MAKERERE LAW JOURNAL
EDITION 2014

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STAND POINTS

CASE REVIEW

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School of Law, Makerere University

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Makerere Law Journal (MLJ) is an annual student-edited law Journal produced by the School of Law, Makerere University with a major objective of nurturing law students into competitive lawyers with all round skills. Contributions for publication are primarily original works by the students at the school with a few contributions from the teaching staff and volunteers for purposes of inspiring the Journal's reach. The text of the article, including the footnotes should be double-spaced. The footnotes must be placed at the bottom of each page and must follow *The Uniform System of Citation* (15th edition). It is advisable that the authors indicate their details. Article contributions to MLJ are sent to the EDITORIAL BOARD by way of E-mail at address: mlj@law.mak.ac.ug

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Makerere Law Society (MLS)

School of law
Makerere University
P.O. Box 7062
Kampala - Uganda
E-mail*: mlj@law.mak.ac.ug*

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FOREWORD

The Patron

It is with great pleasure that I write a foreword for yet another edition of the Makerere Law Journal. After a long period of inactivity the Makerere Law Journal has now consistently been published for the last four years thus firmly making it the most consistently published law journal in Uganda.

This is a great achievement for the student body at the School of Law, Makerere University. Special congratulations to the Editorial Board which has worked tirelessly to achieve this goal. The Editorial Board has also worked hard to improve the content of the Makerere Law Journal so that it is relevant to students, people in academia and practitioners alike. This is in line with the international best practices for law journals from schools of law as can be seen from other law schools especially in the USA like Harvard, Stanford and Columbia. I am confident that with time the Makerere Law Journal will become a key authority for the citation of credible research and scholarship.

This edition of the Makerere Law Journal has a wide range of subjects from the re-examination of popular topics like "lifting the corporate veil" and "the death penalty" to very contemporary subjects like "social economic rights", "morality and ethics". This will make it a very balanced journal with authors coming from the student community, academia and practising lawyers.

I also want to commend the Dean of the School of Law Dr Damalie Naggita-Musoke and her fellow lecturers for supporting the Makerere Law Journal and encouraging the culture of writing among the students from an early stage.

I have enjoyed reviewing the articles in the Journal and I trust you too who will read it will find it stimulating.

Geoffrey Kiryabwire, J
Justice of Appeal/Constitutional Court of Uganda
Patron Makerere Law Society

The Dean

On behalf of the Law school Community, I welcome this edition, Makerere Law Journal 2014. Being a student edited Journal; one cannot help but think about the sacrifice made by the student writers and editors who volunteered to take up the enormous task. To these, one word; the School is proud of you! I particularly thank the Editor-in-Chief and her Team for the work well done. I am confident that the experience has blessed you with skills that are to be used in the entire course of your legal profession. Secondly, I thank the Patron and other advisors for the mentorship you do for the students' fraternity at the School of Law. As a School, we are committed to produce not just a graduate but a fully-fledged one with all the skills deserving for a lawyer of that stage. I am confident that through projects like the student edited Journal, that objective is achieved.

I therefore appeal to the entire Students community to embrace this cause by way of writing as well as applying for editorship through the established procedure. That way, you shall be building for not just a future but a brilliant future in the Legal realm.

I wish you a successful interaction with the works following hereunder.

Damalie Naggita Musoke (Dr.)

Dean School of Law, Makerere University

ACKNOWLEDGEMENT

This Edition for the year 2014 of Makerere Law Journal comes as a clear manifestation of the Journal's true nature; that of a permutation of illuminating and educative original contributions from students, legal practitioners and professionals in the academia. I have no doubt that our wide range of readership shall find relevance in this edition which I believe will rank high when put in context with its predecessors. For as a matter of fact, every edition of the Makerere Law Journal serves a sole purpose of making better her already established precedents. However a cause eminent as this cannot be achieved without a lot of commitment, hard work and sacrifice on the part of the role players.

Thus far, I feel indebted to my editorial team for toiling to the very last hour to see to it that we do not only complete but also perform quite well in the task assigned to us by the MLS executive. In a very special way, I am sincerely grateful for the selfless and diligent work of my Assistant, Brian Kibirango. Thank you for making this edition a reality. In the same manner, I express my utmost gratitude to the Dean, Dr. Naggita-Musoke Damalie; the Patron of the Makerere Law Society, Justice Geoffrey Kiryabwire; and the whole leadership of the Makerere Law Society for the guidance, support and motivation they have unreservedly and relentless afforded to the editors throughout the preparation period. To those who facilitated this publication by way of financial contributions, no amount of words can properly express our appreciation.

Finally, I thank you the readers of Makerere Law Journal. Your insatiable desire for knowledge is what has, and always will, keep us going. For comments and/or more information on the journal, contact us via *mlj@law.mak.ac.ug*.

I wish you a fruitful reading.

Nalinya Naggayi Adron
EDITOR-IN-CHIEF,
MAKERERE LAW JOURNAL,
EDITION 2014
mlj@law.mak.ac.ug

TABLE OF CONTENTS

ARTICLES

COMMENTARIES

STAND POINTS

CASE REVIEW

AGRICULTURE FOR PEACE AND CONFLICT PREVENTION IN AFRICA'S LEAST DEVELOPED COUNTRIES*

Samuel B. Tindifa*

ABSTRACT

The African continent suffered the wrath of colonialism, the cold war, absence of democratic governance, and the persistent conditions of underdevelopment, and conflicts are attributable to this history.[1] This is in spite of Africa's vast natural resources, which have become a curse rather than an asset. The poor economic, social and political conditions have condemned the largest portion of the population to the squalid conditions of rural Africa,[2] where they largely depend on subsistence agriculture as the main economic activity, source of food, income, raw materials for the agro processing industries and export revenue. This paper describes and analyses the nature and conditions of agriculture in the least developed countries of Africa. The second part deals with the discourse on conflicts in Africa and highlights the issues that link agriculture with conflict. The third part outlines the lessons, conclusion and recommendations.

I. INTRODUCTION

Despite its prominence, agriculture still remains underdeveloped in Africa because of the unsustainable systems of production, low levels of human and financial capacity, inefficient technologies, unfavourable international economic and political system, and persistent absence of democratic accountability in governance at all levels of political and social life. Africa is a continent that can be described as being in a crisis of development, partly manifested in the perennial conflicts that aggravate the conditions of underdevelopment and dependence.

The causes of these conflicts are multifaceted, but one glaring condition that makes the situation fluid and feeds into these conflicts in Africa, is poverty. The levels of poverty reflect the state of the economy and since agriculture is the hub for most of the economies of least developed countries, it follows that poverty has a direct correlation with the poor

* This research was conducted for and presented at the United Nations University in Tokyo in 2003.

* Lecturer, School of Law, Makerere University Kampala.

[1] See, The New Partnership for African Development (NEPAD) Concept Paper, Abuja Nigeria, October 2001 at page 4.

[2] WEHAB Working Group (2002) *A Framework for Action on Agriculture*. At page 7 of the paper, it is indicated 70% of the poor people in developing countries live in rural areas and dependent on agriculture.

conditions of agriculture in these countries.[3] Agriculture in these countries is in a very sorry state, but whether this has a direct causal relationship with the on-going conflicts in Africa, is a debate this paper focuses on, and tries to locate the strategic importance of agriculture in conflict prevention.

Conflict in Sub Sahara Africa (SSA) is a manifestation of a crisis of subsistence arising from the neo-colonial economic structures and mal governance. Africa continues experiencing serious conflicts, stagnated economic growth and under development, environmental stress and shrinking soil fertility, chronic shortages of food, due to fluctuating weather and unsustainable agricultural systems, unfair international trade rules and practices and governance problems. It is no surprise therefore, that the "zone of turmoil" is located in the poorest countries in Sub Sahara Africa.[4] Conflicts produce conditions of deprivation of basic needs, aggravated by environmental stress and the corresponding violence. It is assumed in this paper that food insecurity, poverty, ecological stress, gender inequalities, poor governance and the unfair international legal and trade regime are interrelated, interface with agriculture and create conditions which constitute threats to human security and stability of least developed states. Agriculture constitutes a resource and as such it attracts competitive interests, a situation being aggravated by high population growth. These conflicting interests converge around access rights to land and the control of the products of agriculture.

The way land is utilised, managed or exploited, has led to ecological disasters--deforestation, soil erosion, pollution and exhaustion. Ecological conflicts have arisen either resulting into or relating to internal population displacements and actual armed conflicts and strife. Most countries experiencing with these problems are either experiencing, or have had armed conflict or share borders with such countries.[5]

[3] FAO (2002) Report on World Agriculture Towards 2015/2030.

[4] Indra de Soya and Nils Petter Gleditsch (1999), *To Cultivate Peace: Agriculture in a World of Conflict*, PRIO Report 1/99.

[5] Francis Deng and William Zartman (Ed) (1991) *Conflict Resolution in Africa*, Brookings Institute, at page 35.

II. NATURE AND CONDITIONS OF AGRICULTURE IN LDCS IN AFRICA

The importance of Agriculture in development need not be over emphasised. Alvin Toffler locates the importance of agriculture in his book the Third Wave, as a development that marks the first wave of civilisation. Although it is declining in importance in the GDPs of developed economies, agriculture remains the principal source of food; and constitutes the hub of economies of the least developed countries.

Africa is still agrarian with 70% of the population in rural areas deriving livelihoods from agriculture,[6] with food insecurity being a "dominant characteristic of ACP countries."[7] Food insecurity in Africa is one of the critical sources of insecurities, yet food security is "the key to human survival and the security of the human resources is a key to development" according to Ayako Sono, chairman of the Nippon Foundation.[8] It is a problem which is long standing, with numerous cases of famine particularly in the drought stricken areas of the Sahel, Eastern and Southern African countries of Malawi, Zambia, Zimbabwe and Mozambique, Tanzania and even Kenya. Countries such as Eritrea, Ethiopia, Senegal, Mauritania, Cape Verde, Gambia and Mali are particularly vulnerable.

Across Africa, agriculture employs 65% of Africa's labour force and accounts for 32% of the GDP[9] and crops such as tobacco, coffee and cocoa account for a large part of the exports of several countries. At independence, agriculture in countries like Nigeria, contributed 60% of the GDP.[10] Although by 1979, this had declined to 25%, it is still high. Considering the fact that Nigeria is comparatively better off, agriculture still

[6] In some countries like Uganda, 89% of the population live in rural areas on agriculture, which contributes 90% of the GDP.

[7] Alan Matthew: (2002) *Regional Integration and Food Security for ACP Countries*: A conceptual Paper published as TCAS Working Document No 44 of April 2002. See page 26.

[8] A Report of workshop on Food Security in Changing Africa, published in CASIN/SAA/Global 2000. The Chairman of Nippon Foundation made the remark during his opening remarks at the workshop, held in Kampala.

[9] World Bank and Agriculture in Africa, Fact Sheet.

[10] Nigeria Business Investment News Letter of 4th November 2001.

accounts for 38% of the non-oil foreign exchange earnings, and employs 70% of the population of the active labour force.[11]

In 1997 the UNDP-EUE African Review of June-July, reported that areas of western and eastern Sudan, Somalia, Ethiopia and Uganda experienced food shortage. Prior to this report, Ethiopia and Somalia had serious famine in 1985 and 1990 respectively. In 1997, 680,000 Somalis were in need of food aid and Uganda sought USD 2 million to buy food. In a statement to the Security Council in April 2003, the WFP director reported Africa's food crisis. He noted that "nearly 200 million Africans are malnourished and 50 million are also at risk."[12] The WFP director attributed the crisis to a combination of factors that include "drought, difficult or failed economic policies, conflicts and the impact of AIDS."

The poor cropping system aggravates this problem; increased exposure to wind and failure to replenish nutrients makes the soils less and less productive. Soil erosion is responsible for about 40% of land degradation and water logging or salinity has damaged 20-30% of irrigated land in developing countries.[13] Increased population, extreme hunger and poverty, push people further into marginal lands. Consequently yields have been falling drastically over the years and environmental stress has intensified. Falling productivity of land is increasing environmental stress and conflicts over the scarce resources. These generate and exacerbate problems of land rights and ownership, security of tenure and management.

Present forms of tenure do not guarantee sufficient security to support investments, facilitate mobility of resources needed in a dynamic economy, and to protect the vulnerable under increasing population pressure. It is however argued by Koori Izuma that there is no clear-cut correlation between "land tenure, security and agricultural performance," although she acknowledges that security of tenure is an essential element for "agricultural intensification, improved agricultural productivity and economic

[11] *Supra* note 5.
[12] Judy Aita: Washington File Staff Writer, April 15 2003. See Department of State International Information.
[13] Ibid.

development."[14] She contends that land tenure alone is not a solution to poor productivity in agriculture. There is need to address other factors that promote agricultural development.

Agricultural performance is improving but at a slow pace. In an assessment by UNIDO of the progress made in the least developed countries since 1994, remarkable improvement in micro economic growth has been made in a number of Sub Saharan countries.[15] However, during the 1980s, only five countries Benin, Mozambique, Comoros, Togo and Cape Verde, according to UNIDO, were able to achieve agricultural growth of 4%. This progress is attributed to increased agricultural output due to improved weather conditions. Thus export revenue for these countries, which depend on export of primary products improved considerably.

III. LINKING AGRICULTURE AND CONFLICT IN AFRICA

There is a link between the conditions of conflict, the crisis in agriculture and development. In this regard the discussion focuses on the critical issues in agriculture that breed conditions of conflict. Africa is considered to have the highest prevalence of civil war in the world. While there is a noticeable decline in other regions, incidence of civil conflict in Africa has increased in the last decade.[16] When he was Secretary General of the OAU, Salim Ahmed Salim, observed that 'the major problem confronting Africa is that of armed conflicts.'[17] A concern reiterated in the report by Kofi Anani to the Security Council, when he pointed out that in 1996 alone, 14 of the 53 states in Africa were afflicted with armed conflicts, and over 30 wars have been fought on the continent since 1970, majority of them being intrastate."

[14] Koori Izumi is a Land Officer with FAO Sub regional Office for Southern Africa, and made a presentation on Land Tenure in a workshop organised by S2000 on Food Security in Changing Africa and the proceedings of the workshop are published as CASIN/SAA/Global 2000.

[15] UNIDO (1997) 4th Ministerial Symposium: Industrial Capacity Building and Entrepreneurship Development in LDCs with particular Emphasis on Agro Related Industries, Vienna 26 November - 5 December 1997.

[16] UN Secretary General Report on Peace and Development in Africa. See document A/52/871-S/1998/318

[17] Gunner M Sorbo and Peter Vale: (1997*) Out of Conflict: From Armed Conflict to Peace*, Nordiska Afrikaninstitutet, Uppsala, at page 9.

According to the PIOOM statistics for 1998, there were 200 violent conflicts, and 72 were in Africa.[18] Resulting from this is the view that Africa is the most warring region on the planet and the intensity of conflict in Africa has made the continent 'a major challenge to efforts to achieve global peace, prosperity and human rights.'[19] According to Ibrahim Elbadawi et al, 20% of the population in SSA live in countries which "are formerly at war and this phenomena had become endemic."[20] Though armed conflicts have declined in some countries, it keeps on breaking out and currently, DRC, Southern Sudan, Somalia, Libya, Nigeria and Central African Republic are experiencing armed conflicts.

Some theories attribute conflicts to a struggle over natural resource[21] and if agriculture is taken to be a natural resource, then its role in conflict can easily be discernable. A simple illustration of this point would be the conflicts among the pastoralist communities in the Greater Horn of Africa,[22] which is essentially over resources.[23] It is about the exploitation of the limited natural resources, water and pasture for grazing.[24] War lordism in Somalia for instance, has manifestly been over the control of banana produce and livestock. The collapse of the coffee and tea prices fed into the structural problems of the Rwandan society and contributed to the escalation of tensions in Rwanda that eventually resulted into the genocide.[25]

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[18] Searching for Peace in Africa: *An Overview of Conflict Prevention and Management published by the European Platform for Conflict Prevention and Transformation/European Centre for Conflict Prevention*, 1999. http:/www.euroconflict.org.

[19] Searching for peace in Africa: an overview of conflict prevention and management: published by the European Platform for Conflict Prevention and Transformation/ European Centre for Conflict Prevention.1999. www.euroconflict.org. See page 25.

[20] Elbadawi, I. and Nicholas Sambanis (2001), "*How Much War Will We See? Estimating the Incidence of Civil War in 161 Countries*", Policy Research Working Paper # 2533, Development Research Group, The World Bank, Washington, D.C.

[21] *Supra* note 2 and in the introduction to the book on Conflict Resolution in Africa, the editors make reference to some of the theories about conflicts in Africa and one. This is also the same theory advanced by Paul Collier on Economic Causes of Civil Wars. (2002). See also Cyril Obi: Resources, Population and Conflicts-Two African Case Studies in Africa Development Journal Volume XXIV # 3 and 4 at page 47.

[22] This is a classification that includes the Great Lakes and Horn of Africa regions.

[23] See Deng and William Zartman, ibid at p1.

[24] Nabudere D.W and Wangoola Paul (Ed) (2000) *Cattle Rustling and Conflict in North Eastern Uganda*, Afrika Study Centre, Mbale Uganda. Unpublished.

[25] Zartman, William: (1992) Conflict and Conflict Management. A paper presented to the Sub Committee on Governance and democracy, Global Coalition for Africa.

Ibrahim Elbadawi et al outline some of the factors underlying these conflicts. They argue that states in Sub Sahara Africa that are in conflict are also the poorest depicting the following characteristics;[26] (1) high dependence on natural resource exports, (2) low per capita income, with a high rate of poor and uneducated youths and (3) absence of democratic culture. Using the "probit model," Ibrahim Elbadawi et al, argue that it is countries with poor economies and without democratic governance structures that have a chance of experiencing civil war. In this analysis, the link between poverty and conflict clearly comes out, but it does not bring out the connection between agriculture and conflict, although that can be implied considering the fact that it is countries with a high percentage of the GDP consisting of agriculture that are most prone to conflict.[27] The poorest regions of the world are dependent on agriculture and de Soya et al argue that countries with a minimal dependence on agriculture have exhibited a less propensity for conflict compared to those with a high dependence on agriculture.[28]

Cyril Obi investigates the theory that rapid population growth is a strain on resources and therefore causes conflict.[29] The author argues that the extent demography is a major factor in conflict depends on the extent it is responsible for resource scarcity and environmental stress, although he contends that population growth alone cannot be a single factor in causing conflict. Instead, he sees a close relationship between conflict on the one hand and "production, access, rights, power, equity and sustainability." It is these variables according to him that determine the interface between nature and politics. The issue here therefore, is one of environmental security and Obi argues:

> …increasing stress on earth's life support systems and renewable natural resources have profound implication for human health and Nils Petter Gleditsch and welfare that are least as serious as traditional military threats…....Ecological deterioration economic decline and political instability reinforce each other,…..with the prospects of social disintegration. Conflicts break out when

[26] MDGs in the Human Development Report 2003, p26.
[27] Francis M. Deng and William Zartman (editors) (1991) *Conflict Resolutions in Africa*, published by The Brooking Institution/Washington D.C. 417 pp. See also the Human Development Report of 2003 at page 26.
[28] Indra de Soya and Nils Petter Gleditsch, *ibid*.
[29] Obi, Cyril (1999) Resources, Population and Conflicts-Two African Case Studies in Africa Development Journal Volume XXIV # 3 and 4 at page 49.

> growing population compete over a state or some resource base… inequitable distribution and the structure of the population do also interact a lot with its ecosystem to generate conflict. (p.50)

Population pressure is a trigger of conflicts as "pressure on resources causes rural urban migration. The consequences are migration, population displacement, urban overcrowding, decay and violence, inter-group conflict over stretched social series and the ineffectiveness of control measure by the state." Kuri Izuma (supra) argues that land in Africa is increasingly becoming a political issue, and there is urgent need to resolve the land question peacefully. She argues that land reform in Africa has been characterised by policy and legal reforms, resettlement of communities and establishment of institutional reforms, but it has been lacking in specific "agricultural policies and programs linked to land tenure reforms." She therefore calls for policies, which are home grown taking into account specific local and community specific conditions. There cannot be uniform standards as is the practice under SAPs.

The politicisation of land arises out of the problem of unequal distribution or access to land and constituted one of the political and economic grievances for a number of liberation wars in southern Africa, Latin America and South East Asia. The situation in Ethiopia was aggravated by the Derg's land reform program around which the conflicts in Ethiopia galvanised. The revolutionary wars in Latin America, Zimbabwe, South Africa, Namibia, and the Philippines were a manifestation of economic and political grievances over land. Access to the means of production is therefore, simply about access to land, forests and water sources and the competition for these resources creates conflict. The conflicts arising from agriculture interface with governance issues in that agriculture breeds its own politics relating to access and utilisation of land, and appropriation of the products.

Likewise those in power set their eyes on the sources of wealth and this generates its own politics too. Controlling agriculture means controlling land, its utilisation and the trade in agricultural commodities. For example, control policies may be geared towards keeping

the prices of food and other products low in order to subsidise the "urban minorities,"[30] or to generate more income for the state from surpluses. With such a position in the economy, cultural and social relation, agriculture feeds into the structural causes of conflict although invariably, it also can feed into the structural prevention mechanisms. Therefore, as a source of conflict, agriculture reflects a crisis in development, serving as an indicator of poverty levels, general denials of basic needs in society, bad governance and absence of social justice. The most effective intervention therefore, is to address the subsistence crisis. How it has to be done is dependent on how the factors contributing to the crisis are addressed.

It has already been pointed out that rural conditions are increasingly becoming more appalling, with poverty being the main source of worry. Poverty is understood not just in terms of "lack of physical and human capital."[31] It is also "a dynamic social economic, cultural, political or other deprivation, which affects individuals, households or communities often resulting in for instance lack of access to basic necessities of life, a feeling of powerlessness, isolation or exclusion."[32]

It has three main characteristics. i) Large inequalities in wealth distribution between rural and urban areas. The disparities impose limits on the growth of the domestic market and sluggishness in agricultural development; ii) Isolation of the poor from economic opportunities resulting into difficulties to access social services, such as health, education, clean water and sanitation; and, inadequate knowledge about rights and functioning of governments. Therefore, the level of participation in and influencing government decisions by poor people is very much constrained and most rural communities are pawns of ruling elites for manipulation to legitimise dictatorial and oppressive regimes.

Studies on intra state conflicts demonstrate that "the conditions affecting the livelihood of the majority of people in poor countries" are the core "of the internal violence."[33] The

[30] World Bank: (2002) *From Action to Impact*: The Africa Region's Rural Strategy, at page 3.
[31] Indra de Soya and Nils Petter Gleditsch, *ibid*.
[32] Uganda, Poverty Eradication Action Plan.
[33] Zartman, William (1992) Conflict and Conflict Management. A paper presented to the Sub Committee on Governance and democracy, Global Coalition for Africa.

war and the subsequent genocide in Rwanda lend credence to this conclusion. The genocide followed a cycle when the tiny country was experiencing land shortage, falling agricultural production, dwindling coffee and tea prices and the effects of SAP.[34]
Some of these studies include the work of Indra de Soya and Nils Petter Gleditsch which so far appears to be the best source of evidence, showing a link between agriculture, poverty and conflict. It is argued in this study that agriculture has a direct link to basic needs and politics. They further observe that "conditions of food production and distribution are a good arena for observing the interaction of politics, economics and environmental issues as they influence violent conflict."[35] This view is also shared by Obi who observes that the "poor conditions of agriculture" have "grave implications for socio-economic development for sustainable peace."[36]

The other dimension of agriculture operating as a causal factor in conflict relates to its role in sustaining of conflict. Agriculture as a source of food and other tradable goods sustains conflict. Rebel groups need resources to execute the war. Agriculture can sustain rebellion in as far as it is a source of food and tradable commodities which can ensure flow of finances needed to buy weapons and other requirements. This can be inferred from Paul Collier theory on causes of civil conflicts and implications for policy. According to Collier's analysis, which seems to have a lot of similarities with the conclusions in the work of Indra de Soya et el, sustainability of a conflict is a major consideration in the choice to wage. The rebels must be assured of availability and continued flow of "lootable" resources if the conflict has to be sustained and that not "any objective grounds for grievances" will determine whether a country will experience civil war. Agriculture, therefore, can provide conditions that constitute a grievance that can lead to a conflict situation although Collier appears to dismiss grievances as causes of conflict.

Collier further argues that countries with high dependence on primary commodities exports, and those with a high proportion of agricultural contribution to the GDP, have a

[34] *Ibid*.
[35] Indra de Soya and Nils Petter Gleditsch, *Ibid*.
[36] Obi C, *ibid*.

high propensity of conflict. According to Collier, primary commodities constitute lootable goods that entice rebels to take up arms.

This illustration fits well in most of the zones of turmoil, where poverty is very rampant, food insecurity is a high risk and conflicts arising out of land and environmental stress are also very rampant. This point is further reinforced by the New Agenda for the Development of Africa, in which it is pointed out that equity is a key factor in the sustenance of livelihoods, and forms a grievance that contributes to the absence of peace. Peace is commonly evident in countries where economic growth and opportunities in sharing the growth are broadly distributed across the population.

Thus social justice is a critical factor in conflict prevention as has been further observed by Nicole Ball that 'economic and political inequality form the root of much of the conflict in Africa and until disparities are reduced, conflict will continue.[37] The New Agenda of African Development reiterates the point that;

> "…conflict is likely to grow worse in Africa unless significant progress is made in generating widely shared growth, reducing poverty, lowering food insecurity and creating more representative institutions..."[38]

What comes out are factors that interplay and constitute risks to peace and security and Leif Ohlsson concludes that "future security in Africa….depends on providing basic need for the total population."[39]

Thus making agriculture a tool of conflict prevention requires distributive justice to be integrated in agricultural policies. Similarly development assistance to agriculture should not only focus on macro-economic reforms, but should ensure that distributive justice is an integral part of the expected outcomes of the assistance to least developed countries. Development assistance should be invested in activities which not only enhance productivity, but address issues that enhance social justice. Such as access to land and tenure reforms, water development for domestic use and irrigation, environmental

[37] Deng Francis and William Zartman, *ibid* at page 385.
[38] See page 12 of the Report.
[39] Ohlsson, Leif (2000) Livelihood Conflicts: Linking poverty and environment as causes of conflict, and Department for Natural Resources and the Environment.

protection to reverse the damage caused by misuse, health, education, infra-structural development. These must be coupled with enhanced participation of communities and civil society in decision and implementation processes.

IV. WHAT ARE THE LESSONS?

For agriculture to contribute to conflict prevention requires an understanding of specific programmes related to the development of agriculture in developing countries and this may require taking up cases studies of the specific programmes. One of these programs being implemented across LDCs is poverty eradication. In Uganda, the concept of poverty eradication was based on turning around agriculture as a vehicle for economic growth.

The reason agriculture is considered the cornerstone for poverty eradication is based on the assumption by the FAO that poverty in rural areas is tied to agricultural productivity and exacerbated by factors of globalisation.[40] "Individual livelihoods and the fate of local communities can no longer be viewed in isolation from national or international structures and processes."[41] This implies that poverty reduction programs must put into account these realities in addition to ensuring social justice and participation.

How agriculture can be the panacea in poverty eradication depends on the policies each country may adopt reflecting its concrete experiences. Uganda government considers commercialisation of agriculture supported by investments in agro processing as the cornerstone of poverty eradication. This it is hoped will enhance opportunities for food security, which cannot be guaranteed without a significant increase in agro processing. This is in line with the view that successful LDCs are those, which have experienced rapid industrialisation. However, for this to happen there is need to enhance technological growth, human and financial capacity building.[42]

Agricultural policies to succeed also require top to bottom political support. Nevertheless this support depends on the level of participation of all stakeholders, which as pointed out

[40] FAO World Agriculture Towards 2015/2030.

[41] Goran Hyden: *Livelihoods and Security in Africa: Contending Perspectives in the New Global Order*, African Studies Quarterly Vol. 1 Issue 1 1997.

[42] UNIDO: *Progress and Prospects for Industrial Development in Least Developed Countries, Towards the 21st Century*, Fourth LDC Ministerial Symposium: Industrial Capacity Building and Entrepreneurship Development in LDC with particular Emphasis on Agro Related Industries, Vienna Nov 26- 5 December 1997.

above does not seem to be the case. It is owing to the absence of participation in governance that the African Charter on Popular Participation was adopted. It calls upon member states of the African Union to ensure that participation is taken as an essential element in development.

The importance of networks and collaborative relations emerges as an important issue in research and policy analysis. This is also lacking as governments in Africa as they rely more on inputs from the multilateral institutions. What this means and requires, therefore, is for governments to create mechanisms that facilitate linkages with all stakeholders in their jurisdiction to undertake collaborative research and policy analysis. Universities and many research institutions are not well funded as the component of R&D is almost absent in policies supporting agriculture. There are research and training institutions, but it is not clear how they feed into policy analysis and formulation. The role of these institutions in LDC and how they are integrated in policy analysis, formulation and implementation is an intriguing issue that deserves a thorough investigation and understanding.

This will facilitate development of home grown approaches upon which the universal norms and imperatives build on. Agricultural policies to succeed also require top to bottom political support. Nevertheless this support depends on the level of participation of all stakeholders, which as pointed out above does not seem to be the case. It is owing to the absence of participation in governance that the African Charter on Popular Participation was adopted. It calls upon member states of the African Union to ensure that participation is taken as an essential element in development.

V. CONCLUSION

The discussion of agriculture for peace clearly demonstrates that conflicts in the least developed countries in Africa are closely associated with livelihoods of the communities on this continent. These communities derive their livelihood from agriculture, which is in crisis, and cannot provide adequate food and income. These are the main issues in the discussion of poverty which is very rampant on the continent. If poverty has to be eradicated, the eradication programmes must address the structural problems in agriculture, which are not only tied to governance problems in the LDCs but to the

international economic and political order. The vicious cycle of poverty continues, because of historical and ideological factors on the one hand, and lack of political commitment and corruption on the other. But what emerges leads to the following lessons and propositions.

The persistent neglect of agriculture stands out glaringly, despite the fact that it is the cornerstone for the economic, social and political development and sustainability of the LDCs in Africa. The neglect is manifested in the failures to invest more in agriculture which is 'de-capitalised' due to structural factors. The political economy of LDCs has for a long time been the cause of primary agricultural production. Secondly, rural Africa is very backward due to the lack of investments. The state of roads, health, education and administrative infrastructure are in very appalling conditions and yet they are important in supporting the social sector.

Despite the abundance of fresh water in terms of rivers in some of the countries of Africa, there are hardly any investments in irrigation. Yet irrigation is very critical in relieving agriculture of the hazards of unpredictable weather, upon which much of the agriculture depends. This raises policy issues relating to investment and management of water resources, which is lacking at this point in history. It is necessary for governments, international development and financial agencies to consider water development and irrigation to be pursued as one of the key social service sector to support the growth of agriculture.

TRANSPARENCY AND ACCOUNTABILITY IN UGANDA'S NASCENT OIL AND GAS INDUSTRY: A REALITY OR MYTH?

Emmanuel Kaweesi*

ABSTRACT

The discovery of oil and gas in Uganda has brought glaring hope to all Ugandans especially those of a generation likely to benefit from the infamous Vision 2040. However at the same time worries, anxiety and grief entangles those with an analytical eye. Behold, there is a group of those who have already exhibited intentions of personalising and tribalizing these hydro carbons as if they are a result of their purported efforts. They are not ready to create structures geared towards equitable benefit but rather have made hefty and filthy deals, thereby turning the ideally national resource into a sectarian and familial delicacy. At the same time, the legislature is not empowered enough to encounter this. It is thus upon this miserable status quo that one wonders whether Uganda shall have a transparent oil and gas industry come the commencement of commercial production by 2020. The purpose of this article is therefore to uncover the concept of transparency and accountability in the context of Uganda's nascent oil and gas sector. It begins by giving a brief historical background of Uganda's oil sector and then examines whether in light of our past and present politico-economic culture and indeed the existing policy and legislative framework, there is hope for transparency. The article is based on the hypothesis that at the time of writing there are all indicators that there is no transparency in the oil industry and chances are that it may never be obtained unless a lot is done.

I. INTRODUCTION

The oil industry in Uganda which started developing as early as the 1920s has gone through a number of stages and as we speak now it is confirmed that Uganda has up to 3.5 billion barrels of realisable commercial oil deposits.[1] This quantity is however expected to rise up to about 6 billion barrels on further exploration.[2] The discovery of commercial oil quantities led to a halt of all licensing and exploration activities after 2006 to enable the government update its legal and policy framework governing the oil

*LLB (Hons) MUK, Holder of Makerere Law School Chief Justice Award, and Bar Course Candidate at Law Development Centre, Kampala. The author is also currently a Personal Research Assistant of Prof. Emmanuel Kasimbazi, at Kasimbazi, Kamanzi & Co. Advocates.

[1] Ministry of Energy and Mineral Development (2013) Remarks by Hon. Engineer Irene Muloni at 6th EITI Conference, Sidney, Australia, at pages 2-3.

[2] International Alert, 'Oil and Gas Law in Uganda: A Legislators' Guide, Oil Discussion Paper, May 2011.

industry.[3] Many international oil companies have been attracted into the industry. However, though Several International Oil Companies (IOCs) including Tullow Uganda Operations PTY Ltd, Heritage Oil & Gas, Dominion and Neptune were awarded licenses/ contracts to explore and extract oil, Heritage sold its assets to Tullow, while Neptune and Dominion withdrew. Tullow and its joint venture partners (i.e. Total and CNOOC) are in the present day the most active in the country. Tullow is making developments in the mid-west (Hoima and Buliisa districts); Total is operating in the northwest; and CNOOC is operating in the Southwest.[4] There on going plans to construct a 60,000 per day oil refinery, a major pipeline running from the oil city of Hoima to Kenya's northern port of Lamu[5] and other minor transportation pipelines connecting the major oil zone to the central business capital of Kampala. There are also plans by the IGAD to construct a pipeline connecting to other East African countries especially Tanzania, Rwanda and Burundi. There was a plan to establish an Early Production System (EPS) at Kaiso-Tonya Area, Block 2 Lake Albert as early as 2008 but due to criticism by CSOs especially on the sufficiency of SEA and Environmental impact assessment (EIA), the same remains postponed.[6] All in all, commercial production of oil is yet to start though it is expected to start by 2020.[7]

II. TRANSPARENCY AND ACCOUNTABILITY IN UGANDA'S OIL INDUSTRY

It has been submitted that transparency and accountability is very vital in the management of the oil and gas industry. According to Ben Shepherd, transparency of budgeting and revenue in flows is a vital aspect of preventing corruption which is obvious with increase in the revenue accruing from oil and gas production.[8] This tool is also praised for preventing ill-informed public opinion from driving the government to

[3] Ibid.
[4] Uganda Contracts Monitoring Coalition (2012) A Tool for Monitoring Social and Environmental Compliance in the Extractive Sector, at 6.
[5] The Wall Street Journal, 'Uganda signs Deals with Foreign Companies to Develop the Oil Sector.'
[6] ACODE (2008) Comments on the EIA for the proposed Early Production System (EPS) at Kaiso-Tonya Area, Block 2, Lake Albert , Uganda.
[7] E. Kasimbazi, 'Environmental Regulation of Oil and Gas Exploration and Production in Uganda' in Journal of Energy and Natural Resources Law Vol. 30 No.2 of 2010 at p.186.
[8] B. Shepherd, op cit, at pp 11-14.

unwise use of resources[9]as the publicans have access to all relevant information in the possession of the state, its agencies and the oil companies. Transparency also helps in maintaining social cohesion because rumour always flourishes in absence of accurate information. Such rumours may disrupt national and regional peace especially where it is shown that advantages are given to certain sections of the society or that resources are unfairly distributed.[10] Because oil operations are by business practice, custom and tradition private in nature, governments are very reluctant to publish their dealings with oil companies. This however breeds uncontrolled corruption and mismanagement which raises the need for transparency. Ideal transparency should envisage contractual transparency, revenue transparency and expenditure transparency.[11]

There are many benefits associated with transparency. For example, making contracts public ensures the integrity of bidding and negotiation which in turn ensures that awards are made competitively and are consistent with the laid down rules. It makes it possible for civil society members and parliament to get a basis of ensuring that contracts are enforced and mitigates political risk and political guessing. In any case, there is no government and public interest in keeping the contracts secret, because after all these contracts are always shared among industry partners to the extent that it is only public that is eliminated. Transparency and accountability ensure oversight, effective budget scrutiny, less suspicion and mitigates the possibility of any conflicts. It also reveals the benefits and obligations of each party involved in contracts and the ultimate benefits of the citizens in a resource rich country.

Furthermore, expenditure and revenue transparency play a great role in ensuring oil serves the benefits of the current and future generations. Transparency is very important in the enforcement of any enacted law as it strengthens the participation of a broad base of constituencies such as the Police, DPP, Judiciary, and Inspectorate of Government, all of which are recognized by the NOGP.[12] Access to full, accurate and up to date information is considered to be at the heart of sound environmental protection and

[9] Ibid.
[10] Ibid.
[11] See Chapter One.
[12] E. B. Kasimbazi, op cit, at 200-201.

sustainable development and a core corollary to transparency.[13] Access to information enables citizens to participate meaningfully in decisions that directly affect their livelihoods, and enables them to monitor public and private sector activities. The nature of environmental degradation is such that its causes and impacts may often only be understood or become visible long after the damage causing project or activity is complete. Consequently, there is a need for early and comprehensive access to relevant data to enable those concerned to make informed decisions. Access to information is also critical for holding governments accountable for their omissions or commissions that prove deleterious to the environment.

The ethic of transparency and accountability in the oil industry is enabled by a number of legal provisions in Uganda. For example, pursuant to article 41(1) of the 1995 Constitution, every citizen is entitled to the right of access to information in the possession of the state except where the release of that information is likely to undermine the sovereignty of the state or interfere with the right to privacy of any person. Pursuant to clause two, Parliament passed the Access to Information Act,[14] which provides for the right to access to information and sets out the procedure for obtaining such information.[15] Section 5 of the Act provides that every citizen has a right to information and records in the possession of the state or any public body except where the release is likely to prejudice security, sovereignty of the state or interfere with the right to privacy of any information. Section 34 of the Act makes provisions for mandatory disclosure in public interest especially if the disclosure would reveal real evidence of an eminent or serious public safety, public health or environmental risk. This act is relevant to dealing all documents such especially Production Sharing Agreements (PSAs), Environmental Management Plans (EMPs) and Waste Disposal and Management Plans (WDMPs). In addition, NEA guarantees 'freedom of access to any information relating to the implementation of the Act submitted to NEMA or to a lead agency'.[16] However, a

[13] R Mwebaza 'Access to Information, Public Participation and Justice in Environmental Decision Making in Uganda' (2003) 9 East African Journal of Peace and Human Rights 37-86; G Tumushabe 'Towards Environmental Accountability: Freedom of Access to Information Legislation for Uganda', in Greenwatch Environmental Law Institute, Handbook on Environmental Law in Uganda (2004) at 163.
[14] Act No. 6 of 2005.
[15] Ibid, s. 5.
[16] National Environment Act, s. 85(1).

person who desires to access this information must pay a prescribed fee,[17] and NEA exempts 'proprietary information which shall be treated as confidential'.[18]

The right of access to information was tested in *Greenwatch (U) Ltd. v. Attorney General & Uganda Electricity Transmission Co. Ltd*[19]. The applicant sought to obtain a copy of a Power Purchase Agreement (PPA) from the government. The government had entered into an Implementation Agreement (IA) with AES Nile Power Ltd, covering the building, operation and transfer of a hydroelectric power complex. As a result of the conclusion of the IA, AES Nile Power Ltd and the Uganda Electricity Board (a statutory corporation) executed a PPA. The applicant requested a copy of the PPA but its request was declined. The applicant accordingly sued for an order directing the disclosure of the PPA. The respondents raised three defences in court. First, they argued that the PPA was a confidential document which included the sponsor's technical and commercial confidential information. Second, the first respondent argued that the PPA was not a public document within the meaning of the Evidence Act,[20] and since the second respondent was not an organ of state, it was not obliged to release the information. Third, they argued that according to article 41 of the 1995 Constitution, only citizens were entitled to have access to information held by the government or its agents or organs; the applicant was not a natural person and could therefore not invoke article 41. The court held that since the Minister of Energy, acting on behalf of the government, had signed the IA; it was a public document. The judge noted that the PPA relating to the IA, was in possession of the government, and accordingly amounted to information in possession of the government. As to the question whether a corporate body is a citizen for purposes of access to information, the court held that corporate bodies can enforce rights under the 1995 Constitution as they are persons in law, though not natural persons. However, the judge refused to grant the order as the applicant had not supplied sufficient evidence as to its membership to enable the court to determine whether it was a citizen or not for purposes of invoking article 41.

[17] Ibid, s. 85(2).
[18] Ibid, s. 85(3).
[19] HCCT-00-CV-MC-0139 of 2001.
[20] Evidence Act, Cap 6 Laws of Uganda, 2000.

However the significance of access to information is still diminished by a lack of clarity in drafting, the envisaged scope of application and insufficient procedural guarantees. Exceptions to the right of access are rather wide and open to diverse and in most cases adverse interpretation. The classification of information as confidential, for example, is not linked to any legal, professional or ethical commitment to secrecy. The Access Information Act does not apply to private bodies which carry out public functions related oil exploration and production yet even the access fee may effectively prohibit most Ugandans from seeking information in absence of any special provision for waiving fees if requestors are unable to pay.

Access to information is supplemented by transparency which is also crucial in oil exploration and production because they provide an opportunity for the people to get benefits from the revenues of the oil. The Oil and Gas Policy mentions transparency and accountability as one of the guiding principles. It states that openness and access to information are fundamental rights in activities that may positively or negatively impact on individuals, communities and the state. Thus it is important that information that will enable stakeholders to assess how their interests are being affected is disclosed. The policy recognises the important roles different stakeholders have to play in order to achieve transparency and accountability in the oil and gas activities. It pledges to promote high standards of transparency and accountability in licensing, procurement, exploration and development operations as well as management of revenues from oil and gas. It also supports disclosure of payments and revenues from oil and gas using simple and easily understood principles in line with accepted national and international financial reporting standards.

There are however some weaknesses in the Policy that may not ensure transparency. For example, the Policy does not clarify the role of local communities. It does not define how their relationship with oil companies would be structured, or what benefits they would derive from oil exploitation or production in their area. The policy does not lay the foundations for future financial arrangements for the collection, sharing and reinvestment of oil revenues. The Policy only states that revenues should be used in an equitable, fair and transparent manner, without demonstrating how this shall practically

be done. The effectiveness of the policy is further limited by the fact that Uganda is not yet a member of the Extractive Industries and Transparency Initiative (EITI) which supports improved governance through the verification and full publication of company payments and government revenues from oil, gas and mining. However there are plans to join EITI soon. [21]

Disclosure of Petroleum information is also required under the Petroleum (Exploration, Development and Production) Act, 2013 and the Petroleum (Refining, Conversion, Transmission and Midstream Storage) Act, 2013 which are the main laws governing the exploitation of oil in Uganda. The former Act focuses on the "upstream" elements and among its purposes is to operationalize the NOGP by ensuring transparency and accountability in all activities conducted under the Act.[22] The Act creates the institution of the office of the minister and among its core functions is ensuring transparency and accountability in the petroleum sector.[23] Also the Oil Authority of Uganda established under s.9 (1) has a duty to ensure transparency in relation to the activities of the Petroleum sector and the Authority.[24] Regarding access to information by the public, the Act empowers the Minister, in accordance with the Access to Information Act, 2005, to make available to the public details of all agreements, licences and any amendments to the licences or agreements whether or not terminated or valid; details of exemptions from, or variations or suspensions of the conditions of a licence; approved field development plan; and all assignments and other approved arrangements in respect of a licence. The information referred to above shall be available to any person upon payment of the prescribed fee.[25] This seems to be a good guarantee for transparency and accountability in the sector. However it has been restricted by the stringent confidentiality provisions under s.152 and other express restrictions in s.153, and the fact that in some cases a person seeking such information may not be able to pay the required access fees.

[21] See Comments of Hon. Eng. Irene Muloni, supra.
[22] S.1(g).
[23] S.8(g) of the Act.
[24] S.11(2)(d), ibid.
[25] Section 151.

The latter Act governs the 'Midstream' sector. The purpose of the Act is also to fulfill the NOGP by ensuring transparency and accountability in the midstream sector. This reflected in the mandate of the Minister.[26] The Act provides for the need to ensure transparency in licensing (Part III of the Act.) Accordingly, the minister shall within 45 days after receiving an application for a license, cause a notice to be published in the gazette and at least one national newspaper of wide circulation in Uganda.[27] The notice shall indicate receipt of the application or a license, a description and nature of the proposed facility, inform the public that the application may within the limits of laws governing intellectual property rights and commercial confidentiality, be inspected at the offices of the minister and invite directly affected parties and local authorities in areas directly affected by the facility/project who object to the granting of the license, whether on personal, environmental or other grounds, to lodge with the minister an objection within a specified time, being not less than thirty days after the notice.[28] Part XI makes provisions for public access to information and documentation. According to s.74, the Minister may, in accordance with the Access to Information Act, 2005, make available to the public, details of all agreements, licences and any amendments to the licences or agreements whether or not terminated or valid; details of exemptions from or variations or suspensions of, the conditions of a licence; and all assignments and other approved arrangements in respect of a licence. The information referred to in this case shall be available to any person upon payment of the prescribed fee. This section would ordinarily be very significant in ensuring transparency and accountability in midstream operations but it seems these guarantees are curtailed by the proceeding sections 75 and 76 which impose very stringent clauses on confidentiality of data and prohibition against disclosure of information, respectively.

However, one of the major barriers to information access in Uganda is the general lack of resources, infrastructure and capacity. Public bodies often lack even basic technical equipment and communication systems, such as computers and internet connections to

[26] S.4 (f) of the Act.
[27] S.12(1).
[28] S. 12(2) (a)-(d). However Para (d) seems to have been wrongly drafted as it does clearly indicate whether 30 days is a ceiling or the time when days within which time to apply should begin running. If this lacuna was not intentionally left by the draftsman to discourage public objections, it should in my view be clarified by using words like *'within thirty days'* or *'not exceeding thirty days.'*

post the information. Moreover, English is the official language for most documents such as EIA reports and yet some Ugandans especially in rural areas cannot read it. The National Environment Management Act which establishes the National Environment Management Authority (NEMA) as Uganda's principal agency for environmental management provides that one of the its functions is gathering and disseminating information on the environment and natural resources, publishing relevant data on environmental quality and resource use, as well as organizing public awareness and education campaigns on the environment, however the NEMA is not only understaffed but also poorly funded.[29]

The Act states that people have the "freedom of access to any information" relating to the implementation of the Act. Access will be granted "on the payment of a prescribed fee" but "does not extend to proprietary information which shall be treated as confidential"; all of which continue to restrict access. As such, there are still many challenges regarding access to information especially concerning oil in Albertine Graben. This is exacerbated by a "culture of secrecy" amongst civil servants as the main barrier. Government officials are reluctant to disclose information related to government activities. This is aggravated by the Official Secrets Act which government officials do not want to violate. A contentious issue in the oil exploration and production has been the non-disclosure of the oil Production Sharing Agreements (PSAs) concluded between the oil companies and the Ugandan government. Under these agreements, the corporations provide capital investment in exchange for control over an oilfield and a share of the revenues from it. Therefore, since even the newly enacted Upstream and Midstream Acts have continued to greatly entrench confidentiality clauses, the journey of our oil sector towards transparency and accountability is still destined to go a long way.

III. PRINCIPLES THAT CAN GUIDE UGANDA TOWARDS TRANSPARENCY AND ACCOUNTABILTY IN THE OIL SECTOR

The emerging trends and international norms for good governance of natural resource wealth emphasize good fiscal governance, especially revenue and expenditure

[29] E. B. Kasimbazi, op cit.

transparency. The key recommendation is that all revenue streams and transactions should be clearly traceable and accounted for in the state budget. Moreover, the state needs to have adequate accounting and auditing capacity to ensure that revenues are collected and managed according to internationally recognized standards of accounting and reporting. Regular public disclosure of revenues is also recommended, along the lines of initiatives such as the Extractive Industries Transparency Industries (EITI), Publish What You Pay (PWYP), Equator Bank Principles, and IMF guide on resource revenue transparency. Other transparency initiatives include the IFC Policy on Contract Transparency, the EC Guidelines on Transparency in the Extractive Sector, the Dodd Frank Wall Street Reform Principles and enormous emphasis on public participation. These have been considered in detail:[30]

A. The Extractive Industries Transparency Initiative (EITI)

EITI is a coalition of governments, companies, civil society groups, investors and international organizations as a voluntary initiative in which participating mineral and oil-rich governments agree to publish their receipts from oil, gas and mining activities.[31] EITI was launched in 2002 by the British Prime Minister Tony Blair at the World Summit for Sustainable Development in Johannesburg. It sets a global standard for international transparency in the oil, gas and mining sectors. Its primary effort is to see that natural resources benefit all citizens of the resource rich countries.[32] The initiative promotes systems that ensure that companies publish what they pay to host governments and that governments in return publish what they receive from the companies.[33] The aim of this is to strengthen governance by improving transparency and accountability in the extractives sector. They publish a block figure of all company payments per country, leading to an independent reconciliation of the reported figures, with any discrepancies being published and explained.[34] However, although participation is voluntary, there are specific steps a government must implement in order first to become a "candidate", up to when it reaches "compliance" to then become a full member. Currently, 36 countries are

[30] It should be noted that principles encapsulated herein are not exhaustive. The paper has considered only a few due to space and time limitation. Further reading is recommended.
[31] AFIEGO (2012) (EITI) A Scoping Study on the Adoption and Implementation of EITI in Uganda, at 1.
[32] Ibid.
[33] Ibid.
[34] What is the EITI? <http://eiti.org/eiti> accessed on 6th April 2014.

candidates of the EITI and only one country has achieved compliance.[35] Among the African resource rich countries, candidate countries include Cameroon, Congo-Brazzaville, DRC, Equatorial Guinea, Gabon, Ghana, Nigeria and Tanzania. On the other hand, Norway is the only industrialized country that has signed up to implement the EITI. Around 40 oil, gas and mining companies support and participate in the EITI, which is also supported by donor countries such as Canada, France, Norway, the UK and the US, in addition to the international financial institutions and investors. The EITI has a secretariat based in Norway, an international board and a multi-donor trust fund to finance technical assistance to candidates. In the ten years of its existence, the EITI has achieved global recognition as a revenue transparency standard, and uniquely for a multi-stakeholder governance initiative of this sort, it has also been endorsed by the United Nations, G8, G20, Africa Union and European Union.

Implementing EITI comes with a number of benefits: implementing countries enjoy an improved investment climate by providing a clear signal to investors and international financial institutions that the government is committed to greater transparency; promotes efficient revenue collection; provides a systematic framework and collaboration among all stakeholders; improves sovereign and corporate ratings for example on international creditworthiness; provides a basis for follow up on public engagement; enables corporate risk management; promotes reduced hostilities; ensures oil revenue benefits all people; strengthens the budget monitoring and oversight; reinforcing broader anti-corruption and good government agendas and building citizen trust in public institution.[36] However, the EITI has also incurred criticism precisely because of its limited, voluntary and non-binding nature, which means that implementation depends entirely on the political will of the government in question. In some countries, civil society organizations have been victims of intimidation, and overall there has been limited progress in countries achieving compliance status. Countries seeking to achieve EITI Candidate status must meet five sign-up requirements, and for a country to achieve EITI Compliance, it has two and a half years to be validated as a compliant country. Once a country is Compliant, the country must undergo Validation at least every 5 years, or upon the request from the EITI

[35] Dr. Peter Wolff (2012) Global Standards for the Extractive Industry – ten years of the EITI and Publish What You Pay.
[36] AFIEGO, op cit, at pp. 23-24.

International Board. To become an EITI Candidate, an implementing country must meet the five sign up requirements. Once these have been met, EITI implementation involves a range of activities to strengthen resource revenue transparency. These activities are documented in country work plans. The development of a work plan, discussed with and agreed by stakeholders, is one of EITI's five sign up requirements. Uganda is preparing to join EITI. The National Oil and Gas Policy, 2008 explicitly commits the government to participate in the processes EITI implementation in order to ensure collection of right revenues and to use them to create lasting value for the entire nation. The policy also provides that the government shall publish the earnings that will accrue from the oil and gas industry.[37]

B. The IMF Guidelines on Resource Revenue Transparency

The Guide on Resource Revenue Transparency applies the principles of the Code of Good Practices on Fiscal Transparency to the unique set of transparency problems faced by countries that derive a significant share of revenues from natural resources. Some of the good practices of resource revenue transparency suggested in the guide include the following: [38] Governments' policy framework and legal basis for taxation or Production Sharing Agreements with resource companies should be presented to the public clearly and comprehensively;[39] fiscal authority over resource-related revenue and borrowing should be clearly specified in the law and legislation should require full disclosure of all resource-related revenue, loan receipts and liabilities, and asset holdings; government involvement in the resource sector through equity participation should be fully disclosed and the implications explained to the public; ownership structures of national resource companies and their fiscal role vis-à-vis the resource sector ministry and the finance ministry should be clearly defined and commercial responsibilities should be clearly distinguished from policy, regulatory, and social obligations; and where international or national resource companies undertake social or environmental expenditure or provide subsidies to producers or consumers without explicit budget support, this should be clearly defined and described in the budget documentation.

[37] MEMD (2013) Remarks by Hon. Engineer Irene Muloni at the 6th EITI Conference, Sydney at 6.
[38] IMF,Guide on Resource Revenue Transparency (2007), <www.imf.org/external/np/pp/2007/eng/051507g.pdf> accessed on 9th April 2014.
[39] This is what Ben Shepherd calls revenue and contract transparency.

Arrangements to assign or share resource revenues between central and sub national levels of government should be well defined and explicitly reflect national fiscal policy and macroeconomic objectives; the budget framework should incorporate a clear policy statement on the rate of exploitation of natural resources and the management of resource revenues, referring to the government's overall fiscal and economic objectives, including long-term fiscal sustainability; mechanisms for coordinating the operations of any funds established for resource revenue management with other fiscal activities should be clearly specified and operational rules applied to resource-related funds should be clearly stated as part of an overall fiscal policy framework; the investment policies for assets accumulated through resource revenue savings should be clearly stated, including through a statement in the annual budget documents; and the government accounting system or special fund arrangements should clearly identify all government resource revenue receipts and enable issuance of timely, comprehensive, and regular reports to the public, ideally as part of a comprehensive budget execution report.

Furthermore, reports on government receipts of company resource revenue payments should be made publicly available as part of the government budget and accounting process. The non-resource fiscal balance should be presented in budget documents as an indicator of the macroeconomic impact and sustainability of fiscal policy, in addition to the overall balance and other relevant fiscal indicators; the government's published debt reports should identify any direct or indirect collateralization of future resource production, for instance through pre-commitment of production to lenders and all government contractual risks and obligations arising from such debt should be disclosed; all financial assets held by government domestically or abroad, including those arising from resource-related activities, should be fully disclosed in government financial statements. Additionally, estimates of resource asset worth based on probable production streams and assumptions should be disclosed; government contingent liabilities and the cost of resource company quasi-fiscal activities arising from resource-related contracts should be reported in budget accounts in a form that helps assess fiscal risks and the full extent of fiscal activity; and risks associated with resource revenue, particularly price risks and contingent liabilities, should be explicitly considered in annual budget

documents, and measures taken to address them should be explained and their performance monitored.

For integrity, internal control and audit procedures for handling resource revenue receipts through government accounts or special fund arrangements and any spending of such receipts through special funds should be clearly described and disclosed to the public; tax administration should be conducted in a way to ensure that resource companies understand their obligations, entitlements, and rights. The scope for discretionary action by tax officials should be clearly defined in law and regulations, and the adequacy of sector skills and standard or sector-specific procedures should be open to review; international and national resource companies should comply fully with internationally accepted standards for accounting, auditing, and publication of accounts. A national audit office or other independent organization should report regularly to parliament on the revenue flows between international and national companies and the government and on any discrepancies between different sets of data on these flows.

C. The Equator Bank Principles

The Equator Bank Principles are a credit risk management framework for determining, assessing and managing environmental and social risk in project finance transactions. This Project finance is often used to fund the development and construction of major infrastructure and industrial projects. These principles are adopted voluntarily by financial institutions and are applied where total project capital costs exceed US$10 million. The EBPs are primarily intended to provide a minimum standard for due diligence to support responsible risk decision-making. Equator Principles Financial Institutions (EPFIs) commit not to provide loans to projects where the borrower will not or is unable to comply with their respective social and environmental policies and procedures that implement the EPs. In addition, while the EPs are not intended to be applied retroactively, EPFIs will apply them to all project financings covering expansion or upgrade of an existing facility where changes in scale or scope may create significant environmental and social impacts, or significantly change the nature or degree of an existing impact.[40] Among others, the principles emphasize the following criterion before

[40] Available at http://www.equator-principles.com/index.php/about-the-equator-principles accessed on 10th June 2014.

approval to finance a project with project affected communities in a structured and culturally appropriate manner: for projects with significant adverse impacts on affected communities, the process will ensure their free, prior and informed consultation and facilitate their informed participation as a means to establish, to the satisfaction of the EPFI, whether a project has adequately incorporated affected communities' concerns. The other one is compliance with relevant host country's laws, regulations and permits that pertain to social and environmental matters.

D. The IFC Policy on Contract Transparency

On April 30, 2006, the International Finance Corporation (IFC) set out a policy on scope of information that it makes available to the public either as a routine matter or upon request. The information IFC makes available can be categorized as: Institutional information about IFC, which includes The Articles of Agreement and By-Laws of IFC and Minutes of formal meetings of IFC Board of Directors other than Executive Sessions. The second category is information regarding activities supported by IFC. While most of the responsibility for disclosing information about IFC-supported activities rests with the relevant IFC client, IFC makes available certain investment-specific information, including technical assistance and advice rendered. As an organization owned by its member countries, IFC is accountable for the use and management of its resources in a manner consistent with its mandate and has an obligation to be responsive to the questions and concerns of its shareholders. In carrying out its mandate to promote the growth of private enterprise in its member countries, IFC receives from its clients and other parties, information that is not publicly available for the purpose of enabling IFC to assess business opportunities. The IFC raises the monies necessary to fund loans to its borrowers by issuing securities in its own name in international markets. It discloses information concerning its financial condition and operations to purchasers of its securities and to the international markets in general. IFC encourages its clients to be more transparent about their businesses to help broaden understanding of their specific projects and of private sector development in general. In addition, IFC believes that when clients are committed to transparency and accountability they help promote the long-term profitability of their investments. IFC requires its clients to engage with communities affected by their projects, including through the disclosure of information,

in a manner that is consistent with the IFC Policy. IFC discloses publicly on a routine basis: annual audited financial statements such as IFC's fiscal year-end appear in IFC's Annual; Report and in IFC's annual Information Statement, the annual audited financial statements include balance sheets as of the end of the current and previous fiscal years, as well as statements of income, comprehensive income, cash flows, and changes in the capital stock.

E. The Publish What You Pay (PWYP) Initiative

PWYP is a global civil society coalition, working with member organizations in over 70 countries that help citizens of resource-rich developing countries to hold their governments accountable for the management of revenues from the oil, gas and mining industries. It does so mainly by advocating for multi-national, private and state-owned extractive companies to disclose a net figure for all types of payments made to governments of every country of operation in their annual financial accounts, and to disclose to which level of government payments are made. On government accountability, PWYP advocates for disclosure of payments by all extractive companies operating in their territory on a company-by-company basis and by payment type to an extent that governments "Publish What You Earn" or in other words disclose fully revenues from resource extraction; independently audit and verify this information in line with best international practice; put in place mechanisms for sub-national reporting of payments and revenues and establish open, participatory and transparent budget processes at national, regional and local levels in order to consult with civil society to promote broad-based economic and social development. PWYP requires Governments of OECD countries to make country-by-country disclosure of payments of all extractive companies registered or listed on financial markets in their country. PWYP urges extractive companies and local authorities to disclose information about social investments and payments to local budgets made by extractive companies. Additionally, it calls for the public disclosure of extractive industry contracts and licensing procedures to be carried out transparently in line with best international practice. PWYP also urges bilateral and multi-lateral financial institutions, including the World Bank Group, International Monetary Fund, regional development banks, export credit agencies and private sector banks, to require extractive companies to comply with the Publish What

You Pay requirements on transparency of payments as a pre-condition of all project support, and governments to have in place a functioning system to account for and independently audit revenues from extractive industries. Donor organizations are also urged to promote the empowerment and capacity building of civil society organizations across resource-rich countries in order to allow citizens to hold their governments accountable for the management and expenditure of revenues received from the extractive industries. PWYP also promotes changes to stock market listing rules requiring extractive sector companies to publish payments to foreign governments on an individual country basis. For example, in 2008 the efforts of the United States PWYP coalition culminated in the introduction of the Extractive Industries Transparency Disclosure Act (EITD) in the US Congress. The law requires disclosure of payments by all oil, gas and mining companies listed on the New York Stock Exchange, wherein twenty seven (27) out of the thirty (30) largest extractive sector companies that operate internationally are listed.

E. The European Commission Proposal on Transparency in the Extractives Sector[41]

The European Union announced a new directive requiring extractive companies to report their payments to governments on a project-by-project basis. This directive picks up the momentum started by the Wall Street reform Act (infra) to an extent that it decisively rejects the oil industry's attempts to evade transparency. The new proposals extend revenue disclosure rules to companies listed on the European stock exchange. This proposal if finally approved will apply to European oil companies engaged in Uganda's oil industry. The proposal specifically requires companies to disclose their payments for each extractive project, rather than lumping all their payments together for each country. This proposal goes further than the Dodd-Frank Act in some important ways. Unlike the Dodd-Frank Act, oil gas mining and timber companies even if unlisted on the stock exchange are also required to report their payments. However companies need not disclose payments to governments whose laws criminalize such disclosure. This

[41] It amends directive 2004/109/EC on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and Commission Directive 2007/14/EC.

undermines transparency, as opaque and repressive governments may be able to unilaterally block the flow of information to investors and the citizenry. Nevertheless, this exception does not apply to Uganda because the law clearly recognizes the democratic right of access to access information. The Directive also allows companies to decline disclosure of payments where the information cannot be obtained without disproportionate expense or undue delay. This gap if not remedied may be exploited by companies to avoid disclosure of the required information. By and large, however, the new European Union rules provide a much-needed provision that requires European companies to disclose payments in respect of their projects in Uganda to this. It is hoped that EU member states approve the directive so as provide to provide the much needed corporate accountability in Uganda's oil sector.

F. The Dodd-Frank US Wall Street Reform Act Principles, 2010

In 2010, US President Barack Obama signed into law the Wall Street Reform Act in which extractive industry companies registered with the US Securities and Exchange Commission (SEC), are required to produce annual reports detailing payments made to any foreign government. Companies must be registered with the SEC in order to trade on US stock exchanges. By 2011, twenty-nine of the world's thirty-two largest multinational oil companies and eight of the world's ten largest mining companies were registered and had to file annual reports with the SEC. This means that this provision represents a major victory for campaigners who have long argued for better information disclosure by the corporate sector. The information disclosed about payments to governments will help citizens track these funds and promote accountability in the sector.

G. Public Participation as a vehicle for Transparency and Accountability

It has been submitted that one of the means for effective environmental management is to empower citizens to exercise a degree of control over natural resources.[42] The right to participate in environmental decision-making processes that affect peoples' lives allows knowledge to feed into the planning process early and ensure broader perspectives and the development of better engagement strategies. There are several policies and laws in Uganda that enable people to participate in the development and management of natural

[42] AFIEGO (2010), op cit, at pp.46-49.

resources. The Constitution Uganda requires the Government take all necessary steps to involve the people in the formulation and implementation of development plans and programmes which affect them.[43] The Oil and Gas Policy recognizes the need for public participation. Thus one of the objectives is to ensure optimum national participation in oil and gas activities. The strategies to achieve this include promotion of public private partnerships whose benefits outweigh their cost, and whose costs and benefits are mutually and fairly shared by the partners and encouraging civil society to participate in the building of a productive, vibrant and transparent oil and gas sector. The Policy defines the role of different institutions in the management of oil resources. The Civil Society Organisations (CSOs) and Cultural Institutions are responsible for advocacy, mobilization and dialogue with communities. CSOs may also be contracted in the delivery of various services, especially in the communities where oil and gas is undertaken. These two institutions are responsible for holding the different players accountable with regard to oil and gas issues and participate in getting the voices of the poor into designing, monitoring and implementation of programmes in the oil and gas sector. However the policy has some weaknesses regarding public participation. It has no further explanation of the forms of participation or conflict management systems envisaged in oil exploration and production. The policy is also vague on the anticipated involvement of local communities and broader civil society in future benefit-sharing structures and the related decision-making processes. It also does not mention the participation of local governments which are important in governance systems. Public participation in environmental management is further recognized under the National Environment Act of 1995. It sets out the general legal framework and policy objectives for the sustainable management of Uganda's environment. It thus encourages participation by the Ugandan people in the development of policies, plans and processes for managing the environment, as well as the equitable use of natural resources for the benefit of present and future generations. One major barrier for implementing public participation in environmental management is lack of funds. Even where public participation would have resulted in tangible outputs such as mitigation measures, the

[43] The 1995 Constitution of Uganda, Principle X.

NEMA and other government agencies often do not have the resources or capacity to monitor and ensure compliance with them.

IV. CONCLUSION

It is therefore clear from the foregoing that transparency and accountability in Uganda's oil sector is more of a myth than reality. N In fact besides the weakness of the NOGP, civil society organizations have observed that even the transparency safeguards in the new laws are inadequate. According to Global Witness, the tight ministerial control, absence of parliamentary oversight and lack of guarantees on contract and financial transparency are key features of the [Acts].[44] The [Acts] are criticized for not setting out the role of parliamentary oversight over the industry. That even provisions on availability of information are inadequate because they contain commercial confidentiality clauses which are not defined, leaving a wide scope of unnecessary secrecy.[45] That whereas the Upstream [Act] allows the minister to make information available, it does not oblige him or her top do so. This means that information will not be necessarily public. The report further discloses that transparency requirements in the two Acts don't cover financial transparency relating to the sector, which means that there is no guarantee that the public will have information about revenue generated from the industry.

[44] Global Witness (2012) Uganda's Petroleum Legislation: Safeguarding the Sector, at 1.
[45] Ibid, at 2.

THE ROLE OF COURTS IN PROMOTING SOCIAL TRANSFORMATION AND THE FACTORS HINDERING UGANDAN COURTS IN PROMOTING SOCIAL JUSTICE

Edline Eva Murungi*

ABSTRACT

In the fight for justice, equality and human dignity to bring about an egalitarian society, there are several key players for example, the state, non-governmental organizations, lawyers as well as the courts. This essay will focus on the role of the courts in bringing about change in society whether through policy change or law reform by creating a forum for such a cause of action. In order to bring about change through social transformation, public interest litigation has to be employed so as to use the law and courts as a forum for achieving social justice on matters that affect the general public. I will also look at the structure of the court system in Uganda and how it has been used to bring about social change. Judges as agents of change will be also examined. However, there are several challenges that hinder the goal of an egalitarian society in promoting human dignity, where all people are equal and have equal opportunities.

I. INTRODUCTION

The courts should ideally provide justice to all persons including the poor.[46] The national, regional, and international legal framework provides that aggrieved persons should seek redress in the courts.[47] Our courts provide a forum to resolve disputes and to test and enforce laws in a fair and rational manner. The courts are an impartial forum and they should make decisions without being influenced by the whims of the government or other non-state actors.[48] Often courts are called on to uphold limitations on the government. They protect against abuses by all branches of government. They protect minorities of all types from the majority, and protect the rights of people who cannot protect themselves. They also embody notions of equal treatment and fair play.[49] The

*Fouth year law student, Makerere Law Student, Kampala.

[46] Roberto Gargarella *et al*, "Courts And Social Transformation in New Democracies: An Institutional Voice for the Poor? 2006.

[47] Article 50 of the 1995 Constitution of Uganda, as amended. See also Article 137 of the same.

[48] The role of the courts, http://www.cscja-acjcs.ca/role_of_courts-en.asp?l=4.

[49] Courts and legal procedure, http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/court_role.html.

courts therefore have an important role to play in public interest litigation so as to bring about the much desired social transformation.

II. BASIC TERMS DEFINED

According to Phillip Karuhanga, *Public interest litigation* describes legal actions brought to protect or enforce rights enjoyed members of the public or large parts of it.[50] Dr. Mbaziira defined it as litigation that is intended to use the legal system in order to instigate change that affects the public.[51] That it seeks to bring about social change through the court ordered decrees which go beyond addressing the problems of the individual or the immediate client.[52] Therefore, public interest litigation involves legal actions aimed at social transformation to cater for the marginalized, public interest to bring about a utilitarian society.

Siri Gloppen summarizes it to broadly refer to the legal action to establish a legal principle of right that is of public importance and aimed at social transformation.[53] That it covers a wide range of legal actions, class actions as well as individual actions, directed at both the state and/or private companies on mass tort cases[54]. The history of this form of litigation is that it can be traced back to the 1960s in the United States of America, brought by the civil rights movement. There was need to assist the disadvantaged, especially the Black community from racial discrimination and enforcing the rights to equality. It has been manifested in other countries like India and South Africa where it has become progressive.[55]

In the case of *Bandhua Mkukti Morcha v. Union of India Air*,[56] Bhagwati J. stated that;

[50] Phillip Karuhanga, "Public interest litigation in Uganda; practice and procedure shipwrecks & seamarks", A presentation at the judicial symposium on environmental law for judges of the Supreme Court and Court of Appeal. 11th-13th September 2005.
[51] Christopher Mbaziira, "Public interest litigation and judicial Activism in Uganda, improving the enforcement of economic, social and cultural rights" HURIPEC Working paper, no. 24 February 2009, page 14.
[52] Ibid.
[53] Siri Gloppen, "Public interest litigation in social rights and social policy", conference paper in Arusha. 2005.
[54] Ibid.
[55] Christopher Mbaziira, *supra note* 6 at page 15.
[56] 1984, Supreme Court.

> Public interest litigation is not in the nature of adversary ligation but it is a challenge and an opportunity to the government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and economic justice, which is the signature of our constitution.[57]

The rationale for the use of this system in the courts is to ultimately affect change in government policies, make government more accountable, alerts the public on unfair practices and opens debate on such cases and inspires more such law suits. Therefore in law, it is used as a tool for bringing about change in either the law or policies so as to bring about equality among all persons in the state.[58]

Social transformation therefore according to Siri Gloppen, is altering structural inequalities and power relation in society in ways that reduce the weight of morally irrelevant circumstances, such as socio- status/ class, gender, race or sexual orientation. That the law is a tool to alter the inequalities however they are entrenched so deep that it is hard to change and rather used for sanctions on arbitrariness and lawyers who should be the custodians of the law but use it for oppression. This aims at bringing about a change in the system or policy for the good of society.[59]

Social justice is a state doctrine of egalitarianism where human dignity is respected, human rights upheld, there is equality for all and equal distribution of resources as well as social participation to bring about change. It involves distributive justice and supports the fair treatment and equitable treatment of all people and aims to protect the marginalised from discrimination because of gender, age, ability, among others. Faith River James states that social justice lawyering refers to the use of the law and legal strategies to achieve community advancement objectives.[60] It was further observed that lawyers have a great influence on the great issues of our time to lead to social justice causes.[61]

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[57] Narayama, *Public interest litigation*, 2nd Edition, 2001.
[58] Christopher Mbaziira, supra note 6.
[59] Siri Gloppen, *supra note* 8.
[60] Faith River James, *Leadership and social justice lawyering*, Santa Clara Law Review, volume 52, no. 3 of 2012.
[61] Ibid.

III. THE COURTS: STRUCTURE AND ROLE IN SOCIAL TRANSFORMATION

Courts have been created as avenues for conflict resolution and dispute settlement. They are of great importance to bring about social transformation through public interest litigation (herein referred to as PIL). According to Article 126(1) of the Constitution,[62] judicial power is to be derived from the people and it is to be exercised in the name of the people and in conformity with the law, values, norms and aspirations of the people. Thus in adjudicating cases, the courts have to ensure that justice is served at all times without consideration to social or economic status.[63]

The structure of the judiciary in Uganda and the jurisdiction of each court are detailed in chapter eight of the constitution. The hierarchal ordering has the Supreme Court as the most superior and final court of appeal.[64] The Supreme Court receives only appeals from the Court of Appeal except in the case of hearing of presidential election petitions.[65] Similarly the Court of Appeal has appellant jurisdiction over matters from the High Court.[66] It also sits as the Constitutional Court [67] when entertaining matters pertaining to constitutional interpretation and the appeals lie to the Supreme Court.[68]

The Constitutional Court is empowered upon considering that there is need for redress, in addition to the declaration sought to; (a) grant an order of redress, or (b) refer the matter to the High court to investigate and determine appropriate redress. The High Court has unlimited original jurisdiction.[69] It is also an appellate court to the matters from the lower courts such as the magistrates' courts and other tribunals as well.[70] Also important to note is that aside from the formal structures, Uganda has a system of other courts such as the local council courts structured along the decentralized system of governance.[71] Professor Mbaziira notes that these courts have jurisdiction to entertain causes and

[62] 1995 Constitution of Uganda, as amended.
[63] Christopher Mbaziira, *supra note* 6.
[64] Article 132 of the 1995 Constitution of Uganda, as amended.
[65] Section 59 of the Presidential Elections Act, 2005.
[66] Article 134(2) of the Constitution.
[67] Article 137(1) of the Constitution.
[68] Article 137(3) of the Constitution.
[69] Section 16 of the Judicature Act, Cap 13 and Article 139 of the Constitution.
[70] See section 204(1) (a) of the Magistrates Court Act, Cap 16.
[71] See the Local Council Courts Act.

matters of a civil nature governed by customary law and matters arising from the infringement of bye-laws and ordinances made under the local Government's Act.[72]

The courts have a mandate under Article 50 of the Constitution to entertain cases of violations of human rights. This provision is the *locus classicus* on public interest litigation and states that;

"Any person or organisation may bring an action against the violations of another person's or group's human rights."

As Phillip Karugaba puts it, this article makes us our brother's keeper.[73] It allows for individuals or organizations even if not directly suffering the injury to bring an action which will benefit the society as a whole.[74] This article therefore abolished the *locus standi* requirement. It therefore does not require one to be directly injured to bring action to the courts. In the case of *Uganda journalist safety Committee & Anor Attorney General,*[75] the constitutional court was of the view that it was not proper for a person seeking redress under Article 50 of the Constitution to petition the court but rather the other courts of judicature as way of an ordinary civil action.

In addition to the above, the Constitutional Court has the mandate to hear petitions related to the violation of the Constitution. Its major role is the interpretation of the Constitution however, it also has the mandate of enforcement of the same and therefore can grant redress. This is provided for in Article 137(3) of the Constitution which clearly states that anyone who alleges that an act or any other law or acts/omission by any person or authority contravenes the Constitution, may seek for a declaration from court to the effect, and for redress where appropriate. In the case of *Ismail Serugo v. KCC & Attorney General,*[76] Justice Mulenga was of the view that a right to present a constitutional petition was not vested in the person who suffered the injury but also in any other person. The court added that it was not enough to merely allege that a constitutional provision was violated but to also show that it requires interpretation. This

[72] Christopher Mbaziira, *supra note* 6.
[73] *Op cit.*
[74] Phillip, shipwrecks and seamarks, 2005.
[75] Constitutional appeal no. 7 of 1997.
[76] Constitutional Appeal no. 2 of 1998.

is in line with Article 3(4) of the constitution which imposes the right to protect and defend the constitution.

Therefore the constitution empowers the courts to be avenues for redress which is favorable in achieving social justice and transforming the society. The right to appeal as seen in the structure of court system allows for the review of cases by the higher courts and therefore widens the scope of achieving the desired goals in achieving social justice.

Through the courts, the concerns of the marginalized can be raised as legal claims thus used as a tool for social control. The litigation process will enable for the law to be applied in a way that will affect society as a whole. Professor Greenberg[77] states that the judiciary is of the use in achieving social change. First, it is to interpret the law and redefine the rights as stated in the constitution and the statutes, and secondly, that the courts should apply existing favorable rules or laws that are ignored or underutilized. It is meant to empower the disadvantaged persons. In the constitutional case of *Uganda Association of Women Lawyers and others v. Attorney General(divorce case),*[78] several sections of the Divorce Act were held to be unconstitutional as women were required to prove both cruelty and adultery in order to instigate divorce proceedings which was not required for the husbands. Similarly in the case of *Law advocacy for women v. Attorney general,*[79] section 27 of the Succession Act was also held to be unconstitutional as only a man could distribute property and women wholly ignored. This case therefore changed the status quo of the woman in the family to promote equality amongst the sexes and improve their status. Litigation can extend rights to otherwise disenfranchised groups through the enforcement of constitutional guarantees. By obtaining favourable judicial decisions, there can be reform of public institutions charged with serving groups such as prisoners, children, persons with disabilities and therefore ultimately empower the disadvantaged groups.

The courts also play a role as e defense mechanism for the existing pro-poor policies. They act as a bulwark for the erosion of these existing policies. The courts will enable litigation to maintain these policies so as to achieve social equality. Similarly this

[77] Cited in Philip, op cit.
[78] Constitutional Petition no. 2 of 2003.
[79] Constitutional petitions No.s 13/05 & 05/06.

enables the bolstering of pro-poor policies[80] so that the State protects the policies of the poor. Strategic litigation can sometimes compel resistant governmental authorities and agencies of public institutions to take action. It can enforce existing laws and regulations, even when those responsible would rather ignore them. The courts create avenues that raise public awareness which enhances advocacy for such policies.

Indirectly therefore, the courts empower the poor, whether financially through compensation orders or the right to legal resources. The courts thus provide a community with a way to prevent a proposed project from going forward for example the construction of a hazardous-waste disposal site, or the building of a housing complex that would destroy parkland. Such litigation would be beneficial to the majority of the community. As such section 71 of the National Environmental Act empowers any person to apply for an environmental restoration order, even though such a person is not suffering any harm and has no interest in the land in issue. In *TEAN v. Attorney General (Nonsmokers case)*[81], an action was brought on behalf of non-smokers for declarations that smoking in public places was a violation on the non-smokers constitutional rights to a clean and healthy environment and to life though it went without saying that all nonsmokers not were named in the motion.

The courts have become a social forum. They are a tool for achieving systematic change and educational value by rising awareness on issues that potentially affect most of the public. This therefore implies that they have become a catalyst for reform. Many lawyers seek to bring change in the laws that have previously been known to be either discriminatory or worsen the position of the marginalized groups.

In trying to achieve social transformation, the role of the judges is paramount and there is need for judicial activism. The judges are required to be more progressive and pragmatic rather than rigid and traditional. In this way they will move away from the previous laws, rules and regulations which have over the years brought about the continued marginalization of certain groups.

[80] Siri, ibid.
[81] Miscellaneous Application no. 39 of 2001.

Originally, the courts were hesitant to entertain actions of public interest stating that they lacked *locus standi* as it was stated in *Rwanyarare and Anor v. Attorney General.*[82] The judges stated that they could not accept such an argument relating to public interest representation as the people had no knowledge and neither had they given their consent and that it would be undemocratic. However recently, the judiciary has become more pragmatic which has encouraged the activists, civil society organizations and other members of the public to bring cases before curt in public interest.

Therefore in the case of *Advocates Coalition for Development and Environment v. Attorney General,*[83]it was held that the importance of Article 50 of the Constitution, is that it allows any individual or organization to protect the rights of another even though the individual is not suffering the injury complained of. Further that, the violation of fundamental human rights for one is the violation for all.

Through judicial activism, the courts have sought to rebalance the distribution of legal resources, increased access to justice for the disadvantaged. Such trials instituted in public interest have been able to re-establish *inter alia* the right to a speedy trial, the right against pollution, the right to life and the right to a clean and healthy environment. The judges are able to view themselves as agents for change, look at the rights more broadly so as to use the law as an engine for change and social transformation. The role of the courts is to promote social harmony and judges should be able to stretch the law and cater for the needs of the vulnerable.

IV. CHALLENGES

Even though the courts are an important asset in achieving social transformation, there have been several hindrances that have seen the growth of strategic litigation not flourishing as much as it should. Adherence to technicalities is a major challenge. The absence of proper laws brings about a lacuna in the law. Judges rely on procedural aspects of the law rather than the substantive aspects of the law. Originally it was only the Attorney General who could bring such claims relating to the public especially public nuisance as expressed in the archaic section 62(1) of the Civil Procedure Act, which

[82] Constitutional Petition no. 11 of 1997.
[83] Miscellaneous cause no. 0100 of 2004.

requires that suits are instituted by the Attorney General or two or more persons by consent of the Attorney General.

The approach was concretized in the case of *Kasirye Byaruhanga & Co Advocates v. UCB,*[84] which emphasized that the rules of procedure are the handmaiden of justice and cannot be ignored. Also in *Serapio Rukundo v. Attorney General,*[85] the court held that while it was agreed that minor irregularities had to be ignored in constitutional matters, it was important to follow the rules of procedure to ensure smooth and practical conduct of constitutional petitions. Under Article 126(2) (e), the Constitution establishes that the justice should be dispensed without undue regard to technicalities. However this has been ambiguous and in many cases ignored and procedure is followed which is a hindrance for the access of justice.

In addition, the law is backward and slow to adapt to the changing situation in the social economic and political vicissitudes. The courts are therefore slow to contemporary needs and thus the need for social transformation only becomes a dream that cannot be achieved. For example in the case of *Law Advocacy for women v. Attorney General,*[86] after the courts struck down section 27 of the Succession Act, there was a lacuna in the law on what should be applied and this has not been remedied to suit changing times.

The other hindrance is that litigation in the courts is very tedious and expensive. There is a lot of paperwork involved, hiring private lawyers, delays, thriving on the technicalities of procedure. With the case backlog in Uganda, it takes years for redress to be sought from the courts and instead of achieving social transformation, justice is delayed. The system has inadequate staff and there is need for the appointment of more judges, that way several matters will be heard and addressed accordingly.

The courts have been a continued disappointment to many due to the continued loss of independence by the judiciary. Article 128 of the 1995 Constitution of Uganda provides for independence of the judiciary should be independent and not influenced by external sources. The decision of the judge should be purely based on his own judgment and not

[84] Supreme Court Civil Appeal no. 2 of 1997.
[85] Constitutional case no. 3 of 1997.
[86] Supra.

under any duress or influence. On the contrary, it cannot be said with precision that the judiciary has been protected from the impunity of politics in the country. In the 1970s, the Chief Justice even disappeared and was never seen again, he has since been presumed dead.[87] In the period of 2004-2006, the country witnessed the adamant refusal by the executive to follow court orders. For instance, on more than one occasion the military raided the sacred premises of the High Court to re-arrest suspects released on bail.[88] The president further stated that the courts had usurped the powers of the parliament by amending the Constitution.[89] Such acts disenable the judicial activism thus crippling social transformation. In the long run, the judiciary seems to be aligned to the whims of the executive, ignoring the independence that it is granted by law.

With all the above mentioned, there has been eroded public confidence in the in the judiciary. Very many people are thus skeptical to instigate proceedings in the courts of law as they fear that justice will not be dispensed and in most cases this fear is rightly placed.

Another major challenge that the courts have faced are the arguments against the economic, social and cultural rights as being non- justiciable. The major argument has been that these rights are positive rights as opposed to the civil and political rights which are negative. The positive rights require the state to intervene actively and cannot be realized without this intervention.[90] The State requires for example to set up hospitals, schools for the rights to be realized. This has generated the debate of the doctrine of separation of powers. That the judiciary should not look into matters of policy as it will be usurping the powers of the executive. This has been termed as the 'political question' which the courts have no business taking part in.

[87] Albert Wade, *Benedicto Kiwanuka: The man and his politics*, Fountain publishers, 1996.
[88] J Oloka Onyango, *Judicial power and constitutionalism in Uganda: A historical perspective*. Available at www.acode-u.org/documents/PRS_58.pdf.
[89] See, *Judicial independence undermined: A report on Uganda, September 2009*. Available at www.ibanet,org/document/default.asp.
[90] Philip Alston and Gerard Quinn, *The Nature of state parties obligations under the International Covenant on Economic, Social and Culture Rights*, (1987) 9 Human Rights Quarterly 156, 159- 160.

A good example has been recent decision in the *CEHURD v. Attorney General (maternal health case*).[91] Court found for the Attorney General stating that by making a decision on the issues of maternal health care in Uganda, it would be determining a political question which did not have the mandate to do. This was a big step backwards of the courts championing public interest litigation.

V. RECOMMENDATIONS

It is notable that courts do not award costs in public interest litigation related matters considering that these are instituted for the public good. This in a way discourages lawyers from taking on several public interest litigation cases since they are devoid of cost. In the event, it is recommendable that the courts award costs to a party that institutes and wins a public interest case. This will encourage more of these cases and social transformation.

Independence of the judiciary will ensure that decisions are devoid of any political influence but instead align with what is most desirable to the people.[92] The I995 constitution establishes the impartiality of the judiciary[93] as an element of a democratic state and significant to portray the rule of law and the spirit of constitutionalism. This is also important because it envisages the right to a fair trial.

There is need for judicial activism and to explore the law in much broader way. The courts in South Africa and India have been seen to be more progressive because they have interpreted rights in a wider perspective. This has increased on the number of public interest litigation cases that are filed and decided. For instance in the case of *Soobromoney v. Minister of Health (Kwazulu- Natal),*[94] where it was stated that there should be available resources for emergence health care and the state had the responsibility to endeavor that it provided for the rights.

The courts should further consider the economic, social and cultural rights as justiciable. The 1993 Vienna Declaration and Programme of Action stipulates that all rights are

[91] *Centre for Health Human Rights & Development & 3 Ors v Attorney General*, Constitutional petition n0. 16 of 2011.
[92] See, Article 126(1) of the Constitution, judicial power belongs to the people.
[93] Article 28 of 1995 Constitution of Uganda. See also the Judicial Code.
[94] 1998 (1) SA 765 (CC).

universal, interdependent, related and equal.[95] Therefore the courts should apply all the rights without drawing a distinction. Article 45 of the constitution should also be brought to paper by considering all the rights that have been provided by the international or regional instruments even though not expressly laid down. The African Commission in the *SERAC case*[96] has stated that obligations of states can be derived by looking at the duty to respect, protect and promote and fulfill to ensure that the rights are upheld.

There is also a need for continued legal education to both members of the bar and the bench. The legal profession should be brought up to date with current trends especially on public interest litigation. There is need to let go of the outdated reliance on procedure but consider the needs of the general public. Precedent which is also heavily relied on should not play a substantive role so that new ideas regarding this field which has not been explored can be used.

VI. CONCLUSION

As discussed above, the courts have an important role in social transformation as they create a forum for litigating matters of social interest. However there have been several constraints. The courts have been a social forum, a place where the rights of the marginalized are realized, policy is changed to change the existing status quo. This has been encouraged by judicial activism which has brought about more pragmatic consequences. If all hindrances are overcome, then social transformation will be achieved.

[95] See, the preamble and Article 1 of the Vienna Declaration and Programme of Action, 1993. Available at www.ohchr.org>OHCHR>English>.

[96] *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

REVENGE IS NOT JUSTICE: THE DEATH PENALTY SHOULD BE ABOLISHED IN UGANDA.

Ampairwe Cynthia*

ABSTRACT.

Today, one of the most debated issues in the Criminal Justice system is the issue of capital punishment or the death penalty. Over the years, a number of countries have abolished the death penalty. However, Uganda still recognizes its imposition for the most serious offences. It is for this reason that this has become one of the major areas of contention especially in the Human Rights perspective. It is a topic of interest not only to the lawyers but also to the public at large. The article therefore presents the current situation in Uganda as regards the abolition of the death penalty. It presents the major reasons that have been given in support of the death penalty; deterrence and retribution. It goes ahead to show how these arguments have not been effective in other countries as well as Uganda. Conversely, more convincing arguments have been raised for its abolition amongst which is the argument that it is a violation of human rights. The article also presents a brief on Jeremy Bentham's theory of punishment. Finally, this article points the way forward. The author argues that publicity and the need for a constitutional review should be the major concerns as we move towards total abolition of the death penalty in Uganda.

I. INTRODUCTION.

History shows that the view of every nation regarding the infliction of the death punishment have, in the process of time undergone significant changes. There is a growing trend towards the universal abolition of the death penalty and a restriction in the scope and use of capital punishment over the last fifty years.[1] Of the one hundred and ninety eight states in the world, fifty eight retain the death penalty, ninety eight are abolitionist for all crimes, seven are abolitionist for ordinary crimes, and thirty five are abolitionist in practice (retaining the death penalty but having not executed anyone during the past ten years).[2]

The vast majority of countries in Africa have moved away from the death penalty while a small, isolated group continues to cling to state-sanctioned killing. Sixteen of the member states of the African Union are abolitionist in law. Gabon is the latest country to abolish the death penalty; others include Angola, Burundi, Senegal, Cape Verde, Ivory

* Fourth year Law student, Makerere University Kampala and an intern at Foundation for Human Rights Initiative.

[1] Penal Reform International, "*Death Penalty Information Pack,"* (*April* 2011), p.5.

[2] Amnesty International report 2013, http://www.amnesty.org/en/death-penalty/numbers.

Coast, Djibouti, Gabon, Guinea-Bissau, Mozambique, Namibia, Rwanda, Seychelles, South Africa, Togo, and Mauritius.[3]

During the year (2013), many states across Africa took small but significant steps towards abolition. New constitutions were drafted in Ghana and Sierra Leone to end capital punishment, Both Benin and Comoros are considering new penal codes that would abolish the death penalty for all crimes. However, there was still an increase in executions in 2013. Nigeria, Sudan, Somalia were behind more than 90% of the 64 reported executions carried out in Africa in 2013. They are also accounted for two-thirds of all reported death sentences in the region with dramatic increases especially in Nigeria and Somalia.[4]

II. PROGRESSIVE ABOLITION; THE UGANDAN EXPERIENCE

Uganda is among the countries that have retained the death penalty. Article 22(1) of the 1995 Constitution recognizes the death penalty. It states that;

> No person shall be deprived of life intentionally except in execution of a sentence passed in a fair hearing 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.

Although this article guarantees the right to life, it is subject to the passing of a death sentence after a fair trial. It is against this premise that Foundation for Human Rights Initiative (FHRI)[5], in 1993, launched a campaign against the death penalty. The multi-pronged strategy comprised of routine prison inspections, human rights training for prison staff, public debates on the death penalty and annual compilation of prisoner statistics. In its move against the death penalty, the organization commissioned one of the leading law firms in Kampala (Katende, Ssempebwa & Company Advocates) to

[3] Ibid.

[4] Death Penalty 2013: Isolated Countries Behind a rise in executions in Africa, *Amnesty International Annual report 2013,* (27 March 2014).

[5] Foundation for Human Rights Initiative is an independent, non-governmental and non-profit making organization established in December 1991 to enhance the knowledge, respect and observance of human rights, encourage exchange of information and experiences through training, education, research, legislative advocacy and networking in Uganda.

lodge a constitutional petition on behalf of all prisoners on death row challenging the application of the death penalty in Uganda.

In 2005, a constitutional petition cited as *Suzan Kigula v. Attorney General* (herein referred to as Suzan Kigula case),[6] was lodged in which Suzan Kigula, the lead petitioner, was convicted of murdering her husband and placed on death row. The petition challenged the constitutionality of the death penalty as cruel, inhuman, and degrading punishment and in the alternative, that the mandatory death sentence was unconstitutional, that hanging is an unconstitutional method of execution and that the long delay between a sentence and execution made an otherwise constitutional death penalty unconstitutional.

The constitutional Court held, a ruling upheld by the Supreme court on appeal that: mandatory death penalty was unconstitutional on grounds that a mandatory death sentence violated the right to fair trial by denying a proper sentence hearing and precluding appellate review of criminal sentences, as well as violating the principle of separation of powers; and any inordinate delay lasting longer than three years as well as poor prison conditions to be unconstitutional; that the death penalty per se was constitutional. Court cited *Kalu v. State* in which the Supreme Court of Nigeria upheld the death penalty.[7] This therefore, shows that the death penalty is still recognized under the law in Uganda. However, the last executions in Uganda reportedly took place in 2005. Court also ordered that those death row inmates, who were sentenced under the mandatory death sentence provisions, should have their cases remitted to the High Court for them to be heard for mitigation of sentence.[8]

Uganda's retention of the death penalty in its constitution goes against the international trend towards abolition as well as international human rights norms. The delay between sentencing and execution, including the time spent waiting for appeals, which can be very

[6] See *Suzan Kigula and 417 ors v. Attorney General,* Constitutional Petition No. 6/2003 at 2 (2005) (cc).
[7] Kalu v State, (1998) 13 N.W.R. 531.
[8] As an intern at FHRI, I was given the opportunity to attend these mitigation hearings for purposes of observing whether the fair trial principles were adhered to. The hearings went on well. Both prosecution and defense referred to the aggravating and mitigating factors under the sentencing guidelines and most of the convicts had their sentences reduced depending on the mitigating factors. Only one death sentence was confirmed.

lengthy under the Ugandan justice system, can cause the so called "death row phenomenon". This is the suffering and psychological torment that prisoners have to endure after the pronouncement of their death sentence.[9]

III. POPULAR ARGUMENTS FOR THE DEATH PENALTY

Those who support the death penalty contend that it serves two main purposes, Retribution and deterrence. For the purposes of this Article we shall only look at these two arguments for the death penalty.

A. Deterrence

The argument most commonly used in support of capital punishment is that it acts as a deterrent to violent crime. People have often asserted that executing convicted murderers will deter would-be murderers from killing people. Capital punishment is often justified with the argument that imposing the death penalty will create social order and it would help prevent potential offenders from committing crimes.

However, a report by Amnesty International claims that detailed research in the USA and other countries shows no evidence that the death penalty deters crime more effectively than other punishments. In fact, in some countries like Canada, the number of violent crimes actually decreased rather than increasing, after the death penalty was abolished.[10] John Donohue's assertion also shows that there is no big difference (in regard to commission of crimes) between countries that have abolished the death penalty and those that have not;

> The homicide rate in Canada has moved in virtual lockstep with the rate in the United States, while approaches to the death penalty have diverged sharply. Both countries employed the death penalty in the 1950s, and the homicide trends were largely similar. However in 1961, Canada severely restricted its application of the death penalty (to those who committed premeditated murder and murder of a police officer only); in 1967, capital punishment was further restricted to

[9] Patrick Izizinga, a former death row inmate stated how just after the mention of four words "GO AND SUFFER DEATH," he saw darkness. From then on, his kidneys and liver were affected, he had uncontrollable headaches which have persisted until today.

[10] Graeme Simpson and Lloyd Vogelman, "*The Death Penalty in South Africa,"* (Center for the study of Violence and Reconciliation). Available at http://www.csvr.org.za/wits/articles/artdpgl.htm.

> apply only to the murder of on-duty law enforcement personnel. As a result of these restrictions, no executions have occurred in Canada since 1962. Nonetheless, homicide rates in both the United States and Canada continued to move in lockstep.[11]

Within the United States, studies have consistently shown that proportionately fewer murders occur in states that do not have the death penalty than in states that do[12] and that, in the latter, murder rates increase after highly publicized executions[13] findings that support the hypothesis that, as George Bernard Shaw put it, "*murder and capital punishment are not opposites that cancel one another, but similar that breed their kind.*"[14]

The situation in other countries is quite similar to that in Uganda. Despite the retention of the death penalty in Uganda, there has not been any reduction in the crimes committed. There are approximately 293 individuals currently under sentence of death in Uganda.[15] Murder cases are still very rampant. If the death penalty deterred murder, it would follow logically that having and using it would result in lower murder rates. However, it appears to me that general deterrence, in any event is a myth.

This argument states that real justice requires people to suffer for their wrongdoing, and to suffer in a way appropriate for the crime. That each criminal should get what their crime deserves and in the case of a murderer what their crime deserves is death. Retribution is usually summarized, by the scriptural invocation to take "an eye for an eye,

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[11] John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN.L. REV. 791, 799 (2005) (internal citations omitted).

[12] *See, e.g.,* David Baldus& James W.L. Cole, *Statistical Evidence on the Deterrent Effect of Capital Punishment,* 85 YALE L.J. 164 (1975). There have been a few studies by economists purporting to document a deterrent effect—notably, Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Matter of Life and Death,* 65 AM. ECON. REV. 397 (1975)—but rigorous analysis of these studies has shown their conclusions to have been false. For a succinct analysis of research on the issue, see Raymond Paternoster, Robert Brame & Sarah Bacon, *The death penalty: America's experience with capital punishment* 140–48 (2008).

[13] William J. Bowers & Glenn Pierce, *Deterrence or Brutalization: What is the Effect of Executions?*, 26 CRIME & DELINQ.453, 453 (1980).

[14]George Bernard Shaw, *Man and superman: Maxims for revolutionists* 232, para. 60 (1903). Available at http://www.bartleby.com/157/6.html.

[15] Amnesty International, Death Sentences and Executions in 2013, p. 48, ACT 50/001/2014. Available at http://www.amnestyusa.org/research/reports/death-sentences-and-executions-2013.

a tooth for a tooth" also meaning, life for a life. In this regard, A.S. Anand and N.P Singh contend that;

> The measure of punishment in a given case must depend upon the atrocity of the crime, the conduct of the criminal and the defenseless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that the courts should impose punishment benefitting the crime so that the courts reflect public abhorrence of the crime.[16]

However, the argument that the death penalty is the only way to acknowledge the pain and suffering of the family and friends of murder victims and to ensure just retribution for their loss serves no purpose. An execution cannot restore life or lessen the loss to the victim's family! Our country should realize that retribution cannot be accorded the same weight under our constitution as the right to life and dignity. The words of Justice Chaskalson in *State v Makwanyane*[17] clearly explain this;

> The righteous anger of family and friends of the murder victim, reinforced by the public abhorrence of vile crime, is easily translated into a call for vengeance. But capital punishment is not the only way that society has of expressing its moral outrage at the crime that has been committed. We have long outgrown the literal application of the biblical injunction of "an eye for an eye, and a tooth for a tooth." Punishment must to some extent be commensurate with the offence, but there is no requirement that it be equivalent or identical to it.

IV. WHY ABOLISH THE DEATH PENALTY?

B. *Retribution*

1. The Right to Life.

The death penalty is an ultimate denial of human rights. It is the premeditated and cold-blood killing of a human being by the state. This cruel, inhuman and degrading

[16] Justices A.S Anand and N.P Singh, Supreme court of India, in the case of *Dhananjoy Chaterjee vs State of W.B*, 1994 SCR (1) 37, 1994 SCC (2) 220.

[17] Constitutional court of the Republic of South Africa, 1995 Case No.CCT/3/94, 1 LRC 269 (1995), judgment of Justice Chaskalson, paragraph 12.

punishment is done in the name of justice.[18] Article 22 of the 1995 Constitution of Uganda provides for the right to life. However this is also accompanied by a savings clause. It requires that to impose the death penalty, a court must provide the accused with a trial and if convicted, the highest appellate court must confirm the conviction. From this, it is evident that our constitution still acknowledges the killing of criminals by the state.

Many lawyers and Human Rights Organizations have argued that the death penalty is not in line with the spirit of the Constitution.[19] First, it violates one of the most fundamental principles under widely accepted human rights law- that states must recognize the right to life. Article 3 of the UN Universal Declaration of Human Rights, which Uganda adopted, states that, "*Everyone has the right to life, liberty and security of person.*" According to Article 6 of the International Covenant on Civil and Political Rights (ICCPR), the right to life is to be protected by law.

The Center for Constitutional Rights[20] has mentioned that the death penalty violates our most fundamental human rights. In its own words, it says "*As long as governments have the right to extinguish lives, they maintain the power to deny access to every other right enumerated in the Declaration. This first, most central right provides the foundation upon which all other rights rest."*[21]

The Right to Life was also pronounced in the South African case of *State v Makwanyane and Mchunu* in which the South African Constitutional Court unanimously struck down the death sentence for violating the right to life and human dignity and the right to be free from cruel, inhuman, or degrading treatment and punishment.[22] Arthur Chaskalson,

[18] Amnesty International, "Death Penalty, Facts and Figures 2013." Available at http://issuu.com/amnestypublishing/docs/death_sentences_and_executions_2013.

[19] In Uganda, such organizations include FHRI, Amnesty International (AI), Friends of Hope for Condemned Prisoners (FCHP-U), the Human Rights Network Uganda (HURINET-U), the Public Defenders Association of Uganda (PDAU), the Uganda Joint Christian Council (UJCC), and the Uganda Association of Women Lawyers (FIDA-U).

[20] The Center for Constitutional Rights is dedicated to advancing and protecting the rights guaranteed by the Universal Declaration of Human Rights (UDHR).

[21] Center for Constitutional rights, "*The Death Penalty is a Human Rights violation: An examination of the Death Penalty in the U.S from a Human Rights Perspective*." Available at http://ccrjustice.org/files/CCR%20Death%20Penalty%20Factsheet.pdf.

[22] See *State v Makwanyane & another* 1995 (3) SA 391 at 144-146.

president of the Constitutional Court states that, "*Everyone, including the most abominable of human beings, has a right to life, and capital punishment is therefore unconstitutional."* Unlike the Ugandan Constitution, the South African constitution does not contain a savings clause since the right to life is unqualified. Why then should our constitution be different? The right to life should remain limitless.

2. *Right to be free from cruel, inhuman and degrading treatment.*

In addition to the right to life, other basic rights are often breached in the application of the death penalty. The death penalty breaches the prohibition against cruel, inhuman or degrading treatment. This is provided for under Article 24 of the Constitution of Uganda. There has also been a growing consensus that the "death row phenomenon" violates the prohibition against torture under international human rights law. It has been shown that humans experience isolations as torture. Decades in isolation without access to family, other prisoners, programming, or any other form of intellectual or social stimulation along with the constant knowledge of one's impending, but uncertain death, combine to create the death row phenomenon.[23]

Research also shows that the prisons are endemically crowded. The cellblocks lack sanitation facilities and prisoners defecate in buckets. Infectious diseases are rampant for example Tuberculosis. Malaria is also common yet the medication is allegedly scarce. Many prisoners suffering from peptic ulcers resorted to eating raw garlic to alleviate pain.[24] For example, according to the current death row prisoners, 10% of prisoners in condemned section started suffering from epileptic fits after incarceration.[25] Such physical conditions and mental suffering of condemned prisoners frequently result in their death even before they are executed. Many allegedly die within 2 to 5years after sentencing. In support of this, a death row prisoner provided the following anecdote: In 1993, when he was convicted, a total of 35 people were sentenced to death in Uganda. Of those 35, two were executed, two had their convictions quashed on appeal, and one

[23] Center for Constitutional Rights, *supra* 21.

[24] The Civil Society Coalition on the Abolition of the Death Penalty in Uganda, "The Death Penalty in Uganda: The Perspective of those Affected," in *Towards Abolition of the Death Penalty in Uganda* (Kampala: Fountain Publishers, 2008), p.135.

[25] Lillian Chenwi, Towards the abolition of death penalty in Africa: A human rights perspective, Pretoria University Law Press, ABC Press, Cape town (2007). Available at www.chr.up.ac.za/pulp.

was pardoned. Out of the remaining 30, as of August 2005, 28 had perished whilst imprisoned on death row.[26] The worst aspect of death row life is the anxiety of living under the shadow of death. Elias Wanyama,[27] a former death row prisoner stated that, "Death row prisoners become living zombies. Its tantamount to living in a mortuary…In normal life, you look forward to the next day, you make plans, but on death row all your hopes are gone, you make no plans."[28]

In addition to this, hanging which is the method of execution is considered a very cruel, inhuman and degrading method. The petitioners in the *Suzan Kigula*[29] argued, without prejudice and in the alternative to its challenge to the death penalty's constitutionality per se, that hanging, the prescribed execution method violated Articles 24 and 44(a) of the constitution.[30] Hanging, they contended, was unduly cruel, inhuman, and degrading. In support, they emphasized the non-derogability of Articles 24 and 44(a).[31] The Court, having held that the death penalty was constitutional per se, held that the death penalty by hanging could not be cruel and degrading within the meaning of the constitution.[32] However, in the landmark case of *Mbushuu,*[33] the Tanzanian Court of Appeal took a different stand. It described hanging as a "dirty, horrible, brutal, uncivilized and unspeakably barbaric" execution method that "defeats the very purpose it claims to be pursuing." It ultimately considered this when determining that capital punishment was an inherently cruel, inhuman, and degrading punishment. Similarly, in the case of *Campbell v. Wood*,[34] the U.S. Supreme Court held that hanging is "a savage and barbaric method of terminating human life", and is "cruel and unusual-in layman's terms and in the constitutional sense".[35]

[26] Ibid.
[27] Elias Wanyama, former death row prisoner (1988-1993 and 1982-2000), Luzira Upper Prison, Uganda.
[28] Civil Society Coalition on the Abolition of the Death Penalty in Uganda, "The Death Penalty in Uganda: The Perspective of those Affected," p.136.
[29] *Suzan Kigula*, supra.
[30] Petitioners' submissions, *supra*, p.58.
[31] Ibid, p.59.
[32] *Kigula and 416 Others v. the Attorney General*, supra , Judgement of Okello JA, pp.43-45; Byamugisha JA, pp. 31-32; Twinomujuni JA, p.51; Mpagi-Bahigeine JA and Kavuma JA,pp.28-29.
[33] *Mbushuu (alias Dominic Mnyaroje) and Anor v. Republic*, ICHRL 5 (30 Jan 1995).
[34] *Campbell v. Wood*, 18 F.3a 662 (1994), U.S. Supreme Court (Case No.25 Vol. 3).
[35] Ibid, p.48, para.5, p. 49, para. 3.

Furthermore, in the 2002 *Atkins v Virginia* Supreme court decision, the court found that executing the mentally disabled constitutes cruel and unusual punishment.[36] However, research shows that Uganda continues to execute mentally ill prisoners. Many condemned prisoners developmental problems as a result of severe overcrowding, the poor sanitation, permanent anguish and the stress they suffer. As a result, some become mentally insane. These are executed nonetheless.[37] From the above discussion, I can only conclude that the experience of being under the sentence of death, and the execution itself, are inhumane and may cause intense suffering. It is in this vein, that Lloyd Volgeman described those incarcerated on death row as "the living dead!"[38]

3. Risks to the Innocent.

Imposition of the death penalty also makes inevitable the execution of some prisoners who have been wrongly convicted. A poorly prepared defense, missing evidence, or even a decision of the investigating authorities to pin the guilt falsely on the accused can all result in wrongful conviction. Such convictions are difficult to reverse as appellate courts will often not consider new evidence, confining themselves only to points of law. Prisoners have been executed during the past decade despite strong doubts over their guilt. Others have been freed after a re-examination of their cases showed they had been wrongly convicted.[39] The Death Penalty Information Center (DPIC) also states that since 1973, 123 persons who had been sentenced to death have been exonerated, fourteen of them through DNA testing.[40] The DPIC defines "exoneration" as reversal of the conviction followed by acquittal or dismissal of charges, or an absolute pardon based on new evidence of innocence.[41]This evidence confirms that some prisoners are executed despite their innocence.

[36] *Atkins v Virginia*, 536 U.S 304 (2002).
[37] Civil Society Coalition on the Abolition of the Death Penalty in Uganda; "The Death Penalty in Uganda: The Perspective of those affected," p. 138.
[38] Greame Simpson, Lloyd Volgeman, "*The Death Penalty in South Africa*." Centre for the study of violence and reconciliation Available at http://www.csvr.org.za/wits/articles/artdpgl.htm.
[39] Amnesty International, "The Death Penalty in practice," in *When the State kills…The death penalty v. human rights*, (London: Amnesty International Publications, 1989), p.31.
[40] The Hon. William W. Wilkins, "The Legal, Political, and Social Implications of the Death Penalty," *University of Richmond Law Review* 41, no. 4.
[41] Ibid.

Edmary Mpagi, a former death row prisoner illustrates such miscarriage of justice in Ugandan capital cases. Mpagi was convicted of murder in 1982 and sentenced to death. However, his "victim" emerged alive and well in 2000. Mpagi received a presidential pardon as a result of this "new evidence."[42] He was however, jointly convicted with his brother, who died whilst in prison. "There is no way to compensate for that loss," he said.[43] Mpagi believes that he was only one of the many unlawfully convicted condemned prisoners in Luzira.

> Many people claimed that they were innocent throughout the whole process… I'm going to die but I'm innocent was something you often heard. But the public perception is that if you are convicted and go through the appeals process you are guilty, you are a killer, a criminal, an anti-person.[44]

It is in this regard that Richard Dieter, the executive director DPIC said that the death penalty had fallen out of favor largely because law makers and the public more and more feared that innocent people could be executed.[45] "A mistake cannot be reversed if an innocent person is put to death."[46]

V. A BRIEF ON JEREMY BENTHAM'S THEORY OF PUNISHMENT

Jeremy Bentham is one of the scholars who greatly opposed capital punishment.[47] He came up with his own theory of punishment. In his theory of punishment, he promoted **panopticon imprisonment** instead of capital punishment. Under panopticon imprisonment, the guards would be able to monitor every prisoner at any time without the prisoner's knowledge. He believed that any person who carried out acts that were detrimental to society should be punished with imprisonment. That if those who were

[42] Civil Society Coalition on the Abolition of the Death Penalty in Uganda, "The Death Penalty in Uganda: The Perspective of those Affected," p.133.
[43] Ibid.
[44] Since his release, Mr. Mpagi has founded an organization named Christian Prison Ministry Uganda to provide support and assistance (moral, spiritual and financial) to condemned prisoners. Contact details may be found at http://prisonministry.net/cpmug.
[45] Ian Simpson, "Maryland becomes the latest U.S state to abolish death penalty," *Reuters*, May. 2,2013, http//www.reuter.com.
[46] Ibid.
[47] Jeremy Bentham was a philosopher and author who strongly believed in a political system of utilitarianism: the idea that the best laws for society are those that benefit the largest number of people. He felt that every action any person took should be judged by how it aided or harmed the general public as a whole. He was an advocate for prisoner's rights, their education and health.

locked up felt that they were under constant surveillance, they would behave more obediently. He also believed since the prisoners would never be certain if armed guards were watching them at any given time, they would be forced to become model prisoners out of fear of retribution.

He denounced capital punishment for possessing the detrimental qualities of inefficiency, irremissibility, positive male ficence (i.e. tending to produce crimes), and for the enhancement of evils produced by ill-applied pardons.[48] He believed that through this, punishment undermined the purpose for which it was intended. According to him, the purpose of punishment is to produce future pleasure by inflicting pain. He believed that the pains resulting from capital punishment, and more particularly from the widespread threat of capital punishment, were judged to be considerable and excessive.[49]

According to Bentham, punishment has to provide a variable quantity of pain in response to the varying quantities of mischief caused by offences.[50] Just like his other English contemporaries (William Blackstone and William Eden)[51], Bentham believes that the immediate end of punishment is to deter future crime and on a wider scale, they concurred that punishment ought prominently to protect the liberties of law-abiding citizens. However, he also emphasized the importance of future benefit/ pleasure over pain. That pain and thus punishment, was always a social negative, unless it promised greater benefit in the future. It is for this reason that he abandoned his support for corporal infliction of pain and joined a contemporary pursuit of an increased use of penal incarceration.

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[48] See "On Death Punishment", Bowring, i. p.526-3.

[49] Tony Draper, *An Introduction to Jeremy Bentham's Theory of Punishment*, Journal of Bentham Studies vol. 5(2002): p. 16.

[50] Introduction to the Principles of Morals and Legislation, Oxford, 1996 (The Collected Works of Jeremy Bentham), henceforth IPML (CW), p. 175.

[51] Sir William Blackstone KC SL (10th July 1723 – 14 Feb 1780) was an English jurist, judge and Tory politician of the eighteenth century. He is most noted for writing the *Commentaries on the Laws of England.* The commentaries were designed to provide a complete overview of English law. On the other hand, William Eden, 1st Baron Auckland PC (Ire), FRS (3 April 1745 – 28 May 1814) was a British statesman and diplomat. He was Secretary of State for the North (Auckland). He was Member of Parliament for Woodstock from 1774 to 1784. In 1778, he carried an Act for the improvement of the treatment of prisoners, and accompanied the Earl of Carlisle as a commissioner to North America on an unsuccessful mission to bring an end to the American war of Independence. On his return in 1779, he published his widely read "*four letters to the Earl of Carlislie*."

Summarily, he says that the obvious advantage that imprisonment and particularly panopticon imprisonment offered was the greatly improved provision for the property of "exemplarity". If prisoners could be seen to be suffering, then the purpose of the punishment could be better fulfilled through imprisonment rather than death. He says that the ends of punishment should always remain the same: reformation, disablement, example, and constant. Overwhelming emphasis is placed on the assessment of the quantities of pain inflicted in pursuit of these ends.[52]

VI. WAY FORWARD.

Basing on the above discussion, I propose that it is time to outlaw capital punishment in Uganda. Public support for the abolition of capital punishment is still limited. The main reason for this is that Ugandans are uneducated about the death penalty and are not versed with what it means and how inhumane it is. People will usually think that there are only two alternatives, you are either killed or released back into society. They believe capital punishment is necessary to deter crime especially murder. However, there is no evidence to show that the death penalty has deterred crime since murder cases continue to exist in Uganda.

The campaign to stop executions is primarily an education and publicity campaign.[53] There is need for comprehensive media publicity and raising awareness to inform the key stakeholders and the public at large about the evils of the death penalty.

Every Ugandan should be sensitized about the fundamental right to life. This can be done with the help of different human rights organizations. A number of such organizations have committed themselves to the campaign for the abolition of the death penalty in Uganda. The Coalition on the Abolition of the Death Penalty in Uganda (CADP) for example, has seven members: FHRI, Amnesty International (AI), Friends of Hope for Condemned Prisoners (FCHP-U), the Human Rights Network Uganda (HURINET-U), the Public Defenders Association of Uganda (PDAU), the Uganda Joint Christian Council (UJCC), and the Uganda Association of Women Lawyers (FIDA-U).

[52] Tony, "An Introduction to Jeremy Bentham's Theory of Punishment", p. 16.
[53] Graeme and Lloyd, id, 54.

These organizations should aim at creating public awareness on issues to do with the negative effects of the death penalty in Uganda and most especially the human rights violations. This will help increase public support for the abolition of capital punishment in our country. In South Africa for example, the campaign to stop hangings was strengthened and advanced by different civil society groups. In particular, the "Save the Patriots Campaign" raised awareness of the issue amongst the youth and other black township residents. The Abolition Society was also formed. It spoke for everyone on death row without exception. The Abolition Society produced pamphlets, booklets and regular news briefs on the issue. It also organized regular public meetings and monthly pickets, as well as counseling for those on death row for "political offences." It also produced social support for both the inmates on death row and their families.[54]

Secondly, in order to effectively advocate for the abolition of the death penalty, there is need to appreciate the nature of the Ugandan legal framework that has continued to abet the death penalty.[55] The constitutional position, especially Article 22(1) of the Constitution of Uganda does not "constitutionalize the death penalty" but rather "recognizes its existence" and authorizes its imposition by legislation.[56] There are also different statutes that create offences punishable by the death penalty, most especially the Penal Code Act, the Uganda Peoples' Defense Forces Act among others. The legislature should aim at reviewing such positions of the law.

The Law Revision (Penalties in Criminal Matters) Miscellaneous Amendments Bill for example, has been tabled in Parliament. This bill seeks to abolish mandatory death penalty against capital offenders. If it is passed, a number of laws which provide for mandatory death sentence will be repealed. These include, the UPDF Act, Penal Code Act, Anti-Terrorism act and the Trial on Indictment Act. This has been a big step in our move against the death penalty. However, we should not stop at that. Uganda should also focus on a constitutional review in regard to Article 22, so that capital punishment is completely eliminated from our legal framework.

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[54] Graeme Simpson and Lloyd Vogelman, "*The Death Penalty in South Africa,"* (Center for the study of Violence and Reconciliation). Available at http://www.csvr.org.za/wits/articles/artdpgl.htm.
[55] Proffessor Emmanuel Kasimbazi, *Towards Abolition of the Death Penalty in Uganda.*
[56] *Ibid.*

VII. CONCLUSION.

With the growing acceptance of human rights values, it is necessary to put a stop to the death penalty. Uganda should remain committed to the respect and promotion of the rights of its citizens. Each and every Ugandan should also appreciate the value of life and realize that there is no place for executions. The success of this anti-death penalty campaign depends on collectiveness of individuals in different fields. Lawyers, academia, civil society organizations, the media, should all come together as one and work towards achieving this common goal. However, the lawyers as officers of court should take the lead. They should concentrate on remedying the injustices in society rather than becoming agents of violence.

ENVIRONMENTAL IMPACT ASSESSMENT AS A TOOL FOR ENFORCING ENVIRONMENTAL LAW IN THE OIL AND GAS INDUSTRY IN UGANDA

Kemigisha Lucy*

ABSTRACT

Environmental concern has become one of the major global issues that affect all nations (Uganda inclusive) individually and/or collectively. Cognizant of this, the Ugandan government has set environmental policies, laws and regulations and administrative frameworks requiring environmental assessment prior to the launching of any investment and development activity in the country. This paper focuses on the background and development of oil and gas exploration in Uganda, the legal and institutional framework that is concerned and governs the Oil and Gas Industry in Uganda. It will go ahead to review Environmental Impact Assessment and the role it plays as a tool for enforcing environmental law in the oil and Gas industry in Uganda. Lastly, it converses the constraints facing the implementation of Environmental impact assessment and recommendations to countermand or mitigate these challenges.

I. INTRODUCTION

Excitement swept across Uganda when oil and gas was discovered in the Albertine graben in viable amounts. Thus the current government of Uganda has given special attention to this mineral that is commonly known as the "Black Gold". For some stakeholders, Uganda is on the verge of becoming the OPEC powerhouse but to others it's a curse of some sort.

Exploration is interpreted to mean the undertaking of activities for the purpose of discovering petroleum and includes geological, geophysical, geochemical, and geotechnical surveys including drilling of wells for the purpose of discovery.[1] While production means "all activities including primary recovery using naturally occurring pressure, secondary or tertiary recovery techniques required for the recovery of petroleum from the reservoir within the earth, the separation and initial treatment of petroleum before shipment in bulky vessels, craft or vehicle or as a commodity.[2]

* Fourth year law student, School of law, Makerere University Kampala.

[1] The petroleum (exploration, development, production and value addition) act 2010, section 2.

[2] *Ibid*.

II. ENVIRONMENTAL IMPACT ASSESSMENT (EIA)

Section 1 of The National Environment Act[3] defines Environmental Impact Assessment (EIA) as a systematic examination conducted to determine whether or not the proposed project will have any adverse impact on the environment. It's a process for examining, analyzing and assessing proposed activities in order to maximize the potential for environmentally sound and sustainable development.

According to Sadler (1996)[4] and Dipper *et al* (1998)[5], EIA is primarily used to assist in identification, prediction and mitigation of environmental impacts caused by new developments. It is intended to ensure that environmental effects of developmental projects likely to be significant are fully investigated and understood and taken into account before decisions are made on whether the projects should proceed or not. It also helps in identifying the mitigation measures that can be implemented to eliminate, reduce or offset the negative environmental effects.

The objectives of the EIA process are to ensure that; appropriate government authorities have fully identified and considered the environmental effects of proposed activities, as well as alternatives that avoid or mitigate the environmental effects; and affected citizens have an opportunity to understand the proposed project or policy and to express their views to decision- makers in advance.

The Environmental Management Policy recognizes that the assessment and evaluation of development activities and land use practices that have impacts the environment is essential. In this respect, the policy aims at providing a system of EIA and environmental monitoring so that adverse environmental impacts can be foreseen and, eliminated or mitigated.

[3] S. 1(r) Cap 153

[4] Sadler, B. (1996) Environmental Assessment in a Changing World: Evaluation Practice to Improve Performance: A Final Report of International Study of the Effectiveness of EIA. Canadian Environmental Assessment Agency and International Association of Impact Assessment, Ottawa.

[5] Dipper, C., C. Jones and C. Wood (1998) "monitoring and post auditing in environment impact assessment: a review. Journal of environmental planning and management 41(6): 731-748.

III. LEGAL FRAMEWORK GOVERNING THE OIL AND GAS INDUSTRY

A. The Uganda Constitution of 1995

The constitution is the supreme law of the land and any written law or custom inconsistent with it is null and void to the extent of the inconsistency. It has binding force on all authorities and persons.[6] Article 244 provides that parliament shall enact the laws regulating the exploitation and development of minerals and such exploitation shall take into account the interests of the individual land owners, local governments and the government. It further states that all minerals are held on behalf of the people of Uganda. This is also known as the 'public trust principle.'[7]

The Constitution further provides that the utilization of the natural resources of Uganda is to be in such a way as to meet the development and environment needs of present and future generations of Ugandans. In particular, the state is required to take all possible measures to prevent or minimize damage and destruction to land, air, and water resources due to pollution or other causes. Article 39 of the Constitution entitles every Ugandan to a clean and healthy environment. Under Article 17(1) (j) it is the duty of every citizen of Uganda to create and protect a clean and healthy environment.

The Constitution also imposes a duty on the state to protect important natural resources; including land, water, minerals, oil, fauna and flora on behalf of the people of Uganda.[8] Parliament has ably done this through the enactment of several laws, discussed below.

B. The National Oil and Gas Policy[9]

This was approved by the Cabinet of Uganda on the 30th of January, 2008 to supplement the Energy Policy of 2002.[10] It is intended to provide guidelines to the development of Uganda's emerging oil and gas industry following the discovery of commercial prospect.

[6] Art. 2 of the 1995 constitution of the republic of Uganda, as amended.
[7] National objective XXVII.
[8] See Article 245 of the 1995 Constitution as amended.
[9] National oil and gas policy, 2008(ministry of Energy and Mineral development).
[10] Part 2.1 of the policy, at pages 4-5.

The major goal of the policy is to use the country's oil and gas resources to eradicate poverty, and create a lasting value to society.[11]

The objectives of this policy are: to ensure efficiency in licensing areas with the potential for oil and gas production in the country, establish and efficiently manage the Country's oil and gas resource potential, efficiently produce and promote valuable utilization of the Country's oil and gas resources, promote suitable transport and storage solutions which give good value to the Country's oil and gas resources, to ensure collection of the right revenues and use them for creating lasting value for the entire nation, and to ensure optimum national participation in oil and gas activities. The policy also aims to support the development of natural skills and expertise, and to ensure that the oil and gas activities are undertaken in a manner that conserves environment and biodiversity.[12]

C. Petroleum (Exploration, Development and Production) Act[13]

The purpose of this act is to operationalise the national oil and gas policy by establishing an effective legal framework an institutional framework to ensure that exploration, development and production of petroleum resources is carried out in a sustainable manner that guarantees optimum benefits.[14] Section 76[15] provides that before a petroleum production license is issued, the licensee is required to carry out environmental impact assessment

D. The Petroleum (Exploration and Production) (Conduct of Exploration Operations) Regulations, 1993

These regulations were enacted as a statutory instrument in line with the Petroleum Act of 1985. The regulations, among other things, provide specific guidelines regarding environmental management in the oil and gas sector with respect to prevention and control of pollution, health and safety during oil and gas activities

[11] See , executive summary of the National Oil and Gas Policy , at page viii.
[12] Executive summary to the national oil and gas policy at pg ix.
[13] Act No. 3 of 2013.
[14] Section 1.
[15] *Ibid*.

E. The National Environment Act[16]

The National Environment Act is a framework law on environment and establishes the National Environment Management Authority (NEMA) as the overall body, charged with the management of environmental issues and provides for sustainable management of the environment. The Authority in consultation with the lead agencies is empowered to issue guidelines and prescribe measures and standards for the management and conservation of natural resources and the environment.

The Act provides for environmental monitoring and impact assessment; environmental audit; environmental restoration orders and improvement notices; environmental easements; environmental performance bonds; licensing and standard setting; use of economic and social incentives; civil and penal sanctions, including community service, among others. It charged with supervising, coordinating and monitoring all aspects of the environment, including the review of environmental impact assessments carried out for various projects. The Act empowers NEMA, in consultation with lead agencies, to issue guidelines and prescribe measures and standards for the management and conservation of natural resources and the Environment. To this effect, NEMA prepared Guidelines for EIA (1997) which define the roles of the different stakeholders in the EIA process. Section 19 of the Act imposes an obligation on all developers to carry out EIA for their projects that are likely to have adverse impacts on the environment.

The Act also provides for the establishment of a Technical Committee on EIA and this has been in place since 1996. The Committee provides advisory services to NEMA on critical aspects of EIA implementation.

Section 19 of the Act provides for EIA as a legal requirement. It obliges a developer of a project described in the third schedule of the Act to submit a project brief to the lead agency, in the prescribed form and give the prescribed information. This is to be carried out for projects that may have an impact on the environment, are likely to have a significant impact on the environment or will have a significant impact on the environment. Such projects include exploration for the production of petroleum in any

[16] Cap. 153, 1995.

form and oil refineries and petrochemical works.[17] The Environmental Impact Assessment Regulations of 1998 provide for several considerations in conducting EIAs. These include ecological and social considerations.[18]

EIA is required to be undertaken by the developer where the lead agency, in consultation with the executive director, is of the view that the project may have an impact on the environment; is likely to have a significant impact on the environment; or will have a significant impact on the environment.[19] The EIA required shall be appropriate to the scale and possible effects of the project, and accordingly where the project may have an impact on the environment, and environmental impact review shall be conducted; where the project is likely to have an impact on the environment, an environmental impact evaluation shall be conducted; or where the project will have a significant impact on the environment, an environmental impact study shall be conducted.[20]

Where the lead agency, in consultation with the authority, is satisfied that an environmental evaluation is conducted as stated above does not disclose possible significant impact on the environment, it may approve the environmental aspects of the project. However, where the lead agency, in consultation with the authority is satisfied, after considering the environmental impact review or the environmental impact evaluation, that the project will lead to significant impact on the environment, it will require that an environmental impact study be conducted.[21]

Where a project has been determined under the above section as requiring an environmental impact study, the developer is required, after completing the study to make an impact assessment study in the prescribed form and manner. This study is to be made according to guidelines established by the authority. The EIS is made to the authority, to the lead agency or any other person requesting it.[22] The lead agency which receives an EIS under section 20 is, in consultation with the authority, required to study it and if it considers it to be complete shall deal with it in the manner prescribed.

[17] National Environment Act Cap 153, Laws of Uganda of 2000, Schedule 3.
[18] Environmental Impact Regulations 1998, First Schedule.
[19] NEA , section 19(3).
[20] Ibid, section 19(5.)
[21] Ibid, section 19(6) and (7).
[22] NEA, section 20(3).

F. The Uganda Wildlife Act[23]

Section 15 requires a developer desiring to undertake a project that may have a significant impact on any wildlife species or community to carry out an EIA in accordance with the National Environment Act. This Act also establishes the Uganda wildlife authority that is charged to control and monitor industrial and mining developments in wildlife protected areas.[24] The same Act obliges the Uganda Wildlife Authority in consultation with NEMA to carry out audits and monitor such projects that may have an impact on wildlife.[25]

G. The National (Environmental Impact Assessment) Regulations[26]

These Regulations govern the environmental impact assessment (EIA) process, including project briefs and environmental impact studies. The Regulations provide for EIA review processes, including invitation of general public comments and public hearings, and the decision of the Executive Director of the National Environment Management Authority in respect of the granting approval, rejection of a project or cancellation of an EIA certificate.

H. The National Environment (Conduct and Certification of Environment **Practitioners) Regulations 2003**

The Regulations establish an independent Committee of Environmental Practitioners whose roles include, among others, to regulate the certification, registration, practice and conduct of all environmental impact assessors and environmental auditors. The Committee also has powers to take disciplinary action as it finds necessary for ensuring the maintenance of high professional standards, ethics and integrity of environmental Practitioners in the conduct of EIA and Environmental Audits.

I. Other EIA Legal Requirements

The sectoral laws have specific EIA requirements to supplement what is already provided in the National Environment Act. For example, the National Forestry and Tree Planting Act 2003 under section 38 require an EIA for any person intending to undertake a project

[23] Cap 200 laws of Uganda.
[24] S.5(g).
[25] *Ibid.*
[26] S.I No.13/1998.

or activity, which may, or is likely to have, a significant impact on a forest.[27] The Mining Act 2003 also requires every holder of an exploration license or a mining lease to carry out an EIA of his or her proposed operations in accordance with the provisions of the National Environment Act.[28] The Investment Code under section 19, on the other hand, requires every investment licensee to take the necessary steps to ensure that the operation of its business enterprise does not cause any injury to ecology or the environment.[29] The above provisions imply that EIAs must be conducted before oil exploration and production in any of the above sectors can be pursued.

Basically, an EIA performed by an oil company must clearly identify any/ all possible environmental and social impacts that could arise from a given project, and document the appropriate environmental management and control measures that must be implemented to mitigate these measures. These measures are collectively known as project environmental management and monitoring plans (EMPs). However, the plans have been subject to general criticism from civil society organizations such as ACODE, which believes that the plans are not comprehensive and do not address all the environmental issues. They argue that the reports do not cover strategic EIA and yet a number of oil drilling sites have been identified in the country, but there is no strategic EIA to form a basis for national planning and decision-making concerning the petroleum sector. For example, commenting on the Tullow EIA report, ACODE observed that the EIA report neither demonstrates the full impact nor how the sanctity and health of biodiversity will be preserved. It thus recommends that Tullow Oil plc. develop the necessary mitigation measures and monitoring for the identified impacts.[30]

IV. PROCEDURE FOLLOWED IN EIA

The Guidelines for environmental impact assessment lay down the basic components of the EIA process in Uganda which consists of 3 interconnected phases: screening; environmental impact study; and decision making. These can be applied to the oil and

[27] National Forestry And Tree Planting Act 8, 2003, Section 38.
[28] Mining Act 9, 2003, Section 108.
[29] National Environment Management Authority, Environmental Impact Assessment Guidelines for Energy Sector, 2004.
[30] See Comments On The Environmental Impact Assessment For The Proposed Early Production System (EPS-EIA) – Kaiso-Tonya Area, Block 2, Lake Albert, Uganda, Www.Acode-U.Org.

gas exploration project affecting the environment during the conceptual and design stages or after completion of project formulation and design but before actual implementation.

The objective of the first stage (screening) is to determine whether the proposed project has or doesn't have significant impacts. If it is determined not to have significant impacts to the environment, it is categorically excluded from further EIA and an appropriate decision shall be made to approve and implement the project, with appropriate recommendations to the developer. If however it is found to have a potential cause to significant environmental impacts, further screening is conducted to determine if mitigation measures can readily be identified through further environment impact review (EIR) or a full environmental impact study(EIS). If in conducting the EIR adequate mitigation measures are incorporated foe the identified impacts, the environmental aspects of the project can be approved.

A mitigation measure is that which a developer may carry out to reduce or minimize the impact to the environment that the proposed project may cause or may have caused. The purpose of this is to look for better alternative ways of implementing the proposed project or associated activities so that the negative impacts are substantially eliminated or minimized while the benefits are enhanced. A mitigation plan should include; identification and summary of all anticipated adverse environmental impacts; description of each mitigation measures, including the type of impact to which it relates and the conditions under which it is required, together with design, equipment descriptions and operating procedures; description of the elements of the monitoring programme; monitoring and reporting procedures that are designed to ensure early detection of conditions that necessitate corrective actions and provide information on the progress and results of mitigation and institutional strengthening measures.

If the adequate mitigation measures are not identified, the project shall be subject to further detailed environmental impact study. Therefore screening assists in determining whether the proposed project does not require EIA; has significant environmental impacts for which mitigation measures can readily be identified either directly or through environment impact review; or has significant environmental impacts whose mitigation

measures can not readily be identified hence requiring a detailed environmental impact study.

Environmental impact study, involves as an initial step, the determination of the scope of work to be undertaken in assessing the likely environmental impacts of the proposed project. Scoping involves identification of potentially significant environmental impacts and elimination of insignificant impacts and is applied to all activities which require a full environment impact study.

This exercise should involve consultations with potentially affected communities, relevant government agencies, representatives of other interested parties like NGOs, the private sector, independent experts and all other stakeholders including the general public. This usually involves meeting them to obtain comments on what should be included in the study and what alternatives should be considered in order that an adequate environmental impact study shall be conducted.

During the exercise of scoping, the developer, in consultation with the authority, lead agency and other appropriate and interested parties is required to determine questions about the proposed project which should be answered through the EIA study; identify the potentially significant impacts of the projects which shall be addressed in the study, identify the full range of stakeholders who may be affected or are interested in the proposed project and other technical aspects related to the proposed action.

Based on the information derived from the scoping, an Environmental Impact Statement is prepared. The developer is required to submit 10 copies of the EIS to the authority, which in turn forwards copies to the lead agency and to other stakeholders and interested parties for comments and review before the approval is considered. Any comment received is to be taken into account in making a decision on the EIS.

The last phase involves decision making. This is on the basis of a finding that either the project is exempt, appropriate mitigation measures have been incorporated for identified potential environmental al impacts, or the preparation of the EIS. The decision may approve or disapprove the environmental aspects of the proposed project.

The basic steps in this phase of EIS include the review of the environmental findings, in which a case the authority in consultation with the appropriate lead agency review the contents of the study, paying particular attention to the identified environmental impacts and mitigation measures related thereto as well as the level of consultation and involvement of the affected stakeholders in the EIS process. In this review, the level of address of the terms of reference set out for the study is to be considered. The lead agency, stakeholder and public comments shall be taken into account in making the decision by the authority on whether or not to approve the EIS.

The second step involves the approval of the EIS by the authority. Based on the contents of the EIS and taking into account the lead agency review findings and the stakeholder and public comments on EIS, the authority is required to approve or disapprove the environmental aspects of the project or part thereof, and issue a certificate of approval of the EIA. The authority may issue also such approval subject to such conditions as it deems fit.

The third step involves a decision on the project and record of decision. After approval or disapproval of the environmental aspects of the EIS by the authority, the lead agency decision makers and licensing authorities, will then take the appropriate action to approve or deny the project based on all of its merits and a record of the decision shall be prepared.

After reaching at a decision on the proposed action, if it is approved, the developer will be licensed or permitted to implement the project in accordance with the mitigation measures stipulated in the EIS and any other terms and conditions attached to the approval. If it is denied, the developer may if such denial is based on the environmental considerations that can further be improved, be urged to revise the proposed action to eliminate adverse effects.

A. Public Participation

The public participation and hearing in the EIA process is regulated by the Environmental impact assessment public hearings guidelines, 1999. The purpose of these guidelines is to guide the conduct of the hearings in the environmental impact assessment

process especially in seeking questions and answers respecting a project under review; provide for public input in the EIA review process and receive submissions and comments from any interested party; find out the validity of the predictions made in EIS; and seek information to assist the Executive Director to arrive at a fair and just decision and promote good governance in the EIA process.[31] All hearings are to be held in public and be accessible to the public with no exclusion.[32] And shall be held a location depending on the location, nature of the project and the cost involved in holding the public hearing but it should most probably be held at a venue convenient and accessible to those persons who are most likely to be affected by the project.[33]

The developer is required to provide at the hearing a person or group of persons who are knowledgeable of the project and who are available to answer questions which are directed to the developer.[34] Public hearings are premised on the fact that the people surrounding the proposed project are the ones likely to benefit from or suffer from the adverse environmental impacts of a proposed project. It is therefore essential to include them in the EIA process to enable them weigh the benefits and burdens of the project and decide whether it is tenable to them.

V. THE IMPORTANCE OF EIA

EIA is a mandatory exercise that should be carried out by the developer. Section 19(3) provides that EIA shall be undertaken by a developer if it may, will and is likely to have a significant impact on the environment. This was confirmed in the case of *ACODE and ors v A.G and NEMA*[35] where Hon. Mr. Justice Rubby Aweri Opio was of the opinion that in the instant case the permit given to Kakira sugar works ltd to clear part of Butamira forest reserve was to effect change in land use whereby Kakira Sugar Works was to use the forest Reserve for planting sugar canes. Such activity would definitely be out of character with surroundings since it would entail changes in the land use from forestry to agriculture. Moreover it would involve clearance of a large forest for the purpose of large-scale agriculture. Butamira is a natural conservation area. The law is

[31] Para 3.
[32] Para 4.
[33] Para 6.
[34] Para 14.
[35] High Court Miscellaneous Cause No. 0100 of 2004.

clear that all the above activities would not be carried out without Environmental Impact Assessment.

It helps to enforce environmental law in such a way that incase the sector is to impact the environment negatively; mitigation measures have to be put in place by the developer for the activity to be approved. The first phase of EIA is screening whose main objective is to determine whether the proposed project has or doesn't have significant impacts. If it is determined not to have significant impacts to the environment, further Environmental Impact Assessment is excluded and an appropriate decision is made to approve and implement the project, with appropriate recommendations to the developer. If however it is found to have a potential cause to significant environmental impacts, further screening is conducted to determine if mitigation measures can readily be identified through further environment impact review (EIR) or a full environmental impact study(EIS). If in conducting the EIR adequate mitigation measures are incorporated foe the identified impacts, the environmental aspects of the project can be approved. These measures may include treatment of waste before disposal, use of sound insulators when using explosives to burst hard rocks.

For example in September 2009, Heritage oil carried out an EIA in Buliisa and the potential impacts included noise, surface and ground water pollution. The recommended mitigation measures included environmental management and setting up a monitoring plan.[36]

The EIA study identifies both potential positive and negative impacts of the sector in advance. From those negative impacts upon the natural and the socio economic environment, possible paths/mitigation measures are identified in advance. This enabled avoidance and minimization of impacts and make the exploration and production of oil environmentally friendly and acceptable to the nearby community and to foster sustainable development.

Furthermore the fact that the public that is to be affected by the oil and gas exploration and production must participate in this exercise enables the clear and detailed assessment

[36] www.oilinuganda.org.

of the impacts. It helps both agencies and the developer to counteract these impacts before they actually occur. This is done through the powers of the agency in this case NEMA of declining to approve the project in case it impacts negatively on the environment or mitigation measures can be put in place by the developer to reduce on the risks. It therefore helps avoid costs and delays in the implementation due to unanticipated environment problems and guarantees a solid assessment of environmental and social issues and a well-structured public and government debate on the environmental issues.

It allows project designers and implementing agencies to address environmental issues in timely and cost effect manner. Since becoming a requirement by law in 1996, EIA has been able to make a contribution to decision making and has in many instances led to avoidance of costly impacts to the environment and natural resources. EIA has therefore been able to assume its role as a planning and decision making tool and indeed EIA has been able to contribute to important decisions that have been acclaimed as positive decisions towards protection and conservation of environmental resources.

It helps reduce the need for project conditionality because when environmental impact assessment is done, appropriate steps are done. It's also a mechanism to take the results of assessment and debate into account in decision making. The sector can therefore benefit greatly from applying EIA because the legitimacy of their usually considerable investments can be enhanced.

VI. CHALLENGES TO THE IMPLEMENTATION OF EIA AND RECOMMENDATIONS

The institutional problems have undermined the effective fulfillment of the legal provisions and the level of participation of various stakeholders as provided for in the legislation. For instance, while the legislation provides for full public participation, in reality it has been that public intervention and participation in matters of EIA has largely been limited to a few keen NGOs and interested members of the public. This has also meant that in some instances the voice of these more active interest groups has been interpreted to mean the voice of the public even where the actual affected members of the public have a completely different opinion from that of the more forthcoming interest

groups.[37] The methods and mode of soliciting views and ensuring that such communities actually do participate in EIA discussions still requires tremendous improvement. It of course begs the question whether it is the duty of the EIA process to actually get down to mobilization of communities rather than merely avail them the opportunity to participate. This should be addressed by improving awareness among the public and developers to increase on the participation by the public and also encourage commitment of implementation when the project has started

One of the most fundamental provisions of the EIA legislation is the need to involve lead agencies at various stages of the EIA process, including EIA review. To-date this provision has continued to be a pillar in implementation of EIA as lead agency feedback has continued to provide useful input to the EIA decision making process. However, this expectation has in some instances been undermined by lack of adequate staffing even where the lead agency has commitment and willingness to participate. The coming into place of the EIA requirement did not find all the institutions ready to shoulder the new demands brought about by the legislation on EIA and it still remains a process to bring all the institutions to a level where they can adequately handle all EIA matters effectively. The need to avail manpower and staff time for EIA activities against other competing demands is critical.

With the increase in the number of EIA practitioners, there has developed a problem to the effect that the communication between NEMA and developers has been severely curtailed, implying that developers are not able to access free advisory services on specific EIA matters regarding their projects. This has also meant that developers sometimes have to pay fees to carry out EIA for projects whose environmental concerns could readily be addressed by the developer without need for hiring consultancy services. This also means that one of the main pillars of the EIA system which calls for EIA to be done by the developers has to some extent been undermined as it is now assumed that all EIAs have to be carried out by Consultants and at a fee.

[37] Justin Ecaat, A Review Of The Application Of Environmental Impact Assessment (EIA) In Uganda; A Report Prepared For The United Nations Economic Commission For Africa, National Environment Management Authority (NEMA) October 2004.

Because of the need to determine whether the actual implementation of projects subjected to EIA fulfills the predictions and recommendations made in the EIAs, there remains a challenge to ensure that developers use the EIA reports as a basis for environmentally sound implementation of their projects. During inspections carried out for enforcement, it is not uncommon to find that some developers or managers of projects for which EIA was done do not even know where the EIA reports are. This situation is further complicated by the fact that in certain instances, the developers take advantage of weak enforcement capacity by different levels of enforcement to omit some of the critical recommendations of EIA.[38]

There is concern about the quality of EIA reports produced and submitted for approval. This is mainly arising from the fact that whereas NEMA's primary area of focus was initially in encouraging as many individuals as possible to participate in carrying out EIAs, the increased number has also brought with it inexperienced practitioners whose quality of work leaves a lot to be desired. This problem should be addressed by increasing the expert manpower in order to improve the quality of EIA and to improve in the methods of collecting information, data analysis, document review, display methods, media invitation of comments and views, and identification of critical members of public to be consulted. There should be development of specialized and structured EIA capacity training programs of practitioners based on the practical case studied since most of their work is practical. This can also enhance competence hence improving on the quality of the assessments made.

Whereas the EIA process emphasizes that EIA should be done before actual project implementation starts, cases of EIA being done during initial phases of project implementation continue to be registered. As a matter of fact, some EIAs done at this stage seek to use EIA to justify the mistakes that have already been made. Under these circumstances, EIA does not have the opportunity to address some of the impacts that would have been avoided if it had been done before commencement of project implementation.

[38] *Supra.*

Another major challenge in the use and application of EIA arises from the common misunderstanding of EIA as being a "supernatural tool" which settles all problems even when there are other options for decision making. EIA has not been understood as being simply one among many environmental management tools whose contribution is only complimentary to other tools such as laws, policies, standards and regulations.

VII. CONCLUSION

EIA is a very important tool in enforcing environmental law in the oil and gas sector. This is because it assesses the significant positive and negative impacts of the sector. It is this assessment that helps in the decision making of whether the oil and gas exploration should continue or whether it should be discontinued. However this exercise is always carried out too late to effectively guide the exploration and incase it is done the quality of the assessment is demanding. This can be because of the low quality of practitioners because most of them have been deemed to be 'quack'. However this has been countermanded by the release of the list of certified and registered environmental practitioners in Uganda[39] by NEMA.

[39] NEMA, List of Certified and Registered Environmental Practitioners in Uganda released under The National Environment (Conduct and Certification of Environmental Practitioners) Regulations, 2003.

IS THE UNIVERSAL PERIODIC REVIEW MUCH ADO ABOUT NOTHING? PERSPECTIVES FROM ERITREA

Darsheenee Ramnauth, Lucianna Thuo & Kudzani Ndlovu*

ABSTRACT

The Universal Periodic Review (UPR) process is a voluntary peer review mechanism for assessing compliance with human rights obligations, and supplements existing monitoring mechanisms under the United Nations Human Rights Council (UNHRC). Unlike other monitoring mechanisms which focus on 'naming and shaming' states into compliance, the UPR seeks to create a forum for constructive dialogue amongst states. The spirit of cooperation that underlies the process coupled with the element of peer review make it more appealing to states than other treaty mechanisms. This is evidenced by the high level of participation by states so far. Eritrea has taken part in two cycles of the UPR. In the first cycle it received 137 recommendations, about half of which were rejected while in 2014 it received 200 recommendations and only accepted 92. Eritrea has voluntarily taken part in the UPR process but the information presented to the Working Group is not easily verifiable. This is because there is no independent monitoring in part because Eritrea has also continuously declined to cooperate with special procedures, banned independent media and no independent NGOs operate within the country. This paper assesses Eritrea's participation in the UPR process and the latter's impact on Eritrea's human rights record and concludes that whereas the high participation of states in the process is laudable, it has not necessarily contributed to greater protection of human rights for repressive regimes like Eritrea. As long as the process, just like much of international law, continues to depend on states for implementation of recommendations, it will remain impotent against states that blatantly flout human rights.

I. INTRODUCTION

The Universal Periodic Review (UPR) was established in 2005 through UN General Assembly Resolution 60/251 on 16 March 2006.[1] It is a voluntary peer review mechanism where states assess each other's human rights records. The mandate of the UPR is defined in the following terms:[2]

* MPhil candidates in Human Rights and democratization in Africa, University of Pretoria.

[1] Universal Periodic Review http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx (accessed 9 July 2014).

[2] UN GA Res 60/251, paragraph 5(e).

> ...undertake a universal periodic review, based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies.

The creation of the UPR arose as a response to criticism levied at the United Nations Human Rights Commission's selective 'naming and shaming' approach to human rights violations; this was viewed as the main reason for the dysfunctional status of the Commission wherein some countries were constantly criticized, whereas others remained immune from scrutiny.[3] Therefore, unlike the practice under the Commission, the UPR mechanism is seen as a non-confrontational approach to human rights implementation whereby participation by states is predominantly cooperative.

The UPR mechanism is divided into three stages. The first stage of the process is the review which is overseen by the UPR Working Group. It is followed up by the implementation of the recommendations adopted by the Working Group.[4] The third stage is the subsequent review. At this stage, the commitments made by the state under review form the basis for a subsequent review which assesses progress made since the previous review.[5] Acceptance of recommendations by a state is therefore seen as acquiescence to being assessed in implementing the recommendations.

The UPR is intended to complement other human rights mechanisms established under the Human Rights Council. However, unlike other mechanisms where assessment is conducted by a body of experts, assessment under the UPR is conducted by other states

[3] M Lempinen, 'The United Nations Commission on Human Rights and the different treatment of governments: an inseparable part of promoting and encouraging respect for human rights?' (2005) cited in Redondo, ED 'The Universal Periodic Review - Is there life beyond naming and shaming in human rights implementation?' (2012) 4 *New Zealand Law Review* 673 677.
[4] Redondo, n 3 above, 679.
[5] Redondo(n 3 above) 678.

rather than independent experts. Therefore, its effectiveness in the protection and promotion of human rights is dependent on the goodwill of the countries under review.[6]

II. ERITREA

Eritrea is a small country located in the horn of Africa between Sudan to the West and Ethiopia to the East. It has an estimated population of 6.64 million citizens. [7] It declared *de jure* independence in 1993 but has since been engaged in border wars with Ethiopia from 1998 to 2000 and with Djibouti in 2008.

Eritrea has taken part in two cycles of the UPR, with the first review taking place in 2009. One hundred and thirty-seven recommendations were put forward and adopted at the 13th session of the Human Rights Council in 2010. According to the Working Group, Eritrea only accepted 'close to 50 per cent' of these recommendations.[8] The 2nd review took place during the 18th Session of the Working Group on 3 February 2014 in Geneva, amid concerns on the failure by the state to implement the bulk of recommendations from the first cycle. At the end of the 2nd cycle, Eritrea received a record 200 recommendations.

Eritrea has continuously asserted that the UPR mechanism is its preferred mode of engagement with the international community, having made it clear that it views the appointment of special procedures antagonistic and contrary to the constructive engagement envisaged by the UPR mechanism. The government argues that:[9]

> … Eritrea has wrongly been targeted with politically motivated Resolutions that denigrate the ongoing efforts of the Government on promoting and protecting Human rights and Fundamental Freedoms. Eritrea believes that country specific resolutions do not serve the advancement of the noble cause of human rights. It is also a double standard and a deviation from the UPR Process that creates a forum for constructive engagement…for every UN Member State.

[6] De Frouville, O 'Building a universal system for the protection of human rights: The way forward' MC Bassiouni & W Schabas (eds.) *New Challenges for the UN Human Rights Machinery* (2011) 241 253.
[7] http://worldpopulationreview.com/countries/eritrea-population/ (accessed 19 May 2014).
[8] Report of the Working Group presented at the 13th Session of the Human Rights Council 8 March 2010, A/HRC/13/2/Add.1, para 1.
[9] Eritrea Country Report presented at the 18th session of the Working Group 2014, para 86.

However, the Report of the Special Rapporteur on the situation of human rights in Eritrea, Ms. Sheila B. Keetharuth, submitted to the Human Rights Council in June 2014 indicates that the human rights situation in Eritrea continues to deteriorate despite Eritrea's participation in two cycles of the UPR.[10] Widespread reports of arbitrary arrests and detention, torture and inhumane treatment, suppression of media freedom and freedom of movement are rife. .[11] Religious persecution continues unabated and military conscription, often disguised as national service, forms part of the government's national policy.[12]

This paper gives a comparative perspective of Eritrea's UPR performance in 2009 and 2014 through a thematic analysis of the national service, detention conditions and children's rights in Eritrea. It questions whether the UPR, a political process, is an appropriate mechanism for dealing with legal norms derived from human rights obligations.[13]

III. NATIONAL SERVICE

The government introduced the national service in 1995 as a way of equipping Eritreans who did not participate in the war of liberation with qualities that led to independence, namely 'resilience, resoluteness, endurance in the face of multi-layered difficulties and purpose'.[14] Those who did not take part in the war of liberation with Ethiopia therefore "acquire" their citizenship by taking part in the national service.[15] Many Eritreans are opposed to the national service because even though it is intended to promote the redevelopment of the country after civil war, the manner in which it is enforced has been

[10] Report of the UN Special Rapporteur submitted at the 26th Session of the Human Rights Council on 13 May 2014 A/HRC/26/45, para 15.
[11] Human Rights Council Resolution (A/HRC/26/L.6) para 2(a)
[12] n 11 above, para 2(b).
[13] n 6 above, 254.
[14] A. Ghebreab, 'The National Service Myth in Eritrea', 1.
[15] Hepner, TR, 'Soldiers, Martyrs, Traitors, and Exiles: Political Conflict in Eritrea and the Diaspora' 2009 cited in D. Bozzini, 'National Service and State Structures in Eritrea' available on http://www.ejpd.admin.ch/content/dam/data/migration/laenderinformationen/herkunftslaenderinformationen/afrika/eri/ERI-agreed-minutes-bozzini-e.pdf (accessed 17 February 2014), 5.

contrary to its objectives.[16] In the words of an Eritrean who escaped the service after 3 years: [17]

> The core element of the [People's Front for Democracy and Justice] PFDJ regime's project for rebuilding the Eritrean state was the idea of voluntary, and where required forced, mass participation in the reconstruction process. This way, it was thought, the Eritrean society can be united and transformed; and in the process the Eritrean national identity can be consolidated. The voluntary or otherwise mass participation in the reconstruction of the country was also designed to rebuild the wrecked Eritrean economy. One vital development was deliberately neglected from this reconstruction project; the inculcation of political culture in the Eritrean youth, and therefore, the political development of the country.

Eritrea often refers to itself as being in a 'no-war, no-peace' situation.[18] This is despite the fact that Eritrea has not been involved in active warfare since 2000.[19] This has caused the state to place a great emphasis on the national service and devote a lot of its state machinery to securing the participation of Eritrean youth in military training and service. One of the outcomes of this strategy has been the indefinite extension of the national service in 2002, originally only intended to be for 18 months.[20] There is hardly any human rights violation that cannot be linked to the national service. The government continues to blame the continued occupation of some of its territories, particularly in the Badme region by Ethiopia, despite an arbitration decision in its favour, to justify the prolongation of the national service and the attendant burdens imposed on its citizens which include the additional expenditure on defense.[21]

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[16] n 13 above, 1.
[17] Id.
[18] Eritrea Country Report presented at the 6th Session of the Working Group on Universal Peer Review in November 2009.
[19] Summary Report of Stakeholder Submissions prepared by OHCRC 2014, A/HRC/WG.6/18/ERI/3, para 6.
[20] Child Soldiers International 'Louder than words-Case Study: Eritrea: Widespread conscription of children goes unchecked' (2012) 1.
[21] It is estimated that 25% of the national budget was allocated to military expenditure as of 2012. See 'African Economic Outlook: 'Eritrea (2012)' 6.

Even though Eritrea continues to assert that the UPR is its preferred mode of engagement with the international community, its track record on human rights in the context of the national service tells a different story. Stakeholder reports presented at both the 2009 and 2014 UPR cycles indicated that not only does Eritrea continue to recruit minors into the national service, but recruits are further forced to work in situations of extreme hardship and degrading conditions.[22] The forced conscription is made worse by military detention centres being located in desert areas with extreme weather conditions.[23]

The Eritrean governments' response at both cycles has been to deny these human rights violations; in the 2009 country report, Eritrea denied the use of forced labour in the country and maintained that this was prohibited by its laws.[24] This position was restated during the dialogue with the Working Group where the delegation asserted that children finishing their high school education in the military camps should not be confused with conscripts.[25] Needless to say, the recommendations related to the national service, for example, not to recruit children and limit the time period for the service to be 18 months, were rejected by the state in 2010.[26]

Eritrea's indignation at the failure by the international community to acknowledge the role played by Ethiopia in the continued emphasis on the national service can be seen in its response to questions about the national service in 2014. The state made no mention of the issue in the country report and no specific response was made by the delegation at the dialogue with the Working Group. However, it unequivocally rejected all the recommendations touching on the national service.[27]

It is clear that Eritrea's repeated rejection of recommendations on the national service has resulted in a failure to curb various human rights violations occurring as a result of

[22] The degrading condition are discussed in further detail under the heading 'Conditions of Detention' below.
[23] Joint Submission by Human Rights Concern Eritrea and Human Rights Watch, presented at the 6th Session of the Working Group on Universal Peer Review in November 2009, para 19.
[24] Eritrea country report presented at the 6th Session of the Working Group on Universal Peer Review in November 2009, para 19.
[25] Working Group Report 2009, para 12.
[26] See status of recommendations on http://www.upr-info.org/database/ (accessed 7 July 2014).
[27] As above.

national service, namely the right to education, freedom from torture, freedom of thought, conscience and religion and the right to an adequate standard of living.[28]

IV. CONDITIONS OF DETENTION

The issue of detention conditions in Eritrea has also dominated the past two UPR cycles and remains a major concern amongst human rights defenders. When the issue was raised during the first cycle in 2009, the Eritrean delegation claimed that the Eritrean Prison and Rehabilitation Department had protected the right to food, clothing, bodily security, sanitation, medical care, access to courts and legal services, freedom of religion, communication, physical exercise, and recreation and to safety and security.[29] However, Amnesty International reported that deaths in custody are often the result of torture and prisoners are frequently denied access to medical care; a direct consequence of inhuman detention conditions.[30] Despite these revelations, the state maintains that torture is illegal[31] in Eritrea and that no secret detention centres exist in the country.

In 2014, during the second cycle the issue was raised again with indications that the conditions in the detention facilities had worsened since 2009. While the government boasted about the establishment of the Eritrean Correctional and Rehabilitation Services (ECRS) to deal with several issues that had been raised in 2009,[32] shadow reports by Amnesty International indicated the opposite.[33] There were reports that most detention facilities remain severely overcrowded, damp and unhygienic. Additionally the secrecy with which prisoners are detained makes them particularly vulnerable to torture, ill-treatment or unlawful killing. This highlights the UPR process' shortcomings with regards to follow-up mechanisms.

As observed above, the contradictions between the information provided by the Eritrean delegation and observations by NGOs highlight one of the major weaknesses of the UPR process: the objectivity of the states under review. In its analysis of the UPR process, the

[28] The connection between the national service and inadequate standard of living is discussed further below.
[29] Eritrea country report presented at the 18th Session of the Working Group on Universal Peer Review in February 2014, para 84.
[30] Amnesty International submission to the UN Universal Periodic Review in November 2009, para 3.
[31] n 29 above, para 48.
[32] As above, para 42.
[33] Amnesty International submission to the 18th Session of the Universal Periodic Review, 2014, 2.

International Federation of Actions by Christians for the Abolition of Torture (FIACAT) notes that the process is inherently and institutionally weak thereby promoting the selectivity syndrome among countries, which allows them to reject or ignore important recommendations. It states:[34]

> …the reviews of some countries presented a singular problem: a lack of objectivity. Indeed, on several occasions there was a clear contradiction between the image portrayed of a country at the conclusion of its review... and the issues raised by special procedures, treaty bodies and NGOs'… In order to gain an objective view of human rights violations in the country under review, the viewpoints both of civil society and of treaty body and special procedure representatives are critical.

The selectivity syndrome is further worsened by unclear and vague responses to certain issues. The Eritrean delegations to both cycles have categorically ignored calls for independent monitors to assess its detention facilities. Without any clear responses to recommendations by states 'the UPR cannot achieve its purpose of fostering tangible improvements in the protection of human rights.'[35]

The rejection of recommendations to allow independent monitors to assess Eritrea's detention facilities also indicates one of the UPR's limitations; the process allows states to accept or reject recommendations. Acceptance of the recommendations highlights the country's willingness to implement it; however Eritrea has shown a culture of rejecting the majority of recommendations, especially those related to civil and political rights. For instance, the Eritrean government has only accepted ninety-two of the two hundred recommendations made in 2014, i.e. less than 50%. These statistics indicate a lack of political will to implement recommendations. Furthermore, the deterioration of conditions in detention facilities between 2009 and 2014 despite the Eritrean government's commitment to addressing the issue highlights the need to also review the UPR's follow-up mechanisms.

[34] FIACAT 'Universal Periodic Review: An Ambivalent Exercise' 2009 15.
[35] Human Rights Watch 'Curing the selectivity syndrome: The 2011 review of the Human Rights Council' 2011 12.

To date the UPR has not attempted further action on states that fail to implement recommendations. There is need to move from mere recommendations to taking sustained action on defaulting states.[36] This could include referring some issues to the Human Rights Council for further consideration.

V. CHILDREN

It was noted with concern by the Special Rapporteur that there is and continues to be an increased number of unaccompanied children crossing the border.[37] These children run away from Eritrea as a result of the dysfunctional family situation created by the conscription of their parents into the national service leaving them without parental care; including the lack of educational opportunities and fear of forced conscription.[38] This concern was echoed by Human Rights Concern Eritrea (HRCE) who noted that the outflow of Eritreans fleeing the country included many children escaping forced conscription.[39] Being unaccompanied increases their vulnerability not just to the human trafficking rings but also to the security forces who often imprison them arbitrarily, torture or sexually abuse them and finally take them to military training camps.[40] HRCE also reported that there are instances where these children are forcibly returned to Eritrea to a family reunion programme for unaccompanied and uncared for children by international relief agencies working in refugee camps in Ethiopia and security forces in Sudan. Many of the children who are forcibly returned are imprisoned or subsequently conscripted into the national service.[41]

Though concerns of forced conscription of children were raised in 2009, these were unequivocally rejected by Eritrea.[42] In 2014, the Special Rapporteur continued to sound the alarm by highlighting Eritrea's ranking as the world's tenth largest producer of

[36] n 34 above, 15.
[37] Report of the Special Rapporteur presented at the 23rd session of the Human Rights Council on 28 May 2013 A/HRC/23/53, para 72.
[38] n 33 above, para 72.
[39] http://asmarino.com/press-releases/1945-report-on-child-rights-violations-in-eritrea (accessed 9 July 2014).
[40] As above.
[41] As above.
[42] n 26 above.

refugees, of which unaccompanied children form a significant percentage.[43] Despite this, Eritrea maintained that there was no forced conscription of minors and that any reports of a migrant situation were sensationalist.[44]

Female Genital Mutilation (FGM) has also been raised consistently in the UPR as an issue affecting children. Eritrea has one of the highest rates of FGM in the world.[45] There have been efforts made by the government to eradicate the practice through legislation, awareness campaigns and the creation of a 5-year plan for the elimination of the practice. However, despite all these efforts, the report of the Special Rapporteur in 2013 indicated that even though the adoption of Proclamation 158 of 2007 had had an effect on reducing the practice of FGM in the country, the rate still remained high.[46] The state alleged that 155 cases of FGM 'were penalized' over the last five years.[47] It is estimated that now only 83% of the population is affected by FGM compared to 90% in 2013.[48] These statistics have however not been verified by independent reports.

Whereas the state has accepted recommendations by the Working Group to take further steps to eradicate the practice,[49] any progress in this regard is difficult to monitor because there is no concrete obligation created. Given that the nature of the recommendations were general and was such that Eritrea was asked to 'take measures' or 'strengthen efforts' to eradicate FGM, it is difficult to assess exactly what Eritrea would be held accountable to in subsequent reviews. Furthermore, lack of access to the country by mandate holders and independent NGOs makes it extremely difficult to verify statistics proffered by the state.

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[43] Report of the UN Special Rapporteur submitted at the 26th Session of the Human Rights Council on 13 May 2014 A/HRC/26/45, para 26.

[44] United Nations Office in Geneva 'Council Adopts Outcomes Of The Universal Periodic Review Of Eritrea, Cyprus, Dominican Republic And Vietnam'. http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/E33459ADF840E081C1257CFD00554BB9?OpenDocument (accessed 9 July 2014).

[45] Committee on the Rights of the Child, Concluding Observations: Eritrea, 48th Session, CRC/C/ERI/CO/3 para 60.

[46] Report of the Special Rapporteur presented at the 23rd session of the Human Rights Council on 28 May 2013 A/HRC/23/53, para 70.

[47] n 9 above, 12. It is not clear from the report of the state what the penalty was.

[48] n 9 above, 11.

[49] n 26 above.

VI. CONCLUSION

The UPR system is broadly considered a success for various reasons. Firstly, it has contributed to the creation of a huge database of information on the status of human rights per country and the impact of the recommendations on human rights at the domestic level. This can be used not only to monitor compliance but also to improve the management of peace-keeping forces.[50] Secondly, the UPR has been successful in attaining the participation of high level government officials in the process compared to other state reporting processes such as the Article 62 mechanism under the African Charter on Human and Peoples' Rights (ACHPR). It is stated that there was 100% participation rate in the first cycle in 2008.[51] Not only is the high level of participation commendable, but it provides a useful source of gauging the *opinio juris* of states in respect of human rights obligations.[52]

The UPR is considered a welcome addition to the human rights enforcement mechanisms because it signifies acceptance of the universality of human rights in the midst of ongoing discourse on cultural relativity of human rights norms. The state practice of reliance on reports of human rights bodies in compiling national reports also signifies an acceptance of the legitimacy and practice of other human rights bodies that the UPR mechanism is intended to complement.[53] It is estimated that from the first seven sessions of the UPR, 68 % of the total recommendations were accepted, 13% were rejected and only 19% received a general response.[54] The success of the UPR is attributed to a combination of the 'naming and shaming' undercurrent implicit in the process, as well as the principle of cooperation and peer review spirit with which states approach the process.[55]

Many human rights practitioners have been criticized for ignoring non-confrontational approaches to human rights protection such as the UPR mechanism in favour of the 'naming and shaming' approach.[56] However it is clear that the UPR mechanism, however well-intentioned, cannot be the solution to all situations of human rights violations. When

[50] n 3 above, 706.
[51] n 3 above, 707.
[52] As above.
[53] As above.
[54] n 26 above.
[55] n 3 above, 708.
[56] n 3 above, 674.

dealing with repressive regimes such as Eritrea which has expressed a lack of political will in resolving gross human rights violations, such peer-led process has not provided the momentum needed to ensure change. As can be seen from the recommendations, there is reluctance amongst African states to engage with Eritrea on core human rights obligations, choosing instead to highlight successes in relation to socio-economic issues.[57] Therefore, a system which was envisioned to create peer pressure to comply with human rights obligations has turned into a system of peer protectionism. This prevents the UPR system from being a robust mechanism for human rights protection.[58]

Eritrea's consistent stand on the national service also precludes an inference of *opinio juris* under international law and this combined by its refusal to ratify important human rights instruments such as the Rome Statute, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the 2nd Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Optional Protocol to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), which makes Eritrea one of the least accountable countries under international law.[59]

Moreover, despite its adoption of only 92 out of 200 recommendations proposed in the 2nd cycle in 2014, it is apparent that the recommendations adopted are vague and immeasurable, and do little to change the landscape of human rights in the country. The recommendations accepted are those requiring Eritrea to 'take measures' to improve on the protection or fulfilment of certain aspects of human rights and the extent of compliance/non-compliance with these is not measurable. Where specific recommendations were made by states such as granting access to special procedures or releasing political prisoners, Eritrea's response was broad, choosing to not commit itself to any particular plan of action. This makes it difficult to follow up on implementation

[57] See list of recommendations, n 26 above.
[58] Mcmahon, ER, 'The Universal Periodic Review: A work in progress: An evaluation of the first cycle of the new UPR mechanism of the United Nations Human Rights Council' (2012) 24.
[59] See United Nations Economic Commission for Africa (UNECA) *African Women's Rights Observatory* on http://www1.uneca.org/awro/RatificationandReporting.aspx (accessed 8 July 2014).

and prevents tangible improvements on human rights protection.[60] Recommendations to ratify key human rights instruments or improve protection of civil and political rights were rejected outright. Rejection of recommendations relating to conscription means the national service continues to adversely affect the lives of Eritrean youth. Not only does mandatory, indefinite conscription deprive them of quality education[61]and the freedom to choose an occupation of their choice, but it also affects their family life as the conscripts are poorly paid, thus fuelling an unending cycle of poverty in Eritrea.

The rejection of key recommendations by Eritrea confirms the fears of some academics that such rejections would result in the undermining of the Human Rights Council mechanisms by states.[62] The pessimism on the impact of the UPR system on the Eritrean situation is shared by CIVICUS World Alliance for Citizen Participation who in a joint statement noted that the process would have little impact because Eritrea places a greater premium on national unity than on individual rights.[63]

Unlike the European Court of Human Rights, the Inter-American Court on Human Rights and the African Court of Human and Peoples' Rights, the UPR mechanism does not have the competence to prosecute and punish those responsible for human rights violations or provide redress to victims. Therefore, the UPR remains a toothless watchdog because states continue to be the main actors in the implementation of recommendations at the national level.

The doom and gloom surrounding the human rights situation in Eritrea is further exacerbated by Eritrea's rejection of special procedures such as the Special Rapporteur on the human rights situation in Eritrea; it perceives the appointment as confrontational and political.[64] With the renewal of the mandate of the Special Rapporteur and the establishment of a Commission of Inquiry,[65] it remains to be seen whether there will be a

[60] n 35 above, 14.
[61] The stakeholder report indicated that the quality of the education was compromised in the military camps because there was more focus on military training, (n 3 above, para 69).
[62] n 6 above, 254.
[63] http://www.ohchr.org/en/NewsEvFents/Pages/DisplayNews.aspx?NewsID=14754&LangID=E (accessed 8 July 2014).
[64] Eritrea country report presented at the 18th Session of the Working Group on Universal Peer Review in February 2014, para 86.
[65] n.11 above.

change in political will and greater cooperation with special procedures. Similar to the Human Rights Commission which was criticized and eventually disbanded for being political, it appears countries like Eritrea have sought to take part in the UPR, 'not to strengthen human rights but to protect [itself] against criticism…. As a result, a credibility deficit has developed, which casts a shadow on the reputation of the United Nations system as a whole.'[66]

While the UPR enjoys widespread support from member states, Eritrea's performance in the last two cycles has shown that the process is too shallow in dealing with politically sensitive human rights violations. It does therefore seem that when dealing with repressive regimes or powerful states, the UPR process continues to be much ado about nothing. As long as international law and mechanisms such as the UPR remain dependent on the consent and good will of states, they will continue to prove impotent against states, they will continue to prove impotent against states that are unwilling to comply or cooperate with recommendations.

[66] K Annan, 'In larger freedom: towards development, security and human rights for all' (2005), para 182.

THE AMBIVALENCE OF INTERNATIONAL LAW ABOUT TOO MUCH STATES' CONSENT AND ENFORCEMENT

Adron Nalinya Naggayi.*

ABSTRACT

International law is predominantly enforced through and by states. Accordingly, this can generally be done where the state(s) in question has consented to be party to the enforcement apparatus adopted. The decision to consent to such an action will depend on the interests of such a state. Enforcement based on such uncertainty (lacking a properly established enforcement mechanism like police forces in domestic law) has imaged international law as being too rueful to be taken seriously as a valid form of law. This article is to address the apologetic nature of international law affecting its enforcement. It will further argue for the non-conventional approach of enforcement of international law and also discuss the exceptional circumstances where international law is enforced strictly with limited or no regard to consent of states and conclude by suggesting recommendations to improve the enforcement of international law.

I. INTRODUCTION

The legitimacy of any law will generally be contingent on the mechanism of its enforcement.[1] Notably, international law is preordained to maintain peace and security among nations.[2] This can be done through enforcing international law principles. The enforcement can be through the use of sanctions[3], out casting[4], use of public opinions[5],

* Fourth year Law student, Makerere University Kampala.

[1] Jutta Brunee, *Enforcement mechanisms in international law and international environmental law*, Available at https://www.law.utoronto.ca/documents/brunnee/BrunneeEnforcementMechanismsInt_lLaw.pdf.

[2] It is a principle in international law that states shall settle their disputes by peaceful means. See Articles 2(3) and 33 of the UN Charter; 1982 Manila Declaration on the Peaceful Settlement of International Disputes, G.A Res. 37/10, G.A.O.R., 37th Sess., Supp. 51, p 261; D. J Harris, *Cases and Materials on International Law*, 5th Ed., London Sweet & Maxwell (1998).

[3] Sanctions are social, political, or economic "punishments" against a government to affect its conduct. They consist of trade sanctions, financial sanctions and asset sanctions. See Anu Bradford and Omri Ben-Shahar, '*Efficient Enforcement in International Law.*' Available at http://home.uchicago.edu/omri/pdf/articles/Efficient_Enforcement_International_Law.pdf. Under Chapter 7 of the UN Charter, the Security Council is expressly empowered in the event of an act of aggression or threat to the peace to take appropriate action "to maintain or restore international peace and security." The sanctions can be economic: for example Security Council resolution 221 against Rhodesia in 1966, Security Council Resolution 418 imposing mandatory arms embargo on South Africa in 1977 or even military for example in the Korean war in 1950, Security resolutions on June 25th, June 27th and July 7th 1950. See M N Shaw, *International Law,* 2nd Edition 1986; Harris, *Cases and Materials on International law,* 3rd Edition 1983 pgs 680-681; Rebecca M.M Wallace, *International Law, A student's Introduction*, London, Sweet and Maxwell, 1977 3rd Edition; Robert F Turner, *International Law Really is*

laws and policies of individual states[6] and various mechanisms adopted by the Security Council[7], among others. The enforcement organs in international law include the

Law, International & National Security Law Practice Group Newsletter - Volume 2, Issue 1, Spring 1998. While largely ineffective during the Cold War, North Korea and Iraq can confirm that the system can work. Countless other potential aggressors may also have been deterred. See Robert F Turner, '*International Law Really is Law*,' International & National Security Law Practice Group Newsletter - Volume 2, Issue 1, Spring 1998. The legality of the Security Council sanctions was upheld in the 1992 in *Pan Am* case [*Independent Union of Flight Attendants v. Pan Am*. No. 88-3120, 810 F. Supp. 263 (1992)] The Court had to consider an application from Libya for the order of provisional measures to protect its rights, which, it alleged, were being infringed by the threat of economic sanctions by the United Kingdom and United States. The problem was that these sanctions had been authorized by the Security Council, which resulted in a potential conflict between the Chapter VII functions of the Security Council and the judicial function of the Court. The Court decided, by eleven votes to five, that it could not order the requested provisional measures because the rights claimed by Libya, even if legitimate under the Montreal Convention, *prima facie* could not be regarded as appropriate since the action was ordered by the Security Council.

[4] Out casting may involve the threat of exclusion. It is also a distinctive method international law uses to enforce the law. It is nonviolent thus in *pari materia* with Article 2 of the UN Charter on the non-use of force and involves denying the disobedient the benefits of social cooperation and membership. For example the out casting of the South Sudan president Omar Bashir in the international community for alleged war crimes. See Hathaway, Oona A. and Shapiro, Scott J., "*Out casting: Enforcement in Domestic and International Law*" (2011). Faculty Scholarship Series Paper 3850. http://digitalcommons.law.yale.edu/fss_papers/3850.

[5] Public opinion is also an effective sanction. States want to be seen to be adhering to International law. Why otherwise do they go to considerable efforts to justify their particular position in International law? When Hitler invaded Poland, Kim Il Sung invaded South Korea, and George W Bush invaded Iraq, they issued careful statements alleging that they were acting in "self-defense." When the Soviet Union invaded Hungary, Czechoslovakia, and Afghanistan, it alleged that it had been "invited" in: and Leninist International Law experts also crafted the so-called 'Brezhnev Doctrine' to provide additional legal *facade* to their aggression. In 1960, Colonel Khadaffi routinely denied any knowledge of the terrorist attacks he had ordered; the Nicaraguan Sandinistas swore to the World Court that they had not given any support to guerrillas in neighbouring El Salvador; and Saddam Hussein's spokesmen raised a panoply of alleged legal defences for the invasion of Kuwait ranging from the absence of agreed-upon borders to alleged Kuwaiti theft of Iraqi oil deposits. Consequently, no state wants to be seen as a violator of International law. Ultimately, a fundamental reason International Law is effective is because States perceive it to be in their *self-interest* to have legal rules and to be perceived by other States as a law-abiding member of the International Community. See Rebecca M.M Wallace, *International Law, A student's Introduction*, London, Sweet and Maxwell, 1977 3rd Edition; John Norton Moore & Robert F. Turner, *International Law and the Brezhnev Doctrine* (1987); Robert F Turner, *International Law Really is Law*, International & National Security Law Practice Group Newsletter - Volume 2, Issue 1, Spring 1998.

[6] International law is routinely enforced by individual States through their domestic laws, courts, and police forces. For instance, under National Objective and Directive Principles Clause 28(b) of the Ugandan Constitution, Uganda's foreign policy is based on the respect for international law and treaty obligations. It is upon this that Uganda has adopted and domesticated several International Instruments. For Example the Children's Act which is *pari materia* with the UN Convention on the rights of the Child. In *Muwanga Kivumbi v Attorney General,* Constitutional Petition No 9 of 2005, [2008] UGCC 4 (27 May 2008), the petitioner sought a declaration that section 32(2) of the Police Act which gave power to police to prohibit the convening of an assembly or the formation of a procession in any public place contravened, among others, the constitutional rights to freedom of expression and assembly. In upholding the petition, Byamugisha JA noted that article 29 of the Uganda Constitution was modelled on the ECHR and that it protected, with regard to political protest, the rights to peaceful assembly, freedom of expression, freedom of thought, conscience and religion as well as the right to respect for family and private life.

International Court of Justice[8], the Security Council,[9] the General Assembly,[10] the Economic and Social Council[11] and the Secretariat[12] which are all an anthology of states.[13] This trails from the United Nations Charter where all States are to offer the United Nations assistance in any action it takes in accordance with the Charter, and to refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action[14]. Outstanding is the participation of the states which in essence requires their consent.[15] In fact, all states' obligations in international law are based on their consent to be bound.[16] This ultimately affects the enforcement of international law because it is majorly grounded on the good will of states. In the event, international law is considered not resilient enough to divulge the compliance of the states that subscribe by requiring their consent in all matters relating to its enforcement. Consequently, expecting international law to offer true justice to the states comprising it is a utopian idea that cannot be fulfilled because the system is so penitent/ remorseful/apologetic/repentant/rueful in relying so much on the consent of states for its enforcement.

The first part of this article will discuss this weakness in light of the requirement of states' consent before the International Court of Justice as the principle judicial organ of

[7] The UN Security Council while exercising its roles under Chapter 7, Article 39 of the UN Charter has formed International criminal tribunals to punish perpetrators who commit war crimes and acts of aggression. For example the Special Court for Sierra Leon, the International Criminal Tribunal for Yugoslavia and that of Rwanda. In 1993 the Security Council established the International Criminal Tribunal for the former Yugoslavia, to prosecute persons responsible for serious violations of international humanitarian law. As of July, the Tribunal had indicted 77 individuals and 10 were in custody awaiting trial. Evidence had been taken from nearly 200 witnesses, and the first two trials had led to convictions and lengthy prison sentences. See, Robert F. Turner, *Is international law really law*, *supra*. Under Article 34 of the UN Charter, the Security Council is also authorized to use military force under extreme cases against threats or breaches of peace or acts of aggression. For example, it adopted resolution 1973 in 2011 approving 'No-Fly Zone' over Libya, authorizing 'all necessary measures' to protect civilians which included the use of military force.

[8] Chapter XIV, Article 93 of the UN Charter.

[9] Chapter V of the UN Charter.

[10] Chapter IV of the UN Charter.

[11] Chapter X of the UN Charter.

[12] Chapter XV of the UN Charter.

[13] Article 7 of the UN Charter.

[14] Article 2(5) of the UN Charter.

[15] The case of the *S.S Lotus [France v Turkey]*, the restrictions on states in international law are not presumed.

[16] *Supra.*

the United Nations to enforce the principles of international law among states with disputes. The second part will converse the weakness of the enforcement of the decisions of the International Court of Justice by the Security Council underpinned on the requirement of consent from the states. Then, it will discuss the lacunas left by international law in its enforcement by General Assembly. Lastly, it will make recommendations on the improvement of mechanisms to enforce international law.

II. THE ISSUE OF CONSENT AND THE INTERNATIONAL COURT OF JUSTICE

The international Court of Justice is by far the most important international Court.[17] It replaced the Permanent Court of Justice in 1946 and was made the "principle judicial organ" of the United Nations.[18] It has been in existence for more than fifty years. Pursuant to Article 34 of the Statute of the International Court of Justice, only states may be parties to cases before the Court. Such states must be *ipso facto* parties to the United Nations Charter[19] or the Statute of the Court[20] or given authorization by the Security Council.[21]

In a bid to promote peace and security, the International Court of Justice is mandated to settle disputes among states judiciously.[22] This however this does not mean that the International Court of Justice can adjudicate over each and every case involving a dispute concerning states as one may think. On the contrary, the jurisdiction of the Court only arises where the states in question have consented. This is envisaged under Article 36 of the Statute of the Court of Justice. Under that provision, the jurisdiction of the Court

[17] D. J Harris, *supra* at page 989.
[18] Article 92 of the UN Charter.
[19] Article 93(1) of the UN Charter; In *the case of the Legality of use of force (Serbia and Montenegro v Belgium)* 2004 I.C.J. 279 (Dec. 15), the International Court of Justice held that it did not have jurisdiction over the matter since Serbia and Montenegro were new states which were not yet party to the United Nations or the Statute of the Court.
[20] Article 35(1) of the UN Charter; *Legality of the use of force (Serbia and Montenegro v Belgium* 2004 I.C.J. 279 (Dec. 15).
[21] Article 93(2) of the UN Charter.
[22] The International Court of Justice is one of the main organs of the United Nations. Being the principle judicial organ, it should play an important role in the maintenance of peace and security by adjudicating over disputes among states. See Article 92 of the UN Charter.

comprises of all cases which the parties refer to it[23] and all matters specially provided for in the Charter of the United Nations[24] or in treaties and conventions in force;[25] and, where the states parties to the Statute of the International Court of Justice have declared that they recognize as compulsory *ipso facto* and without special agreement the jurisdiction of the Court, in relation to any other state accepting the same obligation.[26]

From that provision, it is evident that the Court is only to have jurisdiction where the parties have consented. In any case, the Court cannot compel states to appear before it if they have not consented even when the matter in question concerns violation of *jus cogens*[27] or *erga omnes* obligations. Exempli causa, the ***Fisheries jurisdiction case (Spain v Canada)***[28], Canada pursued, boarded and seized on the high seas the fishing vessel-the Estai-flying a Spanish flag. Despite the fact that Canada was in violation of *jus cogens*, the International Court of Justice upheld that it did not have jurisdiction over

[23] So far the following 16 cases were submitted to the Court by means of special agreements (by date of their addition to the General List): *Asylum (Colombia v Peru); Minquiers and Ecrehos (France v United Kingdom); Sovereignty over Certain Frontier Land (Belgium v Netherlands); North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands); Continental Shelf (Tunisia v Libyan Arab Jamahiriya); Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* (case referred to a Chamber); *Continental Shelf (Libyan Arab Jamahiriya v Malta); Frontier Dispute (Burkina Faso v Republic of Mali) (case referred to a Chamber); Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* (case referred to a Chamber); *Territorial Dispute (Libyan Arab Jamahiriya/Chad); Gabcíkovo-Nagymaros Project (Hungary v Slovakia); Kasikili/Sedudu Island (Botswana v Namibia); Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia); Frontier Dispute (Benin v Niger)* (referred to a chamber); and *Sovereignty over Pedra Branca v Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore)*.

[24] Article 33(2) of the UN Charter provides that the Security Council shall, when it deems necessary, call upon states to settle their disputes before the International Court of Justice. This provision however does not make it obligatory for a state to appear before the Court. A case in point is the *Corfu Channel case (United Kingdom v Albania)* (Preliminary Objection), International Court of Justice (ICJ), 25 March 1948, available at: http://www.refworld.org/docid/40239abf2.html [Accessed 30 June 2014], where Britain *interalia* argued that the Court had jurisdiction pursuant to the recommendation by the Security Council to Albania to bring the matter before Court. Although the Court did not address this issue in the lead judgment-being that it had already found that it had jurisdiction based on *forum prorogatum*- in the separate opinion by judges Basdevant, Alvarez, Winiarski, Zoricic De Visscher, Badawi and Krylov, it was stated that the Security Council's recommendation to Albania did not confer compulsory jurisdiction to the Court.

[25] Article 36(1) of the UN Charter.

[26] Article 36(2) of the UN Charter.

[27] Pursuant to Article 53 of the Vienna Convention on the law of treaties, *jus cogens* is a peremptory norm of general international law from which no derogation is permitted. See Rozakis, The concept of *jus cogens* in the Law of Treaties (1976); Sztucki, *Jus cogens* and the Vienna Convention on the law of treaties (1974).

[28] [1974] ICJ Rep 3.

the case since Canada relied on Spain's reservation in its declaration to state that it was a domestic matter that did not require the involvement of the Court.

Further in the *case on the legality of the use of force [Serbia and Montenegro v Beligium]*,[29] the International Court of Justice in holding that it did not have jurisdiction clearly stated that the question of *locus standi* of Serbia and Montenegro before the Court, or its jurisdiction, is one thing, and the question of the legality of use of force is another[30]; In the *South West African case* of 1966,[31] the International Court of Justice held that Ethiopia and Liberia did not have *locus standi* thus the Court did not have jurisdiction over the matter even when it concerned the prominent right to self-determination which was/is part of the norms of *jus cogens*; In the case of the *Armed activities on the territory of the Congo (DRC v Rwanda)*[32], the International Court of Justice vehemently averred that it did not have jurisdiction because the Genocide Convention between the Democratic Republic of Congo and Rwanda had expressly prohibited it, yet the case inter alia concerned crimes of genocide.

These among other cases have expressed how crippled the International Court of Justice is when it comes to enforcing international law principles, more so those so crucial as *jus cogens.* Due to the inherent features of the jurisdiction of the Court—the consensual nature coupled with limited access—the Court is usually not in a position to make a pronouncement with regard to the legality of certain states' actions in particular cases. This fact testifies by itself to the delicate position in which the Court has found itself.

The Court, whose function is "to decide in accordance with international law" disputes as are submitted to it is, in these particular cases, is hindered in a way in carrying out its function in regard to the issue that certainly cannot be regarded as an ordinary one.[33] The requirement for this much consent for the Court to have jurisdiction to perform its functions of settlement of disputes, has weakened the enforcement of international law.

[29] Preliminary objections, ICJ Summary judgment of 15th December, 2004.
[30] Paragraph 76.
[31] (1966) I.C.J. 6 (July 18).
[32] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda); Request for the Indication of Provisional Measures*, International Court of Justice (ICJ), 1 July 2000, available at: http://www.refworld.org/docid/3ae6b6e14.html [accessed 7 November 2013].
[33] *Legality of the use of force case* (supra) at Para 76.

This has been reviewed by for instance, Judge Koroma in his dissenting opinion in the *case concerning Armed activities on the territory of the Congo*[34], when he stated that he did believe that the gravity of the matter and the nature of the allegation before the Court was such that the Court should have been allowed to adjudicate the case. Vice President Weeramantry was also of a similar opinion in *the Fisheries jurisdiction case (Spain v Canada)*[35]. He averred that where violations of basic principles of international law, extending even to violation of Charter principles are alleged, the dispute should fall within the general referral to the International Court of Justice.

Anthony D'Amato criticized the International Court of Justice for dismissing Yugoslavia's requests for an injunction ("provisional measures") in 1999 in ten separate suits against ten NATO countries engaged in the bombing it.[36] He was of the view that Yugoslavia was at least entitled to deliberation on the merits of its claim rather than being brushed off on a jurisdictional technicality.

Arguably, this problem has been partly plastered by the imputation of consent by the doctrine of *forum prorogatum*. If a State has not recognized the jurisdiction of the Court at the time when an application instituting proceedings is filed against it, its separate acts/conduct either expressly or impliedly can be considered as an acceptance of the Court's jurisdiction. This is pursuant to Article 36(1) of the Statute of the International Court of Justice and Article 38(5)[37] of the Rules of Court.

The very first application of the doctrine was in the *Corfu Channel case*.[38] United Kingdom brought a claim before the Court and argued that the Court had jurisdiction

[34] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda); Request for the Indication of Provisional Measures*, International Court of Justice (ICJ), 1st July 2000, available at: http://www.refworld.org/docid/3ae6b6e14.html [accessed 7 November 2013].

[35] *Supra* note 28.

[36] Anthony D'Amato in "Review of the ICJ Order of June 2, 1999 on the Illegality [sic] of Use of Force Case", as found in "Kosovo & Yugoslavia: Law in Crisis", a presentation of Jurist (source: http://jurist.law.pitt.edu/amato1.htm.)

[37] Article 38, paragraph 5, of the present Rules of Court provides that: "When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case."

[38] *Corfu Channel case (United Kingdom v Albania)* (Preliminary Objection), International Court of Justice (ICJ), 25 March 1948, available at: http://www.refworld.org/docid/40239abf2.html [Accessed 30 June 2014].

based on the resolution by the Security Council to refer the case to the Court; Albania's acceptance of the Security Council's invitation to discuss the dispute; and the obligation on members states under the Charter to carry out decisions of the Security Council. The Court found that it had jurisdiction over the matter basing on Albania's letter to the Security Council accepting to participate in dispute resolution.[39] The doctrine was also applied in the case on *Certain questions of mutual assistance in criminal matters (Djibouti v France)*[40] and the *Certain criminals proceedings case (Congo v France)*[41]. From the above, it seems that the Court confers jurisdiction upon itself even when the state in question has not expressly accepted. On the contrary, my opinion on the issue is that still the consent of the state is required. It is of little or no issue that the state has not expressly consented to the Court's jurisdiction since any form of consent can suffice. In any event, jurisdiction acquired by the Court basing on the doctrine of *forum prorogatum*, although widens the scope of cases the Court can adjudicate over, still limits the enforcement of international law as long as it arises from the consent of the state in question.

III. ENFORCEMENT OF ICJ DECISIONS BY THE SECURITY COUNCIL

Article 94 of the Charter requires UN Members to "comply with the decisions of the International Court of Justice" in any case to which they are a party, and empowers the Security Council to enforce such decisions.[42]

It is notable however that for the Security Council to enforce such decisions, the resolution must be accepted by the five permanent members. Although this appears to be an obligation on the state in its capacity as a permanent member of the Security Council, the state still exercises such duties in a manner that is in its interest. In any case, a state that is a member of the Security Council may not consent to a decision relating to

[39] See also, D. J Harris, 5th Edition, p 997.
[40] *Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v. France*), Judgment, I.C.J. Reports 2008, page 177.
[41] *Certain Criminal Proceedings in France (Congo v. France),* 2003 I.C.J. 102 (Order of June 17).
[42] Article 94(2), UN Charter; 'If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

enforcement of international law, if it is likely to be affected by such decision. This occurred, for example, after the *Nicaragua* case,[43] when Nicaragua brought the issue of the United States' non-compliance with the Court's decision before the Security Council and it was vetoed.

Even with the use of sanctions by the Security Council to enforce international law, it is argued that despite their frequent use, sanctions are controversial, costly, and usually ineffective.[44] It is from this that international law has been largely considered to be inefficient.[45] It has left others questioning; 'how is legal order to be established among equal and sovereign states?'[46]

The requirement for consent from states has weakened international law to the extent of being doubted as to whether it is really law. The Austinian theory is the *locus classicus* for the view that international law is not law because it *interalia* lacks an enforcement mechanism. According to John Austin, a command or law is the expression of a wish by a person or determinate body, backed by a threat to inflict an evil in case the wish is not fulfilled, issued by someone who is willing and able to act on the threat.[47] Various legal scholars and the modern state conception hold that; (1) conduct rules must be enforced through a law enforcement chain, and (2) at least one link in the chain must permit officials to use physical force. In this view international law lacks an arranged physical force[48] due to the constant reliance on the states for enforcement. It is averred that the legal rules whose content or application depends on the will of the legal subject for whom they are valid are not proper legal rules at all but apologies for the legal subject's political

[43] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits*, International Court of Justice (ICJ), 27 June 1986, available at: http://www.refworld.org/docid/4023a44d2.html [accessed 7 November 2013].

[44] David A. Baldwin, *Economic Statecraft* 57(Princeton 1985) (noting that "[i]t would be difficult to find any proposition in the international relations literature more widely accepted than those belittling the utility of economic techniques of statecraft")

[45] Marti and Luke Hiken, '*International law; Reality or Myth'*, Luke Hiken and Marti Hiken; *The Impotence of International Law, International law exists in theory, not practice*. July 17, 2012. Jutta Brunnée; *Enforcement Mechanisms in International Law and International Environmental Law.*

[46] Antony Angie; *The Evolution of International Law, colonial and postcolonial realities*.

[47] John Austin, *The province of jurisprudence determined* 5-6 (Univ. of London 1832).

[48] Oona A. Hathaway, Scott J. Shapiro, Outcasting: *Enforcement in Domestic and International Law*.

interest.[49] Accordingly, international law is too *apologetic* to be taken seriously in the construction of international order.[50] Jean d'Aspremont avers that;

> The theory of the softness of international law has been gaining significant currency in international legal scholarship over recent decades. Its proponents have argued that not only has law proven soft, but so have governance, law-making, international organizations, enforcement, and even – in a critical legal perspective – international.[51]

It further explains why some states have not complied with the decisions of the Court and still no corresponding punishment arises.[52] In *Armed Activities on the Territory of the Congo (DRC v. Uganda)*[53], Judge Oda warned that 'the repeated disregard of the judgments or orders of the Court by the parties will inevitably impair the dignity of the Court and raise doubts as to the judicial role to be played by the Court in the international community'. Up to date, Uganda has not paid DRC the amount of money the

[49] See, e.g., H. Lauterpacht, *The Function of Law in the International Community* (1933) 189 and *passim.* For an alternative but similar type of exposition, see D. Kennedy, *International Legal Structure* (1987). Article 2(5) of the UN Charter, 'All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.'

[50] Martti Koskenniemi; *The politics of International law*. Available at http://www.ejil.org/pdfs/1/1/1144.pdf

[51] Kennedy, ' *The Sources of International Law* ' , 2 *American U J Int'l L and Policy* (1987) 1, especially at 20 – 21; Makau Mutua and Antony Angie; *What is TWAIL*? Available at http://www.jstor.org/page/info/about/policies/terms.jsp; Abott and Snidal, '*Hard and Soft Law in International Governance*,' 54 *International Organization* (2000) 421; Dupuy, '*Soft Law and the International Law of the Environment,*' 12 *Mich J Int'l L* (1990 – 1991) 420, especially at 424; Klabbers, '*Institutional Ambivalence by Design: Soft Organizations in International Law* ' , 70 *Nordic J Int'l L* (2001) 403; Yoshida, ' *Soft Enforcement of Treaties: The Montreal Protocol's Noncompliance Procedure and the Functions of Internal International Institutions* ' , 95 *Colorado J Environmental L & Policy* (1999) 95; Boyle, ' *Some Reflections on the Relationship of Treaties and Soft Law* ', 48 *ICLQ* (1999)b 901, especially at 909.

[52] These cases (at least for a time) include *Corfu Channel, supra* note 37 (for a long time, it was the only case that could be cited as an instance of non-compliance. The case, however, was eventually settled through a memorandum of understanding reached in 1992 and implemented in 1996, 47 years after the original judgment), *Anglo-Iranian Oil Company* [1952] ICJ Rep 93*, Fisheries Jurisdiction* [1974] ICJ Rep 3*, Nuclear Tests* [1974] ICJ Rep 253*, United States Diplomatic and Consular Staff* [1980] ICJ Rep 3*, Nicaragua case* [1986] ICJ Rep 14, the *Armed Activities case, op. cit* 52 and the *La Grande case*. Although some of these cases eventually were complied with, most were to a substantial extent and others took a considerable time. See also Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice,* The European Journal of International Law Vol. 18 no.5, 2008.

[53] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda); Request for the Indication of Provisional Measures*, International Court of Justice (ICJ), 1st July 2000, available at: http://www.refworld.org/docid/3ae6b6e14.html [accessed 7 November 2013].

International Court of Justice ordered it to pay. If the Security Council refuses/fails to enforce a judgment against any other state, there is no method of forcing the state to comply.

IV. ENFORCEMENT BY THE GENERAL ASSEMBLY

Pursuant to Article 65(1) of the ICJ Statute and Article 96(1), of the United Nations Charter, the General Assembly has power to request for advisory opinions. If such opinions are given by the Court, the General assembly can pass a resolution to enforce them. The General Assembly is considered the weakest organ of enforcement because its resolutions are not binding.[54] This ultimately provides the states with the widest scope of exercising their right of consent. Such a weakness came to suffice especially in the aftermath of the Wall opinion.[55]

The General Assembly requested for an opinion from the International Court of Justice regarding the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions.

The ICJ rendered an extensive opinion to the effect that; The construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory,

[54] Pursuant to Article 10 of the UN Charter, the General Assembly is to make recommendations aimed at the protection and promotion of peace and security. These are however to first be referred to the Security Council (Article 11(2) of the UN Charter) and are to be made when requested for by the Security Council (Article 12 of the UN Charter). See Arangio-Ruiz*, The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations,* 137 Recueil des Cours (1972-III), at 446-47 ("[I]n so far as the letter of the Charter is concerned ... while it would be simply naive to look for a provision spelling out the non-binding character of unqualified General Assembly Resolutions, the relevant Articles do all that is necessary-- short of spelling it out in as many words-to exclude the binding character of such resolutions."); J. Castaneda, *Legal effects of the United Nations resolutions,* 2-3, 197 (1969)(the drafters of the ICJ statute knew very well that within the system of the new united nations charter, general assembly resolutions would not be binding); Restatement (revised) of the foreign relations law of the United States Paragraph 103 reporter's note (tent. draft no. 1, 1980); G.W Kerwin, *The Role of United Nations General Assembly Resolutions in determining principles of international law in United States Courts,* (1983).

[55] *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004, available at: http://www.refworld.org/docid/414ad9a719.html.

including in and around East Jerusalem, and its associated régime, are contrary to international law; Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem, to dismantle forthwith the structure therein situated, and to repeal or render ineffective forthwith all legislative and regulatory acts relating thereto, in accordance with paragraph 151 of this Opinion; Israel is under an obligation to make reparation for all damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem; All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention; The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory opinion.

Consequent to the delivery of the opinion, the General Assembly passed a Resolution A/*RES*/ES-10/15 of 2 August 2004 to enforce the opinion of the Court. Disappointingly, the opinion of the Court has not been complied with up to date by Israel. This was a derision of the Court's power and that of the General Assembly. It in essence proves the tempestuous nature of international law, which in the end produces little or no results, especially in terms of enforcement. Notably, the wall exists up-to-date. This is explained by the wide scope of consent States have that international law becomes torn between enforcement and striping the states of their consent.

Besides, even the passing of such resolutions for the maintenance of peace and security by the General Assembly is determined by the member states' consent and interests in the matter at hand. For instance, after the US had attacked Iraq, both the twenty-two-member Arab Group at the United Nations, and the fifty-seven-member Organization of Islamic

Conference (OIC), decided to introduce a resolution to convoke an emergency meeting of the General Assembly of the United Nations demanding an immediate end to the US invasion of Iraq.[56] Their intention was to demonstrate the overwhelming international opposition to US unilateral warfare and to discuss the means to bring about a withdrawal of all foreign troops from Iraq.[57] The Non-Aligned Movement of 115 nations, as well as several national governments, including Russia, China, Indonesia, and Jamaica, had also expressed their support for an emergency UN General Assembly session under the 1950 UN resolution 377.[58] The General Assembly could have achieved a number of purposes by adopting such a resolution and could certainly have put pressure on the United States and the coalition led by it not to use force against Iraq in disregarded of the rules of international law. Unfortunately, despite all the attempts, the clear statement made by the United States that 'if you are not with us you are against us', left hardly any options for the states that were willing to back a Uniting for Peace resolution.[59]

V. RECOMMENDATIONS

The main recommendation in redress to all the consent problems that exist in international law is the amendment of the United Nations Charter as the major international agreement to limit the states' consent. This is extremely necessary especially with regard to matters relating to violations of *jus cogens* and obligations *erga omnes*. The amendment can be done under Article 108 of the UN Charter.[60] Moreover, this still requires the consent of three thirds of the states composed of the General Assembly. The fact that this will not be the first time to amend the Charter,[61] points to

[56] K. Hossain, *The complementary role of the United Nations General Assembly in the maintenance of peace, Review of International Law and Politics (RILP), Vol. 4, No: 13, 2008, pp. 77-93.*

[57] *Supra*.

[58] Mike Billington, '*A 'Uniting for Peace' Resolution Could Demand End to U.S. War on Iraq*', Executive Intelligence Review, available at: http://www.larouchepub.com/other/2003/3014un_res_377.html.

[59] Justin Morris, '*United Nations Security Council: Prospects for Reform*', *McCoubrey Memorial Lecture* 2003, University of Hull, 28 May (2003), available at: http://hull.ac.uk/law/docs/mccoubreylecture03.doc.

[60] Article 108 of the UN Charter, 'Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.'

[61] The changes to the UN Charter, made by means of five amendments, were: 31 August 1965: Expansion of the UN Security Council from 11 to 15 members, with the supermajority required for action being increased from 7 to 9 votes; 31 August 1965: Expansion of UN Economic and Social Council from 18 to 27

the actuality that a matter as this which lies at the heart and efficiency of international law requires immediate attention, even more than some of the previous ones that led to the amendments.

VI. CONCLUSION

All in all, respect is awarded to the fact that States consider the Court as a place to settle their disputes even without a legal compulsion for them to do so, rather than resorting to war as it was in the first and second world wars. Additionally, no state wants to be viewed as a violator of International law thus most states try to enforce the Court's decision.[62] For instance, In the *case of the territorial dispute between Libya and Chad*,[63] The ICJ handed down judgment in February 1994, awarding the entire land in contention (Aouzou Strip) to Chad. Libya initially rejected the judgment, and reportedly began reinforcing troops in the Aouzou area. After a month of negotiations, however, Qaddafi indicated that he would accept the decision. Libya formally recognized the ICJ judgment's delimitation of its border at the Aouzou area on numerous occasions and, together with Chad, sought and received Security Council assistance to monitor the full withdrawal of Libyan troops, which ended on 30 May 994 after the last departure of Libyan forces. In a real sense, the ICJ decision effectively ended Libyan occupation of the Aouzou Strip.

It is additionally argued that enforcement is not, after all, the hallmark of what is meant, or what should be meant, by the term 'law.'[64] Harris reiterated that the existence of a police force or the military is not the proof of existence of law.[65] Roger Fisher observed that much of what we call 'law' in the domestic context is also unenforceable.[66] As

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members; 12 June 1968: Article 109 was amended; 24 September 1973: Expansion of the UN Economic and Social Council from 27 to 54 members by an amendment to Article 61 of the Charter, which was adopted by the General Assembly in 1971 and became operative on 24 September 1973.These amendments were adjustments to take into account increases in the UN membership, which has almost quadrupled since 1945.

[62] In the *case of the territorial dispute between Libya and Chad (Libya v. Chad),* 1994 I.C.J. 7 (Feb. 3).

[63] *(Libya v. Chad),* 1994 I.C.J. 7 (Feb. 3).

[64] Anthony D'Amato; *Is International Law Really "Law?",* Northwestern Law Review 1293 (1985), (Code A853).

[65] D. J Harris, *Cases and Materials on International law,* 3rd Edition 1983.

[66] Fisher, '*Bringing Law to Bear on Governments'*, 74 Harvard Law Review, 1130 (1961), excerpted in B. Weston, R. Falk & A. D'amato, *International law and world order* 125-30 (1980). R. Fisher, *Improving*

Louis Henkin put it, 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.'[67] This statement in a sense follows tautologically from the fact that there is an international system of legal rules. Clearly, the rules that have evolved over time are the ones that nations have found to be in their collective self-interest; this is simply a Darwinian process applied to customary international law. Professor Henkin's statement however while tautological, is not vacuous; after all, nations might have instead evolved into a non-rule anarchical system. As averred by Rebecca Wallace, international law is a young, immature system which is constantly evolving and developing. The hallmark being the maintenance of peace among States as envisaged under the UN Charter, which aim has largely been met.

compliance with international law 39-72, 236-300 (1981). For example civil law that entitles the offended party to damages.

[67] L. Henkin, *How nations behave*, 2nd Ed. 1979.

POST WASHINGTON CONSENSUS: HAVE THE 2010 GOVERNANCE REFORMS AT THE WORLD BANK AND IMF ADDRESSED THE CONCERNS OF THE DEVELOPING WORLD?

Walyemera Daniel Masumba*

ABSTRACT

The creation of the Bretton Woods institutions by the victor powers after Second World War was inspired by two justifications. First, was to advance the reduction of tariffs and barriers to international trade and secondly, to create a global economic framework to minimize the economic conflicts among nations which at least in part, were held to have been responsible for the outbreak of the second World War. The Washington Consensus emanates from a set of ten recommendations identified by Economist John Williamson. The "consensus" was premised on influential ideas originating from think tanks around Washington. These think tanks were obviously supported by the US Congress and Administration on what economic model the developing world needed to get to the developed World. These ideas then found their way into Washington based IMF and World Bank. The institutions implementation of the said ideas, which included the so called Structural Adjustment Programs (SAPs) had devastating impact on the developing World. In 2008, with the occurrence of the financial crisis in the western world, they woke up to the realities that free market economy model required state intervention to correct its failures. The 2010 institutional and legal reforms at the IMF and World Bank are geared towards giving more "voice" to the developing world in the two institutions. To what extent do the governance reforms at both the World Bank and IMF alter the legal and institutional frameworks in a manner that addresses the concerns of developing countries within the context of the Post Washington Consensus?

I. INTRODUCTION

The Atlantic Charter of 1941 envisaged the establishment, of a liberal international economic order[1], the idea was supported by United States and United Kingdom, to increase international economic transactions on the basis of equal market access conditions[2].

*LL.M Candidate, School of Law, Makerere University.

[1] Malanczuck, P. "*Akehurst's Modern Introduction to International Law*," p.223

[2] Ibid.

The modern global system of international economic regulation between states rests upon the multilateral system established by the Bretton Woods conference of 1944[3]. The two main objectives of the conference were, first, to advance the reduction of tariffs and barriers to international trade[4], and second, to create a global economic framework to minimize the economic conflicts among nations which at least in part, were held to have been responsible for the outbreak of the second world war[5].

The conference led to creation of three basic international economic institutions regulating money and trade[6]: the International monetary Fund (IMF), The International Bank for Reconstruction and Development (IBRD), also known as the World Bank and later the General Agreement on Tariffs and Trade (GATT)[7].

II. THE WASHINGTON CONSENSUS

The term "Washington Consensus" comes from a simple set of ten recommendations identified by economist John Williamson in 1989[8]: 1) fiscal discipline; 2) redirecting public expenditure; 3) tax reform; 4) financial liberalization; 5) adoption of a single, competitive exchange rate; 6) trade liberalization; 7) elimination of barriers to foreign direct investment; 8) privatization of state owned enterprises; 9) deregulation of market entry and competition; and 10) secure property rights[9]. The reference to "consensus" meant that this list was premised on the ideas shared at the time by power circles in Washington, including the US Congress and Administration, on the one hand, and international institutions such as the Washington-based IMF and the World Bank, on the other, supported by a range of think tanks and influential economists[10].

A. The International Monetary Fund (IMF)

[3] Sillard, SA. "*Financial Institutions, Intergovernmental*," EPIL II (1995), 378-81.
[4] Opt. Cit.
[5] Ibid.
[6] Ibid.
[7] Ibid.
[8] Lopes, C. "*Economic Growth and Inequality: The New Post-Washington. Consensus,*" RCCS Annual Review, 4, October 2012. P.2; A different version of this article was published in English in *Géopolitique Africaine*, 43 (2012), with the title "*Is There a post-Washington Consensus?".*
[9] Ibid.
[10] Ibid.

The main ideas that led to the creation of the IMF rest upon proposals made by renown Economists John Maynard Keynes (UK) and Harry Dexter White (USA).[11] According to article IV of the IMF Articles of Agreement, the essential purpose of the international monetary system is "to provide a frame work that facilitates the exchange of goods, services and capital, among countries, and that sustains growth."[12]

Furthermore article 1 prescribes the purposes of the IMF[13]. The rights and duties of the members are based upon the economic and financial position of the members and which also determine the level of financial contribution of the members to be made to the Fund[14]. The main organ of the IMF is the Board of Governors composed of one governor and an alternate nominated by each member (usually the Minister of Finance or Central Bank Governor are nominated). The executive board has at least twenty executive directors, five of whom are appointed and fifteen are elected[15]. The members with the largest five quotas have the right to appoint directors[16]. They are United States, United Kingdom, Germany, France and Japan[17]. A maximum of up to two additional directors, maybe appointed by other members under certain conditions[18]. The voting system is weighted and puts the actual decision making power into the hands of the group of Western states with the largest quotas[19].

A rather controversial issue in this connection is the "conditionality" of loans offered by the IMF and the World Bank to developing countries with huge debts[20]. Such required structural adjustment policies often have painful social consequences for the populations of developing countries[21]. Whether they are effective is a matter of debate[22].

[11] Gold, J. "*International Monetary Fund*," EPIL (11995), 1271-8.
[12] TIAS No. 1501 (1947), (original articles).
[13] Ibid.
[14] Malanczuck, Op.Cit. p.226
[15] Ibid.
[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] Ibid; Also See Article XXX Lit.d, Articles of Agreement of IMF.
[21] Malanczuck, Op.Cit. p.227.
[22] Ibid.

B. The World Bank

The International Bank for Reconstruction and Development (World Bank) was set up together with the IMF at the 1944 Bretton Woods conference[23]. As set forth in Article 1 of its Articles of Agreement, the purposes of the World Bank are to assist in the reconstruction and development of territories of members, among others[24].

The bank was originally concerned with reconstruction after the Second World War and is nowadays primarily occupied with granting loans to developing countries to finance particular projects to improve infrastructure and economic development in the south in general[25].

Membership of the World Bank requires membership of the IMF; therefore the two organizations have the same circle of member states[26]. The voting system and structure of the main organs is similar to the model of the IMF; thus the largest shareholders enjoy a privileged position according to their financial input[27].

It was development economics that had often guided policies experimented in developing countries before the Washington Consensus era[28]. Most independent African governments, for example, sought to promote industrialization, in an effort to develop local production and reduce imports, promote employment, raise the standard of living, and break out of the vicious circle of trade patterns epitomized in the Prebisch-Singer hypothesis[29] (unfavorable terms of trade for commodity-exporting and manufacturer-importing countries)[30].

The Washington Consensus' recipes, by contrast, were presented as universal, similarly applicable in the context of developed and developing countries, even if they ended up being implemented in a discriminatory and uneven fashion[31]. Washington Consensus

[23] Shihata, IF. "*The World Bank in a changing World*," Selected Essays, 1991.
[24] IBRD Articles of Agreement. (amended text in 1967).
[25] Head, JW. "*Evaluation of Governing Law for Loan Agreements of World Bank and other multilateral Banks*," AJIL, 90(1996), 213-34.
[26] Malanczuck, Op. Cit.
[27] Ibid, p.227
[28] Ibid.
[29] Ibid.
[30] Ibid.
[31] Ibid.

policies were applied for more than two decades in such diverse contexts as Africa, Latin America and Asia, as well as in countries emerging from real socialism in Eastern Europe and Central Asia[32]. There were usually two major stages of intervention: the first focused on macroeconomic stability and structural adjustment programs, and the second included such objectives as improving institutions, reducing corruption or dealing with infrastructure inefficiency[33].

The conditionality exercised by the Bretton Woods institutions and wealthy countries played a crucial role in indebted countries' decisions to push through macroeconomic stabilization reforms and structural adjustment programs[34]. The debt crisis that first affected a number of Latin American countries and then African and Asian countries, in the 1970s and 1980s[35], further increased their dependence on external loans, leaving them no other option than to follow the prescriptions that enabled them to access financing[36].

It is now commonplace to say that structural adjustment (SAP) and macroeconomic stabilization programs had a disastrous impact on social policies and poverty levels in many countries[37]. Following the first wave of reforms undertaken by debt-affected African and Latin American countries – which included public expenditure cuts, introduction of charges for health and education, and reductions in industrial protection, leading to high unemployment, poverty rise and unequal income distribution – UNICEF published the report[38], which called for "meso-policies" to be redirected towards protecting social and economic sectors that were essential to the survival of the poor, through the introduction of social protection programs[39]. The period of structural adjustment programs in sub-Saharan Africa in the 1980s was characterized by poor economic performance[40].

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[32] Ibid.
[33] Naim, Moses (1999), "*Fads and Fashion in Economic Reforms: Washington Consensus or Washington Confusion*." Working Draft of a Paper Prepared for the IMF Conference on Second Generation Reforms, Washington, D.C. 26 October. Available online at http://www.imf.org/external/pubs/ft/seminar/1999/reforms/naim.htm.
[34] Lopes, Opt. Cit. p.3
[35] Ibid.
[36] Ibid.
[37] Ibid.
[38] UNICEF *"Adjustment with a Human Face"* (1987).
[39] Ibid.
[40] Ibid.

It is thus not surprising that macroeconomic stabilization and structural adjustment policies prompted a wave of popular unrest that contributed to the recrudescence of many civil wars in the 1990s[41].

III. THE STRUCTURAL CONSEQUENCES OF THE WASHINGTON CONSENSUS[42]

The rapid economic growth registered in many regions of the South in the first decade of the 21st century, accompanied by expanding trade and investment, offset the worries of the financial markets, which ignored the signs of the impending storm[43]. In 2008, however, the crème de la crème of the economist profession, as well as the governments of rich countries, finally had to face the inconvenient truth about the imperfection of markets[44]. Massive and uncontrolled financial speculation has produced the worst global economic crisis since the Great Depression, suddenly revealing a number of structural "diseases" that the Washington Consensus had been hiding under the rug[45].

A. The Impact of the Financial Crisis on the Washington Consensus

The reconfiguration of economic geography started exerting pressure on the old and inadequate governance structures of the IMF and World Bank established after the Second World War[46]. As a result, they began a slow process of reform that included the redistribution of voting shares[47]. First, the voting share of Sub-Saharan Africa rose by 3%, but continues to represent only 1.4% of the total[48]. After a second round of revisions, China's calculated quota share rose from 6.38 to 7.47%, which placed it ahead of Japan (whose calculated quota declined to 6,99%), but still behind the United States, with 17.8%[49]. The total share of the European Union is estimated to fall from 25% in 2000 to 18% in 2015[50]. Similarly, as a result of the reform of the World Bank governance, only

[41] Ibid.
[42] Lopes, Opt. Cit. p.5
[43] Ibid.
[44] Ibid
[45] Ibid.
[46] Ibid.
[47] Ibid.
[48] Ibid.
[49] Ibid.
[50] Ibid.

3.3% of votes have been transferred from OECD to developing countries[51]. China's share rose from 2.77 to 4.42%, thus turning it into the third largest shareholder after the US and Japan[52]. However, the US continues to be the leading player, holding 16.85% of voting shares, while more than one-third of African countries saw their shares actually decrease[53]. The financial downturn signaled the need for more radical transformations within the IMF[54].

*B. **Post Washington Consensus***

The return of the State onto the scene to correct market failures is inevitable[55]. Ha-Joon Chang[56] remarks that "industrial policy is conspicuous by its absence," reminding us of the export-oriented industrial policy experience of South Korea: "sustainable export success over a long period of time, for which the country is justly famous, requires protection and nurturing of 'infant industries' through selective industrial policy, rather than free trade and deregulation." In contrast to the "one size fits all" approach promoted by the Washington-based institutions, Koreans speak of a "dynamic iPhone model" or "a set of development apps for every occasion, drawn from successful approaches in different countries"[57]. Dani Rodrik[58] points to a "broader intellectual shift within the development profession, a shift that encompasses not just growth strategies but also health, education, and other social policies." He contrasts a traditional policy framework, which is "presumptive," starts with "strong preconceptions," produces recommendations in the form of a "laundry list" of reforms, and is "biased toward universal recipes," with the new policy approach, which emphasizes pragmatism and experimental gradualism[59].

[51] Ibid.
[52] Ibid.
[53] Ibid.
[54] Ibid.
[55] Lopes, Op. Cit., p 14.
[56] Chang, Ha-Joon (2010), "*It's time to reject the Washington Consensus*," *The Guardian*, 9 November. Available online at: http://www.guardian.co.uk/commentisfree/2010/nov/09/time-to-rejectwashington-seoul-g20
[57] Ibid.
[58] Rodrik, Dani (2008), "*Is there a new Washington Consensus*?" *Project Syndicate*, 11 June. Available online at: http://www.project-syndicate.org/commentary/is-there-a-new-washington-consensus-
[59] Lopes, Op. Cit., p 14.

What Rodrik recommends is avoiding "both market fundamentalism and institutional fundamentalism," and letting each country "devise its own mix of remedies."[60]

After a long period of Washington Consensus orthodoxy, the blossoming of alternatives and the variety of approaches are refreshing, all the more so since many of their proponents are part of "the system," so to speak[61]. We are living in exciting times marked by the demise of the ideology that has guided Western policymakers and was imposed on the rest of the world for nearly three decades[62].

*C. **Reforms within the IMF***

Following years of discussions between IMF members, the 2010 IMF reforms have been the most significant since the creation of the said financial institution in the 1940s.

1. Emerging market countries to have bigger say in IMF governance

The discussions centered around three changes as follows; First, the fast-growing emerging market countries will have a bigger say in how the institution is run and how it interacts with its membership[63]. For the first time, the combined voting power of the United States and the current European Union members will fall below 50 percent[64].Although largely symbolic, this transition has the potential to change the culture of the institution[65]. Because the reform also looks forward so that future changes in countries' growth rates can be incorporated every few years, it overcomes at least some of the inertia that has tethered the IMF to the past[66]. Asia and Latin America will gain in influence in the short term, and Africa can be accommodated as its economic performance continues to improve[67]. Advanced European countries will have fewer seats on the Executive Board but will have the opportunity to consolidate their positions and become more effective as a group[68]. These changes will be difficult to complete because

[60] Rodrik, Op. Cit.,p 14.
[61] Lopes, Op. Cit.,p. 15.
[62] Ibid.
[63] Boughton, J (2010). "The Year of IMF Reform," accessed at: http//www.iMFdirect.org.Posted on December 28, 2010. James Boughton is an IMF Historian.
[64] Ibid.
[65] Ibid.
[66] Ibid.
[67] Ibid.
[68] Ibid.

they require sensitive political commitments by several countries[69]. Whether they will improve the policies and decisions of the Fund depends on how the emerging markets—countries that are still developing their roles in the international economy—choose to use their new influence and how receptive the traditional powers prove to be[70].

2. Flexibility in IMF Lending

Secondly, the institution has become much more flexible in the way it lends money[71]. When the IMF made its first loans in 1947, it had just one technique: an immediate currency swap (the borrower's domestic currency exchanged for a convertible currency, usually U.S. dollars)[72]. It gradually expanded the repertory to include stand-by arrangements, extended (larger and longer term) arrangements, more favorable terms for loans to cover commodity price shocks or loans to low-income countries, and other special-use facilities[73]. At the end of the 1990s, the Fund had at least ten lending facilities, but all of those that were in active use required the borrower to undertake a detailed program of macroeconomic and structural reforms[74]. Recently, however, after many years of failed attempts, the IMF has succeeded in setting up lending facilities that are more suitable for countries with good track records and solid commitments to implement good policies on their own[75].

The goals of this reform are to improve the Fund's ability to avert financial crises and to respond more flexibly to borrowers' needs[76]. The new facilities may also help reduce the stigma that has long been associated with asking the IMF for support[77]. The main challenge will be to ensure that borrowers do carry out strong policies, put their financing difficulties behind them, and repay the loans when they fall due[78]. Past efforts by the Fund to be more flexible failed in part because weak loan conditions often were followed

[69] Ibid.
[70] Ibid.
[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] Ibid.
[75] Ibid.
[76] Ibid.
[77] Ibid.
[78] Ibid.

by weak national economic policies, and in part because the conditions were still considered to be stigmatic[79]. Finding the right balance between discipline and flexibility is bound to be an ongoing test[80].

3. *IMF to reduce the need to borrow from creditor countries to finance large lending operations*

Thirdly, the general financial resources of the IMF, which usually have been quite scarce in relation to member countries' financing needs, are to be doubled[81]. That increase, however, is to be matched by a rollback in the Fund's standing borrowing arrangements[82]. The main immediate effect of this reform, therefore, will not be to increase the amount that the IMF can lend, but rather to reduce the need for the Fund to borrow from creditor countries to finance large lending operations[83]. The challenge in coming years will be to ensure that the IMF's resources are adequate, are used well, and do not become a substitute for the difficult policy reforms that can be made only when manifestly necessary[84].

D. Ongoing Impact of 2010 IMF reforms

Apart from the three significant changes to the corporate governance of the IMF, some other changes may be inevitable, following the 2010 reforms. One major ongoing effort is for any future competition for the leadership of the IMF to become more open[85]. All of the Fund's ten Managing Directors have been European[86]. All eight of the Deputy Managing Directors (First Deputies since 1994) have been from the United States[87]. For the past decade, while non-European candidates for Managing Director have been nominated but ultimately rejected, pressure has been intense for the selection process to be open fully to all candidates without regard to geography[88].The IMF's Executive

[79] Ibid.
[80] Ibid.
[81] Ibid.
[82] Ibid.
[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] Ibid.
[87] Ibid.
[88] Ibid.

Board, which selects the Managing Director, agreed in principle several years ago to open up the process, but winning higher political support for the reform has not been easy[89]. The IMF of the next decade will continue to evolve to reflect the rapid and major transformations in the world economy[90].

E. Reforms at the World Bank

In a speech in April 2010, World Bank president Robert Zoellick (2010) argued that the advent of "a new, fast-evolving multipolar world economy" required fundamental reforms of the World Bank itself, including in the balance of power between developed countries and emerging countries[91]. Soon after, the World Bank presented a set of ostensibly far-reaching proposals on "voice reform", to be endorsed by its Board of Governors, the culmination of negotiations begun years before[92]. Voice reform had several components, of which the central and most contentious one was voting reform to give developing and transition countries (DTCs) more voting power in the Bank's governing body[93].

The Governors approved the proposals at the 2010 Spring Meetings of the World Bank and International Monetary Fund (IMF), and the Bank launched them under the headline, "New World, New World Bank"[94].

Scholars[95] have criticized the 2010 World Bank reforms as empty, considering what the intent of the reforms were in the first place. The voice reform was guided by several ostensible objectives[96]. One was "parity" between developing and transitional countries (DTCs) and developed countries[97]. A second was alignment of countries' voting shares

[89] Ibid.
[90] Ibid.
[91] Wade, RH and Vestergaard, J. "*The future of the world bank: why more "voice reform" is needed,*" Conference Paper on future of World Bank and IMF, Williams College, 27-28 September 2012.
[92] Ibid.
[93] Ibid.
[94] Ibid.
[95] Wade and Vestergaard, Op. Cit.
[96] Ibid.
[97] Ibid.

with their relative economic weight[98]. A third was to protect low-income countries from loss of shares[99].

Wade and Vestergaard[100] argue that the actual outcome did not reflect the objectives of the reforms and here is why;

1. *No increase in voice reform*

First, they contend that the voice reform increased the share of developing and transitional countries (DTCs) from 42.60 % to 47.19 % and reduced the share of developed countries from 57.40 % to 52.81 %[101]. So at first glance, the voice reform brought the World Bank close to voting power parity (50%) between developed and non-developed countries, in line with one of its stated objectives[102]. In reality, the shift was much more modest, because the DTC category includes several high-income countries which should not be in the developing country category and do not borrow from the Bank[103]. Including only low-income and middle-income countries, the Bank's borrower members, the voting share of developing countries (in the proper sense of the term) increased from 34.67 % to only 38.38 % while the developed (high-income) countries retained more than 60 %[104].

2. *Voting share with economic weight*

Secondly, Wade and Vestergaard further argue that relative to the objective of realigning country voting power with country economic weight, the realignment fell well short[105]. The upshot is that ratios of "share of votes to share of world GDP" continue to vary widely from country to country, from 0.5 (China) to 4 (Saudi Arabia), despite the often-declared principle that voting power should "largely reflect economic weight" (so that

[98] Ibid.
[99] Ibid.
[100] Ibid.
[101] Ibid.
[102] Ibid.
[103] Ibid.
[104] Ibid.
[105] Ibid.

each country's ratio should be fairly close to 1)[106]. The difference in the extent to which GDP translates into voting power weakens the legitimacy of the World Bank's governance[107].

3. No gain in voting power by low income countries

Thirdly, they further contend that despite repeated assurances to the contrary, low-income countries as a group (as distinct from middle-income countries) gained hardly any voting power[108]. This reflects a pattern of marginalizing the interests of the low-income countries in the voice reform[109]. The culmination of this trend was the decision to make only a very small increase of "basic votes" (votes allocated equally to all countries), leaving the share of basic votes in total votes at only about half of what it was when the World Bank was established in 1944[110].

4. No criteria for reallocation of votes in future

Fourthly, Wade and Vestergaard reiterate that the voice reform made no headway in reaching agreement on criteria for reallocating votes in future (except for the agreement that shareholding reviews be conducted every five years)[111]. For example, it is unclear whether the next shareholding review in 2015 will take "voting power parity" between developed countries as a group and DTCs as a group as the central objective, and whether and how a country's financial contributions to IDA (the soft-loan arm of the World Bank) should be recognized in its share of IBRD votes (IBRD being the main lending arm)[112].

[106] Ibid.
[107] Ibid.
[108] Ibid.
[109] Ibid.
[110] Ibid.
[111] Ibid.
[112] Ibid.

5. Shares and capital contributions

Fifth, they further contend that the voting shares announced in the voice reform of 2010 are "rights" to subscribe to a given number of shares[113]. But a government may not exercise its right to subscribe, especially because shares must be matched by capital contributions[114]. Governments have until 2015 to finalize their subscriptions[115]. So until that time the actual distribution of votes will change as governments decide how much of their entitlement to subscribe to. So far, most low-income countries have not subscribed to their full entitlement and many have not subscribed to an increase at all and have thus lost voting share[116].

Wade and Vestergaard contend that by 2015 more low-income countries may take up their entitlement (if their governments agree to pay more money), so they might in the end not experience a loss of voting shares[117]. But there is no reason to think that the rich countries which backtracked on "voluntary forbearance" will suddenly again become virtuous[118].

IV. CONCLUSION

The 2010 governance reforms at the Bank and Fund have to some extent addressed the concerns of the developing countries, in view of the post Washington consensus that recommends that "one size fits all" economics that was espoused by both institutions will not work. The 2010 legal and institutional reforms at both institutions, if well implemented, will enable developing countries have "more voice" at the Bank and Fund, consequently resulting into each member country having its own mix of economic remedies.

[113] Ibid.
[114] Ibid.
[115] Ibid.
[116] Ibid.
[117] Ibid.
[118] Ibid.

COMMAND RESPONSIBILITY AND THE QUESTION OF SUCCESSOR RESPONSIBILITY.

Jonathan Kiwana Sentongo*

ABSTRACT

After the heinous atrocities of the Rwandan genocide, the world swore to never again see such. This resolve led to the establishment the International Criminal Tribunal for Rwanda (ICTR) in 1994 to punish those most responsible for the crimes committed during the Rwandan genocide.[1] *In the course of its work, one concept of international criminal law jurisprudence that has grown to leaps and bounds is the doctrine of command/superior responsibility. In this article, I will examine the nature and rationale of the doctrine; its historical development and the way it has been applied at the ICTR and her sister court the International Criminal Tribunal for Yugoslavia (ICTY). In examining this doctrine, I will also highlight some gaps in the law in general but in particular what I consider as a gap in as far as the issue of successor command responsibility.*

I. NATURE AND RATIONALE

Command responsibility or superior responsibility is a doctrine whereby commanders or superiors of any other nature are held liable for unlawful conduct of subordinate members of their armed forces or other persons subject to their control.[2] In essence, command responsibility imposes criminal responsibility for a superior's failure to act when under a duty to do so. It requires that superior had either actual knowledge or constructive knowledge of crimes by subordinates or had committed gross negligence that contributed to their commission coupled with a failure to act.[3] It is a sui generis form of liability for culpable omission.[4]

Mettraux explains that the core of the commander's culpa and the basis of his liability stands, not in the contribution that he has made to the crime of the subordinate but in

*Graduate of Law from Uganda Christian University, 2013 and currently a Bar course student at Law Development Centre.

[1] Available at http://www.unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx.

[2] Prosecutor *v Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo* (*Celebici Case*) Trial Judgment Case No. IT-96-21-T Para 333; Burnett Weston; *Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Program at Shalita and Sabra*; 1985, 107 Military Law Review 71. page 76.

[3] *Prosecutor v Tihomir Blaskic*, Appeal Judgment IT-95-14-A (29th July, 2004). Para 63, *Prosecutor v Ignace Bagilishema*, Appeal Judgment ICTR-95-1A-A (3rd July,2002) Para 35 (herein after *Bagilishema Appeal* Judgment).

[4] Guenael Mettraux; *The Law of Command Responsibility*; Oxford University Press, 2009, page 38.

culpable dereliction of his duty.[5] There is a likelihood of confusing aiding and abetting and the doctrine of command responsibility however they are not the same. The action of an aider and abettor has the 'substantial effect' on the commission of the crime yet the failure of a superior to act by contrast, was just a 'significant contributing factor' in the commission of the crime.[6] It is also important to note that it is not a form of vicarious liability; it imposes upon a commander criminal responsibility for failure to take corrective action it does not make the commander a party to the crime committed by that other party.[7]

In the recent past, international tribunals have held natural persons individually responsible for their involvement in international crimes such as genocide, crimes against humanity and war crimes. Even though these crimes are usually physically committed by a large number of individual perpetrators who often remain unidentified, the commanders over these individuals will be held responsible. The reason for this is that it is often impracticable for these tribunals to investigate, identify and prosecute all the persons who physically carried out these crimes on the ground.[8] Furthermore, it became apparent soon after World War I that those in military or civilian authority provided a cornerstone for the good conduct of those under their command and hence should carry some liability for their actions.[9] It has generally been seen as one of the most effective methods by which international criminal law can enforce responsible command.[10]

II. THE LAW ON COMMAND RESPONSIBILITY

Command responsibility has been codified in the Additional Protocol I.[11] Article 86 (2) deals with the notion of a superior failing to act, stating that guilt is imputed:

[5] *Ibid*, at page 40.
[6] *Ibid*, at page 43.
[7] Judge Shahabudeen's partially Dissenting Opinion in *Hadzihasanovic Appeal* Decision, para 52.
[8] Judge Bakone Justice Moloto; *Command Responsibility in International Criminal Tribunals*; 2009 Berkley Journal of International Law Publicist Volume 3, 2009, 12.
[9] Page 573; supra note 2.
[10] *Prosecutor v. Hadzihasanovic et al.* Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (July 16, 2003) [hereinafter "*Hadzihasanovic* Appeals Decision on Jurisdiction"] Para 16.
[11] Protocol Additional to the Geneva Conventions of 12 August 1949, 1977.

> ……if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Article 87(1) goes on to state the requirement for military commanders "to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions of this Protocol." Article 87(3) further provides:

> …….Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

A. Command responsibility; The custom

With the coming into force of the Additional Protocol I, it can safely be asserted that the doctrine of command responsibility is part of the body of international customary law. In the *Celebici Appeal* Judgment, the appeal chamber declared itself on the matter thus: "**(t)**he principle that military and other superiors may be held criminally responsible for acts of subordinates is well established in conventional and customary law."[12](Emphasis mine)

For a rule to be recognized as customary, it must be seen to be practiced by States in a manner that such practice is regarded as a matter of law.[13] Indeed this rule has met these requirements and is now recognized by the International Committee of the Red Cross as Rule 153 of International Customary Law with many States including it in their military manuals and several tribunals applying the doctrine albeit in variant forms.[14] For this

[12] *Celebici Appeal* Judgment Para 195, *ibid*.

[13] Article 38(1)(b); See also ICRC discussion of Customary International Law, Available at http://www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law/index.jsp.

[14] For an in depth study of Command Responsibility as a Custom visit ICRC website discussing Rule 153, Available at http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter43_rule153.

article however, I will only delve into the ways this doctrine has been applied at the ICTR and the ICTY.

III. THE ICTY AND THE ICTR.

The greatest contributors to the jurisprudence pertaining to command responsibility have been the ad hoc tribunals of Yugoslavia and Rwanda.[15] On May 25th, 1993, United Nations Security Council Resolution 827 effectively established the International Tribunal for the former Yugoslavia (ICTY) to deal with war crimes that took place during the conflicts in the Balkans in the 1990's.[16] In similar fashion, in November, 1994, the United Nations Security Council Resolution 955 effectively established the International Criminal Tribunal for Rwanda (ICTR) in recognition that serious violations of humanitarian law were committed in Rwanda, and acting under Chapter VII of the United Nations Charter. The purpose of this measure is/was to contribute to the process of national reconciliation in Rwanda and the maintenance of peace in the region.[17] Notably, it was established to deal with a non-international conflict yet still contained the doctrine of command responsibility under Article 6(3)[18] an equivalent of the ICTY's Article 7(3).[19]

Article 6(3) of the ICTR provides for command responsibility as follows:

> The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the

[15] Judge Bakone Moloto, page14.
[16] See http://www.icty.org/sections/AbouttheICTY.
[17] See http://www.unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx.
[18] Statute for the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other such violations committed in the Territory of and Neighbouring States between 1 January 1994 and 31st Dec. 1994 S.C Res.955 Annex UNSCOR 49th Sess-Res 8th Dec. S/INF/50 (1994).
[19] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993).

necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

The appeal chamber shared by the ICTY and the ICTR has given the elements of the doctrine as follows: Firstly, the existence of a superior-subordinate relationship between the accused as a superior and the perpetrator of the crime as a subordinate secondly; that the superior knew or had reason to know that the crime was about to be or had been committed (the *mens rea* required) and that the superior failed to take the necessary and reasonable measures to prevent the criminal acts or punish the perpetrators thereof.[20]

A. Superior-subordinate Relationship

The doctrine of command responsibility is ultimately predicated upon the power of the superior to control acts of his or her subordinates. This was pointed out in the *Hadzihasanovic Appeal* Judgment[21] that the doctrine of command responsibility applies to both international armed conflicts and non-international armed conflicts and that what matters is that the commander had a force under his command and not the theatre in which the acts were committed. Moreover, such superior need not be a military leader only but even a political leader or civilian may qualify under the title superior. The hierarchical relationship demanded by command responsibility may either be direct or indirect. This means that a commander could be held responsible not only for acts of immediate subordinates but also those who are subordinates of subordinates as long as he may be shown to have had effective control over them albeit through others.[22] This subordination may be either; *de jure* or *de facto*.

1. De jure subordination

This is the assumption of power through official delegation of command from a pertinent office. It is thus the most obvious way to gain authority over others. It however does not have to be a formal status only but in absence of a formal grant, the accused must be

[20] *Prosecutor v Juvenal Kajelijeli* ICTR-98-44T Para 772, *Prosecutor v Zlatko Aleksovski* IT-95-14/1A Appeal Judgment Para 72 & 76, *Celebici Appeal* Judgement Paras 189-198, 225-226, 238-239, hereafter *Balskic Appeal* Judgment Para 484, *Bagilishema Appeal* Judgment Para 24.
[21] Discusssion in Paras 11-31.
[22] *Prosecutor v Laurent Semanza* Trial Judgment Case No. ICTR-97-20-T.

found to actually possess the right to control subordinates.[23] Generally, de jure authority is determined by reference of accused in the overall organization on question. For example in the *Akayesu* case[24] which involved allegations of incitement and complicity of a Rwandan local civilian official for the actions of others resulting into genocide against the Tutsi residing in his commune.

The ICTR Trial chamber advanced that according to Rwandan law, *Akayesu's* position as *bourgmestre* placed him as : 1)The head of the communal administration, 2) The *officer de le'etat* and 3) The person responsible for maintaining and restoring peace. This was sufficient to establish *Akayesu's de jure* authority as a necessary element of his conviction for the crime of genocide. Generally, de jure power determines one's competence and jurisdiction in the sense that authority to take action or intervention is confined to a predefined field beyond which there exists no competency and subsequently no liability. This of course becomes difficult where there is no legislation to go by. Four sources may be cited for de jure command. These are generally a hierarchical model built upon a vertical scale from decision makers to foot soldiers.

i. Policy Command- Power to determine policy objectives and consequently the power to commit or withdraw a State's armed forces. It may be exercised by State leaders either individually or collectively. Holders of such command may be the Head of State and Minister of Defense.

ii. Strategic command- Military authorities responsible for producing viable military plan to achieve policy command objectives. This is usually drawn up by Joint Chiefs of Staff in conjunction with other senior government officials and requires authorization to implement.

iii. Operational Command- This is usually composed of senior military officers commanding midlevel groupings of forces many in form of corps or divisions. These don't issue orders directly to troops but to commanders of smaller groups.

[23] *Celebici Appeal* Judgment; Para 370.
[24] *Prosecutor v Jean Paul Akayesu* Trial Judgment ICTR-96-4.

iv. Tactical command- These are at the end of the scale and exercise immediate command over troops.[25]

2. De Facto subordination

Superiority does not mean superiority only in rank,[26] since it could happen in an illegal enterprise that a Captain guides the Major, rather it is the power to force a certain act; power to demand and an actual capacity to impose obeisance.[27] Ultimately what international law looks at as the actual and effective control and not merely the formality.[28]

The discovery of de facto subordination is not as obvious as de jure subordination. The ICTY however has pointed out some indicators for de facto subordination. In the *Nikolic* case,[29] the ICTY found that one's superior status may be derived through an analysis of the distribution of tasks within a specific combat unit or prison camp. For example in the *Furundzija* case,[30] which concerned the murder and ill treatment of civilian detainees by Bosnian Croats paramilitaries, ICTY Trial Chamber accepted that the accused was the commander of a local Croatian Defense Council (HVO) unit, 'the Jokers' because he was in charge of interrogations and was called "boss" by members of his unit. Similarly, Bantekas[31] also points out de facto command may be deduced from the influence one exerts over others upon whom he has effective control. Bantekas also points out that the capacity to issue orders is another way to determine de facto authority. For example, the signing of release orders in the *Celebici* case was used to demonstrate authority and thus accused; *Mucici's* command status was amply established.[32]

[25] Page 581, Bantekas (supra).
[26] *Prosecutor v Dragoijub Kunarac, Radomir Kovac and Zoran Vukovic* IT-96-23 Trial Judgment Para 398.
[27] This Concept is also discussed in the *Sadaiche case* in the United States Military Tribunal 15 Law Reports, 31 at 175 (1949) where the accused was a commanding officer of a Prisoners of War camp and was held liable because he led to acquiescence by his "more powerful adjutant."
[28] As seen in *Celebici Appeal* Judgment para 377.
[29] *Prosecutor v Nickolic* (Review of Indictment Pursuant to Rule 61 of Rules of Procedure and Evidence Case No. IV-94-2-R61 Para.24.)
[30] *Prosecutor v Anton Furundzija* Case No. IT-95-17/1-T.
[31] Supra at Pg. 582.
[32] *Celebici* Trial Judgment Para 764.

3. Concurrence of De facto and De jure subordination.

Such instances are not uncommon especially in the ICTY and ICTR. In fact, in the context of the Rwandan conflict, the ICTR noted that the unique position of '*bourgmestre*' usually endowed upon the holder de facto authority far greater than the de jure authority.[33] Generally in the determination of a superior- subordinate relationship, the court will determine whether the superior had actual power to control the actions of his or her subordinates. To determine this, Tribunals have applied the "Effective Control Test". This test aims to determine whether the superior has "the material ability to prevent and punish the criminal conduct." If he does, then there is a legal basis for command responsibility.[34]

B. Mental Element/ Mens Rea

Command responsibility is not a form of strict liability, there is a mental element required for liability to arise. The superior must have had *actual knowledge* or had a *reason to know* that his subordinates were committing crimes or about to commit crimes. The latter being an imputed form of knowledge.

1. Actual knowledge

Actual knowledge may be defined as the awareness that the relevant crimes were committed or were about to be committed.[35] Actual knowledge may be established through direct or circumstantial evidence.[36] This knowledge may also be imputed to supervisors where they had in possession information of a nature which at least would put them on notice of risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed.[37] In absence of direct evidence to prove actual knowledge, constructive knowledge may be established through circumstantial evidence. The following

[33] Pg. 384 Bantekas (supra) analyzing the case of Akayesu.
[34] *Celebici Appeal* Judgment Para 256, *Kajelijeli Appeal* Judgment Para 86, *Prosecutor v Clement Kayishema & Obed Ruzindana* Trial Judgment ICTR-95-1-T Paras 229- 231.
[35] *Prosecutor v Dario Kordic and Mario Cerkez* Trial Judgment IT-95-14/2-T Para 427. (Hereafter *Kordic and Cerkez* Trial Judgment).
[36] *Prosecutor v Haloilovic* Case No. IT-01-48-T Trial Judgment at para 66.
[37] *Celebici Appeal* Judgment at para 383.

circumstantial evidence has been used[38] and may be used to determine that a commander "must have known" about criminal activities of their subordinates:

> number, type and scope of illegal acts, the time during which they occurred, the number and type of troops involved, the logistics involved, if any; the geographical location of the acts; their widespread occurrence, the tactical tempo of operations; the modus operandi of similar illegal acts; the offenders and staff involved and the location of the commander at that time.

Pursuant to the above criteria, the ICTY trial chamber[39] found that *Celebici* camp commander Mucic was well aware of his sub commanders' activities of mistreating the detainees because of the notoriety of the crimes and evidence that was adduced that he could not have heard about them.[40] Bantekas[41] explains that there has always been a general presumption of knowledge albeit a rebuttable one where crimes under ones command are widespread and notorious. Bantekas goes on to assert that this duty has been upheld by Additional Protocol 1 Articles 86 and 87 and the ICTR statute Article 6(3) and the Rome Statute's Article 28. Bantekas is however quick to cast doubt on whether this presumption has gained international customary law status. In this presumption, lies one of the differences between the standard set by Additional Protocol 1 and the ad hoc tribunals.

2. "Had reason to know" standard

Other than actual knowledge, Article 7(3) of the ICTY statute creates responsibility for failure to act upon information which a superior had reason to know. The prosecution in this regard is charged with showing that the commander must have possessed some general information which put him on notice of the likelihood of unlawful acts. Mere awareness of risk of crime being committed is not enough. The Prosecution must show that he was aware of substantial likelihood that a crime will be committed as a result of

[38] Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992); UNSCOR Annex, UN Doc. S/1994/674; Para 58 (May 27, 1994).
[39] *Celebici Trial Judgment* at para 770.
[40] Page 588, *Bantekas* (*supra*).
[41] *Ibid*, at page 589- 590.

failure to act and aware of it decided not to act.[42] The information need not be detailed but rather sufficiently clear or alarming enough to trigger the duty to investigate the matter further.[43] Moreover, they must be crimes of similar nature and gravity as those he is being charged with, not just general terms. In the case of *Krnojelac*[44] the court explained that information of beatings happening must be sufficient enough to point to them amounting to acts of torture and not merely arbitrary acts and that though this may be general information, it must point to such detail.

This 'had reason to know' standard as per the world war jurisprudence means that a commander who was in possession of sufficient information to be on notice of subordinate criminal liability cannot escape liability by declaring their ignorance even if such ignorance of specific crime is amply established. This standard created an "objective negligence test" which took into full account the circumstances at that time. Furthermore, absence of knowledge was not a defense if the commander did not take steps to know; thus raising a duty to know rebuttable through evidence of due diligence.[45] The trial chamber however did not make a finding as to whether this was the current customary law position[46] and only made reference to the 'had reason to know' standard in the ICC statute[47] in this respect. It may thus be concluded that *mens rea* in Article 7(3) of ICTY statute requires direct intention or indirect intention that is foreseeing a certain consequence as possible and yet proceeding with some unlawful act or gross negligence as per the *Celebici*[48] where a commander maybe held liable as long as the information available to that superior was sufficient to justify a further inquiry.[49]

This "had reason to know" standard may be contrasted with the "should have known standard" set out in Additional Protocol 1[50] which essentially imputes a duty to obtain information. This standard is absent in the ad hoc tribunals but has been adopted by the International Criminal Court Statute.

[42] *Blaskic Appeal* Judgment at paras 41- 42.
[43] *Celebici Appeal* Judgment at para 238, Bagilishema Judgement at para 42.
[44] *Prosecutor v Milorad Krnojelac* Appeal Judgment IT-97-25-A at para 155.
[45] Page 590- 591 Bantekas (*supra*), Celebici Trial Judgment at para 388.
[46] *Celebici Trial* Judgement at para 393.
[47] Infra.
[48] *Celebici Trial* Judgment at para 393.
[49] *Supra* note 47.
[50] Article 86(2) Additional Protocol 1.

C. The Duty to Act

The doctrine of command responsibility finally has the requirement that a superior take necessary and reasonable measures to prevent or punish the crimes of his subordinates. Necessary and reasonable measures are those that can be taken within the competence of a commander as evidenced by the degree of effective control he wielded over his subordinates.[51] Generally the measures a commander may take and with what amount of urgency is not an issue of substantive law but one that may be dictated by the nature of the crimes in each case.[52] Simply put, a superior is not obliged to perform the impossible only that within the confines of his limitations.[53]

1. The duty to prevent

The duty to prevent rests on a superior at any stage before commission of a crime if he or she acquires knowledge that such a crime is being prepared, planed or when he or she has reasonable grounds to suspect that such crimes will be committed.[54] If a superior fails to fulfill his duty to prevent, this failure cannot be cured simply by punishing the subordinates afterwards.[55]

2. The duty to punish

This duty arises after the commission of an offence. This punishment is thus intended to prevent future crimes.[56] Depending on the circumstances, and in particular depending on the commander's proven ability to do so, his 'duty to punish' may entail investigating, issuing appropriate orders to his subordinates, reporting crimes to the competent authorities, or taking appropriate disciplinary measures against the perpetrators.[57] The superior does not have to be the person who dispenses the punishment and the fact that he has failed to take particular steps following reports of crimes having been committed by

[51] *Blaskic Appeal* Judgment at para 72.
[52] *Prosecutor v Milorad Krnojelac* Appeal Judgment IT-97-25 at para 95, *Prosecutor v Zlatko Aleksovski* IT-95-14 Trial Judgment at para 81.
[53] *Celebici Appeal* Judgment Para 226 and *Prosecutor v Clement Kayishema & Obed Ruzindana* ICTR-95-1-A Appeal Judgment at para. 302.
[54] *Kordic & Corkez Trial* Judgment at para 445.
[55] Prosecutor *v Halilovic* Trial Judgment IT-01-48-T at para 72 and *Blaskic Appeal* judgment at para 83.
[56] Bantekas taking into cognizance the *Balskic Decision* on Defense Motion to strike portions of amended indictment alleging failure to punish liability at Page 591-592.
[57] See *Kordic and Cerkez*, Trial Judgment at para 446 and *Prosecutor v Ignace Bagilishema* Case No. 95-1A-T Trial Judgment at para 50.

his subordinates (such as reporting the acts to superiors) are not per se conclusive of his failure to abide by his duties, although it may be relevant to the Chamber's determination that he had the material ability to do so and that he should have taken such measures in the circumstances of the case.[58]

It should be noted generally that in determining whether a superior took all necessary and reasonable measures to punish or prevent crimes, courts will not merely look at whether or not the acts happened but will take into consideration all circumstances surrounding events such as availability of resources, time to do investigations and such. Thus a commander who despite best efforts failed to was unable to prevent or punish crimes will not be held criminally liable.[59]

IV. THE QUESTION OF SUCCESSOR COMMAND RESPONSIBILITY IN THE ICTR

The doctrine of command responsibility is a great tool in the bag of international criminal law an effective way to account for crimes that would otherwise go unaccounted before because the perpetrators cannot be easily identified. It ensures responsible command and so deters the commission of crimes. However, its effectiveness is hampered by the question of successor command responsibility as discussed below.

Recently[60], the appeal of the *Military II case*[61] was heard by the Appeals chamber of the ICTR. The four defendants in this case held key positions in, and were active senior officers of the Rwandan Armed Forces during the genocide and the widespread and systematic attacks against Tutsi civilians in 1994 Rwanda. The Trial Chamber convicted them on various counts and acquitted them on others. The acquittals, convictions and sentences were however challenged by the Prosecution and the defense respectively alleging various errors of law and fact that occasioned a miscarriage of justice.[62] Of particular relevance to the issue at hand was the Prosecution's challenge of the acquittal of Major General Bizimungu for the events at ETO-Nyanza on 11 April 1994.

[58] See for example *Blaskic* Appeal Judgment at paras 68-72.
[59] See *Bagilishema* Appeal Judgment at para 35, Guenael Mettraux; *International Crimes And The Ad Hoc Tribunals*, Oxford University Press, 2005 Pg. 308.
[60] 7th- 10th May, 2013.
[61] *Prosecutor v Augustin Ndindiliyimana*, *Augustin Bizimungu, Francois Xavier Nzuwonemeye, Innocent Sagahutu* Case No.ICTR-00-56-T (Hereinafter Military II case).
[62] Personal deductions from attending the hearing.

Bizimungu was the Commander of Operations for Ruhengeri *secteur* and then Chief of Staff of the Rwandan Army from 16th April, 1994.

Following the withdrawal of the Belgian contingent of UNAMIR from the ETO school in Kigali on 11th April 1994, between 2000 and 3000 Tutsi who had sought refuge at the school were forced to leave the school premises. They were then forced to march to Nyanza Hill by members of the Rwandan Army and *Interahamwe* militiamen who led them up the Hill and subjected them to a protracted gun attack. As a result, approximately 2400 Tutsi refugees were massacred at Nyanza Hill on that day. The Trial Chamber found that all the elements of superior responsibility pursuant to Article 6(3) of the ICTR Statute were satisfied with respect to this massacre at ETO-Nyanza.[63]

However, it failed to hold Bizimungu criminally responsible as a superior for his failure to punish the soldiers who perpetrated the killings. It concluded that it was unable to do so simply because the killings were perpetrated before Bizimungu assumed command of the Rwandan Army.[64] This, the prosecution submitted was an error.[65] In delivering its judgement, the Trial chamber of the ICTR explained that it was bound by the ICTY decision of *Hadzihasanovic*[66] and so could not hold Bizimungu liable as a superior for acts done before he assumed office. The trial chamber however expressed certain disapproval of this decision.[67] It was this disapproval and other arguments examined briefly below that the Prosecution built on in appealing the Trial chamber's decision.

The Prosecution argued that the ICTR statute is the primary source of law for the ICTR and that the proper interpretation of Article 6(3) of ICTR statute is that a superior ought to be held responsible for failure to punish criminal acts of his subordinates even when he had no control over those subordinates at the time of the commission of the acts. In support of their assertion, they cited Antonio Casseses' "*International Criminal Law"*[68], the trial chamber's judgment[69] and Judge Liu's partially dissenting opinion I the *Oric*

[63] *Military II Trial* Chamber Judgement, paras. 1148-1156, 1960, 1964.
[64] *Military II Trial* Chamber Judgement, paras. 1157, 1961.
[65] *Military II Prosecution* Appeal Brief Para 77.
[66] IT-01-47.
[67] Supra 65 at paras. 1961-1964.
[68] 2nd Ed., (Oxford University Press, Oxford: 2008) at page 246.
[69] Paras 1961- 1966.

Appeal Judgment.[70] The Prosecution explained[71] that the effect of the *Hadzihasanovic decision* in as far as successor command responsibility is to conflate "the distinct duties of prevention and punishment into a unitary obligation." The Prosecution went on to explain[72] that the *travaux prepartories* to the Statute[73] made no indication of the intention of States or the drafters to distinguish between a superior's liability for failing to punish crimes of a subordinate committed prior to or those committed during a superior's command and that in absence of such indication, no such interpretation can be read into the Statute. The Prosecution then went on to examine Articles 86 and 87 of Additional Protocol I to the Geneva conventions and reasoned that a similar interpretation ought to be lent to it. At Paragraph 97 of their brief they explained that:

> The language of these provisions may appear ambiguous at points. However, Article 87 makes clear that the "duty of a commander" is triggered when a superior "is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol." Moreover, the provision requires a superior "to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof."[74] Neither this provision nor the Commentaries on the Additional Protocols distinguish between violations committed before or during a superior's command." The Prosecution went on to explain[75] that to interpret Articles 86 and 87 otherwise would contradict Article 31 of the Vienna Convention on the Law of Treaties, which requires that a treaty and its provisions should be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

[70] *Prosecutor v Nasser Oric* Appeal Judgment Case No. IT-03-68-A.
[71] Para 90 of Appellant Brief.
[72] At Para 92 of their Appellant brief.
[73] *Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994),* U.N. Doc. S/1995/134 (13 February 1995), at para 9.
[74] Additional Protocol I, Article 87.
[75] Appellant Brief at para 100.

They then went on to explain this spirit of the Additional Protocols thus: "The Additional Protocol as a whole is informed by the general principle of international humanitarian law to ensure protection for protected categories of persons and objects during armed conflict."[76] The doctrine of superior responsibility is founded upon this principle: seeking adherence to responsible command and to ensure protection through compliance with the laws and customs of war and international humanitarian law.[77] Imputing a distinction between liability for a failure to punish a subordinate's crimes committed prior to and those committed after the assumption of command where no such distinction exists within the text is contrary to the object and purpose of the Additional Protocol.

Contrary to the principles underlying international humanitarian law, imputing such a distinction could result in the criminal conduct "falling between two stools",[78] that is, falling outside the tenure of both a past superior and an incoming superior."[79] Indeed, there is weight to this reasoning because in for example the case of Bizimungu, by not being held liable for the killings on Nyanza hill and also his predecessor not being held responsible (because he was removed from office before he could punish), a gap is created; a crime is left unpunished and so occasioning a miscarriage of justice. The defence argued that Major General Bizimungu could not be held responsible for crimes done before he took office because this would not be legally sound and would occasion an injustice on Mr. Bizimungu.[80]

It is my humble submission however that this is not so. I am inclined to agree with the Prosecution that the spirit of the law was to punish commanders who fail to punish crimes even those done when they were not in command. This is especially relevant for conflict and other such situations where commanders may be changed too often for one to effectively punish all wrong done under his tenure of command. Furthermore, it is not an injustice to the commander because I believe commanders are (or ought to be) ably

[76] Hans-Peter Gasser, *International Humanitarian Law – An Introduction* (Paul Haupt Publishers, Berne: 1993), page16.
[77] See *Oric Appeal* Judgement, Partially Dissenting Opinion and Declaration of Judge Liu, at paras 16, 19, 30.
[78] *Hadzihasanovic*, Command Responsibility Appeal Decision, Partially Dissenting Opinion of Judge Shahabuddeen, para. 14. Also *see* Antonio Cassese; *International Criminal Law*, 2nd Ed., (Oxford University Press, Oxford: 2008), page 246.
[79] *Supra* note 74.
[80] Oral reply to the Prosecutions Arguments during the Appeal Trial hearing of 10th May.

equipped with such legal knowledge to know that this is expected of them. To leave crimes unpunished, as Bantekas explained, is to acquiesce to them; it leaves a big and "ugly" gap in the law and brings about a miscarriage of justice one that ought to be quickly remedied. For now however, we can only await the decision of the Appeal Chamber in this matter.

V. CONCLUSION

The doctrine of command responsibility is a vital element of international criminal law and international humanitarian law. It is one that resonates with the spirit of the ICTR; challenging impunity by firstly encouraging the prevention of war crimes and if this is not done by ensuring that such acts are punished and so still ensuring they are not committed again. However, one major obstacle to this objective of challenging impunity is the current position of the ICTY in the *Hadzihasanovic* decision which seems to create a gap in the law by allowing some crimes to go unaccounted for.

REGULATION OF BIOTECHNOLOGY AND BIOSAFETY IN UGANDA: A CRITIQUE OF THE PROPOSED NATIONAL BIOTECHNOLOGY AND BIOSAFETY BILL 2012

Mandela Walter*

ABSTRACT

Biotechnology and Biosafety are reputed to be the current breakthrough in modern agriculture today. There is however no scientific consensus on this globally. The proponents of Biotechnology opine that its products are not harmful for human and animal consumption and pose no threat to the environment and biodiversity. They also harangue that it can increase the yield of crops, make crops more nutritious, make crops resistant to harsh climatic conditions and also resistant to pests and diseases among other things. The opponents however are of the view that the products of this technology are harmful for human and animal consumption, that they pose a huge threat to the environment, biodiversity and that the increased crop yields and disease resistance are short lived as nature always wins among other things. The Government of Uganda in a bid to employ Biotechnology and Biosafety to revitalise its ailing agricultural industry passed the National Biotechnology and Biosafety Policy (NBTBSP) 2008 through the Cabinet and, Parliament drafted the National Biotechnology and Biosafety Bill (the Bill) 2012 that is aimed at legalising and regulating this technology. This Article critiques this Bill and further goes ahead to point out the likely issues which are likely to arise from the regulation of this technology. It then concludes by proposing that this Bill is ahead of its time in the Ugandan jurisprudence.

I. INTRODUCTION

The contribution of agriculture in Uganda to the Gross Domestic Product (GDP) has declined from 32% in 1990 to 15% in 2012.[1] Uganda's agriculture is characterised by low yields, low fertiliser use,[2] and poorly functioning pest, vector and disease control. As a result, Ugandan livestock farmers may be losing a startling USD 155 million a year due to disease.[3] Uganda is host to the most dangerous and epidemic diseases of the world. She neighbours the vast Congo-Sudan-Uganda Albertine ecosystem which is the world's largest reservoir of known and unknown viruses.[4] The agriculture is rain fed. Uganda

* Fourth year law student, Uganda Christian University, Mukono.

[1] The Government of Uganda, The Agricultural Sector Development Strategy And Investment Plan 2010/11 – 2014/15 by The Ministry of Agriculture, Animal Industry And Fisheries, Page 6.

[2] Ibid, at page 19.

[3] Ibid, at page 13.

[4] Ibid, at page 21.

does not have preparedness plans for adapting to climatic changes and hence remains exposed and vulnerable.[5] Land degradation in Uganda is widespread predominantly in the dry lands of the cattle corridor.[6] The government's extension services to the rural farmers through the National Agricultural Advisory Services (NAADS) have suffered major setbacks.[7]

The "magic cure" for the poorly performing agricultural sector in Uganda is biotechnology and biosafety. The utilization of biotechnology results into fast maturing, more yielding, and more nutritious crops. The crops are also drought resistant and resistant to pests and diseases.[8] However biotechnology presents challenges and dangers to humans and the environment.

II. DEFINITION OF BASIC TERMS

The National Biotechnology and Biosafety Policy (NBTBSP) 2008 defines Biotechnology as any technique that uses living organisms or substances there from to make or modify a product, improve plant or animal breeds or microorganisms for specific uses.[9] The Cartagena Protocol on the Convention of Biodiversity defines biotechnology as; a) the application of in vitro nucleic acid techniques, including recombinant DNA and direct injection of nucleic acid into cells or organelles or; b) the fusion of cells beyond the taxonomic family.[10]

Biosafety is the safe development, transfer application and utilisation of biotechnology and its products.[11] Biosafety is used to describe efforts to reduce and eliminate the potential risks resulting from biotechnology and its products.[12]

[5] Ibid, at page 23.
[6] Ibid, at page 22.
[7] Ibid, at page 20.
[8] The National Bio Technology and Bio Safety Policy,(2008) by the Ministry of Finance, Planning and Economic Development , at page 3.
[9] Ibid.
[10] The Cartagena Protocol on Bio Diversity on the Convention of Bio Diversity, Article 23.
[11] The Government Of Uganda, The National Bio Technology And Bio Safety Policy, (2008)By The Ministry Of Finance, Planning And Economic Development Glossary, Page VIII.
[12]Available at http://www.Icgeb.org/biosafetv/introduction; See also Ellady Muyambi, More Public Debate Needed on GMOs, The Independent New Magazine, 15th March 2013.

III. LEGAL, ADMINISTRATIVE AND INSTITUTIONAL FRAMEWORK OF BIOTECHNOLOGY AND BIOSAFETY IN UGANDA

The NBTBSP was adopted in 2008 following the ratification of the CPBD in 2000. This Policy was meant to ensure that the provisions of the CPBD are met.[13] The Bill was tabled in the Parliament by the chairperson of the Committee on Science and Technology Denis Hamson Obua as a private members Bill.[14] The Cabinet of Uganda in the exercise of its powers to determine, formulate and implement the policies of government[15] approved the Bill in 2012.

The Bill proposes the Uganda National Council on Science and Technology (UNCST) as the competent authority for biotechnology and biosafety,[16] the functions of which as per the Bill are to approve the development, testing and use of Genetically Modified Organisms (GMOs), to update and inform the national focal point on matters relating to biotechnology and biosafety, to ensure the safety of biotechnology to human health and the environment during development, testing and use of a GMO, to ensure the necessary measures to avoid adverse effects on the environment, biological diversity, human health and socio economic conditions arising from GMOs, to prescribe conditions, standards, and procedures relating to development, testing, transit and general release of GMOs, and also to advise the government on issues of biosafety and biotechnology.[17]

The UNCST Act [18] states the functions of the body as to assist in the promotion and development of indigenous science and technology through carrying out scientific and technological research, technology transfer and adaptation, to assist in the rationalisation of foreign science and technology, to review generally and advise on programmes and budgets for the promotion of science and technology.

The Bill designates the Ministry of Water and Environment(MOWE) as the national focal point for the purposes of the CPBD and the Convention on Biodiversity(CBD) .[19] The

[13] The National Biotechnology and Biosafety Policy, Section 1.
[14] Available at http://in2eastafrica.net/scientists-told-to-explain-gmo-technology.
[15] Article 111 of the 1995 Constitution of Uganda, as amended.
[16] National Biotechnology and Biosafety Bill, Clause 6.
[17] Ibid, Clause 7.
[18] The Uganda National Council of Science and Technology Act Cap 209, Section 4.
[19] National Biotechnology and Biosafety Bill, 2012, Clause 4.

Bill states the functions as liaising with the secretariat of the CBD[20], providing coordinated flow and the exchange of information between relevant ministries, agencies, and departments as regards the transboundary movement of GMOs,[21] governments through formal diplomatic channels[22], the secretariat to the CBD and other international organisations as regards biotechnology and biosafety.[23]

The Bill provides for the establishment of the National Biosafety Committee which will consist of the chairperson who shall be a person with at least 10 years' experience in plant or animal breeding, genetics or biotechnology, representatives of the ministry responsible for crop protection, ministry of health with experience in public health, ministry of environment, civil society organisation engaged in biotechnology, UNBS, ministry of justice, the academia conducting research in genetics and biotechnology, farmers. [24]

The Bill provides that the functions of the committee will include reviewing and making recommendations on applications made to the competent authority; to advise the Competent Authority (C.A) on comments received from the public on biotechnology and biosafety; to recommend to the C.A the amount of fees for processing the applications; to recommend to the C.A measures to be taken in case of for mitigation in event of an accident and to also advise on biosafety; to advise the C.A on the implementation of this Act; to give recommendations to the C.A on procedures and conduct for safety and risk assessment; to recommend new scientific information on biotechnology to the C.A and to perform any other function assigned to it by the C.A. [25]

Institutional Biosafety Committees shall be established as per the Bill[26] by every institution registered under this Act. It shall consist of not less than 5 people with at least 3 having expertise in biosafety. It shall have to be approved by the competent authority and its roles will be approve laboratory experiments and contained testing, regular review

[20] Ibid, Clause 5(1).
[21] Ibid, Clause 5(2)(a).
[22] Ibid, Clause 5(2)(b).
[23] Ibid, Clause 5(2)(c).
[24] Ibid, Clause 9.
[25] Ibid,Clause 10.
[26] Ibid, Clause 14.

of laboratory experiments, contained testing and confined testing, ensure that research is carried out in accordance with this Act, Regulations and Guidelines of the C.A.

IV. LACUNAS IN THE NATIONAL BIOTECHNOLOGY AND BIOSAFETY BILL 2012

A. *Misrepresentation of the title*

The Bill states that the Act applies to the research and general release of a GMO.[27] It must be remembered that the Bill uses the all-encompassing title of "National Biotechnology and Biosafety" yet in essence, the bill is only regulating one form of biotechnology, GMOs. This is in isolation of other bio technologies like natural selection, processing of seeds for next planting by the farmers, conventional breeding, hybrid breeding, tissue culture, traditional methods of controlling pests and diseases, cloning and selective breeding. All these technologies need to be protected.[28] In the event, either such a title should be amended to represent only the GMOs or to amend the bill as a whole to cover all the technologies.

B. Absence of a Labeling Clause

The Bill is devoid of a clause that mandates the labelling of GMOs and this puts the health of Ugandans in jeopardy. This should have been a priority in the Bill so that there is informed consent and for people do not consume them in ignorance. The labelling should ideally cover GMO foods, GM feeds, and any other products that will be derived from GM food, GM feed or GM organisms. The CPBS directs that shipments of GMOs for intentional introduction to the environment will have to be identified in accompanying documentation as GMOs with specification of the identity and characteristics and with a declaration that "the movement is in conformity with the requirements of the protocol." [29]

The CPBS stipulates that shipments of GMO commodities intended for direct use for food, feed or processing will in the interim have to be identified in accompanying documentation that they "may contain" GMOs and are not intended for intentional

[27] Ibid, Clause 1(1).
[28] Giregon Olupot, *Issues To Address Before GMO Bill Is Considered*, The New Vision Newspaper, Saturday November 23rd 2013.
[29] The 2000 Cartagena Protocol On Bio Safety To The (1992) Convention On Biological Diversity,Article 18.

introduction into the environment.[30] The CPBD directs that any party that approves for domestic use and marketing GMOs intended for direct use as food, feed or processing that may be exported will be required to communicate this decision and details about the GMO to the world via an electronic , web accessible database, the Biosafety Clearing house.[31] Notably, none of these provisions makes labeling of such GMOs mandatory.

C. Inadequate penalties under the Bill

The penalties that are prescribed by the Bill for offences committed are simply preposterous. The Bill provides that where any person engages in research and makes general release of a GMO without approval commits an offence and is liable on conviction to a fine not exceeding 120 currency points(an equivalent of two million and four hundred thousand Uganda shillings) or imprisonment not exceeding 5 years or both.[32] The Bill also directs that anyone who fails to disclose information as required by this Act commits an offence and is liable on conviction to a fine not exceeding 48 Currency points (an equivalent of nine hundred and sixty thousand Uganda shillings) or imprisonment not exceeding 24 months or both.[33] It also lays down that one who uses a GMO in a manner inconsistent with the approval given under the Act commits an offence and is liable on conviction to a fine not exceeding 48 Currency points (an equivalent of nine hundred and sixty thousand Uganda shillings) or imprisonment not exceeding 24 months or both.[34] It further provides that one who uses a GMO to deliberately harm or injure the environment or human health commits an offence and is liable on conviction to a fine not exceeding 240 Currency points (an equivalent of four million and eight hundred thousand Uganda shillings) or imprisonment not exceeding 10 years or both.[35] Charging such frivolous amounts as a fine will not suffice as a deterrent, especially considering that people dealing in such a business have/ are generally presumed to have more than enough money to pay off such lenient fines. When these amounts are viewed in light of the potential dangers presented by biotechnology, they seem/are ridiculous.

[30] Ibid, Articles 11, 18 and Annex II.
[31] CPBD, Article 11(1).
[32] *Supra* note 16, Clause 37(a).
[33] Ibid, Clause 37(b).
[34] Ibid, Clause 37(e).
[35] Ibid, Clause 37(f).

D. The unsuitability of the UNCST as the Competent Body in the Bill

The Bill[36] proposes the UNCST as the as the competent authority for biotechnology and biosafety. The Bill gives the UNCST immense powers in the regulation of GMOs. For clarity, the key mandate of UNCST is the promotion of biotechnology as per the UNCST Act. The UNCST Act states the functions of the body vide to assist in the promotion and development of indigenous science and technology through carrying out scientific and technological research, technology transfer and adaptation, to assist in the rationalisation of foreign science and technology, to review generally and advise on programmes and budgets for the promotion of science and technology. Further, the National Biosafety Framework was developed by the UNCST.[37] Evidently, the UNCST is a party with a great interest in the promotion GMOs which prima facie makes it biased in its regulatory role and renders it incompetent.

E. MOWE's role as a National Focal Point for the CBD and the CPBD

It is perplexing that the Bill designates the Ministry of Water and Environment (MOWE) as the national focal point for the purposes of the CPBD and the CBD.[38] The Bill states the functions as liaising with the secretariat of the CBD[39], providing coordinated flow and the exchange of information between relevant ministries, agencies, and departments as regards the trans boundary movement of GMOs,[40] governments through formal diplomatic channels[41], the secretariat to the CBD and other international organizations as regards biotechnology and biosafety.[42]

The MOWE is not the most appropriate designate as the national focal point. The mandate of the MOWE is of sound management and sustainable utilization of Uganda's

[36] Ibid, Clause 6.
[37] Falck-Zepeda, Jose Benjamin, Grure, Guillame P. Sithole-Niang, Idah, *Genetically Modified Crops in Africa, Economic and Policy Lessons from Countries South of the Sahara*, Chapter 4 at Page 106.
[38] *Supra* note 16, Clause 4.
[39] Ibid, Clause 5(1).
[40] Ibid, Clause 5(2).
[41] Ibid, Clause 5(2)(b).
[42] Ibid, Clause 5(2).

natural resources for the present and future generations.[43] It also has the responsibility for setting national policies and standards, managing and regulating water resources and determining priorities for water development and management.[44]

In any event, it seems out of code that the present role and function was accorded to MOWE yet it would be better executed by the Ministry of Agriculture, Animal Industry and Fisheries(MAAF) whose mandate is derived from the National Objectives of the 1995 Constitution of the Republic of Uganda XI (II) which provides that the state shall "stimulate agricultural, industrial, technological and scientific development by adopting appropriate policies and the enactment of enabling legislation" and Objective XXII (a) which provides that the state shall "take appropriate steps to encourage people to grow and store adequate food".

The Constitution therefore bestows the responsibility for the management of the agricultural sector with the MAAIF. This is would be in tandem with its mandate which is "to promote and support sustainable and market oriented agricultural production, food security and household incomes."[45]

F. Inadequate Public Awareness, Education and Participation

The CPBD[46] lays down that parties shall promote and facilitate public awareness, education and participation concerning the safe transfer, handling and use of living modified organisms in relation to the conservation and sustainable use of biological diversity, taking also into account risks to human health. In doing so, the Parties shall cooperate, as appropriate, with other States and international bodies; Endeavour to ensure that public awareness and education encompass access to information on living modified organisms identified in accordance with this Protocol that may be imported.[47] The Parties shall, in accordance with their respective laws and regulations consult the public in the decision-making process regarding living modified organisms and shall make the results of such decisions available to the public, while respecting confidential information

[43] The Government of Uganda, Ministry of Water and Environment, Water and Environment Sector Performance Report 2009, Foreword by Hon. Maria Mutagamba, Minister for Water and Environment.
[44] Supra, at page 4.
[45] Available at http://www.agriculture.go.ug/index-page-aboutus.htm.
[46] The Cartagena Protocol on Bio Diversity on the Convention of Bio Diversity, 2000, Article 23(a).
[47] Ibid, Article 23(b).

in accordance with Article 21.3.[48] Each Party shall endeavor to inform its public about the means of public access to the Biosafety Clearing-House. On scrutiny of the drafting of the Bill and the process of operationalizing it into law, the above provisions of the CPBD have been disregarded and where effort has been made to ensure public awareness and also consult with the public, it has been absolutely minimal and insufficient albeit they are the major stakeholders.

G. Disregard of the Precautionary Principle

The Bill acknowledges the dangers and risks with GMOs in where it emphasizes safety in using biotechnology by providing for measures to be taken to minimise or avoid risk to human health and the environment arising from actual or potential contact with a GMO.[49] What is shocking is that the precautionary principle which is lauded by the CPBD is totally disregarded. The CPBD[50] recognizes that modern biotechnology has great potential for human wellbeing if developed and used with adequate safety measures for the environment and human health, it also takes into account the limited capabilities of many countries, particularly developing countries to which Uganda belongs, to cope with the nature and scale of known and potential risks associated with living modified organisms. The Bill on the other and is totally in want of such provisions.

H. Immunity of the members and the staff of the UNCST

The Bill veils the members of the UNCST as well as staff from any ramifications which shall result from GMOs.[51] It states that the mentioned people shall not be personally liable for any act or omission done bona fide in the execution of the functions, powers or duties of the competent authority under this Act.[52] The absolute lack of liability will encourage the above persons to execute their duties with laxity and the efficacy which they would have otherwise exhibited if they were liable is lost.

[48] Ibid, Article 23(2).
[49] *Supra* note 16, Clause 29.
[50] Ibid, the Preamble.
[51] Ibid, Clause 40.
[52] Ibid.

I. Disregard of GM Animals

The Bill seeks to govern GMOs.[53] It lays down that the object of the bill is to provide a regulatory framework that facilitates the safe development and application of biotechnology. It is therefore conspicuous that the Bill has no mention of GM animals since GMOs covers both plants and animals.

V. EMERGING ISSUES FROM THE STRICT REGULATION OF BIOTECHNOLOGY AND BIOSAFETY IN UGANDA

A. Environmental Issues

The Constitution dictates that the utilisation of the natural resources of Uganda shall be managed in such a way as to meet the development and environmental needs of present and future generations of Ugandans; and, in particular, the State shall take all possible measures to prevent or minimise damage and destruction to land, air and water resources resulting from pollution or other causes. [54] Furthermore, the Constitution states that every Ugandan is entitled to a clean and healthy environment.[55] Biotechnology has been proven to be environmentally friendly and can be employed to arrest the progression of climate change.[56] The strict regulation of it is likely to stir people into invoking this Constitutional right.

B. Conflict of government policy

The regulation of biotechnology through the NBTBSP as well as through the proposed Bill, ushers a clash of government policy. The government adopted the United Nations Millennium Declaration in New York in September 2000 which established the Millennium Development Goals universally endorsed by all UN member states. The eight MDGs reflect the global consensus on the most important challenges facing humanity and a shared vision for human and social development. The eradication of hunger is one of these Goals.[57] Biotechnology has the potential of transforming agriculture in Uganda hence enabling the government fulfil this United Nations

[53] Ibid, Memorandum 1.
[54] The (1995) Constitution of the Republic of Uganda, The National Objectives and Directive Principles of State Policy Objective, XXVII.
[55] Ibid, Article 39.
[56] Can GM Crops help the fight against Climate Change? Available at http://www.europabio.org.
[57] The Government Of Uganda, (2013), The Millenium Development Goals Progress Report By The Ministry Of Finance, Planning And Economic Development ,Page 1.

Declaration. The strict regulation of the industry is a hindrance to the Declaration since the government pledged to the international community to use its arsenal exhaustively to rid hunger in its populace.

Additionally, the Constitution stipulates that the State shall take appropriate steps to encourage people to grow and store adequate food establish national food reserves and encourage and promote proper nutrition through mass education and other appropriate means in order to build a healthy state.[58] By establishing strict regulations on biotechnology, a likelihood of inconsistency with the Constitution might arise, especially when one considers that biotechnology has been proven to increase crop yields and also offer enhanced nutrition.[59]

C. Scientific Progress Obstruction

The Constitution commands that the state shall stimulate agricultural, industrial, technological and scientific development by adopting appropriate policies and the enactment of enabling legislation.[60] The regulation of the industry is likely to arouse people to demand for this Constitutional right since the regulation can be interpreted as stifling agricultural, industrial, technological and scientific development since biotechnology has been proven to stimulate agriculture[61] and is a technological as well as scientific development.

A major legal issue which will arise in the regulation of scientific progress is the mode of regulation of research and development. A decision will have to be made on whether to position the government institutions as the legal bodies responsible for the dissemination of the biotechnology products or whether this role should be left in the hands of the private sector. In the former, the government should be willing to undertake the allocation of vast resources to the government agricultural agencies to enable them execute this role. In the latter case, the government should be willing to offer subsidies which will empower the private sector in this role.

[58] The (1995) Constitution of the Republic of Uganda, The National Objectives and Directive Principles of State Policy Objective XXII.
[59] Benefits of Biotechnology, NBTBSP, Page 3.
[60] National Objectives of the (1995) Constitution of the Republic of Uganda XI (II).
[61] Ibid.

Another likely issue is whether the government should encourage the research and development in the entire plethora of options that biotechnology presents or whether the government should specialise and encourage the research and development in the fields of biotechnology most applicable to the case of Uganda and which have also proven to be productive like the molecular markers and micro propagation.[62]

D. Gender Issues

Owing to mainly cultural and historical reasons, women in Uganda have since time immemorial played second fiddle to men. This has been extended to the biotechnology and is likely to become a legal issue. The Constitution proclaims that the State shall recognise the significant role that women play in society.[63] It further states that Women shall be accorded full and equal dignity of the person with men.[64]

Gender-biased extension systems (public, private and informal sector) can represent a major hurdle for poor rural producers to gain access to enhanced germplasm, improved vaccines and other outputs from agricultural biotechnologies for agriculture and food production.[65] Many traits relevant for the harvesting, threshing, milling and cooking of grains can be more or less invisible even to the men in the local community, and may be overlooked by scientist-breeders. However, these processing-related traits may be of paramount concern to the women who actually carry out such tasks as they prepare food from the crops on a daily basis. The importance of women in the outcome of breeding projects has been shown in several case studies say in Cote d'Ivoire, where the selection of inappropriate traits by poorly-informed scientific breeders led to the rejection of new varieties by women farmers.[66]

The gravity of this issue is reflected by the fact that it is only Uganda among the developing countries embracing biotechnology that gender equality has been a big issue

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[62] Biotechnologies for Agricultural Development, Proceedings of the FAO International Technical Conference on "*Agricultural Biotechnologies in Developing Countries: Options and Opportunities in Crops, Forestry, Livestock, Fisheries and Agro-industry to Face the Challenges of Food Insecurity and Climate Change*" (ABDC -10) by the Food and Agricultural Organisation of the United Nations.

[63] Social and Economic Objective XV, The 1995 Constitution of the Republic of Uganda.

[64] Article 33(1), The 1995 Constitution of the Republic of Uganda.

[65] *Supra* note 62, Page 479.

[66] Dalton, T. & Guei, R. 2003. *Productivity gains from rice genetic enhancements in West Africa: Countries and ecologies*.

of contention.[67] The position of the country seems to reflect that the patriarchal status quo in the dissemination of biotechnology be maintained yet women are increasingly the farmers of the developing world, performing the vast majority of agricultural work and producing between 60 and 80 per cent of food crops.[68]

E. Intellectual Property Regulation

The regulatory framework of biotechnology has to incorporate the issue of Intellectual Property (I.P). The TRIPS agreement stipulates that Members may also exclude from patentability plants and animals other than micro-organisms and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof.[69]

I.P and biotechnology are intertwined. The nature of biotechnology involves immense research. Colossal sums are risked which the government may not be willing to invest. The private sector in this case rises to the occasion. The catch here is that the investors will demand returns on their investment. To implement stringent I.P regulations will be the only incentive for the capitalists to invest. The implementation of these regulations also encourages the flow of I.P from abroad especially from the western world which is the world leader in I.P. This however presents horror to the farmers. The enforcement of I.P regulations works against the interests of the farmers. High regulatory costs (for testing, production or marketing) can act as barriers to innovation, investment and smallholder farmer access to agricultural biotechnologies. Regulatory systems which are too strict, complicated, non-functioning or uncertain can all act as barriers to effective use of I.P. A balance has to be made on the I.P legal framework which will promote innovation as well as the dissemination and use of I.P. The loose regulation of I.P will leave the farmers at the mercy of the biotechnology industrial complex. In this case, the objectives for the adoption of biotechnology will not be achieved.

F. Institutional Linkages

[67] Ibid, page 364.
[68] Ibid, page 546.
[69] Article 27(3) of the TRIPS Agreement.

The efficacy of the regulatory framework will require an unprecedented level of connectivity and cooperation among the government institutions mandated with the responsibility of the regulation. This is bound to be problematic. Neither the NBTBSP nor the Bill provide a comprehensive and systematic format which the institutions like the MAAF, MOWE, Uganda National Bureau of Standard(UNBS), National Agricultural Research Organisation (NARO), National Environmental Management Authority (NEMA) will adopt to harmonise and coordinate their activities targeted at biotechnology regulation.

The Bill establishes the MOWE as the focal point as regards to the CBD and the CPBD.[70] Unfortunately, as regards Uganda, the agricultural agencies which are at the vanguard of biotechnology in Uganda fall under the MAAF. These include National Agricultural Research Laboratories (NARL), National Crops Resources Research Institute (NCRRI), and NARO among others. This presents a foreseeable challenge in the supervision and coordination of the above agricultural agencies towards the fulfilment of the CBD and the CPBD.

VI. CONCLUSION

In conclusion, Biotechnology seems like a magic wand which can be used to revolutionise Uganda's agriculture. The government has made commendable steps to regulate biotechnology and Biosafety. However in drafting the Bill, a lot of loopholes were left by the proposed legislation which has been pointed out in the paper. I opine that the Bill is premature and the government should shelve it until scientists globally arrive at a general consensus on the issue of biotechnology. Further, issues likely to emanate from the regulation of Biotechnology and Bio safety have been discussed. These must be addressed if the government goes ahead to pursue the passing of the Bill.

[70] *Supra* note 16, Clause 4.

TO EVICT, OR NOT TO EVICT? A COMMENTARY ON THE UGANDA CABINET'S DIRECTIVE TO CANCEL ALL LAND TITLES HELD ON PROTECTED ENVIRONMENTAL RESOURCES

Brian Kibirango*

ABSTRACT

Despite the fact the government of Uganda has formulated a number of laws and policies to regulate land use and its impact on the environment, the rate at which natural resources are being depleted is still very alarming. The conclusion from that development is that probably these laws and policies are not enforced and if enforced, then it is the enforcement which is not done effectively−which is not right. In light of the recent directive to the Land registry; by the Government of Uganda, to cancel all land titles held on lands that are said to be comprised in protected resources, this paper traces the genesis of the problem of natural resource degradation, previous attempts at regulating it vis a vis the new approach of cancelling titles, challenges faced in environmental management and control, and concludes with recommendations on approaches that could make management of these resources better than what it is today.

I. INTRODUCTION

"Cabinet directs cancellation of wetland titles" read the headline in one of the leading daily publication of Uganda.[1] Therein was reported a resolution by the Uganda cabinet to cancel all land titles held on protected resources inter alia; wetlands and critical ecosystems areas, including those on the 200 meter lakeshore protection zone, swamps, and forest reserves. The Minister in charge of Water and environment[2] described the proposed cancellation as one which would be indiscriminate and without compensation.[3] Just a month later, another Cabinet Minister, Ms. Betty Bigombe,[4] threw some more light on the said eviction; that it was to be in respect of all titles acquired subsequent to the enactment and coming into force of the 1995 Constitution of Uganda and the laws made

[1] See Mary Karugaba, 'Cabinet directs cancellation of titles in wetlands,' The New Vision, April 24, 2014 at pg 7. Barely 4 months before this cabinet decision, there was also reported a directive to encroachers of Kayango forest reserve in Nebbi district to leave, *See* Benedict Oketh Wengu, New Vision, Jan 7, 2014, pg 9.

[2] Professor Ephraim Kamuntu in Karugaba, id.

[3] See Karugaba, note 3 above.

[4] While at a public dialogue organized by Environmentalists entitled; 'Policies and their effect on environment and development,' May 22, 2014.

there under. In essence, the said Constitution having come into force on the 8th October, 1995, titles held prior to this date are free from the directive. What is questionable though is whether the degradation is only severe as a result of activities on lands acquired post 1995 and if answered in the negative, whether alternative measures are to be put in place to save such resources as well.

To Ugandans familiar with the commitment of our governments to the fulfillment of promises, or even the enforcement of orders, the proclamation sounded over ambitious and non-feasible let alone being pretentious and hypocritical. Yet to others this resolution is one of those described as having been long-overdue sighting the recent threats of floods, global warming, land and mud slides. To them, the message is as clear as saying; it is time for the cat play to end in respect of environment management and control. However, the resolution carries with it a number of legal, political and economic implications. It is also a candidate to a plethora of challenges in the course of its implementation. These contentious issues thus form the basis of my discussion.

II. JUSTIFICATION FOR THE DIRECTIVE

The fact that the livelihoods of most Ugandans intimately depend on the environment, both as a source of subsistence and as a basis for production is undeniable.[5] Uganda being majorly an agricultural country,[6] much reliance is made on nature and so a friendlier climate with regular seasons of rain and sunshine, is necessary in order for there to be continued production. The fact that traditional means of production are predominant with very rare and sparse reliance on modern methods such as irrigation further necessitate that the price of nature is maintained jealously. Not only that, it is also imperative to note that aside agriculture, other areas that ensure sustenance of the Ugandans' livelihoods are also dependent on an enabling environment.

On the very contrary however, the rate at which Uganda's natural resources are being depleted brings to the fore the question of whether such sustenance is maintainable for

[5] Twesigye Morrison Rwakakamba, 'How effective are Uganda's Environmental Policies?' International Mountain Society, 2009, pg 121. Available at: DOI http://dx.doi.org/10.1659/mrd.1092 and URL: http://www.bioone.org/doi/full/10.1659/mrd.1092.g.

[6] According to the Uganda Economy profile 2013, the agriculture sector employs over 80% of the Ugandan population, accessed at http://www.indexmundi.com/uganda/economy_profile.html on July 18, 2014.

the next five or so decades. There are reports in the Newspapers (as a big contribution to the daily news), cases and/or research findings on the existence of depletion of Uganda's natural resources and/or the results thereof. On a regular basis, there are reports of potential depletion[7] or that which is almost complete.[8] The commonest among these are; threats to food security,[9] floods causing property destruction as well as hindering ease of access to friends, places of work and abode.[10] Economic wise, avenues such as tourism are also victimized by environmental degradation especially in cases of direct intervention. A case in point is the famous Kitagata hot spring which has been affected by mudslides due to activities of a nearby mine.[11]

Also, the treasure Uganda used to boast of in the area of bird species that is; more than 20% of the world's bird species being in our own Mabira forest, is now under serious threat due to the near-extinction of this forest as a result of encroachment thereon.[12] Needless to say is that these resources do a lot in the arena of hydrological, ecological and biological functions. Mabira Forest in particular is located between two big lakes (Victoria and Kyoga) and two rivers (Nile and Sezibwa). Therefore, if Uganda's concern extends to the incidence of flooding and consequences arising there from, this forest and those others with the same function of water catchment need to be protected selfishly from the hands of ruthless opportunists.

[7] See for example, Martin Ssebuyira, "Uganda to lose all forests by 2050," Daily Monitor, March 21, 2014, at 24.

[8] One such case arising from wetlands degradation was reported by Dismus Buregeya in The New Vision, April 22, 2014 at 8 under the headline "Encroachers (pineapple and tree farmers) finish off Masaka wetlands," (emphasis mine) the results being among others; drying up of 6 shallow wells, non-functioning of 32 bore holes at Buwanga due to fallen water levels among others.

[9] See Gerald Tenywa, "Degradation threatens food security," New Vision, June 20, 2014 at 4.

[10] See "Floods cut off Kampala City Roads," New Vision, June 10, 2014 at 7, where it was reported that on June 9, 2014, Kampala-Jinja road was cut off by floods around the Kyambogo junction thereby limiting access to and from the city. Furthermore, the floods in Kasese in March 2014 were said to be a result of cutting down natural resources (see Daily Monitor, March 21, 2014 at 25).

[11] See "Sheema cries to government over Kitagata Hot Spring," New Vision, January 7, 2014 at 11.

[12] See Daily Monitor, March 21, 2014 at 25.

III. PROTECTION OF LAND RIGHTS UNDER UGANDA'S LEGAL FLAME WORK.

There is in Uganda's land law, a notion of indefeasible title which stems from the Torrens system of land conveyance. This principle found its way into Uganda's laws by way of the Registration of titles Ordinance cap 102 (revised 1923), which in turn had its origins in the 1915 Transfer of Land Act of the State of Victoria. Section 3 of the said Ordinance made subjection of land to the Ordinance a necessary requirement, and pursuant to section 9(3) of the same instrument, no further dealings in land could be valid without registration be it in mailo, leasehold or freehold tenure. It was this subjection of land to the Ordinance that gave a registered proprietor absolute rights in the land. Subsequent laws such as the 1995 Constitution, the Land Act[13] and the Land Policy[14] further emphasize these rights. The 1995 Constitution of Uganda in particular guarantees the freedoms and rights of individuals in its fourth chapter. Among others, Article 26 provides for an individual's right to ownership of property either solely or in association with others. In the case of land, legal possession as an individual's property follows registration and issuance of a certificate of title under the Registration of Titles Act[15] and that title is paramount as per section 59 of the same Act.[16]

However, Section 43 of the Land Act imposes on land owners an obligation to manage and utilize their land in accordance with provisions of the forest Act, the Wildlife Act, the Environment Act, and the Water act. There are also other legally recognized exceptions to the paramount status of a certificate of title in Uganda. Such instances may include where the registered proprietor acquired a title through fraud,[17] misdescription of land on the title[18] and where such land is not a subject of appropriation for example in case of gazetted land.

[13] Cap 227, (1998).
[14] Available at http://landportal.info/sites/default/files/the_uganda_national_land_policy-_february_2013.pdf.
[15] Cap 230, Section 55 thereof is to the effect that a registered proprietor is entitled to a certificate of title.
[16] A number of cases both from the local and foreign jurisdictions have emphasized this position. Among others see Patel v. Patel [1992-93] HCB 137; Moya Drift Farm ltd v. Theuri [1973] EA 114.
[17] Section 59 of the Registration of Titles Act, cap 120.
[18] Section 64, RTA, cap 230.

IV. POWERS OF THE STATE IN TAKING OVER LAND OWNERSHIP.

Just like is the case in respect to the categorical allowance given to a state to limit enjoyment of certain rights of individuals[19], the state may likewise limit one's right of enjoying land as property.

In Uganda, state's takeover of appropriated land may thus be justifiable on grounds of public interest.[20] Public interest may arise where there is need to protect and/or promote other rights such as a clean and healthy environment under Article 37 of the 1995 constitution. Section 3 of the National Environment Act, which is a reflection of Article 39 of the 1995 constitution, also protects the right to a healthy environment and this right has to be observed by the state, all agencies and individuals[21]. There are several obligations imposed on the state in order to provide safeguards to this right. For example, Objective XVII of the National Objectives and Directive Principles of state policy provides for the protection of natural resources. The state is obliged to regulate the acquisition, ownership, use and disposition of land in accordance with the constitution[22]. More still, Article 237 of the constitution and Section 44 of the Land Act cap 227 impose on the state a duty to act as trustee for the entire citizenry in respect of among others, natural resources. Section 44(4) of the Land Act also dictates that no natural resource referred to thereunder is to be leased out or alienated by government. Therefore, all that the government or a local government can do with such resources is to grant licenses and concessions or permits under section 44(5) of the Land Act.

Section 42 of the Land Act authorizes government or a local government to acquire land in accordance with the provisions of Article 26 and 237(2) of the Constitution. Hence, government may take up an action limiting the protected rights of an individual or class of individuals under Article 26 and 237 of the constitution. This is however only justifiable where there is need to protect rights of the public which are likely to be violated should utilization of such lands be left in the hands of private individuals or

[19] See Article 43, Constitution of the Republic of Uganda, Cap 1, Laws of Uganda.
[20] Article 43 of the 1995 Constitution as amended.
[21] The public trust Doctrine was discussed in the case of Advocates Coalition for Development v Attorney General, HC Misc. Cause No. 01 of 2004; *National Forestry Authority v Kiwanuka*, Civil Appeal No. 05 of 2009.
[22] See Objective XI (iii).

institutions. In the case of *Amooti Godfrey Nyakaana v. National Environmental Management Authority and others*,[23] the court held in favor of the demolition of the plaintiff's house which was constructed in a wetland as against his right to property that he vehemently emphasized in his submissions before court. The court accentuated that the right to property is subject to public interest reiterated under Article 43 of the Constitution. Further, that it was the Plaintiff's misuse of land that was taken away for the purposes of protecting the environment.

In *Bhatt v Habib Rajar*,[24] public interest was considered that which caters for the popular interest of individuals. The 1965 Acquisition of land Act provided for government's right of acquiring land under section 2(1). Per section 18(b) thereof, government could enter into negotiations/agreement with a person having an interest in the land being compulsorily acquired, whereby the person's claim to compensation is settled by either grant of some other land or in any other way[25]. More still, for there to be any amount of compensation, the claimant must be entitled to the land by virtue of legal ownership or any other form of ownership that is recognized in Uganda.

V. STATE OF NATURAL RESOURCES FROM 1900 TO THE PRESENT

A. The pre-independence Period

The genesis of the problem of acquiring land titles on natural resources was a result of the uncertainty of the laws regarding such resources dating as far back as the colonial periods which were characterized by extreme abuse of these resources. [26] The 1900 Buganda Agreement, Toro Agreement and the 1902 Order in Council for example particularly regarded wetlands as wastelands. Even though there was a category of lands regarded as wastelands allocated to the crown under the kingdom agreements[27], such lands were

[23] Constitutional Petition No. 3 of 2005.
[24] [1958] EA 536.
[25] It is therefore worth noting that compulsory acquisition of land is not unlawful per se as was observed in Pyarali Abdul Ismail v. Edrian Sibo, Constitutional case No.9 of 1997.
[26] Dr. Henry Mugisa Amanya; Have Uganda's Wetlands turned into wastelands?, A paper presented at the 8th International conference on environmental compliance and enforcement, February 2nd, 2011. Available at http://nepis.epa.gov/Exe/ZyPURL.cgi%3FDock.
[27] An equivalent of the trusteeship created by the 1995 constitution vesting natural resources in the hands of government to be held on behalf of all citizens for purposes already discussed above. See, id.

subsequently acquired by some private individuals.[28] To these, the principle of individual indefeasible title under the Torrens system guaranteed almost unfettered rights of abuse and was only subject to the crown's intervention[29].

Unfortunately however, the crown was less concerned about protecting these vital natural resources.[30] Priority was on mineral exploitation and other "productive ventures." A clear example in this respect is the wetland resource which was regarded as *res nullius* (wastelands).

B. The period between 1962-85

Just like the colonial government, the subsequent post-independence governments paid little attention towards preserving the natural resources. This can be inferred from the little legislation and policy regarding environmental management which were enacted at the time.[31] The few laws enacted include; the Land Acquisition Act, Cap 226 of 1965, the Petroleum (Exploration and Production) Act of 1985, the Public Health Act, Cap 281 of 1964, the Forest Act, cap 246 of 1964. Worse still, most of these laws had lacunas and were not properly enforceable.[32] It is thus no wonder that lands in such areas were easily

[28] Id.
[29] Id.
[30] Id.
[31] Environmental Impact Regulations 1998; Land Acquisition Act, Cap 226 of 1965; Mining Act Cap 148 of 2003. Available at http://www.osall.org.za/docs/2011/03/Uganda-Mining-Act-2003.pdf [accessed on 9th April 2014]; National Environment Act Cap 153 of 1995; National Environment Management Authority, Environmental Impact Assessment Guidelines for the Energy Sector, June 2004; National Forestry and Tree Planting Act, 2003; Petroleum (Conduct of Exploration Operations) Regulations (1993); Petroleum (Exploration and Production) Act of 1985; Petroleum (Exploration, Development and Production) Act, 2013; Petroleum (Exploration, Development and Production) Act, 2013; Public Health Act, Cap 281 of 1964; Republic of Uganda, Oil and Gas Policy of Uganda 2008, www.acode-u.org/documents/oildocs/oil&gas_policy.pdf. (Accessed on 15th March 2014); The Environmental Impact Assessment Regulation, 1998 No. 13. (Under section 107 of the National Environment Act Cap 153) [1st May 1998], available at http://www.nemaug.org/regulations/eia_egulations.pdf [accessed on April 10, 2014]; The land Act, Cap 227; The National Environment (Wetlands, River Banks And Lake Shores Management) Regulations, No. 3/2000 (Under section 107 of the National Environmental Act Cap 153, available at http://www.nemaug.org/regulations/wetlands_riverbanks.pdf [accessed on April 10, 2014]; The Republic of Uganda, 'The Energy Policy for Uganda', www.energyandminerals.go.ug/pdf/EnergyPolicy.pdf (accessed on 15th March 15, 2014); The Republic of Uganda, Ministry of Water, Lands and Environment, the National Environment Management Policy for Uganda (1994); The Water (Waste Discharge) Regulations, Statutory Instrument No. 32 of 1998.
[32] For example, The Forest Act, cap 246 enacted in 1964 is considered to have low levels of fines imposed on offenders which may not discourage the continuance of acts of environmental degradations.

leased out to public individuals despite the legal limitations from so doing. As a result, degradation continued to flourish in a rather slow but sure manner.

C. Period from 1985 to present

The NRM government seized power in 1986. Shortly thereafter, attempts to reorganize the entire system took course. Among the several reforms were those aimed at restructuring and strengthening the natural resource protection. These reforms were in terms of legislation as well as other non-legislative measures.

1. Legislation

On 14th March 1988, Uganda acceded to the Ramscar convention which entered into force on 4th July of the same year. There under, Uganda undertook to implement the convention in her national laws. This thus called for a comprehensive re-assessment of our national policy and law relating to, for example, wetlands. This was to be by way of incorporating in our policies and laws, principles such as the wise use concept. It is thus no wonder that the subsequent legislations such as the National Environment Act, 1995, the Land Act, 1998, Local Governments Act, 1997, the National Forestry and tree planting Act, 2003 and other laws all of which put a limit on the hitherto malicious exploitation of what had come to be endangered species[33]. As of present, it is illegal to exploit the environment in an unreasonable manner and without authority so to do and there are clearly laid down fines for defiance.

[33] The legal framework providing for protection to natural resources as it is today is composed laws such as: Environmental Impact Regulations 1998; Land Acquisition Act, Cap 226 of 1965; Mining Act Cap 148 of 2003. Available at http://www.osall.org.za/docs/2011/03/Uganda-Mining-Act-2003.pdf [accessed on 9th April 2014]; National Environment Act Cap 153 of 1995; National Environment Management Authority, Environmental Impact Assessment Guidelines for the Energy Sector, June 2004; National Forestry and Tree Planting Act, 2003; Petroleum (Conduct of Exploration Operations) Regulations (1993); Petroleum (Exploration and Production) Act of 1985; Petroleum (Exploration, Development and Production) Act, 2013; Petroleum (Exploration, Development and Production) Act, 2013; Public Health Act, Cap 281 of 1964; Republic of Uganda, Oil and Gas Policy of Uganda 2008, www.acode-u.org/documents/oildocs/oil&gas_policy.pdf. (accessed on 15th March 2014); The Environmental Impact Assessment Regulation, 1998 No. 13. (Under section 107 of the National Environment Act Cap 153) [1st May 1998], available at http://www.nemaug.org/regulations/eia_egulations.pdf [accessed on April 10, 2014]; The land Act, Cap 227; The National Environment (Wetlands, River Banks And Lake Shores Management) Regulations, No. 3/2000 (Under section 107 of the National Environmental Act Cap 153, available at http://www.nemaug.org/regulations/wetlands_riverbanks.pdf [accessed on April 10, 2014]; The Republic of Uganda, 'The Energy Policy for Uganda', www.energyandminerals.go.ug/pdf/EnergyPolicy.pdf (accessed on 15th March 15, 2014); The Republic of Uganda, Ministry of Water, Lands and Environment, the National Environment Management Policy for Uganda (1994); The Water (Waste Discharge) Regulations, Statutory Instrument No. 32 of 1998.

2. The Environment Protection Police Unit (EPPU)

The Environment Protection Police Unit (EPPU)[34] to support the Ministry of water and environment in enforcing environmental laws and regulations. The Unit carries out patrols and surveillances in sensitive ecosystems and indeed there has been said to be registered some success in reducing the level of degradation.[35] It is further argued that the recent cabinet decision to cancel titles was based on the activities of this unit which begun the eviction of encroachers on the various protected resources but would occasionally be defeated by presentation of land titles by the same evicted people who subsequently recovered the same lands thus defeating its efforts.[36] It is thus still moot whether the move to cancel titles came as a booster of the force's efficiency as it would nullify titles that have been presented as a challenge to the force, or if it is a whole new arrangement of its own for which credit can be duly given to the government.

3. The Collaborative Forest Management (CFM) approach

The Collaborative Forest Management (CFM) approach involves public participation in environment management and control. This begun way back in 1996 with pilot activities in selected forest areas such as Butto - Buvuma.[37] Later, CFMs were institutionalized by the 2001 Uganda Forest Policy and in the National Forestry and Tree Planning Act of 2003[38]. Under this arrangement, communities enter into an agreement with NFA in the case of Central Forest Reserves and District Forestry Service in the case of Local Forest Reserves to manage part or the whole of gazetted forest reserve.[39] By 2011, twenty seven (27) CFM agreements had been signed in all the seven forest management ranges as designated by the NFA across the country.[40]

[34] Formed in December 2011.
[35] According to the Director Wetlands management, Mr. David Mafabi, had this force not come into being, one would not be seeing any Green vegetation in Kampala. See, The New Vision, Monday, May 12, 2014, at 45.
[36] Id.
[37] See Simon Musasizi, 'Community participation would revive forest cover,' The Observer, Wednesday, May 28 - 29, 2014, at 40.
[38] Id.
[39] Id.
[40] Id.

4. Cancellation of Titles

Very recently, the government has resolved to cancel all land titles held on protected resources inter alia; wetlands and critical ecosystems areas, including those on the 200 meter lakeshore protection zone, swamps, and forest reserves. This indiscriminate exercise is set to be without compensation as long as the land titles are found to have been acquired subsequent to the enactment and coming into force of the 1995 Constitution of Uganda and the laws made there under.[41] Whether the government will actually stick to this path is debatable if one is to consider the precedent so far set in the area of law enforcement. Putting this in context with a plethora of other related challenges, the answer to the foregoing question tends to incline more to negative than to the positive. What follows is a discussion of challenges usually affecting Uganda government's efforts to conserve the environment from degradation and to which even the recent move to cancel titles held on such protected resources is likely to fall victim.

VI. CHALLENGES TO THE EXISTING REGIME OF PROTECTION

Despite clear provisions of the law relating to environmental protection, occupation and acquisition of titles on protected resources continues with equal force as does the encroachment! Several factors could explain this unfortunate result. Firstly, the problem seems to be an administrative one involving big shots in the land registry who conspire with the unscrupulous people and help them get titles on these lands. According to a recent report by the Policy Committee on Environment (PCE) arising out of a study in Wakiso and Kampala districts between May through June 2010, a host of titles were found to have been acquired on protected resources way after the 1995 constitution came into force and it is therefore hard to evict such people because of court protection.[42] As if not enough, when the committee recommended that these titles be cancelled, this was not done. Such performance provokes suspicion on the land registry's capability to perform its mandate.

[41] Supra note 3, above.

[42] A good example in this case is the Supreme court decision in NFA v. Sam Kiwanuka, Supreme Court of Uganda, Civil Appeal No. 17/2010, wherein NFA's appeal against the lower court's decision (that eviction of the respondent had been unlawful), was dismissed because the respondent had registration by title on the subject forest land.

Of great significance also is the lack of political will in the efforts towards environmental protection. This is evident in incidences of unclear legal frame work, institutional conflicts for example between Kampala Capital City Authority, land boards, NEMA and the wetlands department in the ministry. For instance land boards issue titles in wetland areas and then the developers go to the wetlands department which says nothing yet it is the law that is to be followed in this case, favoring him who has a physical title. Such confusion usually results into unending court battles. Where traces of the will have been cited, it is still very weak[43] while the degradation continues. A case in point is the enactment of a land policy which has been under demand since 1962. The policy however only got cabinet approval recently in 2013.[44] Worse still, it remains unpopular and is still challenged by language preference that is; it is written in English, and it is not accessible by a large section of Ugandans.[45] This limited access leaves a good number of encroachers without knowledge of its existence yet others cannot duly read let alone interpret the content in that policy.

In a number of cases, locals neighboring the degraded resources usually give protection to the encroachers by alerting them whenever they see supervisors or unknown people entering the 'encroaching zone'. This voluntary assistance is usually rewarded by a few shillings to solve whistle blowers' food needs. This way, clear and elaborate legal and policy provisions providing for environment protection and management remain a mystery.

Cases have also been reported of political leaders (LC chairs, MPs, RDCs, and some big shorts in the president's office) getting involved in degradation of the protected resources and/or protecting the encroachers using their influence.[46] In 2006 for example, the

[43] Despite constant reminders to government about the need to save the environment, response has on many occasions been too slow. See for example Martin Ssebuyira and Paul Tajuba, 'Conservationists accuse government of failure to protect natural resources,' Daily Monitor, Friday, May 23, 2014, at 8.
[44] Ssebuyira Martin, 'Uganda to lose all forests by 2050,' Daily Monitor, Friday 21, June, 2014 pg 24-25.
[45] One needs to appreciate the attitude had by majority of Ugandans towards learning about the laws of their country. Save for the few who are chanced with legal education in disciplines such as administrative and business law, majority of the Ugandans are misguided in a belief that laws are only meant to be known by lawyers, for in any case ''what else are they paid for?' This in my view is dangerous given that there are basic laws that need to be appreciated by everyone.
[46] Arnest Tumwesige, 'Leaders blamed for environment degradation,' New Vision, Monday, May 26, 2014 at 15.

president issued a Directive stopping NEMA from evicting settlers on protected lands such as sugar cane growers.[47] This reaction by the president has been interpreted as having meant that a sugar cane investment was more important than environmental protection.[48] In 2008, the then Vice president encouraged rice growers in the wetlands of Kashambya and Muko sub-counties, Kigezi district, to continue with their activities.[49] Such populist leaders' conduct greatly interferes with NEMA's enforcement of the laws regulations, policies and standards relating to the environment as it is mandated to do.[50] Indeed with such backing of the politicians, the encroachers also become more rebellious; this creating a potentiality of bloodshed in case of an inter face between the law enforcers and the encroachers who in this case have been advised by their political leaders, to stay.[51] This situation worsens with the involvement of armed men as another intervening force.

Furthermore, the government has not put in place clear policy guidelines regarding funding of the enforcement activities. Thus, the law enforcement organs such as the EPPU[52] are faced with financial shortages. They are faced with shortages in transport facilities for carrying out patrols; they lack adequate fuel, a number of available cars are those in dangerous mechanical conditions and usually break down in operations. Such shortages hinder timely accomplishment of activities. There is also a problem of coping up with the ever changing methods used by encroachers. Some investors for example disguise their motives to get legal status on some of the protected areas by promising to comply with the conditions set by authorities[53].

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[47] Aryamanya-Mugisha Henry; *20 years of wetlands conservation in Uganda – Have Uganda's wetlands become wastelands again?* Public talk at Uganda museum, Kampala on the World wetlands day, 2nd February 2011. Available at http://www.natureuganda.org/downloads/presentations/WETLANDS%20STATUS.pdf.

[48] See for example *The New Vision, April 25, 2014 at 14*.

[49] Supra note 40.

[50] Section 6 of the National Environment Act, Cap 153 (1995).

[51] See for example Paul Watala, 'Mt. Elgon encroachers nearly lynched NFA officials trying to evict them,' New Vision Monday, May 26, 2014.

[52] See Francis Kagolo, 'Environmental police too broke to enforce laws,' New Vision, Monday, May 12, 2014, at 11.

[53] In a number of cases, they turn out to be defiant to their promises of compliance. See for example Dr. Tumwesige quoted in *The New Vision, Wednesday, April 23, 2014 at 7* that only 50% of the investors in forest reserves comply with their agreement terms signed prior to acquiring permission to exploit the

Similarly, one would think that whereas titles held on environmentally sensitive resources whose acquisition preceded the 1995 constitution are protected, activities on such lands also need to be regulated and mechanisms put in place to negotiate with such land owners as to be compensated and get land in less sensitive areas for the entire good of Ugandans. However, there appear to be no prospect of such strategy by our government.

There is also a conflict between individual/ private rights and the broader social and economic costs arising there from, this being added to the country's need for economic development at the expense of our environmental resources. The Government report of 2001 for example averred the 1994 disregard in Kampala of green corridors that had been zoned off for urban expansion and development and some have now been turned into industrial areas while others have become settlements. When one looks back at the 1994 plan and the aftermath thereof, they are left with no choice but to doubt even the present purported seriousness of our government in protecting the environmentally sensitive areas.

It is worth noting that a number of the petty encroaching activities are a result of the scorching poverty that leaves Ugandans with limited options including turning into savages of their own environment as to survive. According to NEMA's 2004 District Report on Soroti, 'poverty has been and still remains the major cause and consequence of environment degradation.'[54] For instance, 98% of the total population in Soroti district uses charcoal and firewood as their source of fuel.[55] This situation subjects the forest resource to constant depletion with no affordable alternative reliable source of fuel for the poor Ugandans. For Ugandans surviving from meager economic activities on protected lands, there is a likelihood of the directive being anti-human rights in as far as a wider analysis of it will depict it as denying the victims of their source of livelihood and life at that.

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resources. See also Martin Ssebuyira, 'Encroachers use new tricks to deplete forests,' Daily Monitor, March 21, 2014 at 4.

[54] See 2004 District State Of Environment Report-Soroti (pdf), accessed at http//:www.nemaug.org/districtreports/DSOER-soroti.pdf.

[55] Id.

In addition, concern has often arisen about the reluctance[56] and corrupt tendencies amongst NEMA and NFA officials.[57] In an interview I had with one of the people involved in the charcoal transportation business operating along the Kampala – Gulu highway, whereas exploitation and transportation of charcoal must always follow licensing and issuing of a receipt issued by NFA officials situated in that particular area, this is not always followed. Throughout the interviewee's experience in this business, the only stage at which he goes to a NEMA office has always been after loading his charcoal,[58] otherwise he exploits and burns trees without observing the correct procedures which, to him, is normal. Like is always the case, this is a representation of the spirit had by our environment enforcement organs while performing their assigned duties.

Furthermore, there is still hardship in demarcation of the protected ecosystems which remain unclear thus giving encroachers excuse to exploit these resources. Finally, the issue of implications for failure to comply is unclear. There is not yet a statement in clear terms of the courses of action to be taken against both the land administration agencies and political forces that are likely to militate against the successful implementation of the policy.

VII. RECOMMENDATIONS.

The first step in problem solution is always identifying the problem itself.[59] This is so because different problems require different solutions and so failure to start with this first step would be a suicidal approach to problem solving. In light of this advice, the recommendations below are all premised on the challenges above listed.

Firstly, it is important that the enforcement bodies be adequately facilitated in terms of equipment, man power and funds as to enable them perform their duties with

[56] See Gerald Tenywa, 'Police fault NEMA on destruction of city swamps,' New Vision, Jan 3, at 4. See also, Risdel Kasasira, National forestry authority doing nothing - Museveni,' Daily Monitor, Wednesday, April 23, 2014 at 3.

[57] Inside sources from NEMA admit that some of their colleagues leak to the encroachers plans of ambushes to the respective encroachment zones thus frustrating NEMA's efforts.

[58] At this stage he pays Ug Shs. 30,000/= which points to the fact that some of these officers are more interested in receiving payments on every truck of tree exploits but not necessarily to regulate such exploitation.

[59] Per the ITS education, Hong Kong Registered School 566985 & 578401, available at http//:www.itseducation.asia/the-stages-of-problem-solving.htm.

commitment and desired efficiency. Thus, local and national leaders should be at the fore front of speaking for proper environment management and control, by which standard their eligibility for such offices should be measured by the electorate. For this approach to yield results there is need for sensitization of the masses about the need for conserving their natural environment as well as the dangers arising from failure to do so.

Secondly, poverty-related corruption among environment enforcement officials who connive with the encroachers can be halted by availing reasonable remuneration and job security. Similarly, Ugandans at large and the civil society in particular should direct their advocacy to transparent and accountable systems for managing protected resources areas.

Political leaders also need to be awake to the severity of degradation so that they stop the behind-the-curtain interferences with environmental bodies' activities. A positive attitude towards environmental protection amongst these politicians will not only lead to reduced excuses of the encroachers previously supported by them but it will also lead to better and timely legal and policy flame works being put in place to facilitate environment management.

As against encroachers, political action should be taken against encroachers who disregard environmental protection laws. Furthermore, it is important that the land policy is popularized and translated into various local languages. This way, encroachment which results from ignorance of the law will be controlled.

On lands in the environmentally sensitive resources but whose titles were acquired before the 1995 constitution, the government should plan and effect negotiations with such proprietors to get them alternative areas of settlement and/or exploitation as the case may be as to save those resources as well. This however necessitates that there is a clear policy guideline on how compensation will follow. Otherwise, monies are likely to be allocated and misappropriated by the corrupt officials, as is usually the case. The land registry should be more vigilant to ensure that no more acquisition of titles occur on lands in protected resources. The government should also identify stakeholders who have an

interest in the natural resource sector, plan with and involve them in environmental protection.

Lastly, there is need for the establishment of a center of excellence in natural resource wealth management to build capacity in government, industry, the media and NGO's. This will lead to adequate planning and management of these resources. It will also strengthen government to undertake impact assessments, and facilitate knowledge on how to deal with vested interests

VIII. CONCLUSION.

The foregoing discussion clearly indicates the importance of protecting natural resources. Considering that our livelihoods are majorly dependent on the natural environment, such environment must be clean and healthy if any sustenance of our livelihoods is to be realized. The directive by the NRM cabinet to cancel titles held on lands in protected resources is thus timely in as far as giving force to the spirit of the 1995 Constitution is concerned. Among other rights protected is the right to a clean and healthy environment enshrined article 39 and the right to life envisaged by article 22 of the Constitution. Notice is however made of a plethora of similar exciting cabinet resolutions in areas of Universal education, democratization, poverty eradication among others yet these aborted at their pre-infant stages. Whereas amidst such failures Ugandans continue to somehow survive, environmental break down cannot allow for such survival, at least for a long run. Therefore appeal lies to the government to hasten the process of effecting its directive to cancel titles held on wetlands, forests and swamps as well as stopping activities thereon forthwith. Finally, Ugandans should be each other's policeman in respect to environmental degradation instead of waiting for government to do something under their (in)famous '*gavumenti etuyambe'* (let the government help us) umbrella. It is only common knowledge that the consequences of environmental degradation affect all citizens no matter the degree of responsibility in the activities by which it comes to exist.

LIFTING THE CORPORATE VEIL UNDER THE UGANDA COMPANIES ACT 2012: A CONFUSED CONCEPT? *A COMMENTARY*

Brian Kalule*

I. INTRODUCTION

The court decision of ***Salomon v A Salomon & Co Ltd***[1] embodies the principle of separate corporate personality; that a "*legally incorporated company must be treated like any other independent person with its rights and liabilities appropriate to itself ..., whatever may have been the ideas or schemes of those who brought it into existence*". This principle has formed the bedrock of company law in the common law world. In more practical terms, it has meant that, except in very exceptional circumstances, the directors and the shareholders of a company cannot be held liable for the actions of the company.

II. LIFTING THE CORPORATE VEIL

By equal measure, we are also familiar with "piercing the corporate veil". Although used indiscriminately to describe a number of different things, "piercing the corporate veil" means disregarding the separate personality of the company. It is important to draw a line around what strictly speaking "piercing the corporate veil" means. This is because there is a range of situations in which the law attributes the acts or property of a company to those who control it, without disregarding its separate legal personality. In addition to the company having liability, the controller may be personally liable for something that he has done as its agent or as a joint actor. Property legally vested in a company may belong beneficially to the controller, if the arrangements in relation to the property are such as to make the company its controller's nominee or trustee for that purpose.

But when we speak of piercing the corporate veil, we are not (or should not be) referring to any of these situations, but only to those cases which are true exceptions to the rule in

* Associate at AF Mpanga Advocates, 9th Floor, Northern wing, Workers' House, Pilkington Road, Kampala. bkalule@afmpanga.co.ug.

[1](1897) AC 22.

Salomon v A Salomon and Co Ltd,[2] i.e. where a person who owns and controls a company is said in certain circumstances to be identified with it in law by virtue of that ownership and control.

III. APPLICATION OF THE PRINCIPLE OVER THE YEARS

In *Woolfson v Strathclyde Regional Council*,[3] Lord Keith made the observation that "it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere facade concealing the true facts."

Over the years, a number of cases have sought to give effect to that phrase and in essence apply the principle of piercing the veil. In both *Gencor ACP Ltd v Dalby*,[4] and *Trustor AB v Smallbone (No 2)*,[5] the court pierced the corporate veil in order to impose liability on a company that was effectively owned and controlled by the wrongdoer, for money which he had misappropriated from the claimant and diverted to the company. In *Nicholas v Nicholas* (1984) FLR 285 the Court of Appeal noted that it would have had no difficulty in ordering the husband to procure the transfer to the wife of a property belonging to a company that was, for all intents and purposes, a one man company. In *Gilford Motor Co Ltd v Horne (1993) Ch 935*, the Judge found that the company had been set up as a one man company to enable the business to be carried on under the managing director's own control but without incurring liability for breach of covenant.

In East Africa, in *Corporate Insurance Company Limited v Savemax Insurance Brokers Ltd*,[6] the Commercial Court of Kenya noted that the veil of incorporation may be lifted where it is shown on the evidence that the directors have dealt with the assets and resources of the company as their personal bounty; for use for their own purposes. Furthermore, in *Yusuf Manji v Edward Masanja and Abdallah Juma*,[7] the Court of Appeal of Tanzania agreed that the corporate veil had been properly lifted and that execution proceedings were properly directed at the directors of a company in a case

[2] Supra.
[3] (1978) SC(HL) 90.
[4] (2000)2 BLC.
[5] (2001)1 WLR 1177.
[6] (2002) 1 EA 41.
[7] Civil Appeal No. 78 of 2002.

brought against the company where the directors had concealed assets of the company. The same principles were accepted in Uganda in *Jimmy Mukasa v Tropical Investments Ltd, John Mary Mpagi and others.*[8]

IV. A CONFUSED PRINCIPLE?

As noted by Lord Neuberger in *VTB Capital plc v Nutritek International Corp and others*,[9] the exact principles on which the corporate veil can be lifted have remained imprecise. The nature, basis and meaning of the principle are all somewhat obscure, as are the precise nature of circumstances in which the principle applies.

For example, the broader principle is that the corporate veil may be pierced only to prevent the abuse of corporate legal personality. It may be an abuse of the separate legal personality of a company to use it to evade the law or to frustrate its enforcement. However, it is not an abuse to cause a legal liability to be incurred by the company in the first place. It is not an abuse to rely upon the fact that a liability is not the controller's because it is the company's.

On the contrary, that is what incorporation is all about. Thus in a case like *VTB Capital v Nutritek International Corporation and Others*,[10] where the argument was that the corporate veil should be pierced so as to make the controllers of a company jointly and severally liable on the company's contract (to which they were never parties), the fundamental objection to the argument was that the principle was being invoked so as to create a new liability that would not otherwise exist. In *Prest v Petrodel Resources Limited and others*,[11] the husband had acted improperly as he had misapplied the assets of his companies for his own benefit. However, in doing so, he was neither concealing nor evading any legal obligation owed to his wife. Moylan J held that he could not pierce the corporate veil under the general law without some relevant impropriety, and declined to find that there was any.

[8] HCCS 232 OF 2007 (Commercial Division).
[9] (2013) UKSC 5.
[10] (2012) EWCA Civil 808.
[11] 2013 UKSC 34.

V. ATTEMPTS TO SOLVE THE CONFUSION

In *Ben Hashem v. Al Shayif*,[12] Munby J, reviewed the authorities and formulated six principles which he considered could be derived from them. These were approved by the Supreme Court of England (formerly the House of Lords) in *Prest v Petrodel Resources Limited and others*,[13] Per Lord Sumption:

> (i) ownership and control of a company were not enough to justify piercing the corporate veil; (ii) the court cannot pierce the corporate veil, even in the absence of third party interests in the company, merely because it is thought to be necessary in the interests of justice; (iii) the corporate veil can be pierced only if there is some impropriety; (iv) the impropriety in question must, as Sir Andrew Morritt had said in *Trustor*, be "linked to the use of the company structure to avoid or conceal liability"; (v) to justify piercing the corporate veil, there must be "both control of the company by the wrongdoer(s) and impropriety, that is (mis)use of the company by them as a device or facade to conceal their wrongdoing"; and **(vi)** the company may be a "facade" even though it was not originally incorporated with any deceptive intent, provided that it is being used for the purpose of deception at the time of the relevant transactions.

The court would, however, pierce the corporate veil only so far as it was necessary in order to provide a remedy for the particular wrong which those controlling the company had done.

VI. LIFTING THE VEIL UNDER THE COMPANIES ACT 2012

The Companies Act, 2012 provides under section 20 that the High Court jurisdiction may lift the corporate veil in cases where a company or its directors are involved in acts including tax evasion, fraud or where, save for a single member company, the membership of a company falls below the statutory minimum.

At first glance, the section seems to recognise the limits to legal personality in the usual cases of misuse, fraud, malfeasance or evasion of legal obligations. However, upon

[12] [2009] 1 FLR 115.
[13] 2013 UKSC 34.

further scrutiny, it follows the well-trodden path that the veil will be lifted automatically in the instances of fraud or tax evasion among others, even if the impropriety in question is not "linked to the use of the company structure to avoid or conceal liability". It does not, for instance, answer the questions: what if the tax evasion is for the benefit of the company? What if the fraud is for the benefit of the company? Shouldn't the company itself be liable, after all, that is what incorporation is all about? Why should lifting the veil be automatic in such circumstances?

VII. CONCLUSION

I suggest, humbly, that in interpreting the said provision, the Court should be guided by the general principle that the veil can be lifted in the above situations (which are no doubt improper) but only where the separate legal personality of a company has been used to evade the law or to frustrate its enforcement. For instance, the veil should be lifted where the directors evade taxes owing personally to them by hiding behind the corporate veil. Any other interpretation would be grossly unfaithful to the principle of corporate personality.

A COMMENTARY ON THE PUBLIC ORDER MANAGEMENT ACT, 2013

Bakulumpagi Kevin*

ABSTRACT

The Public Order Management Act, 2013 was purposely enacted to ensure control over the various ways of expressing the right to freedom of assembly and freedom of association. But to many, this Act could as well be described as a creature of Government to stifle the freedoms of the masses. This discussion goes on to show first, the objective of the law, then the origin of this law and the context of time in which it arose in Uganda. A brief description of the rights to assembly and association then follows. Further, an analysis is made to examine to what extent this Public Order Management Act 2013 conforms to the principles set down by Courts of law in interpreting fundamental Human Rights enshrined in the Constitution.

I. INTRODUCTION

The Public Order Management Act, 2013 was passed by parliament on 6th August 2013 and later on assented to by the president on 2nd October 2013. The objective of this law is to provide for the regulation of public meetings, provide for duties and obligations of police and the organizers plus participants in any public meeting. It is also meant to safe guard public order without interfering with the principles of democracy, freedom of association and freedom of assembly. The Act is premised upon Article 43 of the 1995 Constitution that provides for limitation of fundamental rights for the sake of public interest.

II. BACKGROUND OF THE ACT

This legal instrument can be traced back to the military regimes of the past Uganda for example the *1967 Public Order and Security Act* that was promulgated in the Obote regime to gag rights and freedoms of any dissenting person in the state after the 1966 crisis. Likewise, this Act was first tabled in 2011, in the wake of the demonstrations by the opposition activists in Uganda and the Act came to be the way to halt such operations.

* Fourth year law student, School of Law, Makerere University, Kampala.

Freedom of Assembly refers to the right of people to gather peacefully for public expression[1]. This freedom is enshrined under the 1995 constitution Article 29(1) (d) which stresses that the right must be exercised without being armed.

Freedom of association is defined in the case of *Dr. Sam Lyomoki and Others v. Attorney General*[2] as freedom to enter into consensual arrangements to promote the common interest of the associating group. It could be for religious purposes, social, political cultural or educational purposes. This is provided for under Article 29(1) (e) of the 1995 constitution. Together, these freedoms form the corner stone of a democratic society.

These freedoms are also provided for by both International and regional human rights instruments. These include the Universal Declaration of Human Rights of 1948, International Covenant on Civil and Political Rights (ICCPR), African Charter on Human and People's Rights among others. This is one of the reasons why this freedom is heavily fought for worldwide.

III. ANALYSIS OF THE ACT

Courts in upholding the rights to freedom of expression and association have postulated certain principles and laws that need to be abided by. However the major question at hand is whether the recently enacted Public Order Management Act 2013 conforms to these rules. To a greater extent, this Act falls short of the already established principles of freedom of association and assembly as shown below.

Courts have established that the principle of prior restraint is rather to defeat the concept of freedom of assembly and association. This is because the police is accorded a lot of discretion there by denying people the platform to demonstrate or associate. Fundamental rights should be limited but not denied hence placing the freedom of the people at the mercy of police is unconstitutional and void. In the case of *New Patriotic Party v Inspector General of Police*[3], court established that people need not go to the police to obtain permission but rather to inform them of their intention to hold an assembly as seeking permission would mean the police retains the right of individuals to

[1] Black's Law Dictionary 8th Edition.
[2] Constitutional Petition No.8 of 2004.
[3] (2001) AHRLR138 (GhSC 1993).

assemble, associate and even demonstrate. In the Public Order Management Act 2013[4], it stipulates that police must inform the organizer whether or not to have the public meeting and this is contrary to court's rules of merely notifying police so as to exercise one's freedoms. With such a law, it means that demonstrations are limited by law unless sanctioned by police and this clearly violates the freedoms under Article 29(1)(d) and (e) of the constitution.

While it is well known that Article 43 of the 1995 Constitution makes limitation of these rights acceptable, court has put in place a test of what is acceptable as a limitation. The limitation must be provided by law, the objective of the limitation must be sufficiently important to override the right and measures to meet this objective must be rationally connected and not merely arbitrary. In *Baczkowski & Others v. Poland*[5], it was held that refusal to grant permission for a march to raise awareness of minority groups including the homosexuals was held to be a violation of the right to assembly and association. This is because refusal was arbitrary, not prescribed by law and very discriminatory since other organisers of various demonstrations were not denied freedom to demonstrate or forced to submit traffic plans. In the current Act, there is no provision providing for rationality of the police's decision hence they can restrict at their own whims without proper reason as to why thereby affection right to association and assembly.

The Public Order Management Act provides for power of the police officer to disperse unruly crowds but does not reveal the nature of how to disperse the people while still upholding their fundamental rights and freedoms. Judicial precedent has created the expectation that the force used must be what is necessary, appropriate and reasonable to deter any sort of violence that ensues. Courts look to the proportionality of the force used to disperse and in *Resident Doctors Association of Zambia v Attorney General*[6], court went on to award exemplary damages against the state for the oppressive actions of the police as they flung the demonstrators on trucks and they used force that did not match up to that of the unarmed civilian. This shows that the Act is still flawed with traces of human rights violations varying from those courts have recognised.

[4] Section 6(1).
[5] [2007] ECHR App No. 1543/06.
[6] (SCZ Judgement No.12 of 2003).

By parliament re-enacting S.3 of the public Order Management Act 2013 seems to go against the judicial decision in the case of *Muwanga Kivumbi v Attorney General*[7], which established that S.32(2) 0f the Police Act cap 303 unconstitutional. The new act gives the Inspector General of Police power to regulate conduct of public meetings. This may defeat the *ratio decidendi* of *Lady Justice Mukasa Kikonyogo* D.C.J(supra) that reiterates the fact that police only have a regulatory and supervisory duty but not a prohibitive role against demonstrations. It is this uncontrolled discretion of the IGP in as regards public meetings which acts as a hindrance to exercise of freedom of association and assembly.

The Act goes on to make organisers and participants liable for any damage to property done or any strike action that takes place[8]. This could hinder affirmative action since a group which is poorly resourced may fear to engage in any action as the organisers dread liability for property damaged or even fail to organise a rally of many people believing it may be liable for actions of a few who may cause mayhem[9]. This can clearly be construed as against the spirit of the Constitution which guarantees and respects institutions charged with responsibility for protecting and promoting human rights and also providing them with adequate resources to function[10].

Under Section 10(1) (d), the organizers are charged with the duty of ensuring that made to the media and public do not conflict with any law. Surely this statement is rather ambiguous and worse still it inflicts on freedom of association since every group has principles that they believe in be it religious or cultural or political. Looking at *Niemotko v Maryland*[11], police dispersed a crowd merely because they were Jehovah Witnesses and they did not like what they preached about. Court held this to be an arbitrary practise by the state police. This is because countries have been built and democracy achieved due to free flow of ideas and exercise of freedom of association. Likewise in Uganda today, the act seems to shroud these freedoms by checking what is said to the media at various meetings. This is unconstitutional.

[7] Constitutional Petition No.9 0f 2005.
[8] S.10(4) of the Public Order Management Act 2013.
[9] SATAWU v Jacqueline and Others, CCT112/11 [2012] ZACC 13.
[10] 1995 Constitution National Objectives and Directive Principles of State Policy, Objective V.
[11] 340 U.S 268 (1951).

However, despite the fact that the Public Order Management Act runs counter to various principles set by the courts, it conforms to some of the principles as a means of upholding freedom of association and assembly. This could majorly be attributed to the profound nationwide criticism of the Public Order Management Bill 2011, which saw various changes and modifications to the actual Act under question here.

The Act goes on to make the organizers and participants liable for property both private and public that is destroyed in case the demonstration turns violent[12]. This is because the right to association and assembly must be exercised with due regard to the rights of others or public interest as per Article 43(1) of the Constitution. In the case of *SAWATU v. Jacquline and Others*[13], courts held the organizer and participants in the Trade Union strike action jointly and severally liable for the damage and destruction of property of the complainants as they had a duty to foresee reasonable damage or harm to others as a result of action taken, a risk they must reconcile with. By this provision, any damage should thereby be claimed from the organizers so as to ensure peaceful rallies in Uganda today.

Courts have gone ahead to support the idea that some places should be gazetted so as to prevent demonstrations from such places. Our Public Order Management Act 2013 also provides for such gazetted areas as prescribed by the minister[14]. This is to conform to the spirit of the law which is to ensure and safe guard public order. In the case of *New Patriotic Party v Inspector General of Police*[15], Charles Hayfron Benjamin JSC reveals that there are some public places committed to other purposes that using them for airing of grievances is rather anomalous. Therefore the power to declare a place to be a gazetted area is rather warranted by court decisions.

Any provision providing for a limitation on a fundamental human right must be written down and prescribed by law. In *Balcik v Turkey*[16], court established that any interference with the freedom of association or assembly must be prescribed by law lest it is construed

[12] Section 10(4) of the Public Order Management Act 2013.
[13] Supra.
[14] Section 12.
[15] Supra.
[16] [2007] ECHR 25/02 (29 Nov 2007).

as *ultra vires* the spirit of promotion and protection of human rights. By codifying the law into the Public Order Management Act 2013, such is the avenue to limit or control the freedoms so as to have an organized society.

The Act confers on the police the power to disperse only when the public meeting is contrary to the Act say was staged without laying out traffic rules and this power is to be exercised only when it is reasonable to so do[17]. In the above mentioned case of *New Patriotic Party v Inspector General of Police*, (supra) court held that police cannot be left to be helpless onlookers in a situation where there is breach of peace. This is because they have a duty to keep and maintain law and order in society. They therefore have to bare the power to disperse assemblies that destroy peace in the society. This shows that the Act is within the ambit of court's principles in regards to freedom of association and assembly.

S.6(4) of the Public Order Management Act provides for an appeal to the magistrates court in case one feels the refusal to permit the public meeting was prejudiced or let alone premised on irrelevant considerations. This is because the courts have construed the refusal to grant permits as rather an attempt to restrict human rights and is thereby unconstitutional hence by having recourse to the judicial system, this comes as a remedy in case injustice is done. This shows how the Act means to be fair to all parties in the bid to uphold the freedoms of association and assembly.

IV. CONCLUSION

In conclusion, the Public Order Management Act 2013 was enacted to ensure that freedom of association and assembly are exercised in reconciliation with public interest and rights of others. However, despite the rules laid out, the government of Uganda and all its agencies have a duty to respect, promote and uphold these rights because peaceful assemblies are a vital right to any democratic society. A democratic society must accommodate some degree of agility and annoyance to encourage and uphold freedoms of association and assembly.

[17] Section 8 (1) and (2).

THE STATE OF ESCR IN UGANDA TODAY; "REALITY OR A MYTH: RIGHTS TO HEALTH, EDUCATION AND HOUSING

Professor Christopher Mbazira*

I. INTRODUCTION

The state of economic, social and cultural rights (ESCRs) in Uganda should be looked at in the context of the nature of these rights and the purpose they serve. For a very long time, ESCRs were marginalised and rejected as human rights. This could explain the 1966 adoption of the International Covenant on Civil and Political Rights (ICCPR) separately from the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICCPR was adopted together with an Optional Protocol giving the Human Rights Committee the mandate to entertain and adjudicate disputes relating to the realisation of the civil and political rights in the ICCPR. No similar provisions were made with respect to the rights in the ICESCR.

The debates leading to the adoption of the ICCPR and the ICESCR were characterised by controversies regarding the nature and legal status of ESCRs. Two schools of thought emerged, one premised on the argument that ESCRs are not human rights *per se* as they did not have the characteristics of human rights. It was argued that the rights demand for positive action, yet human rights are supposed to be negative; they requires resources to realise, yet human rights are inherent and are to realised without any conditions; and that they are vague in the obligations they define in contrast to civil and political rights which are clear in the obligations they give rise to. It was also argued that by their nature, ESCRs are incapable of judicial enforcement because they give rise budgetary and policy matters which can only be dealt with by political entities and not the incompetent and unelected judges. The countering school of thought was bent on showing that in nature, civil and political rights were not any different from ESCRs. Both categories of rights had budgetary implications, raised both negative and positive obligations and could in some respects be vague.

A lot has happened since the adoption of the ICESCR and the ICCPR, mainly to close the gap between ESCRs and civil and political rights. In first place, a good number of

countries that initially appeared to be opposed to ESCRs, mainly the western states, rushed to ratify the ICESCR. More significant was the recognition of ESCRs by the United Nations at the World Conference on Human Rights in 1993.

A Declaration adopted at this Conference indicated that all human rights are universal, indivisible and interdependent and interrelated. The Declaration also called for concerted effort to ensure recognition of economic, social and cultural rights at the national, regional and international levels.[1] Since the adoption of the Declaration, a lot of time and resources have been invested in ensuring that ESCRs are recognised. One of the factors which have given impetus to ESCRs has been the recognition that human rights, and particularly ESCR, are a vital element in the reduction of poverty. It has been stated that:

> Underpinned by universally recognized moral values and reinforced by legal obligations, international human rights provide a compelling normative framework for the formulation of national and international policies, including poverty reduction strategies.[2]

Efforts to accord ESCRs legal status as justiciable rights in 2008 resulted in the adoption of the Optional Protocol to the ICESCR,[3] a Protocol which gives the UN Committee on Economic, Social and Cultural rights the power to entertain and consider in a judicious manner complaints relating to the violation of the rights in the ICESCR. At the domestic level, many jurisdictions have accorded ESCRs the same status as the civil and political rights in their bills of rights. In Africa, countries which have done this include Burkina Faso, South Africa and more recently Kenya.

In the case of Uganda, the question whether or not ESCRs are a myth or reality can only be answered after looking at ESCRs in Uganda at two levels. The first level is the extent to which the rights have been recognised in the country's legal system, the second level is the extent to which the rights have been realised on ground. Analysis reveals that the

[1] See *Vienna Declaration and Programme of Action*, adopted by the United Nations at the World Conference on Human Rights, Vienna 14 – 25 1993

[2] United Office of the High Commissioner for *Human Rights Human Rights and Poverty Reduction: A Conceptual Framework* (2004), at p 2.

[3] General Assembly adopted resolution A/RES/63/117, on 10 December 2008.

rights have not been accorded full legal protection and their full realisation is yet to become a reality.

II. ESCR IN UGANDA'S LEGAL SYSTEM

A reading of the Constitution of Uganda reveals that the Bill of Rights has a number of ESCRs. A number of these though are not crafted along the same lines as those in the ICESCR. Yet, a good number is to be found in the National Objectives and Directive Principles of State Policy (NODPSP). Additionally, some of the rights in the Bill of Rights are broadly crafted and ESCRs elements in these rights can only be seen through deductive reading. The Constitution protects the right for respect for human dignity and protection from inhumane or degrading treatment.[4] This is important because human dignity is the foundation of ESCRs as it dictates the conditions under which people must live.[5]

Also protected in the Constitution is the right of all persons to education;[6] rights of women to facilities and opportunities necessary to enhance the welfare of women to enable them realise their full potential and protection of their maternal functions;[7] right of children to basic education, protection from deprivation of medical treatment, education or other social or economic benefits by reason of religious or other beliefs, protection of children from social or economic exploitation and hazardous work;[8] right to respect and human dignity for persons with disabilities and entitlement to measures for their full mental and physical potential;[9] right to belong to, enjoy, practise, profess, maintain and promote any culture, cultural institutions, language, tradition, creed or religion;[10] the right to a clean and healthy environment;[11] and "economic rights" including right to work

[4] Article 24.
[5] See Liebenberg, S., 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* pp 1 – 31.
[6] Article 30.
[7] Article 33.
[8] Article 34.
[9] Article 35.
[10] Article 37.
[11] Article 39.

under satisfactory, safe and healthy conditions, equal payment and rest and reasonable working conditions.[12]

The NODPSP also have several objectives which have elements of ESCRs. The Constitution provides that the NODPSP are meant to guide all organs and agencies of the State, all citizens, organisations and other bodies and persons in applying or interpreting the Constitution or any other law and in taking and implementing any policy decision for the establishment of a just, free and democratic society.[13]

The objectives among others require the state to take measures for the welfare and maintenance of the aged;[14] provisions of adequate resources for organs of government at all levels;[15] facilitate the right to development by encouraging private initiative and self-reliance;[16] involvement of the people in formulating and implementing development plans;[17] take measures to ensure balanced development of the different areas of Uganda;[18] promote free and compulsory basic education and take measures to afford every citizen equal opportunity to attain the highest level of education necessary;[19] and take all practical measures to ensure provision of basic medical services.[20]

The relevance of the NODPS has been bolstered by the 2005 insertion of Article 8A in the body of the Constitution. Article 8A is crafted as indicated below:

> *"8A. National interest*
>
> *(1) Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy*

[12] Article 40.
[13] Objective I.
[14] Objective VII.
[15] Objective VIII.
[16] Objective IV
[17] Objective X.
[18] Objective XII.
[19] Object XVIII.
[20] Objective XX.

(2) Parliament shall make relevant laws for the purposes of giving full effect to clause (1) of this Article".

The provision above in effect brings the NODPSP into the body of the Constitution, thereby giving them more force and making their application obligatory.

In spite of the above provisions, not many ESCRs cases have been filed with the judiciary. Yet, even for the few cases, the judiciary has been reluctant to adjudicate these rights. Such pragmatic judicial approaches as was applied in the case of *Salvatori Abuki and Anor v The Attorney General*[21] have not been nurtured and used to encourage litigation in this area. In the case, Mr. Abuki and another person had been convicted of witchcraft under the Witchcraft Act,[22] and in addition to being sentenced to terms of imprisonment had been banished from the village. In the case, they among others contested the constitutionality of the order of banishment. The Court found in their favour, holding that the order violated their right to a livelihood, deduced from the right to life and the NODPSP.

The problem is that the Constitutional Court has not been coherent and followed through with the level of activism depicted in the *Abuki* case. This though is partly because the Court has been starved of ESCRs cases. Yet, the few cases that have been filed after the *Abuki* case have hit a dead end, with a potential of discouraging further litigation. One such tragic case is *Joyce Nakacwa v The Attorney General*.[23] This case arose out of tragic events, Ms. Nakacwa had reported at Naguru Kampala City Council Clinic in labor. Instead, she was asked to go to Mulago although no referral letter was given to her, yet she did not have means of transport. Nakacwa was later rescued by a good Samaritan who picked her by the roadside and took her to a health care facility where she delivered and was discharged the same day. On return home she was accosted by a mob, which accused her of having stolen a baby, she was later detained by the police at Jinja Road in

[21] Constitutional Case No. 2 of 1997.
[22] Chapter 124, Laws of Uganda.
[23] Constitutional Petition No. 2 of 2001.

a cold cell. Her baby died at Sanyu babies home and she herself died after filing the Petition, which per the Rules of Court abated the Petition.

An even more disturbing case is the recent case of *Center for Health, Human Rights and Development & Others V Attorney General*, [24] a case which arose out of senseless maternal and infant mortalities arising from either the negligence of medical staff or absence of basic medical facilities and drugs at public health care facilities. The Center for Health alleged that the acts of negligence of the medical personnel, combined with the lack of basic medical facilities amounted to violation of the right to reproductive health care. However, when the matter came up for hearing, the state raised a preliminary objection, arguing that the Petition raised issues that were of a political nature and outside the jurisdiction of courts on the basis of separation of powers doctrine. The Court upheld the objection, while expressing sympathy with the state of health care in the country, the Court held that the "Executive has the political and legal responsibility to determine, formulate and implement these policies of Government". The Court added that "[t]his duty is a preserve of the Executive and no person or body has the power to determine, formulate and implement these policies except in [sic] the Executive".

The case above shows that the Constitution has in some respects been let down by the judiciary. In the Center for Health case, it is clear from the ruling that the Court has misunderstood the political question doctrine and appears not to appreciate its modern conception.

III. REALISATION OF THE RIGHTS TO HEALTH, EDUCATION AND HOUSING

As indicated above, to answer the question whether or not ESCRs are a myth or reality in Uganda, at the second level one has to determine the extent to which specific rights have been realised. It is in the spirit of answering the question that this part of the paper examines the rights to health, education and housing.

[24] Constitutional Petition No. 16 of 2011.

A. Right to health

Full realisation of the right to health requires the state to put in place a comprehensive system for the provision of health care services; this includes preventative and curative services. Such services should be available to all without discrimination; equal access to the services should be guaranteed to all, including vulnerable and marginalised sections of society. Also to be made available is properly trained human resource that should be provided in sufficient numbers. The State has to ensure that health care services, goods and facilities are available to all and that they are of good quality. In addition, the state has an obligation to ensure that the services are acceptable and accessible, both physically and economically.[25]

In Uganda, the health care system is facing a number of challenges. In the first place, the health care system is facing acute staff deficiencies. At the moment, the general staffing level stands at 56%, which is still unsatisfactory, yet, in some districts the staffing level is as low as 38%.[26] The problem is aggravated by the low levels of staff remuneration and poor working conditions of staff. This has tremendously affected the quality of health care services and could in part explain the increasing cases of negligence as is seen in the area of maternal health care.

The quality of health care services has also been affected by the inadequate budgetary allocations, which has denied public health care providers vital resources for the provision and maintenance of health care services. At approximately 9% of the national budget, allocation to the health sector is still below the 15% commitment as reflected in the Abuja Declaration on HIV/AIDS, Tuberculosis and other Related Infectious Diseases. Yet, ironically, the country is experiencing problems with absorption of funds as can be seen in drug procurement and distribution.[27]

[25] See Committee on Economic, Social and Cultural Rights *General comment No. 14: The right to the highest attainable standard of health (art. 12)*.
[26] Ministry of Health, Human Resources for Health Audit, (May 2009),at p 19.
[27] See *CSO Alternative Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights in Uganda*, at p 37.

Other challenges in the health care system include drug stock-outs, arising from either procurement and delivery challenges or theft of drugs and embezzlement of funds meant for drugs. Funding for essential drugs has also remained low. There are also serious problems in the area of reproductive health, with mothers dying due to neglect and lack of essential drugs and facilities. The Nakacwa and Centre for Health cases illustrated above are an example of this. There is also an unmet access to family planning services, in addition to problems caused by unsafe abortions.[28]

B. Right to education

Realisation of the right to education requires the state to ensure that there is a functional education system and education programmes that are of sufficient quality. According to the Committee on Economic, Social and Cultural Rights:

> [A]ll institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; … while some will also require facilities such as a library, computer facilities and information technology.[29]

In addition to the above, education has to be made accessible to all without discrimination and should be both physically and economically accessible.

In the mid 1990s, Uganda moved ahead of its neighbours and many African countries when it adopted Universal Primary Education (UPE). Later, the country adopted Universal Secondary Education (USE). The impact of UPE was immediate, school enrolment increased beyond imaginable proportions. Primary schools were also established in areas which hitherto lacked schools. Nonetheless, the programme has not been as successful as anticipated; it has faced a number of challenges. One of the biggest

[28] Christopher Mbazira *In Legal and Human Rights Lenses: Unsafe Abortions and the Law in Uganda.* Report of Study commissioned by the Uganda Association of Women Lawyers (2011).

[29] Committee on Economic, Social and Cultural Rights *General Comment No. 13: The Right to Education* (art 13).

challenges has been inadequacy of infrastructure for classrooms and teachers' houses. The levels of sanitation have also not been unsatisfactory, seen through the absence of such sanitation facilities as clean water and toilet facilities. In some upcountry schools, pupils study under trees, yet even where infrastructure has been put in place, the quality is wanting because of corruption and mismanagement in the government procurement processes.

In addition, there are staffing challenges; the ratio of teacher pupil level, in some cases is only three teachers could handle a school of over 300 pupils.[30] Yet, working conditions are characterised by poor pay, lack of facilities and housing, all of which have demoralised the teachers thereby compromising the quality of education. The dropout rates have also remained high, affecting girls mainly, in some cases children have dropped out of school to engage in child labour as a way of providing for their families.[31]

C. Right to housing

There is nothing to write home about realisation of the right to housing. According to the Committee on Economic, Social and Cultural:

> [T]he right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity.[32]

In Uganda, the housing sector is in shambles, mainly as a result of "over-privatisation" of the sector. Even such government agencies as NHC operate on a commercial basis. Housing has mainly been left to be developed by the private sector, which has commercialised the sector and resulted in business being concentrated mainly in urban centres. Although the relative political stability has allowed individuals to build houses using their own means, only a few, mainly middle class individuals have been able to

[30] CSO CESCR Alternative Report.
[31] Ibid.
[32] General comment No. 4: *The right to adequate housing (art. 11 (1) of the Covenant)*.

benefit from this stability. Yet, even in these cases, the quality of the housing has been compromised by lack of such services as electricity, access, water and sanitation.

Realisation of the right to housing is also compromised by the lack of security of tenure, resulting from the country's land tenure system. The land tenure system is characterised by the customary land system which is not supported by certificates of ownership. In the central region, the security of tenure problem is associated with the dual land ownership system which characterises the mailo system. As a result, evictions are rampant, even when prohibited by the law. In many cases the rich are able to influence judicial processes, which allow them to obtain eviction orders; sometimes without even giving the victims are hearing. Cases of land fraud are also on the increase, arising among others from the poor land registration system coupled with corruption.

IV. CONCLUSION

Although Uganda does not comprehensively protect ESCRs as fully justiciable rights, there is a lot that can be read into various provisions of the Constitution that could result into enforcement of the rights. The NODPSP are rich with elements of ESCRs and yet Article 8A now appears to make these rights justiciable. Yet, there are various ESCRs in body of the Bill of Rights such as education and children's ESCRs. What is required is to encourage courts of law to build a jurisprudence which appropriately responds to the socio-economic needs of Uganda and takes advantages of the opportunities in the law.

LEGISLATING MORALITY; THE HARM PRINCIPLE AND COMMUNITARIANISM IN AFRICA[33]

Professor Sylvia Tamale*

I. INTRODUCTION

Earlier this month, at an extraordinary Synod meeting of Catholic Bishops in Rome, Pope Francis urged participants to respond to the 'epochal changes' that families were living through and desist from imposing 'intolerable moral burdens' on believers. The Synod focused on the controversial issues of abortion, contraception, homosexuality and divorce. Although these are not new issues confronting the church, certainly there is a new wind blowing with regard to their discussion. As feminists, the critical question becomes how best to respond to the Pontiff's agenda which undoubtedly foreshadows tremors of change in this powerful global institution.

Most of the current arguments against legislating morality center upon notions of harm and privacy. This short presentation explores the conceptual link between three pertinent issues, namely: (a) Legislating sexual morality; (b) the classic harm principle in Criminal Law; and (c) the tradition of communitarianism associated with African societies. What significance does such link hold for our bid to decriminalize abortion, same-sex relations and sex work? As you will notice, I ask more questions than I offer answers because I am of the view that rather than closing off debate and exploration on these matters, we should be opening them up to fresher reflections and inquiries.

II. LEGISLATING SEXUAL MORALITY

Chapter 14 of the Penal Code of Uganda is entitled, 'Offences Against Morality' and it includes crimes such as rape, defilement, prostitution, abortion and unnatural offences (which includes homosexuality). So, clearly all the crimes under focus at this dialogue are viewed as moral crimes. By 'sexual morality' we are talking about the social mores

[33] Presentation at the Global Dialogue on Decriminalization, Choice and Consent organized by CREA at the Bellagio Conference Centre, Italy, October 22-24, 2014.

* Professor, Makerere University, School of law.

or personal convictions about the general kinds of sexual behavior in which people in a society should engage. Everywhere on the continent political and religious leaders are lamenting 'African culture' being in a state of moral free fall. But given the vast diversity of peoples on the continent, can we really speak of an authentic 'African culture'? Is there such a thing as 'public morality'? Whose morality are we talking about? And whose interests are these moral standards furthering?

The Ugandan Penal Code that criminalizes abortion, same-sex relations and sex work was introduced by the British colonial administration in 1952, and was modeled on the 1899 Queensland Code. Like elsewhere in Commonwealth Africa, post-independence governments uncritically adopted colonial penal policies and the colonial criminal justice system completely ignoring the realities and experiences on the ground. In the early twentieth century the autocratic British colonial power imposed its own moral standards on its African colonial states through various Orders-in-Council.

Under these orders, only those cultural norms and practices that were 'not repugnant to [colonial] natural justice, equity and good conscience' would be recognized in the hierarchical legal framework which prioritized the adopted written law over Customary Law. Hence, 'Offences Against Morality' in the Penal Code reflected the morality of the colonial power, overtaking and undermining any moral standards that existed in Africa prior to colonization. Their morality—which was steeped in Anglo-Christian and strong patriarchal values—was superimposed on the African legal system. Moreover, pre-colonial penal policies that emphasized reconciliation and restoration were replaced with those based on retribution and deterrence.

A few questions to ponder:

- Given the plurality, diversity and heterogeneity of our societies, is it possible to speak of a common standard of morality?
- Are morality and the law the same thing?

- Should government legislate morality? Does the majority have a political or constitutional right to legislate against what it deems immoral at the expense of the minority? E.g., if a society holds popular anti-black views in which association and congress between the different races was abhorred as immoral, would that be enough justification for passing apartheid laws?

- Should one group impose their morality on others? In other words, isn't the imposition of moral values a reflection of a single world view? E.g., polygyny in African and Islamic cultures and monogamy in Western ones.

- How come only some conducts considered immoral are made illegal? E.g., selling sex but not buying it. Drinking alcohol and smoking are not illegal.

- Can legislation get people to accept a moral norm? E.g., a desperate young girl raped by her uncle who procures an abortion or a desperate sex worker who has no other choice for economic survival.

So where does a society draw the line between conduct that should be criminalized and that which should not? One way of determining this is by following the fundamental criminological theory known as the Harm Principle.

III. THE HARM PRINCIPLE IN CRIMINAL LAW

The 'Harm Principle' and the issue of legislating morality was tackled by the British philosopher, John Stewart Mill in his essay *On Liberty*. It is the principle behind the UDHR. Mill outlined the classic statement of the principle in the following way:

> The object of the Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. … *The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.* His own good, either physical or moral is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better

> for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. *To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to someone else.* The only part of the conduct of any one for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.[34] [Emphasis added.]

So for Mill the sole end of limiting liberty is for the purpose of preventing harm to others. The notions of personal autonomy and privacy lie at the core of the harm principle. How then does the Millian philosophy which is person-centered and rooted in Western liberal individualism sit with the traditional philosophy of communitarianism where the collective value for all is considered critical to the African way of life? For example, can we advance arguments of 'victimless crimes' in communitarian contexts?

IV. THE IDEOLOGY OF COMMUNITARIANISM

Many twentieth century African scholars elaborated on the fact that African societies in general live under the *Ubuntu* philosophy which emphasizes the dictum: 'I am because you are and you are because we are.' Under this communitarian ethic there is a strong belief in the notion that individuals are 'in existence with or through others.' The championing of group rights in Africa is also seen in its 1981 regional human rights document called the African Charter on Human *and People's* Rights (Banjul Charter). The question then follows whether the societal or collective interests of African people should concede to Western individualism? In other words, can the harm principle be applied in a society where the actions of one are automatically deemed to affect the interests of others?

[34] John Stuart Mill, *On Liberty* (Appleton-Century-Crofts, Inc., New York, 1947), pp. 9-10. Originally published in 1859.

It is my considered view that the juxtaposition between Western individualism and African communitarianism has become somewhat banal and passé. The fact is that the nature and shape of traditional family structures and community relationships in Africa are rapidly changing in the face of powerful socio-economic and political forces. Although collective identity is not completely dead on the continent, demographic studies reveal that the extended family is breaking down, community-based societies are becoming rarer and individualism has gained more currency. Therefore, because socio-economic conditions militate against the communal, it is necessary for us to look at both the individual and the community through different lenses. In other words, there is a bit of both opportunism and idealism accompanying the application of the communitarian principle when it is used as justification for legislating morality on the continent.

V. THE CONCEPTUAL LINK BETWEEN THE THREE CONCEPTS AND THE WAY FORWARD

Ideally, decriminalization should be the goal and I fully support it. However, in this conversation I wish to inject a word of caution. The rights arguments regarding bodily integrity, privacy, individual choice, dignity, equality and non-discrimination to support the decriminalization of abortion, same-sex relations and sex work are all very good, but there are some limitations that we must acknowledge. Decriminalization in Western countries was not an overnight success, but a progressive evolution of changing social values, coupled with legal intervention and innovation by courts of law. Each situation and each country has adopted different strategies towards the issue. When you think about landmark decisions such as: the European Court of Human Rights case of *Dudgeon v. UK* (1981); the UN Human Rights Committee case of *Toonen v. Australia* (1994); the South African Constitutional Court in the case of *National Coalition for Gay and Lesbian Equality v. The Minister of Justice* (1998); and the U.S. Supreme Court case of *Lawrence V. Texas* (2003); they were all decided against the backdrop of decades of political activism on same-sex relations. But contrast the issue of abortion in the United States, which appeared to have been settled by *Roe v. Wade* in 1973, but is presently facing serious challenge as conservative right-to-life forces seek to reassert themselves against the free-choice movement; the battle is by no means over.

We also need to be cautious in trying to apply a single remedy to fit the very diverse contexts in which these issues arise. Sumit Baudh's (2008) paper shows that there are varied and scattered applications of human rights to the criminalization of same sex relations by courts. Thus, for example, the 2000 Zimbabwe case of *Banana v. The State* and the 2003 Botswana case of *Kanana v. The State* were both unsuccessful in overturning the penal provisions on homosexuality, while the more recent Ugandan case of *Oloka-Onyango & 9 Ors. v. Attorney-General* only succeeded in having the Anti-Homosexuality Act declared unconstitutional on a legal technicality. Therefore if we are to avoid our cause being perceived as furthering neocolonial interests and if we are to avoid the devastating backlash that was witnessed last year in the Indian *Naz Foundation* case as well as other cases of re-criminalization that we have witnessed in Uganda, Nigeria and Russia, our focus should be very strategic.

How do we address the question of decriminalization in contexts where (a) Homophobia, transphobia and sexism are rife; (b) Populations are facing a wide array of neocolonial challenges such as globalization, structural poverty and lack of voice; and (c) a resurgence of fundamentalist values exported by powerful religious movements? How do we simultaneously criticize and accommodate the categorization 'communitarian Africa'? Chi-Chi Undie (2011) also reminds us of the nuanced understandings of concepts such as 'choice' and 'privacy' in Africa which we ignore at our own peril.

Arguments rooted in cultural and religious relativism that are routinely advanced against women's sexual and reproductive rights signify the backlash against African women's gains over the past few decades. Those legislating morality have consistently argued that the law should not be measured against international human rights standards because sexual and reproductive rights go against Africa's cultural and religious values. They express the view that the process of incorporating international human rights standards must first account for local culture. Religious morality is gaining strength, infiltrating and redefining culture and motivating law reform.

First of all, deference to the values of African society cannot be absolute. Indeed, most constitutions extend international human rights standards to individuals and minorities against the will of the majority culture. Being populist arguments, moralistic attacks against sexual minorities appeal to the larger society; targeting the sexuality of disadvantaged minority groups in society will always excite the population, diverting them from the real issues that affect them such as corruption, high inflation, taxes and unemployment rates, below-average wages and poor healthcare services.

But we do not have to rely exclusively on international human rights standards in responding to the arguments of religious and cultural relativists. There are several lessons that can be drawn from African philosophy to inform the international response to the abuse of women's sexual and reproductive rights. Instead, we can turn Africa's emphasis on group rights on its head. The group rights of social collectives such as women and homosexuals should be recognized. Hence African cultural and religious relativists who revere 'group rights' above 'individual rights' must acknowledge the rights of women and homosexuals as significant social groups in society.[35] Just as they argue that there is no such thing as universal 'moral truths' and that the structure of human rights needs to recognize cultural differences when applying human rights norms, so too must the relativists realize their patriarchal 'moral truths' are not universal to women and homosexuals. What is good for the gander is not necessarily (and always) good for the goose! Ironically, the contemporary religious morality being parroted by these relativists is steeped in Abrahamic religions which are alien to 'African culture' and therefore can lay no legitimate claim to traditional values.

[35] This argument is made with full knowledge of the differences among women and the intersectional discrimination that such heterogeneity engenders. Reference to the social group women is used here politically and strategically to spotlight the gender injustice suffered by all women.

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BANK OF UGANDA V. TRANSROAD LTD: A MISSED OPPORTUNITY IN THE REFORM OF THE LAW ON JURISDICTION AND THE ENFORCEMENT OF FOREIGN JUDGMENTS IN UGANDA

Henry Odimbe Ojambo*

ABSTRACT

Uganda's law on jurisdiction in conflict of laws is as archaic as its law on the recognition and enforcement of foreign judgments, both being relics of the colonial legacy. While this state of affairs could have been tenable in the past, the advent of globalization certainly demands better. As an era which is characterized by an unprecedented volume of international travel and trade, globalization demands legal reforms that will facilitate increased transnational relations. In this regard, the paper argues that the old territorialist common law rules on both jurisdiction and enforcement of foreign judgment are outdated and require urgent appraisal. It is in this context that, the paper argues, the Supreme Court's judgment in Bank of Uganda v. Transroad Ltd missed a great opportunity to effect timely reform of the law. How soon or late another opportunity might avail itself for the top court to revisit its position is as much of a matter of conjecture as to whether the Parliament will adopt a legislative approach to address the gap left unfilled by the Court.

I. INTRODUCTION

When a legal dispute with transnational connections does arise, the court seized of the matter must determine whether, in accordance with its domestic rules of conflict of laws, it does possess jurisdiction. Unlike in a purely domestic legal dispute, where the court determines its jurisdiction in accordance with the provisions of the Civil Procedure Act[1] together with the Civil Procedure Rules[2], a court seized of a matter with transnational elements, especially if the defendant is foreign, applies the principles of what is ordinarily referred to as 'jurisdiction simpliciter' to determine whether it does possess

*SJD & LLM - University of Toronto; LLB - University of Dar es Salaam; Lecturer, Makerere University and Adjunct professor of Law, Ted Rogers School of Management – Ryerson University. This paper benefited from the research support extended to me by the University of Toronto as a Visiting Scholar at the Faculty of Law, University of Toronto (2013/14). Email:odimbeoj@gmail.com.

[1] Chapter 71, Laws of Uganda 2000. §§ 12-15. Last accessed at http://ulii.org/ug/legislation/consolidated-act/71 on Oct. 7, 2014

[2] SI 71-1 as amended. see Order V, rr 28. Last accessed at http://ulii.org/files/Civil%20Procedure%20Rules%20SI%2071-3.pdf on Oct. 7, 2014.

jurisdiction or not. Interestingly, as will shortly be explained, such determination of jurisdictional competence ultimately directly determines, in large measure, whether the resultant judgment from such proceedings would be accorded recognition and enforcement by foreign countries. To that extent, therefore, it is generally recognized that, to a certain degree, the taking of jurisdiction in conflict of laws does directly relate to the enforcement of foreign judgments and it is thus hardly surprising that the two concepts—the determination of jurisdiction and the enforcement of foreign judgments are generally treated as flip sides of the same coin, or different ends of the jurisdiction spectrum.[3] At common law, the law on this relationship was articulately spelt out in the seminal case of *Emanuel v Symon*[4], whose ratio has since extensively been codified into legislative provisions on the enforcement of foreign judgments in the common law world, Uganda inclusive.[5]

This paper argues that the traditional common law approach to jurisdiction simpliciter and the enforcement of foreign judgments is a relic of the jaded modernist power theory or territorialist approach to law and thence in urgent need of review for purposes of realigning it with the objectives of the current era of increased economic integration. While noting that different countries have adopted different approaches to redressing the shortcomings of the traditional common law approach to this issue, including the UK itself[6], the paper argues that the Canadian approach[7] is the most instructive perspective of them all and Uganda ought to have it in consideration while dealing with legal reform in

[3] T.J. Monestier, "(Still) A "Real and Substantial" Mess: The Law of Jurisdiction in Canada" (2012) 36 Fordam Int'l. L.J 396 at 400 -401 and 456 -459.

[4] [1908] 1 K.B. 302 (hereinafter Emanuel).

[5] The Reciprocal Enforcement of Judgments Act, Cap 21, Laws of Uganda 2000. Last accessed on Oct. 7, 2014 at http://ulii.org/ug/legislation/consolidated-act/21; Under the same name, most former colonies of the UK adopted this legislation and it remains in use in its original state.

[6] As being part of the European Union, the UK's law on jurisdiction as well as enforcement of foreign judgments has been greatly altered through legislatives mechanisms. Examples of the applicable legislation include the Brussels and Lugano Conventions. See Dicey, Morris & Collins, Conflict of Laws, 14th edn 305 & 343-4 (2006); C.M.V. Clarkson & J. Hill, Jaffey on the Conflict of Laws, 147-156 (1997) (hereinafter Jaffey on the Conflict of Laws); A.M. Setalvad, Conflict of Laws, 186 – 191 (2009).

[7] Canada applies the 'real and substantial connection test' to determine the appropriate jurisdiction and will grant the recognition and enforcement to foreign judgments irrespective of whether a defendant submitted or not provided the court appropriately assumed and exercised jurisdiction in a given case. For more discussion of this, see part 3 below.

this context. The paper uses the Supreme Court authority in *Bank of Uganda v Transroad Ltd*[8] to advance the argument for the legal reform as proposed above.

The paper is comprised of four parts: the introduction comprises the first part, while an overview of *Transroad* constitutes the second part. The third part is a critique and proposal on Uganda's law on the subject, and, finally, the conclusion forms the last part.

II. AN OVERVIEW OF THE CASE, *BANK OF UGANDA V TRANSROAD LTD*

This case arose from an attempt by the Respondent, Transroad Ltd, to register a UK judgment against the Appellant, Bank of Uganda, for the enforcement in Uganda of the UK judgment as required under the Reciprocal Enforcement of Judgments Act. The brief facts of the dispute between the parties are that, the Respondent, A British Company carrying on business in the UK entered into an agreement with Bank of Uganda in the UK in the 1980s for the shipment by the Respondent of 300 railway wagons and spares from India to Mombasa for an agreed sum payable by promissory notes endorsed by the Appellant. While the Respondent duly performed its obligations under the contract, the Appellant breached its obligation by only making partial payment. The Responded then filed a suit for the recovery of the outstanding amount in the UK Court.

The Appellant was duly served with summons but it neither defended nor entered appearance. The Respondent accordingly obtained an ex parte judgment and subsequently a Garnishee Order Nisi against the Appellant's funds in ANZ Bank in the UK. At that point, the Appellant sought to set aside the UK ex parte judgment and have the Garnishee Order Nisi discharged on the ground that the UK Court did not have jurisdiction over the Appellant and also that the appellant's funds were protected under the UK State Immunity Act, respectively.

By consent of the parties, the Appellant agreed to the dismissal of its application to set aside the ex parte judgment while the Respondent also agreed to the discharge of the

[8] S.C.C.A. No. 3 of 1997. Last accessed at http://ulii.org/ug/judgment/supreme-court/1998/7 (hereinafter Transroad).

Garnishee Order Nisi. However, in separate, out of court communications, the Appellant conceded being liable to the Respondent but no undertaking to settle the debt was ever made. For emphasis, it is important to note that none of these communications were ever made to or before the Court in the UK.

Defeated in its efforts to execute the judgment in the UK, the Respondent turned to Uganda where it sought to register[9] the judgment for enforcement against the Appellant. The Appellant opposed the application for the registration of the UK judgment in Uganda on the grounds that it had not submitted to that jurisdiction and therefore, pursuant to s.3 (2) (a) & (b) of The Reciprocal Enforcement of Judgments Act, the UK Court acted without the requisite jurisdictional competence to warrant the enforcement of its judgment in Uganda. Both the High Court and Court of Appeal found that, by virtue of its acceptance that the UK Court had jurisdiction, as directly inferred from its consent to the dismissal of its application to set aside the ex parte judgment which sought to challenge the UK Court's jurisdiction, the Appellant had submitted to that court's jurisdiction. On its part, the High Court even went further and reasoned that Article 126 (2) (e) of the Constitution warranted a ruling in favor of the Respondent, thus:

> I do not think the respondent bank should be permitted to hide behind the veil of technicalities to escape liability in the face of the clear provisions of Article 126 (2) (e) of the Constitution of the country which now enjoins the Courts of the Country to administer substantive justice without undue regard to technicalities. Substantive justice demands that contractual obligations, voluntarily entered into without distress, undue influence or fraud, should be honored. The courts should resist the attempts of being drawn into situations where their decision can have the effect of scaring away potential or prospective investors.[10]

Though this reasoning did not form the basis of the Court of Appeal ruling, Egonda-Ntende JA approvingly remarked of it when he observed:

[9] Registration of foreign is just one of the different streams applicable in Uganda for the enforcement of foreign judgments. Under the Reciprocal Enforcement of Foreign Judgments Act, all judgments from designated common law countries must first be registered before they can be enforced. This paper is not concerned with other forms of enforcement of foreign judgments in Uganda.

[10] Transroad, supra note 8, Judgment of Justice Wambuzi C.J. (as he then was). The judgment neither has page numbers nor paragraphs numbers for reference purposes.

> Before I take leave of this matter I would like to echo the words of the trial Judge. If I may borrow the expression, the appellants would appear to treat the proceedings in the UK Court and indeed their obligations under the promissory notes as waste paper! This makes hollow our efforts as a nation to attract investors and create investment confidence in this country when key institutions do not wish to attend to their obligations.[11]

The appellant then appealed against the ruling of the Court of Appeal, as it had done to that of the High Court, to the Supreme Court, hence the judgment currently under review. In allowing the appeal, the Supreme Court found that the Appellant did not submit to the UK Court and therefore the UK judgment was not capable of registration in Uganda. After a thorough analysis of the English authorities, Wambuzi CJ ruled that the actions of the Appellant did not and rightly so indeed, amount to submission. Notably, the Court found that though the UK Court was possessed with jurisdiction as provided under s.3(2) (a) of the Reciprocal Enforcement of Judgment's Act, there was no evidence to support a finding that the Appellant had submitted as required under s. 3(2) (b) of the same legislation. Thus:

> On the evidence, the appellant went on the UK Court to protect its assets. If the judgment were set aside, the Garnishee Order Nisi would not stand. It appears the respondent intimated that having regard to the provisions of section 14 (4) of the State Immunity Act, 1978 the appellant's assets were immune to attachment and they proposed abandonment of the Garnishee Order Nisi hinting that there was no point in the appellant continuing with the application to set aside the judgment and that if they did, the application would be resisted. The appellant examining the law as to its immunity also agreed to have the application to set aside the judgment dismissed. *Quite clearly the appellant conceded that the UK Court had jurisdiction in the matter and so the ex parte judgment stood.* This admission, as the learned trial Judge observed, had effect of satisfying section 3 (2) (a) of the Reciprocal Enforcement of Judgments Act which provides that no

[11] Id.

> judgment shall be registered under that section if the original Court acted without jurisdiction.[12]

And, on s. 3 (2) (b) regarding submission, the Court ruled:

> In my view the appellant submitted to the jurisdiction to decide whether the UK Court had jurisdiction to deal with the matter, but did not submit to the jurisdiction to deal with the matter. Thereafter, the appellant did nothing in the matter. They did not appeal. In my view there was no submission.[13]

Having thus held, it followed that inasmuch as the Uganda Court and defendant/Appellant both recognized that the UK Court had jurisdiction over the action, it (the UK Court) nonetheless did not attain jurisdiction over the defendant and therefore its judgment could not be registered for enforcement in Uganda.

III. A CRITIQUE OF THE CASE AND PROPOSAL FOR LEGAL REFORM

Transroad[14] constitutes a perfect illustration of how the assumption and exercise of jurisdiction in conflict of laws is so directly related to the recognition and enforcement of foreign judgments that the two can fairly be regarded as simply being different ends of a jurisdictional spectrum, or flip sides of a coin. But, on a deeper analysis, the relationship between the two is not such an innocuous one that it simply has to be recognized. To the contrary, it is in fact largely a relationship whose principle objective is to facilitate a territorialist, power-based theory of resolving transnational legal disputes and thence one which requires urgent review. It is particularly noted that in an era where international cooperation has never been more vital in human history, the justification for discarding self-interested, territorialist approaches of the modernist era cannot be more pressing. I will get back to this issue in part 3 of this paper but, for present purposes, it is deemed that a brief discussion of jurisdiction simplicter and the enforcement of foreign judgments

[12] Id.
[13] Id.
[14] id.

is apposite for purposes of facilitating a better understanding of the relationship between the two concepts.

A. Jurisdiction simpliciter

According to traditional English common law[15], a court would only attain jurisdiction in a matter involving a foreign defendant only in at least one of the following situations: a) where the defendant is present or resident within the court's jurisdiction, b) where the defendant would have expressly or otherwise submitted to the court's jurisdiction, or where the court grants service of summons *ex juris* on account of the fact that there exists some connection between the forum and the legal dispute/subject matter to justify exercise of the court's jurisdiction.[16]

In regard to the first ground—residence or presence of the defendant, it is rather settled that if a defendant is resident within the court's jurisdiction, the court should justifiably be able to exercise its powers over such person. However, it remains a matter of controversy both in legal scholarship and jurisprudence as to what indeed does constitute presence. While scholars and judges alike have questioned the justification for exercising jurisdiction over a fleeting or transient defendant, Lord Denning held in *Maharanee of Baroda v Wilderstein*[17], where the defendant was served with summons while at Ascot to watch racehorses, that:

> If a defendant is properly served with a writ while he is in this country, albeit on a short visit, the plaintiff is prima facie entitled to continue the proceedings to the end. He [sic] has validly invoked the jurisdiction of the Queen's courts; and he is entitled to require those courts to proceed to adjudicate upon his claim. The courts should not strike it out unless it comes within one of the acknowledged grounds, such as that it is vexatious or oppressive, or otherwise an abuse of the process of the court ... It does not come within those grounds

[15] It is vital to maintain the distinction between the traditional English Common and the different rules that have since developed in respect to different doctrines and principles of the law in different jurisdictions through the common law process as well.
[16] Jaffey on the Conflict of Laws, supra note 6 at, 66.
[17] [1972] 2 QB 283.

> simply because the writ is served on the defendant while he is on a visit to this country.[18]

As it is, therefore, every country will develop for itself the meaning of presence for purposes of jurisdictional competence in conflict of laws. The Supreme Court of Uganda had the opportunity in *Transroad*[19] to clear the air on some of these grey areas in the development of the law but failed to take advantage of it.

The Court, however, dwelt more on the second ground for jurisdictional competence—submission, and rightly so because it was squarely at the center of the action. The court rightly defined submission as "to put oneself under the power of the Court to adjudicate over the matter in issue." At common law, what constitutes submission is largely a function of legal construction of the defendant's conduct, not necessarily what the defendant psychologically intends to do in respect to the proceedings. Other than express submission where a defendant categorically states his intention to be bound by the proceedings whether in the form of a provision of an agreement[20], or through express representation in the pleadings, or through the entering of appearance in response to summons, a defendant can also be deemed to have submitted to a given court's jurisdiction where he comments on the merits of the case even though he denies the jurisdiction of the court,[21] or where he seeks a discretionary remedy from the court irrespective of whether he had contested the jurisdiction of the court,[22] or where he files an appeal in a matter where he had denied jurisdiction and refused to participate previously,[23] or where he seeks to challenge an order in execution before such order is in fact issued,[24] or where a defendant submits to proceedings arising from a given set of facts, he/she is deemed to have submitted to other proceedings from the same set of

[18] Id. p. 292
[19] Supra, note 8.
[20] Rodrigo Cha Con t/s Andes v Alpes Trading High Court Misc. Appln 337/08 Last accessed at http://ulii.org/ug/judgment/commercial-court/2008/77 on Oct. 11, 2014
[21] Harris v Taylor (1915) 2 KB 581
[22] Transroad, supra note 8
[23] Id.
[24] Id.

facts.[25] Similarly, when a defendant selects a jurisdiction in the character of the plaintiff, he/she is deemed to have submitted to such jurisdiction.[26]

The general principle of the law, which the court articulately summed up, is that once a defendant is proven to have submitted, the court attains jurisdictional competence and any decision thereby rendered ought to be binding on such defendant both within and without the jurisdiction.[27]

Under the third ground, a court can attain jurisdictional competence at common law if, in accordance to its rules of civil procedure, it finds it just to issue summons for service *ex juris*.[28] However, it is important to note that unlike the other two grounds, the jurisdictional competence attained pursuant to this ground does not constitute a basis for the foreign recognition and enforcement of the resultant judgment. This is precisely what happened in *Transroad*[29]—in the sense that though the UK court assumed jurisdiction through issuance of summons for service *ex juris* on Bank of Uganda, its judgment proved unenforceable by a foreign court (Ugandan court). Yet, rather curiously, the court totally avoided any discussion of this ground in relation to the enforcement of foreign judgments. Instead, the court only confined itself to a rigid interpretation of s. 3(2) (a) and (b). The silence of the top court on this ground, even when the Justices of the Court of Appeal as well as the trial judge had soundly raised concerns about its adverse implications on transnational economic transactions, is difficult to fathom. As will shortly be discussed under part 3.3 of this paper, the court's silence on this issue constitutes a lost opportunity to reform the law so as to reflect the true objectives of the current era, namely: the promotion of transnational cooperation and facilitation of order and fairness in the resolution of transnational legal disputes.[30]

[25] Murthy v Sivajothi [1999] 1 WLR 467.

[26] For instance, where a defendant files a counterclaim, he is deemed to have submitted. Similarly, where a defendant loses an action in a given jurisdiction in the character of the plaintiff and he is subsequently pursued as a defendant in the recovery of costs, he is equally deemed to have submitted when he filed the action.

[27] As will shortly be seen under section 3.2 of this paper, there are other considerations courts take into account in the process of determining whether a given foreign judgment ought to be recognized and enforced in the forum.

[28] Available in Uganda under Order V rule 28 of the CPR, supra, note 2.

[29] Supra, note 8.

[30] For a deeper analysis, see section 3 of this paper.

B. The recognition and enforcement of foreign judgments

The recognition and enforcement of foreign judgments constitutes a great part of the subject matter of conflict of laws. Generally speaking, save for *in rem* judgments arising from divorce proceedings, the recognition and enforcement of foreign judgments is largely confined to *in personam* (money recovery) judgments. Even then, only those that have a definite sum and are final from the court that issued them can be enforced at common law. Moreover, it is also settled at common law that only private law judgments can be the subject of foreign recognition and enforcement. Thus, as a matter of law and public policy, no court of any country shall afford assistance to foreign governments (sovereigns) in the enforcement of public law judgments/reliefs. In the same measure, a foreign judgment can only be enforced if none of the recognized common law defenses such as fraud, public policy and due process/natural justice can successfully be invoked to impeach it.[31] Finally, and indeed the ground with which this paper is most concerned, no foreign judgment can be enforced at common law unless the court is satisfied that the issuing court possessed jurisdictional competence. Interestingly, jurisdictional competence for enforcement purposes is comprised of different grounds than trial jurisdictional competence. That was precisely the basis of the holding in *Transroad*[32].

At common law, jurisdictional competence for enforcement of foreign judgments was articulated in *Emanuel v Symon*[33], a case quite similar in striking ways to *Transroad.* In *Emanuel,* the plaintiff was involved in a partnership with the defendant through which they both operated a gold mine in Western Australia. When the parties dissolved the partnership, it turned out that there was an account to be settled against the partnership. The plaintiff decided to settle the account and subsequently demanded payment from the defendant for his portion of the account but in vain. The defendant, who was a Briton, decided to move back to Britain. The plaintiff decided to file an action in Western Australia and was issued summons for service *ex juris*. The defendant was duly served with the summons but took no steps at all. On getting the judgment, the plaintiff sought enforcement in the UK While dismissing the application for registration of the foreign

[31] Bealsv Saldhana [2003] 3 S.C.R 416, 234 D.L.R. (4th) 1 [hereinafter Beals].
[32] Supra, note 8.
[33] Supra, note 4

judgment, just like in *Transroad*, for want of jurisdictional competence by the Western Australia case, the court outlined the elements of jurisdictional competence for enforcement purposes to include the following:

> (1.)… the defendant is a subject of the foreign country in which the judgment has been obtained; (2.) … he was resident in the country when the action began; (3.) … the defendant in the character of the plaintiff has selected the forum in which he is afterwards sued; (4.) … he has voluntarily appeared; and (5.) … he has contracted to submit himself to the forum in which the judgment was obtained.[34]

It would thus seem at this point that the Supreme Court did in fact properly apply the law as it obtains at common law. However, what the court failed to appreciate is the propriety of the rule in *Emanuel* to the circumstances of the current era. As a top court, there is more to expect from it than merely proper interpretation of the law as developed in different jurisdictions and times. It is thus argued that in keeping strictly to the proper interpretation of the precedents without questioning their utility in the current era, the Supreme Court missed the mischief and thence a special opportunity to reform the law.

C. The mischief and the prescription

Emanuel was decided at the beginning of the 20th Century, a time when the UK Empire reigned. The conditions that obtained then are quite distinct from those that obtain today, both in terms of international relations and private transnational transactions. Taking these considerations into account, the Supreme Court of Canada critiqued *Emanuel* in the celebrated case of *Morguard Investments Ltd v De Savoye*[35] and concluded that the current era demands a different approach to the recognition and enforcement of foreign judgments. The facts in *Morguard* were quite similar to those in *Emanuel* and *Transroad*. The Appellant, De Savoye, was sued by the respondents, Morguard Investments Ltd, in Alberta in respect of a mortgage transaction which had taken place there—in Alberta—and the defendant was served in accordance with the rules of service *ex juris* of Alberta but, like in *Transroad* and *Emanuel*, he never took any steps to defend the claim. Throughout the time of the proceedings, the Appellant was resident in British Columbia

[34] Id. at 309.; also reproduced in Morguard, at 16.
[35] [1990] 3 S.C.R., 1077, 76 D.L.R. (4th) 256 [Morguard]

where he had relocated. When the Respondents sought to enforce the Alberta judgment against the defendant in British Columbia, he, quite like in *Emanuel* and *Transroad*, also objected to the enforcement proceeding on the ground that he had not submitted to the Alberta court proceedings and therefore was not bound by her Court's judgment.[36]

Just like in Uganda, the enforcement of foreign judgments is governed by a *parimateria* legislation in Canada—The Reciprocal Enforcement Judgments Act. In dismissing the appeal, however, the Court held, among others, that "The Reciprocal Enforcement of Judgments Acts in the various provinces were never intended to alter the rules of private international law. They simply provided for the registration of the judgments as a more convenient procedure than was formerly available,"[37]

Nonetheless, the real ratio of the judgment lay in the Court's recognition that it was time for the reconceptualization of comity as well as the reappraisal of the law to ensure that it promotes order and fairness in the resolution of transnational legal disputes.[38] In support of the argument for reappraisal of the meaning accorded to comity, the court explained the factual differences between the 19th century and the current era, noting that unlike the 19th century when there was great emphasis on territorialism by states, "modern states … cannot live in splendid isolation"[39] and that:

> The world has changed since the … rules were developed in the 19th century England. Modern means of travel and communications have made many of these 19th century concerns appear parochial. The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth,

[36] As earlier noted, the Defendant's argument was based on the traditional common law rules as adopted from England where trial jurisdiction is not sufficient for the judgment creditor to enforce a judgment unless he further proves that the defendant was either present, was bound by some legal rule or had submitted to the foreign proceedings. In this particular case, De Savoye's relocation to British Columbia had rendered him a foreign defendant to Alberta proceedings. On the other hand, it is important to note that under the principle of *jurisdiction simplicitor*, the Alberta court has jurisdiction since it had a connection to the legal dispute (it is where the cause of action arose) and had granted the eservice of summons *ex juris* according to its domestic rules of procedure.

[37] Id. 56.

[38] Id. 30-33

[39] Id. 29

> skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for appraisal.[40]

In support of the argument that the subject was due for the reappraisal to promote order and fairness in international transactions, the court held that the taking of jurisdiction ought to be viewed as a correlative to the recognition and enforcement of the resultant judgment;

> It seems anarchic and unfair that a person should be able to avoid legal obligations arising in one province simply by moving to another province. Why should the plaintiff be compelled to bring an action where the defendant now resides, whatever the inconvenience and cost this may bring and whatever degree of connection the relevant transaction may have with another province?[41]

Ultimately, the court promulgated a criterion to be employed in the determination of jurisdiction:

> …the taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlatives, and I added that recognition in other provinces should be dependent on the fact that the court giving judgment "properly" or "appropriately" exercised jurisdiction. It may meet the demands of order and fairness to recognize a judgment given in a jurisdiction that had the greatest or at least significant contacts with the subject-matter of the suit. But it hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction; without regard to the contacts that jurisdiction may have to the defendant or the subject-matter of the suit.[42]

In the lead judgment, Justice La Forest concluded: "it seems to me that the approach of permitting suit where there is a real and substantial connect with the action provides a reasonable balance between the rights of the parties. It affords some protection against

[40] Id. 34
[41] Id. 41
[42] Id. 42

being pursued in jurisdictions having little or no connection with the transaction or the parties."[43]

Because *Morguard* was decided in a provincial context, controversy soon arose as to whether it was intended for application in cases involving foreign countries as well.[44] In *Beals*[45], which was decided only three years after *Morguard*, the Supreme Court of Canada resolved the controversy by clearly stating that the 'real and substantial connection test' as enunciated in *Morguard* was indeed equally applicable to the enforcement of judgments from outside Canada. Another controversy that dogged the 'real and substantial connection test' was the failure by the Court to articulate the test's content[46], but that too was later answered in *Club Resorts Ltd v Van Breda*[47]. According to *Van Breda*, the determination of the propriety of a court's jurisdiction, particularly in tort cases, should be based on four presumptive factors: a) whether the defendant is domiciled or resides in the province; b) whether the defendant carries on business in the province; c) whether the tort was committed in the province; and d) whether a contract connected with the dispute was made in the province.[48]

The court, however, did recognize that the list of presumptive connecting factors is not closed: "Over time, courts may identify new factors which also presumptively entitle a court to assume jurisdiction."[49]

Through *Morguard*, *Beals* and *Van Breda*, the Supreme Court of Canada has therefore developed a seamless relationship between the exercise of jurisdiction and the

[43] Id. 51.
[44] Moses v B.C. Shore Boat Builders Ltd, 106 DLR (4th) 654; [1994] 1 WWR 112; 83 BCLR (2d) 177
[45] Supra note 31
[46] Generally see T. J. Monestler, A 'Real and Substantial' Mess: The Law of Jurisdiction in Canada, Queen's L.J. Vol 33, 179 (2007); J. Blom and E. Edinger, The Chimera of the Real and Substantial Connection Test, U.B.C. L. Rev. 373 (2005); J.G. Castel, Uncertainty Factor in the Canadian Private International Law, 52 McGill L. J. 555 (2007).
[47] [2012] 1 S.C.R. 572, [2012] 1 R.C.S. 572 [hereinafter Van Breda]
[48] Id. 90.
[49] Id. 91. The court proceeded to propose a criterion for to be applied by the courts in the identification of any new presumptive factors such as a) similarity of the connecting factor with the recognized presumptive factors; b) treatment of the connecting factor in the case law; c) treatment of the connecting factor in statute law; and d) treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.

recognition and enforcement of foreign judgments through the application of an objective test—the real and substantial connection test, which also promises order and fairness through striking a balance between the interests of the parties and curbing against forum shopping. Under the operation of the *Morguard* principle, the real and substantial connection test, once a court properly assumes and exercises jurisdiction, as did the UK Court in *Transroad*, the refusal of the defendant to submit to its jurisdiction would have no effect on the enforcement of the foreign judgment provided he was duly served with the process.

IV. CONCLUSION

The law on jurisdiction and enforcement of foreign judgments in Uganda is still deeply steeped in the 19th century era. Whether through legislative or common law processes, the foregoing discussion has demonstrated that the fears of the judges of the lower courts justifiably felt concerned about a rule of law that promotes injustice. It is particularly disconcerting that a country whose efforts to attract foreign investment are difficult to conceal is the one whose judicial system should insensitively deal with such investors legitimate concerns. Like in *Morguard*, the paper has demonstrated that both in *Emanuel* and *Transroad*, it is unfortunate that the plaintiffs who filed cases in the jurisdictions with undoubtedly the more real and substantial connection to the action were unable to realize the benefits of their efforts only because the defendant could afford to change residence and shun the court process! Most of all, it is quite ironic that, while upholding an outdated territorialist approach to frustrate the Respondent's legitimate claims, the top Court openly hoped that their judgment did not mark the end of the matter for the Respondent who they seemed to recognize did deserve better: "Without saying more, I would also like to end by commenting that the respondents may be aware that their loss of this appeal may not necessarily be the end of the road for them in this matter."[50]

[50] Transroad, supra, note 8, per the judgment of Justice H.O. Oder.

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