definition of 'private prosecutor' under section 320 to private prosecutions under that section is that it would mean that a private prosecutor under section 102 would remain undefined, yet the costs being referred to under section 320 can only arise after a private prosecution has been instituted on the basis of section 102. In order to avoid such an absurdity, it is argued that the definition of a private prosecutor under section 320 should apply to the whole act. It should be recalled that the Tanzanian Court of Appeal has held in many decisions that legislation should be interpreted to avoid an absurdity which was not intended by the legislators.[14]

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11. The proviso to section 13(6) provides that 'For the purpose of this section the word "Higher Court" means the Court Superior in Jurisdiction immediately after the Court which entered the conviction.'

12. Section 37(2) provides that 'In this section "child" means a person who has not attained the age of sixteen years.'

13. Section 136(2) provides that 'In this section "thing" includes: (a) computer system or part of a computer system; and (b) a computer data storage medium.'

14. Attorney General v. Maalim Kadau and 16 Others 1997 TLR 69 (CA) (interpreting Court of Appeal's Rules); Joseph Warioba v. Stephen Wassira and Another 1997 TLR 272 (CA), Attorney-General and two Others v. AmanWalid Kabourou 1996 TLR 156 (CA) (interpreting the Elections Act); Attorney General v. Lohay Akonaay and Joseph Lohay 1995 TLR 80 (CA) (interpreting the Regulation of Land Tenure (Established Villages) Act 1992).

Referring to the jurisprudence from the Court of Appeal of Eastern Africa and from the United Kingdom, the Tanzanian Court Appeal held that:

> A cardinal rule of interpretation is that one must, whenever one can, place such interpretation on a statute as will not lead to an absurdity…[I]n effect…the literal rule of statutory construction has been replaced by the purposive approach…[T]he Courts should adopt such a construction as will promote the general legislative purpose underlying the statute…[W]henever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it, by reading words in, if necessary, so as to do what parliament would have done had they had the situation in mind.[15]

The Prosecutions Act does not define a private prosecutor or a private prosecution. However, section 3 defines a public prosecutor to mean:

> Any person appointed by the Director [of Public Prosecutions] whether formally or by written direction to conduct prosecution whether generally, within specified jurisdiction, for specific category of cases or for one specific case and shall include a person appointed to conduct private prosecution.

The problem with this definition is that it is not in sync with section 15(1) of the Prosecutions Act which provides that the DPP may "permit," as opposed to appointing, a person to conduct a private prosecution. One gets the impression that what is being referred to under section 3 of the Prosecutions Act is a case where the DPP appoints a lawyer in private practice, for example, to conduct a prosecution on behalf of the state. This practice is known in some African countries such as South

15. Calico Textile Industries Ltd and Another v Tanzania Development Finance Co. Ltd 1996 TLR 257 (CA) at 267.

Africa,[16] Kenya[17] and Zimbabwe.[18] It is also known in Mainland Tanzania.[19] Referring to this as a private prosecution is misleading in the light of the fact that the prosecutor in such a case is paid by the DPP and remains under the control of the DPP and therefore a public prosecutor.

Emerging from the above discussion are the following issues: in Zanzibar a private prosecution may be instituted by both natural and juristic persons and that for a person to institute a private prosecution, he/she does not have to be a victim of crime. The position appears to be the same in Mainland Tanzania. Section 99(1) of the Criminal Procedure Act of the United Republic of Tanzania provides that:

> Any magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorised by the President in this behalf shall be entitled to conduct the prosecution without such permission.

Unlike in Zanzibar, in Mainland Tanzania, it is not the DPP who authorises a person to institute a private prosecution. It is the magistrate. Case law shows that even if the DPP is opposed to the institution of a private prosecution, a magistrate may

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16. Section 38(1) of the National Prosecuting Authority Act No. 32 of 1998 provides that 'cases.—(1) The National Director may in consultation with the Minister, and a Deputy National Director or a Director may, in consultation with the Minister and the National Director, on behalf of the State, engage, under agreements in writing, persons having suitable qualifications and experience to perform services in specific cases.'

17. Section 30(1) of the Office of the Director of Public Prosecutions Act No. 2 of 2013 provides that '(1) The Director may from time to time, and as need may arises, engage the services of a qualified private legal practitioner to assist in the discharge of his mandate.'

18. Section 27(1) of the National Prosecuting Authority Act No. 5 of 2014 provides that 'The Prosecutor-General may, in consultation with the Minister, engage under agreement in writing any person having suitable qualifications and experience to perform services for the Authority in specific cases.

19. Section 22 of the National Prosecutions Service Act, Act No. 27 of 2008 provides that '(1) The Director may appoint a person to be a public prosecutor from other departments of the Government, local government authority or private practice to prosecute a specified case or cases on his behalf. (2) A person appointed as public prosecutor shall be required to comply with directives, instructions and guidelines issued by the Director.' Section 2 of the Criminal Procedure Act, 1985 defines a public prosecutor to mean 'any person appointed under section 22(1) of the National Prosecutions Services Act, 2008 and includes the Director of Public Prosecutions, the Attorney General, the Deputy Attorney General, a Parliamentary Draftsman, a State Attorney and any other person acting in criminal proceedings under the directions of the Director of Public Prosecutions.'

authorise such private prosecution to go ahead.[20] In *Edmund Mjengwa and six others v. John Mgaya and four others,*[21] the Court of Appeal held that the magistrate has the discretion to decide whether or not to permit a person to conduct a private prosecution.[22] However, the court added that such discretion should be exercised judicially to avoid victimising innocent people.[23] Section 99 of the Criminal Procedure Act does not answer the following questions: whether a person has a right to institute a private prosecution; whether only victims of crime may institute private prosecutions; and whether only natural persons may institute private prosecutions. The answers to the above questions could be found in case law.

The issue of whether a person has a right to institute a private prosecution was dealt with by the Court of Appeal in the case of *Edmund Mjengwa and six others v. John Mgaya and four others*.[24] The accused in this case had allegedly stolen money which they had received on behalf of an education trust.[25] The facts are silent on whether the private prosecutors were members of the trust or just concerned members of the public. The accused's lawyer argued "that an individual has a right to institute private prosecution" but "contended that this right is not unlimited" and that an individual should be permitted to institute a private prosecution "only in exceptional and deserving circumstances."[26] The private prosecutors' lawyer, without elaborating, argued that "the right to private prosecution under the provisions of section 99(1) of the Act is in accordance with the individual's constitutional right."[27] He did not explain which constitutional right was applicable to the right to institute a private prosecution.

Without disputing the above submissions that a person has a right to institute a private prosecution, the Court held that:

> It is common ground that private prosecution does not usurp the power of the Director of Public Prosecutions. Under the provisions of section 90(1)(b) and (c), the Director of Public Prosecutions is empowered to take over and continue or discontinue any such criminal proceedings that have been instituted. As stated by Lord

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20. EphantaLema v. The Republic, Criminal Appeal No. 2 of 1990 (judgement of 24 March 1994).
21. *Edmund Mjengwa and six others v. John Mgaya and four others [2004] T.L.R. 200.*
22. *Id.,* at 206.
23. *Id.,*at 211.
24. *Id.,* at 200.
25. *Id.,* at 211.
26. *Id.,* at 206 – 207.
27. *Id.,* at 207.

> Wilberforce in the case of *Gourie v. Union Post Office Workers*… "the individual's right to prosecute remains a valuable constitutional safeguard against inertia or partiality on the part of the authority."[28]

In light of the above holding, it is argued that in Mainland Tanzania a person has a right to institute a private prosecution. This right was expressly stated by the Court of Appeal when it read section 99 of the Criminal Procedure Act in light of English case law. This brings us to the second question that is not expressly answered by section 99 of the Criminal Procedure Act: does a person have to be a victim of crime to institute a private prosecution?

Section 99 does not state that for a person to institute a private prosecution he has to be a victim of crime. According to the Court of Appeal in *Edmund Mjengwa and six others v. John Mgaya and four others*,[29] section 99 has to be read in tandem with section 128(2) of the Criminal Procedure Act which provides that: "[a]ny person who believes from a reasonable and probable cause that an offence has been committed by any person may make a complaint of the offence to a magistrate having competent jurisdiction." The court referred to section 99 of the Criminal Procedure Act and held that "the operative words are any magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person."[30] It is argued that there is no requirement that a private prosecutor has to be a victim of crime. The court in fact appears to suggest that a private prosecution may be conducted in the public interest when it held that the private prosecutor "as well as members of the public…may well have a genuine concern for the proper utilization of money and other resources mobilized for the purpose of constructing schools" but could only be permitted to institute a private prosecution if they had a prima facie case against the accused.[31]

The third question which is not answered by section 99 of the Criminal Procedure Act is whether a private prosecution may only be instituted by natural persons. The few known cases of private prosecutions in Mainland Tanzania, which are referred to in this article, were instituted by natural persons. In terms of section 99 of the Criminal Procedure Act, the magistrate may permit "any person" to institute a private prosecution. Section 128 permits "any person" to lay a complaint. The challenge is that the Criminal Procedure Act does not define the word 'person.'

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28. *Id.*.
29. *Id.*, at 206.
30. *Id.*.
31. *Id.*, at 211.

Section 4 of the Interpretation of Laws Act[32] defines 'person' to mean "any word or expression descriptive of a person and includes a public body, company, or association or body of persons, corporate or unincorporated."

It could be argued that on the basis of section 4 of the Interpretation of Laws Act, a person under sections 99 and 128 of the Criminal Procedure Act includes a juristic person. However, it could also be argued that in all cases where the word 'person' in the Criminal Procedure Act referred to the context is only applicable to natural persons and in the few instances where the legislators wanted the law to apply to juristic persons, this was expressly mentioned, for example, in sections 105, 106, 109, 111 and 135(c)(ii). This issue would have to be settled by legislators or courts when the right time comes. Either way, one of the two approaches could be adopted. One, by allowing all natural and juristic persons to institute private prosecutions as is the case in some countries such as Kenya[33] and Zimbabwe[34] or by generally allowing only natural persons to institute private prosecutions and juristic persons in exceptional circumstances as is the case in South Africa.[35]

A. Appeals in a case of private prosecution

Related to the right to institute a private prosecution is the right of the private prosecutor to appeal against a court's decision. Section 102(5) of the Zanzibar Criminal Procedure Act provides that: "[n]o appeal against the decision of the Director of Public Prosecutions to refuse private person to conduct an appeal of a case originally conducted by the Director of Public Prosecutions shall be entertained." Section 15(5) of the Prosecutions Act is also to the effect that "no appeal against the decision of the Director to refuse a private person to conduct an appeal of a case originally conducted by the Director or public prosecutor shall be entertained."

Implied in sections 102(5) of the Criminal Procedure Act and 15(5) of the Prosecutions Act is the fact that the DPP may permit a private person to appeal a case originally conducted by the DPP or a public prosecutor. However, if the DPP refuses a private person to appeal such a case, such person is barred from appealing

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32. The Interpretation of Laws Act, Cap. 1.

33. *See*, Lois Holdings Limited v. Ndiwa Tamboi & 184 others [2014] eKLR 1 para 7.

34. See generally, Mujuzi, J.D. *Private prosecutions in Zimbabwe: Victim participation in the criminal justice system versus prosecutorial independence,* 56 SOUTH AFRICAN CRIME QUARTERLY (2016), at 37 – 45.

35. See generally, Mujuzi, J.D. *Private prosecution of environmental offences under the South African National Environmental Management Act: Prospects and challenges*, 29(1) SOUTH AFRICAN JOURNAL OF CRIMINAL JUSTICE (2016), at 24 – 43.

against the DPP's decision. What is not clear is whether in such a case, should the DPP grant permission to a private person to appeal, the appeal becomes a private appeal or remains a public one. A similar provision does not appear in the Criminal Procedure Act of Mainland Tanzania although the Prosecutions Service Act empowers the DPP to take over an appeal arising out of a private prosecution.[36] However, the Mainland Tanzanian High Court appears to be of the view that a private prosecutor has a right to appeal against a court's decision.

In *Fanuel Msengi v. Peter Mtumba*,[37] the magistrate, in a public prosecution, acquitted the respondent on the charge of stealing the complainant's cow. When the complainant was "aggrieved by the decision of the District Court in acquitting the respondent," he "appealed to" the High Court.[38] In dismissing the case, the court held that:

> This was a public prosecution conducted by the Director of Public Prosecutions (D.P.P.). It was not a private prosecution. That being the case the complainant has no right of appeal to this court. According to section 43 of the Magistrate's Court Act No. 2/1984, appeals from District Courts to the High Court have to be done in accordance with the procedure stipulated in the Criminal Procedure Act No. 9/1985. Now according to section 378(1) of the Criminal Procedure Act No. 9/1985 only the D.P.P. may appeal against an acquittal to the High Court in respect of public prosecution. The complainant is not personally allowed to appeal in a public prosecution – what he can do is to ask the D.P.P. to appeal on his behalf. So the appeal in this case was misconceived.[39]

Implied in the above ruling is that a private prosecutor may appeal against an acquittal in a private prosecution although this is not expressly provided for in section 378 of the Criminal Procedure Act.[40]

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36. Section 10(1)(b) provides that the DPP may 'take over an appeal, revision or application arising from private prosecution, whether as appellant, applicant or respondent and where the Director takes over the appeal as appellant or applicant, he may continue or otherwise withdraw the appeal.'

37. *Fanuel Msengi v. Peter Mtumba* 1992 TLR 109 (HC).

38. *Id.*, at 109.

39. *Id.*, at 109 – 110.

40. Section 378 provides that 'Where the Director of Public Prosecutions is dissatisfied with an acquittal, finding, sentence or order made or passed by a subordinate court…he may appeal to the High Court.

(2) An appeal to the High Court under this section may be on a matter of fact as well as on a matter of

B. Prima facie case before instituting a private prosecution

Related to the issue of *locus standi* is the question of whether a private prosecutor has to have a *prima facie* case before he may be permitted by the DPP to institute a private prosecution. This issue is addressed differently in the Zanzibar Criminal Procedure Act and in the Prosecutions Act. Section 102(4) of the Criminal Procedure Act provides that "[a]ny application to conduct a private prosecution must be supported by an affidavit of the applicant and attached with a brief of evidence which may establish a prima facie case." On the other hand, section 15(2) of the Prosecutions Act provides that "any application to conduct private prosecution shall be supported by an affidavit of an applicant and attached with a summary of evidence to be relied upon during the trial."

Section 15(2) is silent on the issue of evidence which may establish a *prima facie* case against the accused. Section 15(4) could be invoked by the DPP to require the applicant to have a *prima facie* before he is permitted to institute a private prosecution. It is to the effect that the DPP "may grant or refuse an application or may direct further evidence to be collected before the application is granted."

Unlike in Zanzibar, in Mainland Tanzania, neither the Criminal Procedure Act nor the Prosecutions Act requires that a private prosecutor should have a *prima facie* case before he may institute a private prosecution. One of the issues that the Court of Appeal had to decide in *Edmund Mjengwa and six others v. John Mgaya and four others*[41] was whether in terms of sections 99(1) and 128(2) of the Criminal Procedure Act a magistrate should only permit a person to institute a private prosecution when there is evidence of a *prima facie* case against the accused. In order to put the discussion in context, these sections will be reproduced here. Section 99(1) provides that:

> Any magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorised by the President in this behalf shall be entitled to conduct the prosecution without such permission.

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law.'

41. *Edmund Mjengwa and six others v. John Mgaya and four others* [2004] T.L.R. 200, at 206.

And section 128(2) provides that:

> Any person who believes from a reasonable and probable cause that an offence has been committed by any person may make a complaint of the offence to a magistrate having competent jurisdiction.

The accused's lawyer argued, inter alia, that before leave is granted to a person to institute a private prosecution, the magistrate had to examine "closely the circumstances on which the application was based" otherwise there was "the danger of granting leave for private prosecution on vexatious and frivolous charges."[42]

Referring to case law from the United Kingdom, he added that "before granting leave, the magistrate should at the very least, ascertain whether the alleged offence is known to the law and if so whether essential ingredients of the offence are prima facie present."[43]

In response, the private prosecutor's lawyer argued that the magistrate had "judicially exercised his discretion to invoke the provisions of section 99(1) of the Act' as the offences proposed in the charge sheet were known to the law and 'the essential ingredients of the proposed offences had been shown."[44] The Court observed that:

> From the submissions by learned counsel for both parties on this ground, we think the central issue is whether the magistrate in dealing with the application for leave addressed and satisfied himself that there were reasonable and probable cause [sic] for mounting a private prosecution…[The accused's lawyer] firmly maintained that the magistrate did not. It is to be observed that section 128(1) and (2) of the Criminal Procedure Act 1985 provides for the institution of criminal proceedings. Sub-section (2) of this section also provides for the parameters in which an individual may make complaint to a magistrate of competent jurisdiction. According to this sub-section, in order for any person to make a complaint to the magistrate with a view to institute proceedings, it is necessary to show that such a person believes from a reasonable and

42. *Id.*, at 208.
43. *Id.*, at 209.
44. *Id*.

> probable cause that an offence has been committed.[45]

The court observed further that case law from the United Kingdom "regarding this requirement…provides helpful guidance on this point."[46] The court held that:

> The provisions of section 99(1) of the Criminal Procedure Act relating to permission to conduct private prosecutions are almost similar to the equivalent provisions in England and Wales…It was imperative therefore for the magistrate to satisfy himself that the essential ingredients of the offence to be preferred against the appellants [the accused] *prima facie* were present.[47]

The court held that the record showed that the charge sheet had not disclosed a *prima facie* case against the accused and that it was wrong for the magistrate to grant the private prosecutor leave to conduct the prosecution.[48] What amounts to 'probable and reasonable cause' is not defined in the Criminal Procedure Act. The Mainland Tanzanian High Court has relied on jurisprudence from the United Kingdom for the definition of 'reasonable and probable cause.' This, the court held, means that:

> [A]n honest belief in the guilt of the accused based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead an ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the offence imputed.[49]

The above discussion shows that in Mainland Tanzania, although the Criminal Procedure Act does not require a private prosecutor to have a *prima facie* case before he is permitted to institute a private prosecution, the Court of Appeal has held that he has to have one. The question of whether a private prosecutor should have a *prima facie* case because he is permitted to institute a private prosecution has been

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45. *Id*.
46. *Id.*, at 209 – 210.
47. *Id.*, at 210.
48. *Id.*, at 210 – 211.
49. *Amina Mpimbi v. Ramadhani Kiwe* 1990 TLR 6 (HC), at 8 (referring to Hick v Faulkner (1881) 8 Q.B.D. 167, at 171); *Jeremiah Kamama v. Bugomola Mayandi* 1983 TLR 123 (HC), at 125 – 126.

addressed differently in different countries. In some countries such as Australia (New South Wales),[50] the existence of a *prima facie* case is one of the requirements that have to be met before a person may be permitted to institute a private prosecution. The rationale behind this requirement is to prevent people from abusing their right to institute a private prosecution.

As the Tanzanian Court of Appeal held in *Edmund Mjengwa and six others v. John Mgaya and four others,*[51] "in all applications of this kind, unless the magistrate judicially applies his mind to all the circumstances in which to grant leave for private prosecution, the danger of victimization and abuse of process is imminent. The essential ingredients of the offence is [sic] one such factor that should not be overlooked."[52] In other countries such as South Africa, there is no need for a *prima facie* case before a private prosecutor may institute a private prosecution. In fact the South African High Court held that:

> The Legislature...must have contemplated that private prosecutors might in many cases have weak grounds for prosecution – a decision by the [DPP] not to prosecute would indicate this – but the policy of Parliament, no doubt, was to allow prosecution even in weak cases, in order to avoid the taking of the law by the complainant into his own hands. The Act contains no provision requiring that the private prosecutor shall satisfy anyone that he has a *prima facie* case. The penalty for vexatious and unfounded prosecution is liability for costs.[53]

The question of whether it should be the DPP or a judicial officer who determines whether or not a private prosecutor has a *prima facie* case has been addressed different in different countries. In some jurisdictions such as Taiwan[54] and Hong Kong,[55] this power is in the hands of judicial officers. In Australia (New South Wales), it is in the hands of the court registrar.[56] What is evident in both examples is

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50. Regulation 8.4 of the Local Court Rules 2009.

51. *Edmund Mjengwa and six others v. John Mgaya and four others* [2004] T.L.R. 200, at 206.

52. *Id.*, at 211.

53. *Solomon v. Magistrate, Pretoria, and Another* 1950 (3) SA 603 (T), p.613.

54. Article 326(1) of the Code of Criminal Procedure.

55. Section 8 of the Magistrates Ordinance (Cap 227). For a detailed discussion of this provision, see Jamil Ddamulira Mujuzi, *Private Prosecutions in Hong Kong: The Role of the Magistrates and State Intervention to Prevent Abuse,* 4 (2) THE CHINESE JOURNAL OF COMPARATIVE LAW (2016), at 253-273.

56. Regulation 8.4 of the Local Court Rules 2009.

that this question is not left in the hands of the DPP. It appears that in Zanzibar the final decision of whether or not permission should be granted to institute a private prosecution lies with the court as opposed to the DPP. Section 15(5) provides that "[w]here the application is refused, the applicant may petition the High Court for review of the decision of the Director [of Public Prosecutions]..." As discussed above, in Mainland Tanzania, it is the magistrate on the basis of section 99(1) of the Criminal Procedure Act to decide whether or not to grant a private prosecutor permission to institute a private prosecution.

C. DPP to decline to prosecute before a private prosecution is instituted

Article 56A(A) of the constitution of Zanzibar provides that one of the functions of the DPP is "to institute and prosecute all criminal cases against any person before any Court (except martial court) in relation to any offence in which the person is charged." The DPP has the discretion whether or not to prosecute a person who has allegedly committed an offence. Section 9(2)(a) of the Prosecutions Act provides that the DPP has the power to "decide to prosecute or not to prosecute in relation to an offence." Neither the Prosecutions Act (section 15) nor the Criminal Procedure Act (section 102) provides expressly that a private prosecution will only be instituted after the DPP has declined to prosecute. However, in light of the fact that both section 102 of the Criminal Procedure Act and section 15 of the Prosecutions Act expressly state that a private prosecution cannot be instituted without the DPP's permission, there is room for the argument that in Zanzibar a private prosecutions cannot be instituted unless the DPP has declined to prosecute.

As is the case in Zanzibar, legislation in Mainland Tanzania does not provide that a private prosecution will only be instituted after the DPP has declined to prosecute.[57] Case law from the Court of Appeal shows that private prosecutions have been instituted not because the DPP had declined to prosecute but because the police had refused to take action against the alleged offenders.

In *EphantaLema v. The Republic*[58] (discussed in detail below in this article), the Court of Appeal observed that the magistrate permitted the private prosecutor to institute a private prosecution because "no action had been taken by the police against the persons accused; and that on the contrary, there had been earnest efforts

57. See section 9 of the National Prosecutions Service Act and sections 99 and 128 of the Criminal Procedure Act.

58. *EphantaLema v. The Republic*, Criminal Appeal No. 2 of 1990 (judgement of 24 March 1994).

by the police to impede court process against them."[59] The Court held, however, that the DPP could "take over and continue the proceedings" as "[t]here was no tangible evidence that the D.P.P. had sanctioned or countenanced those acts…"[60]

In *Edmund Mjengwa and six others v. John Mgaya and four others,*[61] the Court of Appeal referred to jurisprudence from the United Kingdom to hold that:

> [T]he individual's right to prosecute remains a valuable constitutional safeguard against inertia or partiality on the part of authority." In this case and as [the private prosecutor's lawyer] submitted, from the affidavital depositions in support of the application, it can hardly be said that the authorities concerned with prosecution were free from inertia in mounting prosecution against the appellants. Apparently, the matter has for long gone the rounds in Mbarali District and the Regional level without any action to institute prosecution. This is borne out from the affidavit of Francis Merere who deponed that he reported the matter to the Regional Police Commander Mbeya to no avail. For this reason, we agree with [the private prosecutor's lawyer] that the [private prosecutor] had cause to resort to private prosecution.[62]

The position in Zanzibar and Mainland Tanzania should be contrasted with that in other countries. In some countries such as South Africa,[63] Zimbabwe[64] and Namibia,[65] the relevant legislation provides expressly that a private prosecution will only be instituted once the DPP has declined to prosecute. However, in other countries such as Uganda, a private prosecution may be instituted even if the DPP has not declined to prosecute although the DPP has the power to take over a private prosecution, in which case it becomes a public prosecution, to continue with it or discontinue it.[66]

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59. *Id.*, at 10.
60. *Id*.
61. *Edmund Mjengwa and six others v. John Mgaya and four others* [2004] T.L.R. 200, at 206.
62. *Id*., at 207 – 208.
63. Section 7(2)(b) of the Criminal Procedure Act 51 of 1977.
64. Section 16 of the Criminal Procedure and Evidence Act Chapter 9:07.
65. Section 7(2)(b) of the Criminal Procedure Act 51 of 1977.
66. Sections 42 and 43 of the Magistrates Courts Act, Chapter 16.There is case law to the effect that private prosecutions have been instituted without the DPP declining to prosecute and the DPP has taken them over. See, for example, Uganda v. Inspector General of Police, General Kale Kayihura and 7 others (High Court of Uganda, Kampala, Criminal Division), Revision Cause No. 34 of 2016 (17 August 2016).

D. Costs for conducting a private prosecution

In Zanzibar, both the Criminal Procedure Act and the Prosecutions Act are silent on the issue of the costs for conducting a private prosecution. However, section 320(1) of the Criminal Procedure Act implies that the costs for conducting a private prosecution are to be borne by the private prosecutor. The section states that:

> It shall be lawful for a Judge of the High Court or a magistrate of a subordinate court…to order any person convicted before him of an offence to pay to the public or private prosecutor, as the case may be, such reasonable costs as to such Judge or magistrate may seem fit, in addition to any other penalty imposed: Provided that such costs shall not exceed two hundred thousand shillings in the case of the High Court or one hundred thousand shillings in the case of a subordinate court.

The above provision implies that the private prosecutor incurs the costs for conducting a private prosecution. A similar provision is contained in the Mainland Tanzania Criminal Procedure Act.[67] In some African countries such as Namibia[68] and South Africa,[69] the law is clear that it is the private prosecutor who incurs all the expenses related to conducting a prosecution. Unlike in some jurisdictions such as Kenya, Canada and the United Kingdom (as illustrated below), where there is no statutory provision requiring the state to make available evidence in its possession to the private prosecutor, in Zanzibar the situation is different. Section 15(7) of the Prosecutions Act provides that:

> Any person authorised to conduct private prosecution shall, on the instruction of the Director [of Public Prosecutions], have the right to statement of witnesses, documents, articles and other items likely to be used as evidence which are in the custody of any investigation authority and where such document or item may not be handed to such a person for any justifiable reason, arrangements shall be made for its production and be tendered as evidence during the trial.

67. Section 345.
68. Section 15(1) of the Criminal Procedure Act 51 of 1977.
69. *Id*.

Section 3 of the Prosecutions Act defines 'investigation authority' to mean "any authority charged with the responsibility to conduct criminal investigation either generally, for specific category of offences or for a specific case." Section 15(7) shows that the DPP is willing to do anything possible to help a private prosecutor present the best case before a court. The issue of whether or not state institutions such as the police should make the evidence in their possession available to a private prosecutor in a case where the public prosecutor has declined to prosecute has been contentious in some countries.

For example, in the United Kingdom, the Court of Appeal held that should the public prosecutor decline to prosecute, the police may provide the evidence in their possession to a private prosecutor if there are no compelling reasons why such evidence should not be withheld from him or her.[70] The Kenyan High Court held that if the DPP declines to prosecute, he has a constitutional duty to make the evidence in his possession available to the private prosecutor to enable him or her to conduct a private prosecution.[71] The court added that this obligation only arises if the DPP declines to prosecute "for reasons that do not accord with its constitutional and statutory mandate."[72] In Canada, the Information and Privacy Commissioner of Ontario and the Information and Privacy Commissioner of Alberta have held that the police should grant a private prosecutor full access to evidence in their possession if such access will not breach other people's privacy or security laws.[73]

On the basis of section 15(7) of the Prosecutions Act, a private prosecutor in Zanzibar is very unlikely to resort to the courts to force the police to provide the evidence in their possession to him or her in order to institute a private prosecution.

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70. *Scopelight Ltd & Ors v. Chief of Police for Northumbria & Anor* [2010] QB 438. See also, *Scopelight Ltd & Ors v. Chief of Police for Northumbria & Ors* [2009] EWHC 958 (QB) (07 May 2009); *R v. Rollins* [2010] WLR 1922.

71. *Samuel Kamau Macharia & 2 others v. Attorney General & another* [2013] eKLR, para 41.

72. *Id.,* para 41.

73. Toronto Police Services Board (Re), 2009 CanLII 41338 (ON IPC). See also, Nova Scotia (Justice) (Re), 1998 CanLII 3725 (NS FOIPOP) where the Justice Department was ordered to disclose information, which disclosure would not violate the attorney-client privilege and the right to privacy; Toronto Catholic School Board (Re), 2003 CanLII 53762 (ON IPC) where it was held that the school body should not disclose information about one of its leaners to a person who wanted to institute a private prosecution against the learner as that disclosure would have violated the learner's right to privacy; Order F2008-007, 2008 CanLII 88744 (AB OIPC), Order F2008-002, 2008 CanLII 88751 (AB OIPC), Port Hope Police Services Board (Re), 1998 CanLII 14447 (ON IPC), Hamilton-Wentworth Regional Police Services Board (Re), 2000 CanLII 21054 (ON IPC), York Regional Police Services Board (Re), 2001 CanLII 26328 (ON IPC), Ontario (Attorney General) (Re), 2003 CanLII 53953 (ON IPC); Ontario (Attorney General) (Re), 1996 CanLII 7406 (ON IPC) (disclosure was denied because of privacy issue); Dubé c. R., 2009 QCCS 6749 (CanLII). See also, Niagara Regional Police Services Board (Re), 1998 CanLII 14418 (ON IPC); Order F2005-013, 2006 CanLII 80871 (AB OIPC).

Even if the police have a justifiable reason not to give such evidence to the private prosecutor, they have to make arrangements to bring it to court. Zanzibar does not have legal aid legislation[74] and therefore there is no legal aid for private prosecutors. Although Mainland Tanzania has legislation on legal aid, it does not provide for legal aid to private prosecutors.[75]

E. Costs in the event of a successful or unsuccessful private prosecution

Related to the issue of costs for conducting a private prosecution are the questions of how the private prosecutor recovers his costs in the event of a successful private prosecution and how the accused recovers the expenses incurred in defending himself in the case of an unsuccessful private prosecution. Section 320(1) of the Criminal Procedure Act deals with the question of costs in the event of a successful private prosecution. It provides that:

> It shall be lawful for a Judge of the High Court or a magistrate of a subordinate court…to order any person convicted before him of an offence to pay to the public or private prosecutor, as the case may be, such reasonable costs as to such Judge or magistrate may seem fit, in addition to any other penalty imposed: Provided that such costs shall not exceed two hundred thousand shillings in the case of the High Court or one hundred thousand shillings in the case of a subordinate court.

A similar provision appears in the Criminal Procedure Act of Mainland Tanzania.[76] Section 320(1) makes it clear that in the case of a successful private prosecution, a judge or magistrate may order the offender to pay the private prosecutor such reasonable costs that the judge or magistrate may deem fit. In the author's opinion, the private prosecutor would have to make submissions to the judge or magistrate on the question of costs for him or her to determine the reasonable costs before making the order. The challenge with section 320(1) is the limitation in the proviso to that section to the effect that in the High Court the costs cannot exceed 200,000 shillings and in a subordinate court the costs cannot exceed 100,000 shillings. This limitation ignores the fact that a private prosecutor may spend more than that amount in

74. See generally, Zanzibar Legal Service Centre, accessed at http://www.zlsc.or.tz/

75. The Legal Aid (Criminal Proceedings) Act, Chapter 21. See also, Legal Aid Bill 2016 (this Bill is also silent on the issue of legal aid for private prosecutors).

76. Section 345(1).

conducting the prosecution.

It is argued that the preferable approach would be for the court to be empowered to order the convicted person to compensate the private prosecutor all the expenses he, the private prosecutor, has incurred in securing his, the offender's, conviction. This is the approach taken in some countries such as South Africa,[77] Namibia[78] and Zimbabwe.[79] If the offender does not have the means to compensate the private prosecutor, such costs should be recoverable from the state. This is so because the state, through the DPP exercising his constitutional mandate, should have prosecuted the offender in the first place. This is an approach followed in some countries such as South Africa,[80] Namibia[81] and Zimbabwe.[82]

The Criminal Procedure Act also deals with the question of costs in the event of an unsuccessful private prosecution. Section 320(2) provides that:

> It shall be lawful for a Judge of the High Court or a magistrate of a subordinate court who acquits or discharges a person accused of an offence, if the prosecution for such offence was originally instituted on a summons or warrant issued by a court on the application of a private prosecutor, to order such private prosecutor to pay to the accused such reasonable costs as to such Judge or magistrate may seem fit: Provided that such costs shall not exceed three hundred thousand shillings in the case of an acquittal or discharge by the High Court or two hundred thousand shillings in the case of an acquittal or discharge by a subordinate court: Provided further that no such order shall be made if the Judge or magistrate shall consider that the private prosecutor had reasonable grounds for making his complaint.

A similar provision appears in the Criminal Procedure Act of Mainland Tanzania.[83] If the accused in a private prosecution is acquitted or discharged, the judge or magistrate is empowered to order the "private prosecutor to pay to the accused such reasonable costs as to such judge or magistrate" seems reasonable. The section also imposes a limit on the amount of costs that may be awarded to the accused

77. Section 15(2) of the Criminal Procedure Act 51 of 1977.
78. *Id*.
79. Section 22(3) of the Criminal Procedure and Evidence Act Chapter 9:07.
80. Section 15(2) of the Criminal Procedure Act 51 of 1977.
81. *Id*.
82. Section 22(3) of the Criminal Procedure and Evidence Act Chapter 9:07.
83. Section 345(2).

depending on the court that acquitted or discharged him or her. However, the judge or magistrate is barred from making such an order if he or she considers that the private prosecution had been instituted based on reasonable grounds. Section 320(2) raises the same challenge that we pointed out above about section 320(1) – it ignores the fact that an accused may have spent more money on defending himself than the limit that a court may award him.

Unlike in the case of a private prosecutor who may be assisted by the DPP in acquiring the evidence he may need in instituting a private prosecution, no such assistance is available to the accused. This loophole could be remedied by the DPP under section 15(3) of the Prosecutions Act which provides that "[t]he Director [of Public Prosecutions] may require a letter of indemnity or any other form of liability cover from the applicant against any civil liability that may arise out [of] the case."

In some countries such as South Africa,[84] Namibia[85] and Zimbabwe,[86] one of the conditions that a private prosecutor has to fulfil before he institutes a private prosecution is that he has to deposit some money with the court as security for the accused to cover the expenses incurred in his defence should he be acquitted. If he does not have such an amount, he is allowed to enter into a recognisance with or without sureties. The constitutionality of such an approach could, however, be challenged.[87]

The fact that the judge or magistrate is not allowed to order a private prosecutor to pay the accused's costs where the private prosecution was based on reasonable grounds could be one of the ways to ensure that people are not deterred from instituting private prosecutions where they have reasonable grounds to do so. Section 320(2) may have to be read with section 325 of the Criminal Procedure Act which is to the following effect:

> If on the dismissal of any case any court shall be of opinion that the charge was frivolous or vexatious, such court may order the complainant and or any policy officer involved in the institution of the case to pay to the accused person a reasonable sum as compensation for the trouble and expense to which such person may have been put by reason of such charge in addition to his costs.

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84. Section 9(2) of the Criminal Procedure Act 51 of 1977.

85. *Id*.

86. Section 17 of the Criminal Procedure and Evidence Act Chapter 9:07.

87. *Julius Ishengoma Francis Ndyanabo v. The Attorney General* 2004 TLR 14 – 44 in which the Court of Appeal declared section 111(2) of the Elections Act, 1985 which required petitioners to make a deposit before they could challenge the outcome of elections, unconstitutional.

> Provided that no police officer shall be ordered by the Court to pay such compensation if it is proved that the officer acted in good faith.

A similar provision appears in the Criminal Procedure Act of Tanzania mainland.[88] Section 3 of the Zanzibar Criminal Procedure Act defines a complainant in a private prosecution as "the private prosecutor or the person making the complaint before the court." A private prosecution has to be instituted in the private prosecutor's name.[89] Under section 325 of the Criminal Procedure Act, the court, after dismissing the case on the basis that the charge was frivolous or vexatious, has the discretion whether or not to order the complainant to compensate the accused person for the trouble suffered and expenses incurred. A different approach is taken in some countries such as South Africa, Namibia and Zimbabwe on this issue. In South Africa and Namibia, the law obligates a court to order the private prosecutor to compensate the accused should the court be of the opinion that the private prosecution was unfounded and vexatious. However, the accused must first make a request to the court for that order.[90] The Zimbabwean legislation follows a similar approach.[91]

F. DPP's intervention in private prosecutions

A private prosecution may be abused and there is case law from countries such as South Africa, the United Kingdom, Canada, Australia, Trinidad and Tobago, Kenya, and New Zealand showing how some people have abused their right to institute private prosecutions.[92] One of the ways in which to prevent people from abusing their power or right to institute private prosecutions is to provide for circumstances in which the DPP may intervene in such prosecutions. Article 56A(3) of the Constitution of Zanzibar provides for the powers of the DPP. These powers include "to take and prosecute all criminal cases which were instituted earlier by any person or other organ" and "to stop any criminal suit instituted by any person or other

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88. Section 347.

89. Section 95 of the Criminal Procedure Act.

90. Section 16(2) of the Criminal Procedure Act 51 of 1977 (of both South Africa and Namibia) provides that 'Where the court is of the opinion that a private prosecution was unfounded and vexatious, it shall award to the accused at his request such costs and expenses incurred by him as it may deem fit.'

91. Section 22(2) of the Criminal Procedure and Evidence Act Chapter 9:07, provides that 'Where the court, upon hearing the charge or complaint on a private prosecution, pronounces the same unfounded and vexatious, it shall award to the accused on his request such costs as it may think fit.'

92. Jamil Ddamulira Mujuzi, *The Right to Institute a Private Prosecution A Comparative Analysis*, 4 INTERNATIONAL HUMAN RIGHTS LAW REVIEW (2015), at 250 – 254.

organ."[93] The constitution does not empower the DPP to delegate his powers under Articles 56A(3)(b) and (c).[94] Article 56A(5) states that:

> The power of the Director of Public Prosecutions under paragraph (b) and (c) of sub-article (3) of this Article shall be in his hands and shall not be interfered [with] by any person or organ. Except when another person or organ has instituted a criminal suit, nothing in this sub-article will bar the person or organ concerned from withdrawing the suit with the Court's permission.

Under Article 56A, the DPP does not need the private prosecutor or the court's consent to take over and continue with or discontinue a private prosecution. However, a private prosecutor may only withdraw a prosecution with the court's permission. Articles 56A(3) and (6) give the Zanzibar DPP many powers compared to those of his counterparts in some African countries such as Uganda, Kenya and The Gambia. In Uganda, when the DPP takes over a private prosecution, he cannot discontinue it without the consent of the court.[95] In Kenya, a DPP has to seek a private prosecutor's consent before taking over a private prosecution.[96] The Constitution of The Gambia empowers the DPP to take over private prosecutions provided that he/she "shall not – (i) take over and continue any private prosecution without the consent of the private prosecutor and the court; or (ii) discontinue any private prosecution without the consent of the private prosecutor."[97]

In Mainland Tanzania, the DPP is also empowered to take over a private prosecution. Section 9(1) of the National Prosecutions Services Act provides, inter alia, that:

> Notwithstanding the provisions of any other law, the functions of the Director shall be to- (a) decide to prosecute or not to prosecute in relation to an offence; (b) institute, conduct and control prosecutions for any offence other than a court martial; (c) take over and continue prosecution of any criminal case instituted by another person or authority; (d) discontinue at any stage before judgement is

93. Article 56A(3)(c).

94. See also section 9 of the Prosecutions Act.

95. Article 120 (3)(d) of the Constitution (1995).

96. Article 157 (6)(b) of the Constitution (2010). For a detailed discussion of private prosecutions in Kenya under Article 157, see MATERU, SOSTENESS FRANCIS, THE POST-ELECTION VIOLENCE IN KENYA: DOMESTIC AND INTERNATIONAL LEGAL RESPONSES (2015), at 132 - 134.

97. Article 85(1)(c) of the Constitution of the Second Republic of The Gambia (1996).

> delivered any criminal proceeding brought to the court by another person or authority.

The Tanzanian Court of Appeal held in *Edmund Mjengwa and six others v. John Mgaya and four others*[98] that "[i[t is common ground that private prosecution does not usurp the powers of the Director of Public Prosecutions."[99] This is so because, the court added, in terms of legislation "the Director of Public Prosecutions is empowered to take over and continue or discontinue any such criminal proceedings that have been instituted."[100]

The DPP's power to take over a private prosecution is not beyond judicial scrutiny. Article 56A(7) of the constitution of Zanzibar provides that:

> In exercising his powers according to the provision of this Article the Director of Public Prosecution is not bound to follow any order or direction of any person or any government department. But the provisions of this Article will not bar the Court from using its power for the purpose of investigating whether the Director of Public Prosecutions is exercising his powers according to the provisions of this Constitution or not.

Article 56A(8) requires that the DPP, in exercising his powers under the constitution, to take "into consideration the importance of the nation in seeing that justice is done and his intention of stopping the abuse of the judicial organs is implemented." It is argued that on the basis of Articles 56A(7) and (8) that the court may stop the DPP from taking over a private prosecution if the court is of the view that he is not exercising his powers according to the constitution or that he is abusing the judicial process. This means, inter alia, that the court may require the DPP to furnish to it the reason or reasons behind taking over a private prosecution where there are grounds to suspect that the DPP's motive may be questionable.

The question of whether the DPP's decision to take over a private prosecution may be subject to judicial review has been dealt with by the Tanzanian Court of Appeal in the case of *Ephanta Lema v. The Republic*.[101] In light of the fact that the Court of Appeal's judgement could be invoked should the same issue arise

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98. *Edmund Mjengwa and six others v. John Mgaya and four others* [2004] T.L.R. 200, at 206.
99. *Id*., at 207.
100. *Id*.
101. *EphantaLema v.The Republic*, Criminal Appeal No. 2 of 1990 (judgement of 24 March 1994).

in Zanzibar on the basis of Articles 56A(7) and (8), it is imperative to deal with that decision in detail.

Before the enactment of the National Prosecutions Service Act in 2008, the Tanzanian Criminal Procedure Act empowered the DPP to exercise different powers including taking over private prosecutions (under section 90(1)(b)).[102] However, the Criminal Procedure Act also provided that "[i]n the exercise of his powers under this Act, the Director of Public Prosecutions shall have regard to public interest, the interests of justice and the need to prevent the abuse of the legal process"[103] and that "in the exercise of the powers conferred on him by this section, the Director of Public Prosecutions shall have and exercise his own discretion and shall not be subject to the directions or control of any person except the President."[104]

The issue for determination in this case was whether the DPP's power to take over a private prosecution could be reviewed by the courts. The appellant had been unlawfully assaulted by police officers. His lawyer, on the basis of section 99(1) of the Criminal Procedure Act, made an application before a magistrate to institute a private prosecution against the six police officers.[105] When the appellant's application came before the magistrate for hearing, the state attorney "appeared and told the Magistrate that the DPP was taking over the prosecution" because "public interest demanded such action."[106] The appellant's lawyer argued that the State Attorney had not been authorised by the DPP in writing, contrary to section 92 of the Criminal Procedure Act, to take over the private prosecution and therefore did not have such powers.[107] The magistrate allowed the appellant lawyer's objection and granted the application for the institution of the private prosecution.[108]

After just over a month, the six accused appeared before the magistrate "and immediately after their pleas were taken…[the] state attorney…stood up to announce that he was instructed by the DPP in writing to take over the

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102. These powers are now conferred on the DPP by sections 9 – 11 of the National Prosecutions Service Act.

103. Section 90(4).

104. Section 90(6).

105. Ephanta Lema v. The Republic, *supra* note 58, at 2.

106. *Id*.

107. Section 92 of the Criminal Procedure Act provides that '(1)The Director of Public Prosecutions may order in writing that all or any of the powers vested in him by sections 91 of and by Part VII of this Act may be exercised also by the Law Officers, a State Attorney or a Parliamentary Draftsman and the exercise of these powers by any of them shall operate as if they had been exercised by the Director of Public Prosecutions. (2) The Director of Public Prosecutions may, in writing, revoke any order made by him under this section.'

108. Ephanta Lema v. The Republic, *supra* note 58, at 2.

prosecution."[109] This "move was strongly opposed by" the appellant's lawyer.[110] The questions to be answered by the magistrate included "whether the court had competence to review or control the DPP's exercise of his powers under section 90(1)(b)"[111] and "whether the court can interfere where it is shown that the DPP's taking-over [a private prosecution] is one that is predicated upon consideration other than the furtherance of public interest and the interests of justice or the need to prevent abuse of the legal process."[112] The magistrate answered the above questions in the affirmative.[113]

On appeal to the High Court by the DPP, the High Court reversed the magistrate's ruling and held, inter alia, that courts cannot impugn the DPP's power to take over a private prosecution and that there was no evidence to support the allegation that the DPP's decision to take over a private prosecution in this case was based on an improper motive.[114]

On appeal to the Court of Appeal, the appellant argued that the High Court had "erred in law in holding that the power of the DPP to take over the conduct of legal proceedings instituted privately is final and cannot be questioned by a court of law."[115] The appellant added that the "powers of the DPP under section 90(1) should not override the powers of the magistrate under section 99" and that "once a magistrate has made a decision under section 99 his jurisdiction is exhausted and, therefore, if the DPP is dissatisfied with the magistrate's decision the only recourse to which he can have is to go to the High Court."[116]

The Court of Appeal observed that "the principal issue involved in" that appeal was "undoubtedly one of some difficulty and importance."[117] The question for the court was "whether or not the exercise of the powers of the DPP under the provisions of section 90(1)(b) of the Criminal Procedure Act, 1985, is totally immune from judicial control and review."[118] The court observed that the question it was dealing with "demands careful deliberation" and that it was not to "conceal the fact that" it "took it a long time to consider it."[119] The court observed that the DPP

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109. *Id*.
110. *Id*.
111. *Id*.
112. *Id*.
113. *Id*., at 3.
114. *Id.*, at 3 – 4.
115. *Id.*, at 4.
116. *Id.*, at 4 – 5.
117. *Id.*, at 1.
118. *Id.*
119. *Id.*, at 5.

"has power to take over private prosecutions at any stage."[120] It referred to jurisprudence from the United Kingdom to the effect that there are cases in which courts may review the exercise of statutory powers.[121] The court also referred to its own jurisprudence to the effect that where the DPP had abused his powers to oppose the accused's release on bail, his decision was set aside because "it stemmed from a desire to abuse the legal process."[122] The court held that:

> [T]here should be no question that the D.P.P. is the chief prosecutor…[T]he overall control of criminal proceedings in the country is vested in him. But we cannot bring ourselves to accept the suggestion that the courts should not interfere with his exercise of those powers even where he has outrageously abused them.[123]

This could happen, for example, "where the DPP is strongly suspected of having been induced by a material benefit to discontinue a private prosecution."[124] The court added that the constitution provides that everyone is entitled to equal protection under the law and that courts have a duty to protect and determine civil rights.[125] The court held that courts should not be deterred by section 90(6) of the Criminal Procedure Act "from adjudging as invalid the DPP's exercise of the powers if it is not meant to achieve any of the three prescribed goals [under section 90(4)]."[126] The court concluded that:

> We are not suggesting, however, that the burden to impugn the D.P.P.'s exercise of those powers should be a light one to discharge. For one thing, the presumption is that public officers do as the law and their duties require them to, and of course this presumption prevails as to the acts of the D.P.P. But it should be right to say that if a prima facie ground is established for the proposition that the D.P.P. is on a course of misusing his powers, the court should be justified to review and decide on the validity of his exercise of the powers.[127]

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120. *Id.*
121. *Id.*
122. *Id.*, at 7.
123. *Id.*
124. *Id.*, at 8.
125. *Id*.
126. *Id*.
127. *Id.*, at 9.

On the facts before it, the court pointed out that although the magistrate had found that "no action had been taken by the police against the persons accused; and that on the contrary, there had been earnest efforts by the police to impede court process against them," it held that the DPP could "take over and continue the proceedings" as "[t]here was no tangible evidence that the DPP had sanctioned or countenanced those acts, let alone that his intended taking over of the proceedings was designed to pervert the course of justice."[128]

In his dissenting judgement, Kisanga J.A. observed that the majority judgement had undermined the principle of separation of powers and held that "the interpretation of [section 90(6)] to mean that the DPP's exercise of his discretion under the section is subject to control by the courts is patently untenable having regard to the clear and unambiguous wording of the subsection itself."[129] He added that "such a construction may in certain cases produce results which impair the DPP in the effective discharge of his functions."[130] This could happen, for example, were the court to require the DPP to give reasons for exercising some of his powers under the act and yet by disclosing such reasons he ends up weakening his case.[131] The judge added that his conclusion did not mean that the DPP was above the law. If he abused his powers, he would have to be investigated and that there were other remedies such as the orders of *certiorari* and *mandamus* that could be invoked in the event of such abuse.[132] When the DPP took over the case, he did not continue with the prosecution.[133]

Courts in some countries such as Fiji and Mauritius have also held that the DPP's powers are subject to judicial review.[134] This is the case whether those powers are provided for in the constitution or in another piece of legislation.

In Mainland Tanzania, the DPP's powers to intervene in private prosecutions are provided for in section 9 of the National Prosecutions Service Act. Section 9 provides that the functions of the DPP include to "take over and continue prosecution of any criminal case instituted by another person or authority"[135] and to "discontinue at any stage before judgement is delivered any criminal proceeding

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128. *Id.,* at 10.

129. *Ephanta Lema v. The Republic*, Dissenting Judgement of Kisanga J.A., at 2.

130. *Id.,* at 2 – 3.

131. *Id.,* at 3.

132. *Id.,* at 5.

133. It has been submitted that 'after getting the case back, the Director of Public Prosecutions never proceeded and all accused police officers went on with their work.' *See*, CHRIS MAINA PETER HUMAN RIGHTS IN TANZANIA: SELECTED CASES AND MATERIALS (1997), at 93.

134. *MohitJeewan v. Director of Public Prosecutions* 2005 PRV 31, 2006 MR 194.

135. Section 9(1)(c).

brought to the court by another person or authority."[136]

Unlike in Zanzibar, in Mainland Tanzania, when the DPP takes over a private prosecution, he is permitted to continue with it in the name of the private prosecutor. This is pursuant to section 9(3) of the National Prosecutions Service Act which states that "[n]othing in this section shall prevent the Director to take over and continue proceedings in the name of the person or authority that instituted those proceedings." This means that the DPP could conduct a public prosecution in the name of the individual. This is not the same thing as conducting it on behalf of the individual. In the latter case, it would remain a private prosecution being conducted using state resources.

However, the DPP's exercise of his powers is subject to guiding principles which are identical to those under the repealed section 90(4) of the Criminal Procedure Act. Section 8 of the National Prosecutions Service Act provides that "[i]n the exercise of powers and performance of his functions, the Director shall observe the following principles - (a) the need to do justice; (b) the need to prevent abuse of legal process; and (c) the public interest." This means that the Court of Appeal's judgement in *Ephanta Lema v. The Republic*[137] applies with equal force to the question of judicial review of the DPP's powers under the National Prosecutions Service Act. The National Prosecutions Service Act does not require the DPP to give reasons when he decides to take over and continue with or discontinue a private prosecution. However, the position is different when he takes over an appeal by a private prosecutor. Section 10(1) of the National Prosecutions Service Act provides that one of the functions of the DPP is to "take over an appeal, revision or application arising from private prosecution, whether as appellant, applicant or respondent and where the Director takes over the appeal as appellant or applicant, he may continue or otherwise withdraw the appeal."[138] Section 10(2) states:

> Where the Director takes over an appeal, revision or application pursuant to subsection (1)(b) and subsequently decides to withdraw the appeal, revision or application, he shall give reasons for the decision and inform the appellant or applicant as the case may be.

If the DPP takes over an appeal and continues with it, he is not supposed to give reasons for the decision. However, if he takes over the appeal and withdraws it, he

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136. Section 9(d).

137. *Ephanta Lema v.The Republic*, Criminal Appeal No. 2 of 1990 (judgement of 24 March 1994).

138. Section 10(1)(b).

has two obligations to discharge: one, to give reasons for withdrawing the appeal; and two, to inform the applicant or appellant "as the case may be." It appears that the reasons for the withdrawal have to be given to the court first and thereafter the appellant should be informed of the reasons and the decision. The appellant or applicant could challenge the DPP's decision if he is not satisfied that the reasons for the withdrawal are in accordance with the guidelines under section 8 of the National Prosecutions Service Act.

Some of the DPP's powers in the Prosecutions Act to intervene in private prosecutions are unique to Zanzibar and are likely to ensure that a private prosecution is in effect closely monitored by the DPP. In fact, it could be argued that private prosecutions in Zanzibar are in effect controlled by the DPP. Apart from the fact that a private prosecution can only be instituted with the DPP's permission, it has to be conducted under the DPP's supervision as if it were a public prosecution. Section 15(6) provides that "[a]ny person authorised to conduct private prosecution may do so personally, or upon prior authorisation of the Director, by an advocate and may change and replace such advocate as he deems appropriate upon obtaining authorisation of the Director." Section 15(8) provides that:

> A person or advocate conducting private prosecution shall be subject to general or specific direction of the Director and he shall have the duty to furnish the Director with regular report [sic] on the progress of the case and at the conclusion of the trial shall inform the Director in writing on the outcome of the case.

Sections 15(6) and (8) show that the DPP in Zanzibar effectively controls private prosecutions. He decides whether or not an advocate instructed by the private prosecutor should conduct the private prosecution, the private prosecutor has to follow general or specific directions issued by the DPP, reports must be submitted to him on a regular basis on the progress of the private prosecution and at the end of the case, and a report on the outcome of the prosecution must be submitted to him. In other countries such as South Africa[139] and Namibia,[140] the DPP does not have such powers over a private prosecutor. The private prosecutor decides which lawyer to instruct, if he decides to instruct one to conduct the private prosecution. The position is the same in Mainland Tanzania where section 99(3) of the Criminal Procedure Act provides that "[a]ny person conducting the prosecution may do so personally or by an advocate."

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139. Section 7(1)(d) of the Criminal Procedure Act 51 of 1977.
140. *Id*.

One of the issues that would have to be resolved in Zanzibar is the tension between section 15 of the Prosecutions Act and section 102(7) of the Criminal Procedure Act on the question of the private prosecutor instructing an advocate. Section 102(7) of the Criminal Procedure Act provides that "[a]ny person conducting the [private] prosecution may do so personally or by an advocate." Unlike section 15 of the Prosecutions Act, under section 102(7) of the Criminal Procedure Act the DPP has no say whatsoever with regards to the private prosecutor's decision to instruct an advocate to conduct the prosecution. Although the Prosecutions Act repealed some sections of the Criminal Procedure Act,[141] section 102 was not one of those repealed. This means that the legislators decided to leave the question of private prosecutions to be governed by two different pieces of legislation. As the Tanzanian High Court stated, if the legislature intends to amend a piece of legislation, it does so "in no uncertain terms" otherwise the legal position remains unchanged.[142]

The DPP's powers under the Criminal Procedure Act on the issue of private prosecutions are less intrusive compared to his powers under the Prosecutions Act. This creates some ambiguity with regards to which law actually governs private prosecutions in Zanzibar. It is now up to the courts, should the issue arise, to determine which of the laws should govern private prosecutions. In resolving this issue, the courts could invoke the 'later in time' rule of statutory interpretation.[143] The legislature may also have to repeal section 102 so that private prosecutions are governed by the Prosecutions Act.

IV. CONCLUSION

In this article, the author deals with the question of private prosecutions in Zanzibar. The following issues are discussed: *locus standi* to institute a private prosecution; appeals in cases of private prosecution; the need for the private prosecutor to have a *prima facie* case before instituting a private prosecution; whether the DPP has to decline to prosecute before a private prosecution is instituted; the costs for

141. Section 26 of the Prosecutions Act provides that '[t]he Criminal Procedure Act is hereby amended by repealing sections 96, 98 and 101 thereof.'

142. *Augustino Mponda v. Republic* 1991 TLR 97 (HC), at 99.

143. This rule has been invoked by courts in some African countries. See for example, *Nhlapo v. S* 2012 (2) SACR 358 (GSJ) para. 23 (South African High Court); *Hodoul v. Kannu's Shopping Centre* [2007] SCSC 126 (Supreme Court of Seychelles); *Transnamib Limited v. Poolman and Others* (SA 6/99) [1999] NASC 4 (17 November 1999) (Supreme Court of Namibia); *NIMR and Chapman (Pvt) Ltd and Others v. Zimbabwe Electricity Supply Authority* (Case No. HC 31/05) [2005] ZWBHC 8 (27 January 2005) (High Court of Zimbabwe).

conducting a private prosecution; the costs in the event of a successful or unsuccessful private prosecution; and the DPP's intervention in private prosecutions. It is recommended, inter alia, that section 102 of the Criminal Procedure Act may have to be repealed so that private prosecutions are exclusively governed by section 15 of the Prosecutions Act.

GOING AGAINST THE TIDE? REFLECTIONS ON THE APPLICATION OF THE DEATH PENALTY IN UGANDA

Daniel Ruhweza*

ABSTRACT

This article critically analyses the arguments for and against the death penalty. It seeks to answer some of the questions posed by both the abolitionists and retentionists of the death penalty by scrutinizing the reasons given by either, for instance, retribution, reformation, deterrence, public opinion and even religious reasons, at the same time attempting to give a balanced analysis of these reasons. A thorough scrutiny of the Ugandan scenario is also provided with recommendations and the way forward. In conclusion, the article asserts that the death penalty should be abolished and alternative forms of punishment such as life imprisonment are recommended.

I. INTRODUCTION

The death penalty remains one of the most controversial topics in the world today and since the advent of human rights advocacy. Democracy and constitutionalism in Uganda have not made matters any easy for those who believe in these core principles of governance. The contention is divided between those who advocate for the retention of the death penalty (retentionists) and those who want it abolished (abolitionists).

Debate surrounding the death penalty has raged on for centuries.[1] According to James Avery Joyce, "…The dark caverns of man's cruelty have echoed through the centuries with the screams and groans of countless martyrs, traitors, rebels and other dangerous persons, as well as common criminals as adjudged by the standards of their age."[2] The 'criminal' is being killed today because he has been killed for centuries in the past. This is a very sad reality because in many situations the said '*criminal'* is in some cases innocent of the charges preferred against him/her. In a forward to the book *May the State Kill* by Father Tarcisio Agostoni,[3] Patrice Vahard, a lawyer, asserts that "the state kills to

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1. LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 (1948), at 220.

2. Cited in *id*.

3. AGOSTINI TARCISIO, MAY THE STATE KILL? PAULINE'S PUBLICATIONS AFRICA (1998).

appease society and compensate relatives of victims."[4] He further argues that today's society should be equipped with the necessary tools for human centered development and as such the death penalty by all means contradicts this.[5]

The same arguments that have been fronted for years are perpetuated as a matter of routine, contradicted only by those measures, which the evolution of public sensibility renders inevitable. The law is applied without consideration of its significance and condemned criminals die by rote in the name of a theory in which even their executioners no longer believe. This provokes the disgust and revolt of public opinion itself.[6] Man has laboured with the question of whether or not he can take the life of a fellow human being. Different reasons have always been given in favour of the death penalty. However, the question yet to be answered satisfactorily is whether one can be justified in taking the life of another in the name of punishment.

II. THE DISCOURSE ON THE DEATH PENALTY IN UGANDA

A close look at independent Uganda shows a bloody streak wherein (save for the recent years for southern Uganda) life is brutish and short, with a generally low regard for human life.[7] The country has had a notorious history of coups, civil strife, violence, brutality, and threats of genocide. [8] A glance at the local media headlines reveals a high crime rate nationwide, the regard for human life is extremely low,[9] and the loss of life very rampant. The price of life is cheapened more by the government, which still promotes the use of the death penalty as a punishment for criminal conduct. The death penalty in Uganda is prescribed for serious crimes like

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4. *Id.*

5. *Id.*

6. JAMES WHITE, THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION (1973).

7. UGANDA HUMAN RIGHTS COMMISSION, ANNUAL REPORT (2010). Deprivation of the right to life was among the top five human rights complaints lodged with the Commission, registering 53 complaints during the year.

8. See generally, D.R. Ruhweza, *'Sleeping Giant or Stealthy Nicodemus? A Review of the Role of the Commonwealth in Promoting the Rule of Law and Good Governance in Uganda*, in GOOD GOVERNANCE AND CONSTITUTIONALISM: QUESTIONING THE CONTEMPORARY RELEVANCE OF THE COMMONWEALTH (Dan Ogalo eds., 2007), retrieved from <http://mak.academia.edu/DanielRuhweza/Papers/1165233/Sleeping_Giant_or_Stealthy_Nicodemus_A_Review_of_the_Role_of_the_Commonwealth_in_Uganda>.

9. Y. MUSEVENI, SELECTED ARTICLES OF THE UGANDA REVOLUTIONARY WAR, NRM PUBLICATIONS (1985).

murder,[10] aggravated robbery,[11] rape,[12] aggravated defilement,[13] smuggling where the offender is armed with, uses or threatens to use a deadly weapon, detention with sexual intent (where a person having authority to detain or keep the victim in custody participates in or facilitates unlawful sexual intercourse[14]), terrorism under the Anti-Terrorism Act 2002 and treason.[15]

Equally, Article 22 of the 1995 Constitution of Uganda allows deprivation of the right to life. This is in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court. The Supreme Court in the landmark case of *Suzan Kigula and 417 others v. A.G* confirmed the constitutionality of the death penalty under Ugandan law.[16]

No executions have been carried out since 1999 in Uganda, except in 2003 by Uganda's military jurisdiction. Although this may be interpreted to mean that there is an unofficial moratorium on executions in place,[17] Uganda continues to issue death sentences.[18] For example, on 22 April 2011, three Pakistani nationals were sentenced to death by the Kampala High Court for murdering two Indians in March 2009. On 4 June 2011, the Kampala High Court sentenced Grace Karungi and four men to death for the murder of her husband on 9 March 2009.[19] On 12 August 2011, the Kampala High Court sentenced Tom Nkurungira to death for the murder of his girlfriend. Uganda has approximately 505 death row inmates (470 men and 35 women).[20]

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10. Penal Code Act, section 189.

11. *Id.,* section 286(2).

12. *Id.,* section 124.

13. The Penal Code (Amendment) Act 2007, section 2 amended section 129 and provides for death penalty for aggravated defilement under section 129 (4) where the person against whom the offence is committed is below 14 years, the offender is infected with HIV, the offender is a parent or guardian, the victim is a person with disability and the offender is a serial offender.

14. *Id.,* sections 319(2) and 134(5).

15. *Id.,* sections 23(1)(2)(3)&(4).

16. Constitutional Appeal No. 3 of 2006.

17. Penal Reform International (PRI) and Foundation for Human Rights Initiative (FHRI), The abolition of the death penalty and its alternative sanction in East Africa: Kenya and Uganda, at 23, available at <www.penalreform.org> (accessed on 26*th* June 2012*).*

18. Foundation for Human Rights Initiative (FHRI) and Penal Reform International (PRI), Submission to the UN Secretary General on the question of the death penalty in East Africa: Kenya and Uganda, April 2012, available at <www.penalreform.org> (accessed on 26*th* June 2012).

19. *Id.*

20. Id.

In a society dominated by fear, motivated by hatred and patterned with violence[21] and immense destruction of life, the use of the most cruel and ruthless punishment is a horrible violation of the whole concept of humanity. This resort to crude and primitive ways to solve crime, instead of human creative thinking and communicative skills to address the causes of crime,[22] is not only uncalled for, but also completely inhuman and degrading, and a violation of the sanctity of life. This is a contravention of international covenants such as the Universal Declaration of Human Rights,[23] the International Covenant on Civil and Political Rights[24] and International Covenant of Economic, Social and Cultural Rights[25] as well as Articles 24 and 44 of the 1995 Ugandan Constitution. Uganda needs to follow the example of countries whose laws do not provide for the death penalty for any crime because they respect the sanctity of life.

The aim of the criminal system is to reduce crime. This can only work successfully if the practice as well as the nature and extent of punishment is accepted by a substantial part of society.[26] Punishment should always be prescribed to fit the crime and this varies in time and circumstances. This depends on society's judgment about what is tolerable or not for society's stability and survival, having regard to the evil effect of punishment on the offender.

The death penalty is not proportional to the crimes committed by the condemned and the prolonged delays in execution that accompany it are illegal and not imposed on the victim by criminal law. Unless the aims of such punishment take into account the sensibility of the community, the penal system will not serve one of its primary functions—which is to maintain communal stability.[27] Since there

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21. HUMAN RIGHTS WATCH, WORLD REPORT: UGANDA, 2012, retrieved from <http://hrw.org>, (accessed 26th May 2012).

22. Edward J.B. Kakonge, *Violence Uganda's most wicked cult*, DAILY MONITOR, 6th April 2000, at 8.

23. Article 3 which provides that everyone has the right to life, liberty and security of person.

24. Article 6 of the ICCPR provides *inter alia* that every human being has the inherent right to life which shall be protected by law. No one shall be arbitrarily deprived of his life.

25. The preamble to the Covenant provides *inter alia* that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, and that these rights derive from the inherent dignity of the human person.

26. Rupert Cross, *The English Sentencing System,* 35 THE MODERN LAW REVIEW (Mar., 1972), at 15. See also the Ugandan Prisons Service policy Document, 2000 *quoted* in Uganda: Challenging the Death Penalty: Fact finding Report by FIDH-FHRI, No 425/2-October 2005, at 28.

27. Roger Hood, Sentencing in Magistrates' Courts: A study in variations of policy (1962), at 12

is a global and local movement towards abolition of the death penalty,[28] if such a law remains unchanged while the moral order undergoes a drastic transformation, it follows that the relationship of laws to morality will be destroyed.[29] Worse still, the applicability of the death penalty in Uganda today is also marred by the weaknesses and failings of the criminal justice system rendering the whole process of proving a capital crime a sham.

A. Administration of Death Penalty

1. A Critique of the Justice System of Uganda—Due to the nature of man, trying of criminals charged with capital offences is prone to the fallibility of human judgement because of the mistakes, blunders and omissions that are likely to be made during the process.[30] Observing that an innocent man can easily be executed, *Thorsten Sellin* noted:

> Human Justice can never be infallible. No matter how conscientiously courts operate, there still exists a possibility that an innocent person may, due to a combination of circumstances that defeat justice, be sentenced to death and even executed. That possibility is made abundantly clear when one considers the many instances in which innocent persons have been saved from the extreme penalty either by the last minute discovery of new evidence or by commutation followed, perhaps after many years in prison, by the discovery of the real criminal.[31]

Ray Hattersley also argues that "…if we are to hang men and women by the necks until they are dead, we ought to do it on more than just a hunch, a superstition, or a vague impression."[32]

The proponents of the death penalty argue that the abolitionists exaggerate the possibility of error because it is not a very real possibility given the precautions taken by the courts in capital cases and the corrective powers of executive clemency. More so, they argue that if an error should be made, this is the necessary price that

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28. Karpal Singh, Death Penalty: Legal and Constitutional Issues (Paper presented at the 12th Commonwealth Law Conference, Kuala Lumpur, September 1999), at 1.

29. TROY DUSTER, THE LEGISLATION OF MORALITY, THE FREE PRESS: N.Y (1970). It follows that the relationship of laws to morality must be a changing thing and cannot be static.

30. O. POLLACK, THE ERRORS OF JUSTICE (1952), at 115.

31. *Id.*

32. *Id.*

must be paid within a society which is made up of human beings, and whose authority is exercised, not by angels, but by men themselves: thus it is noteworthy to suggest that the danger of miscarriage of justice must be weighed against the far greater evils for which the death penalty seeks to remedy.[33] Efficacious administration of the death penalty in Uganda should be examined in light of the nature and efficiency of the criminal justice system as a whole. The United Nations Office of the High Commissioner for Human Rights captures the lacuna within Uganda's justice system as follows:

> Administration of justice structures and institutions are weak... They are often not perceived as impartial and their accessibility is limited, for both logistical and economic reasons… Corrupt practices reportedly discourage victims from seeking a legal remedy and there is a general lack of confidence within the justice system...[34]

It therefore ineluctably follows that the criminal Justice system of Uganda is not conducive for the passing of a sentence of such high magnitude.

The death penalty is always an unjust method of Justice. There is arbitrariness in the sentencing of a convicted person contrary to the constitutional provisions of equality before and under the law.[35] A similar view was held in the case of *State v. Makwanyane & Mchumu*[36] where it was observed that:

> …at every stage of the trial process, there is an element of chance. Thus the outcome may depend upon factors such as the way the case was investigated by the police, how effectively the accused is defended and the personal attitude to capital punishment of the trial judge or of the judges selected to hear the case on appeal.

This prejudicial process is marred with loopholes. The police can easily be corrupted so as to drop criminal charges. Death row cells are filled with people from impoverished and ethnic minority backgrounds who are least able to defend themselves in court. Guilt is established quite arbitrarily depending on such random

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33. Massachussetts Special Commission, Established For The Purpose Of Investigating And Studying The Abolition Of The Death Penalty In Capital Offences: Recommendations (1958) Mc Cellan Ed., 1961.

34. United Nations, Office of the High Commissioner for Human Rights, Report on the Work of her Office in Uganda, UN Doc A/HRC/4/49/Add2, 12 February 2007, at 12.

35. Article 22 of the 1995 Uganda Constitution.

36. *1995 1 LRC 269.*

factors as the competence of lawyers or plea-bargaining. Herbert Vander Lugt agrees with this view when he writes: "…my sense of Justice cries out in protest whenever the fact that cold-blooded murderers who have the money to hire expensive lawyers seldom end up on death row."[37]

More so, *Mukubwa* asserts that many of those accused of committing capital offences are unable to afford legal assistance and are defended under a *pro-bono* system.[38] Most of such lawyers are young and inexperienced and many of them have to consult through an interpreter. *Pro-bono* advocates are paid a nominal fee and therefore lack the financial resources and infrastructural support to undertake the necessary investigations and research. The rich individuals, on the other hand, can fund their defences and are therefore less likely to be sentenced to death than persons similarly placed who are unable to pay for the services.

The criminal justice system is therefore fallible.[39] Joseph M.N. Kakooza, a former Judge and chairperson of the Uganda Law Reform Commission, noted that the justice system is lacking because "little (if any) attempt is made to consider the particular circumstances of a given case."[40]

The Eastern Caribbean Court of Appeal in the case of *Peter Hugues and Newton Spence v. The Queen* held that the mandatory imposition of the death penalty was unconstitutional, as it amounted to inhuman and degrading punishment.

The appeal system in Uganda is also lacking because such appeals are decided on the record of the case and on the findings made by the trial Judge.[41] Imperfections inherent in criminal trials cannot be eliminated or excluded. Further still, the Advisory Committee on the Prerogative of Mercy established by Article 121 (6) of the 1995 constitution renders the whole judicial process, in regard to capital offences, a political matter. The recent release of Sharma Kooky who was granted presidential pardon pursuant to article 121 on the prerogative of mercy raised controversies surrounding the death sentence and the exercise of presidential powers under this article.

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37. HERBERT VANDER LUGT, A MATTER OF LIFE AND DEATH (1981), at 14.

38. Grace P.T Mukubwa, Public Interest Law and Public Interest Litigation: The Role of the Judiciary (Paper Presented At Judicial Officer Training Workshop, 5-7 August 1999, at Hotel Triangle Jinja).

39. AMNESTY INTERNATIONAL, THE DEATH PENALTY AN AFFRONT TO HUMANITY (1999). Available at <http://bahai-library.com/newspapers/1999/000099.html> (accessed on 26th April 2012). *Quoting* Justice G.H. Rose quashing the conviction of Mahmmod Husseod Hussein Mattan, a Somali seaman who had been hanged for murder in Cardiff, Wales 46 years earlier.

40. Interview with Professor Joseph M.N. Kakooza at Kayondo and Co. Advocates, Kizito Towers, Kampala-Uganda, 4th April 2000.

41. Article 134 of the 1995 Uganda Constitution.

Whereas women activists described Kooky's release as unfortunate and demanded the release of other convicts, including women,[42] others welcomed the pardon as indicating government's commitment to reform and rehabilitate rather than revenge.[43] However, other reports suggested that Kooky was pardoned due to an independent report indicating that he did not murder his wife, contrary to the findings.[44] Be that as it may, all this reveals the risk, speculation, politicisation and uncertainty with which the death penalty is likely to be meted out against innocent people.

Accordingly, it has been argued that the prerogative of mercy is not a review of the judicial process, but an evaluation of the criminal to find out whether he is repentant, remorseful or reformed considering every possible latitude to save the condemned from the gallows. It is however submitted that this should be a mandate of the courts, and hence the *allocutus*. A report by the International Federation of Human Rights (FIDH) and the Foundation for Human Rights Initiative (FHRI) notes as follows:

> Although the situation of condemned prisoners is not clear due to the lack of public information, the number of people executed is much lower than the number of people condemned to death. One wonders what is the decision-making process leading to the choice of the persons to execute… It seems that influential politicians exploit the corrupt system to accuse political opponents falsely of capital offences in order to keep them out of circulation. FIDH and FHRI has observed a number of former political opponents, former political leaders from Obote's government, members of armed groups fighting against the Government, or military personnel among the prisoners executed, raising suspicion as to the selection of the people executed. The opacity of the procedure followed by the Advisory Committee on mercy requests reinforces the ambiguity of the whole process…[45]

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42. Ephraim Kasozi, *Activists bitter over release of murder convict Sharma Kooky*, DAILY MONITOR, 26th March 2012.

43. *Id.*

44. Siraje Lubwama, *Why Kooky was spared*, THE OBSERVER, March 30-April 1, 2012, at 1-2.

45. FIDH AND FHRI, INTERNATIONAL FACT FINDING MISSION REPORT, UGANDA: CHALLENGING THE DEATH PENALTY (OCTOBER 2005).

1. The Death Penalty under the Military Code—Under the Uganda Peoples' Defence Forces Act,[46] the death penalty can be applied to any member of the armed forces who commits any of the over 24 offences, including mutiny, where it results in failure of operation, loss of life or destruction of military materials, treachery, cowardice resulting in failure of operation or loss of life, spreading harmful propaganda, desertion, murder, treason, rape, careless shooting of a fellow soldier or civilian, and also aiding or abetting commission of any of the above offences.[47] This big number of offences punishable by death is probably due to Uganda's history of undisciplined armies. The army had become notorious for rape, armed robbery, extra-judicial killings, looting and plunder. Thus, in order to maintain discipline and order in the army, many offences were made capital in nature.

Capital offences in the army are triable by a Field Court Martial consisting of nine members appointed by the deploying authority before departure. They also have competence to execute punishment immediately, without the use of any legal personnel.[48] Whereas there is no appeal from the Field Court Martial,[49] there is an elaborate appellate system that makes provision for an appeal to the Division Court Martial, the General Court Martial,[50] the Court Martial Court of Appeal[51] and the High Command chaired by the president.

Much as the military code is separate and distinct from the civil courts, a condemned soldier can appeal to the Supreme Court of Uganda in situations where the Court of Appeal has upheld a sentence of death.[52] The above discussion reveals uniformity in the crimes punishable by death. The military code is however fraught with problems in guaranteeing a fair trial. In 2002, two UPDF soldiers, Corporal James Omedio and Private Abdullah Muhammad, attached to the "B" company of the UPDF's 67th Battalion were executed by firing squad. hey were reportedly charged with the murder of Rev. Fr. Declan O'Toole, his driver, Patrick Longoli, and his cook, Fidel Longole, when they were held up at a roadblock three kilometres from the UPDF's barracks at Kalosarich (Karamoja, eastern Uganda) on 21 March 2002. It was reported that the court martial proceedings lasted for two hours and

46 Cap. 30 Laws of Uganda.

47. Sections 14-44 of the UPDF Act (2005) spell out persons and circumstances subject to military law.

48. *Id.*, section 78.

49. *Id.*, section 227.

50. *Id.*, section 197 (3).

51. *Id.*, section 199.

52. *Id.*, sections 77-84.

thirty-six minutes.[53] This only compounds the fact that there could not have been a thorough investigation to determine the guilt or otherwise of these two men.

Brendan Jordan, a missionary of the Mill Hill Missionaries, with whom O'Toole had been working, stated that the execution was 'revenge' which was not what the deceased priest would have wanted. Father Joe Jones, a bursar with the same mission in Dublin said, "...definitely there was undue haste. It all seems too opportunistic and we have to ask if these two men were scapegoats."[54] The above executions are just a microcosmic portrayal of the problems that exist within the military code. Other problems include the politicisation of the Court Martial and questions of capacity within the system since often times persons appointed to the Court Martial may not necessarily be lawyers.

III. ARGUMENTS FOR AND AGAINST THE DEATH PENALTY

The arguments for and against the death penalty are several and intense. I will try to give them fair treatment, juxtaposing them to enable making of meaningful conclusions as to the propriety of the penalty.

A. Retribution

Retentionists of the death penalty believe that it is inflicted on the offender because he is guilty of the crime he committed. Society claims that it amends for the harm done or for satisfaction of the feelings or emotions of resentment of the victim, his friends and relations or others who were aware of the crime.[55] This is the most ancient method of treating offenders because punishment was made to fit the crime and offenders were given their just deserts,[56] the reciprocation of evil with evil (*malum passioni's propter malum actions*) as advocated by Hammurabi (C. 1722-1750 BC).[57]

Many proponents of the retributive theory of the death penalty believe that some criminals are simply unfit to live for they have committed acts so heinous that the only appropriate punishment is death. George Kanyeihamba, a former justice of

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53. H. Onoria, *Soldiering and Constitutional Rights in Uganda: The Kotido Military Executions*, 9 EAST AFR. J. PEACE AND HUMAN RIGHTS (2003).

54. *Id.*

55. V.R. J. Krishna, *Supreme Court Of India , in* WHEN THE STATE KILLS…THE DEATH PENALTY V HUMAN RIGHTS (Amnesty International, 1989).

56. P'ODONNELL AND DI CURTIS, TOWARDS A JUST AND EFFICIENT SENTENCING SYSTEM (1971).

57. GIORGIO DEL VECCHIO, THE STRUGGLE AGAINST CRIME (Translated By Prof. A.H. Campbell, University Of Edinburgh).

the Supreme Court of Uganda, notes as follows:

> … anyone who has witnessed the consequences of crime, mutilated bodies, slaughtered civilians, the horrific massacres of communities, traumatized women and children who have been raped and defiled, is not one likely to lose sleep over culprits who are given the maximum punishment allowed by law."[58]

The desire by the society that a man pays with his life for a violent crime represents both society's moral condemnation of such acts and a closing of the ranks against those who violate society's law. Denning, L.J. testified before the British Royal Commission on Capital Punishment and stated as follows:

> The Punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for then, the ultimate justification of any punishment is not that it is deterrent but that it is the emphatic denunciation of the community of a crime; and from this point of view, there are some murders which in the present state of public opinion, demand the most emphatic denunciation of all, namely the death Penalty.[59]

1. Retribution vis-a-vis Vengeance—Abolitionists, on the other hand, believe that death, as a retributive punishment, is nothing more than vengeance. Koestler, in his book *Reflections on Hanging,*[60] observes:

> Yet though easy to dismiss in reasoned argument on both moral and local grounds, the desire for vengeance has deep, unconscious roots and is around when we feel strong indignation or revulsion – whether the reasoning mind approves or not. Deep inside every civilized being, there lurks a tiny Stone Age man, dangling a club to rob and rape and screaming an eye for an eye, but we would rather not have that little fur-clad figure dictate the law of the land.

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58. George Kanyeihamba, Uganda Still Needs the Death Sentence, UHRC Col. 3 Monthly Magazine (June-July 1999), at 23 - 24.

59. *Quoted in* R. Donnely, Capital Punishment, Congress Records, A6283, A6285. August 24, 1960.

60. 105 (1956).

Peirre Elliott Trudeau also notes that "the Society which adopts vengeance as an acceptable motive for its collective behavior. If we make that choice we will snuff out some of that boundless hope and confidence in ourselves such as has marked our maturing as free people."[61] Thus, much as the desire for vengeance by society can be understood and acknowledged, the exercise must be resisted.

Criticising the retributive theory of the death penalty, St. Thomas Acquinas stated that not even a supposed public interest authorises us to violate the universal precept of charity. Therefore, the public interest can and must be protected by some other means without the disgraceful aim of causing suffering.[62] It is also argued that retribution is a violation of the purpose of the criminal law, which is to provide protection against man's irrationality and violence, not to furnish a means of expressing it.[63] The motivation behind the use of the death penalty is of the same order as the irrationality, which provoked the criminal to commit the act for which he is being executed. Abolitionists argue that if the sole justification of the death penalty was vindication of the victim's injury, then it ought never to be inflicted where the victim forgives the offender like in cases of defilement. However, the criminal justice system always considers the attitude of the victim irrelevant to the accused's punishment.[64]

Thorsten Sellin asserts that society seems to be torn between a desire to see murderers suffer the ultimate penalty and a reluctance to execute it.[65] Even those who ardently advocate for retribution by death often paradoxically stress that it should be used sparingly for fear that otherwise it would dull our moral sensitivity and lose its terrifying force. Thus, a token number are executed, in effect sacrificed, to satisfy popular demand.

Albert Pierre Point, a former executioner in the United Kingdom, affirms the above view as follows:

> The fruit of my experience has this bitter after taste: that I do not now believe that any one of the hundreds of executions I carried out has in anyway acted as a deterrent against murder. Capital

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61. Pierre Elliott Trudeau, Speech in Support of the Abolition of Capital Punishment (House of Commons, 15th June 1976). Available at <uranowski.wordpress.com>(accessed 28 May 2012).

62. Summa Theologica1467 (Benziger (Ed); 1947) Translated From The Italian Version -*Non Enim Debet Homo In Aliquiem Peccare Propter Hoc Quod Ille Peccavit Prius In Ippsum*.

63. M.D. Commission On Capital Punishment Report 25(1962).

64. Amnesty International, 'When The State Kills: The death penalty v Human rights (1989) at 86.

65. Report For The Model Penal Code Project Of The American Law Institute (1970).

> punishment in my view achieved nothing except revenge.[66]

Thus, retributive punishment is only a polite name for revenge; it is vindictive, and thus immoral. Such an infliction of pain–for–pain's sake harms the person who suffers the pain, the person who inflicts it, and the society, which permits it. Everybody loses, which brings out its essential pointlessness. By making the punishment of wrong doers a moral duty, the retributive theory removes the possibility of mercy.

B. Deterrence

Retentionists under the banner of utilitarianism sought to derive principles of punishment from human nature, holding that the basic objective of the criminal law was to deter potential criminals. Jeremy Bentham observed as follows:

> Pain and pleasure are the great springs of human action. When a man perceives or supposes pain to be the consequence of an act, he is acted upon in such a manner as tends, with a certain force, to withdraw him, as it were, from the commission of that act. If the apparent magnitude, or rather value of that pain be greater than the apparent magnitude or value of the pleasure or good he expects to be the consequence of the act, he will be absolutely prevented from performing it. The mischief which would have ensued from the act, if performed, will also by that means be prevented.[67]

This was manifest in the case of *Rex v. Singh Atma s/o Chanda Singh,* where it was held that when one considers that the most important objective of punishment is deterrence, a lesser sentence may be misunderstood and the imposition of heavy sentences for such acts would be all the more necessary.[68]

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66. *Albert Pierre Point* cited inAmnesty International, 'When The State Kills: The death penalty v. Human rights (1989) at 86.

67. *See*, 'The Rationale of Punishment, Part II, Book I, General Principles, Chapter III, Of the Ends of Punishment' in 'Principles of Penal Law in Bentham's Works (Pt. 11 BK1; Chapter.3 Bowring (Ed., 1843). Available at http://www.laits.utexas.edu/poltheory/bentham/rp/rp.b01.c03.html last accessed August 29, 2013. See also, ROBERT B. SIEDMAN, A SOURCE BOOK OF THE CRIMINAL LAW OF AFRICA SWEET AND MAXWELL: LONDON (1966).

68. (1942) 9 E.A.C.A. 69.

The efficiency of the death penalty as a deterrent to crime is the major factual issue in the dispute between abolitionists and retentionists.[69] The latter argue that the deterrent value of the death penalty vis-à-vis imprisonment cannot be, and has not been, determined by statistical studies.

First, the abolitionists assert that the criminals who are deterred do not show up as statistics[70] because there is no reliable method for determining who has contemplated committing a capital crime but refrained due to the fear of the death penalty as distinguished from other forms of punishment. They argue that it is impossible to subject deterrence to a scientific study in any direct way since the facts cannot be ascertained and be subjected to analysis and interpretation.

Secondly, retentionists argue that there is no reliable information pointing to the volume of capital crime and the rate or figures used by the abolitionists which are in effect imprecise.[71] They argue that most of the statistical studies of the deterrent impact of the death penalty relies on "murder and non-negligent manslaughter" figures which do not distinguish between first degree murders and the lesser non negligent criminal homicides punishable by imprisonment. Retentionists therefore assert that it is questionable and inconclusive to assume that the proportional relationship of capital murders to total homicide rates is relatively constant.[72]

However, abolitionists argue that the deterrent value of the death penalty is called into question by the available evidence of modern psychology, and by the manner in which the death penalty is administered. A study conducted by Thorsten Sellin on the deterrent impact of the death penalty analyses the four ways in which the deterrent value of capital punishment would be statistically evident (if it exists), but finds evidence to the contrary, which is indicative of no measurable deterrent value. The study revealed that crime rates in contiguous jurisdictions with or without the death penalty show that they have virtually identical murder rates.[73] However, studies conducted to determine if the rate in a given jurisdiction increases with the abolition of the death penalty and decreases with its restoration show that there is no correlation between the status of the death penalty and crime rate.[74]

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69. *The Death Penalty in America. An Anthology*, at 260 – 261 (H. Bedau Ed. 1967).

70. *Id*., at 56-7.

71. United Nations, Florida, Special Commission for the Study of Abolition of death penalty in Capital Cases, Report (1963-1965).

72. Established By Congress In Public Law 89-801: Vol. II (Relating to Chapters. 14 to 36 (Sections 1401 to 3605 of the Study Draft Of A New Federal Criminal Code: US).

73. H. Bedau, The Death Penalty In America. An Anthology, at 260 – 261 (Ed., 1967)

74. Department of Economic and Social Affairs: Capital Punishment, St. UN DOC. ST/ S. O. A/SD/9/1962.

On the assumption that a well publicised execution should have the greatest deterrent effect in the local community, studies show that there was no significant decrease or increase in the rate following an execution.[75] Studies to determine if law enforcement and prison personnel are afforded greater protection by the death penalty show that police and prison officer homicides are virtually the same in abolition states as in death penalty states.[76] The study therefore concluded that "anyone who carefully examines the...data is bound to arrive at the conclusion that the death penalty, as we use it exercises no influence on the extent or fluctuating rates of capital crimes."

In South Africa, the country's Constitutional Court reported that between 1990 and January 1995, 243 death sentences were imposed, of which 143 were confirmed by the appellate division. Yet, according to statistics provided by the Commissioner of Police and the Attorney General, there were approximately 20,000 murders and 9,000 prosecutions for murder each year between 1990 and January 1995. The court then posed the question: "Would the carrying out of the death sentence on those 143 prisoners have deterred the other murderers or saved any lives?"[77]

Amnesty International, an international human rights watchdog organization, in its 2011 report, documented death penalty trends in the USA and indicated that developments in that particular year suggested that the country was edging away from the use of the death penalty. Illinois became the 16th abolitionist state in the USA and the third to enact legislation to abolish the death penalty since 2007, followed by New Jersey in 2007 and New Mexico in 2009. In addition, a moratorium on executions was established in the state of Oregon in November.

In 2011, only 43 executions were recorded in 13 of the 34 US states that retained the death penalty,[78] hence indicating a decline in the use of the death penalty, particularly when compared with the average of 280 death sentences per year in the 1980s and 1990s.[79] Amnesty International also reports that China still

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75. *See*, Tibamanya Mwene Mushanga, The Death Penalty and its Alternatives (A Paper Presented at the Conference on Death Penalty in Africa, Ibandan, Lagos, 3-8 October 1997; and also at Amnesty International Conference on the Abolition of the Death Penalty, Stockholm, December 1997, CDP 20th March 1977). *See*, R. Dann, *The Deterrent Effect On Capital Punishment*: The Committee Of Philanthropic Labor Of Philadelphia Yearly Meeting Of Friends/Bulletin No. 29 (1935).

76. Sellin, *The Death Penalty And Police Safety* 22 Parliament 2nd Session 718 – 728 (1955). See also, L. Savitz, *A Study in Capital Punishment*, 49 J. CRIM. L .C & P. S 338 _341 (Nov –DEC 1958).

77. *State v. Makwanyane and Mchunu* (1995), Par., 126.

78. AMNESTY INTERNATIONAL, DEATH SENTENCES AND EXECUTIONS 2011, ANNUAL REPORT (March, 2012), at 6. Available <http://www.amnesty.org/en/library/info/ASA36/004/2012/en>, (Accessed, 2, June 2012).

79. *Id.*

accounts for the majority of the world's executions. The use of the death penalty in the country is still shrouded in secrecy since it considers the records as a state secret.[80] However, the recent lifting of the death sentence on a total of 22 Ugandans who were due for execution over offences of drug trafficking in China[81] indicates a softening policy towards the death penalty in the country. At least 1,923 people were known to have been sentenced to death in 63 countries in 2011, which represents a decrease from the 2010 figure of at least 2,024 death sentences worldwide.[82] At least 18,750 people were under sentence of death worldwide at the end of 2011.[83]

1. Individual Deterrence—Deterrence takes two forms: *individual deterrence* where the offender is given such unpleasant time, that through fear of repetition of the punishment, he will never repeat his conduct. Reverend Sydney Smith states that "when a man has been proved to have committed a crime it is expedient that society should make use of that man for the diminution of crime; he belongs to them for the purpose."[84] It is however clear that this theory never considered the death penalty as a punishment.[85] Reverend Sydney Smith further asserts that "When we recommend severity, we recommend, of course that degree of severity which will not excite compassion for the sufferer and lessen the horror of the crime. That is why we do not recommend torture and amputation of limbs (and certainly, not the death penalty)."[86]

Abolitionists don't disagree with retentionists that the death penalty is an effective protective measure against incorrigibly non-reformable dangerous criminals, but argue that life imprisonment is a completely adequate and protective measure.[87] Cesare Beccaria asserts that the continual example of a man deprived of his liberty and condemned, as a beast of burden to repair by his labour the injury he has done to society, is a better option.[88] Although abolitionists agree that it is

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80. *Id*., at 19.

81. Milton Olupot, *Ugandan drug dealers survive gallows in China,* THE NEW VISION, 3rd June 2012.

82. Amnesty International, *supra* note 79, at 6.

83. *Id.,* at 8.

84. RADZINOWICZ LEON AND TURNER, THE MODERN APPROACH TO CRIMINAL LAW 40 (1968).

85. G.B. Edmund, Working Papers Of The National Commission On Reform Of Federal Laws, USA Government Printing Press, Wahington, at 368.

86. Radzinowicz and Turner, *supra* note 84.

87. T. Sellin, *Death Penalty,* in Working Papers of The National Commission on Reform of Federal Criminal Laws Vol. 2 1, Washington (G.B Edmund, 1970).

88. Cesare Becaaria, "*Crime and Punishment*" (An Essay), Translated By E. D. Ingraham (Stanford: Academic Reprints, 1952), at 99.

misguided to release those who remain a danger to society, they contend that this indicates a need for reform of parole and pardon practices rather than a need for executions. The incorrigibly dangerous criminals should be studied to determine how to deter others from such behaviour.[89] Amnesty International observes that as much as the death penalty prevents that person from repeating the crime, there is no way to be sure that the prisoner would indeed have repeated the crime if he is allowed to live, nor is there any need to violate the prisoner's right to life for the purpose of incapacitation.[90]

A number of penologists believe that the death penalty is a highly unsatisfactory solution. They argue that such a sentence removes all inducement to improve and thus greatly increases the difficulty and danger involved in handling the men so sentenced. Several states that have generally abolished capital punishment have thus retained it for serial killers. This is because the death penalty is an absolute deterrent measure compared to life imprisonment.

Sydney Hook, professor of philosophy at New York University, observes as follows:

> In a sub-class of those who murder *several times*, there may be a special group of serial murderers who knowing that they will not be executed, will not hesitate to kill again and again. For them, the argument for individual deterrence is obviously valid. Those who say that there must be no exceptions to the abolition of capital punishment can't rule out the existence of such cases on *apriori* grounds. If they admit that there is a reasonable probability that such murderers will murder again (a probability which usually grows with the number of repeated murders), and still insist they would never approve of capital punishment, I would conclude that they are indifferent to the lives of the human beings doomed, on their position to be victims.[91]

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89. R. Caldwell, *Why is the Death Penalty Retained?* The Annuals: 48-49 Nov. (1952). See also, K. MENNINGER, THE CRIME OF PUNISHMENT (1968).

90 Amnesty International, (1989) When The State Kills…The death penalty v Human rights (1989) at 5.

91. S. Hook: *The Death Sentence,* Quoted *In* The Death Penalty In America. An Anthology (H. Bedau ed., 1967) at 153. See also, G.B. Edmund, *Working Papers of the National Commission on Reform of Federal Criminal Law* 1970, USA.

2. General Deterrence—The other form of deterrence is general deterrence in which the aim of the punishment is to discourage others minded to commit a crime. Sir James Stephen states that "A great part of the general detestation of crime which happily prevails among the decent part of the community in all civilised countries arises from the fact that the commission of offences is associated in all such communities with the solemn and deliberate infliction of punishment whenever crime is proved."[92]

The Massachusetts Special Commission on The Death Penalty also stated that since many murders are crimes of passion or acts of insanity, it is an indication of the success of the death penalty in deterring people from premeditated murder. The impact of the death penalty is most effective as a psychological deterrence in preventing large numbers of potential wrongdoers from ever reaching the state of criminality where their behaviour becomes uncontrollable and impulsive.[93] The former director of the Federal Bureau of Investigations (FBI), J. Edgar Hoover, observes that "The professional law enforcement officer is convinced from experience that the hardened criminal has been and is deterred from killing based on the prospect of the death penalty."[94] Hoover further observed that in America, those who committed capital offences would take their victims to American states that were against the death penalty.

Holmes plainly states as follows:

> If I were having a philosophical talk with a man I was going to have hanged, I should say, "I do not doubt your act was inevitable for you, but to make it avoidable by others, we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you live. But the law must keep its promises.[95]

However, in Uganda, the controversial state policy of shoot-to-kill aimed at armed robbers did not decrease armed robberies. More so, with the introduction of capital punishment for defilement in 1990, there have been increasing cases of defilement,[96]

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92. See also, W.F. Roper, Murderers In Custody, (Ed. Louis. Bloom-Cooper), Duckworth; London (1969), at 103.

93. Massachussetts Special Commission, Established For The Purpose Of Investigating And Studying The Abolition Of The Death Penalty In Capital Offences: Recommendations (1958) Mc Cellan Ed., 1961

94. *Id.*

95. Mabbott, Punishment, 48 Mind (n. s) 152 (1939).

96. The New Vision Newspaper, 19th July 1994.

even deteriorating from defilement of teenagers to toddlers.[97] It is incorrect to assume that all or most of those who commit such crimes as murder do so after rationally calculating the consequences. James B. White, for example, observes that one magistrate discovered that men who had shaved their beards in the morning did not know that they would commit a murder that night.[98] Gardiner also says that:

> …deterrence works less through fear of punishment itself than through fear of social disapprobation. The majority of people need the approval of their fellow citizens… the criminal looks to other criminals...the way to get prestige with other criminals is by being more daring in your criminal exploits, more persistent in pitting yourself against society and its rules…[99]

Based on the above, the UN Committee on Crime Prevention and Control concluded that the fact that all evidence continues to point in the same direction is persuasive *apriori* evidence that countries like Uganda need not fear sudden and serious changes in the curve of crime if they reduce their reliance upon the death penalty.[100] In concluding the deterrence argument, Roger Hood asserts that "[T]he issue is not whether the death penalty deters people, but whether, when all circumstances surrounding the use of capital punishment are taken into account, is it a more effective deterrent than the alternative sanction, most usually imprisonment for life…"[101]

C. Public Opinion

Another reason given for retaining the death penalty is that public opinion demands it. The official response of the Government of Uganda towards Amnesty International's 1991 report titled *Uganda: Failure to Safeguard Human Rights,* was that if the death penalty was abolished, the people would lose confidence in government and take the law in their own hands. However, respect for human rights must never be dependent on public opinion especially when it is based on

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97. Paul Waibale Senior, *Should We Abolish Hanging*?, THE NEW VISION, 20th December 1999.

98. J. White J, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (1973).

99. *Id.*, at 197.

100. UN, *The Question Of The Death Penalty And The New Contributions Of The Criminal Sciences To The Matter*, at 80.

101. R. HOOD, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE, 2ND ED. (REVISED AND UPDATED), 1996, OXFORD: CLARENDON PRESS, at 6, para 23.

incomplete understanding of the relevant facts and the phraseology of the questions asked is biased. Father John Mary Waliggo, a former commissioner of the 1995 Uganda Constitutional Commission, noted that the response of the public towards the issue of the death penalty was poor because of poor sensitisation of the masses on the issue. He observed that apart from a few letters in newspapers, Uganda failed to embark on a fully-fledged debate on the issue.[102]

Unfortunately, the Uganda Constitutional Commission relied on the above insufficient statistics to recommend that the majority of Ugandans wanted the death penalty retained. The commission further reported that the desire to retain the death penalty was due to the long periods of unrest in the country. More so, that the penalty would deter hardened criminals who fear only death and no other punishment.[103] However, these reasons are not strong because Uganda has been enjoying a relatively peaceful status quo, yet over the past 10 years, the rate of crime has more than doubled. It is, therefore, important for the government to develop a policy on the death penalty and ensure that the public is fully informed about the same.

It is likely that more people would support the abolition of the death penalty if they were properly informed of the facts surrounding the use of the same and the reasons for its abolition.[104] This was proved by a study of a random sample of adults carried out by *Austin Sarat and Neil Vidmar.*[105] They found that most people knew little about the effects of the death penalty and the support for it declined when people were exposed to information. Some of the 181 subjects of the experiment were asked to read an essay giving facts and arguments of the death penalty. Before reading it, 51% of the subjects said they favoured the death penalty, while 29% were against it and 20% were undecided. After reading the essay, support for the death penalty had dropped to 38% and opposition had grown to 42% with 20% undecided. Among the control group who were asked to read an essay on unrelated topic, opinions of the death penalty remained substantially unchanged.[106]

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102. Fr. John Waliggo, How The Constitution Process Dealt With The Death Sentence, Uganda Human Rights Monthly Magazine, June 1999.

103. *Id.*

104. AMNESTY INTERNATIONAL, WHEN THE STATE KILLS: THE DEATH PENALTY V. HUMAN RIGHTS, REPORT (1989).

105. HUGO ADAM BEDAU AND CHESTER M. PIERCE, PUBLIC OPINION, THE DEATH PENALTY AND THE EIGHTH AMENDMENT: TESTING THE MARSHALL HYPOTHESIS "IN CAPITAL PUNISHMENT IN THE UNITED STATES (1976), at 190-223.

106. *Id.*

Apollo Makubuya, in the same vein, argues that from a legal perspective the constitutionality of the death penalty cannot be founded on public opinion *per se*.[107] He argues that the issue should not be what the majority of Ugandans believe to be a proper sentence for murder.[108] Rather it is whether the death penalty is consistent with the concept of human rights, under its constitutional order and binding treaty law. Questions of interpretation of the constitution are vested in the courts. The courts cannot afford to allow themselves to be diverted from their duty of being independent arbiters of the constitution by making choices on the basis that they will find favour with the public.[109] Hence, if public opinion were to be decisive, there would be no need for constitutional adjudication.[110]

D. The Financial Cost

Another justification offered in defense of the death penalty is simply that it is cheaper to kill certain prisoners than keep them in prison. In 1982, a study in the US state of New York found that the average capital offence trial and first stage of appeals alone costs the tax payer about $ 1.8 million, more than twice as much as it would cost to keep a person in prison for life.[111] A number of judges and prosecutors thus oppose the death penalty precisely because they believe that the enormous concentration of judicial services on a handful of cases diverts valuable resources away from other more effective areas of law enforcement and social reform. Uganda needs to follow this example.

A Ugandan local daily reported that over 44 prisoners at Luzira Maximum Prison would have to be executed since there was lack of space to accommodate them in the prison.[112] However, Joseph A. A. Etima, the former Commissioner General of the Uganda Prisons Service, argues that the percentage of prisoners on death row is negligible compared to the number of other prisoners and therefore their upkeep is negligible. He supported this finding with the prison statistics that showed that in the year 2000, out of the general prison population of 15,391, only 225 were on death row, representing only 1.5% of the entire prison population. He

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107. A.N. Makubuya, *The constitutionality of the death penalty in Uganda*, 6, EAST AFRICAN JOURNAL OF PEACE AND HUMAN RIGHTS, 222 (2000), at 229.

108. *Id.*

109. *Id.*, at 230.

110. *Id.*

111. NEW YORK STATE DEFENSE ASSOCIATION TO THE SENATE FINANCE COMMITTEE AND OTHER SECTIONS OF THE LEGISLATURE, CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY FOR NEW YORK STATE, REPORT (APRIL 1982).

112. The Sunday Vision Newspaper, 19th March 2000, at 28.

also argued that these prisoners can be made to contribute significantly to their upkeep and strongly argued that the value of human life cannot be quantified in monetary terms.[113]

E. Reformation

It has been argued that the only humane motive and possible moral justification for punishment are to reform the criminal. This is because of the belief that the delinquent may be re-educated to become a useful member of society.[114] Aliro Omara, a former commissioner at the Uganda Human Rights Commission, believes that every person can improve himself and should be given the opportunity to do so regardless of the seriousness of his mistakes.[115] Retentionists of the death penalty refute this argument, arguing that the condemned are already religious, have school education, and some may even respond to emotional appeal but are very likely to backslide when opportunity or temptation avails. To them, it is impossible to be certain that a prisoner has in fact been cured. The scientific means of cure are more uncertain because the apparatus of detention only increases the killer's *anti–social animus.*

Nabimanya Ericsson,[116] a prisons officer in the Uganda Prisons Service, observed that some of the convicted criminals are indeed "cured" so long as they stay under a rule. The stress of the social free-for-all throws them back on their violent modes of self-expression, thus society has failed – twice: it failed the victims, of the crime and also the killer.[117]

Other advocates of the death penalty argue that the state should not devote large funds for maintaining perpetrators of horrible crimes in prison at the expense of law abiding citizens missing out social services such as adequate hospital facilities. One respondent vehemently argues that "the condemned should not even remain in prison for a long time, because they don't deserve to feed on our taxes."[118] Abolitionists, however, claim that murderers on death-row are no more likely than any other prisoners to commit acts of violence against prison officers or fellow

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113. R.D. Ruhweza, A Review of the application of the death penalty in Uganda (LLB Dissertation, Makerere University, 2000). Unpublished.

114. Professor Emeritus Rani Bharilai of Thailand, *Quoted in* Amnesty International, *supra* note 104.

115. Ruhweza, *supra* note 113.

116. Interview carried out on March 24, 2000 at the Condemned Section of Luzira Upper Prisons, Uganda.

117. H. Bedau, The Death Penalty In America. An Anthology, at 159 (Ed., 1967).

118. Bartholomew Musigire Ziriddammu, The New Vision, 7th January 2000.

prisoners or to attempt escape. On the contrary, it would appear that in all countries, they are on the whole, better behaved than most prisoners. Reformation in form of religion has played a big role in the life of the condemned.[119] According to the respondent, most of the death row prisoners are reformed and devote Christians.

Father Tarcisio Agostoni, in his book *May the State kill?,* reveals a letter written by a reformed prisoner—Kalisiti Sebugwawo—who was hanged in February 1993. In the letter, the prisoner notes:

> Jesus has been calling me to follow him, but I said to him… I am a sinner, leave me alone, how can you love me, when am still in the condemned section of Luzira prison? He said, "I have a plan for you in this confined place that is why I created you". I accepted Jesus and started to obey his call daily. Jesus used me as his instrument for 14 years in condemnation… Don't worry or curse anybody about my death. But give thanks to God because he has called us home to live with Him in Happiness…[120]

The 1999 report of Amnesty International also affirms that criminals do actually reform. The report cites the example of Joseph Cannon who was executed on April 22 1998 and observes as follows:

> I want people to know I have repented for what I have done, and if I could do something, anything to change what has been, I would … I am very ashamed to die this way." His counterpart in crime, Robert Anthony Carter said: "I hope the victim's family will forgive me because I didn't mean to hurt or kill no one."[121]

It should thus be noted that a murderer is "a man plus murder, and real justice is done when the judge punishes the murder and restores the man."[122] The death sentence is indeed abominable, as abominable as crime itself, yet our state must be based on love, not hatred and victimisation. Our Penal Code must be based on rehabilitation rather than annihilation.

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119. See generally, Ruhweza, *supra* note 113.

120. TARCISIO AGOSTONI, MAY THE STATE KILL? A CHALLENGE TO THE DEATH PENALTY (2002), at 31 – 34.

121. Amnesty International, *supra* note 40.

122. V.R. J. Krishna, *Supreme Court of Indi , cited in* Amnesty International, *supra* note 104.

F. Religious Argument

The defense of capital punishment on religious grounds rests primarily on two points: first, in the case of the Hebrew Christian tradition, the Bible clearly differentiates between murder and the death penalty as a just punishment for the taking of God-given life.[123] The Bible also elaborates in very clear terms that a murderer is to be put to death only on the testimony of more than one witness. More so, one who has killed could run to a city of refuge not to be killed in revenge before standing trial before the assembly.[124] This can be likened to our modern justice system.

It is further argued that the law of love preached by Jesus Christ implies the need for the existence of a strong civil law, and that it is a misreading of the biblical teaching to see it as advocating leniency for criminal behavior. Rev. Dr. Jacob J. Vellenga states that "The law of love, also called the law of liberty, was not presented to do away with the natural law of society but to inaugurate a new concept of law written on the heart where the main springs of action are born." Wherever and whenever God's love and mercy are rejected as in crime, natural law and order must prevail, not as extraneous to redemption but as part of the whole scope of God's dealing with Man. Thus, the law of capital punishment must stand as a silent but powerful witness to the sacredness of God-given life. It is also argued that the state authorities are ordered by God[125] and have the mandate to carry out the penalty of death on behalf of God.[126]

In Sharia Law, major crimes for which death is recommended are: Apostasy (where individuals convert from the Islamic faith to another religion and begin to criticise Islam), adultery (where, however, four eye witnesses should be produced to prove this if the accused does not admit to the crime); cowardice during war, abortion, and insulting the Prophet Mohammed and his Holy Qu'ran. The death penalty in these cases is decided upon by the Mufti in consultation with the Ullamah (committee of justice) bearing in mind the place, time, age, culture and history of the people.[127]

Abolitionists, however, believe that even sinful men are the objects of God's redemptive love and that vengeance belongs to God, not man.[128] In the words of

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123. Genesis 9:6; Numbers 35:16-21 N.I.V.

124. Numbers 35:30 NIV.

125. Romans 13:1 – 2 NIV.

126. Genesis 9:6 NIV.

127. Mohammed Ndaula, Death Penalty in Uganda: The Islamic View Point, UHRC Magazine June – July, Vol .6, 1999, at 13.

128. Romans 12:17,GENESIS 4:15, Leviticus 19:18 (K.J.V).

Bishop John Wesley, Lord of the Washington D.C. Conference of the Methodist church:

> A Christian view of punishment must look beyond correction to redemption. It is our Christian faith that redemption by the grace of God is open to every repentant sinner, and that is the duty of every Christian to bring to other by every available means, the challenge and opportunity of a new and better life. We believe that under these circumstances, only God has the right to terminate life.[129]

Abolitionists also quote St. Augustine of the early church in his plea to save some Donatists, a heretic African sect that had confessed to heinous murder of Christians. He said:

> We do not have the sufferings of the servants of God avenged by the infliction of precisely similar injuries in the way of retaliation. Not, of course, that we object to the removal from these wicked men of the liberty to perpetrate further crimes, but our desire is rather that justice be satisfied without the taking of their lives or the maiming of their bodies in any particular; and that by such coercive measures as may be in accordance with the law, they be drawn away from their insane frenzy to the quietness of men in their sound judgment or compelled to give up mischievous violence and betake themselves to some useful labour.[130]

Martin Luther, the founder of the Protestant church, also protests the use of the death penalty, writing:

> The image of God is the outstanding reason why he does not want a human being killed on the strength of individual discretion: man is the noblest creature… God wants us to show respect for this image in another, he does not want us to…shed blood in a tyrannical manner.[131]

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129. *Id.*

130. ARTHUR KOESTLER, DARKNESS AT NOON (1941).

131. The Works of Martin Luther: "*Lectures On Genesis*". PHILADELPHIA[:Muhlenberg (1931)2:141]

In Islam, the Quran clearly enjoins upon the faithful in *Surat Bakar and Maida* as follows;

> "O ye who believe
> The law of equality is prescribed to you
> The free for the free
> The slave for the slave
> The woman for the Woman
> But if any remission is made by the brother of slain, then grant any reasonable demand and compensate him with handsome gratitude
> In the law of equality there is saving of Life (Emphasis added).
> To you o ye men of understanding
> That you may restrain from yourselves..."[132]

The Quran enjoins us to desist from taking a life. It only recommends the taking of life in exceptional circumstances. It states that "…Take not life which God has made sacred, except by way of justice and …law….[133] It further states:

> Nor take life which God has made sacred – except for just cause. And if anyone is wrongfully killed, we have given his heir authority (to demand Qisas (retribution) or to forgive); but let him not exceed bonds in the matter of taking life.[134]

Prophet Muhammad, in his farewell sermon, also declared: "Verily your lives and properties are sacred to one another till you meet your Lord on the day of resurrection."[135] In another tradition, the prophet Muhammad said "the first offence to be judged by God between mankind on the day of Judgment will be unlawful taking of lives."[136] The Quran recommends that if the relatives of the murderer can remit a compensation to make retribution for the dead, that is what is best for a believing Muslim since Islam is a religion of restraint. It is clear from the above arguments that the sanctity of life is of foremost concern to both God and man; life should be preserved regardless, or rather in spite of, what that life has done to society.

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132. Ndaula, *supra* note 128.
133. Surat 6: 51.
134. Surat 17:33.
135. International Human Rights and Islamic Law, p. 67
136. *Id.*

G. Human Rights Arguments

Since World War II, the movement for respect of human rights has grown rapidly, and with it has been the advocacy for the abolition of the death penalty.[137] Human rights are now central in all aspects of human development. Human rights are basic to man's dignified existence and the foundation of peace, justice and morality.

During the past two decades, at least two countries a year have on average eliminated the death penalty. Today, over 50% of countries worldwide have abolished it in law or in practice. This affirms the respect for human rights and dignity envisaged in Articles 3 and 6 of the Universal Declaration of Human Rights (UDHR) and the International Covenant for Civil and Political Rights (ICCPR).

The United Nations has also showed its commitment towards abolishing the death penalty by enacting General Assembly Resolutions 2393 and 2857[138] which refer to the elimination of capital punishment.[139] Dane R. Gordon argues that the condemned is also a member of the human family. To put him to death is to absolve him forever from responsibility to undo his wrong, and this responsibility falls back to the relatives who remain behind. Society is thus injured twice.

IV. THE GLOBAL MOVEMENT AGAINST THE DEATH PENALTY UNDER INTERNATIONAL HUMAN RIGHTS AND INTERNATIONAL CRIMINAL LAW

The death penalty has increasingly come within the ambit of international human rights standards, which are adopted by governments in the UN and other regional inter-global organisations. Elements of these standards have been established by restrictions and safeguards to be observed by the countries where the death penalty has not yet been abolished. For example, the Protocol to the European Convention on Human Rights abolishes the death sentence for peacetime offences.[140] In 1980, the Parliamentary Assembly of the Council of Europe adopted a resolution calling on parliaments of member states to abolish the death penalty for peacetime offences and recommended the amendment of the European Convention on Human Rights (ECHR). Article 2 of the ECHR states, in part that: *"No one shall be deprived of his*

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137. Amnesty International, *supra* note 105, at 1.

138. G. A Res.2393 (XXIII), UN Doc. A/PV.1727(1968), G.A Res 2857 (XXVI), UN Doc. A/8429 (1971).

139. COALITION FOR THE ABOLITION OF THE DEATH PENALTY IN UGANDA AND FOUNDATION FOR HUMAN RIGHTS INITIATIVE, TOWARDS ABOLITION OF THE DEATH PENALTY IN UGANDA (2008).

140. See Appendix 13 Annexed.

life intentionally save in the execution of sentence of a court following his conviction of a crime for which this penalty is provided by Law."[141] The European Union has also followed suit by requiring all its members to abolish the death penalty in its Charter on Fundamental Rights. The death penalty is outlawed both in peacetime and war.[142]

Other treaties aimed at abolition of the death penalty include the Second Optional Protocol to the International Convention Civil and Political Rights which states in Article 1 that "No one within the jurisdiction of a state party to the present protocol shall be executed." The treaties also obligate state parties to take all necessary measures to abolish the death penalty within their jurisdiction. The UN Economic and Social Council, in Resolution 1984/50, adopted safeguards guaranteeing protection of the rights of those facing the death penalty. Article 3 states that "persons below 18 years of age at the time of commission of the crime shall not be sentenced to death nor shall the death penalty be carried out on pregnant women or new mothers or on persons who have become insane."[143]

In July 1996, the UN further tightened the Safeguards in Resolution 1996/15 by urging members of the UN "to ensure that officials involved in decisions to carry out an execution are fully informed of the status of appeals and petitions for clemency of the prisoner in question." This is designed to prevent situations which sometimes arise when a prisoner is executed while an appeal is pending, supposedly because officials carrying out the execution were not aware of the appeal. An example is the case of *Bello v. Attorney-General of Oyo State*, where the Attorney General recommended the execution of the deceased which was effected while an appeal was pending. The Supreme Court held that the premature execution of the deceased while his appeal was still pending was illegal and unlawful and a deprivation of the deceased's right to life.[144]

On 11th December 1977, the Stockholm Conference on the Abolition of the Death Penalty adopted the Declaration of Stockholm "calling for unconditional opposition to the death penalty, condemning all executions in whatever form, committed or condoned by the governments and committing to work for the Universal abolition of the death penalty".

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141. *See Appendix 8 Annexed.*

142. Charter of Fundamental Rights of the European Union, Nice (2000), 2000/ C 364/ 01, <http://www.europarl.eu.int/charter/pdf/text_en.pdf>.

143. See Appendix 2 Annexed

144. M.O. Ogungbe, *Bello v. A.G, Oyo State: An Appraisal of the right to life in Nigeria,* 4 EAST AFRICAN JOURNAL OF PEACE AND HUMAN RIGHTS (1998), at 209.

Although countries which retain the death penalty would be obliged to ratify these treaties, the treaties can be attractive to abolitionist countries as a means of adding to national abolition, the force of international law and cement international obligations towards human rights and in particular, the right to life. On a positive note, a number of countries which have abolished the death penalty make a practice of refusing to extradite people to countries where they could be sentenced to death and only grant extradition after receiving satisfactory assurances that a death sentence will not be imposed or, alternatively, will not be carried out.[145] Article 11 of the European Convention on Extradition of 1957 states:

> If the offence for which extradition is requested is punishable by death under the law of the requesting party, and if in respect of such offence the death penalty is not provided by the law of the requested Party is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death Penalty will not be carried out.[146]

More so, provisions imposing safeguards on extradition in cases involving possible death penalties are included in the laws of abolitionists countries like Australia, Denmark, the Netherlands, Switzerland, and the United Kingdom.[147] In the *Kindler Case,*[148] Canada refused a request to extradite an escaped murderer back to the USA. The UN Human Rights Committee, in deciding whether Canada was violating Article 4 of the Second Optional Protocol to the ICCPR, held that the issue was not the status of the death penalty which was permitted by Article 6 of ICCPR but extradition engages the responsibility of the abolitionist state making such extradition prohibited.

At the regional level, the European Commission of Human Rights in the *Soering Case*[149] held that extraditing Soering to the state of Virginia in the USA,

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145. Amnesty International, *supra* note 105, at 85.

146. Article 11 of the European convention on Extradition of 1957, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/024.htm>, (last accessed August 30, 2013).

147. Auselie Ferungs – Und Rechtshilfegesetz of 1979, Par.20; Extradition Act of 1967 Article 10; Extradition Act of 8; Loefe'derale Sur Lemntraide Internatinale En Matiere Penale of 1981, Article 37 and Criminal Justice Act, 1988 Part 1, Section 9(6) respectively.

148. *No. 470/1991 Decision of July 30, 1993 Text In International Human Rights Reports* 1(2) 1994, at 98.

149. 7 July Series, No,161. Para 91, at 35,*reported in* Human Rights in the World: An Introduction to the Study of International Protection of Human Rights [Ed: A.H. Robertson] Merrills 4th Edn. [Manchester University Press, New York, 1996]

while knowing that he would be subjected to the death penalty, would be inhuman treatment considering his mental capability and age and would be contrary to article 3 of the ECHR. The court stated that neither expulsion nor extradition is permitted to a country where the person concerned may be subjected to a serious violation of his most fundamental human rights.[150] This shows a fair amount of commitment by developed countries to abolishing the death penalty.

However, this campaign is hampered by double standards in its implementation. The fact that the countries that are permanent members of the Security Council like China and USA have agreed to abolish the death penalty for international crimes but continue to impose it freely for murder or even theft is a serious contradiction.

Trends in international criminal law are also moving towards the abolition of the death penalty. The statutes of the International Criminal Tribunals for Rwanda (ICTR) and former Yugoslavia (ICTY) do not have provisions for the death penalty. The Rome Statute of the International Criminal Court also does not have provisions on the death penalty. At the ICTR, seven officials of the former Hutu-led government of Rwanda—including Jean Paul Akayesu—were tried[151] and sentenced to life imprisonment for genocide, crimes against humanity and direct and public incitement to commit genocide.[152]

The continued existence of the death penalty in Rwanda constituted one of the main obstacles preventing the transfer of detainees held by the International Criminal Tribunal for Rwanda (ICTR), or indicted genocide suspects living abroad, to the country's national jurisdiction. Rwanda's abolishment of the death penalty in 2007[153] made it the first country in Africa's Great Lakes region to call a halt to executions and the 100th country worldwide to abolish the punishment in law, hence accelerating the worldwide trend towards ending capital punishment.[154]

Uganda has adopted the First Optional Protocol to the ICCPR and the resolutions safeguarding the rights of those facing the death penalty in its municipal law.[155] The state has also ratified the Rome Statute to the International Criminal

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150. NANATTE A.NEUWAHL & ALLAN ROSS, THE EUROPEAN UNION & HUMAN RIGHTS (1995).

151. J. Navarethem Pillay President of the International Criminal Tribunal For Rwanda (ICTR), *We neither target nor favour any groups in Rwanda,* THE EAST AFRICAN NEWSPAPER, March 20-26, 2000, at 13.

152. ICTR-96 –T Judgement Derived On September 2, Arusha International Conference Centre, Tanzania, <available at http://www.ictr.org.> (accessed 26th May 2012).

153. Amnesty International, Rwanda abolishes death penalty, 2 August 2007. Available at <www.amnesty.org/.../rwanda-abolishes-death-penalty-200708...> (Accessed 27, May 2012).

154. *Id.*

155. See, sections 102 and 104 of the Trial on Indictment Decree No. 26 of 1971.

Court and domesticated it under the International Criminal Court Act.[156] This notwithstanding, Uganda retains the death penalty for ordinary crimes under the domestic law like murder, rape, and aggravated defilement.[157]

7. Constitutional Concerns

Article 44 of the 1995 constitution states that "Notwithstanding anything in this constitution, there shall be no derogation from the enjoyment of the following rights and freedoms: (a) freedom from torture, cruel, inhuman or degrading treatment or punishment." Killing constitutes the ultimate denial of the humanity and dignity of the condemned prisoner as entrenched in the constitution. The death penalty is inhuman because it "involves, by its very nature, a denial of the executed personal humanity, and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state."[158] Article 22 (1) of the 1995 constitution provides as follows:

> No person shall be deprived of life intentionally except in the execution of a sentence passed in a fair court of competent jurisdiction, in respect of a criminal offence under the laws of Uganda, and the conviction and sentence have been confirmed by the highest appellate Court.

This is a claw-back clause that brings the provision in conflict with the absolute prohibition *against "any form of torture, cruel, in human and degrading treatment.*" It follows that the exception in Article 22 does not extend to Articles 24 and 44 because no derogation is allowed for such treatment or punishment, as the provision says, "notwithstanding anything in the constitution."[159]

The courts are therefore competent to declare the death penalty unconstitutional.[160]A precedent can be seen in an American case where the United States Supreme Court held by a majority in *Furman v. Georgia*[161] that the death penalty statute of the state of Georgia was unconstitutional because it had been applied in an arbitrary, capricious, and discriminatory manner. Attempts to declare

156. Under sections 7-9, the ICC Act provides for the maximum sentence of life imprisonment for genocide, crimes against humanity and war crimes respectively.

157. International Criminal Court Act No.11 of 2010.

158. *State v. Makwanyane & Another* (1995) I L.R.C. 269 Par.10.

159. Tumwine-Mukubwa, *supra* note 38.

160. *Id.*, at 24.

161. *Furman v. Georgia* (1972) 408 US 238 at 282.

the death penalty unconstitutional in other jurisdictions have been made, with varying degrees of success.[162]

Justice Nwaluanya, in the case of *Mbushu and Dominic Mntaroje and another v. R*[163] ruled that hanging as a form of punishment was a cruel, degrading and inhuman and therefore unconstitutional. To him, "*the effect upon the public of the death sentence is to brutalize rather than humanize. If we insist on killing murderers, we are descending to the same levels as the murderers.*"

The sentence of death in Uganda is carried out by hanging in accordance with the provisions of the *Prisons Act Cap.313* and can only be executed after the president has issued a warrant directing the sentence to be carried out.[164] There are cases in which hangings have been messed up and the prison guards have had to pull a prisoner's legs to speed up his death. The whole process is sordid, debasing and brutalising. If the hangman gets it (the length of rope) wrong and the prisoner is dropped too far, the prisoner's head can be decapitated or his face torn away. If the drop is too short, then the neck will not be broken but instead the prisoner will die of strangulation. James B. White writes:

> The devastating, degrading fear imposed on the condemned man for months or even for years is a punishment more terrible than death, and one that has not been imposed on his victim. A murdered man is generally rushed to his death, even at the height of the terror of the mortal violence being done to him. The period of his horror is only that of his life and his hope of escaping whatever madness has pounced on him probably never deserts him. However, for the condemned man on the other hand, horror of his situation is served up to him at every moment on end. Torture by hope alternates only with the pangs of animal despair. His lawyer, and the prison warders in order to keep him docile unanimously assure him that he will be reprieved. He believes them all with his heart, yet he cannot believe them at all. He is hopeless by day, despairs by night. And as the weeks pass, his hope and despair increase proportionately until they become equally unsupportable. He is no longer a man, but a thing waiting to be manipulated by the executioners. He is kept in a state of absolute necessity, the condition of inert matter,

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162. *Patric Ntesang v. The State*, Court Of Appeal, Criminal Appeal No.97/1994. [Quoted FromAfrica: A New Future Without The Death Penalty April 1997 AI INDEX AFR 01/03/1997.]

163. HCCS Case No. 44/1991.

164. S. 9B (1) Of The Trial Of The Indictment Decree 26/71 And S. 101(4) And (5).

yet within him is the consciousness that is his principal enemy.[165]

More so, in the case of *Re Munhummeso and others,* it was held that the *raison d'etre* for the right not to be subjected to torture, inhuman or degrading punishment is nothing less than the dignity of man. It embodies broad and idealistic notions of dignity, humanity and decency against which penal measures should be evaluated. It guarantees that the power of the state to punish is exercised within the limits of civilised standards. Punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society or which involve the unnecessary and wanton infliction of pain are repugnant.[166] The death penalty is not the only way that society has of expressing moral outrage at the crime that has been committed.

Moreover, article 4 of the American Convention on Human Rights (ACHR) and Article 6 of the ICCPR clearly state that the severity of a punishment should not be disproportionate to the gravity of the offence. The 1984 ECOSOC safeguards on the death penalty state that the scope of the most serious crimes punishable by death should not go beyond the "intentional crimes with lethal or other grave consequences." Hence, the proportionality is between the loss of the offender's life and the "lethal or other extremely grave consequences" of the crimes for which the offender has been convicted.

8. Aiming High but falling Short? The Position in the Susan Kigula Case

The decision in the famous case of *Susan Kigula and 417 others v. Attorney General*[167] is the first of its kind in Uganda. The decision is considered a step forward towards abolishing the death penalty. Although the court did not entirely abolish the death penalty, it made pronouncements as regards the mandatory nature of the death penalty. The petitioners on death row petitioned the court under Article 137 (3) of the constitution challenging *inter alia* the death penalty/sentences imposed on them. They alleged that the death penalty and sentences related thereto

165. James White ,*THE LEGAL IMAGINATION*: *Studies In the Nature Of Legal Thought and Expression* (University Of Calorado, Little Brown AND Co., Boston Torornto 193).

166. Supreme Court Judgement No.221/93.

167. Constitutional Petition No.6 of 2003.

as provided for in various laws[168] were inconsistent with the constitution,[169] asserting further that it was a cruel inhuman and degrading treatment and/ or punishment going contrary to the provisions of Article 24.

The court was put to task to adjudge *inter alia* whether, the death penalty as provided was unconstitutional and whether it amounted to cruel inhuman and degrading treatment, whether the various laws[170] providing for a mandatory death penalty were unconstitutional, whether the mode of implementing the death penalty, which is by way of hanging as provided under section 99 (1) of the Trial on Indictment Act, is cruel, inhuman and degrading and a further violation of the constitution, and whether execution after a long period of time on death row was unconstitutional and amounted to cruel, inhuman and degrading treatment.

At the Court of Appeal, it was noted that: Firstly that the death penalty was constitutional and that it did not amount to cruel, inhuman, degrading treatment or punishment. The court affirmed that the framers of the constitution did not intend for the right to life to be absolute. That Article 22 recognises the death penalty as a legitimate exception to the right to life when pursuant to due process of law.[171] The court further went on to assert that the framers of the constitution did not intend to take away by Article 22 the right recognised in Article 24 and as such the death penalty was not cruel, inhuman and degrading.[172]

Secondly, for the respondents, whose sentences were mandatory and still pending before the appellate court, their cases should be remitted to High Court for mitigation of their sentences and the High Court may pass any sentence as deemed fit. The court, in analysing section 98 of the Trial on Indictments Act, observed that persons facing the death penalty should be the most deserving to be heard in mitigation.[173] It also concluded that mandatory death sentences were an intrusion of the legislature into the work of the judiciary, of which powers the legislature did not possess, yet the mandatory sentence did just that.[174]

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168. Sections 23(1), 23(2), 23(3), 23(4), 124, 129(1), 134(5), 189, 186(2), 319(2) and 241(1) of the Penal Code Act and sections 7(1)(a),7(1)(b), 8,9(1) and 9(2) of the Anti- Terrorism Act in as far as it permitted the imposition of the death penalty and section 99 (1) of the Trial on Indictment Act which p provided for the mode of carrying out the death penalty.

169. Articles 20, 21, 22(1), 24, 28, 44(a), 44(c) and 45.

170. For instance, section 98 of the Trial on Indictments Act which require courts to consider "the character and antecedents of the accused" when sentencing unless the sentence is death. Also section 189 of the Penal code states that "any person convicted of murder shall be sentenced to death."

171. *Kigula and 417 Others v Attorney General,* Judgment of Okello J, at 19.

172. *Id.*

173. *Id.,* at 38.

174. *Id.,* Judgement of Twinomujuni JA, at 46-47.

Thirdly, for those respondents, whose sentences were already confirmed by the highest court, their petitions for mercy under Article 121 of the constitution must be processed and determined within three years from the date of confirmation of the sentence. Where after three years no decision has been made by the executive, the death sentence shall be deemed commuted to imprisonment for life without remission. This meant that all prisoners on death row who would not have been executed in three years would benefit from a remission of their sentences to life imprisonment. The court affirmed that the death row syndrome as articulated in Catholic Commissioner and Riley cases makes an otherwise lawful death sentence cruel, inhuman and degrading punishment and that Uganda as a member of the global village cannot deny the death row phenomenon.[175]

Finally, that section 99(1) of the Trial on Indictments Act which provides for hanging was not unconstitutional. That the same provision did not amount to cruel inhuman degrading treatment as it operationalised Article 22 of the Constitution as far as the execution of a sentence by a competent court is concerned.[176]

The Attorney General appealed against the Constitutional Court's declarations on the mandatory sentences being unconstitutional and on the more than three year delay while on death row, while the respondents cross-appealed the Constitutional Court's declarations that the death penalty is constitutional and that hanging is an appropriate and therefore constitutional method of execution.[177]

The Supreme Court on the issue of whether the death penalty in itself constitutes a form of cruel, inhuman and degrading punishment in violation of Article 24 of the constitution, therefore unconstitutional, held that the death penalty does not in itself constitute a form of cruel, inhuman and degrading punishment, in violation either of public international law or Article 24 of the constitution.[178] And that had the framers of the constitution intended to provide for the non-derogable right to life, they would have so provided expressly.[179]

On the constitutionality of the mandatory death penalty, it was held that the mandatory death sentence is inconsistent with the constitution. In arriving at this finding, court considered the fact that the mandatory death penalty compromises the principle of fair trial and is inconsistent with the principle of equality before and

175. *Id.,* Judgment of Okello JA, at 50-51; Byamugisha JA, at 36; Twinomujuni JA, at 68-72.

176. *Id.,* Judgment of Okello JA, at 31-32; Twinomujuni JA, at 51; Mpagi-Bahigeine JA and Kavuma JA, at 28- 29.

177. Attorney General v Susan Kigula and 417 others, Constitutional appeal, no.3 of 2006.

178. *Id.,* at 27, 33-34.

179. *Id.,* at 33-34.

under the law. And that by fixing a mandatory death penalty, parliament had removed the judiciary's power to determine sentences, in essence "tying the hands of the judiciary in exercising its function to administer justice which fetters the judiciary's discretion hence a violation of Article 126 of the constitution and contrary to the principle of separation of powers.[180] It therefore held that cases of those individuals whose sentences are still pending before an appellate court shall be remitted to the High Court for a mitigation trial.

On whether prolonged detention prior to execution constituted a form of cruel, inhuman or degrading treatment in violation of Articles 24 and 44(a) of the constitution, the Supreme Court agreed with the finding of the Constitutional Court that to hold a person beyond three years after the confirmation of sentence is unreasonable.[181] It therefore held that cases of those individuals whose sentences are still pending before an appellate court shall be remitted to the High Court for a mitigation trial.[182] For those respondents whose sentences have already been confirmed by the highest appellate court, their petitions for mercy under article 121 of the constitution must be processed and determined within three years from the date their sentence was confirmed. Where no decision is made by the executive after three years, the death sentence shall be deemed commuted to imprisonment for life without remission.[183] The court while considering the death row syndrome, held that this period of delay should be counted from the time when the death sentence is confirmed by the highest court.

Finally, the court recommended that the legislature should make a scientific study of the available methods of execution and adopt and provide for one which conforms to the "*evolving standards"* of decency. The court held that hanging was constitutional because the pain and suffering experienced during the hanging process is inherent in the punishment of the death penalty which has been provided for in the constitution. However, Justice Egonda Ntende, in his famous dissenting judgment, noted as follows:

> …hanging as a method of execution as it is carried out in this country, is a process that is cruel, inhuman and degrading treatment and punishment. In situations where the head is plucked off this is like killing an insect or a bird. It is inhuman to decapitate persons in the name of punishment. To subject those who do not die instantly

180. *Id.,* at 41-44.
181. *Id.,* at 55.
182. *Id*., at 64.
183. *Id.,* at 63.

> to death by bludgeoning is likewise not only cruel, it is inhuman and degrading as well…

The Kigula case has generated some uncertainties, for instance, the Supreme Court held that only the cases of those individuals whose sentences are still pending before an appellate court shall be remitted to the High Court for a mitigation trial.

Barrie Sander argues that by only granting a right to mitigate to those individuals whose cases are still pending before an appellate court, the Supreme Court is arguably in breach of Article 21(1) of the constitution, which provides that all persons are equal before and under the law.[184] The right to mitigate should be available to all individuals who have been sentenced to death under a mandatory sentence regardless of whether they had previously exhausted the appellate process.[185] Questions have also been raised as to the practicality of mitigation hearings being conducted by new judges who had not conducted the trial, since some of them are no longer at the High Court or retired or even passed on.[186]

Whereas the Kigula case made it clear that death sentence shall be deemed commuted to imprisonment for life without remission if the executive fails to act in three years, what constitutes life has also been a subject of controversy. Section 47(6) of the Uganda Prisons Act defines imprisonment for life to mean 20 years of imprisonment. Jamil Ddamulira Mujuzi argues that the Supreme Court in the Kigula case went too far in ordering prisoners whose applications for clemency have not been commuted to imprisonment for life without remission. He argues that it overlooked the fact that prison authorities have the discretion to grant remission to offenders for meritorious behavior in prison as provided for under sections 84 to 86 of the Prisons Act.[187]

He further contends that there is a difference between life imprisonment where the offender is imprisoned for the rest of his life on the one hand and life imprisonment without remission on the other. He interprets the latter in light of section 47(6) hence imprisonment for 20 years. He alludes to the practice where prisoners are released after serving 16 years, eight months and 10 days if they

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184. Barrie Sander, *Capital Punishment Jurisprudence: A critical Assessment of the Supreme Court of Uganda's Judgment in A.G v. Susan Kigula and 417 others*, 55, 2 J.A.L, 261(2011) at 271-272.

185. *Id.*

186. Richard Buteera, Director of Public Prosecution, Effects of Susan Kigula and 417 others v A.G On principles of Sentencing and the way forward (A paper presented at the 12th Annual Judges Conference held at Imperial Royale Beach Hotel Entebbe,10th-14th January 2010), at 5.

187. Jamil Ddamulira Mujuzi, *How Should the most evil of law breakers be punished? The death penalty versus life imprisonment in Uganda, 1993-2009,* 17 EAST AFRICAN JOURNAL OF PEACE AND HUMAN RIGHTS, Vol (2011), at 445-446.

behaved well and earned profits, while in the former scenario, the prisoner would be imprisoned until death.[188] The ruling in the Kigula case could be interpreted to mean that an offender whose death sentence has been commuted to life imprisonment without remission should remain in prison for the rest of his life.

The Supreme Court, in its recent decision in the case of *Tigo Stephens v. Uganda*[189] delivered in May 2011), has clarified the position and noted as follows:

> We note that in many cases in Uganda, Courts have imposed specific terms of imprisonment beyond twenty years instead of imposing life imprisonment. It would be absurd if these terms of imprisonment were held to be more severe than life imprisonment.

It held that "life imprisonment means for the natural life term of a convict, though the actual period of imprisonment may stand reduced on account of remissions earned. It has been stated that the *Tigo* judgment has created a legal anomaly whereby the legislature said that 'life' means 20 years, and the judiciary that 'life' means life without the possibility of parole.[190] Hence, the *Tigo* judgment is not in conformity with section 47(6) of the Uganda Prisons Act. Therefore, the executive must clarify this issue at their earliest opportunity.[191]

It is apposite to note that on 6th August the Chief Justice constituted a task force to develop the sentencing guidelines[192] in order to provide guidance to judicial officers and avoid inconsistent and unjust sentences. The development of the Guidelines is a positive step towards creating uniformity and prescription of punishment commensurate with the nature of the crime. Guideline 31 which gives guidance on death penalty is to the effect that death penalty may only be imposed in the "rarest of rare cases…" This can be interpreted as a move in the right direction towards abolition of the death penalty.

9. Summation of Review of Capital Punishment in Uganda

This article has shown that the trend in the international community is that abolition of capital punishment is not just a necessity of our lives. It is the ultimate goal of the

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188. *Id.*

189. *Criminal Appeal No. 08 of 2009.*

190. PENAL REFORM INTERNATIONAL (PRI) AND FOUNDATION FOR HUMAN RIGHTS INITIATIVE (FHRI), THE ABOLITION OF DEATH PENALTY AND ITS ALTERNATIVE SANCTION IN EAST AFRICA: KENYA AND UGANDA (2011), at 32.

191. *Id.*

192. UGANDA LAW REFORM COMMISSION: ANNUAL REPORT (2010), at 28..

century and the meeting point of different cultures. It is true that the retentionists and abolitionists of the death penalty know no frontiers, be they ideological or economic, for abolition is not the preserve of developed countries such as the USA with a long standing democratic tradition, but equally the concern of countries like Uganda.[193]

The death penalty has been shown to be a violation of the fundamental right to life and to carry the official message that killing is an appropriate response to killing. The death penalty brutalises and contributes to desensitising the public to violence and can engender an increasing tolerance of other human rights abuses. An increasing number of jurisdictions are thus opting for life imprisonment without parole instead of the death penalty, while more religious and prestigious organisations like the American Bar Association are asking for courts to adopt a moratorium on capital punishment for abolition of the death penalty and advancement of human rights.[194]

The death penalty has often been used to repress political agitation and eliminate political opponents. Capital punishment, as it is practiced today in Uganda, was introduced by the colonial powers. However, governments continue to echo the colonial masters' claims that execution is an appropriate and effective deterrent, yet it has never been shown to deter more effectively than any other punishment.[195] It is a pseudo solution that diverts giving real attention to the problems of crime in a modern democracy. We must recognise the need to tackle the penal problems of the country.[196]

The death penalty is cruel, inhuman and degrading. Executions are brutalising and de-humanise everyone involved in the process. Life is cheapened and mental suffering is inflicted upon the relatives of the condemned. The cruelty of the death penalty is evident in spite of modern attempts to make the actual killing more 'humane.' The cruelty of the death penalty is seen in the decision of the state to take a prisoner's life, not merely how it takes that life. [197]

The feelings of the relatives of the crime victim, who appeal for the lives of the perpetrators to be spared, deserve respect. So does the pain and suffering of

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193. HANDS OFF CAIN, TOWARDS ABOLITION: THE LAW AND POLITICS OF THE DEATH PENALTY (1997), at 2.

194. *Id.,* at 2.

195. General Olusegun Obasanjo on Terrorism BBC Focus On Africa, *cited* in Agostoni, *supra* note 3.

196. EDWARD HEATH: Former Prime Minister Of United Kingdom Speaking On A Debate On Capital Punishment In The House Of Commons:] Parliamentary Debates Report (Hansard) Vol. 49 No.20] July 13, 1983 Col. 911.

197. Amnesty International, *supra* note 104, at 24.

distraught relatives who call for vengeance. But ultimately, the argument over the death penalty must rest, not on emotions, but on reason and universal respect for human rights. The victims gain nothing out of the death penalty since harm is already done; the raped remain traumatised, the orphans remain without parents, the robbed remain poor, and the murdered are never brought back to life.[198]

The death penalty negates the internationally accepted goal of punishment, which is the rehabilitation of offenders. No penological justification for the death penalty outweighs the human rights grounds for abolition. Life should be a sacred thing to man. The death penalty cannot be useful because of the example of barbarity it gives to men as the law which punishes homicide by committing homicide. The movement for the abolition of the death penalty is unstoppable and it will be only a matter of time before Uganda abolishes the practice. However, it is the people and leaders who must take the initiative to make a commitment to the advancement of human rights, and to finding genuine solutions to the problems of crime in society.[199]

V. RECOMMENDATIONS

Parliament should review harsh penal laws which contravene the human rights of individuals. These should be amended and more humane legislation that uphold the dignity and sanctity of life be developed. Article 22 of the 1995 Constitution should be amended to abolish the death penalty as it contravenes the right to life and the right not to be subjected to inhuman treatment, and as such contradicts Article 44, which prohibits the right not to be subjected to any form of torture or degrading treatment.[200] In light of this, parliament should be sensitised about the evils of the death penalty and periodic parliamentary debates should be instituted to make legislators more aware of the strength of the case against capital punishment.

The public needs to be sensitised about the death penalty by availing it with comprehensive and accurate information on the incidence and nature of crime and on the general effects of capital punishments to enable them to form an opinion on the death penalty objectively. The public ought to know about their civil and legal rights and should be given a forum where they can voice their opinions.[201] Civic education should be used to educate the masses on the barbarism of 'constitutional'

198. Ruhweza, *supra* note 114.

199. *Id*.

200. Tumwine-Mukubwa, *supra* note 38, at 23.

201. George Kanyeihamba, Uganda Still Needs the Death Sentence, UHRC Col. 3 Monthly Magazine (June-July 1999).

and legal executions of wrongdoers. In the absence of such education, the abolition of the death penalty will be a license for the population to take the law into their own hands and execute suspects (including innocent ones) before they are even tried in courts of law.[202]

To replace the death penalty, long-term custodial sentences should be given to those who commit capital crimes. This is because prison sentences create the possibility of rehabilitation and can always be reversed if evidence indicates that the convict is actually innocent.[203] However, in cases where harsh custodial sentences will be of no advantage to the society or the criminal due to overcrowding, poor health and sanitation, learning of bad habits by juveniles from adults, and pregnancy, house arrest for those less likely to commit crime again is recommended.

Compensation/restitution should be encouraged and effected by those found guilty of armed robbery, rape, defilement and even murder. This has been an old customary penalty in Uganda (if a man killed a fellow tribesman, it was possible to prevent or curtail a feud by payment of cattle). This was also used elsewhere by Hammurabi as early as 1700 BC, and the Romans in 449 BC. It is as such a tried and tested mechanism of conflict resolution, appeasement and abatement of crime.[204]

There should be a reawakening of judicial activism. Although traditionally courts in Uganda have adopted a broad 'hands off' policy from government action as seen from the cases of *Uganda v. Commissioner of Prisons Exparte Matovu,*[205] *Kayira and Ssemwogerere v. Rugumayo, Omwony Ojok, Ssempewa and 8 others,*[206] the courts have a duty to uphold basic norms of human rights in the performance of their duties as decided in *Frederick Ssempebwa v. Attorney General*.[207] They need to make reference to international human rights instruments like the Second Optional Protocol to the ICCPR, the European Court of Human Rights (ECHR) and judicial decisions emanating from those jurisdictions whose reputation for the advancement of human rights is high.

A judicial decision has great legitimacy and will command more respect if it accords with international norms that have been accepted by many countries than if it is based upon the parochial experience of foibles of a particular judge of court.

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202. For example, on Tuesday, May 09, 2000, Makerere University Students in Livingstone Hall wanted to lynch a thug, one Ismael Nuwa, who had attempted to rob the living out allowances of students worth 20 million shillings. [*The Makererean* Vol. No. 4, May 12, 2000, at 1-2]

203. William H. BAKER, *On Capital Punishment* Moody Press (1985), at 117.

204. A.N.M. Ousainu Darboe, "*The Role Of The Lawyers In The Protection Of Human Rights"* BASANGSANGE CHAMBERS –Banjul: The GAMBIA, at 2.

205. (1966) EA 514.

206. Constitutional Case No. 1 of 1979.

207. Colloquium held in April 1989, 407 US 514 (1972).

The majority decision in the case of *Susan Kigula, Fred Tindigwihura, Ben Ogwang and 414 others v. Attorney General,* is therefore a step in the right direction. This is because the death penalty is no longer a mandatory punishment. This view was also held in the cases of *Woodson v. North Carolina* and in *Roberts v. Louisania*.[208]

The process of the president executing his right to commute death sentences or sign death warrants should not take ages. This prolongation is a violation of human rights for which there is no tangible excuse, for justice delayed is justice denied.[209] There is need to create a Criminal Cases Review Commission like the one in Great Britain. In Great Britain, this body is charged with investigating possible miscarriages of justice in England, Wales and Northern Ireland. It assesses whether convictions or sentences should be referred to a court of appeal.

VI. CONCLUSION

Today, museums display thumb screws and racks, guillotines, ganottes and burning stakes, which were once instruments of torture and death commonly used but now serving as reminders of a harsh and distant past. Modern penal systems should relegate electric chairs, nooses, the guns of firing squads and lethal injections to museums where future generations will wonder how any society could ever have sanctioned their use. It is time that governments accepted that executing people violates fundamental human rights and serves no legitimate penal purpose.[210]

208. Supreme Court Decision 1976, *Quoted* in Roger Hood: *The Death Penalty: A worldwide perspective,* 2nd Ed. (Revised and Updated), (1996).

209. Giorgio Del Vecchio, *The Struggle Against Crime*" Translated By A.H Campbell, Professor Of Public Law, University Of Edinburgh.

210. Amnesty International, *supra* note 40.

'OUR' COWS DO MATTER: LIVESTOCK AND HUMAN SECURITY IN THE KARAMOJA CLUSTER

David-Ngendo Tshimba*

ABSTRACT

This article concerns itself with a security framework that seeks to privilege the survivability and safety of livestock in the Karamoja Cluster, beyond the normative claims of disarmament-cum-development professed by Disarmament-Demobilisation-Reinsertion-Reintegration (DDRR) campaigns. Far from eulogising the assumption that de-weaponisation of pastoral communities will usher in peace and security in the pastoral region, the article argues instead for the reserve of this DDRR approach—that is, imagining reintegration before disarmament—after challenging, in view of all contextual evidence, the orthodoxy of sedentarisation in this cluster as the promising way to development. At stake in the debate over livestock and human security in the Karamoja Cluster, the article reckons, is the contemplative possibility of de-weaponisation with(out) de-pastoralisation: an obsessive preoccupation with ending armed cattle raiding among pastoralist groups in the Karamoja Cluster, to an extent of doing away with nomadic pastoralism itself, on modernist schemes of sedentarisation, has only been proven to be counter-productive, if not futile in Karamoja sub-region and the cluster as a whole.

I. INTRODUCTION

Countries that make up the Karamoja Cluster—Uganda, Kenya, South Sudan and Ethiopia—have had and still are susceptible to violence fuelled by easy access to arms. To be precise, the end of the Cold War in the global South, and more so in sub-Saharan Africa, resulted in a substantial increase in non-international armed conflicts in comparison to international ones. Small Arms and Light Weapons (SALWs) proliferation has no doubt contributed to sustaining many of these violent conflicts such that DDRR programmes have generally been considered an essential

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step in the so-called post-conflict reconstruction process. In Eastern Africa, guns have become the weapon of choice for insurgents, terrorists, organised criminal syndicates and thugs alike.[1] Thousands of deaths (of human and livestock) have been attributed to the use of such SALWs that not only kill and maim, but also undermine all facets of security while diminishing the prospects for holistic social development.

This article seeks to illuminate the undergirding motives driving firearms-aided cattle raids in the Karamoja Cluster and argues for a security framework that privileges the survivability and safety of livestock in such an environmentally challenged region. To this end, the article contends that human security—as we know it today—in the Karamoja Cluster is, as a matter of fact, conditioned by the security of livestock in the cluster, and not the other way around; resultantly, the reversal of the much vaunted DDRR approach to security in this region—starting with reintegration of pastoral communities with their livestock and only to end with disarmament—may indeed be a much more promising way to human security in the cluster. To argue for holistic human and livestock security therefore is to articulate a complex move running counter to the apparent serenity provided by state security apparatuses through the different regional governments' application of the DDRR model among pastoralist communities in today's Karamoja Cluster.

Drawing insights from a brief ethnographic fieldwork in the month of October 2014 as well as documentary analysis of recent reports (2008-2013) on the military as well as socio-economic developments in the Karamoja Cluster, the article explores some of the drivers of insecurity (both perceived and real) in the modern era, from the advent of colonial rule through post-independent periods (especially post-Idi Amin regime). In its subsequent parts, the article attempts an anthropological argument for human and livestock security—reading the socio-cultural, environmental and economic set-up of pastoralist communities in today's Karamoja Cluster in view of the drivers of armed violence in the cluster—and concludes with a reflection on how the culture-environment-economics nexus could better help us envisage security and survivability of both humans and livestock in this region beyond the prescriptions of the DDRR model.

II. PASTORALISM AS LIFESTYLE

Pastoralism has been—and still is, for the most part—a major factor and a complete way of life for millions in the Karamoja Cluster. Estimated to be more than a third

1. O. M. Ouko & J. Ahere, *Information Communication Technology (ICT) in combating Small and Light Weapons*, 24 HORN OF AFRICA BULLETIN (January-February 2012), at 10 -14.

of the region's total population, pastoralist communities in this region consist of three ethno-culturally linked clusters. The first and largest is no doubt the *Karamoja* cluster which includes the border areas of Ethiopia, Kenya, the Sudan and Uganda; the second is the *Somali* cluster which falls in the borders of Ethiopia, Kenya and Somalia, and the third is the *Dikhil* cluster, which links the cross-border regions of Djibouti and Ethiopia.[2] Pastoralism practised in the Karamoja Cluster, in the main, consists of nomadic transhumance, which is essentially characterised by mobility, large and diverse herd sizes, and communal land ownership. To a great extent, scholarship on pastoralism in this Karamoja Cluster has emphasised competition and scarcity of resources in terms of water, land, pasture, and livestock assets as playing a key role in conflicts among pastoral groups.

As early as the turn of the twentieth century, anthropological writings reveal the importance of cattle for many African peoples; many cultural anthropological research projects devoted to specific groups have analysed the functions of livestock and of transactions involving it. In a particularly noted anthropological research, Melville Herskovits applied the theory of *Kulturkeis* to East Africa.[3] He proposed boundaries for the area over which the following characteristic series of cultural traits are distributed: "cattle as wealth, cattle as the only acceptable dowry, cattle as the proper animals to be used in ceremonies or at special feasts, cattle associated with distinct sex and occupational taboos, special milk customs, these all have a distribution which is very similar."[4]

In most parts of Eastern Africa where his cultural anthropological fieldwork was conducted, Herskovits emphatically noted that the "cattle complex"—important as it is today—must be regarded as a cultural layer superimposed on an underlying agricultural stratum. Over and beyond the rather sterile controversy around the economic rationality of herding, one underlying discourse persists: in the area studied by Herskovits—the Greater Horn of Africa—farming is economically more important but herding holds greater prestige. Underpinning this cattle complex in the case of Karamoja Cluster, a host of cultural/social anthropologists in this region since the colonial era have noted that possession of livestock, and cattle in particular, consists of the main source of subsistence (livelihoods), wealth accumulation and social reproduction. In fact, one such social anthropologist, Dyson-Hudson, wrote

2. For a detailed discussion of this subject, see D. AKABWAI & E. P. ATEYO, E. P. DECEMBER (2007) THE SCRAMBLE FOR CATTLE, POWER AND GUNS IN KARAMOJA. MEDFORD, MASSACHUSETTS: FEINSTEIN INTERNATIONAL CENTER; see also, K. MKUTU, PASTORAL CONFLICT AND SMALL ARMS: THE KENYA -UGANDA BORDER REGION. LONDON: SAFERWORLD (2003).

3. D. de Lame, A Hill among a Thousand: transformations and Ruptures in Rural Rwanda. Madison, Wisconsin: The University of Wisconsin Press (2005).

4. *Id.*, at 320.

that the ultimate aim of every Karimojong man is to accumulate enough cattle to ensure a more endowed and prestigious life for his extended family over three generations.[5]

It has been argued that Uganda's Karamoja has from early colonial times been a peripheral zone[6]; although the respective post-independence governments have each made attempts at incorporating fully this zone into the national body politic of Uganda, relations between Karamoja and the centre (Ugandan state) remain distrustful at worst, and lukewarm at best. In addition to political marginalisation, the demarcation of political-administrative boundaries in Karamoja in separate grazing ranges following the advent of colonial rule is considered a great contributing conflict driver among pastoral groups. In fact, colonial boundaries dating back to the early 1900s did impoverish Karimojong herders by trying to "pin the pastoralists to the ground."[7] This, it is argued, created frequent ecological crises, eroding the basis of community regulation of pastoral resources and thus paving way for "individual survival strategies" in each case making sense from individual and short-term points of view.[8]

A semi-arid region, Karamoja is located in the north-eastern part of Uganda and shares borders with Kenya to the east and South Sudan to the north. Pastoral livelihoods are dominant and agriculture is practiced in very few areas. Uganda's Karamoja area has for long experienced insecurity, harsh climatic conditions and depletion of livestock population due to both anthropogenic cattle raids and non-anthropogenic attacks by diseases. Blamed for insecurity are inter-ethnic conflicts, cattle rustling and use of illicit arms.

A report by Mercy Corps, a U.S.-based relief organisation, published in April 2013 reiterates that Uganda's Karamoja has long been characterised by poverty, under-development and pervasive insecurity in the marginal dry lands predominantly inhabited by pastoralists. While cattle raiding has characterised the relationship among the Karimojong sub-clans for many generations, in recent years, however, raiding has become increasingly violent, given the accessibility to illicit SALWs.[9]

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5. N. Dyson-Hudson, Karamojong Politics. Cambridge: Cambridge University Press (1966).

6. M. Mirzeler & C. Young, *Pastoral Politics in the Northeast Periphery in Uganda: AK-47 as Change Agent*, 38 THE JOURNAL OF MODERN AFRICAN STUDIES (2000), at 407-29.

7. M. Mamdani, A. B. Katende and P. M. B. Kasoma, Karamoja: Ecology and History, CBR Working Paper No. 22, 1992. Kampala: Centre for Basic Research, at 25.

8. *Id.*, at 37.

9. *See*, MERCY CORPS, THE CONFLICT MANAGEMENT SYSTEM IN KARAMOJA: AN ASSESSMENT OF STRENGTHS AND WEAKNESSES (2013), online at http://www.mercycorps.org/

Communities within the Karamoja Cluster are primarily nomadic pastoralists. In this nomadic vision, it has been argued, "path, motion, and exchange are the keys, not the fixity and boundedness of an agrarian world."[10] Citing Dyson-Hudson, Mirzeler and Young underscore that subsistence pastoralism remains the preferred way of life for most people in northeast Uganda as it has been for centuries; the uncertainties of rainfall and other ecological hazards make "settled agriculture alone a high-risk strategy."[11]

Furthermore, due to the number of animals kept and the nature of pastures as well as the climatic conditions in the sub-region, these herders are forced to move around with their stock in search of more pasture and water. Their movements are definitely unrestricted to one area or country and they frequently migrate across international borders. Borrowing Gunther Schlee's phrase, Vigdis Broch-Due, too, reiterated in her study of the forced displacements of the Turkana pastoralists in colonial Kenya that pastoralist identities are "identities on the move."[12] These movements are major sources of misunderstanding and armed conflict between them and their neighbours.

In fact, historically, the image of nomadic pastoralist communities as aggressive intruders pushing for an expansion of their territories for herding at the expense of their peaceful agrarian neighbours indeed "dominated the mind-sets, rhetoric, policies, and actions of nineteenth-century colonialists."[13] The post-colonial leadership of the respective states of the Karamoja Cluster, more especially if drawn from an agrarian community, seems to have fully internalised this imagery in their subsequent policies and actions vis-à-vis their pastoralist citizens.

Suffice to note that such seasonal movements of herders and their cattle do not in themselves constitute sufficient reason for the perennial cattle raiding, which has come to characterise a complex set of fluid alliances and antagonisms among different pastoralist communities. In their historical study of Tswana pastoralist communities in British colonial South Africa, Jean and John Comaroff noted that by means of accumulation of livestock, the Tswana produced and reproduced the bonds that wove together their social fabric: through bride-wealth they made marital ties, exchanging rights in women's labour and offspring, and through sacrifice they

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10. V. Broch-Due, *A Proper Cultivation of Peoples: The Colonial Recognition of Pastoral Tribes and Places in Kenya*, In PRODUCING NATURE AND POVERTY IN AFRICA (V. Broch-Due and R. A. Schroeder eds. 2000), at 61.

11. Mirzeler & Young, *supra* note 6, at 408.

12. Broch-Due, *supra* note 10, at 61.

13. *Id.*, at 65.

communed with their ancestors.[14] The cattle circuit, Vidgis Broch-Due argues, is where social power is encoded, and it also provides the bride wealth with which wives and fresh cohorts of children and calves can be obtained: "These are the most valuable assets in an economy in which procreation among human and herds is simultaneously production."[15] Hence, because the cardinal objective of adult men in pastoralist communities is to own livestock and so "transact the value embodied in them,"[16] cattle raiding comes to serve—and depending on the raiders' socio-economic background—either the catalytic moment in the raider's rite of passage to adulthood or an avenue for livestock accumulation for adult raiders on the verge of socio-economic alienation.

III. THE CULTURE—ECOLOGY—ECONOMICS NEXUS

It has been argued that the situation in the Horn of Africa continues to be deplorable due to the absence of environmental security-related infrastructure combined with inadequate levels of awareness of the combined socio-economic potentials of pastoralist communities dwelling in the region. Yet, the history of the civilising mission under colonialism reveals that pastoralist communities in the colonised global South—whenever and wherever—had always not showed enthusiasm for any sedentarising move through hitching the animal to the plough, let alone hoe cultivation.

To be precise, British colonial military campaigns waged against pastoralist warriors of this cluster in the 1920s were followed by failed agricultural schemes of the 1930s, launched in a bid to 'civilise' these pastoralist communities by way of promoting their sedentarisation.[17] Both the colonial and post-colonial discourses of pastoralist communities, territory and fixity had been the result of "a sedentary vision bound to a very European vision of nature."[18] Compounded by this modernist sedentary vision is a tenacious tendency to view pastoral rangelands as both uninhabited and under-productive.[19] Yet, nomadic transhumance among these pastoralists seems to have persisted as a way of life, hardwired in a socio-cultural-

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14. Jean and John L. Comaroff, *Home-Made Hegemony: Modernity, Domesticity, and Colonialism in South Africa*", In AFRICAN ENCOUNTERS WITH DOMESTICITY (K. T. Hansen ed. 1992).

15. Broch-Due, *supra* note 10, at 72.

16. Jean & Comaroff, *supra* note 14, at 42.

17. Broch-Due, *supra* note 10.

18. *Id.*, at 60-1.

19. J. Schilling, F. E. O. Opiyo and J. Scheffran, *Raiding pastoral livelihoods: motives and effects of violent conflict in north-western Kenya*, 2 PASTORALISM: RESEARCH, POLICY AND PRACTICE (2012), at 1-16.

environment-economics nexus.

First of all, cultural practices among these communities such as the high demand for bride wealth (dowry in terms of livestock) coupled with diminishing stocks due to drought and the practice of livestock rustling had historically encouraged both migratory movements for pasture and the acquisition of defensive weaponry, for the sake of livestock security. The aftermath of the Cold War, with a corresponding increase in non-state armed conflict in the Horn of Africa, ushered in substantive availability of SALWs to pastoralist communities throughout the Karamoja Cluster. In 2002, it was estimated that a young Karimojong man from a poor family in Uganda was expected to pay 30 cows as bride price on average and 60 cows if one were from a rich family; while among the Jie, bride wealth was as high as 130 heads of cattle excluding the small stock such as goats.[20] Other cultural aspects include initiation rites into adulthood that young men must undergo, amidst so many other rituals, such as the mounting of successful livestock raids.

Hence, by way of quotidian life, the livelihoods of these pastoralists revolve around the preservation and welfare of their livestock, which essentially serves as the primary asset as well as source of sustenance. The prevalence of small arms in this region is therefore conspicuous: almost all households or homesteads in the region, in the aggregate, have a weapon or two.[21] Furthermore, the ways of life of these pastoralist communities in the Karamoja Cluster are dictated by the severe weather patterns whereby temperatures often exceed 40 degrees celsius with annual rainfall too meagre to support anything else other than conditioned pastoralism.[22]

Environmental scarcity further renders these pastoralists dependent upon a mobile, livestock-rearing lifestyle, which in turn augments the proclivity to raiding, especially in the absence of alliances with other pastoralist groups. Hence, these pastoralist communities remain determined at all costs to arm themselves in a bid to secure their ever-threatened source of livelihoods through cattle raids. It may therefore be no exaggeration to argue that livestock in this cluster does constitute a fundamental form of pastoral capital: livestock remains essential for payment of dowry, compensation of injured parties during raids, symbol of prosperity and prestige, store of wealth and security against drought, disease and other calamities, in addition to functioning as a means of production, storage, transport, and transfer

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20. Mkutu, *supra* note 2.

21. K. L. Nolasco & M. Munene, *Armed Pastoralists in North Rift Valley – a shift towards reintegration, demobilization and disarmament*, 24 HORN OF AFRICA BULLETIN (January-February 2012), at 5-9.

22. *Id.*

of food and wealth.[23]

What is more, the lack of planned viable economic opportunities coupled with political marginalisation of pastoralist areas often times translate into the fact that pastoralist communities must struggle to ensure their survival.[24] Already colonial governments—and subsequently postcolonial ones—did gazette large swaths of pastoral land such that pastoralists in the Karamoja Cluster in particular have to compete for increasingly small areas of pasture and scarce sources of water.[25] From the last decade of colonial rule in Kenya and Uganda, the latter governments have sought to introduce private land tenure, "which discriminated against non-settled peoples [nomadic pastoralists, in particular] who were not adapted to owning land."[26]

In the second instance, one of the ways that environmental factors contribute to conflict (armed violence by proliferation of SLAWs) is through interaction with social, political and economic factors as well as the attendant issue of mass migration.[27] Mass migration stresses the environmental quality and natural resources as people compete for resources. This is particularly the nature of conflicts in the Karamoja Cluster and more specifically pastoralist conflicts that form the more prevalent types of conflict in the region.

Scholars of environmental conflicts, natural resources and environmental diplomacy, including Lester Brown, George Kaplan, Daniel Schwartz and Singh Ashbindu, propose that conflicts over resources can be as a result of scarcity, abundance or management.[28] Scarcities arise as a result of environmental stress, mismanagement, high population growth or unfavourable climatic factors and can occur in a number of ways: (i) where demand for natural resources exceeds supply and as such the resources cannot meet the needs of the people; (ii) where natural resources have been reduced as a result of degradation; and (iii) where access is restricted or is unequally distributed.

In each of the above cases, conflict arises as the grassroots compete for the scarce resources available to them and/or their rights, or access to exercise control over these resources, especially in the case where they have been marginalised.

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23. Schilling *et al.*, *supra* note 19.

24. J. Bevan, Crisis in Karamoja: Armed Violence and the Failure of Disarmament in Uganda's Most Deprived Region, Occasional Paper No. 21 of the Small Arms Survey. Geneva: Small Arms Survey (2008). See also, Mercy Corps, *supra* note 9.

25. Mkutu, *supra* note 2.

26. *Id.*, at 61.

27. I. Farah, C. Kiarie & P. Durito, *Environmental Conflicts, Natural Resources and Diplomacy in the East and Horn of Africa,* 25 HORN OF AFRICA BULLETIN (January-February 2013).

28. *Id.*

Informed by ethnographic fieldwork between 2008 and 2011, one study on motives and effects of increasingly violent cattle rustling in north-western Kenya reveals that hunger and drought impacting on availability and access of resources are critical raiding motives among the Turkana, while increasing wealth and payment of dowry are the most important motives for the Pokot community.[29] Claims over rights or access to and/or control over these resources are what ultimately contribute to conflict over natural resources.

Augmenting friction to the conflict over already scarce natural resources is the political economy of raiding viewed from the market standpoint: With the commercialisation of raiding which entails funding of raids and purchasing of raided stocks by wealthy business people, the raided stock is hence used to supply urban markets with beef products for economic gains.[30] This further complicates the nexus as it exemplifies the extent to which a culturally grounded practice (cattle rustling) can take and indeed takes an economic dimension whereby raided livestock does enter into the food supply chain for a profit-making business.

Indeed, the motivation of livestock raiders to engage in relatively smaller raids in the Karamoja Cluster is further exacerbated by the development of commercialisation as one noted aspect of the broader integration of pastoralists within a market economy.[31]Lastly, in spite of the government-spearheaded programmes in terms of both military- and civil-led campaigns and operations to curb cattle rustling with the aid of SALWs, conflict and insecurity, which affected and continue to affect the livelihoods of the Karimojong, have persisted. What is even more disenchanting is the fact that as traditional power structures kept eroding over time in the midst of proliferation of SALWs in the region, socio-cultural norms that once moderated raiding have consequently dissolved, and raids are thus increasingly carried out by young men for their own personal gain.[32]

It is commercialisation of raiding—which includes the selling of raided cattle in markets and the purchasing of firearms for further raids—Charles Ocan in fact argues, that can paradoxically be summoned as the key cause of frequent famines in contemporary Karamoja.[33] This, it is argued, enabled among other factors elite accumulation of land and labour such that young Karimojong men were particularly susceptible to lumpenisation: These lumpens gravitated to elite warriors

29. Schilling *et al., supra* note 19.

30. Mkutu, *supra* note 2.

31. Schilling *et al., supra* note 19.

32. Mercy Corps, *supra* note 9.

33. C. Ocan, Pastoral Crisis in North-eastern Uganda: The Changing Significance of Cattle Raids, CBR Working Paper, No. 21, 1992. Kampala: Centre for Basic Research.

able to provide them with cash, guns and cattle, and the scale of conflict and violence increased dramatically.[34]

Worst still, the contextual vulnerability of the Karimojong communities compounded by inadequate education and health services further dwindles chances for a knowledge-based economy, notwithstanding the quest for alternatives to challenges of pastoralist lifestyles. Yet, Uganda's Karamoja has increasingly become an area of interest for both the state and the private sector—national and international—for its mineral endowments.

Paradoxically, mining activity in Karamoja—having recast the region in the national limelight—has cast Karimojong pastoralists in a further state of remoteness. No doubt, the animosity between the government-in-bed-with-the-(foreign) private-sector and Karimojong pastoralists over mining could only reinforce the rationale for weaponisation among the latter. Eventually, not only are pastoralist conflicts ensuing from both socio-cultural, economic and environmental contexts localised within the boundaries of a state but also, given the mobility of pastoralists, they often times have the potential of being trans-boundary in nature.

IV. PROLIFERATION OF SALWS: AN INSECURE SECURITISATION

The United Nations Office for Disarmament Affairs (UNODA) conventionally refers to small arms, on the one hand, as personal weapons that can be operated by only one person. These include revolvers, self-loading pistols, assault rifles, submachine guns and light machine guns. Light weapons, on the other hand, usually include hand-held under-barrel and mounted grenade launchers, portable launchers of anti-tank and anti-aircraft missile systems, and mortars of less than 100 millimetre calibre. A commensurate rise in armed criminality, in which acts of violence are increasingly orchestrated irrespective of community norms on the use of force, has severely impaired this region's socio-economic development.[35] Mirzeler and Young too argued that the transformation of local modes of conflict by large-scale infusion of the AK-47 has had far-reaching effects both on relationships with the state and its local representatives, and within the very pastoralist communities.[36] Already by 2000, it was estimated that the number of arms in circulation in Uganda's Karamoja alone ranged from 40,000 to 80,000 for a population of 950,000.[37]

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34. *Id.*
35. Bevan, *supra* note 24.
36. Mirzeler & Young, *supra* note 6.
37. *Id.*

In a bid to spearhead a fight against the proliferation of SALWs in the Greater Horn of Africa, the government of Kenya, in 2000, convened a ministerial conference on illicit SALWs in the Great Lakes and Horn of Africa sub-regions. The conference culminated into the Nairobi Declaration on the Problem of Proliferation of Illicit Small Arms and Light Weapons in the Great Lakes Region and Horn of Africa signed on 15th March 2000. Ten governments (Burundi, DR Congo, Djibouti, Ethiopia, Eritrea, Kenya, Rwanda, Sudan, Tanzania, and Uganda) pledged to work together to implement a coordinated regional action plan to stem the proliferation of SALWs.

Kennedy Agade Mkutu, in his previous field research conducted between 2003 and 2005, mapped out four main routes for the movement of SALWs into the Uganda-Kenya border area:

> The first and the most commonly used route is into Karamoja from Sudan. The second is the Karenga–Lopoch–Kotido route which is a tributary from the first route, supplying Karamoja via the Jie peoples. The Acholi–Jie route is a new emerging source to the Jie and is considered in the same section. The third route considered is the route from Sudan into Lokichogio in Kenya. The fourth route is the 'north-eastern route' into Kenya from Somalia. There used to be a route originating in Ethiopia and connecting to Uganda via Sudan, but the eviction of the Sudan People's Liberation Army (SPLA) from Ethiopia led to its decline.[38]

Pastoralist communities of the Karamoja Cluster have both suffered and caused suffering due to armed violence during cattle raiding, whether from within their national boundaries (in this context Uganda) or across borders (Kenya, South Sudan, Sudan or Ethiopia). Among all plain pastoralists, such as those in Karamoja, it has been argued that cattle-rustling has historically been "a method of wealth redistribution to ensure that all were fed at times of scarcity, as well as a means of payment for bride price and the making of alliances with other groups."[39]

Having been utterly marginalised under the colonial dispensation and further isolated politically and economically in the post-independence era, these communities do share characteristics of pastoralist poverty under some harsh

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38. K. A. Mkutu, *Small Arms and Light Weapons among Pastoral Groups in the Kenya-Uganda Border Area*, 106 AFRICAN AFFAIRS (2006), at 59.

39. *Id.*, at 48.

environmental conditions.[40] In the same vein, it is argued that the Karimojong pastoralists have been acutely aware, ever since the era of the British Protectorate, that "if they cede protection to government, their livelihood is dependent on its effectiveness against enemy raiders."[41]

States have the right to export and import SALWs to protect their citizens. Nonetheless, in isolated security situations, some communities have resorted to illegal ownership of SALWs to 'protect' themselves from enemies from within and outside their communities, especially in cases where the state is slow in responding to their protection concerns.[42] The first influx of weaponry more lethal than the spears, which had previously served as instruments of hunting and raiding in the Karamoja Cluster, dates back to the second half of the nineteenth century when mercantile networks extending from Khartoum, Ethiopia and Zanzibar began to reach the region with ivory.[43]

Cognisant of the ineffectiveness of the governments of states in the Horn of Africa to protect pastoralist and other marginalised communities from potential cattle raiders from neighbouring communities (whether from within a state or outside the boundaries of that state), these communities—each for their self-preservation and self-aggrandisement motives—view such shortcomings of state security forces in the region as an unavoidable rationale to acquire illicit arms. Remarkably, the ransacking of the well-stocked Moroto armoury by Karimojong herders in 1979 opened "a new era in pastoral politics in northeast Uganda, and in the nature of relationships with the central state."[44] Thus, whereas for centuries spears, bows and arrows were used in raids—with deaths treated seriously and compensated with cattle, whereby warriors hardly harmed women, children or the elderly—the last three or so decades have seen a transformation of raiding into large-scale armed conflict, resulting in many deaths and the emergence of racketeers.[45]

For instance, the Turkana in Kenya have a common cultured practice of gun ownership arising from the need to protect their livestock from incursions by their neighbours the Pokot and Samburu in north-western Kenya; the same does apply for

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40. For a full treatment of this subject, see I. Farah, C. Kiarie & P. Durito, *Environmental Conflicts, Natural Resources and Diplomacy in the East and Horn of Africa*, 25 HORN OF AFRICA BULLETIN (January-February 2013), at 1-6. See also, Nolasco & Munene, *supra* note 21, at 5-9.

41. B. Knighton, '*Disarmament': The End or Fulfillment of Cattle Raiding?*, 14 NOMADIC PEOPLES(2010), at 130.

42. Ouko & Ahere, *supra* note 1.

43. Mirzeler & Young, *supra* note 6.

44. *Id.*, at 409.

45. Mkutu, *supra* note 38.

the Karimojong in Uganda; the Toposa in South Sudan and the Merille in Ethiopia. They equate their circumstances to living in a cave, surrounded by hostile neighbours and without protection.[46]

Arguably, governments in the Karamoja Cluster have been unable to effectively battle the persistent inter-pastoralist conflicts in which the use of illicit arms is common. In many cases, the response to livestock raiding by the law enforcement agencies was slow, ineffective, and sometimes overly forceful or non-existent.[47] In regard to human security, with a SALWs death rate approaching 60 per 100,000 of the population, Uganda's Karamoja was up until very recently one of the world's most armed violence-afflicted regions.[48] In line with livestock security, tensions that arise among pastoralist communities are often prompted by competition over pasture and water, in addition to traditional practices of raiding cattle from rival communities.[49] In the same vein, the pattern of conflict among the Karimojong's sub-clans have remained complex, switching quickly between fragile alliances and outright war.

Unique as its case may be, Uganda has periodically engaged in coercive disarmament of its pastoralist populations in the Karamoja area, which is home to the Bokora, Dodoth, Jie, Matheniko, and Pian sub-clans. Early campaigns in 2001 and 2002 led to the recovery of at least 10,000 weapons, though many (about 8,000) were reportedly reissued to warriors who had been recruited into Local Defence Units (LDU) and Anti-Stock Theft Units (ASTU).[50] Early isolated successful cases of the forceful disarmament exercise carried out in 2001 and 2002 notwithstanding, due to a weaker state security apparatus, the physical security—let alone human security—of the previously disarmed pastoralists was compromised, thus forcing such vulnerable communities to re-arm through illegal means, something which in turn attracted high-handed response from the government forces. Particularly, for Uganda, the Karamoja Integrated Disarmament and Development Programme (KIDDP) was designed to effect disarmament by the Uganda armed forces, with an ultimate aim to rid the sub-region of cattle raiding. SALWs had been found out to be the only source of security for various pastoral groups in the Karamoja Cluster. Continued acquisition of SALWs for securitisation of one group's livestock against the other(s) correspondingly perpetuated even greater insecurity.

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46. Mkutu, *supra* note 2.

47. *Id.*

48. Bevan, *supra* note 24.

49. *Id.*

50. Government of Uganda (GoU), Karamoja Integrated Disarmament and Development Programme: Creating Conditions for Promoting Human Security and Recovery in Karamoja, Kampala: Office of the Prime Minister (2007).

Furthermore, as the integration of the warriors (from pastoralist communities) into the local defence units (LDUs) was both ineffectively planned and implemented, these warriors deserted their units and resumed raids and counter-raids and caused insecurity in the region. What remained even more ironic with respect to the fight against the proliferation of SALWs in this region was the fact that a plethora of armaments (both light and heavy) were not only used but even exchanged hands in the very fight against SALWs in this region. It has been reported that the Karimojong acquire weapons from southern Sudan (now South Sudan), on the domestic illicit market in Uganda, and notably, from members of Uganda's security forces.[51]

Once more, the escalating insecurity following the disarmament campaigns in 2001-2002, attracted a formal response from the government in which the Uganda Peoples' Defence Forces (UPDF) adopted a more aggressive approach to disarmament in the region from April 2006 and continued into 2007. Only 1,068 guns were reported to have been recovered forcibly and voluntarily in four districts of Uganda's Karamoja from 2004 to January 2006, while the first disarmament exercise between 2001 and 2003 was characteristically a fiasco.[52]

A combination of heavy-mounted machine guns, assault rifles, and grenades was used, sometimes with excesses, in various parts of Karamoja. Many human rights organisations, including Human Rights Watch (HRW), reported that the campaigns included mass beatings, unlawful killings, torture, arbitrary detention, and the destruction of property. Particularly, HRW documented that resentments of the UPDF flared among the Karimojong and resulted into reprisal attacks of various kinds and magnitudes to the extent that, in retaliation for the arbitrary killings associated with cordon and search operations near Kotido town, Jie warriors killed the commanding officer of the UPDF 67th Battalion and a number of soldiers in late October 2006.[53] By and large, the resulting losses on both sides (government forces and community warriors) simply underscore the need for embracing the need for and application of human and livestock security in Uganda's Karamoja in particular, and the Karamoja Cluster in general.

The government of Uganda officially designed the KIDDP, purposed at effective disarmament and development—akin to the rest of the country—in the Karamoja sub-region. The objectives of the KIDDP were: (i) to empower the Karimojong to harness the potential of their natural resources and support economic

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51. *Id.*

52. Mkutu, *supra* note 38.

53. Human Rights Watch, Get the Gun! Human Rights Violations by Uganda's National Army in Law Enforcement Operations in Karamoja Region, New York: HRW Publications (2007).

diversification interventions in Karamoja with a view to reducing reliance on livestock as a means of living; (ii) to promote sustainable utilisation of Gum Arabic and related dry land products for improved livelihood and biodiversity conservation; (iii) to secure the land rights of communities in order to encourage sustainable utilisation of natural resources; (iv) to support interventions to improve the viability of pastoralism in Karamoja; and (v) to facilitate the resettlement and rehabilitation of people affected by natural disasters and armed conflicts.[54] Successful accounts of the KIDDP implementation notwithstanding, the programme however failed to capture the underlying issues causing proliferation of SALWs in a systematic manner. The result of forcible disarmament measures not only made disarmament a more contentious issue, but also impeded the very implementation of the plan.[55]

It was after frequent episodes of insecurity in Karamoja that the government of Uganda undertook a forceful disarmament exercise during 2001-2002 in order to address the problem of illicit arms. Within a short time from the beginning of forceful disarmament, around 10,000 illicit guns had been collected. However, there were complaints of high-handedness by the military that led to slowing down the processes and when re-launched in September 2004, the campaign was not executed simultaneously throughout the area. This meant that while some villages had handed over their illicit arms, others still possessed theirs. The groups that retained their illicit firearms could easily raid the disarmed ones.[56]

The government of Kenya, on the other hand, launched a series of military-led disarmament programmes between the Pokot and Turkana in seven districts of the North Rift region. The process proceeded in three phases:(i) Operation 'Dumisha Amani' (maintain peace), a voluntary and non-coercive weapon collection initiative that promised increased security and amnesty from prosecution of community warriors; (ii) Operation 'Okota I' (Collect Phase I), which entailed the forceful disarmament of communities that did not cooperate during the earlier phase; and (iii) 'Okota II' (Collect Phase II), a development intervention designed to improve economic conditions in previously armed communities and insure areas in order to reduce incentives for illicit arms possession.[57] The pastoralist communities in northern Kenya—the Pokot, Turkana, and the Samburu—have remained obstinate in surrendering their arms to the authorities. A major reason for this resistance has

54. GoU, *supra* note 50.

55. Bevan, *supra* note 24.

56. D. AKABWAI AND E.P. ATEYO, THE SCRAMBLE FOR CATTLE, POWER AND GUNS IN KARAMOJA. MEDFORD, MASSACHUSETTS: FEINSTEIN INTERNATIONAL CENTER (2007).

57. Edaan of Riam Riam, Disarming the Turkana: The Riam Riam Experience. (Paper presented at the IGAD Regional Workshop on Disarmament of Pastoral Communities in the Horn of Africa, Entebbe, Uganda, 2007).

been the communities' lack of confidence in the authorities to offer security to them and their treasured livestock.[58] This lack of confidence in the government authorities to offer security against their perceived long-standing traditional enemies has curtailed cooperation among the actors in the disarmament exercises, more especially the warriors.

Incidentally, such disarmament campaigns also increased the insecurity of some groups at the expense of others. In the southern part of Turkana, for instance, neighbouring Pokot and Karimojong communities repeatedly attacked the Turkana who had voluntarily disarmed. The assurance from the government of Kenya for their protection had not materialised as promised.[59] Many members of the Pokot community therefore fled to Uganda in order to avoid having their weapons confiscated. The Turkana were unable to relocate, leaving them exposed to Pokot warriors, who returned from Uganda with newly acquired illicit arms. The disarmament exercise launched in May 2006 was the largest in Kenya and covered at least seven districts in the North Rift (north-east of Kenya), occurring at the same time the Ugandan army conducted a similar mission in the neighbouring pastoralist communities in the North Rift.[60]

Compounding the situation, Kenyan military personnel reportedly tortured and abused civilians who refused to surrender their weapons voluntarily or did not divulge information concerning armed community members. In the course of these disarmament campaigns, civilian populations also rapidly lost confidence in the exercise, more so when they discovered that they would not be adequately compensated for their surrendered weapons. Pastoralist populations, who were used to repressive interventions from the state, interpreted the disarmament process as yet another repressive effort to undermine their communities and limit their freedom of movement.[61]

Between December 2005 and May 2006, the then government of South Sudan, through the Sudan People's Liberation Army (SPLA), administered a coercive civilian disarmament campaign in northern Jonglei State. The campaign was initiated at the request of the communities that needed to negotiate access to cattle camps. This sought to remove weapons from local pastoralist groups, primarily the Luo Nuer, many of whom perceived it as a political crackdown. The history of animosity between the Nuer and the Dinka, who have dominated the ranks of the SPLA, may have compounded this suspicion. From the beginning, this

58. Nolasco & Munene, *supra* note 21.
59. Edaan of Riam Riam, *supra* note 57.
60. Nolasco & Munene, *supra* note 21.
61. Edaan of Riam Riam, *supra* note 57.

initiative encountered resistance from the Luo Nuer 'White Army' militias—which was a semi-organised grouping of armed young men formed to protect cattle and conduct raids on neighbouring tribes.[62] In the course of the disarmament programme, more than 3,000 weapons were collected, and an estimated 1,600 White Army and SPLA soldiers killed.[63]

In light of the mounting casualties under the SPLA-led arms recovery effort, the UN acted quickly to promote peaceful disarmament elsewhere in the state. A Luo–Murle Peace Agreement, based on an April 2006 ceasefire, provided a starting point. The campaign netted some 1,200–1,400 functioning assault rifles, machine guns, rocket-propelled grenade launchers, and mortars by the end of August 2006.[64] Although the disarmament could not be described as 'voluntary,' no lives were lost as a direct result of the exercise. The UN subsequently undertook a third disarmament exercise in Jonglei to reduce the stock of weapons among the Murle, a tribe that had hitherto not participated in the arms recovery campaigns but was feared locally.

Splinter groups and opportunistic individuals acted as spoilers, and the disarmed residents of neighbouring Akobo County were explicitly targeted during the campaign. The SPLA, which had committed to providing buffer zones to protect disarmed communities during the arms recovery process, did not deploy any troops until the end of the dry season in May. More problematic still, under the assumption that the Murle community still had a large stockpile of small arms, the SPLA continued to threaten to carry out a forcible disarmament campaign.[65] Despite the recovery of thousands of weapons, security remained elusive for many who participated in the Jonglei disarmament campaigns, while raiding did not diminish at any time during the disarmament exercise.[66]

To be sure, illicit small arms among these pastoralist communities have also been used to commit gross human rights abuses. These are evident in both pre- and post-raid situations. More often than not, weapons have been used to facilitate systematic rape and other war crimes by spreading a reign of fear. In such contexts, it is common to find women and girls raped at gunpoint while men (most especially the young ones) are sometimes abducted at gunpoint and forced to work for their attackers. By and large, SALWs in this region play an equally offensive role as they

62. For an extended discussion of this subject, see J. Young, The White Army: An Introduction and Overview, HSBA Working Paper No.5, 2007. Geneva: Small Arms Survey.

63. Small Arms Survey, Anatomy of civilian Disarmament in Jonglei State: recent experiences and implications, HSBA Issue BriefNo.3, 2nd *ed.*, 2007. Geneva: Small Arms Survey.

64. *Id.*

65. Young, *supra* note 62.

66. Small Arms Survey, *supra* note 63.

do a defensive. Furthermore, violations of human rights in the case of the fight against the proliferation of SALWs are not only perpetrated by armed civilians, but are also prevalent during forceful disarmament exercises undertaken by governmental military forces in the region.

It is now apparent that military-enforced disarmament initiatives in Karamoja did destabilise an already volatile security situation and involved torture and extra-judicial killings.[67] Even more ironical, like in the preceding British colonial military campaigns professing the desire to stop the raiding between pastoralist groups, the latter once again accused their respective national armies (especially in the cases of Kenya and Uganda) as the greatest raiders of all. A study by Ben Knighton conducted in South Karamoja between 2007 and 2008 points out that the frequency of armed cattle raiding incidents increased, compared at least with the 1950s, or even with such an insecure decade as the 1980s: In the last years of the 2000s, Karimojong herders had to deploy raiding and guns much more secretly.[68]

Underlying the preoccupation of this article is the realisation that that while several large scale military-led operations as well as civil development interventions have been undertaken to improve the living conditions of these pastoralist communities, issues pertaining to both human and livestock security—in light of the socio-cultural-ecological-economical nexus of the cluster—have not been sufficiently addressed. The ineffectiveness of governments in the Karamoja Cluster to provide adequate systemic security of both livestock and humans to all different pastoral groups inhabiting the region remains an important rationale for these nomadic pastoralist communities to acquire illicit arms—including the motive of the landmark 1979 Karimojong raid into the well-stocked armoury in Moroto in the wake of the demise of the regime of President Idi Ami. Knigton in fact has made an important qualitative interjection when noting that "it was not guns in themselves that caused raiding after 1979, but the unequal and variable distribution of firearms."[69]

It therefore appears that the increasingly conspicuous presence of arms (of both state security forces and pastoralist communities themselves) in a bid to securitise the region from potential armed cattle raiding ironically turns out to worsen an already bad situation. Yet, Knitghton's study conducted in South Karamoja underscores that while guns may be the means of bloodshed in thousands of families in Karamoja, there is no evidence that guns are responsible for most deaths among the Karimojong: Without the external shocks provided by the

67. Bevan, *supra* note 24.
68. Knighton, *supra* note 41.
69. *Id*., at 127.

Ugandan state—the collapse of Amin's rule and a forced disarmament campaign by the Museveni regime endorsed by the West in the post-9/11 era—causing disequilibrium between territorial sections of different pastoral groups, casualties could be fewer in the long run.[70] Poignantly put, it is neither the nature of the gun, nor the quantity of guns that causes escalation of livestock raiding in this cluster; it is "only imbalances in the firepower between enemies."[71] Thus, a solitary focus on herders' security without the required level of awareness of and determination for livestock security within the socio-economic as well as environmental context of pastoralist communities in the Karamoja cluster would always remain futile.

V. CONCLUSION

For so long as we [*ngi'karimonjong*] have existed, cattle has been our source of survival. Form cattle we get our food, our clothing and our shelter, and without cattle no meaningful social gathering or cultural rite can take place. Through cattle we relate among ourselves socially and economically, and only through cattle can we commune with our spiritual world. That's why for the sake of cattle our men, young and old, would give up their lives for it is by cattle that they live in the first place. That's precisely how our cows do matter![72]

Due to the fact that the proliferation of SALWs has sustained many of these violent conflicts, the DDRR policy has come to be seen as an essential part of conflict transformation. At the core of the DDRR endeavour is an assumption that de-weaponisation of pastoral communities will usher in peace and security in the pastoral region. Remarkably, such an assumption depicts and isolates the presence of weapons among pastoral communities as the problem, while eclipsing a better appreciation of the complex drive for weaponisation in the first place.

At any rate, disarmament campaigns in this region have been more of reactive exercises, and as such are almost always conducted only when there have been increased incidents of armed cattle raiding and banditry among these pastoral groups. Particularly for Uganda's KIDDP—known for its disarmament-cum-development approach—when the escalation of livestock raiding due to new disequilibria created by the latter is taken into account, it becomes all the more reasonable to ask, as Ben Knighton rhetorically did, whether "the attempted solution [KIDDP] to chronic insecurity of Karamoja is not more brutal than 'the problem'

70. *Id*.

71. *Id.,* at 134.

72. Excerpts from an interview with an *Ateran* [Karimonjong bride] in Moroto Municipality, Karamoja, Uganda [12thOctober 2014].

[armed livestock raiding]".[73]

Is it not an exercise in futility, if not detrimental, to disarm targeted pastoralist groups in a region awash with SALWs where the very rationale for weaponisation of these groups is left unattended to? In fact, the case of Uganda's Karamoja as with Kenya's Turkana depicts the worst case scenario whereby the recovered weapons—often through forceful disarmament—find their way back to the hitherto disarmed pastoralists whose thirst for weaponisation would have remained unquenched. Paradoxically, de-weaponisation among pastoralist groups—especially via forceful disarmament—feeds localised, if not regionalised, inter-pastoralist groups re-armaments.

There seems to be ample need to envisage a much more elaborate systematic approach vis-à-vis militarisation and proliferation of the SALWs in the Karamoja Cluster—an approach that is sensitive to conflict dynamics and works to promote both livestock and human security within pastoralist communities. At the heyday of the Isiolo Turkana question in colonial Kenya, the in-charge British colonial administrators classified, enumerated, taxed, and issued special passports to the whole Isiolo Turkana population along with its livestock to prevent trespassing across district boundaries during their repatriation exercise. Should current governments of the Karamoja Cluster consider reverting to this British method in their dealing with the nomadic pastoralist question in the respective nation-states?

By and large, the colonial government—whether in Kenya, Uganda or Sudan—remained overly preoccupied not only with ending cattle raiding among pastoralist groups, but even more so nomadic pastoralism itself, on a modernist account that the latter ran counter to a modern way of life. It is, in great part, in reaction to this modernist discourse and praxis—subsequently espoused by post-colonial governments—that pastoralist groups of the Karamoja Cluster increasingly sought to acquire (modern) weapons.

That the presence of firearms causes cattle raiding in the Karamoja Cluster has been the axiomatic assumption of government and a myriad of civil society organisations (local and international), whose support for the Joint Kenya-Uganda Disarmament Action Plan as well as KIDDP was unrelenting. Consonant with the urgent need to make disarmament campaigns among raid-ridden pastoralist communities work effectively, this article recommends that in lieu of beginning with disarmament, followed by demobilisation and then reintegration (DDRR), the model could instead start from the last stage of reintegration and reinsertion, followed by demobilisation and then disarmament (RRDD).

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73. Knighton, *supra* note 41, at 132.

Undergirding the DDRR approach in the Karamoja Cluster is an underlying assumption that nomadic pastoralism is the problem, and hence the sooner it is done away with, the better for the wider region. To reserve this DDRR approach will therefore mean coming to grips, first and foremost, with a research-based understanding of pastoral mobility, challenging—in view of all contextual evidence—the orthodoxy of sedentarisation in this cluster as the promising way to development. The history of British colonial rule in this region has revealed that the ideal sought for the Karimojong nomadic pastoralist was a turn from herding to farming, in that, cultivation was seen as the seedbed for the grand civilisation project. Yet, time and again, a sedentary vision in the eyes of both the colonial and the post-colonial beholder for nomadic pastoralist communities has proven futile.

The argument for reintegration before demobilisation and disarmament here refutes the predominant modernising discourse that proclaims, in the words of Vigdis Broch-Due, the practical domestication of nature—the moulding of soil, body, and mind. Instead, reintegration of cattle-raiders as here argued calls, first and foremost, for due recognition of nomadic herding as a way of life among pastoralist communities of the Karamoja Cluster. In this sense, it hence becomes incumbent upon the respective governments to work out an integrative cross-border climate-sensitive transhumance model for the concerned pastoralist communities, whereby the security of herds and herders is prioritised in the national interests of the each of the respective governments collaboratively.

The implementation of the RRDD model in lieu of the original DDRR approach does respond to the whole question of "sustainable reintegration" of the raiders (extant and potential) as one that inculcates in ex-combatants a sense of social belonging and provides them with a long-term stake in the region's social and ecological management as well as (trans-) national economic development. Working backwards from the reintegration process through the removal for any reason to (re)arm—thus inducing self-generating will to disarm and demobilise—actually means coming to grips with the complexities of "a localized inter-communal arms race,"[74] which the DDRR approach ignores. Yet, to reintegrate rather than disarm, first and foremost, foregrounds in no uncertain terms issues pertaining to environmental sustainability within this pastoral context, such that mitigating measures against further aridity in the wake of fast changing climate becomes key to the security of both cattle and cattle-keepers in the cluster.

Far more crucial, this article ultimately argues, is the abandonment of the much-idealised vision of sedentarisation, which has perennially underpinned much

74. Mkutu, *supra* note 38, at 62.

of the public policy of respective governments in the Karamoja Cluster vis-à-vis their respective nomadic pastoralist communities. The abandonment of this vision must give way to a holistic attempt at an integrated cross-border climate-sensitive transhumance for the said communities.

At stake in the debate over livestock and human security in the Karamoja Cluster, it appears, is the contemplative possibility of de-weaponisation without de-pastoralisation: Can the former take course without resultant manifestation of the latter? If it can be postulated, in the final analysis, that pastoralist communities of the Karamoja Cluster resort to arming themselves illicitly in order to provide the much needed security for their livestock especially in face of anthropogenic attacks (raids), it may therefore be more sensible for any actor interested in durable pacification in the Karamoja Cluster to consider freeing the livestock first and foremost from imminent threats—whether by raids from other human enemies or by exhausting environmental resources—in order for peace to be imagined and sustained within such communities. Resultantly, it is perhaps an RRDD approach rather than the DDRR model (in repeated fiascos) that seems to embed a great deal of possibility for both livestock and human security in the Karamoja Cluster as we know it today.

THE CALIBRATED FRAMEWORK FOR HUMAN RIGHTS ENFORCEMENT UNDER NIGERIAN DOMESTIC LAW: A PROGRESSIONAL TRAJECTORY?

Paul Adole Ejembi*

ABSTRACT

This article examines the main developments regarding the enforcement of human rights in Nigeria with particular reference to the Fundamental Rights (Enforcement Procedure) Rules, 1979, which has been abrogated, as well as the extant Fundamental Rights (Enforcement Procedure) Rules, 2009 (subsequently referred to as the FREP Rules). The article seeks to ascertain the innovations in the FREP Rules of 2009 and its potentialities in enhancing a more efficacious realisation of fundamental human rights in the country. The article adopts the doctrinal research methodology. It finds that salient provisions enshrined in the FREP Rules of 2009 include the removal of statutory limitations which hitherto debarred litigants from filing actions to enforce their rights after a period of 12 months under the defunct FREP Rules of 1979. Another novel provision enshrined in the FREP Rules of 2009 is the introduction of representative actions and public interest litigation. The article implores courts to give effect to the provisions of the FREP Rules by applying them judiciously and judicially so as to engender effective human rights enforcement in Nigeria. The article asserts that the FREP Rules, 2009, is patently geared towards a progressive trajectory as far as human rights enforcement is concerned.

I. INTRODUCTION

The constitution of the Federal Republic of Nigeria (hereafter referred to as CFRN), 1999, as amended, guarantees the following fundamental human rights: right to life, right to dignity of human person, the right to personal liberty, the right to fair hearing, the right to private and family life, the right to freedom of thought, conscience and religion, the right to freedom of expression and the press, the right to peaceful assembly and association, the right to freedom from discrimination, and the right to acquire and own immovable property anywhere in Nigeria. The African Charter on Human and Peoples' Rights which is currently part of Nigerian

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municipal law also makes similar provisions for the protection of human rights.[1]

By virtue of section 46 sub-section 1 of the CFRN, 1999, as amended, any person who alleges that any of the fundamental human rights provisions stated in chapter IV of the constitution has been, is being or likely to be contravened in any state in relation to him may apply to the High Court in that state for redress. The Chief Justice of Nigeria[2] is vested with constitutional powers to make rules with respect to the practice and procedure of a High Court for the purposes of enforcement of fundamental human rights. Prior to 1st December 2009, the rules governing the enforcement of Human Rights in Nigeria were the Fundamental Rights (Enforcement Procedure) Rules, 1979. These rules have been abrogated.[3] The current rules relating to the practice and procedure for the enforcement of human rights in the country is the Fundamental Rights (Enforcement Procedure) Rules 2009 (hereafter referred to as FREP) made by Justice Idris Legbo Kutigi (as he then was), which commenced with effect from 1st December 2009. The preamble to the rules states, inter alia, that "the court shall constantly and conscientiously seek to give effect to the overriding objectives of these Rules at every stage of human rights action, especially whenever it exercises any power given to it by these Rules or any other Law and whenever it applies or interprets any rule." In this discourse, the essential provisions of the Fundamental Rights (Enforcement Procedure) Rules 2009 would be considered.

II. OBJECTIVES OF THE FUNDAMENTAL RIGHTS (ENFORCEMENT PROCEDURE) RULES 2009

Regulations are made to achieve certain aims in society. For instance, the instrument used to engender the enforcement of human rights in Nigeria is the Fundamental Rights (Enforcement Procedure) Rules (FREP) 2009. The cardinal objectives of the FREP Rules, 2009 may be enumerated as follows:[4]

> (a)The constitution, especially chapter IV, as well as the African Charter, shall be expansively and purposely interpreted and applied, with a view to advancing and realizing the rights and freedoms contained in them and

1. See the African Charter on Human and Peoples' Rights, adopted on the 27th June, 1981 by the Assembly of Heads of State and Government of the Organization of Africa Unity (now called African Union). It entered into force on the 21st of October, 1986. The Charter was enacted into Nigerian Law by the National Assembly in 1983.

2. *See*, Section 46(3) of the 1999 Constitution of Nigeria as amended.

3. *See*, Order XV Rule 1 of the Fundamental Rights (Enforcement Procedure) Rules 2009.

4. *Id*. The Preamble to the Rules 2009.

affording the protections intended by them.

(b)For the purpose of advancing but never for the purpose of restricting the applicant's rights and freedoms, the court shall respect municipal, regional and international bill of rights cited to it or brought to its attention or of which the court is aware, whether these bills constitute instruments in themselves or form parts of larger documents like constitutions. Such bills include: (i) The African Charter on Human and Peoples' Rights and other instruments including protocols in the African regional human rights system; and (ii) The Universal Declaration of Human Rights and other instruments (including protocols) in the United Nations human rights system.

(c) For the purpose of advancing but never for the purpose of restricting the applicant's rights and freedoms, the courts may make consequential orders as may be just and expedient.

(d) The court shall proactively pursue enhanced access to justices for all classes of litigants, especially the poor, the illiterates, the uninformed, the vulnerable, the incarcerated, and the unrepresented.

(e) The court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of locus standi. In particular, human rights activists, advocates or groups as well as any non-governmental organizations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following:

(i) anyone acting in his own interest;

(ii) anyone acting on behalf of another person;

(iii) anyone acting as a member of, or in the interest of a group or class of persons;

(iv) anyone acting in the public interest, and;

(v) association acting in the interest of its members or other individuals or groups.

(f) The court shall in a manner calculated to advance Nigerian democracy, good governance, human rights and culture, pursue the speedy and efficient enforcement and realization of human rights.

(g) Human rights suits shall be given priority in deserving cases. Where there is any question as to the liberty of the applicant or any person, the case shall be treated as an emergency.

A. Types of rights enforceable under Fundamental Rights (Enforcement) Rules

Section 46 of the 1999 Nigerian constitution is to the effect that any person who alleges that any of the provisions of chapter IV of the constitution has been, is being or likely to be contravened in any state in relation to him may apply to a High Court in that state for redress. The fundamental rights enunciated under chapter IV of the constitution include the right to life, right to dignity of human person, the right to personal liberty, the right to fair hearing, the right to private and family life, the right to freedom of thought, conscience and religion, the right to freedom of expression and the press, the right to peaceful assembly and association, the right to freedom from discrimination and the right to acquire and own immovable property anywhere in Nigeria. Similar human rights as enshrined in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act[5] are also enforceable under the Fundamental Rights (Enforcement Procedure) Rules 2009.

Thus, in the case of *Solomon Ohakosim v. Commissioner of Police of Imo State & Others,*[6] the Court of Appeal held, inter alia, that the African Charter on Human and Peoples' Rights constitutes part of the laws of Nigeria and must be upheld by all law courts in the country. The Court of Appeal further stated that "indeed, Nigeria has given due recognition to the African Charter on Human and Peoples' Rights" by enshrining most of the rights and obligations guaranteed therein in chapter IV of the CFRN, 1999, as amended. The court in its exposition on the types of rights enforceable under Fundamental Rights (Enforcement Procedure) Rules stated in the case of *Fred Egbe v. Babatunde Belgore*[7] as follows:

> The Fundamental Rights (Enforcement Procedure) Rules, 1979 (now 2009) were put in place following the exercise of the powers conferred on the chief Justice of Nigeria by virtue of section 42 (3) of the 1979 constitution (now section 46(3) of the 1999 constitution) of the Federal Republic of Nigeria. The constitutional provisions and the rules of procedure so contrived are for the enforcement of these rights specifically entrenched in chapter IV of the 1979 constitution (also in chapter IV of the 1999 constitution). The two are not amenable to litigants in respect of such other civil claims or

5. Cap A9 Laws of the Federation of Nigeria, 2004.

6. (2009) 15 NWLR (pt. 1164) p. 229 at pp. 251-252 para G-A Ration 1. See also, *Abacha v. Fawehimi* (2000) 6. NWLR (pt. 660) 288; *Ogugu v. State* (1994) 9 NWLR (pt. 366) 1.

7. (2004) 8 NWLR (pt. 875) p. 336 at pp. 253-354 para G-C Ration 2; see also, *Ejefor v. Okeke* (2000) 7 NWLR (pt. 665) 363.

> rights that have not been so entrenched. If it were to be otherwise, there would not have been the need for and in fact the entrenchment of these specific rights (current provisions supplied in parenthesis).

By and large, not all civil claims can be enforced using the FREP Rules. It may be inferred on the authority of *Fred Egbe case* that civil claims, other than those specified in chapter IV of the CFRN, 1999, as amended, and the African Charter on Human and Peoples' Rights as well as related and relevant international instruments, cannot be enforced under the FREP Rules, 2009. This stand point is further buttressed by the Supreme Court of Nigeria in the case of *Amale v. Sokoto Local Government& Others*,[8] where the apex court held, inter alia, as follows:

> The correct approach in a claim for the enforcement of fundamental rights is to examine the relief sought; the grounds for such relief and the facts relied upon. Where the facts relied upon disclose a breach of fundamental rights of the applicant as the basis of the claim, there is a redress through the Fundamental Rights (Enforcement Procedure) Rules, 1979. However, where the alleged breach of right is ancillary or incidental to the main grievance or complaint, it is incompetent to proceed under the rules. This is because the right, if any, violated, is not synonymous with the substantive claim which is the subject matter of the action. Enforcement of the right, per se cannot resolve the substantive claim which is in any case different.

The foregoing view is manifestly restated in a relatively recent case of *Ejieke Maduka v. Microsoft Nigeria Limited & Others*[9] where the court asserted that:

> In ascertaining the justiciability or competence of a suit commenced by way of an application under the Fundamental Rights (Enforcement Procedure) Rules (FREP), the court must ensure that the enforcement of the fundamental rights under Chapter IV of the constitution is the main claim and not the ancillary claim.

Furthermore, although order IX rule one of the Fundamental Rights (Enforcement Procedure) Rules 2009 states that the effect of non-compliance with the provisions of the rules as regards time, place, manner or form, shall he treated as an irregularity,

8. [2012] ALL FWLR (pt 618) p.833 at pp 843-844.
9. [2014] 41NLLR (pt 125) p.67 at p 135.

rule 1 sub rules (i) and (ii) of order IX, apropos, provides an exception where the subject matter is not chapter IV of the CFRN, 1999, as amended, or the African Charter on Human and Peoples' Rights. In other words, where the subject matter of a course of action for the enforcement of fundamental human rights does not relate to any of the provisions of chapter iv of the CFRN, 1999, as amended, or the Africa Charter on Human and Peoples' Rights, such procedures shall be treated as a nullity and not just a mere irregularity.

B. An overview of the Fundamental Rights (Enforcement Procedure) Rules 2009

The Fundamental Rights (Enforcement Procedure) Rules, 2009 consists of a total of 15 orders and 55 rules. Essential provisions of the FREP Rules would be considered below.

Order 1 provides for the citation of the FREP Rules, 2009. Rule 1 of order 1 gives concise interpretation of concepts such as 'African Charter,' 'applicant,' 'application,' 'constitution,' 'courts,' 'defend,' 'fundamental right,' 'human rights,' 'judge,' 'legal representative,' 'public interest,' 'prison,' 'superintendent,' 'registrar,' 'respondent,' 'rules,' and 'state.' Order II focuses on the commencement of an action under the FREP Rules, 2009. Rule 1 of Order II states that:

> Any person who alleges that any of the Fundamental Rights provided for in the Constitution or African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act and to which he is entitled, has been, is being, or is likely to be infringed, may apply to the court in the state where the infringement occurs or is likely to occur, for redress:
> Provided that where the infringement occurs in a state which has no division of the Federal High Court, the division of the Federal High Court administratively responsible for the state shall have jurisdiction.

In the case of the *Federal University of Technology, Yola v. Musa Futuless,*[10] the court held, inter alia, that where a High Court of a state and a Federal High Court are within one state, they both have concurrent jurisdiction in matters pertaining to fundamental rights. However, it would appear that where the subject matter of a suit questions the action of the Federal Government or any of its agencies, the Federal

10. *(2005) 12 NWLR (pt. 938) p. 175 at p. 202 para D Ration 13;* see also, *Tukur v. Government of Gongola State* (No. 3) (1989) 4 NWLR (pt. 117) 517.

High Court has exclusive jurisdiction to entertain the matter.

This principle is succinctly stated in the case of Musa Futuless.[11] In that case, the respondent, as applicant, applied for the enforcement of his fundamental human rights at Adamawa State High Court. The crux of the respondent's complaint was that he was expelled by the appellant university based on the allegation of examination malpractice and assault on the invigilator when he was apprehended. The State High Court granted the respondent leave to enforce his fundamental rights. Dissatisfied with the decision, the appellant appealed to the Court of Appeal. The main question for determination on appeal was whether the state High Court had jurisdiction to have entertained the action challenging the decision of the appellant to expel the respondent from the university.

The court held that where the subject matter of a suit filed before the trial court questions the action of the appellant, the Federal University of Technology, Yola, which is a Federal Government agency, the subject matter certainly comes within the exclusive jurisdiction of the Federal High Court and as such Adamawa State High Court has no jurisdiction to entertain the matter. The court also held that by virtue of the provisions of section 230(1) of the CFRN, 1979 (similar to the provisions of section 251(1) of the CFRN,1999, *mutatis mutandis*), it is only the Federal High Court to the exclusion of any other court that has jurisdiction in civil courses and matters arising from:

> (a) the administration or management of the Federal Government or any of its agencies;
> (b) subject to the provisions of the constitution, the operation and interpretation in so far as it affects the Federal Government or any of its agencies; and
> (c) any action or proceedings for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies.

Furthermore, order II of the FREP Rules, 2009 specifically stipulates the mode of commencement of a matter. The rule states that an application for the enforcement of a fundamental right may be made by originating process accepted by the court which shall lie without leave of court.[12] It is obligatory to support such an

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11. *Id* (pt. 938) p. 175 at pp. 200-201 para G-D Ration 7; see also, *Onyenucheya v. Military Administrator, Imo State* (1997) 1 NWLR (pt. 482) 492.*Ali v. CBN* (1997) 4 NWLR (pt. 49) 192; and *University of Abuja v. Ologe* (1996) 4 NWLR (pt. 445) 706 at 723.

12. Order II rule 2, FREP Rules, 2009.

application by a statement setting out the name and description of the applicant, the relief sought, the grounds upon which the reliefs are sought, and an affidavit setting out the facts upon which the application is made.[13] The applicant is required to make the affidavit personally but where the applicant is in custody or if for any reason is unable to swear to the affidavit, the affidavit shall be made by a person who has personal knowledge of the facts or by a person who has been informed of the facts by the applicant, stating that the applicant is unable to depose personally to the affidavit.[14] This procedure is unequivocally articulated in the case of *Maduka v. Microsoft Nigeria Limited*[15] where the National Industrial Court of Nigeria held that:

> The law is settled that the Fundamental Rights (Enforcement Procedure) Rules constitute the only procedure for securing the enforcement of fundamental rights. Order II Rule 2 provides that the application may be made by any originating process accepted by the Court. Order II Rule 3 and 4 of the FREP Rules specify that the application shall be supported by affidavit, and not pleadings. Therefore, this application (referring to the instant application before the Court) cannot be made by way of complaint. It can be commenced by either Originating Summons or Originating Motion which are usually accompanied by affidavit. Either of these is a process by which an action can be commenced and accepted by the Court.

Order III of the FREP Rules, 2009, is concerned with the period of limitation of action. It provides that an application for the enforcement of fundamental rights shall not be affected by any limitation statute whatsoever. Order IV focuses on the general conduct of proceedings. Rule 1 of order IV states that an application shall be fixed for hearing within seven days from the day the application is filed. Rule (3) provides as follows:

> The count may, if satisfied that exceptional hardship may be caused to the applicant before service of the application especially when the life and liberty of the applicant is involved, hear the application ex parte upon such interim relieves as the justice of the application may demand.

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13. Order II rule 3, FREP Rules, 2009.
14. Order II rule 4 FREP Rules, 2009.
15. *[2014] 41 NLLR (pt 125) p.67 at p.135.*

Order V generally provides for the manner of service of court process. Order VI is concerned with the procedure to be used in amendment of statements and affidavits. Order VII is concerned with the mode of consolidation of several applications relating to infringements as regards the same matter. Order VIII makes provision in respect of the form and manner of notice of preliminary objection disputing the court's jurisdiction. Order IX stipulates that the effect of non -compliance with the FREP Rules as regards time, place, manner, or form, shall be treated as an irregularity and such proceedings would not be nullified except as they relate to the mode of commencement of the application or where the subject matter is not chapter IV of the CFRN, 1999, as amended, or the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. Order X deals with the procedure on how to commence an application to quash any proceedings in respect of matters brought pursuant to the 2009 rules. Order XI stipulates the orders or directions which a court may make for the purpose of enforcement of fundamental rights as follows:

> At the hearing of any application, under these Rules, the court may make such order, issue such Writs, and give such directions as it may consider just or appropriate for the purpose of enforcing or securing the enforcement of any of the Fundamental Rights provided for in the Constitution or African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act to which the applicant may be entitled.

The provision of order XI conforms to section 46(2) of the CFRN, 1999, as amended. This view is glaringly depicted in the case of *Solomon Ohakosim v. Commissioner of Police of Imo State & Others*[16]where the court held that section 46(2) of the CFRN, 1999, as amended, gives original jurisdiction to a High Court before which an allegation is made that any of the provisions of the constitution has been, is being or is likely to be infringed in relation to him, to hear and determine any application made to it in pursuance of the provisions of the section. The section also empowers the High Court to issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement within that state of any right to which the person making the application may be entitled under chapter IV of the CFRN, 1999, as amended.

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16. *(2009) 15 NWLR (pt. 1164) p. 229 at p. 252 para E-G Ratio 3.*

Order XII specifies the mode of hearing applications for the enforcement of fundamental human rights. Order XIII gives the latitude and right to any other person or body, who appears to the court to be a proper party to be heard whether or not such a party has been served with any of the relevant processes, and whether or not the party has any interest in the matter. The import of the provisions of order XIII of the FREP Rules, 2009, is that a person need not have an interest in the subject matter of a suit in order to be vested with the right to maintain an action for the enforcement of fundamental rights. In other words, parties that do not have direct interest in the subject matter of legal proceedings have the *locus standi* to institute an action (for themselves or on behalf of others) for the enforcement of fundamental human rights by virtue of the 2009 rules.

Order XIV empowers the court to mete out punishment for contempt. Order XV is concerned with transitional provisions. Rule 1 of order XV states that the fundamental rights (Enforcement Procedure) Rules 1979 are hereby abrogated. Rule 2 is to the effect that from the commencement of the FREP Rules, 2009 pending human rights applications commenced under the FREP Rules, 1979, shall not be defeated in whole or in part, or suffer any judicial censure, or be struck out or prejudiced, or be adjourned or dismissed, for failure to comply with the FREP Rules, 2009, provided the applications are in substantial compliance with the latter rules. Rules 3 of order XV also provide that such pending human rights applications brought pursuant to the FREP Rules, 1979, may continue to be heard and determined as though they had been brought under the FREP Rules, 2009.

Finally, Rule 4 apropos of order XV is to the effect that where in the course of any human rights proceedings, any situation arises for which there is or appears to be no adequate provisions in the FREP Rules, 2009, the civil procedure rules of the court for the time being in force shall apply. This implies that where there is a gap in the FREP Rules, 2009, recourse can be had to the High Court Civil Procedure Rules in a given state or the Federal High Court Rules, as the case may be.

III. INNOVATIONS IN THE FUNDAMENTAL RIGHTS (ENFORCEMENT PROCEDURE) RULES 2009 VIS-À-VIS THE 1979 RULES

By virtue of order 2 rule 2 of the FREP Rules, 1979, it is mandatory for an applicant to seek leave at the appropriate court for the enforcement of fundamental rights and such permission must be granted by a court of competent jurisdiction before the actual action can proceed. Thus, order 1 rule 2 sub rule 2 of the Fundamental Rights (Enforcement Procedure) Rules 1979 provides: No application for an order enforcing or securing the enforcement within that state of any such rights shall be

made unless leave therefore has been granted in accordance with this rule".[17] In the case of *Solomon Ohakosim v. Commissioner of Police of Imo State & Others,*[18] the appellant, an evangelist, was conducting a religious crusade in Okwelle in Imo state on the 14th June 2006, when he was arrested by police officers from the Nigerian Police, Imo state headquarters, Owerri. The police officers allegedly disrupted the crusade, dismantled and removed chairs, canopies as well as cash offerings amounting to N38,000 and some music instruments and disrupted the congregation.

The appellant filed a motion *ex parte* subsequently, through his counsel, at the High Court of Imo State, pursuant to the Fundamental Rights (Enforcement Procedure) Rules of 1979 for an order granting him leave to enforce his fundamental rights. After hearing the motion *ex parte*, the trial court refused the application on the grounds that there was a criminal charge against the applicant before a Magistrate Court at Dikenafai, which it held had not been determined. There was no evidence about the proceedings before the trial court. The ruling was delivered on 11th July 2006. Dissatisfied with the ruling, the appellant appealed to the Court of Appeal. The appeal was unanimously allowed pursuant to the judgment of the Court of Appeal on the 2nd April 2009. The court held, inter alia, as follows:

> The grant of an application for leave to apply to enforce Fundamental Rights is within the discretionary powers of the High court. And an appellate Court would not usually interfere with the exercise of such discretion unless it is shown that the discretion was exercised in an arbitrary manner or without due consideration of relevant issue. In the instant case, the trial Court did not properly exercise its discretion when it refused the appellant's application. Consequently, the Court of appeal interfered with same.

It may be deduced from the above-mentioned judicial authority that the provision of Order 2 Rule 2 of the FREP Rules, 1979, which makes it mandatory for an applicant to seek leave before enforcing her fundamental rights can occasion delay and hardship especially when it is arbitrarily refused. In the *Solomon Ohakosim case*, the Court of Appeal held that the trial court did not properly exercise its discretion when it refused the appellant's application to enforce his fundamental rights. Although the court allowed the appeal and accordingly granted the appellant leave to enforce his fundamental rights in the court below, so much delay had been

17. Cap C23 Laws of the Federation of Nigeria, 2004.

18. *(2009)15 NWLR (pt. 1164) p. 253 para C-G Ration 6; see also, Mbani v. Bosi* (2006) 11. NWLR (pt. 991) 400; and *Oyekanmi v. N.E.P.A.* (2000) 15 NWLR (pt. 690) 414.

occasioned. The trial court delivered its ruling on 11th July 2006 and the appeal ended at the Court of Appeal on 2nd April 2009, a period of over two years. In contradistinction, the FREP Rules, 2009 do not require an applicant to seek leave for the enforcement of his fundamental human rights. Order 2 rules of the FREP Rules, 2009, provide thus: "An application for the enforcement of the Fundamental Right may be made by originating process accepted by the court which shall subject to the provisions of the Rules, lie without leave of court."

This innovation has unequivocally eliminated the hardship or delay applicants are likely to suffer where there is an arbitrary refusal by a trial court to grant leave to enforce human rights as experienced in the case of Solomon Ohakosim. By virtue of order 1 rule 3 sub rule 1 of the FREP Rules, 1979, leave shall not be granted to apply for an order for the enforcement of fundamental human rights unless the application is made within 12 months from the date of the happening of the matter or act complained of except where the delay is accounted for to the satisfaction of the court or judge to whom the application for leave is made.

The above provision implies that under the FREP Rules, 1979, a right of action for the enforcement of fundamental human rights would become statute barred if an applicant fails to seek leave to enforce such rights within 12 months from the date of the happening of the event. On the contrary, statutory limitations have been completely expunged from the FREP Rules, 2009. Order III apropos provides that: **"**An application for the enforcement of fundamental Rights shall not be affected by any limitation statute what so ever."

Furthermore, order 2 rule 1 sub rule 1 of the FREP Rules, 1979, is to the effect that when leave has been granted to apply for the order being asked for, the actual application for such an order must be made by notice of motion or by origination summons to the appropriate court. It is therefore mandatory for an application for the enforcement of human rights to be made by notice of motion or originating summons. Order 2 rule 1 sub rule 1 of the FREP Rules, 1979 also provides that "there must be at least eight clear days between the service of the motion or summons and the day named for hearing". This process requires ample time before a matter is heard. No provision is made for emergencies or circumstances in which hardship may be caused before the service of processes and hearing of the matter. Order IV rule 3 of the FREP Rules, 2009 provides as follows:

> The Court, may, if satisfied that exceptional hardship may be caused to the applicant before service of the applications especially when the life or liberty of the applicant is involved, hear the applicant ex

> parte upon such interim reliefs as the justice of the application may demand.

The purport of the above provisions is that an applicant may seek interim reliefs by way of an *ex parte* application provided it is shown to the satisfaction of the court that hardship may be caused to the applicants especially as it relates to matters affecting the life and liberty of the applicant. Hearing of an application for the enforcement of fundamental rights under the FREP Rules, 1979 is done by oral arguments upon service of motion or summons annexed with relevant affidavits to the respondents involved.[19] There is no express provision for written address or brief of argument. However, under the FREP Rules, 2009, such an application is essentially heard based on written addresses of the parties duly filed and adopted in court.

Nevertheless, each party to the action is given the latitude to present oral argument of not more than 20 minutes in respect of matters not contained in their written addresses provided such matters come to the knowledge of the party after he had filed his written address.[20] The novel provision in the FREP Rules, 2009, for hearing applications by filing written addresses engenders the expeditious determination of matters. This view is predicated on the fact that so much time is expended in the course of hearing oral arguments which are usually recorded in long hand by most judges in Nigerian courts.

IV. CONCLUSION

The purport of the Fundamental Rights (Enforcement Procedure) Rules 2009 made by retired Justice Idris Legbo Kutigi, GCON (former Chief Justice of Nigeria) is to provide for contemporary rules of procedure governing applications for the enforcement of fundamental human rights as enshrined in chapter IV of the CFRN, 1999, as amended, and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. Some salient innovations in the FREP Rules, 2009 include the following:

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19. See Order 2 Rule 1 (1), (2), (3), (4) and (5) of the Fundamental Rights (Enforcement Procedure) Rules of 1979 Cap C23 Laws of the Federation of Nigeria, 2004. See Order 2 Rule 1 (1), (2), (3), (4) and (5) of the Fundamental Rights (Enforcement Procedure) Rules of 1979 Cap C23 Laws of the Federation of Nigeria, 2004.

20. Order XII Rules (1) and (2) of the Fundamental Rights (Enforcement Procedure) Rules of 1979 Cap C23 Laws of the Federation of Nigeria, 2009.

(1) The FREP Rules, 2009, do not require an applicant to seek leave or permission of a trial court to enforce his fundamental human rights. This is in contrast to the FREP Rules, 1979 which make it mandatory for an applicant to seek leave and express approval of a court before such an application is made.
(2) Unlike the FREP Rules of 1979, statutory limitations are not applicable in respect of actions for the enforcement of fundamental human rights under the FREP Rules of 2009. Order III of the FREP Rules, 2009, succinctly states that "an application for the enforcement of fundamental rights shall not be affected by any limitation statute whatsoever."
(3) Contrary to the mandatory requirement of eight clear days from the date of service of motion or summons before a court can commence hearing an action to enforce fundamental human rights under the FREP Rules, 1979, an applicant may seek for interim reliefs in emergencies by way of an *ex parte* application provided it is shown to the satisfaction of the court that hardship may be occasioned especially as regards matters affecting the life and liberty of the applicant by the extant FREP Rules of 2009.
(4) Unlike the FREP Rules of 1979, under the FREP Rules, 2009, an application for the enforcement of fundamental human rights is essentially heard in court on the basis of written addresses duly filed and adopted in court. This procedure enhances expeditious determination of matters.

Justice Idris Legbo Kitigi, GCON, (Chief Justice of Nigeria as he then was) is commended for the unprecedented innovations in the FREP Rules, 2009, which is palpably aimed at advancing the frontiers of human rights advocacy and enhancing the efficacious protection of the inalienable human rights. It is submitted that the replacement of the FREP Rules, 1979, with the current FREP Rules of 2009 is patently geared towards a progressive trajectory as far as the enforcement of human rights in Nigeria is concerned.

JUSTICE FOR CHILDREN IN UGANDA: AN EXPLORATORY REVIEW

Damalie Naggita*

ABSTRACT

This article reviews the international legal regime for the protection of children and examines the extent to which Uganda has conformed to the standards. It reviews the existing legal and policy framework and assesses the country's conformity to the international standards for the care and protection of children. The article observes that whereas Uganda has ratified the UN Convention on the Rights of the Child and domesticated the instrument by providing for children's rights in the 1995 constitution and also enacting the Children's Act, cases of violation of children's rights persist. The article urges the Uganda government to prioritise the protection of children from abuse and violence so as to ensure a safe environment that is conducive for child growth and development.

I. INTRODUCTION: LEGAL FRAMEWORK FOR THE PROTECTION OF CHILDREN

A. International Frameworks for the Protection of Children

1. Convention on the Rights of the Child (CRC)[1]—The United Nations adopted this convention on 2nd September 1990. It contains the basic standards for the care and protection of children. According to its preamble, it is premised, among others, on the Universal Declaration of Human Rights[2] (UDHR) proclamation that childhood requires and is entitled to special care and assistance.[3] The CRC thus recognises that due to their physical and mental immaturity, children need special

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1. United Nations General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, page 3. Available at: http://www.refworld.org/docid/3ae6b38f0.html.

2. United Nations General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: http://www.refworld.org/docid/3ae6b3712c.html.

3. CRC, paragraph 4 of the preamble; Article 25(2) of the UDHR (1948).

safeguards and care.[4] This is especially so because of the fact that they are dependent on others for their wellbeing, growth and development. The CRC provides for the basic rights of children as well as duties, responsibilities and obligations of State Parties and others towards children. This review recognises the indivisibility and interdependence of rights. For ease of reference, rights which are on similar or more closely connected areas have been handled together, and in some cases along the reporting lines as recommended by the Committee on the Rights of the Child[5] in as far as they are within the ambit of this review.

a) Definition of a child and General Principles

Under the CRC, a child is any human being under 18 years of age, unless under the applicable national laws maturity is attained earlier.[6] The CRC enjoins States Parties to observe the following general principles, viz:

i) The principle of non-discrimination: Under this principle, all children are entitled to the rights and protections enshrined in the CRC without distinction or discrimination on any ground whatsoever.[7]

ii) Best interests of the child: The best interests of the child must be the guiding principle in all matters and decisions concerning the child. In this regard, States Parties must take all appropriate measures to ensure that institutions, services and facilities concerned with the care and protection of children conform to standards as set in the CRC and other instruments.[8] In pursuance of this principle, the CRC provides that where the child is capable of forming views on matters concerning them, such views must be respected and taken into account.[9]

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4. CRC, paragraph 9 of the preamble; UN Committee on the Rights of the Child (CRC) (hereinafter: 'CRC Committee'), General comment No. 13 (2011): The Right of the Child to Freedom From all Forms of Violence, 18 April 2011, CRC/C/GC/13. Available at: http://www.refworld.org/docid/4e6da4922.html.

5. *See*, CRC Treaty Specific Reporting Guidelines, Harmonized According to the Common Core Document, CRC/C/58/Review, 21 October 2010.

6. CRC, Article 1.

7. *Id.*, Article 2.

8. *Id.*, Article 3; CRC Committee, General Comment No. 14 (2013) on the Right of the Child to Have his or her Best Interests Taken as a Primary Consideration (Article 3, paragraph. 1), 29 May 2013, CRC /C/GC/14, Available at: http://www.refworld.org/docid/51a84b5e4.html.

9. *Id.*, Article 12.

b) The right to life, survival and development

Every child has the inherent right to life as well as to survival and development.[10] In order to realise this right, States Parties must ensure that the child not only has access to health care services, but they must also, inter alia, take measures to combat and prevent disease and malnutrition; ensure the provision of pre-natal and post-natal health care for mothers as well as providing the necessary information to both children and their parents/carers and society at large that will enable them achieve the highest attainable standard of health.[11] The right of children with disabilities to special care is especially provided for and this must be in conditions that ensure their dignity, self-reliance and full participation in the community.[12]

For the right to development, the CRC provides that both parents and/or carers are primarily responsible for providing an adequate standard of living which ensures the child's development in all spheres of life, viz, the physical, mental, spiritual, moral and social.[13] However, where necessary, States Parties must provide assistance, material and otherwise, to parents/carers to enable them fulfill this obligation.[14] In addition, States must also take necessary measures to enable every child benefit from social security and social insurance which would further the realisation of the rights to life, survival and development.[15]

c) The rights to education, leisure and cultural activities

The CRC recognises every child's right to education, including vocational training and guidance.[16] States are required to provide free and compulsory primary education, encourage the development of different forms of secondary education together with general and vocational education, as well as to take measures towards the provision of free secondary education and financial assistance to those in need.[17] The convention also recognises the child's right to rest, leisure, recreational and

10. *Id.*, Article 6.

11. *Id.*, Article 24; CRC Committee, General Comment No. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Article 24), 17 April 2013, CRC/C/GC/15, Available at: <http://www.refworld.org/docid/51ef9e134.html>.

12. *Id.*, Article 23; CRC Committee, General Comment No. 9 (2006): The Rights of Children with Disabilities, 27 February 2007, CRC/C/GC/9.

13. *Id.*, Articles 27(1) and 18(1).

14. *Id.*, Articles 27 and 18.

15. *Id.*, Article 26.

16. *Id.*, Article 28(1).

17. *Id.*, Article 28.

cultural and artistic activities.[18]

d) Family environment and alternative care

The child has a right to appropriate parental guidance and direction together with the right to know and live with its parents.[19] Children should only be separated from their parents if it is considered to be in their best interests.[20] Where they are separated, measures should be taken to encourage contact and such separation should as much as possible be temporary and with a view to eventual reunification.[21] Apart from the right to know and be cared for by its parents, the child also has the right to a name and a nationality[22] as well as the right to preserve its identity, nationality, name and family relations in accordance with the law.[23] Where adoption is considered, it shall be done in a manner which safeguards the best interests of the child.[24]

e) Other civil rights and freedoms

The child has the right to freedom of expression,[25] freedom of thought, conscience and religion with proper direction from its parents.[26] The child further has the right to freedom of association and peaceful assembly in accordance with the law and to information that is relevant to its social, spiritual and moral wellbeing as well as for its physical and mental health.[27] The CRC also protects the child's right to privacy and from unlawful attacks on honour and reputation.[28] It further enjoins States

18. *Id.*, Article 31; CRC Committee, General Comment No. 17 (2013) on the Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts (Article 31), 17 April 2013, CRC/C/GC/17. Available at: http://www.refworld.org/docid/51ef9bcc4.html.

19. CRC, Article 9.

20. *Id.*, Article 3.

21. *Id.*, Article 9.

22. *Id.*, Article 7; *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v. The Government of Kenya Decision*, Communication no. 002/2009, paragraph 47. See also, Article 24 (3) of the UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, at 171, available at: http://www.refworld.org/docid/3ae6b3aa0.html.

23. CRC, Article 8.

24. *Id.*, Article 21.

25. *Id.*, Article 13.

26. *Id.*, Article 14.

27. *Id.*, Article 17.

28. *Id.*, Article 16.

Parties to protect the child from torture or other cruel, inhuman or degrading treatment or punishment while prohibiting sentencing the child to capital punishment or life imprisonment without parole.[29]

Where the child is imprisoned or detained, this should be the result of due process of the law and at all times during such detention or imprisonment, the child must be treated with humanity and respect and in accordance with its needs and age. In particular, such child must not be detained or imprisoned together with adults unless it is considered in its best interests to do so.[30]

f) Special protection measures

The CRC provides special measures of protection for children who are considered to be more vulnerable. These include children in emergency situations like refugee children and those involved in armed conflict.[31] Both these groups of children must be given appropriate protection and assistance as provided for in the CRC as well as under humanitarian law.[32] The latter must also be protected from recruitment and involvement in direct hostilities.

Special protection is also accorded to children in conflict with the law. Such children must be treated with dignity and in a manner which safeguards their rights with a view to their reintegration in society. Their privacy must be protected at all stages of the proceedings, which must be conducted without delay and where possible outside of the regular judicial proceedings.[33]

Lastly, the CRC specially recognises the vulnerability of children in situations of exploitation like economic exploitation and child labour,[34] drug abuse,[35]

29. *Id.*, Article 37(a).

30. *Id.*, Article 37(b), (c).

31. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, General Assembly Resolution A/RES/54/263 of 25 May 2000, entry into force 12 February 2002. Available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPACCRC.aspx; See also, General Recommendation 30 On Women in Conflict Prevention, Conflict and Post-Conflict Situations, U.N. Doc. CEDAW/C/GC/30 (2013).

32. CRC, Articles 22 and 38.

33. *Id.*, Article 40.

34. *Id.*, Article 32.

35. *Id.*, Article 33.

sexual exploitation and sexual abuse,[36] sale,[37] trafficking and abduction,[38] and other forms of exploitation which may prejudice a child's welfare.[39] The latter could include, for example, children living or working on the street.[40]

The foregoing are some of the basic protections for the rights of children which Uganda has undertaken to observe for all children in its territory. It must thus put in place measures, legislative, administrative and otherwise which ensure their observance, enjoyment and protection. In addition to these international obligations, there are also regional instruments and arrangements geared towards the protection of children. These too are reviewed below.

B. African Instruments Protecting the Rights of Children

1. The African Charter on the Rights and Welfare of the African Child (ACRWC)[41]—This charter entered into force on 29th November 1999. It arose, among others, out of the concern that the situation of most African children remains critical due to the unique factors of their socio-economic, cultural, traditional and development circumstances as well as the natural disasters, armed conflicts, exploitation and hunger which have beset the continent. In addition to that and on account of the child's physical and mental immaturity, the child needs special safeguards and care for it to develop into a self-reliant and responsible adult. The ACRWC thus provides for different rights, duties and obligations on the part of children, Member States and other members of society regarding the physical and mental health of children as well as their moral and social development. These will be considered along the same line.

The ACRWC defines a child as a human being below 18 years.[42] It also recognises non- discrimination and the best interests of the child as the guiding

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36. *Id.*, Article 34; see also, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, General Assembly Resolution A/RES/54/263 of 25 May 2000, entered into force on 18 January 2002. Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx.

37. *Id*.

38. CRC, Article 35.

39. *Id.*, Article 36.

40. Paragraph 38(e) CRC/C/58 Rev.1

41. OAU Doc. CAB/LEG/24 9/49 (1990).

42. ACRWC, Article 2; *Michelo Hunsungule and Ors (On behalf of children of Northern Uganda) v. The Government of Uganda*, Decision of the African Committee of Experts on the Rights and Welfare of the Child, Communication No.1 of 2005, paragraph 40*; Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v. The Government of Kenya, supra* note 23 , paragraph 42.

principles in determining matters relating to children, with the attendant requirement to respect and take into account their views in all proceedings affecting them.[43] The ACRWC, in addition, discourages all customs, traditions, cultural or religious practices which are inconsistent with its rights, duties and obligations.[44]

Like the CRC, the ACRWC recognises the child's right to life, survival and development and prohibits death sentences against children.[45] It also protects the child's right to physical, mental and spiritual health as a way to ensure the realisation of the child's right to life and survival.[46] It affirms the parental responsibility for the child's upbringing and development and urges States to offer assistance to parents and carers where need arises.[47] All forms of economic exploitation of the child are prohibited as well as work that might be injurious to the health and overall development of the child.[48] In order to realise this protection, States Parties must regulate both formal and informal sectors through prescription of the minimum working age, regulation of working hours and conditions of employment and by making provisions for sanctions in cases of breach.[49]

The ACRWC also guarantees the child's rights to education in order, among other things, to develop its personality, talents and mental and physical abilities,[50] as

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43. ACRWC, Articles 3 and 4; *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v. The Government of Kenya*, *id.*, paragraph 55 – 57.

44. ACRWC, Article 1(3).

45. *Id*., Article 5.

46. *Id.*, Article 14, *Michelo Hunsungule and Ors (On behalf of children of Northern Uganda) v. The Government of Uganda*, *supra* note 43, paragraphs 72 – 75; *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v. The Government of Kenya*, *supra* note 23, paragraph 56 – 62. See also, *Purohit and Moore v. The Gambia*, Communication 241/2001, paragraph 80; *Free Legal Assistance Group and Others v Zaire*, Communications No. 25/89, 47/90, 56/91, 100/93.

47. ACRWC, Article 20.

48. *Id.*, Article 15.

49. *Id*.

50. *Id.*, Article 11; *Michelo Hunsungule and Ors (On behalf of children of Northern Uganda) v. The Government of Uganda*, *supra* note 43, paragraphs 61 – 71; ; *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v. The Government of Kenya*, *supra* note 23, paragraph 63 – 68; See also W*orld Organisation Against Torture, Lawyers' Committee for Human Rights, Jehovah Witness, Inter-African Union for Human Rights v. Zaire*, Communications 25/1989, 47/1990, 56/1991, 100/1993, at paragraph 40. The African Commission on Human and Peoples' Rights found that the closure of schools for two years constituted a violation of Article 17 of the Banjul Charter on the right to education. The Commission stated that when the State closes a school, it has to make other options available, however makeshift or problematic these alternative arrangements might be.

well as the child's right to leisure, recreation and participation in cultural activities.[51] Like the CRC, the ACRWC also protects the child's right to a family environment, parental care and protection.[52] It recognises adoption when considered necessary and provides that it must be guided by the best interests of the child and in accordance with the law.[53] In contrast, however, it recognises the family as the natural unit and basis of society.[54]

Under the ACRWC, the child's fundamental freedoms of expression, association, thought, conscience and religion are protected.[55] It protects against child abuse and torture,[56] guarantees the child's right to privacy,[57] and provides for special treatment in the administration of juvenile justice.[58] The ACRWC also specially protects more vulnerable children like refugee children[59] and those affected by armed conflicts[60] and in situations of exploitation including sexual exploitation and abuse, and engagement in pornographic activities.[61] Children of imprisoned mothers are also given special protection. The ACRWC recommends that non-custodial sentences be preferred in the case of such mothers and/or ensuring that they are not imprisoned with their children.[62] It further protects children from illicit drug use and abuse,[63] and enjoins States Parties to take appropriate measures to prevent and protect children from abduction, sale, traffic or any form of begging.[64]

In addition, the ACRWC enjoins States Parties to undertake measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child, especially customs and practices which are prejudicial to health or life, as well as customs and practices which discriminate

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51. ACRWC, Article 12.
52. *Id.*, Articles 19 and 25.
53. *Id.*, Article 24.
54. *Id.*, Article 18.
55. *Id.*, Articles 7, 8 and 9.
56. *Id.*, Article 16.
57. *Id.*, Article 10.
58. *Id.*, Article 17; CRC Committee, *General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10. Available at: http://www.refworld.org/docid/4670fca12.html.
59. ACRWC, Article 23.
60. *Id.*, Article 22; *MicheloHunsungule and Ors (On behalf of children of Northern Uganda) v. The Government of Uganda*,*supra* note 43, paragraphs 40 – 60.
61. ACRWC *id*, Article 27; *MicheloHunsungule and Ors (On behalf of children of Northern Uganda) v. The Government of Uganda*, *id*, paragraph 76 – 78.
62. ACRWC, Article 30.
63. *Id.*, Article 28.
64. *Id.*, Article 29; *Michelo Hunsungule and Ors (On behalf of children of Northern Uganda) v. The Government of Uganda*, *supra* note 23, paragraph 79 – 80.

against children on grounds of sex or other status.[65] Child marriage and child betrothal are expressly prohibited with States Parties being required to specify the age of marriage at 18 years.[66]

2. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)[67]—In addition to the CRC, the African Union also provides for the protection of children's rights in the Maputo Protocol. This protocol is pursuant to, inter alia, article 18 of the African Charter providing for the elimination of discrimination against women and for ensuring the protection of the rights of women. Although the protocol is devoted to the rights of women, it also provides for protection of children, especially the girl-child. Indeed, it defines a "woman" as a person of the female gender, including girls.[68] Among its provisions for the elimination of discrimination against women and the equalisation of opportunities, it protects the right to equal opportunity and access to education and training, urging States Parties to ensure the retention of girls in schools and other training institutions.[69] It calls upon States Parties to undertake legislative measures to eliminate all forms of harmful practices like female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation as well as behaviours, attitudes and practices which negatively affect the fundamental rights of women and girls to life, health, dignity, education and physical integrity.[70]

The Maputo Protocol further provides for reciprocal responsibility of both women and men towards children[71] and for the minimum age of marriage at 18 years.[72] It urges States Parties to set a minimum working age to protect children from exploitation and abuse.[73] It prohibits the participation of children below 18 years in direct hostilities, or their recruitment as soldiers.[74] Finally, the protocol expressly protects the right of widows to automatically become guardian and custodians of their children, unless this would prejudice the interests of such children.[75]

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65. ACRWC, Article 21.
66. *Id.*, Article 21(2).
67. African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003, available at: http://www.refworld.org/docid/3f4b139d4.html.
68. Maputo Protocol, Article 1(k).
69. *Id.*, Article 12.
70. *Id.*, Articles 5(1)(g).
71. *Id.*, Articles 6(i), 7(c), 13(l).
72. *Id.*, Article 6.
73. *Id.*, Article 13.
74. *Id.*, Article 11(4).
75. *Id.*, Article 20.

The above are some of the basic international and regional instruments for the protection of the rights of children. It is now pertinent to review Uganda's legal and policy framework to determine how far it has conformed to the above standards.

C. National Legal Regime for the Protection of Children

1. Constitution of the Republic of Uganda—The 1995 constitution of the Republic of Uganda provides for the special protection of children. Apart from the general protections in its bill of rights, children are specifically protected in its article 34. Under this provision, children have the right to know and be cared for by their parents or those entitled to do so. They also have the right to basic education provided by the State and their parents.[76] In addition, the constitution also guarantees them the right not to be deprived of the basic social, health and other amenities.[77] It also protects them from all forms of exploitation and protects them from performing hazardous work or that which may interfere with their education or cause them harm in all spheres of development.[78] It further accords special protection to orphans and other vulnerable children[79] and also protects child offenders who must not be incarcerated with adults.[80]

2. The Children Act[81]—This is a 1997 consolidation of all the laws relating to children. Formerly, these were scattered in different statutes and some of them were quite outdated, while other areas of children's protection had not been properly legislated for. It came into force to further operationalise the constitutional provisions relating to children and, more importantly, it is the domestication of the CRC to which Uganda is a signatory. It thus emphasises the protection of the child by re-affirming the rights, protections, duties and responsibilities as contained in the CRC as well as those in the Banjul Charter and Maputo Protocol.

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76. *Mifumi (U) Ltd and 12 Ors v. Attorney General* and *Kenneth Kakuru*, Constitutional Petition No. 12 of 2007.

77*In the Matter of Joshua Muyingo Steven Katongole and Henry Kakooza (children)* and *In the Matter of an Application for a Legal Guardianship Order by James Todd Figueroa and Nicole Theresa Figueroa*, High Court at Kampala, Family Division, Family Cause No. 299 of 2013.

78. UGANDA CONST., 1995, Article 34(4).

79. *Basiku Thomas v. Uganda*, In the Supreme Court at Kampala, Criminal Appeal No. 33 of 2011.

80. UGANDA CONST., 1995, Article 34(6).

81. Chapter 59 of the Laws of Uganda.

i) The Protection of Children's Rights under the Act—As required by the CRC, the Children Act defines a child as a person below the age of 18 years.[82] It provides for the welfare principle as paramount in all decisions concerning a child.[83] It affirms the child's right to know and be cared for by its parents or guardians.[84] It further protects the child's right to education and guidance, immunisation, adequate diet, clothing, shelter and medical attention.[85] The Children Act further protects children from harmful social or customary practices[86] in addition to prohibiting employment which is likely to be harmful to their health, education or mental, physical or moral development.[87] Children with disabilities are specially protected as required by the CRC, and they, inter alia, must be afforded rehabilitation facilities as well as equal opportunities for education.[88] Children with disabilities are further specifically protected in the Persons with Disabilities Act of 2006.[89] This is in accordance with the CRC as well as the Convention on the Rights of Persons with Disabilities.[90]

Apart from the law, other interventions have been put in place by the government in order to safeguard and further ensure the enjoyment of the rights enshrined in the CRC and the Children Act. There are, for example, the Universal Primary Education and Universal Secondary Education policies, which seek to provide free education for children, with special attention to children with disabilities. The National Population Policy for Sustainable Development[91] also recognises that Uganda's population is largely youthful with 49.3% being children below 15 years.[92] It encourages increased primary school enrollment and aims to

82. Children Act, section 2.*In the Matter of an Application for Guardianship of Kyarukundo Aidan Innocent Order by Michael Kyle Edwards and Toria Anne Argo Edwards*, High Court at Kampala, Family Cause No. 114 of 2010.

83. Children Act, section 3. *In the Matter of an Application for Guardianship of Kyarukundo Aidan*, *id*.

84. Children Act, section 4.

85. *Id.*, section 5.

86. *Id.*, section 7.

87. *Id.*, section 8.

88. *Id.*, section 9.

89. See also *Legal Action for People with Disabilities v. Attorney General and 2 Ors*, in the High Court at Kampala, Civil Division, Miscellaneous Cause No. 146 of 2011.

90. UN General Assembly, Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Annex 1. Available at: http://www.refworld.org/docid/4680cd212.html.

91. Ministry of Finance, Planning and Economic Development, National Population Policy for Social Transformation and Sustainable Development (2008), paragraph 30. Available at: http://www.hsph.harvard.edu/population/policies/uganda.pop.08.pdf.

92. National Population Policy for Social Transformation and Sustainable Development (2008), paragraph 30.

combat dropout rates especially of girls, which are rated at 78%.[93] The policy also recognises the need to open up opportunities for education, skills development, recreation, healthcare and employment in order to cater for the large segment of youths, children and adolescents.[94] It further affirms the need to revise laws to target cultural practices, customs and norms regarding polygamy, property ownership, widow inheritance, child marriages, female genital mutilation and bride price, child labour and gender division of labour which all have implications on the status and welfare of women and children.[95]

ii) Support for Children—The CRC requires States Parties to take all appropriate legislative, administrative and other measures for the implementation of the rights recognised by the convention.[96] In light of this requirement, Uganda has put in place institutional frameworks and monitoring measures to ensure the protection of the rights of children. The Children Act in part III provides local government councils at all levels with the duty to safeguard and promote the welfare of all children in their area.[97] These Local Councils are required to designate one of their members, the secretary for children's affairs, to be responsible for the welfare of children.[98] The act also further strengthens measures for children protection by extending the duty to ensure the protection of children against abuse of their rights to every person.[99] It also provides for criminal liability to any person who witnesses an abuse against the rights of the child and fails to report to the responsible authorities.[100] This provision widens and strengthens the protection of children from violence and abuse of their rights since some of the cases meted out against children occur in areas outside or farthest from the authorities and therefore extending the obligation to non-state actors and individuals will ensure a safe environment for the growth and development of children.

In addition to the above, Uganda also created the National Children Authority as a body responsible for handling the affairs of children in Uganda.[101] The authority is mandated to manage, monitor and coordinate the implementation of all child-related policies and laws, creating inter-sectoral coordination and

93. *Id.,* paragraph 48.
94. *Id.*, paragraph 79.
95. *Id.*, paragraphs 60, 61.
96. CRC, Article 4.
97. Children Act, section 10(1)a).
98. *Id.*, section 10(1)b).
99. *Id.,* section 5.
100. *Id.,* section 6.
101. *Id*., section 9(A).

management of matters related to inter-country and domestic adoption of children.[102]

iii) Administration of Juvenile Justice—The CRC requires States Parties to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children who come in conflict with the law, and whenever appropriate, to put in place measures for dealing with such children without resorting to judicial proceedings.[103] The CRC further recommends a variety of dispositions which must be considered first in the handling of such children in places of institutional care.[104] This undertaking is an affirmation of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice otherwise called "The Beijing Rules."[105] As one of the principles of these rules, Member States must provide for positive measures that involve the full mobilisation of all possible resources, including the family, volunteers and other community groups, as well as schools and other community institutions for the purpose of promoting the wellbeing of the juvenile. This aims to support the juvenile in conflict with the law address the challenges one might be facing.

In this vein, therefore, Uganda has enacted provisions governing the treatment and handling of children in conflict with the law.[106] It has also provided for the establishment of the Family and Children Court with jurisdiction to hear and determine criminal charges against a child in conflict with the law, as well as applications relating to child care and protection.[107] Proceedings of this court shall be in camera in order to protect the privacy of the child and where possible they shall be informal and non-adversarial. Where possible, the parents or guardians may be present as well as a probation and social welfare officer, and the child has the right to legal representation.[108] Like the CRC, the Children Act also provides for a variety of orders against the juvenile offender.[109] It also provides for matters regarding infringement of the child's rights to be heard by the executive committee court at the village level where this will not adversely affect the interests of the child, with a

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102. *Id.*, section 9(B).

103. UN Committee on the Rights of the Child (CRC), *General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10. Available at: http://www.refworld.org/docid/4670fca12.html.

104. CRC, Article 40(3), (4).

105. Adopted under GA Res 40/33 of 29/11/1985.

106. Children Act, sections 88 to 92.

107. *Id.*, sections 13 to 18.

108. *Id.*, section 16.

109. *Id.*, section 94.

right of appeal to higher courts.[110]

Where a matter concerning a child is referred to the police, or where the provisions relating to juvenile offenders in part X of the Children Act apply, the police must follow the Police Guidelines 2000 in handling such a child. These guidelines were designed to ensure that cases involving children are disposed of in a speedy and efficient way that ensures that the best interests of the child take priority and where possible, cases involving children in conflict with the law must be handled by the Child and Family Protection Unit, which has been specially set up within the police for that purpose.

iv) Fostering, Adoption, and Care and Protection of Children—Uganda is bound by its undertakings under the CRC to ensure that where it is found necessary to put the child into foster care or to have it adopted, such proceedings shall be properly and legally authorised by a competent authority and with due regard to the best interests of the child.[111] It must also ensure that such processes do not lead to improper financial gain for those involved nor must it result into trafficking of the child involved. Apart from the CRC, this duty is further emphasised in the Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption of 1993 which seeks to ensure that children put up for adoption across borders continue to enjoy the protections and rights of the CRC. In order to fulfill this obligation, Uganda has included provisions in the Children (Amended) Act for the lawful and supervised fostering and adoption of children in line with the duties imposed in the aforesaid conventions.[112] It also has in place provisions for the care and protection of children[113] in accordance with its obligations under the CRC.

v) Other Laws and Policies to Safeguard the Rights of Children—In addition to the laws and policies discussed above, Uganda has a number of other laws, policies and plans which either directly or indirectly affect the rights, wellbeing and development of children. The policies include, for example, the National Youth Policy, the National Child Labour Policy, the National Gender Policy, the National Policy on Disability, the National Orphans and other Vulnerable Children Policy, the Draft National Health Policy and others. Among the laws are: the Penal Code Act and its amendments, which have detailed provisions geared towards the protection of children in compliance with the CRC governmental

110. *Id.*, section 92.
111. CRC, Articles 20 and 21.
112. Children Act, Parts VI, VII.
113. *Id.*, Part V.

undertakings. The Penal Code Act, for example, criminalises the abduction and unlawful removal of a child under 18 years from its parents or guardians;[114] prohibits indecent assaults,[115] defilement,[116] including aggravated defilement,[117] procuring the defilement of women and girls whether in or outside Uganda,[118] permitting or suffering the defilement of any girl under 18 years,[119] conspiracy to defile,[120] detention with intention to commit sexual offence,[121] and indecent assault on boys under 18 years.[122]

In addition, the Penal Code Act also criminalises kidnapping from lawful guardianship of any male minor under 14 years or a female minor under 16 years of age,[123] kidnap and abduction for slavery, sexual exploitation, including aiding and abetting as well as conspiracies to commit such offences.[124] Habitual dealing in slaves, wrongful confinement, buying and selling of persons as slaves, inducing persons to give themselves up as slaves, or compelling them to perform compulsory labour are all offences under the Penal Code Act.[125] Kidnapping or abduction of any child under 14 years for purposes of dispossessing them of their property is also another provision to safeguard the interests of children. All these offences are intended to protect children against sexual exploitation and abuse, plus trafficking, sale, slavery and slave-like practices as obliged by the CRC.

In further protection of the right to life and survival of the child, the Penal Code Act prohibits desertion of a child under 14 years;[126] neglecting to provide food to any child of tender years;[127] child stealing or receiving or harbouring any stolen

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114. Penal Code, Chapter 120 of the Laws of Uganda, Section 126(b); *Sabwe Abdu* v. Uganda, in the Supreme Court of Uganda at Mengo, Criminal Appeal No. 19 of 2007.

115. Penal Code, Section 128; *Uganda v. Ojengo Abdu*, High Court at Jinja, Criminal case No. 009 of 2011.

116. Penal Code *id*, section 129(1); *Ssali Ibrahim v Uganda*, Court of Appeal at Kampala, Criminal Appeal No. 0243 of 2009.

117. Penal Code (Amendment) Act, section 129(1)(2); *Uganda v. Juma Olaro*, High Court of Uganda at Mukono, Criminal Case No. 0086 of 2010.

118. Penal Code Act, section 132.

119. *Id.*, section 133.

120. *Id.*, section 140.

121. *Id.*, section 134.

122. *Id.*, section 147.

123. *Id.*, section 240.

124. *Id.*, sections 244-246.

125. *Id.*, sections 247-252; *Uganda v Kalungi Constance*, High Court at Kampala, Criminal Suit No. 443 of 2007.

126. Penal Code Act, section 156.

127. *Id.*, section 157.

child;[128] failing or neglecting to provide the necessities of life to any child under 14 years;[129] concealing the birth of a child whether born dead or alive;[130] killing an unborn child[131] and committing infanticide.[132]

To safeguard the child against harmful traditional and other cultural practices, Uganda has enacted the Prohibition of Female Genital Mutilation Act, 2010 as well as the Domestic Violence Prevention Act, 2010. It has also amended the Penal Code Act to provide for the offence of aggravated defilement,[133] where defilement is followed by transmission of the virus that causes HIV/Aids to the defiled child.

However, in spite of all these and other progressive laws and policies, children in Uganda continue to suffer violence and threats to their lives and health. They continue to be deprived of parental care, education, healthcare and other social services.[134] The laws and policies have not put in place adequate safeguards to protect their rights, neither are there adequate mechanisms for the implementation of the said laws and policies.[135] It is thus pertinent to analyse the gaps and challenges to the implementation of these laws and policies.

III. GAPS AND CHALLENGES IN THE REALIZATION OF CHILDREN'S RIGHTS IN UGANDA

Uganda faces a number of challenges in ensuring the implementation and protection of children's rights. These range from, inter alia, budgetary constraints, lack of prioritisation, high levels of poverty, HIV/AIDS and its effects, armed conflict and its effects on the social fabric, traditional and cultural beliefs and practices, to lack of awareness of and respect for children's rights by society generally.

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128. *Id.*, section 159.
129. *Id.*, section 200.
130. *Id.*, section 211.
131. *Id.*, section 212.
132. *Id.*, section 213.
133. Penal Code (Amendment) Act, section 129(1)(2).
134. MINISTRY OF GENDER, LABOUR AND SOCIAL DEVELOPMENT (MOGLSD), CHILD PROTECTION STRATEGY FOR NORTHERN UGANDA 2009-2011, available at: http://cpwg.net/wp-content/uploads/sites/2/2012/09/Uganda-CP-Recovery-Strategy-2009-2011-ENG.pdf.
135. MINISTRY OF GENDER, LABOUR AND SOCIAL DEVELOPMENT (MOGLSD), IMPLEMENTATION OF THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY: REPORT OF THE GOVERNMENT OF UGANDA TO THE UN COMMITTEE ON THE RIGHTS OF THE CHILD (2006), available at: http://www2.ohchr.org/english/bodies/crc/docs/advanceversions/crc.c.opsc.uga.1.doc.

1. Budgetary Constraints and/or Prioritization—Uganda has not allocated the necessary resources for the implementation of its undertakings in the CRC. The treaty requires government to put in place various measures, including the setting up of institutions to be charged with the care and safeguard of the rights of the child.[136] While the local government councils have the responsibility of monitoring the care, safeguard and development of the child, these lack both financial and other resources to carry out this function.[137] For example, local/village councils are required to remove children who are considered to be at risk from such situations.[138] However, government has not provided and/or designated places of safety where such children may be kept pending determination of their matters. Recourse is often to well-wishers and child-oriented NGOs whose resources may be overstretched.

Whereas government has provided for Universal Primary Education and Universal Secondary Education, with special emphasis on children with disabilities, education still eludes these children because of the unfriendly facilities at schools.[139] There is a need to increase resource allocation as well as to rationalise government spending if the government is to meet its obligations under the CRC.[140] This is especially so since as observed, the community and social services sector, the principle sector responsible for child protection, promotion of social protection, equity, human rights, culture, development, empowerment of children and youth, and so on is so grossly underfunded.[141]

2. Armed Conflict and HIV/AIDS—Armed conflict in Northern Uganda wrecked havoc on the social fabric and infrastructure which hitherto protected children. The resultant insecurity and displacement led to the increase in unaccompanied and/or separated children, increased incidence of orphanhood, as well as child-headed households, among others.[142] Children were rendered homeless, without access to food, shelter, health, education or other social

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136. CRC, Article 3(3).

137. MoGLSD, *supra* note 134, paragraph 2.6.

138. Children Act, section 10.

139. MINISTRY OF GENDER LABOUR AND SOCIAL DEVELOPMENT (MOGLSD), WORLD FIT FOR CHILDREN: NATIONAL PROGRESS REPORT 2006, at 28. Available at: http://www.unicef.org/arabic/worldfitforchildren/files/Uganda_WFFC5_Report.pdf.

140. *Id.,* at 6.

141. *Id.,* at 8.

142. UNESCO, THE HIDDEN CONFLICT: ARMED CONFLICT AND EDUCATION, MONITORING REPORT OF 2011. Available at http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/ED/pdf/gmr2011-UNESDOC.pdf.

amenities.[143] These forced children to work, sometimes as child labourers, in order to survive.[144] Others have had to live on the streets, while others engage in crimes and drug use in order to survive.[145] The situation of children affected by HIV/AIDS is almost similar, some dropping out of school due to the loss of their parents/guardians, or becoming heads of households in order to fend for themselves and their siblings. Some have turned to the streets for lack of shelter, or where their parents' properties have been grabbed by relatives.[146]

3. Poverty and High Levels of Unemployment—The high levels of poverty and unemployment have also greatly contributed to the lack of effective realisation of children's rights. For example, even though government has made provisions for free primary and secondary education, such entitlement is not easily realisable. In the first place, such education is not free for all children but for a specified number of children for each home. In addition, the policies provide for free tuition without the provision of the other school requirements, a factor which has been blamed, among others, for the high dropout rates. Since not all children are able to access education through these programmes, some are unable to go to school because of the poverty of their parents/guardians. They are thus forced to leave school to engage in work so as to contribute to the livelihoods of their families. In some rural places, the benefits of educating children to high levels, especially the girl child, have not been appreciated leading to the infringement of their right to education.

These children thus find themselves performing child labour in bars and restaurants as waiters and waitresses, in homes as housemaids, on farms, mines and quarries, and construction sites, doing work that is obviously harmful to health and development, as well as interfering with their right to education.[147] While local

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143. Save the Children, Protecting Children in Emergencies: Escalating Threats must be Addressed, Policy Brief, volume 1, No. 1 of 2005. Available at: http://www.savethechildren.org/atf/cf/%7B9def2ebe-10ae-432c-9bd0-df91d2eba74a%7D/policy_brief_final.pdf.

144. MINISTRY OF GENDER, LABOUR, AND SOCIAL DEVELOPMENT, REPORT OF THE THEMATIC STUDY ON CHILD LABOUR AND ARMED CONFLICT IN UGANDA (2004). Available at: http://www.ilo.org/ipecinfo/product/download.do?type=document&id=700.

145. Annie Weber, Challenges Affecting Street Children in Post-Conflict Northern Uganda: Case of Gulu Municipality, (2013) Independent Study Project (ISP) Collection, paper 1685. Available at: http://digitalcollections.sit.edu/cgi/viewcontent.cgi?article=2721&context=isp_collection.; Charles Amone*et al*, Armed Violence and Street Children in Northern Uganda, Asian Journal of Social Sciences & Humanities, volume 3(3) August 2014. Available at: http://www.ajssh.leena-luna.co.jp/AJSSHPDFs/Vol.3%283%29/AJSSH2014%283.3-03%29.pdf.

146. Charles Amone, *et al*, *id*.

147. MoGLSD, *supra* note 137, at 23.

government councils have the initial mandate to monitor the situations in which children live and work, in most cases they are not able to. This might be due to lack of financial resources, but also to the very nature of the places of work for these children.

An example may be taken of the girl-child employed as a house maid. Her place of work is within the home, usually secured by high walls that deny access to intruders as well as well-meaning neighbors. In such a situation, the girl-child may be made to work up to the wee hours of the morning, cleaning up and preparing for the following day. Apart from the members of the household where she works, none would easily see this so as to take action. In the process she is also at risk of defilement and other abuses like denial of sleep, food, etc. The councils may have no way of monitoring her working conditions or investigating infringements of her rights. Yet such a child may need to work as the only way to survive.

4. Harmful Traditional and Cultural Practices and Beliefs—These include child marriages, female genital mutilation, traditional male circumcision in unhealthy conditions, and belief by some sections of society that having sex with young girls will prevent men from acquiring HIV/AIDS. All these practices and beliefs may lead to transmission of various diseases to children, affecting their rights to health, education, and exposing them to future reproductive problems.

Uganda has enacted the FGM Act which prohibits the practice in the country.[148] While this is a positive development in preventing young girls from being subjected to the inhuman practice, however, there have been challenges in the implementation of the law. This is because of the deep-rooted belief in the practice by the communities which subscribe to the practice. This is to the extent that an uncircumcised woman is considered to be a minor by those communities however old they may be and however many children they may have. In some cases, they may even be denied the right to make decisions over their children since they themselves are considered to be children. They have no voice in decisions affecting their communities by reason of being considered minors. Likewise, any man who marries such a woman becomes a laughing stock for having married a "minor." Owing to these pressures as well as the human need to belong, women and girls are forced to undergo female genital mutilation to avoid being ostracised by their communities.

For the case of defilement (and rape), society, especially men have not yet appreciated the gravity of the offence and the adverse effects it has on women and

148. Prohibition of Female Genital Mutilation Act, 2010.

girls. There is the unvoiced belief that girls are just being engaged in an activity that first of all they were created for, and secondly, which they must in future perform. It is thus believed that having carnal knowledge of a pre- and pubescent girl is perfectly fine and causes no harm to her.

5. Limited Awareness of and Respect for Children's Rights—There is a general lack of and awareness for children's rights in society. Traditional society has tended to view children as mere appendages and/or property of the adults. As a result, they have failed to accord them the inherent dignity and rights that every human being must enjoy. The concept of the individuality of the child sometimes appears strange in the traditional African context and as such the idea that children have rights which they can and must enjoy irrespective of and independently from their parents/guardians has not been fully appreciated. This serves to undermine the implementation of the protections guaranteed by the State since even some of the people responsible for the implementation of these safeguards sometimes subscribe to such beliefs. There is thus need for awareness-raising campaigns and mass education of the populace concerning the rights of the child as well as the requirement for their respect and protection.

IV. CONCLUSION

Children are one of the vulnerable groups who require special protection to ensure their survival and development. As noted in this article, the international community has developed instruments and also adopted declarations affirming the protection of children's rights. Individual states have followed suit by enacting laws and policies to create a safe environment that guarantees the wellbeing, growth and development of children. For the case of Uganda, the government has developed legal, institutional and policy frameworks to ensure a safe environment for child growth and development. While this is laudable, there remain bottlenecks in realising this goal. The challenges, which have been highlighted in this article, have negatively impacted on enjoyment of rights by the children. This has among others resulted in the increased school dropout rates, child malnutrition and homelessness of children. While government and the parents, guardians or child caregivers have the primary responsibility to ensure proper growth and development of the children, there is need for a holistic approach to ensure proper coordination and support systems in order to ensure the wellbeing of children in Uganda.